Protecting Geographical Indications in Malawi: Current Situation and Future Prospects

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This paper examines the challenges and opportunities available for the protection of geographical indications (GIs) in Malawi. Like in many countries in Africa, there are no statutory provisions for the protection of GIs in Malawi. The challenges and opportunities available for GI protection in Malawi were determined using the SWOT analysis which included data from consumer preference survey, key informants, interviews and desk study.

The analysis showed that Malawian consumers are not only influenced by price but also the place of origin of a product (geographical indication) and the quality associated with it. It also showed that Malawi has limited human capacity, infrastructure and finances to successfully implement a *sui generis* system of protection despite having many potential GIs to benefit from. A comparative analysis found that the available regime of protection is inadequate in protecting GIs. The study concluded that Malawi stands to benefit from GI protection of its products which already have local, regional and international reputation. This would be achieved by short term revisions of the trademark laws and in the long run through a *sui generis* system of protection.

**Keywords:** Geographical indication, TRIPS, *sui generis*, trademark

Malawi is a land-locked country in Southern Africa bordered by Zambia to the West, Mozambique to the South and East and Tanzania to the North. The economy is agro-based with 90 per cent of merchandise exports earnings derived from among others, tobacco, tea, coffee, macadamia nuts, ground nuts and paprika, with tobacco as the main export. The agricultural sector is mainly comprised of smallholder farmers. Due to the increasing antismoking wave globally, there have been efforts to diversify to products such as fruit, vegetables and spices.

Agriculture contributes a little more than a third (34 per cent) to Malawi’s GDP, while the manufacturing and service sectors account for 18 per cent and 48 per cent respectively.¹ Most of the activities in the service sector are non-tradable. The importance of agriculture cannot be overstressed, being the leading export earner. Approximately half of Malawi’s citizens who are in paid employment work in the agricultural sector and 85 per cent of the population is supported by it.² In order to realize more from agricultural exports, there have been calls for value addition to the products including quality management and branding.

The current consumer trends in various circles including in agriculture and food sectors indicate that there is increasing preference and added value on products that can be associated with a certain place and/or special means of production.³ This has resulted in renewed interest in authentic, traditional and traceable food being attributed to a range of factors such as increased awareness of food safety, the socio-cultural status of consuming certain foods and renewed interest in and nostalgia of culinary heritage.³,⁴ The concept of *produits de terroir* (products of local or regional land) is well known in Europe and enjoys a small, but growing market position when compared with mass produced agricultural food

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stuffs: these products’ share of the total foodstuffs market is 10.6 per cent in France, 10.7 per cent in Italy, 6.7 per cent in Spain and 5.2 per cent in Portugal.\textsuperscript{5,6} This has been recognized and reflected in the Preamble of The European Regulation 2081/92 on origin labeled products.

Given the global competitive environment characterized by declining agricultural commodity prices, this trend towards traditional and/or quality products provides producers of origin labeled products, such as those in Malawi, with the opportunity to move away from commodity markets into more lucrative niche markets through differentiation. However, the success of such a marketing strategy depends largely on whether there are measures in place that prevent the production of such a local product from spreading to other countries as this would change the product status from niche to commodity, eroding the premium.\textsuperscript{6} In essence, the protection of origin labeled products aims at protection against misleading use of a protected indication which is a measure aimed primarily at consumers and protection against the dilution of an indication (genericization) which is a measure aimed primarily at the producer.\textsuperscript{7}

As a result, international rules for the regulation of origin labeled products have become increasingly important in recent years. By including a chapter on geographical indications (GIs) in the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), members of the World Trade Organisation (WTO) acknowledged GIs as a distinct intellectual property right. However, protecting GIs as a form of intellectual property has proven controversial.

