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TITLE:

Enhancing South Africa's traditional knowledge trade through the extension of geographical indications under the TRIPS Agreement

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Declaration

I, Sujata Balaram (student number: 213511859), declare that my dissertation entitled 'Enhancing South Africa's traditional knowledge trade through the extension of geographical indications under the TRIPS Agreement':

- i) Is my own original work and due acknowledgement is given to the sources used and quoted in said dissertation.
- ii) Has not been submitted for any degree or publication at any other university, institution, organization or anywhere else.



Signed on the 10th of December 2018.

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Table of Contents

Declaration.....	ii
Acknowledgements.....	iii
Table of Contents.....	iv
List of Acronyms	vi
Abstract.....	vii
Key words.....	viii
Chapter One: Introduction.....	1
1.1. Background and outline of research problem.....	1
1.2. Statement of purpose	5
1.3. Research questions.....	5
1.4. Rationale and significance of this dissertation	6
1.5. Literature review	7
1.6. Theoretical framework	10
1.7. Research methodology.....	13
1.8. Delimitations of this dissertation	13
1.9. Structure of this dissertation	14
1.10. Conclusion.....	15
Chapter Two: Understanding the relationship between Traditional Knowledge and Geographical Indications.....	16
2.1. Introduction.....	16
2.2. Defining traditional knowledge and geographical indications	16
2.2.1. Traditional Knowledge.....	16
2.2.2. Geographical Indications.....	19
2.3. The protection of traditional knowledge through geographical indicators	20
2.4. The importance of and possible benefits to traditional knowledge trade in South Africa	30
2.5. Conclusion.....	32
Chapter Three: TRIPS and Traditional Knowledge: The geographical indication extension debate and the role of Free-Trade Agreements.....	34
3.1. Introduction.....	34
3.2. The position of traditional knowledge in the World Trade Organization.....	35
3.3. Geographical indications under the TRIPS Agreement	38
3.4. The debate: Extension of geographical indicators beyond wines and spirits	41
3.4.1. The TRIPS provisions	41

3.4.2. The developmental standpoint	45
3.5. The role of Free-Trade Agreements in the facilitation of traditional knowledge protection through geographical indicators	51
3.6. Conclusion.....	54
Chapter Four: Traditional Knowledge and Geographical Indications: The South African Experience.....	56
4.1. Introduction.....	56
4.2. Intellectual property and traditional knowledge in South African Free-Trade Agreements.....	57
4.2.1. The Southern African Development Community.....	57
4.2.2. The Tripartite Free Trade Area.....	58
4.2.3. The African Continental Free Trade Area.....	59
4.3. Protection of Traditional Knowledge in South Africa	60
4.3.1. National Environmental Management Biodiversity Act 10 of 2004.....	61
4.3.2. The Indigenous Knowledge System Policy.....	62
4.3.3. Intellectual Property Laws Amendment Act 28 of 2013.....	62
4.4. The Protection of Geographical Indications under the Intellectual Property Laws Amendment Act 28 of 2013	65
4.5. The South African Experience with Geographical Indications	67
4.5.1. Rooibos.....	67
4.5.2. Honeybush.....	71
4.5.3. Handicrafts.....	73
4.6. Geographical Indications and the position of African countries	75
4.7. Conclusion.....	78
Chapter 5: Recommendations and conclusion	80
5.1. Introduction.....	80
5.2. Findings.....	81
5.3. Recommendations.....	83
5.3.1. The need for developed countries to co-operate	84
5.3.2. The need for African developing countries to unite.....	87
5.4. Steps that South Africa can take to enhance its traditional knowledge trade.....	90
5.5. Conclusion.....	93
Bibliography	94
Appendices.....	108

List of Acronyms

ACFTA	African Continental Free Trade Area
ACP	African, Caribbean and Pacific Groups
AG	African Group
ARIPO	African Regional Intellectual Property Organization
CARIFORUM	Caribbean Forum of the African, Caribbean and Pacific Group of States
DCs	Developing countries
DTI	Department of Trade and Industry (South Africa)
EC	European Community (with the inclusion of the UK)
EPA	Economic Partnership Agreement
EU	European Union (with the inclusion of the UK)
FTA	Free Trade Agreement
GI/s	Geographical Indicator/s
IKSP	Indigenous Knowledge System Policy
INAO	Institut national de l'origine et de la qualité
IP	Intellectual Property
IPLAA	Intellectual Property Laws Amendment Act 28 of 2013
IPLAB	Intellectual Property Laws Amendment Bill
NEMBA	National Environmental Management Biodiversity Act 10 of 2004
OAPI	Organisation Africaine de la Propriété Intellectuelle
SADC	Southern African Development Community
SAHTA	South African Honeybush Tea Association
SARC	South African Rooibos Council
TFTA	Tripartite Free Trade Area
TK	Traditional Knowledge
TK Bill	Protection of Traditional Knowledge Bill of 2013
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
UK	United Kingdom
USA	Unites States of America
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

Abstract

Due to the absence of an international agreement to protect traditional knowledge, divisive measures need to be taken in order to ensure that a governing structure is available, if not to fully protect traditional knowledge but at least to recognise it and limit its usage in order to prevent misappropriation. Geographical indications can provide such a governing structure, on an international level, as it is already entrenched under TRIPS.

The hindrance to such governing structure being realised is that enhanced geographical indication protection under Article 23 of TRIPS is only available to wines and spirits. Negotiations have been initiated to see such enhanced protection be extended to products other than wines and spirits, such as traditional knowledge. Such negotiations started off with vigour but have since reached a stagnate point, with developing countries appealing for the reigniting of negotiations, with limited success and progress to no avail. The prime cause for the stagnation is the stalemate debate between the proponents (the EU and its supporters) and the opponents (the USA and its supporters) of the extension and thus recommendations need to be sought to identify measures to appease both parties to reach an amicable agreement.

South Africa has seen success with the use of geographical indications to protect traditional knowledge, in light of the Rooibos issue. If such success is garnered through a free-trade-agreement with the EU, then success can be anticipated if geographical indication protection is extended to traditional knowledge on a multilateral level, through the WTO. It is against this background, that the research seeks to identify recommendations that can propel the support of the TRIPS geographical indication extension and see its realisation so that traditional knowledge can be enhanced in developing African countries such as South Africa.

Key words

Traditional knowledge, geographical indications, trade, Trade-Related Aspects of Intellectual Property Agreement, intellectual property, World Trade Organization, South Africa, Rooibos, Honeybush, handicrafts.

Chapter One

Introduction

1.1. Background and outline of research problem

The role that intellectual property plays in the multilateral forum has of late gained importance as it has emerged as a tradable economic asset.¹ The World Trade Organization (hereinafter, referred to as the WTO), for example, has acknowledged such value by enforcing the Agreement on Trade-Related Aspects of Intellectual Property (hereinafter, referred to as TRIPS). This multilateral trade agreement provides a guide for WTO member states, which can incorporate the intellectual property protection guiding principles found in such agreement, into their own national laws.

The protection of intellectual property rights of traded goods and services are becoming increasingly prevalent with developed countries, such as the United States of America (hereinafter, referred to as the USA) and the European Union (hereinafter, referred to as the EU), which are the recipients of royalties and licence fees linked to intellectual property rights.² Emerging markets, such as Japan and South Korea are also evidenced as becoming innovation centres.³ In light of this, the prevailing argument is that such countries are currently ruling the intellectual property trade markets. Therefore, Africa's potential to start its progress into such markets needs to be explored as it is imbedded with unique traditional knowledge that can be used to

¹ J M Curtis 'Intellectual Property Rights and International Trade: Overview' (May 2012) *Centre for International Governance Innovation* available at <https://www.cigionline.org/sites/default/files/no.3.pdf>, accessed on 19 March 2018 4-5. World Intellectual Property Organization 'IP Asset Development and Management: A Key Strategy for Economic Growth' (2006) *World Intellectual Property Organization* available at http://www.wipo.int/edocs/pubdocs/en/intproperty/896/wipo_pub_896.pdf, accessed on 27 April 2018 5. 'Intellectual property assets are collections of intellectual properties – patents, trademarks, copyrighted works, industrial designs, geographical indications, trade secrets – that are strategically chosen for their business value. Intellectual property assets have economic value because of their ability to enhance the value and financial return from technologies, products and services'.

² Congressional Research Service 'Intellectual Property Rights (IPR) and International Trade' (22 July 2015) *IP Mall* available at https://www.ipmall.info/sites/default/files/hosted_resources/crs/IF10033_2015-07-22.pdf, accessed on 27 April 2018 2.

³ *Ibid* 2.

establish its intellectual property trade presence on a global platform. For this to happen, the protection of traditional knowledge needs to be established in order to prevent the exploitation and appropriation of the cultural and spiritual nature of the knowledge by third parties⁴ for their own financial gain.⁵

As such, the protection of traditional knowledge through an intellectual property lens has been a hotly debated topic on the international platform. Two key international organisations, the World Intellectual Property Organization (hereinafter, referred to as WIPO) and the WTO, have been moving towards creating such protection. Unfortunately, these organisations have not yet developed a binding agreement and are currently in the process of finding a way to marry intellectual property and traditional knowledge, since the relationship has been viewed to be incompatible as it can be difficult for traditional knowledge to be forced into a western intellectual property protection system.⁶

In light of the absence of an international agreement to protect traditional knowledge, divisive measures need to be taken in order to ensure that a governing structure is available; if not to fully protect all products of traditional knowledge but at least to recognise it and limit its usage so as to prevent unfair capitalisation. Geographical indications can provide such a governing structure on an international level, as it is already entrenched under TRIPS.⁷ Although the idea to protect traditional knowledge through geographical indications had been put forward to the WTO in 1999,⁸ no agreement has been reached since then. This is due to a variety of issues⁹ which the TRIPS Council has not yet negotiated and debated on intensely. The question lies as to how effective the proposed protection of traditional knowledge is through

⁴ Examples can include foreign businesses and companies, especially those from western nations such as the USA.

⁵ A Van der Merwe 'Can traditional knowledge be effectively covered under a single umbrella' (2010) 13(4) *Potchefstroom Electronic Law Journal* 5.

⁶ *Ibid* 2-10.

⁷ T Dagne 'The Identity of Geographical Indications and their Relation to Traditional Knowledge' (2014) 54(2) *The Intellectual Property Law Review* 263.

⁸ M L Blakeney 'Protection of Traditional Knowledge by Geographical Indications' (2009) 3(4) *International Journal of Intellectual Property Management* 358.

⁹ Some issues plaguing the movement towards a final agreement include: problems with difference in opinion between nations, the issue of geographical indications not being able to accommodate the nature of traditional knowledge effectively, and the problem of dispute resolution methods (used by international instruments) not being able to accommodate traditional knowledge values and practices.

geographical indications under TRIPS and what the causes of the delay are in concluding the agreement. This has to be examined in light of the importance of traditional knowledge to African developing countries, specifically South Africa.

In respect of traditional knowledge being a negotiating priority, in October 1999 countries such as Bolivia, Columbia, Ecuador, Nicaragua, and Peru suggested that the Seattle Ministerial Conference include the recognition and protection of traditional knowledge on a multilateral framework.¹⁰ In October 2001, the delegations of various countries¹¹ submitted that the protection of products through geographical indications, under Article 23 of TRIPS, should be extended beyond wines and spirits and such to be formally included in the negotiating agenda.¹² By 2011 the Ambassador, Darlington Mwape, of Zambia (the Chairman of the Special Session of the Council for TRIPS) 'strenuously resisted any calls for the extension of the multilateral register to products other than wines and spirits' due to the conflicting views on the matter by old world and new world players.¹³

The debate between these views is represented by two key players that have opposing views regarding the geographical indication extension, namely, the EU (representing the old world) and the USA (representing the new world). EU countries continue to strive for the extension of higher geographical indication protection, as it is a distinct intellectual property tool, and have garnered the support of negotiating blocks such as the African, Caribbean and Pacific Groups (hereinafter, referred to as ACP)¹⁴ and developing countries such as India and Brazil.¹⁵ The USA and its negotiating partners,

¹⁰ Blakeney (note 8 above; 358).

¹¹ Bulgaria, the Czech Republic, Egypt, Iceland, India, Kenya, Liechtenstein, Pakistan, Slovenia, Sri Lanka, Switzerland and Turkey.

¹² G Mengistie & M Blakeney 'Geographical Indications and the Scramble for Africa' (2017) 25(2) *African Journal of International and Comparative Law* 202.

¹³ *Ibid* 208.

¹⁴ V Fautrel...et al 'Protected Geographical Indications for ACP Countries: a Solution or a Mirage?' (5 August 2009) 8(6) *Trade Negotiations Insight* available at <https://www.ictsd.org/bridges-news/trade-negotiations-insights/news/protected-geographical-indications-for-acp-countries-a>, accessed on 27 April 2018. 'While the EU forms a sizeable market for most ACP countries, other developing countries (particularly those in Asia) boast markets with high growth potential for ACP exports. It is therefore important that geographical indications developed by ACP countries are protected also at the international level and not solely within the European market'. Therefore the ACP turned to TRIPS, to provide an international protection, but such Agreement only provides adequate protection for wines and spirits. In light of this, 'the EU's proposal to the WTO to extend the multilateral register of geographical indicators to other agricultural products is now supported by a large number of ACP countries (with the notable exception of South Africa)'.

¹⁵ Dagne (note 7 above; 256).

on the other hand, do not support the extension of geographical indications, stating that geographical indications are not a distinct category of intellectual property and should therefore be considered under the branch of existing trademark law.¹⁶ Such conflict is hindering the progression of traditional knowledge protection and ways need to be sought for both players to reach a middle ground, especially since developing countries have already suffered from its exploitation.¹⁷

South Africa has already experienced an exploitation issue on an international platform with a traditional knowledge product, namely Rooibos. Rooibos subsequently obtained protection in South Africa and in 2016 received geographical indication recognition by the EU. Based on this success story, the questioned posed by this dissertation is whether the proposed geographical extension under TRIPS can provide protection for traditional knowledge products from South Africa so that the trade in such products can be established (with regard to handicrafts) and increased (with regard to the agricultural products).

Since 1999, when the idea of traditional knowledge protection through geographical indications was first put forward, many valid questions were asked and discussed, however this dissertation observes that the current debate (the issue of extending geographical indications) seems to be drawn out for an extensive period with players¹⁸ not prioritising a final agreement.¹⁹ This illustrates a disinterest in the well-being of the broader WTO goals of fair trade, trade liberalisation and its duty towards providing for the needs of developing countries.²⁰

¹⁶ Dagne (note 7 above; 257-258).

¹⁷ See examples of Rooibos from South Africa and Basmati from India in, E Biénabe & D Marie-Vivien 'Institutionalizing Geographical Indications in Southern Countries: Lessons Learned from Basmati and Rooibos' (2017) 98 *World Development* 58-67. A further example includes neem and turmeric from India. M Ouma 'Traditional knowledge: the challenges facing international lawmakers' (February 2017) *World Intellectual Property Organization* available at http://www.wipo.int/wipo_magazine/en/2017/01/article_0003.html, accessed on 27 April 2018.

¹⁸ Players include WTO member countries and their respective decision makers.

¹⁹ Mengistie & Blakeney (note 12 above; 208).

²⁰ World Trade Organization 'Principles of the trading system' *World Trade Organization* available at https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm, accessed on 22 February 2018.

1.2. Statement of purpose

The purpose of this dissertation is to examine why WTO member states have not concluded the negotiations relating to the geographical indication extension under TRIPS and how this impacts on the protection of traditional knowledge and the development of trade in traditional knowledge in African developing countries. Being an African developing country, South Africa, which has established a trade market for Rooibos and has the potential to expand its markets to other agricultural traditional products and handicrafts, will be the focus of this dissertation.

The aim of this dissertation is not to promote the idea that geographical indications is the only answer to traditional knowledge protection but in light of the urgency to protect African developing countries' interests, such as South Africa, and help them boost their trade and economy, geographical indications can at least form a foundational or interim protection.

1.3. Research questions

The focus of this dissertation will be to make recommendations that could possibly propel the protection of traditional knowledge on an international level, through the extension of Article 23 under TRIPS, thereby boosting traditional knowledge trade, especially in African developing countries, specifically in South Africa. In light of this focus, the following questions are structured as such:

- What is traditional knowledge and what is its trade, economic and cultural importance to an African developing country such as South Africa?
- What is geographical indications and how can it protect traditional knowledge?
- How are geographical indicators provided for in TRIPS and what are the issues surrounding the extension of geographical indicators beyond wines and spirits?
- What role can free-trade agreements (hereinafter, referred to as FTAs) play with regard to promoting traditional knowledge through geographical indications?

- To what extent has South Africa experienced traditional knowledge and geographical indications, with reference to the review of relevant traditional knowledge products namely Rooibos, Honeybush and handicrafts?
- What recommendations can be sought to ensure that the TRIPS geographical indication extension is realised?
- How can the TRIPS geographical indication extension and other multilateral agreements assist South Africa in providing protection for traditional knowledge so that its trade can be enhanced?

1.4. Rationale and significance of this dissertation

Since traditional knowledge holds social, cultural and economic importance²¹ in African developing countries like South Africa, the protection of it is vital. Recognising that few African nations have taken steps to create a form of protection for their traditional knowledge,²² there is an urgent need for an international structure to govern its protection. As mentioned earlier, the development of an agreement to serve this purpose is slow therefore the use of an already established intellectual property instrument would be an appropriate interim proposal. This dissertation therefore discusses the use of geographical indications (already established under TRIPS) to provide an interim protection, with the potential to continue its operation even after the establishment of an international agreement governing the protection of traditional knowledge.

The ability of geographical indications to provide protection for traditional knowledge is being debated amongst concerned nations and academics.²³ The new world players believe that geographical indications cannot provide the necessary protection sought but the old world and developing country players propose that geographical indications can be one of the answers to traditional knowledge protection. The advantages and

²¹ S Panikarova 'Traditional Knowledge in Socio-Economic Development: National and Local Perspectives' (2013) 5(4) *International Review of Social Sciences and Humanities* 245. Traditional knowledge promotes identity, sustainability and development.

²² Kenya has established The Protection of Traditional Knowledge and Cultural Expressions Act 2016; Zambia enacted The Protection of Traditional Knowledge, Genetic Resources and Expressions of Folklore Act 2016; and South Africa has the Intellectual Property Laws Amendment Act 2013.

²³ Some academics include the likes of Sherman and Wiseman, Martens, Frankel, Blakeney and Frantz, to name a few. All authors appear in this dissertation.

disadvantages of the debate will be reviewed by this dissertation so that recommendations can be made to advance negotiations between WTO member states, on the matter of geographical indication extension.

Another problem that is hindering the finalisation of such an agreement is the stagnation of talks regarding the extension of the geographical indications under TRIPS. Scholars have mentioned the reasons for the slow negotiating process, as featured in the literature review below, but positive ways forward are not dealt with in detail. This dissertation therefore aims to collate and add to the recommendations to overcome this issue, thereby allowing for the extension of geographical indications to protect traditional knowledge in terms of trade on an international multilateral level for the benefit of African developing countries, such as South Africa.

South Africa has the potential to expand its trade markets to include products of traditional knowledge as is evident by the Rooibos success story, but more needs to be achieved in order to promote this idea on a national platform²⁴ and international platform,²⁵ which this dissertation will address.

1.5. Literature review

One of the primary questions that will be asked in this dissertation, is the ability of geographical indications to protect traditional knowledge. As illustrated below, some authors tend to be sceptical of the idea while some, such as Blakeney, see it as a positive move ahead. He evaluates the compatibility of traditional knowledge and geographical indications and concludes that they share many policy objectives which complement their relationship.²⁶ However, he warns that even though geographical indications may be a good form of protection for traditional knowledge, it only protects the designation of the traditional knowledge and not the knowledge itself.²⁷

²⁴ D Troskie & E Biénabe 'Institution Building and Local Industry Dynamics: Lessons from the Rooibos GI Initiative' in C Bramley...et al (ed) *Developing Geographical Indications in the South* (2013) 109. '...there is no publicly supported organisation in South Africa dedicated to the development of geographical indicators other than wines and spirits...'

²⁵ With regard to the need of an agreement concerning the TRIPS geographical indication extension.

²⁶ Blakeney (note 8 above; 363).

²⁷ *Ibid* 371.

Further, Sherman and Wiseman highlight the similarities between geographical indications and traditional knowledge some of which include the shared concern for environmental protection, the symbolism of quality and guaranteeing authenticity, the indigenous rights vesting in a group or collective and the recognition of a product being embodied in the place from which it originated.²⁸ Because of such similarities, as pointed out, geographical indications are viewed as being more suitable for the legal protection and promotion of traditional knowledge as opposed to the other intellectual property instruments such as copyright, patent and trademark.

Despite such a view, both Sherman and Wiseman as well as Martens agree that there have been few success stories in developing countries.²⁹ Sherman and Wiseman, therefore, question whether indigenous interests must be adjusted to comply with the requisite legal requirements and whether the geographical indication provision, of the recognition of connection to place, can translate into the legal framework.³⁰ The authors go on to provide solutions which include, increasing the attention given to historical links between products and place and denaturalising geographical indications so that the role of humans are amplified in shaping the natural connection of the traditional product.³¹ Even though the authors provide recommendations, they have an overall negative view on the potential of geographical indications being a form of protection for traditional knowledge. They conclude that traditional values will need to be suspended in order for protection to succeed thereby depreciating the essence of traditional knowledge protection.³²

With regard to the debate between the old world and new world concerning the geographical indication extension under TRIPS, Mengistie and Blakeney highlight the role of African nations in the debate between old worlds and new worlds regarding the form of protection geographical indications should take.³³ The importance of the

²⁸ B Sherman & L Wiseman 'From Terroir to Pangkarra: Geographical Indications of Origin and Indigenous Knowledge' in DS Gangjee (ed) *Research Handbook on Intellectual Property and Geographical Indications* (2016) 484-507.

²⁹ *Ibid* 492. P Martens 'Can Traditional Knowledge Owners and Producers in Developing Countries use Geographical Indications for Protection and Economic Gain?' (2012) 4 *Society of International Economic Law* 12.

³⁰ Sherman & Wiseman (note 28 above; 492).

³¹ *Ibid* 493-494.

³² *Ibid* 503-506.

³³ Mengistie & Blakeney (note 12 above; 203).

geographical indication protection beyond wines and spirits, such as handicrafts, is noted by African countries to be of importance for fair trade and non-discrimination on a multilateral level since such goods approve the protection of its traditional knowledge.³⁴ Non-extension arguments are put forward also by the authors who conclude, by observing Kenya's geographical indications, that developing nations need not necessarily require stronger geographical indication protection in order to claim ownership over its cultural heritage or place in the world market.³⁵ The authors further provide the reason as to why the negotiations, regarding the extension, are not moving forward stressing the cause to be unconstructive engagement by nations fuelled by the old world and new world feud.³⁶

Moreover, Frantz³⁷ draws attention to the new world and old world debate to be one of the hindering factors to the development of the TRIPS geographical indication extension proposal. He speaks to the role of free-trade agreements also, which have been argued by non-extension proponents, deepening the divide in the extension debate with the EU thereby promoting a *sui generis* approach and rallying the support of developing countries.³⁸ The author sides with the promulgation of the extension stating its need for fair trade and legal certainty, which is an idea echoed by Mengistie and Blakeney,³⁹ but warns that geographical indication protection is only the first step as there are still many factors such as political climate and social standing that some regions need to overcome in order to profit from their local products.⁴⁰ Frantz mentions the interest of developing countries in geographical indication protection also, as a means to safeguard and preserve traditional knowledge and promote rural development.⁴¹ He further states that geographical indication reputation is 'partly based on creativity, including the development of traditional knowledge'.⁴²

³⁴ *Ibid* 203.

³⁵ *Ibid* 220.

³⁶ *Ibid* 208.

³⁷ F Frantz 'Twenty Years of Trips, Twenty Years of Debate: The Extension of High Level Protection of Geographical Indications - Arguments, State of Negotiations and Prospects' (2016) 21 *Annual Survey of International and Comparative Law* 93-118.

³⁸ *Ibid* 112.

³⁹ Mengistie & Blakeney (note 12 above; 203).

⁴⁰ Frantz (note 37 above; 115-117).

⁴¹ *Ibid* 101.

⁴² *Ibid* 103.

Martens⁴³ examines the relationship between traditional knowledge and geographical indications from an economic view. He highlights the arguments of such relationship stimulating economic and community development, citing success stories from Europe⁴⁴ and middle income developing countries⁴⁵. He does note, however, that a deeper enquiry is needed on the global value and institutional constraints of traditional products and economic costs and possible benefits of potential geographical indications, for the advantage of less economic well-off countries.⁴⁶ He suggests therefore, that benefit-sharing in legal frameworks and the idea of national treatment are important.⁴⁷ He stresses that developing countries can learn from each other and use benchmarking techniques, particularly for institutional frameworks, development strategies and collective organisation for geographical indication products.⁴⁸

The above-mentioned authors, in this literature review, provide useful insights into the issues surrounding the extension of geographical indications to protect traditional knowledge generally and do not specifically deal with, for example, South Africa. Hence, this dissertation will refer to local South African products to provide relevant insight. Since their recommendations over the TRIPS geographical indication extension to move ahead are limited, this dissertation will further aim to collate and add to the recommendations.

1.6. Theoretical framework

Free trade or trade liberalisation can be defined as ‘a policy of unrestricted foreign trade with no tariffs or subsidies on imports or exports and no quotas or other trade restrictions’.⁴⁹ By enabling such liberalisation, a country’s economy is exposed to international competition resulting in greater efficiency.⁵⁰ The benefits of such include open-market access, employment thereby raising the standards of living, economic

⁴³ Martens (note 29 above; 1-15).

⁴⁴ Fautrel (note 14 above). A product protected by a geographical indications is estimated to be 40% higher than that of a similar non-protected product.

⁴⁵ Martens (note 29 above; 4). Darjeeling tea from India, Blue Mountain coffee from Jamaica, Madagascan vanilla and Ethiopian coffee named according to region e.g. *Harrar*, *Sidimo*.

⁴⁶ *Ibid* 12.

⁴⁷ *Ibid* 12.

⁴⁸ *Ibid* 12.

⁴⁹ J Drozd & A Miškinis ‘Benefits and threats of free-trade’ 2011 2(14) *Ekonomia* *Economics* 41.

⁵⁰ *Ibid* 41.

growth and trade creation.⁵¹ In particular, economic growth and trade creation are important to traditional knowledge since free trade can generate trade that would not have occurred otherwise, thereby opening a way for supply from more efficient producers of a product, thus increasing a country's national welfare.⁵² In light of this, if traditional products are introduced into the markets, a niche can develop creating economic growth. With reference to the definition of free trade above, the latter part of the definition, that is 'other trade restrictions', is of importance to the theme of this dissertation. The restrictions that are hindering the trade of traditional knowledge include: the lack of national protection (i.e. very few African developing countries have enacted governing legislation as mentioned above) and the deficiency in international protection and recognition (i.e. TRIPS not catering for the protection of traditional knowledge under Article 23).

Due to the importance of the concept of free trade, the theories that support it need to be looked at.

Adam Smith developed the theory of absolute advantage which focused on the 'ability of a country to produce a good more efficiently than another nation. Smith reasoned that trade between countries shouldn't be regulated or restricted by government policy or intervention. He stated that trade should flow naturally according to market forces'.⁵³

In response to the challenge of the absolute theory being problematic when a country has an advantage in many areas, David Ricardo introduced the theory of comparative advantage.⁵⁴ The theory occurs 'when a country cannot produce a product more efficiently than the other country; however, it can produce a bettered version of the product more efficiently than it does other goods'.⁵⁵ Notably, the difference between these two theories is fine-drawn where, comparative advantage concentrates on the

⁵¹ *Ibid* 41-43.

⁵² *Ibid* 41.

⁵³ 'What Is International Trade Theory?' *Saylor Academy* available at https://saylordotorg.github.io/text_international-business/s06-01-what-is-international-trade-th.html, accessed on 16 April 2018.

⁵⁴ *Ibid*.

⁵⁵ *Ibid*.

relative productivity differences and absolute advantage focuses on the absolute productivity'.⁵⁶

When considering the application of comparative advantage in its entirety in Africa, where the continent mainly specialises in the continuous export of raw materials, it is seen that the benefits of international trade have not been reaped and the continent will continue to be hindered because countries, which focus on manufacturing rather than raw materials, will produce more jobs, grow their profits and ultimately reap the 'fruits of globalisation and international trade'.⁵⁷

According to Ukwandu,⁵⁸ the results of David Ricardo's theory of comparative advantage from a decolonial standpoint impels that African policy-makers, researchers, and intellectuals need to remove themselves from the 'shackles of European and American-centred theories of development, which are inimical to the holistic development of the continent'.⁵⁹ He explains that good governance plays a role in Africa's quest for development in this respect.⁶⁰ The author further stresses that Western techniques and methods must not be disregarded but rather such techniques and methods must be examined and implemented through an African lens.⁶¹

In light of the above, it can be concluded that with regard to extending geographical indication protection to traditional knowledge, an African perspective needs to be considered. Some compromise needs to be sought by African countries to fit the requirements of the Western created WTO and TRIPS but negotiations can help with the assurance that the whole essence of traditional knowledge protection is not eliminated.

⁵⁶ *Ibid.*

⁵⁷ D Ukwandu 'David Ricardo's theory of comparative advantage and its implication for development in Sub-Saharan Africa. A decolonial view' (2015) 8(3) *African Journal of Public Affairs* 23.

⁵⁸ *Ibid* 17-34.

⁵⁹ *Ibid* 29.

⁶⁰ *Ibid* 27.

⁶¹ *Ibid* 29.

1.7. Research methodology

This dissertation will follow a qualitative, deductive, desktop-based research methodology, where the sources as mentioned below, will be critically studied and analysed in order to explore the questions posed in this dissertation. The primary sources that will be examined are TRIPS and various agreements such as the Southern African Development Community (hereinafter, referred to as SADC), the Economic Partnership Agreement between the SADC and the EU (SADC-EU EPA), the African Regional Intellectual Property Organisation (hereinafter, referred to as ARIPO), the Organisation Africaine de la Propriété Intellectuelle (hereinafter, referred to as OAPI), the Cariforum-EU Economic Partnership Agreement (Cariforum-EU EPA), the Cotonou Agreement, the Agreement Establishing the African Continental Free Trade Area (hereinafter, referred to as ACFTA) and the Agreement Establishing a Tripartite Free Trade Area among COMESA, EAC and SADC (hereinafter, referred to as TFTA). Secondary sources such as journal articles, textbooks, trade briefs and various websites of relevance will be explored to ascertain the current debates and frameworks related to the TRIPS extension of geographical indications and address the position of South African traditional knowledge trade and its experience with geographical indications on an international platform.

1.8. Delimitations of this dissertation

This dissertation speaks to the need for traditional knowledge protection for all African developing countries but only examples of traditional knowledge from South Africa will be featured extensively, to emphasise this need, as this dissertation cannot be inundated with extensive case studies and examples from other African developing countries. Furthermore, the focus of this dissertation is on South Africa hence the attention to focus on a South African context.

In addition, this dissertation will only address the provision of geographical indications under TRIPS. This does not mean that this dissertation disregards other trade instruments providing for this area. Owing to the international appeal and influence of the WTO on trade, TRIPS was sought to be examined.

Further, this dissertation is cognisant of the broad and complex nature of traditional knowledge but seeks to bring focus by only examining handicrafts and particular agricultural products to the extent of their relation to traditional knowledge.

1.9. Structure of this dissertation

This dissertation will explore the questions proposed above, in detail, through the following chapters:

Chapter one is the overview depicting the background, relevant issues, problem statement, research methodology and the purpose of this dissertation.

Chapter two will explain the concept of traditional knowledge and the importance it holds for developing countries such as South Africa in terms of trade, economics, and culture. The chapter will further explain what geographical indications are and its compatibility with traditional knowledge in order for it to act as a protecting instrument for traditional knowledge.

Chapter three will explore how traditional knowledge will be protected as a geographical indication under TRIPS and the debates surrounding the geographical indication extension (under Article 23 of TRIPS) beyond wines and spirits will be teased out. The chapter will then turn to explore the role of international FTAs in fostering the link between geographical indications and traditional knowledge promotion.

Chapter four will further explore regional FTAs that South Africa is a part of and will discuss the position of geographical indications in African developing countries also. In addition, a review of relevant traditional knowledge examples in South Africa, specifically Rooibos, Honeybush and handicrafts, will be conducted in order to articulate the country's experience with traditional knowledge and geographical indications.