Most of the products eligible for GI protection are often products of the ‘poor and deprived’, typically agricultural, natural or handicraft products. In developing countries, such as Malawi, it is well known that these sectors have an important share in the GDP, whether in terms of employment, revenues or exports. Moreover, many countries have a particular interest in protecting the traditional knowledge and the traditional cultural expressions (folklore) of their communities. It is therefore logical that developing countries should direct their attention to this ‘new’ type of IP right. A national policy to protect these abstract rights will be based on the perceived economic impact that protection might have and political pressures both domestically and internationally.\textsuperscript{8}

Fundamentally, the debate on the protection of GIs revolves around two different approaches. The first approach depends on existing intellectual property and competition laws. The opinion of countries such as the USA is that GIs are sufficiently protected within this framework. The second approach for protecting GIs is through legislation specifically designed for this purpose as advocated by the EU. It points to the fact that GIs are not sufficiently protected within existing trademark laws and thus demand a \textit{sui generis} protection in the form of a multilateral register. In contrast, a country such as China offers dual option in the trademark law and through a \textit{sui generis} system.\textsuperscript{9}

**The Context**

Malawi has an intellectual property rights regime which comprises of the Patents Act (1958), the Registered Design Act (1958), the Trademarks Act (1958), the Trade Description Act (1987) and the Copyright Act (1989). Of these, the Trademarks Act and the Trade Description Act are relevant to the protection of GIs. Malawi is a signatory to international treaties such as the Paris Convention for the Protection of Industrial Property (1883) and TRIPS which have \textit{inter alia} GIs as object of industrial property as well as regional agreements such as SADC, ARIPO, COMESA and ACP-EU Economic Partnership Agreements (EPA) which impose some obligations, intellectual property inclusive.\textsuperscript{10,11} It is therefore important to assess the readiness of Malawi as a country to embrace GI protection, examine the adequacy of the legal instruments available in Malawi for the protection of GIs, compare them with other national laws and meter their compliance with international legal frameworks and recommend the way forward. It would also be important to identify potential products for protection using the legal definition of GIs and also gauge consumer perception on this type of protection. These areas are the focus of this article.

In this paper, the argument is that there are many potential GIs in Malawi and that their protection would result in positive economic impact to rural poor communities in Malawi. Thus protection of GIs as a specific statutory law has been advocated for. Most of the potential GIs are agro-based products as well as handicrafts whose production costs are lower than in most countries of the region which gives Malawi a comparative advantage. Such opportunities have been weighed against the challenges associated with structural reforms costs on policy, institutional and legal frameworks.
Several commentators have pointed out the benefits of protecting GIs in economic, social and environmental dimensions. It has been argued that the economic benefits of protecting GIs arise from the regulation of information asymmetry between producers and consumers.\textsuperscript{12-15} This being due to the increase in consumer interest in origin labeled goods.\textsuperscript{16} The regulatory role by GIs also shields consumers from misleading information on the origin of products and also protects against dilution of an indication.\textsuperscript{17, 18}

Another way in which economic benefits arise is by creation of monopolistic market access exerted by product differentiation as opposed to standardization in production. The contribution of GI protection to rural development resulting from equitable distribution of products, an added value that flows across the whole chain down to rural farmers, also contributes to the positive aspect and includes the socio-economic benefits accruing from spillover effects resulting from the reputation of the GIs. Environmental protection has also been cited as an important aspect of GI protection through protection of traditional knowledge and local resources.\textsuperscript{19, 20} It is therefore important to study the impacts of GI protection with relevance to social, economic and environmental spheres.

**Geographical Indications and Africa**

The benefits accrued from protection of conventional intellectual property rights such as patents, trademarks, designs and copyright in Africa have been questioned by several scholars who conclude that there is little to show in terms of volumes and economic development. For example, Africa contributes only 2 per cent of the total patent applications in the world; the largest share emanating from North America and Europe. This is due to big corporate firms based in these regions which have amassed large shares of IP portfolio. This makes Africa lag behind in these fields.\textsuperscript{21}