Finally, chapter five will provide possible recommendations for the realisation of the geographical indication extension under Article 23 of TRIPS so that African developing countries, such as South Africa, can enhance trade in traditional knowledge.

1.10. Conclusion

After having established the aim and structure of this dissertation in this chapter and gained an insight into the topic issue and a few literature illustrations, a map is drawn to direct the route of this dissertation. The next chapter will introduce the concepts of traditional knowledge and geographical indications and will further illustrate the compatibility between the two to show the ability of a geographical indication system to protect traditional knowledge. A further discussion will extend to the cultural, trade and economic benefits of traditional knowledge in South Africa.

Chapter Two

Understanding the relationship between Traditional Knowledge and Geographical Indications

2.1. Introduction

There is a common thread that links traditional knowledge and geographical indications. At first instance, when examining the two terms, it can be observed that they are viewed as 'outsiders', as Sherman and Wiseman pronounce it, 'ill-fitting' and 'different'.⁶² With traditional knowledge being so unique, that it cannot be categorised along with other forms of creativity and innovation that is protected under current intellectual property systems and geographical indications being viewed as pre-modern and traditional,⁶³ the manner in which they do not fit in with the norm is illustrated.

Taking cognisance of the similarity between the two concepts above, this chapter will endeavour to define traditional knowledge and geographical indications respectively since understanding the meaning of the concepts and their interaction is key to this dissertation. Therefore, this chapter will explore their relationship to ascertain the suitability of a geographical indication protection system for traditional knowledge. To demonstrate the significance traditional knowledge holds for African developing nations the cultural, economic and trade importance of traditional knowledge in South Africa will be highlighted, as such country is the centre of this dissertation.

2.2. Defining traditional knowledge and geographical indications

2.2.1. Traditional Knowledge

Traditional knowledge does not have a set definition that is recognised internationally⁶⁴ due to its diverse nature, hence international instruments such as WIPO and the

⁶² Sherman & Wiseman (note 28 above; 488).

⁶³ *Ibid* 488. Geographical indications operate against the 'law, culture and economic logic of American businesses' which are orientated towards the 'liberal economic theory based in individual ownership'.

⁶⁴ O H Dean & A Deyer *Introduction to Intellectual Property Law* (2014) 342. E Du Plessis & C B Ncube 'Introduction: Indigenous Knowledge' in C B Ncube & E Du Plessis (ed) *Indigenous Knowledge & Intellectual Property* (2016) 2.

Convention on Biological Diversity have made attempts to generate a definition but such has yet to be ratified by countries. Interestingly, national legislation of countries which have recognised traditional knowledge and developed a policy for its protection,⁶⁵ have defined the term but explanations differ from country to country, however, the true essence of traditional knowledge has been a common denominator. In light of the differing definitions, the need for an internationally recognised definition is required in order to bring a degree of conformity and ensure protection. Indeed, such can only be accomplished once definitions are amicably agreed upon by developed, developing and least developed countries.

For purposes of this dissertation, however, the following definition will be followed, since it exhibits the essence of traditional knowledge as being a form of identity for a community, both culturally and geographically, and features overlapping traits with geographical indications⁶⁶:

Traditional knowledge is knowledge, know-how, skills, teachings, and practices curated, developed, sustained and passed on and shared orally,⁶⁷ through generations within an indigenous community from a particular geographic area, often forming part of such community's cultural or spiritual identity.⁶⁸

The traditional knowledge of a particular community includes traditionally made goods,⁶⁹ as well as 'scientific, agricultural, technical, medical and economic

⁶⁵ W Wendland 'Pride and trepidation: Respecting and protecting indigenous knowledge' (2015) Issue 10 *UBUNTU South Africa's Public Diplomacy in action* available at http://www.wipo.int/export/sites/www/pressroom/en/documents/pressroom_2016-01-Ubuntu.pdf, accessed on 29 October 2018 72. 'Peru, India, Brazil, Kenya, Indonesia, Panama, Ghana, Tunisia, Thailand, the Cook Islands and Kyrgyzstan are... some countries that have enacted legislation to try to curb the misappropriation of indigenous knowledge'.

⁶⁶ The overlapping features will be identified and discussed under the heading 'The protection of traditional knowledge through geographical indicators' below.

⁶⁷ Du Plessis & Ncube (note 64 above; 2). Traditional knowledge is expressed and 'shared orally through well preserved and well-developed processes within a specific community'.

⁶⁸ World Intellectual Property Organization 'Traditional Knowledge' *World Intellectual Property Organization* available at <http://www.wipo.int/tk/en/tk/>, accessed on 19 March 2018. Du Plessis & Ncube (note 64 above; 2). F K Phillips 'Intellectual Property Rights in Traditional Knowledge: Enabler of Sustainable Development' (2016) 32(83) *Utrecht Journal of International and European Law* available at <https://utrechtjournal.org/articles/10.5334/ujiel.283/>, accessed on 4 June 2018 4.

⁶⁹ P Martens 'Protection of Traditional Knowledge and Origin Products in Developing Countries: Matching Human Rights and IP Protection with Business Development Opportunities' (2014) 31 *Maastricht School of Management* 9.

knowledge, including cultigens, medicines and the use of flora and fauna',⁷⁰ all of which can have commercial potential in creative, agricultural and medicinal industries.⁷¹ Essentially, traditional knowledge is embedded in the 'history of the community as well as the culture while forming an integral part of the social, cultural, economic and technological identity of the community'.⁷² For this reason, indigenous communities aspire to protect their traditional knowledge from exploitation and appropriation by third parties for financial gains.⁷³ Notably, Masango highlights that 'western society...accumulates data about non-western societies and appropriates their knowledge systems'.⁷⁴ Such misappropriation of traditional knowledge cannot only have long-term economic consequences but can adversely impact on the preservation of local traditions and culture also.⁷⁵ Therefore, a call for its protection is evidently crucial, especially in African countries that have been victims of such appropriation.⁷⁶

⁷⁰ Du Plessis & Ncube (note 64 above; 2). Phillips (note 68 above; 4)

⁷¹ Martens (note 69 above; 9).

⁷² Du Plessis & Ncube (note 64 above; 3).

⁷³ C A Masango 'Indigenous traditional knowledge protection: prospects in South Africa's intellectual property framework?' (2010) 76(1) *SA Journal of Libraries & Information Science* 74-75. 'Drug industries financially benefit and exploit the medicinal properties in plants used by indigenous traditional people to treat certain illness...without the recognition of the indigenous traditional peoples' knowledge of the plant and its medicinal properties. It can be argued that the drug industries are exploiting the collective knowledge of indigenous traditional people for the profit of a few... and refusing to acknowledge its economic value and ownership'.

⁷⁴ *Ibid* 74-75. S Frankel 'The mismatch of geographical indications and innovative traditional knowledge' (2011) 29(3) *Prometheus, Forthcoming Victoria University of Wellington Legal Research* 254. 'Developing countries and indigenous peoples have found that the developed world freely uses indigenous peoples' knowledge and its associated cultural outputs or generic resources without any benefits necessarily flowing back to the source of knowledge'.

⁷⁵ I Calboli 'In Territorio Veritas: Bringing Geographical Coherence in the Definition of Geographical Indications of Origin under TRIPS' (2014) 6(1) *The WIPO Journal: Analysis of Intellectual Property Issues* 65.

⁷⁶ L Feris 'Protecting traditional knowledge in Africa: Considering African approaches' (2004) 4(2) *African Human Rights Law Journal* 244. '...claims that indigenous and community knowledge, innovations and practices about the medicinal, cultural, cosmetic, domestic or other value and use of bioresources have been widely appropriated. Not being recognised as either 'scientific' or valuable within traditional western frameworks of knowledge and ideas, it has been freely utilised by others and patented to the exclusion of its originators and original owners'. The sweetening proteins of the *katempfe* and *serendipity* berries, which have long been used by African people for their sweetening properties, was patented by the University of California and Lucky Biotech, a Japanese corporation, with no share of the benefits with the indigenous communities, to which the traditional knowledge belonged.

2.2.2. Geographical Indications

The origin of geographical indications can be traced back to ancient Egypt, Greece and China.⁷⁷ In Egypt it was used to identify reputable bricks for the building of the pyramids and in Greece it was used to indicate the quality of wine.⁷⁸ Stemming from the thirteenth century civil law traditions, geographical indications are used as a method to recognise origin-linked products today.⁷⁹ Some popular examples include Tequila from Mexico, Roquefort cheese and Champagne from France.⁸⁰

As seen with traditional knowledge, there is no international consensus regarding the definition of geographical indication especially with regard to the criteria and minimum standards for protection.⁸¹ Owing to the varied conceptualisation of the term by different countries at different times, ambiguity is said to plague its definition.⁸² This ambiguity can result in the national geographical indication system of one country not complying with the geographical indication system requirements of another country or the requirements of a bilateral or multilateral agreement. This issue can hinder the progress of geographical indication usage for traditional knowledge protection but such will be discussed in more detail in the chapters to follow.⁸³

The term 'geographical indications' was used for the very first time 'in the submission of European countries to the WIPO negotiations for the establishment of a geographical indication treaty encompassing earlier concepts of appellations of

⁷⁷ O Chinedu, T Manyise & R Moruzzo 'Protected Geographical Indication in Sub-Saharan Africa: Issues and Implications' (2017) 2(1) *African Journal of Intellectual Property* 82.

⁷⁸ *Ibid* 82.

⁷⁹ Chinedu, Manyise & Moruzzo (note 77 above; 82). T W Dagne *Intellectual property and traditional knowledge in the global economy: translating geographical indications for development* (2016) 27.

⁸⁰ World Intellectual Property Organization 'Geographical indications: An Introduction' (2013) *World Intellectual Property Organization* available at http://www.wipo.int/edocs/pubdocs/en/geographical/952/wipo_pub_952.pdf, accessed on 4 June 2018 8. Dagne (note 7 above; 259). Sherman & Wiseman (note 28 above; 491). This idea stems from the concept of *terroir*, which is a French words used to describe the 'characteristics and attributes of a place resulting from the land, soil, geography, climate, humans and seasonal influences which contribute to unique characteristics of agricultural products'.

⁸¹ Sherman & Wiseman (note 28 above; 486). Dagne (note 7 above; 259). A K Sanders 'Incentives for and Protection of Cultural Expression: Art, Trade and Geographical Indications' (2010) 13(2) *The Journal of World Intellectual Property* 82.

⁸² Sherman & Wiseman (note 28 above; 486).

⁸³ Chapter 4; page 77. Chapter 5; page 89-90.

origin⁸⁴ and indications of source⁸⁵.⁸⁶ When TRIPS was established, it provided geographical indications with its own unique definition that did not need the aid of the terms, 'appellations of origin' and 'indications of source'. For purposes of this dissertation, the definition of geographical indications as provided for in TRIPS will be followed as the agreement forms the centre of the research. TRIPS defines geographical indications as:

'...indications which identify a good as originating in the territory of a member (of the World Trade Organisation), or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin'.⁸⁷

The definition of a geographical indication, allows for it to be a name (as the word 'identifies' suggests in the definition above) and an indication of information⁸⁸ (as the words 'originating in' and 'quality, reputation or other characteristic' suggest in the definition above). This definition therefore allows for three types of protection, that is the name of a product, its location and its characteristics. Such protection abilities allow for geographical indications to protect traditional knowledge to an extent. A more in-depth discussion on the suitability of geographical indications to protect traditional knowledge, will be featured below.

2.3. The protection of traditional knowledge through geographical indicators

According to Gervais, the gap created between western intellectual property systems (such as copyright, trademarks, patents, and design) and traditional knowledge can

⁸⁴ Article 2(1) of The Lisbon Agreement for the Protection of Appellations of Origin and their International Registration 1958 defines appellations of origin as the 'geographical denomination of a country, region, or locality, which serves to designate a product originating therein, the quality or characteristics of which are due exclusively or essentially to the geographical environment, including natural and human factors'.

⁸⁵ Article 1(1) of the Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods 1981 speaks to indications of source as, 'all goods bearing a false or deceptive indication by which one of the countries to which this Agreement applies, or a place situated therein, is directly or indirectly indicated as being the country or place of origin shall be seized on importation into any of the said countries'.

⁸⁶ Dagne (note 79 above; 17).

⁸⁷ Article 22(1) of TRIPS.

⁸⁸ Dagne (note 79 above; 25).

be partially filled by the geographical indication system of protection.⁸⁹ The rationale for this argument is that unlike other intellectual property systems, which cannot accommodate the defining attributes of traditional knowledge without being extensively changed, geographical indications provide a 'discernable structural and functional compatibility'⁹⁰ with traditional knowledge which caters for its unique attributes.⁹¹ The compatibility is based on the similarities with regard to the features and aims of geographical indications and traditional knowledge however, such is criticised by some authors who see it to be 'superficial' and 'insufficient' to support the idea of traditional knowledge protection through geographical indications.⁹² In light of the above, the argument for and against the ability of the geographical indication system to protect traditional knowledge will be discussed below.

Geographical indications are associated with traditional knowledge in two ways. Firstly, it can be used as a mechanism to protect and sustain traditional knowledge interests and secondly, it can act as a template for the development of a *sui generis* form of protection for traditional knowledge.⁹³ The latter calls for a study to explore such form of regulation but it is beyond the scope of this dissertation; rather the former is the point of focus, as will be elaborated below.

Geographical indications are concerned with creating awareness⁹⁴ as well as preserving,⁹⁵ protecting and sustaining localised cultures and their significance, ancestral lands, traditional practices, skills and values and it further takes into account the broader social and cultural interests, such as the importance indigenous communities place on the relationship with their land, bodies of water and living ecosystems.⁹⁶ Such relation collates the two concepts and developing countries find such

⁸⁹ D Gervais 'Traditional Knowledge: Are We Closer to the Answers? The Potential Role of Geographical Indications' (2009) 15(2) *ILSA Journal of International and Comparative Law* 558.

⁹⁰ Dagne (note 79 above; 44).

⁹¹ Gervais (note 89 above; 558).

⁹² Frankel (note 74 above; 253).

⁹³ Sherman & Wiseman (note 28 above; 484-485).

⁹⁴ Calboli (note 75 above; 65).

⁹⁵ World Intellectual Property Organization (note 81; 19). 'In designing a geographical indication scheme for a product, the production standards (code of practice/regulations of use) may include a description of the traditional process'.

⁹⁶ Sherman & Wiseman (note 28 above; 488-489). Calboli (note 75 above; 58). M Chon 'Notes on a Geography of Global Intellectual Property' (2014) 6(1) *The WIPO Journal: Analysis of Intellectual Property Issues* 22. C Bramley & E Biénabe 'Why the need to consider GIs in the South?' in C Bramley...et al (ed) *Developing Geographical Indications in the South* (2013) 9-10. Dagne (note 79

relationship to be suitable as they find 'normative'⁹⁷ value in their traditional knowledge-rich indigenous communities, who wish to preserve local tradition and prevent cultural appropriation⁹⁸ while accessing global markets.⁹⁹

In this respect, Dagne highlights the explanation of geographical indications as articulated by Taubman, the WTO's Director of the Intellectual Property Division,¹⁰⁰ who states that geographical indications are a global protection system that can provide localised protection while 'linking cultural diversity and the local environment with global markets'; 'thinking locally, acting globally'.¹⁰¹ He further mentions that geographical indications link 'conventional mainstream trade with agricultural commodities, contemporary conceptions of a knowledge economy and the growing recognition of traditional knowledge as a distinctive element of the very personality of a community.'¹⁰² Thus, not only can traditional knowledge trade enhance a country's economy, it can further bring about cultural promotion and exchange.

The exporting of traditional knowledge products does seem like an economic booster, especially for developing countries which have an abundance of traditional knowledge, but a hindering factor is that many countries wish to reduce the amount of influence from foreign cultures and the focus is on the promotion of their own culture.¹⁰³ However, the growth of ethno-marketing is contributing to the increased awareness of traditional knowledge products and what they can provide to consumers, in the global

above; 44-45). World Intellectual Property Organization (note 81 above; 19). Indigenous peoples and owners of geographical indications share a common concern for the protection of the environment and biodiversity.

⁹⁷ Gervais (note 89 above; 563).

⁹⁸ Dagne (note 79 above; 46). Dagne (note 7 above; 283). Frankel (note 74 above; 257). World Intellectual Property Organization (note 81 above; 19). Appropriation such as biopiracy. Geographical indications can provide protection for traditional knowledge against 'misleading and deceptive trading practices and can also benefit indigenous communities by facilitating commercial exploitation of traditional knowledge and encouraging traditional knowledge-based economic development'.

⁹⁹ Sanders (note 81 above; 82).

¹⁰⁰ Dagne (note 79 above; 6).

¹⁰¹ Dagne (note 79 above; 6-7). Chon (note 96 above; 22). Geographical indications link 'community based initiatives with larger economic and political units...by marketing locally produced products to global markets'.

¹⁰² Dagne (note 79 above; 6).

¹⁰³ Sanders (note 81 above; 81-82). '...many countries have in place, legitimately or not, systems to protect predominantly domestic cultural values against the onslaught of popular cultural goods and services'. 'These systems comprise direct subsidies, import restrictions, tax rebates, screen quotas, licensing restrictions, price fixing, limits on foreign investment and foreign ownership, nationality requirements, domestic content requirements and intellectual property protection'.

economy.¹⁰⁴ Notably, this will help with the promotion of traditional knowledge products in foreign countries. Blackeney, Keer and Knaak all agree that an established register for geographical indications, as discussed under the WTO TRIPS negotiations to be discussed in detail in the next chapter,¹⁰⁵ can overcome the problem of ‘non-publicity’ of traditional knowledge goods also.¹⁰⁶ Further, the recognition given to the role of consumers illustrates modern geographical indication law that regards the denaturalisation of geographical indications, where the connection between the product and the place is viewed in addition to the role that humans play in shaping the natural connection, which is the reputation generated by consumers.¹⁰⁷

On the other side of the coin that views traditional knowledge protection through geographical indications as a trade enhancer, there is a belief that geographical indications produce wealth for and is only beneficial to existing businesses within the concerned geographical indication region¹⁰⁸ and it does not create innovative opportunities producing, what Martens describes as, a ‘static system’.¹⁰⁹ If no protection is available for traditional knowledge, then neither indigenous communities nor businesses will benefit. However, with the promotion of geographical indication protection, communities will be willing to start businesses that trade in traditional knowledge products and the benefit of such geographical indication protection could reap substantial gains. A counter-argument to the lack of innovation criticism above, is that traditional knowledge is actually used as a source of inspiration for new developments, progress and innovations, all of which are not prohibited under the

¹⁰⁴ Dagne (note 79 above; 5). Blakeney (note 8 above; 361).

¹⁰⁵ Chapter 3; page 36-37.

¹⁰⁶ Dagne (note 79 above; 5).

¹⁰⁷ Sherman & Wiseman (note 28 above 494, 487, 500). Federal Republic of Germany and Kingdom of Denmark v Commission of the European Communities Judgment of the Court of Justice in Joined Cases C-465/02 and C-466/02 (2005). According to Sherman and Wiseman, there are two types of geographical indications, natural geographical indication of origin and geographical indication dependence on consumer perception. The former speaks to the characteristics of a product as a direct result of its place of origin or production, where nature plays a role in shaping the product. The latter looks at the view that the consumer has about the product and the role of competitors. Advocate General Colomer, in the Feta litigation ECJ, stated, ‘determination of essential or exclusive link between product and *terroir* is not based on strict or exact science but on global evaluation of all factors from climate, to flora and from fauna to people’.

¹⁰⁸ Frankel (note 74 above; 254,264).

¹⁰⁹ Martens (note 69 above; 9). Sherman & Wiseman (note 28 above; 489). Frankel (note 74 above; 265). Geographical indications reward traditional cultural values and knowledge rather than promote innovation per se, as in the case of other intellectual property systems.

geographical indication system.¹¹⁰ Dagne adds that geographical indications recognise traditional production methods while allowing for the evolution and experimentation of the unique form of 'local farming techniques, food preservation methods and processing procedures', to name a few, that contribute to the differentiation of the traditional knowledge product.¹¹¹ These statements, therefore, demonstrate that traditional knowledge innovation and progression is possible under the geographical indication system of protection.

Another issue with exporting traditional knowledge products is that, if geographical indication success can result in a demand for traditional knowledge products, there can be a burden on natural resources and consequently a decline of genuine traditional knowledge products since other non-traditional practices may be introduced to cope with this demand.¹¹² This argument is compelling and the only means to overcome these issues are to ensure that protection laws, for the non-degradation of natural resources, are enforced and scientific research is conducted to seek ways to ensure the sustainable growth and cultivation.

Another feature of geographical indications, that proclaims its connection with traditional knowledge, is that geographical indications only protect products that are connected to a place from where such products originate and by which it is shaped.¹¹³ As such, where the land is the source of value, as in the case of traditional knowledge and geographical indications, special characteristics and meanings for the rights and obligations of collective holders are born.¹¹⁴ A positive result that can occur from this geographical indication feature is that, due to the fact that geographical indications can ensure that traditional knowledge goods are identified as having a specific origin, the value of the traditional knowledge products can increase,¹¹⁵ prompting an economic incentive for indigenous communities to sell their traditional knowledge products. However, a criticism of this feature, as stated by Frankel and Martens, is

¹¹⁰ Sanders (note 81 above; 88). Blakeney (note 8 above; 361). 'Geographical indications protect the use of indications and the innovations behind it'.

¹¹¹ Dagne (note 79 above; 45).

¹¹² Bramley & Biénabe (note 96 above; 9-10). World Intellectual Property Organization (note 81; 11).

¹¹³ Sherman & Wiseman (note 28 above; 494). Uniqueness of the product name is ensured since geographical indications allow the name to be used in relation to products from the designated territory.

¹¹⁴ *Ibid* 491-492. Frankel (note 74 above; 253, 259).

¹¹⁵ Gervais (note 89 above; 563).

that the geographical indication only protects the name associated with the product and the 'evocative' value or quality as well as the 'uniqueness of the knowledge and the way of doing things', are not protected.¹¹⁶ However, Sherman and Wiseman assert that geographical indications play a role in symbolising the quality and guaranteeing the authenticity of a product.¹¹⁷ Frankel and Martens are correct when they state that the method of production of a traditional knowledge product is not necessarily protected. As noted in chapter one of this dissertation, a geographical indication system of protection for traditional knowledge is a way forward but not the final answer.¹¹⁸ Therefore, the geographical indication system of protection should only be applied to traditional knowledge products that are best suited to be protected effectively by it, such as agricultural products and handicrafts. Other traditional knowledge products may seek protection in other intellectual property instruments or through a *sui generis* form of protection.

As stated above, geographical indications cater for the traditional practices, skills and values and take into account further the broader social and cultural interests.¹¹⁹ This notion is echoed by Taubman who sees the definition of geographical indications as recognising traditional knowledge to be the 'distinctive element of the very personality of a community'.¹²⁰ Dagne also notes that in addition to geographical indications protecting the distinguishing characteristics of a traditional knowledge product, its cultural aspects, quality and geographical area, geographical indications also protects the 'goodwill and reputation developed through the participation of a group of producers' in a specific geographical area.¹²¹ Traditional cultural expressions such as indigenous and traditional names,¹²² signs and symbols,¹²³ may also be protected by

¹¹⁶ Frankel (note 74 above; 257). Martens (note 69 above; 9).

¹¹⁷ Sherman & Wiseman (note 28 above; 490).

¹¹⁸ Chapter 1; page 5.

¹¹⁹ Sherman & Wiseman (note 28 above; 488-489). Calboli (note 75 above; 58). Chon (note 96 above; 22). Bramley & Biénabe (note 96 above; 9-10). Dagne (note 79 above; 6). World Intellectual Property Organization (note 81 above; 9-10).

¹²⁰ Dagne (note 79 above; 6).

¹²¹ *Ibid* 45.

¹²² Rooibos and Honeybush from South Africa.

¹²³ 'Law On Approval Of National Symbols Associated With GIs Enters Into Force In Moldova' (28 August 2014) *PETOŠEVIĆ* available at <https://www.petosevic.com/resources/news/2014/08/2929>, accessed on 6 November 2018. 'The Moldovan State Agency on Intellectual Property (AGEPI) announced on its website that the Law on Approval of National Symbols Associated with Protected Geographical Indications (GI), Protected Appellations of Origin and Traditional Specialties Guaranteed entered into force in Moldova on July 25 2014'.

geographical indications along with agricultural products, despite such expressions not having a geographical meaning.¹²⁴ These statements can counter-argue the criticisms put forward by Frankel and Martens, noted above, since such statements purport that the geographical indication system protects the quality and uniqueness of a traditional knowledge product.

Indigenous communities recognise collective production¹²⁵ and decision-making when it concerns a traditional knowledge product and geographical indications allow for such recognition as its protection is based on 'spatial ties' which allow for the 'exercise of traditional systems and cultural practices in a collective and participatory process'.¹²⁶ It further preserves cultural heritage while 'conserving agricultural systems for multiple benefits'¹²⁷ within a specific geographical area. Geographical indications, therefore, protect the collective rights and not an individual owner or a proprietor¹²⁸ of a traditional knowledge in a defined geographical area. This overcomes the shortfalls of copyright and patents where focus is given to an individual at the expense of the broader collection of people's interest.¹²⁹ Such feature enhances the idea of geographical indication protection for traditional knowledge due to its compatibility.

A geographical indication right over a traditional knowledge product is available to an 'indefinite number of producers' resulting in an unqualified monopoly by an individual in a specified geographical area from which the concerned product for protection originates and which adheres to the traditional methods of production.¹³⁰ This can allow for healthy competition among local producers while affording protection against the use of the traditional knowledge by businesses that fall outside of the geographical area of protection, where similar goods may be manufactured with imitated or improved methods.¹³¹ Geographical indications, unlike trademarks, are not transferable outside of the protected demarcated location, further protecting against

¹²⁴ World Intellectual Property Organization (note 81 above; 18).

¹²⁵ Dagne (note 79 above; 44-45). 'Communities regard efforts of traditional breeding and selection of plant varieties as a collective rather than an individual exercise'.

¹²⁶ Dagne (note 7 above; 265).

¹²⁷ *Ibid* 267.

¹²⁸ *Ibid* 268.

¹²⁹ Sherman & Wiseman (note 28 above; 490). Dagne (note 7 above; 264). Frankel (note 74 above; 253, 259).

¹³⁰ Dagne (note 79 above; 45).

¹³¹ Frankel (note 74 above; 259).

the use of traditional knowledge outside of this region. Ultimately, geographical indications are tied and controlled locally, which ensures that rituals, knowledge and practices remain with and under the control of the collective rights held by the indigenous community.¹³²

Before addressing a few more criticisms on the use of the geographical indication system for traditional knowledge protection, a look at the ability of geographical indications to cater for traditional or customary law will be briefly discussed. According to Sherman and Wiseman, geographical indications can open up an avenue where indigenous law can be incorporated into legal regimes used to regulate indigenous culture.¹³³ As illustrated above, there is a belief that geographical indications do not protect the innovation of traditional knowledge. If such a belief prevails, then a solution can be sought through the ability of the geographical indication system to allow for indigenous law to step in to protect such innovation. In most legal systems, generally, indigenous law is able to evolve and change over time and allows for self-determination.¹³⁴ This idea connects to the notion mentioned earlier about geographical indications acting as a template for the development of a *sui generis* form of protection for traditional knowledge.

However, in contrast to this positive outlook, the question lies as to whether indigenous interests must be adjusted in order to comply with the laws of present day,¹³⁵ especially with regard to the issue of evidence in a dispute settlement on an international level. Owing to the lack of access to knowledge and expertise regarding the unique needs of indigenous peoples in various countries, there will be a slim chance for the rules of evidence to be changed in order to accommodate indigenous ideas about evidence and proof.¹³⁶ Therefore it is seen that communities would have to comply with existing procedures to prove, for example, connection to a place.¹³⁷ According to Sanders, in order to act against the misappropriation of traditional knowledge, geographical indications may offer a path forward in 'reconciling local traditional knowledge belief

¹³² Sherman & Wiseman (note 28 above; 490). Sanders (note 81 above; 83). World Intellectual Property Organization (note 81; 18-19). Dagne (note 7 above; 266).

¹³³ Sherman & Wiseman (note 28 above; 490).

¹³⁴ *Ibid* 491.

¹³⁵ *Ibid* 492.

¹³⁶ *Ibid* 503.

¹³⁷ *Ibid* 503.

systems with western notions of property'.¹³⁸ To see such amalgamation, it can be argued that some adaptations need to be made by indigenous communities in order to fit and accept the western legal system. However, such goes against the idea of decolonisation with regard to free-trade policies and the move towards Africanisation as put forward by Ukwandu,¹³⁹ in chapter one¹⁴⁰ of this dissertation. But, in order to establish a starting point for African traditional knowledge trade presence in the intellectual property global markets, protection cannot start at a point where there is uncertainty. Notably, western legal systems have been the *status quo* and this would hurt African international trade if a deviation occurs as the rest of the world, especially western countries, will not willingly welcome such deviation.

Despite geographical indications being viewed as a legal mechanism to protect and support traditional knowledge, there are very few success stories.¹⁴¹ Martens cites success stories from the EU and from the middle income developing countries to support the relationship between geographical indications and traditional knowledge.¹⁴² However, he notes that for the benefit of less economically well-off countries, a deeper enquiry is needed on the global value and institutional constraints of traditional products and economic costs, and the possible benefits of potential geographical indications.¹⁴³ If such enquiries are conducted thoroughly and timeously then the statistics that result from such enquiry may be able to provide evidence and support for the protection of traditional knowledge through the geographical indication system.

Further another negative perception on geographical indications, as submitted by Frankel, is that the protection of a geographical indication is costly and therefore not worth the expense if development is needed.¹⁴⁴ In order to prove this statement, a comparative study will need to be conducted between the geographical indication

¹³⁸ Sanders (note 81 above; 89).

¹³⁹ Ukwandu (note 57 above; 29).

¹⁴⁰ Chapter 1; page 12.

¹⁴¹ Sherman & Wiseman (note 28 above; 492).

¹⁴² A product protected by a geographical indication is estimated to be 40% higher than that of a similar non-protected product. Fautrel (note 14 above). Martens (note 29 above; 4). Darjeeling tea from India, Blue Mountain coffee from Jamaica, Madagascan vanilla and Ethiopian coffee named according to region e.g. Harrar, Sidimo.

¹⁴³ Martens (note 29 above; 12).

¹⁴⁴ Frankel (note 74 above; 264).

system and other intellectual property protection systems. African countries will need to be the sample group studied, in order to provide accurate statistics based on the costs incurred in different African countries, whose economies, products of trade, laws and protection of traditional knowledge may differ.

Based on what is known, if traditional knowledge is protected by a geographical indication system, then there will be no requirement for such protection to be renewed¹⁴⁵ and therefore no renewal costs will be involved. Unlike other intellectual property protection instruments which have finite terms, such as copyright and patents, geographical indications have no limitations on the protection period since it lasts for perpetuity; the legal right remains in force as long as the collective traditional practice which guarantees the distinctive quality, characteristic and reputation of the local product (derived from cultural and traditional practices¹⁴⁶ linked to a specific place of origin), is sustained and the geographical indication has not fallen into genericity.¹⁴⁷ According to Andrade and Viswanath, a recent study showed that the estimated patent maintenance fees constitute approximately 41% of the total estimated costs of a patent, in South Africa.¹⁴⁸ Thus, if a study can prove that a geographical indication will not result in such extensive costs, then the statement made by Frankel, as noted above, can be disproved for South Africa at least.

Yet another negative view, of geographical indication protection for traditional knowledge, is that once traditional knowledge receives the protection of geographical indications, the perception may be that such protection is sufficient.¹⁴⁹ As mentioned in chapter one of this dissertation,¹⁵⁰ geographical indications are not the final answer to traditional knowledge protection but, as argued by this dissertation, it needs to be the first step that establishes international protection for traditional knowledge. The

¹⁴⁵ Dagne (note 7 above; 283). Frankel (note 74 above; 253, 258). Sherman & Wiseman (note 28 above; 490). Martens (note 69 above; 9). Sanders (note 81 above; 83). Dagne (note 79 above; 46). World Intellectual Property Organization (note 81 above; 18-19).

¹⁴⁶ Dagne (note 7 above; 283). Frankel (note 74 above; 258).