However, unlike the other intellectual property rights, GIs are collective rights, which protect reputation rather than innovation. They can be adapted to create intellectual property in agricultural economies like Africa and can be used to protect goods obtained from endemic species or traditional breeds which involve specific know-how.\textsuperscript{22, 23} Different characteristics of GIs highlight the possibility of using them in Africa with a view to conserving biodiversity and related knowledge. GIs can provide a source of income to African farmers, by ensuring higher selling prices for the predominant small farmers using traditional methods in the area historically associated with the products. They can also be used defensively by communities to prevent external actors from distorting elements of local heritage. The names of goods, varieties and production areas whose reputation extends beyond the national borders are thus sheltered from a form of biopiracy, where they may be registered as trademarks in Northern countries.\textsuperscript{24}

In general, the African continent is endowed with a diversity in areas of agriculture, natural resources, culture and traditions that qualify as GIs. The potential, though enormous, has not been tapped and the custodians of such GIs languish in abject poverty. Where African products have come out distinctively in the world market, their reputation has always been abused by middlemen who ride on it and even register the products as theirs own. For African countries, GI is a new concept, which if properly introduced, developed and widely publicized could benefit African farmers and craftsmen to market their value added products at premium prices, empower local producers, create employment and maintain tradition or cultural values as well as conserve natural resources.\textsuperscript{25} These factors make GIs more suited to Africa than the other forms of intellectual property rights.\textsuperscript{26}

**Consumer Preference of GI Products**

A product can only be protected as a GI if it has a reputation in the country of origin.\textsuperscript{27, 28} In order to assess this parameter, both quantitative and qualitative methods may be used but quantitative methods are usually preferred.\textsuperscript{29} Data from a previous study was used to gauge a real market situation, where Mzuzu Coffee, a specialty coffee was chosen as the product under consideration.\textsuperscript{30} Mzuzu Coffee represents a product that would qualify as an origin labeled product. It also has reputation in both local and international markets using definitional criteria of product specificity, reputation, coordination and cooperation, institutional support and market attractiveness.\textsuperscript{13}

In the study, the price attribute was the most important, with 49.55 per cent relative importance. The second attribute in importance was the quality label (33.86 per cent) or rather the reputation associated with the product while the package
Current Protection of Geographical Indications in Malawi

There is growing importance of the issue of protection of GIs at international level, however, the term geographical indication per se has not yet been introduced into Malawian legislation or been considered in case law. There are no statutory provisions which explicitly protect the unauthorized use or registration of GIs. Despite this lack of explicit protection, there are piecemeal measures available for protecting GIs in both common and statutory law.

In common law, for instance, the action of passing off in the Malawian Law was defined in Bata Shoe Company (Malawi) Ltd v Shore Rubber (Lilongwe) Ltd. The wrong of passing off is a species of unlawful competition which specifically involves infringement of another’s rights in an existing goodwill. Here, what stands to be protected is a right in the reputation or goodwill of a name, mark or symbol which might denote a GI. Goodwill as a subject of proprietary right is incapable of subsisting by itself. It has no independent existence apart from the business to which it is attached. The law of passing off can thus be used to protect GIs in terms of reputation and goodwill in Malawi although no relevant case law exists.

The first of the statutory law tackling aspects of GIs is the Trademark Act (Cap 49:01) of 1958 in its Section 42 (1). It is clear from this section that a mark adapted in relation to any goods to distinguish in the course of trade goods certified by any person in respect of origin, material, mode of manufacture, quality, accuracy or other characteristic from goods not so certified can be registrable only as a certification trade mark. The ‘false trade description’ legislation is also an offence under Section 8(1) of the Act. The same principles are also applied in the Merchandise Marks Act (Cap 49:04) of 1958 through its Preliminary Section and Section 3(3).

The Competition and Fair Trading Act (Cap 48:09) of 1989 also hints at protecting GIs as it prohibits misleading advertisements, the sale of goods and services using false information, the sale of unsafe or sub-standard products that can cause injury to health or physical harm, pyramid and bait selling, conduct of promotion competitions with no intention to give the prizes and claim of payment for unsolicited gifts.

According to Section 43 of the Competition and Fair Trading Act, prohibited unfair trading practices related to supply of goods and services include making any warranty limited to a particular geographic area or sales point; falsely representing that products are of a particular style, model or origin; falsely representing that goods are of a particular age; or representing that products or services have any sponsorship, approval, performance and quality characteristics, components, materials, accessories, uses or benefits which they do not have.