¹⁴⁷ Sherman & Wiseman (note 28 above; 490). Martens (note 69 above; 9). Sanders (note 81 above; 83). Dagne (note 79 above; 46). World Intellectual Property Organization (note 81 above; 18-19). Frankel (note 74 above; 253, 258).

¹⁴⁸ A De Andrade & V Viswanath 'The Costs of Obtaining and Maintaining a Patent in the BRICS Economies' (25 May 2018) *IPWatchdog* available at <http://www.ipwatchdog.com/2018/05/25/costs-obtaining-maintaining-patent-brics/id=97475/>, accessed on 4 June 2018.

¹⁴⁹ Frankel (note 74 above; 265).

¹⁵⁰ Chapter 1; page 5.

decision to protect traditional knowledge by amalgamating it into current intellectual property systems or through adopting a *sui generis* system can be concurrently or later debated upon. Finally, if businesses that sell non-traditional products benefit from geographical indications, then there is no reason as to why businesses selling traditional knowledge products should not consider geographical indications as a form of protection.¹⁵¹ This sentiment can be seen to stem from the proverb, 'half a loaf is better than no bread'. If there is already a system that can accommodate traditional knowledge protection then it should be implemented and used rather than having no protection for traditional knowledge.

2.4. The importance of and possible benefits to traditional knowledge trade in South Africa

Even though traditional knowledge has and still is used widely within indigenous communities in South Africa, recognition for its protection came later than expected which occurred after the country experienced a misappropriation issue on an international scale.¹⁵² Nonetheless, although the recognition of traditional knowledge importance has increased over the years, more needs to be achieved. As such, recommendations will be put forward by this dissertation in chapter five.¹⁵³ The focus will now shift to the cultural, trade and economic importance of traditional knowledge in South Africa, in order to demonstrate the significance of traditional knowledge in an African developing country. Such significance encourages the call for traditional knowledge protection on an international level.

South Africa, like many other developing countries such as Kenya and Ghana (to name a few), rely on mainly raw goods for exports. However, as mentioned in chapter one, with the advent of a knowledge climate in the trade sphere,¹⁵⁴ South Africa should take steps to join in. Non-traditional products are protected by general intellectual property systems such as copyright, patent, trademarks and designs, to name a few. These systems can assist South Africa to establish its knowledge market but in order to enhance its position in this trade, the country needs to increase its current traditional

¹⁵¹ Frankel (note 74 above; 264).

¹⁵² See footnote 383.

¹⁵³ Chapter 5; page 84-89.

¹⁵⁴ Chapter 1; page 1.

knowledge trade. Presently, very few products of traditional knowledge are being exported, with Rooibos and Honeybush leading the way. If traditional knowledge is enhanced in South Africa, it will bring more income, awareness, respect and recognition of traditional knowledge products. Awareness is the key word, if this is viewed from a developmental perspective, as national and international awareness of traditional knowledge is created through trade, thus the movement towards traditional knowledge protection can be sought.

From a developmental and economic standpoint, traditional knowledge can bring income to rural communities, thereby creating employment and developmental opportunities. This point will be explored in detail in chapters four and five,¹⁵⁵ with relation to traditional knowledge in terms of Rooibos, Honeybush and handicrafts. In addition to the above benefits, bursaries and community programmes can be provided to traditional knowledge right-holder communities through the call for benefit agreements. For example, four years ago, a benefit-sharing agreement was entered into between Nestlé,¹⁵⁶ the San Council and the National Khoisan Council.¹⁵⁷ This agreement was established and concluded in order to recognise the Khoi and San people as traditional knowledge holders to Rooibos and that their consent was a requirement for Nestlé's project of establishing 'Red cappuccino', using Rooibos.¹⁵⁸ The benefits that were to accrue to the Khoi and San communities were mainly monetary but provisions were made for future non-monetary benefits, such as employment, bursaries and community programmes.¹⁵⁹ Another economic gain that can also overlap with the benefit of culture promotion is the establishment of tourism. South Africa has seen many tourists visit the wine routes and Morocco has seen the same with its Argan routes.¹⁶⁰ In light of this, it can be concluded that the popularity of

¹⁵⁵ Chapter 4; page 72, 73, 75, 76, 79. Chapter 5; page 91.

¹⁵⁶ 'About Us' Nestlé available at <https://www.nestle.co.za/aboutus>, accessed on 16 November 2018. Nestlé is the world's largest food and beverage company, with more than 2000 brands ranging from global icons to local favourites, and further being present in 191 countries worldwide.

¹⁵⁷ L Jansen 'Rooibos Restitution' *Access and Benefit-sharing Capacity Development Initiative* available at http://www.abs-initiative.info/fileadmin//media/Events/2017/6-10_March_2017__Dakar__Senegal/12_Jansen_Rooibos_Restitution.pdf, accessed on 29 October 2018 slide 16.

¹⁵⁸ *Ibid* slide 16-17.

¹⁵⁹ *Ibid* slide 17.

¹⁶⁰ M L Blakeney & T Coulet 'The protection of Geographical Indications (GI): Generating Empirical Evidence at Country and Product Level to Support African ACP Country Engagement in the Doha Round Negotiations' (6 June 2011) *African, Caribbean, and Pacific Group of States* available at

products can bring agro-tourism to South Africa. Essentially, if traditional knowledge products receive demand and is revered overseas, then traditional knowledge can also add to the tourism influx in South Africa.

With regard to the cultural importance traditional knowledge holds in developing countries like South Africa, it can be simply explained as embracing the identity or uniqueness of an indigenous community. Thus, the traditional knowledge of a community is essentially its identity and way of life. In South Africa, the practice of traditional knowledge not only results in agricultural products, such as Rooibos, or handicrafts, such as Zulu beadwork, but also in the unique, indigenous concept of *ubuntu*. South Africa is currently going through a phase of decolonisation despite it receiving its independence decades ago. Such decolonisation, wishes to see the emergence of Africanisation. If traditional knowledge is promoted and its trade enhanced, then the idea of Africanisation can rise even though the protection of such traditional knowledge is through a western-legal system, such as geographical indications. South Africa will therefore, be moving forward with the help of existing frameworks.

2.5. Conclusion

Indeed, geographical indications and traditional knowledge share many characteristics, from being viewed as 'outsiders', to not having a fixed international definition, to sharing other unique features, as discussed in this chapter, that compel them to be compatible. This chapter notes that the protection of the cultural aspects and geographic location of a traditional knowledge product are not the only benefits of a geographical indication system. Geographical indications can also contribute to the improvement of rural communities by providing a way for income generation and community development.¹⁶¹ Hence geographical indications do not only serve cultural interests but economic and trade interests as well.¹⁶²

<http://www.acp.int/content/protection-geographical-indications-gi-generating-empirical-evidence-country-and-product-lev>, accessed on 29 October 2018 56.

¹⁶¹ Dagne (note 79 above; 100-101, 105).

¹⁶² *Ibid* 101,104,105.

This opens the pathway for geographical indication protection over traditional knowledge. However, there are criticisms that perturb this idea but counter-arguments have been put forward by this dissertation, as indicated in this chapter. Even though suggestions can be proffered on paper, it cannot be denied that more active consultations between countries need to take place in order to realise the international protection of traditional knowledge through a geographical indication system. As such, the voices of developing countries, especially those from Africa, need to be heard and a compromise initiated by developed countries is imperative so that necessary steps can be taken rapidly to protect traditional knowledge, especially in the realm of trade. This notion will be explored in more detail in chapter three and in chapter four with further recommendations in chapter five.

Chapter Three

TRIPS and Traditional Knowledge: The geographical indication extension debate and the role of Free-Trade Agreements

3.1. Introduction

Seeing that African countries are also WTO members, their interests should be actively considered and protected. As seen in the previous chapter, traditional knowledge plays an important role in trade, economics and social development in African developing countries, such as South Africa. Therefore such countries' traditional knowledge interests should be one of the central topics on the WTO's TRIPS platform. In light of this, this chapter endeavours to discuss how traditional knowledge is featured within the WTO.

After establishing that one of the avenues to cater for traditional knowledge protection is through the geographical indication provision under Article 23 of TRIPS, this dissertation turns to the extension debate issue. Currently, only wines and spirits have absolute geographical indication protection, under Article 23 while all other products are allocated relative geographical indication protection.¹⁶³ This protection inconsistency therefore causes an unfair situation as promulgated by the EU and its developing country supporters. These parties therefore argue for the geographical indication extension of Article 23 while the USA and its supporters oppose such extension. Against this background, this chapter will explore the provisions of Articles 22 and 23 and the debate surrounding the extension in more detail, along with the role of free-trade agreements (FTAs), which is seen as a possible alternative to the TRIPS geographical indication extension debate with regard to the protection of traditional knowledge.

¹⁶³ M Panizzon 'Traditional Knowledge and Geographical Indications: Foundations, Interests and Negotiating Positions' (2006) 1 *NCCR Trade Regulation* 23.

3.2. The position of traditional knowledge in the World Trade Organization

As highlighted in the previous chapter,¹⁶⁴ the importance of traditional knowledge to African developing countries impels for its protection on an international platform. Unfortunately, as stressed in chapters one and two,¹⁶⁵ no entrenched international protection exists, even in the eminent TRIPS. It is surprising that such agreement has not mentioned the term 'traditional knowledge' nor alluded to it in an indirect, let alone a direct form. Furthermore, according to Panizzon, no WTO agreement makes any provision to empower traditional knowledge holders with the legal means to defend against misappropriation.¹⁶⁶ The author rightly states that it is 'only equitable to give traditional knowledge legal recognition and nothing in the TRIPS prevents the WTO from adopting specific protection'.¹⁶⁷

It is trite to commence with a background on the development of traditional knowledge on the WTO's multilateral trade framework. As a starting point, at the Seattle Ministerial Conference in 1999, developing countries¹⁶⁸ submitted a joint mandate to initiate negotiations to establish a multilateral framework that would grant the effective protection of the expressions and manifestations of traditional knowledge.¹⁶⁹ The Doha Ministerial Conference, reignited this idea in Clause 19 of the Doha Ministerial Declaration¹⁷⁰ which made reference to Article 7 of TRIPS,¹⁷¹ which can be interpreted to see the protection of traditional knowledge as a negotiating priority due to its developmental dimension.¹⁷² It would seem that the WTO was launching its initiative

¹⁶⁴ Chapter 2; page 30-32.

¹⁶⁵ Chapter 1; page 2. Chapter 2; page 16-17.

¹⁶⁶ Panizzon (note 163 above; 5).

¹⁶⁷ *Ibid* 16.

¹⁶⁸ Bolivia, Columbia, Ecuador, Nicaragua and Peru.

¹⁶⁹ Blakeney (note 8 above; 358).

¹⁷⁰ Paragraph 19 of the Doha Ministerial Declaration: 'We instruct the Council for TRIPS, in pursuing its work programme including under the review of Article 27.3(b), the review of the implementation of the TRIPS Agreement under Article 71.1 and the work foreseen pursuant to paragraph 12 of this Declaration, to examine, inter alia, the relationship between the TRIPS Agreement and the Convention on Biological Diversity, the protection of traditional knowledge and folklore, and other relevant new developments raised by Members pursuant to Article 71.1. In undertaking this work, the TRIPS Council shall be guided by the objectives and principles set out in Articles 7 and 8 of the TRIPS Agreement and shall take fully into account the development dimension'.

¹⁷¹ Article 7 of the Agreement on Trade Related Aspects of Intellectual Property Rights: 'The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations'.

¹⁷² Blakeney (note 8 above; 358, 366).

to protect traditional knowledge but, up until now, there has been limited progress and nothing has been codified since the reference to traditional knowledge in Clause 19 was made.¹⁷³ This therefore indicates that the TRIPS Council has not begun to address the issues of traditional knowledge in a significant way.¹⁷⁴ Owing to this, an alternative approach is needed to ensure the realisation of traditional knowledge protection and geographical indication protection seems to be a plausible route, as discussed in the previous chapter.¹⁷⁵

In October 2001, a joint delegation¹⁷⁶ submission was tabled calling for the extension of the geographical indication protection under Article 23 of TRIPS to include products beyond wines and spirits and such to be formally included in the negotiating agenda.¹⁷⁷ A year later in 2002, the European Council put forward a proposal to extend Article 23 to agricultural products which could then receive a higher level of protection.¹⁷⁸ Such proposals, put forward in 2001 and 2002 respectively, envisaged the inclusion of traditional knowledge as it can be considered a category that falls beyond wines and spirits and it can also be a product of agriculture.

In addition, prior to the Seattle Ministerial Conference, Turkey proposed an extension of the geographical indication multilateral register to accommodate products beyond wines and spirits.¹⁷⁹ This was endorsed by the African Group (hereinafter, referred to as AG)¹⁸⁰ with Kenya, on behalf of the AG, stating that the extension of such multilateral register should be inclusive to all products that are recognised by a geographical origin, such as handicrafts and agro-foods,¹⁸¹ which can have traditional knowledge associations. The rationale behind this is that if developing countries are

¹⁷³ *Ibid* 358.

¹⁷⁴ *Ibid*.

¹⁷⁵ Chapter 2; page 20-30.

¹⁷⁶ The delegation included the following countries: Bulgaria, the Czech Republic, Egypt, Iceland, India, Kenya, Liechtenstein, Pakistan, Slovenia, Sri Lanka, Switzerland and Turkey.

¹⁷⁷ Mengistie & Blakeney (note 12 above; 202).

¹⁷⁸ Panizzon (note 163 above; 6). Dagne (note 7 above; 256).

¹⁷⁹ Article 23(4) of TRIPS has a built in agenda, calling for the negotiations of a multilateral geographical indication register for wines and spirits. The Article states, 'in order to facilitate the protection of geographical indications for wines, negotiations shall be undertaken in the Council for TRIPS concerning the establishment of a multilateral system of notification and registration of geographical indications for wines eligible for protection in those members participating in the system'.

¹⁸⁰ Mengistie & Blakeney (note 12 above; 201).

¹⁸¹ *Ibid* 201. Dagne (note 79 above; 101).

involved in negotiations concerning the multilateral register for the protection of wines and spirits, then negotiating discussions should extend to the benefits that can accrue to them from a register that includes other products and not only wines and spirits.¹⁸² In 2005, the European Council proposed to amend TRIPS in order to provide for the global protection for geographical indications in a multilateral system of registration, with the centralised register being compulsory and legally binding.¹⁸³

So far it is noted that two proposals, the Article 23 extension and the multilateral register extension, have the ability to provide some protection for traditional knowledge products. Another proposal, submitted by the AG, also has the ability to extend some protection to traditional knowledge in terms of patents. The AG has noted that through patents, traditional knowledge, whether or not associated with genetic resources, may be misappropriated by third parties and has argued for a solution to such within the WTO framework.¹⁸⁴ Therefore, the AG put a suggestion to the TRIPS Council to consider adopting a decision on protecting traditional knowledge as an integral part of TRIPS,¹⁸⁵ and to amend TRIPS so that all patent applications be required to disclose the origin of genetic resources and/or traditional knowledge used in an invention.¹⁸⁶

All of the three proposals, mentioned above, have been met with strong opposition by the USA and its supporters¹⁸⁷ prompting the EU to make a practical decision. The EU decided to partially accept the AG's proposal in exchange for its support in the creation of a register for wines and spirits¹⁸⁸ (with an intention to extend it beyond wines and spirits) and the extension of geographical indications under Article 23. Owing to the continued rejection of such proposals by the USA and its supporters, the EU and the AG linked their respective proposals to create a single undertaking,¹⁸⁹ to place

¹⁸² Mengistie & Blakeney (note 12 above; 202).

¹⁸³ *Ibid* 205-206. Blakeney (note 8 above; 367). Opponents to the establishment of a compulsory register and South Africa proposed that TRIPS should set up a voluntary consulting database registry.

¹⁸⁴ South Centre 'The TRIPS and WTO Negotiations: Stakes for Africa' (March 2017) *South Centre* available at https://www.southcentre.int/wp-content/uploads/2017/03/AN_DIIP_TRIPS1_The-TRIPS-and-WTO-Negotiations-Stakes-for-Africa_EN.pdf, accessed on 31 July 2018 12.

¹⁸⁵ *Ibid* 12.

¹⁸⁶ *Ibid* 13-14. This proposal seeks to draw on the relationship between TRIPS and the Convention on Biological Diversity.

¹⁸⁷ Japan, Korea, Australia, Canada, Argentina and New Zealand, to name a few.

¹⁸⁸ The idea of having a multilateral register for all products seem to have fallen away.

¹⁸⁹ South Centre (note 184 above; 15). The three issues that were incorporated into a single undertaking include the EU's proposal to extend enhanced geographical indication protection to products other than wines and spirits and the establishment of a register for wines and spirits and the

pressure on the USA to negotiate on all TRIPS issues, in 2008.¹⁹⁰ Despite these advances, there is still no agreement on the single undertaking and negotiations limp on. Furthermore, in recent years there has been little discussion and more of an evasion on the topic of traditional knowledge protection in the TRIPS Council. For purposes of this dissertation, the focus will be to examine the extension of the geographical indication protection, under Article 23, for products beyond wines and spirits.

3.3. Geographical indications under the TRIPS Agreement

TRIPS came into force in 1995 and is seen as the most 'comprehensive multilateral agreement on intellectual property'¹⁹¹ as it covers the main categories of intellectual property rights, their standards of protection,¹⁹² rules of enforcement¹⁹³ and provides for the resolution of disputes.¹⁹⁴ A distinctive quality of this agreement is that, unlike other agreements in the WTO,¹⁹⁵ where the focus is on market-access through tariff and subsidy reduction, TRIPS focuses on the protection and enforceability of intellectual property rights.¹⁹⁶

Notably, Part III, Section 3 (Articles 22-24) of TRIPS is dedicated to geographical indications. According to Jain, TRIPS is the first international treaty with the largest number of signatories, which 'protects geographical indications through substantive provisions and provides an enforcement mechanism through the WTO'.¹⁹⁷ Though this agreement has its praises, there is the notion that this agreement is discriminatory due

AG's proposal to disclose the origin of genetic resources and/or traditional knowledge in an invention when making a patent application.

¹⁹⁰ *Ibid* 15.

¹⁹¹ S Jain 'Effects of the Extension of Geographical Indications: A South Asian Perspective' (2009) 16(2) *Asia-Pacific Development Journal* 65, 72.

¹⁹² Part II of TRIPS: Section 1: copyright, Section 2: trademark, Section 3: geographical indications, Section 4: Industrial Design, Section 5: Patents, Section 6: Layout-Designs (Topographies) of Integrated Circuits, Section 7: Protection of Undisclosed Information, Section 8: Control of Anti-Competitive Practices in Contractual Licences.

¹⁹³ Part III of TRIPS.

¹⁹⁴ Part V of TRIPS.

¹⁹⁵ Some examples of agreements include: The Agreement on the Application of Sanitary and Phytosanitary Measures, The Technical Barriers to Trade Agreement, Agreement on Implementation of Article VI of GATT 1994 (known as the Anti-Dumping Agreement).

¹⁹⁶ CUTS International 'TRIPS-related Issues' (2017) 4 *CUTS CITEE* available at http://www.cuts-citee.org/pdf/Viewpoint_Paper_TRIPs_Issues.pdf, accessed on 6 November 2018 1.

¹⁹⁷ Jain (note 191 above; 66).

to its enhanced protection, under Article 23, being extended to wines and spirits only. This argument will be elaborated later in this chapter,¹⁹⁸ because in order to understand the arguments put forward, the provisions for geographical indication under TRIPS first need to be discussed.

As presented in chapter two,¹⁹⁹ geographical indications are defined in Article 22(1)²⁰⁰ as:

‘...indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin’.²⁰¹

According to Blakeney, this definition aims to rely on human and natural factors in addition to the geographical connotation.²⁰² It would be important to note that both these factors are as a result of traditional techniques which indigenous communities have established, developed and incorporated into the manufacturing and production process.²⁰³ The traditional knowledge-geographical indication relation is therefore indirectly evident in the TRIPS geographical indication definition, thereby allowing for the diversity of creativity that is present in traditional knowledge products such as agricultural products²⁰⁴ and handicrafts.

Of relevance, Article 22(2) does not stipulate how members should provide geographical indication protection under national laws, therefore members can comply with the provisions of such article by enacting geographical indication specific laws (*sui generis* laws) or non-geographical indication specific laws, such as consumer law, trademark law (through certification or collective marks), unfair competition, and

¹⁹⁸ Chapter 3; page 42.

¹⁹⁹ Chapter 2; page 20.

²⁰⁰ Article 22 (1) of TRIPS.

²⁰¹ Frantz (note 37 above; 95). According to Frantz, the geographical indication definition under TRIPS protects anything that ‘evokes’ the geographical origin of a good, be it a geographical name or word, symbol or anything else implying religion.

²⁰² Blakeney (note 8 above; 362).

²⁰³ Blakeney (note 8 above; 362). Jain (note 191 above; 68). Dagne (note 7 above; 283). ‘The broad scope of protection under the TRIPS criteria makes it possible for the geographical indication system to accommodate the traditional practice of indigenous local communities’.

²⁰⁴ Dagne (note 7 above; 283).

passing off.²⁰⁵ Further, Article 22(3) prohibits the misleading of the public with regard to a geographical indication protected good and therefore invalidates the 'registration of a trademark which contains or consists of a geographical indication with respect to goods not originating in the territory indicated'.²⁰⁶

Further, Article 22 in whole speaks to the protection of all goods capable of geographical indication protection against misleading the public as to the true geographical origin of the protected product and further prohibits an act constituting unfair competition or the exploitation of goodwill.²⁰⁷ Article 23, on the other hand speaks to the enhanced geographical indication protection for wines and spirits only, where there is no need to prove an act of unfair competition or that the public was misled.²⁰⁸ The Article prohibits the 'use of accompanying expressions such as kind, type, style, imitation or like', it provides protection when a translated geographical indication is used,²⁰⁹ and it prevents the use of a trademark containing or consisting of a geographical indication used to identify wines and spirits.²¹⁰

Articles 24(4) to 24(9) cover the exceptions²¹¹ to the criteria set out in the previous two Articles, rendering some geographical indications non-protectable, that is if the provisions under Article 24 apply to them. Articles 24(1) to 24(3) speak to the position of international negotiations, calling members to 'enter into negotiations aimed at increasing the protection of individual geographical indications under Article 23' and to review the application of the Section 3 provisions.²¹² This therefore clarifies that the exceptions, featured under Article 24, shall not be used to ignore and reject negotiations and agreements pertaining to geographical indication protection.²¹³

²⁰⁵ Mengistie & Blakeney (note 12 above; 200-201). Frantz (note 37 above; 95). According to Frantz, Article 1(1) of TRIPS allows members to provide a higher form of intellectual property protection, compared to the protection featured under TRIPS, provided such higher protection does not contravene any provisions of TRIPS. This therefore allows a member country to impose stricter geographical indication protection rules.

²⁰⁶ Article 22(3) of TRIPS.

²⁰⁷ Jain (note 191 above; 73). Frantz (note 37 above; 95-96).

²⁰⁸ Jain (note 191 above; 73).

²⁰⁹ Article 23(1) of TRIPS.

²¹⁰ Article 23(2) of TRIPS.

²¹¹ Frantz (note 37 above; 98). A geographical indication cannot be used if it: was previously used as a geographical indication or trademark, falls into genericity, is a personal name, does not have national protection.

²¹² Section 3 of TRIPS.

²¹³ Frantz (note 37 above; 98).

For purposes of the discussion below, Section 3 of TRIPS becomes important and the teasing out of the section will be executed.

3.4. The debate: Extension of geographical indicators beyond wines and spirits

The debate between the opposing views, on the issue of geographical indication extension beyond wine and spirits, is represented by the major two powers and principal protagonists namely, the EU (representing the old world) and USA (representing the new world). The EU countries continue to strive for the extension of higher geographical indication protection, as it is a distinct intellectual property tool, and has garnered the support of negotiating blocks such as the African, Caribbean and Pacific Groups (hereinafter, referred to as ACP) and developing countries such as India and Brazil.²¹⁴ The USA and its negotiating partners, on the other hand, do not support the extension, stating that geographical indications are not a distinct category of intellectual property and should be considered under the branch of existing trademark law.²¹⁵ Such views reflect the different geographical indication protection methods used by the respective parties. In respect of the EU model, the state takes on a significant role of controlling production standards and other conditions of the producer operating under a geographical indication, as well as enforcing them.²¹⁶ The USA follows a trademark-based model where enforcement is the role of the holder.²¹⁷ The motivations for the proposing and opposing of the geographical indication extension will be illustrated below.

3.4.1. The TRIPS provisions

A starting point, will be to look at the relevant TRIPS provisions and what it propagates. According to the Preamble of TRIPS, members need to 'ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade'.²¹⁸ In light of this, the enhanced protection for wines and spirits

²¹⁴ Dagne (note 7 above; 256).

²¹⁵ *Ibid* 257-258.

²¹⁶ Martens (note 29 above; 17).

²¹⁷ *Ibid* 17.

²¹⁸ Preamble of TRIPS.

only, under Article 23 (as mentioned above), can be seen as a barrier to the legitimate trade of other products that are not afforded the additional protection. Such treatment of higher level protection given to only two categories of products, is discriminatory with no substantive justification nor logical or legal reasoning.²¹⁹

According to Mengistie and Blakeney, the different levels of protection amounts to an unfair trade practice which is something the WTO should not support.²²⁰ Jain further points out that other areas of intellectual property rights, under TRIPS, do not provide different levels of protection for products falling into different categories; rather there is a uniform protection.²²¹ The geographical indication extension can be seen as a 'coherent step' based on what is already in TRIPS and there is no justification for a selective protection since the trade value of geographical indications falling outside of the category of wines and spirits, is equally important.²²² The reason for this is that at times the trade value of such products are higher than a specific geographical indication for wines and spirits.²²³ A single level of protection for all products, which can be granted by the geographical indication extension, has the ability to create certainty, fair distribution and predictability for trade in all geographical indication protected products.²²⁴

The next provision of TRIPS, that allows for the extension, is Article 8(1) which states that,

'members may, in formulating or amending their laws and regulations, adopt measures necessary to...promote the public interest in sectors of vital

²¹⁹ D Gervais 'Geographical Indications under TRIPS' in DS Gangjee (ed) *Research Handbook on Intellectual Property and Geographical Indications* (2016) 124. Jain (note 191 above; 76-77). Mengistie & Blakeney (note 12 above; 202-203). At the TRIPS Council meeting in 2000, Egypt, Kenya and Pakistan suggested that there is no logical explanation for a distinction made between wines and spirits and other products as all products are equally important for trade. Frantz (note 37 above; 116). According to Frantz, protection levels should be decided on based on logical and material reasoning and not to fulfil the interests of the strong-holders of the debate, but rather should consider developing countries, whose benefit lies outside of wines and spirits.

²²⁰ Mengistie & Blakeney (note 12 above; 203).

²²¹ Jain (note 191 above; 76).

²²² Mengistie & Blakeney (note 12 above; 203).

²²³ Jain (note 191 above; 76).

²²⁴ Mengistie & Blakeney (note 12 above; 203). Frantz (note 37 above; 115-116).

importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement'.²²⁵

In respect of this, it can be shown that the need for geographical indication extension is in the interest of promoting public awareness for the protection of traditional knowledge,²²⁶ with such traditional knowledge hailing from developing countries that see it to be of social and economic importance. According to Blakeney, geographical indications promote respect for the dignity, cultural integrity and the intellectual and spiritual values of traditional knowledge and its contribution to science and technology.²²⁷ This sentiment correlates with both Articles 7 and 8, again demonstrating that the extension of geographical indications is in-keeping with the principles and objectives of TRIPS.

The ability of geographical indications to protect rural traditional products²²⁸ and prioritise local autonomy as well as broad community goals while allowing such products to gain a higher commercial value,²²⁹ thereby developing global markets,²³⁰ illustrates the socio-economic benefits and trade potential that a geographical indication protection system has, if it protects all products and not just wines and spirits.²³¹ Such extension will further improve consumer choice preventing the buying of imitations which lack quality and authenticity and better reward producers in maintaining the quality of goods marketed, thereby allowing for legitimate products to reach the market and fulfilling the global vision for the multilateral trading system.²³²

²²⁵ Article 8(1) of TRIPS.

²²⁶ Blakeney (note 8 above; 363). Geographical indication recognises the economic and commercial value of traditional knowledge.

²²⁷ *Ibid* 363.

²²⁸ M Handler 'Rethinking GI extension' in DS Gangjee (ed) *Research Handbook on Intellectual Property and Geographical Indications* (2016) 158. The extension will see the development of traditional rural products in the rural areas, preventing the relocation of production, which will help retain and sustain workers in such rural areas thereby reducing rural urban migration.

²²⁹ Handler (note 228 above; 158). Geographical indications can be used as an effective marketing tool of great economic importance as it adds value to exported products, which are the natural riches of a country or which require the utilisation of unique skills to give it its distinctive identity.

²³⁰ *Ibid* 158. Jain (note 191 above; 77). Producers in developing countries will be able to secure access to foreign markets and extension will open new markets by preventing trade distortions and the benefits will foster development of local rural communities and encourage quality agricultural and industrial policy.

²³¹ Gervais (note 219 above; 124-125). Jain (note 191 above; 66).

²³² Handler (note 228 above; 158). Jain (note 191 above; 69). Geographical indications enable producers to increase profits through product differentiation. Mengistie & Blakeney (note 12 above;

Panizzon distinguishes between Articles 22 and 23 by labelling them as ‘low-level protection’ and ‘enhanced protection’ respectively.²³³ Besides such differentiating labels, further differences can be established which are not noticeable through the printed Article provisions in TRIPS. Under Article 22, the ‘misleading test’ will have to be applied to determine if unfair competition has occurred, in a particular dispute, or if consumers were misled.²³⁴ Such test allows for free-riding.²³⁵ This enables regions outside of the protected area to misappropriate the reputation of a geographical indication thereby drawing a share of the market away from legitimate right-holders.²³⁶ Free-riding results in legal uncertainty with regard to the enforcement of the geographical indication protection for a product at an international level,²³⁷ due to the difference in litigation²³⁸ among countries over the same geographical indication. The ambiguity in differentiating and inconsistent court decisions prove costly for geographical indication owners²³⁹ who, as the plaintiff, have to incur the burden of proof.²⁴⁰ Such owners seek to enforce their rights in foreign markets and the differing court decisions may further undermine and damage the function of the international trade in goods protected by geographical indications.²⁴¹ Article 23 on the other hand, does not demand a misleading test or evidence of unfair competition,²⁴² instead it prohibits the use of geographical indications for wines and spirits not originating in the established place of origin.²⁴³ This ensures that disputed decisions are made

202-203). Increasing quality awareness and higher quality requirements promote the demand for products of a specific geographic origin.

²³³ Panizzon (note 163 above; 6).

²³⁴ Jain (note 191 above; 74).

²³⁵ Handler (note 228 above; 158). Jain (note 191 above; 77). A producer may use a geographical indication even if it does not originate in the place purported so as long as the product’s true origin is indicated on the label. This allows the producer to profit from a famous geographical indication and argue that it is not misleading the consumer

²³⁶ Jain (note 191 above; 76). Frantz (note 37 above; 101). If a geographical indication does not meet the requirements for a misleading test then competitors can market similar products under such a geographical indication before it can, itself, gain a reputation. A geographical indication may even become generic due to its illegitimate use and the true geographical indication can lose potential economic value.

²³⁷ Jain (note 191 above; 74).

²³⁸ Jain (note 191 above; 74). Handler (note 228 above; 158). It is up to the court and national administration authorities to decide if the public is being misled by the use of a geographical indication.

²³⁹ Handler (note 228 above; 158).

²⁴⁰ Jain (note 191 above; 75). Frantz (note 37 above; 97). The party alleging the unauthorised use, passing-off or unfair competition has the burden of proof to show that they have been misled, incurred damages or will incur damages.

²⁴¹ Jain (note 191 above; 74-75). Frantz (note 37 above; 97).

²⁴² Jain (note 191 above; 74-75). Gervais (note 89 above; 562).

²⁴³ Jain (note 191 above; 75).

objectively and that the judicial 'correctness test' is uniform and harmonious.²⁴⁴ Further, the burden of proof also does not lie with the plaintiff.²⁴⁵ An extension of Article 23 will also prevent geographical indications from becoming generic through misuse in translations or through decolonisation.²⁴⁶ In light of the advantages proved above, the additional protection should be extended to all products so as to save costs, promote equality for product protection and ensure certainty.