It would therefore appear that some statutory provisions in the laws of Malawi have stipulations for protecting GIs including the Trademark, Trade Descriptions, Merchandise Marks and Competition and Fair Trading Acts. It would thus be important to determine the adequacy of these pieces of legislation in protecting GIs in Malawi.
Existing Statutory Provisions: Adequate or not?  
In trying to establish the adequacy of the current protection regime for GIs in Malawi, a comparative analysis was done between Malawian and other international regimes. The European Union (EU) protection of GIs has been heavily used in the comparison because of its success stories.

Prior Trademark Registrations  
Potential Malawian GI producers may be confronted with registered trademarks which contain their GI names in neighbouring countries. Communities producing tea and fish extend into neighbouring countries and may be confronted with such a situation. According to the principle of ‘first in time, first in right’ applicable to trademarks, it may not be possible for Malawian producers to seek trademark registration of their name if it is already legally owned by another private party. In such a case, Malawian producers have only two options. They can launch proceedings to obtain the cancellation of the registered trademark or they can enter into negotiation with the owner of the trademark in order to buy it which is costly, lengthy and with little chance of success.

Use of Trademark or Certification Mark  
In most countries, trademarks are protected if they are registered. However, for the protection to be effective, the trademark must be used in the market. Potential Malawian GIs are agricultural or food products that have not been exported to third countries as those markets are not open to imports of these products due to sanitary or phytosanitary measures. These barriers to trade would pose an important problem to producers when it comes to securing protection of their GI name. Indeed, even if they do register their GIs as trademarks as a preventive measure and not use the name on the market, they face the prospect of a cancellation of the trademark for non-use.

The Registration of Composite GI Names  
The Trademark Act in Malawi does not explicitly address the aspect of registration of composite GI names, for example, if a product originates from two regions. This is common in GI names in EU which may contain more than one term, such as Ossau-Iraty, Parmigiano-Reggiano, Jijona y Turron de Alicante and Brunello di Montalcino. The Malawi Act does not give any direction as to whether the registration of such composite GI names would cover the protection of the two individual terms as is the case with the EU legislation so as to stop abuse of the composite name and also the abuse of one of the two names used on its own.

Authorized Use of a Registered Certification Mark  
According the Malawian Trademark Act, a certification mark certifies the origin, quality, mode of manufacture or other elements of a good. This essentially means that the use of a certification mark on products other than the GI product itself is prohibited. More importantly, such use – on promotional materials, for instance, such as pens, hats and writing pads – can effectively lead to the invalidation of the registration. The EU *sui generis* regime however, allows such use without invalidation of the GI name.

Scope of Protection by a Trademark Registration  
The use of a trademark regime to protect a GI name does not provide for a protection as comprehensive as the one offered by the EU GI system. In general, trademark registration does not cover translation, nor does it prevent the use of the name with ‘de-localisers’ (e.g. Californian Champagne) or expressions such as ‘like’ or ‘style’.

Time and Costs Associated with the Registration of a Trademark  
The Trademark Act in Malawi is under the Industrial Property Office of the Registrar General Office that prosecutes patents, trademarks and registered designs. It would therefore take some time to get GI protection because of workload in that office. In view of the EU experience for GI producers, it is costlier to obtain legal protection of GIs via a trademark systems than via a *sui generis* regime due to the requirements to demonstrate that a name is neither generic nor descriptive, besides costs of monitoring against misuse or abuse.

As much as the Trademark Act of Malawi allows for registration of certification marks which might include geographical indications, it is obvious from the above discussion that this is not adequate to protection of GIs. Due to the limitations inherent in certification marks, it is recommended that Malawi adopts an alternative protection system.

Comparison with Provisions in TRIPS  
When compared and contrasted with the provisions for GIs in TRIPS, Article 22.1 of the TRIPS
Agreement subsumes both the concept indication of source (denoting the origin of a product) and appellation of origin (which assumes that a product has certain characteristics associated with its place of origin). The result of the inclusion of this definition is that Member countries are obliged to respect and protect names falling within its ambit at national level according to the requirements set out in Articles 22, 23 and 24. Certification marks under Section 42(1) in the Malawian law satisfies this requirement to an extent.