3.4.2. The developmental standpoint

Moving away from the provisions of TRIPS, the attention is now turned to the importance of extension from a developmental standpoint. According to Gervais, the geographical indication extension can repair historical wrongs and de-westernise intellectual property rules which are seen as discriminatory because they favour western methods of creation, invention, marketing and production.²⁴⁷ In light of this sentiment traditional knowledge products, such as handicrafts and agricultural products, can have a place for protection under the geographical indication extension since it will provide wider protection coverage.²⁴⁸ The geographical indication extension can therefore be seen as a preserver of culture while contributing to 'remunerative marketing' of traditional knowledge.²⁴⁹ Even though the extension might be criticised for burdening developing countries, as will be discussed below, it can be seen as a positive example for developing countries as it illustrates the practical use of an international intellectual property regime and justifies the implementation of TRIPS.²⁵⁰

²⁴⁴ *Ibid* 77. Frantz (note 37 above; 97, 100, 104). World Trade Organization 'Geographical Indications' *World Trade Organization* available at https://www.wto.org/english/tratop_e/trips_e/ta_docs_e/modules4_e.pdf, accessed on 7 November 2018 11. 'Some delegations to the WTO have recently referred to the test of 'correctness' or 'correct use' when referring to Article 23 level of protection, i.e. a term used is exactly the one identifying the true place of origin, as opposed to the misleading test under Article 22'.

²⁴⁵ Jain (note 191 above; 73).

²⁴⁶ Jain (note 191 above; 84). The term 'decolonisation' is used in terms of the process of reigniting and promoting indigenous traditional knowledge and culture. When such a process occurs traditional terms are bound to reach a public domain and steps need to ensure that it does not fall into genericity when it reaches the public sphere.

²⁴⁷ Gervais (note 219 above; 124).

²⁴⁸ CUTS International (note 196 above; 2). Blakeney (note 8 above; 366-367). Such idea was endorsed by the African Group.

²⁴⁹ Dagne (note 79 above; 101).

²⁵⁰ Blakeney (note 8 above; 371).

Further, the USA and its supporters²⁵¹ argue that the current international protection is adequate²⁵² and drastic developments will undermine future gains in market-access for non-European food and agricultural products,²⁵³ creating agricultural protectionism.²⁵⁴ Argentina, Brazil and USA see the extension as a protectionist move because it will prevent them from using original methods of production, used by their immigrated European predecessors, thereby hampering a 'comparative advantage in producing and marketing highly competitive like products'.²⁵⁵ While these arguments are valid, they project a self-centred expression as they do not consider the many countries, such as those in Africa and Asia that can benefit from such extension in a socio-economic sense.

The USA and its supporters further argue that an imbalance in obligations and benefits will result if the extension is realised, since a single country, with few protected geographical indications, may have to protect numerous geographical indications from another country.²⁵⁶ This belief alludes to the issue of an unfair deal between two countries, especially when a developed country holds the power and the developing country heeds to such power. This can be dangerous and not beneficial, with specific regard to free-trade agreements (hereinafter, referred to as FTAs) but success stories, such as the Economic Partnership Agreement between the EU and Southern African Development Council (hereinafter, referred to as SADC-EU EPA), evidence the contrary to the unfair deal belief (as will be discussed below²⁵⁷ and recommendations proffered in chapter five²⁵⁸).

Some developing countries seem to side with the USA and fellow opponents, in terms of their cost implementation contention.²⁵⁹ Such countries feel that implementing and maintaining a distinctive system of geographical indication protection, while still

²⁵¹ Argentina, Australia, Canada, Chile, Guatemala, New Zealand, Paraguay.

²⁵² Dagne (note 7 above; 257, 269).

²⁵³ Blakeney (note 8 above; 368).

²⁵⁴ Panizzon (note 163 above; 6).

²⁵⁵ Panizzon (note 163 above; 21).

²⁵⁶ Frantz (note 37 above; 105).

²⁵⁷ Chapter 3; page 51, 52, 54.

²⁵⁸ Chapter 5; page 84-85.

²⁵⁹ Mengistie & Blakeney (note 12 above; 204). In 2001, the joint commission of Argentina, Australia, Canada, Chile, Guatemala, New Zealand, Paraguay and the USA stated that the advantages of the extension was overstated and insufficient to address the costs and burdens of the extension.

fulfilling outstanding TRIPS obligations, is costly²⁶⁰ especially for least developed countries.²⁶¹ A response to such concerns can be that costs for the extension will not be more than the existing costs needed for the additional protection for wines and spirits.²⁶² After all, the extension of Article 23(1) will not create further obligations for members to form new, costly and onerous regimes, as such members already have to provide for geographical indication protection under Articles 22 and 23.²⁶³ As mentioned earlier, TRIPS does not prescribe a certain method for geographical indication protection, hence a country can implement any type of protection, based on what suits their needs and costs.²⁶⁴ Assistance in establishing a set of geographical indication laws can be provided for by regional groups and FTAs through the technical assistance provision,²⁶⁵ as will be touched on below and discussed in chapter five.²⁶⁶ Another response to the opponents' cost argument, is that implementation costs incurred can be off-set by benefits of extension.²⁶⁷ An idea would be to carry out studies to determine the feasibility of different geographical indication protection methods.²⁶⁸ When such data is collected, then arguments can be reinforced with evidence. According to Blakeney, countries are presently examining cost influences and other practicalities of extension.²⁶⁹

²⁶⁰ Blakeney (note 8 above; 367-368).

²⁶¹ *Ibid* 367.

²⁶² Mengistie & Blakeney (note 12 above; 204). Handler (note 228 above; 158).

²⁶³ Mengistie & Blakeney (note 12 above; 204). Frantz (note 37 above; 104). Existing geographical indication protection structures need to be simply expanded in order to include more products other than wines and spirits. Extension in this case is 'seamless'.

²⁶⁴ Sanders (note 81 above; 83). Members can protect geographical indications through a *sui generis* system or through a trademarks regime under certification and collective marks. O Gunzel 'From obscure speciality to breaking news: GIs under the spotlight' (25 June 2018) *World Trademark review* available at <https://www.worldtrademarkreview.com/governmentpolicy/obscure-speciality-breaking-news-gis-under-spotlight>, accessed on 29 October 2018. Some other methods of protection also include: geographical indication protection under consumer protection, unfair competition laws, national legislation created for a single product, and bilateral and multilateral agreements.

²⁶⁵ Martens (note 69 above; 13). Technical assistance is needed by developing countries in order for them to comply with developmental standards and obtaining market-access. A Tauberman 'Thinking locally, acting globally: how trade negotiations over Geographical Indications improve fair-trade rules' in DS Gangjee (ed) *Research Handbook on Intellectual Property and Geographical Indications* (2016) 215. According to Articles 24(1) and 24(2), TRIPS obliges members to undertake bilateral negotiations on geographical indication protection.

²⁶⁶ Chapter 5; page 86, 87, 90.

²⁶⁷ Mengistie & Blakeney (note 12 above; 204). Jain (note 191 above; 84). Handler (note 228 above; 158). Dagne (note 79 above; 137).

²⁶⁸ Mengistie & Blakeney (note 12 above; 219-220). The Ethiopian trademark experience and coffee licencing initiative shows that a country can claim their cultural heritage, ownership and marketplace without geographical indication protection. However, countries differ and so do product needs hence the situation needs to be assessed in order to determine the most appropriate form of protection.

²⁶⁹ Blakeney (note 8 above; 367).

Opponents²⁷⁰ further believe that building a reputation is time-consuming and expensive.²⁷¹ This reasoning appears to underestimate the capabilities of developing countries and it almost seems to want to stifle their ability to persevere in developing unique products, qualifying for geographical indication protection. The opponents go on to express that much of the agricultural activities in developing countries are conducted by individual or small scale farmers who are unlikely to have the required resources to develop recognisable brands in foreign export markets.²⁷² This statement further undervalues the ability of developing countries. Products like Rooibos tea from South Africa, Argan oil from Morocco and Darjeeling tea from India, to name a few, have managed to garner international recognition, and the establishment of producer groups further shows the competency of developing countries.

With regard to the multilateral register for geographical indications under TRIPS, the USA and Australia contend that Article 23(4)²⁷³ does not provide for the mandate to negotiate an extension to the multilateral register beyond wines and spirits.²⁷⁴ This argument is justifiable but only to the extent that Article 23 of TRIPS remains applicable only to wines and spirits. Should the extension be approved, then whatever products are approved to be granted protection under Article 23, will have to be registered, therefore calling for negotiation for the multilateral register to be extended. New world WTO members further contend the multilateral register extension since such countries have few traditional knowledge products as they have been using the European names of products, similar to what they produce.²⁷⁵ This argument is self-centred for the same reasons discussed above.²⁷⁶

²⁷⁰ USA and its supporters.

²⁷¹ Handler (note 228 above; 175).

²⁷² *Ibid* 175.

²⁷³ See footnote 179.

²⁷⁴ Panizzon (note 163 above; 24).

²⁷⁵ Panizzon (note 163 above; 31). European Commission 'The European Commission Paper of Geographical Indications (GIS) in the EU-U.S. Transatlantic Trade and Investment Partnership' (2016) *European Commission* available at

http://trade.ec.europa.eu/doclib/docs/2016/march/tradoc_154384.Paper%20Geographical%20Indications%20FINAL.pdf, accessed on 29 October 2018 4. The U.S. Transatlantic Trade and Investment Partnership with the EU contains a list of EU spirit names that need to be protected in the USA. A few of those names include: Scotch Whiskey, Cognac and Armagnac.

²⁷⁶ Chapter 3; page 46, 48, 49.

Mengistie and Blakeney interestingly point out, by reference to the Ethiopian trademark experience and coffee licencing initiative²⁷⁷ that a country's claim on their cultural heritage, ownership and marketplace can occur without geographical indication protection.²⁷⁸ Such assessment is attractive to opponents but it must be comprehended with caution. Countries differ and so do product needs, hence the situation needs to be assessed in order to determine the most appropriate form of protection. So even though it may be true that geographical indication protection is not needed for the Ethiopian coffee experience, it might very well be needed for Maasai attires and beads,²⁷⁹ which are currently seen as potential products for geographical indication protection.

Considering the extension debate as a whole, it can be observed that WTO members are not dedicated to negotiate on the 'reforming and rebalancing' of TRIPS in favour of developing countries.²⁸⁰ In the past, the AG was an active participant but recently it seems to have lost its steam, however Kenya still expresses interest.²⁸¹ In 2004, the EU demands for geographical indication extension was discarded and the issue of traditional knowledge protection was left out of the Doha Development Agenda Package.²⁸² Later in 2011, Darlington Mwape (previous chairman of the Special Sessions of the TRIPS Council) stated that:

'members have been unable to engage constructively...and have instead insisted that the purely bottom-up and member-driven nature...be scrupulously respected at this time'.²⁸³

According to Handler, the opponents and proponents of the extension cannot agree on whether they have an agreement to negotiate on the extension.²⁸⁴ These details

²⁷⁷ Mengistie & Blakeney (note 12 above; 219-220). Ethiopian coffee, *Harar*, *Sidamo* and *Yirgacheffe*, have secured trademark protection in a few countries and Starbucks agreed to sign a voluntary trademark licensing agreement which immediately acknowledged Ethiopia's ownership of the three coffees, regardless of whether or not a trademark was granted.

²⁷⁸ *Ibid* 219-220.

²⁷⁹ *Ibid* 213.

²⁸⁰ Panizzon (note 163 above; 7).

²⁸¹ South Centre (note 184 above; 15).

²⁸² Panizzon (note 163 above; 16).

²⁸³ Mengistie & Blakeney (note 12 above; 208).

²⁸⁴ See footnote 18 in Handler (note 228 above; 150-151).

further clarifies the inability to find a solution to global harmonisation, as members are divided with regard to regulations and capacity in terms of geographical indication protection.²⁸⁵ In November of 2017, at the TRIPS Council meeting, India with the support of the Brazilian, Thai, Chinese, Indonesian and South African delegation, called for the parallel, simultaneous and joint treatment of the three TRIPS issues under the single undertaking.²⁸⁶ Unfortunately, such attempt to re-ignite extension talks did not reap its goal. The representative from Thailand, however, persevered and requested for the consideration of other constructive ways forward, due to the stationary negotiating reality, and welcomed members to share experiences and best practices in geographical indication protection and registration, so that such experiences and practices can contribute to the furtherance of the negotiating process.²⁸⁷

The persisting failure of the WTO to find a solution to the extension debate has re-established the relevance of the WIPO²⁸⁸ and Lisbon agreements.²⁸⁹ If a solution is to be sought then, as suggested by Handler, some attractive benefit needs to be given to opponents that will suit their national needs, in exchange for their support in the extension.²⁹⁰ The EU and its supporters will therefore need to find a compromise in order to reach a middle ground. A possible suggestion is that enhanced protection should be extended only to traditional knowledge products or a category of traditional knowledge products, such as agricultural products²⁹¹ and handicrafts. In this way, developing countries with thriving traditional knowledge can benefit and the USA and the EU cannot accuse each other of wanting to monopolise their methods of geographical indication protection.

²⁸⁵ Handler (note 228 above; 146-147).

²⁸⁶ World Trade Organization 'Council for Trade-Related Aspects of Intellectual Property Rights Special Session' (29 November 2017) *World Trade Organization* available at https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=240546,240472,233191,225468,123734,123752,121860,121849,121836,96423&CurrentCatalogueIdIndex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True, accessed on 8 November 2018 3-6.

²⁸⁷ *Ibid* 4.

²⁸⁸ Mengistie & Blakeney (note 12 above; 217). WIPO has conducted many projects in Africa to demonstrate the value and utility of geographical indications.

²⁸⁹ *Ibid* 217.

²⁹⁰ Handler (note 228 above; 181).

²⁹¹ Agricultural products that have seen geographical indication success include Darjeeling tea, Basmati rice, Argon oil, Rooibos and Honeybush.

3.5. The role of Free-Trade Agreements in the facilitation of traditional knowledge protection through geographical indicators

Due to the extension debate reaching a stagnant point on an international multilateral platform, free-trade agreements (hereinafter, referred to as FTAs) have stepped in to fill the void, the effectiveness of which will be discussed below.

FTAs create international co-operation to help build stronger economic and political relationships between countries and allow for market-access.²⁹² Regional trade agreements between countries serve to strengthen their unity through the convergence of particular interests.²⁹³ Such positive allusions are evident in the Cotonou agreement,²⁹⁴ CARIFORUM²⁹⁵ and SADC-EU EPA.²⁹⁶ According to Martens, it can be interpreted that in such 'asymmetric' trade agreements, the European Council will be involved in providing support for the development and aid for trade through regional indicative programmes such as promoting and preserving local traditional knowledge.²⁹⁷ This is evident in the Cotonou agreement which speaks to the development of and equitable access to the economic sector through co-operation, to support sustainable policy and institutional reforms with regard to the promotion of traditional knowledge.²⁹⁸ Even though the EU-CARIFORUM EPA and the SADC-EU

²⁹² Chinedu, Manyise & Moruzzo (note 77 above; 85). Martens (note 69 above; 6).

²⁹³ Martens (note 29 above; 7). CUTS International (note 196 above; 4).

²⁹⁴ This agreement is between the EU and the ACP group of countries. See Appendix A, attached, for a list of the ACP countries. The preamble of this Agreement states the following which proves the objective to obtain unity: 'Reaffirming their willingness to revitalise their special relationship and to implement a comprehensive and integrated approach for a strengthened partnership based on political dialogue, development co-operation and economic and trade relations'.

²⁹⁵ CARICOM 'CARIFORUM - The Context' CARICOM available at <https://caricom.org/cariforum-the-context>, accessed on the 12 October 2018. 'The Caribbean Forum of the African, Caribbean and Pacific Group of States are: Antigua and Barbuda, The Bahamas, Barbados, Belize, Cuba, Dominica, Dominican Republic, Grenada, Guyana, Haiti, Jamaica, St. Kitts and Nevis, Saint Lucia, St. Vincent and the Grenadines, Suriname and Trinidad and Tobago'. "All Participating States in CARIFORUM, with the exception of Cuba, are signatories to the ACP-EU Partnership Agreement or "Cotonou Agreement" and the EPA, respectively'. Article 1(f) of the CARIFORUM EPA states the following which proves the objective to obtain unity: 'strengthening the existing relations between the Parties on the basis of solidarity and mutual interest'.