Article 22.2 of TRIPS pertains to the general level of protection afforded to all products and goods including agricultural products. Protection under this Article is aimed at consumer protection (Article 22.2 (a)) and protecting producers (Article 22.2 (b)). Two requirements must be met in order to constitute a violation. First, there needs to be a geographically descriptive indication on a good and secondly, this representation should be false or misleading. Thus the Trademark, the Trade Descriptions and the Competition and Fair Trading Acts put together make the Malawian laws to be TRIPS compliant in this aspect. However, Article 23 which deals with additional protection to wines and spirits (absolute protection) makes the IP regime in Malawi not TRIPS compliant. Such level of protection afforded under Article 23 is independent of any requirement of deception or unfair competition and more comprehensive than under Article 22, as use of a GI for wine or spirits is prohibited regardless of whether the true origin is indicated or whether it is used in conjunction with words such as kind and type.

The GI protection regime in the European Union favours GIs over trademarks (Article 14.1). If there is conflict between a GI and a trademark, then the TRIPS-plus strength and scope of protection in the EU shifts the balance decidedly in favour of the GI. As regards registration, for example, the prior existence of a conflicting trademark (whether registered or unregistered) may not necessarily prevent registration of a GI in the EU (Article 7.3.c). This is not the case in either TRIPS or Malawian laws. The Malawian protection regime needs to be TRIPS compliant as it is a signatory to it and also look at ways of modernizing its provisions to levels that will benefit its producers.

**Challenges in Establishing a Sui Generis Regime**

Key informant interviews, particularly, key and relevant officers in the Ministries of Justice, Trade and Agriculture, Management at National Smallholder Farmers’ Association of Malawi (NASFAM), Mzuzu Coffee Cooperative, Rab Processors Ltd and Bottling & Brewery Group Ltd, were used to determine the best model that Malawi can use in the protection of GIs. Twelve people were interviewed using a unstructured but guided questionnaire. Key informant interviews focused on GIs knowledge and capacity levels, institutional support, coordination, infrastructure issues, value chain analysis and bottlenecks to implementation of special protection for GIs.

The information collected using various methods and at different stages is complimentary in the overall analysis and conclusions. For example, during the key informant interviews, which were meant for identifying challenges and opportunities for GI protection in Malawi, possible GI products were suggested.

It was argued that a *sui generis* system would be an alternative way in the protection of GIs in Malawi. Therefore it was imperative to determine the challenges associated with establishment of such a system. A SWOT analysis was used in the process.

The special system of GI protection has proved successful in the European Union. However, the discussions with key informants from various public and private organisations involved in issues related to intellectual property and trade in Malawi revealed various challenges that have to be considered for Malawi to successfully implement a *sui generis* system for GI protection. Nevertheless, it was apparent that Malawi can greatly benefit from GI protections as it has a large number of products, mainly agricultural, which would qualify as GI products. The producers of such products have associations which promote their interest as alluded to by the NASFAM official which meant that coordination and cooperation among the producers already existed.

Further, it was emphasized that GIs as a form of intellectual property rights can only be applied to local goods with a reputation and specific characteristics that are recognized by their potential buyers, and for which there is a market and a real threat of unfair competition or usurpation of names.

All these aspects are applicable to most products in Malawi.

Furthermore, establishing a GI requires entrepreneurial skills - producers must be able to organize themselves and mobilize the necessary
technical, legal and commercial expertise to obtain protection and take advantage of it (including supply chain adjustments, quality assurance schemes and record keeping) - which is not necessarily the case for the most marginal among Malawian producers. All this leads to the notion that the development of GIs should not be seen as a universal solution; on the contrary, the suitability of setting up GIs should be examined on a case-by-case basis.

It was also obvious from the discussions that an increasing number of consumers favour geographical labeling in that it provides information on a product’s origin and quality, and this information is effective in mitigating quality uncertainty which enhances willingness to pay for specific geographical origins. However, Malawi as a country has limited cachet and certified supply-chain systems that international markets can bank on. Second, the majority of policy makers in Malawi have no or limited experience in the use of the most demanding form of geographical labeling, GIs, as a policy tool.

In order to establish a *sui generis* system in line with international obligations, Malawi needs to invest scarce resources in establishing national GI frameworks. The administrative and financial costs may prove too much for a country like Malawi. Malawi can therefore embark on a special system of GIs protection only after critically carrying out an assessment including the cost and benefit implications associated with such initiative.

**Opportunities Available for GI Protection in Malawi**

Geographical indications have an important bearing on the four dimensions of human development: empowerment, productivity, equity and sustainability. They confer on owners legitimate rights, empowering them; they offer opportunities to make productive use of those rights which, given the characteristics of the assumed owners of these rights (mostly low-income agricultural and artisanal societies), can be expected to contribute to an equitable distribution of benefits. The legal-economic incentives could then create a virtuous cycle of other incentives to nurture and sustain traditional methods and know-how, which could contribute to intergenerational equity.

Malawi should take this up as a development issue, as GIs are linked with the livelihoods of the people residing the designated areas. Most potential GIs in Malawi are linked to products related to agriculture, fisheries, crafts and artisanal works, which are also some of the sectors that provide livelihoods to large sections of the poor. In order to examine the socio-economic implications of a GI, the entire supply chain of the product concerned needs to be examined. While GI protection may indeed strengthen the sector concerned by yielding financial benefits, these benefits may not be shared equitably among various stakeholders along the supply chain of the product. If the higher price commanded by the product on account of GI protection is confined to the more powerful actors on the upper stream of the supply chain and does not filter down to the weaker sections of the chain, it will nullify the development implications of GI protection. Given such possibilities, the realities on the ground of the impact of GI protection on rural development in the region are worth investigating.

There is a growing trend that is emerging, which places a premium on locally grown and artisanal products. By emphasizing the link between place and product, communities producing distinctive goods would develop niche markets, at least among consumers who wish to purchase such products. These niche markets although limited can be economically lucrative. However, exploiting these niches requires not only protected product designations, it also requires extensive marketing to develop a positive reputation and extensive policing to protect against counterfeiting.

Currently in Malawi, there are reviews on some laws including the Trademark and Patents Acts. This would be an opportunity to include geographical indications protection in the Trademark Act so that this is comprehensively covered in the short term as further studies are done on *sui generis* system. Strong candidates for GI protection include coffee (e.g., Mzuzu coffee), fish (Chambo fish), peanuts, tobacco, macadamia nuts, chillies, tea, artisanal products and many other products which already have a reputation both locally and internationally.

**Conclusion**

There is no dearth of products that qualify as GIs in Malawi because of their local reputation such as Mzuzu Coffee. Geographical indication products can be successful in Malawi as people want to be associated with goods from a particular region and quality as shown in the consumer preference studies.
The current legal regime for protecting potential GIs in Malawi is limited as compared to the protection provided by the EU and in contrast to their growing importance at the international level. These existing Acts do not take into consideration the collective nature of geographical indications and as such are found to be inadequate.

Despite favouring a sui generis system, several challenges were identified that Malawi as a country would face in implementing such a system including the low technical capacity to implement such a system as well as the financial and administration costs associated with such an endeavour. In the short term it was obvious that implementing a sui generis system with the low awareness and infrastructure levels would be disastrous. As the Trademark Act in undergoing review, it was felt that this could be an opportunity to include an explicit mention of GIs in the Act. On a long term basis, it was felt that these challenges can be overcome by capacity building and garnering enough funds for establishment of a sui generis system.

Malawi stands to benefit from GI protection because of its potential to improve livelihoods of rural people through improved market access and increased incomes. It also confirms that Malawi possesses a number of agricultural products and indigenous biological resources that could benefit from GI protection by protecting such intellectual property right as well as preserving potential price premiums which may have important development implications.

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