²⁹⁶ The Southern African Development Community (SADC) entered into an Economic Partnership Agreement (EPA) with the EU in 2016. Article 1(f) of this agreement states the following which proves the objective to obtain unity: 'strengthen the existing relations between the Parties on the basis of solidarity and mutual interest'.

²⁹⁷ Martens (note 29 above; 9). Martens (note 69 above; 6). Martens warns however, that agreements such as the EU-CARIFORUM EPA could be biased towards the EU as the EU could be seen to have developed a system to favour itself.

²⁹⁸ Article 23(n) of the Cotonou Agreement 2010. Mengistie & Blakeney (note 12 above; 215). 'Under the Cotonou Agreement the EU has been engaged in a number of activities to promote the potential of geographical indications for ACP member states'.

EPA do not speak to the EU's aid for trade initiative, applying specifically to the promotion and protection of traditional knowledge, it does recognise the EU's duty to provide aid for trade across all areas covered in the respective agreements, which include traditional knowledge and geographical indications.²⁹⁹

After having considered the positive role that FTA's can play in terms of providing support and assistance to realise the necessity of protecting and promoting traditional knowledge and geographical indications, the focus must now turn to how these agreements have assisted in recognising and protecting products that have a geographical indication and that fall beyond the scope of wines and spirits, which includes traditional knowledge.

Under the above-mentioned EU EPAs, any product from a country can reap the benefits of protection in the EU provided that it is protected and registered domestically.³⁰⁰ Therefore, there is a need for established national legal frameworks that cover geographical indications. The implementation of such frameworks may be problematic for African countries as they may not have the resources, the institutional frameworks nor the expertise to establish a geographical indication protection system. The difference in the requirements for a geographical indication system based on the strong target markets, the EU and the USA, further causes a challenge for countries.³⁰¹ In light of alleviating this situation, the role of regional groups becomes pronounced.

As such the African regional group, namely the African Regional Intellectual Property Organization (hereinafter, referred to as ARIPO) and the EU joined hands by entering into the Stone Town Administrative Memorandum of Understanding 2012 in order to commit to the building and promotion of the practical use and development of geographical indications across Africa through co-operation and harmonisation.³⁰² According to Chinedu, 'in 2017, the organisations entered a new agreement that requires that either party offers technical assistance when requested and take a

²⁹⁹ See Appendix B, attached, for quotes from each agreement that support this statement respectively.

³⁰⁰ Article 145(A)(1) of the EPA between the CARIFORUM States and the European Community and its Member States 2008. Protocol 3, Part 1, Article 5(5) of the EPA between the European Union and its Member States and the SADC EPA States 2016.

³⁰¹ Martens (note 29 above; 9).

³⁰² Chinedu, Manyise & Moruzzo (note 77 above; 86).

common position on major intellectual property issues affecting the member states'.³⁰³ On the topic of the provision of assistance, before the EU's relation with ARIPO, the EU attempted to secure African support for geographical indication protection through the ACP-EU Project and thereafter the EU organised workshops aimed at building the capacity among stakeholders and administration so that the development of geographical indication protection could occur in eighteen African countries.³⁰⁴

Through a co-operation agreement between the French Organisation Institut National de l'origine et de la Qualité (hereinafter, referred to as INAO) and the African Union of Organisation Africaine de la Propriété Intellectuelle (hereinafter, referred to as OAPI)³⁰⁵ a few African products, containing traditional knowledge, gained geographical indication protection. Such products include the *Khorogha* garment from Côte d'Ivoire, *Oku* white honey³⁰⁶ and *Njombe* pepper from Cameroon. Owing to the OAPI being made up of previous French colonies and due to it working with the INAO, the *sui generis* system of geographical indication protection has been influential due it being promoted by the INAO. Notably, TRIPS does not prescribe a way in which geographical indication obligations should be implemented.³⁰⁷ International influence, as illustrated above, should therefore be seen in a positive light as steps are being made towards a geographical indication system of protection and understanding, thereby persuading involved African countries to see the benefits of the TRIPS

³⁰³ *Ibid* 86.

³⁰⁴ Mengistie & Blakeney (note 12 above; 215-216).

³⁰⁵ *Ibid* 211. The OAPI provides for geographical indication registration and protection on behalf of its member states as the agreement embodies national intellectual property laws of such members therefore the application of the agreement will be direct. Organisation Africaine de la Propriété Intellectuelle 'Member States' *Organisation Africaine de la Propriété Intellectuelle* available at <http://www.oapi.int/index.php/en/aipo/etats-membres>, accessed on the 31 of July 2018. Member states include: Benign, Burkina faso, Cameroon, Central, Comoros, Congo, Ivory Coast, Gabon, Guinea, Guinea Bissau, Equatorial Guinea, Mali, Mauritania, Niger, Senegal, Chad, Togo. The scope of products that geographical indications protect under the OAPI Agreement (Agreement Revising the Bangui Agreement of March 2, 1977, on the Creation of an African Intellectual Property Organization) is more extensive than the scope of products under to EU system as protection extends to natural, agricultural, craft or industrial products. See Appendix C that shows the provision in the agreement that illustrates this.

³⁰⁶ World Intellectual Property Organization 'Bees, Geographical Indications, and Development' (24 November 2014) *World Intellectual Property Organization* available at <http://www.wipo.int/ipadvantage/en/details.jsp?id=5554>, accessed on 29 July 2018. 'Traditional knowledge on how to make beehives, collect the bees, and where to place the beehives in the forests are extremely important to the quality of *Oku* white honey. Producing it is not easy and it is a practice that has been passed down orally within families and communities'.

³⁰⁷ Mengistie & Blakeney (note 12 above; 211).

geographical indication extension, which could influence the negotiations to tip in favour of the EU, allowing for African countries to benefit.

The SADC-EU EPA and the EU-CARIFORUM EPA recognise the importance of TRIPS but opt to extend the form of protection featured under Article 23 of TRIPS to all products and not only wines and spirits.³⁰⁸ The EU-CARIFORUM EPA further highlights the natural link between geographical indications and traditional knowledge.³⁰⁹ The SADC-EU EPA protects 105 South African geographical indications in the EU and 251 EU geographical indications in South Africa, while ensuring that each party's geographical indication benefits from high level protection co-existing with registered trademarks.³¹⁰ In light of this and the work of the INAO and the EU in Africa, as discussed above, it would seem that the EU agreements involve a far more explicit recognition of geographical indications as instruments of trade policy³¹¹ when compared to that of TRIPS, as the EU agreements see the economic potential and value of products other than wines and spirits. With such progressive and pioneering agreements being in force, the promotion of traditional knowledge trade is elevated.

3.6. Conclusion

According to Gervais, TRIPS is seen as a 'historical legacy of colonial disdain' as the initial negotiators were all from the western world, with only a few from developing countries.³¹² This chapter speaks to the fact that developing countries' interests are still not heard, even though developing countries, such as the ACP Group, AG, India and Brazil, have voiced their opinions on the need for extension to cover traditional

³⁰⁸ Article 145(B) of the EPA between the CARIFORUM States and the European Community and its Member States 2008. Protocol 3, Part 1, Article 5 of the SADC-EU EPA.

³⁰⁹ Article 164(2)(c) of the EPA between the CARIFORUM States and the European Community and its Member States 2008. 'Identification of products that could benefit from protection as geographical indications and any other action aimed at achieving protection as geographical indications for these products. In so doing, the EC Party and the Signatory CARIFORUM States shall pay particular attention to promoting and preserving local traditional knowledge and biodiversity through the establishment of geographical indications'.

³¹⁰ Martens (note 69 above; 6). South African trade negotiators succeeded in protecting rooibos tea, honey bush tea and karoo lamb.

³¹¹ Handler (note 228 above; 181).

³¹² Gervais (note 89 above; 553-554). Haiti was one of the few developing countries involved in TRIPS discussions.

knowledge products of agriculture and handicrafts. Despite this, the geographical indication extension debate beyond wines and spirits, is still portrayed as being between the western worlds, which is the EU and the USA.

As a result of static negotiations with contrary positions being held steadfast, by opponents of and proponents for the geographical indication extension beyond wines and spirits, the role of bilateral and multilateral agreements outside of the WTO becomes relevant. According to Frantz, such agreements are a more feasible and realistic way to reach consensus on geographical indication protection. Thus, the African FTAs with the EU allow for traditional knowledge promotion and geographical indication protection. The focus of the FTAs in this chapter, is on Africa's relation and agreements with European countries (inter-continental relations), however the next chapter will explore established African FTAs within the continent itself (intra-continental relations). As the focus of this dissertation is on South Africa, her experience with traditional knowledge and geographical indication protection will also be discussed in the next chapter of this dissertation.

The perceived colonial nature of TRIPS, can be eradicated if recognition is given to traditional knowledge (which developing countries are rich in) and its protection. Geographical indications provide a way for traditional knowledge protection but the reach of its protection needs to be extensive, hence the need to extend Article 23, under TRIPS. This chapter holds that TRIPS does allow for an extension, after having discussed Articles 7-8 and 22-24, which can hold numerous benefits for traditional knowledge right-holders. This includes reduction of costs, additional protection, diminished burden of proof and legal certainty when matters are disputed. In light of this, solutions to achieve the extension need to be sought. As such, recommendations as to how consensus on the extension can be reached so as to eradicate the colonial stronghold on TRIPS, will be discussed in chapter five.

Chapter Four

Traditional Knowledge and Geographical Indications: The South African Experience

4.1. Introduction

South Africa's experience with traditional knowledge is fairly new. The country is in the early stages of realising the potential of traditional knowledge as a tradable asset as it is in the process of actively taking steps to protect traditional knowledge. The focus of this chapter will therefore be on the legislation that surrounds traditional knowledge and geographical indications in South Africa, as well as traditional knowledge examples that highlight the role of traditional knowledge agricultural goods and handicrafts in the realm of international trade. This chapter therefore undertakes to explore the South African experience with traditional knowledge and the role geographical indications play in its protection.

At the end of chapter three, the role of international free-trade agreements (hereinafter, referred to as FTAs) are discussed, opening the way for an extension of the topic that focuses on African FTAs. This chapter will therefore start with a brief exploration of particular African FTAs, of which South Africa is a party to, in order to determine the extent of influence that such agreements have on South African law, with respect to traditional knowledge. The chapter will then turn to explain the various South African legislations that govern traditional knowledge protection and will turn to focus on the Intellectual Property Laws Amendment Act of 2013 and its amendment to the geographical indication provision under the Trade Marks Act of 1993. Such amendment will be teased out to provide an overview. The penultimate focus will be on South Africa's traditional knowledge products, namely Rooibos, Honeybush and handicrafts, and thereafter a shift will be made to look at the role of geographical indications in Africa as a whole, since South Africa is a part of the continent. Such discussion will lead the thought process to chapter five which will provide recommendations for a way forward, for the protection of traditional knowledge products and the enhancement of its trade.

4.2. Intellectual property and traditional knowledge in South African Free-Trade Agreements

Since South Africa is at the centre of this dissertation and this chapter, this section will only endeavour to explore certain FTAs that South Africa is a signatory to.

4.2.1. The Southern African Development Community

The first FTA to be discussed is the Southern African Development Community (SADC).³¹³ Adopted in 1992, one of the objectives of this agreement is to promote economic growth and socio-economic development.³¹⁴ In light of such an objective, it would seem that intellectual property would be added to SADC's current list which addresses the role of goods in trade and economic development but this dissertation observes that it is not the case. The word 'intellectual property' does not appear in the SADC treaty itself, let alone the word 'traditional knowledge'. The SADC's Protocol on Trade recognises intellectual property rights in Article 24 but such recognition only extends to the need for members of the SADC to adopt national rules in accordance with TRIPS.³¹⁵ This Protocol shows that this FTA does not offer more benefits than TRIPS as it does not assert higher protection for products other than wines and spirits. According to Nkomo, it was only when negotiations on the Economic Partnership Agreement (hereinafter referred to as EPA) with the EU started, that the issue of intellectual property integration and recognition arose.³¹⁶ Intellectual property and traditional knowledge protection is not one of the SADC's priorities, although it should be since protection of traditional knowledge leads to Southern African development, especially in the realm of trade. A major link that South Africa has to intellectual property within SADC is through the SADC's EPA with the EU, where certain South

³¹³ Southern African Development Community 'About SADC' *Southern African Development Community* available at <https://www.sadc.int/about-sadc>, accessed on 7 September 2018. SADC has 16 Member States which include: Angola, Botswana, Comoros, Democratic Republic of Congo, Eswatini, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Tanzania, Zambia and Zimbabwe.

³¹⁴ Article 5(1)(a) of the Declaration and Treaty of SADC 1992.

³¹⁵ Article 24 of the SADC's Protocol on Trade: 'Members states shall adopt policies and implement measures within the Community for the protection of Intellectual Property Rights, in accordance with WTO Agreement on Trade Related Aspects of Intellectual Property'.

³¹⁶ M Nkomo 'Regional integration in the area of intellectual property: The case for Southern African Development Community involvement' (2014) 18 *Law, Democracy and Development* available at http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S2077-49072014000100016, accessed on 7 September 2018.

African products gained geographical indication protection.³¹⁷ This EPA was concluded in 2016 but the SDAC was established in 1992. This large year gap illustrates the slow manner and the lack of prioritisation of intellectual property development and traditional knowledge protection in the SADC, even after the issues of a democratic transition was dealt with in the mid to late 1990s to the early 2000s.

4.2.2. The Tripartite Free Trade Area

The second FTA for discussion is the SADC-EAC-COMESA³¹⁸ Tripartite Free Trade Area (TFTA),³¹⁹ which was launched in 2015 to 'respond to the need for Africa to overcome small fragmented markets and increase prospects of stimulating industrialisation, employment, income generation and poverty reduction'.³²⁰ In terms of the TFTA's Preamble, recognition is given to international obligations under existing agreements, where determination is to be pursued in order to 'progressively liberalise trade in goods and services and promote industrial development while building the capacity of micro, small and medium scale enterprises which provide job creation and income generation for the majority of the people' in TFTA's member states.³²¹ Unlike the SADC, TFTA's Preamble recognises international agreements such as TRIPS and shows initiative to introduce more goods (of which can be of traditional knowledge origin, if such can be read into the Preamble) into the trade system in order to address industry development (of which can be the traditional knowledge industry, if such can be read into the Preamble) as well as the flourishing of minor businesses (which cultivate and/or manufacture traditional knowledge products). The Preamble therefore

³¹⁷ An array of wine and spirits received geographical indication recognition but the highlight of the agreement was the recognition of non-wine and non-spirit products. Such products included Rooibos, Honeybush and Karoo lamb.

³¹⁸ Southern African Development Community-East African Community-Common Market for Eastern and Southern Africa

³¹⁹ Countries that have signed the agreement to date include: Angola, Burundi, Comoros, Democratic Republic of Congo (DRC), Djibouti, Egypt, Kenya, State of Libya, Madagascar, Malawi, Mauritius, Namibia, Rwanda, Seychelles, Sudan, Tanzania, Uganda, South Africa, Swaziland, Zambia and Zimbabwe. P Kambafwile '22 Countries have now Signed the Tripartite Agreement' (16 February 2018) *Common Market for Eastern and Southern Africa* available at <http://www.comesa.int/22-countries-have-now-signed-the-tripartite-agreement/>, accessed on 7 September 2018.

³²⁰ Department of Government Communication and Information System, Republic of South Africa 'Approved agreement to establish Tripartite Free Trade Area between Comesa, EAC and SADC' *Government Communication and Information System* available at <https://www.gcis.gov.za/newsroom/media-releases/approved-agreement-establish-tripartite-free-trade-area-between-comesa-eac>, accessed on 7 September 2018.

³²¹ Preamble of the Agreement Establishing a Tripartite Free Trade Area among COMESA, EAC and SADC.

appears to acknowledge the potential for traditional knowledge indirectly. TFTA also makes it clear that there shall be an endeavour to establish a Protocol on Intellectual Property Rights.³²² However, nothing has been mentioned by TFTA key players about incorporating traditional knowledge into the Intellectual Property Protocol but this dissertation recommends that the issue of traditional knowledge protection and its potential as a trade asset is a matter of urgency that should be discussed when forming such Protocol. Although the TFTA is in effect, it still has to be tested³²³ in order to realise the benefit it can provide for African trade. Until such time, it is difficult to draw any further analysis on this issue.

4.2.3. The African Continental Free Trade Area

The final FTA to be discussed is the African Continental Free Trade Area (ACFTA) which was signed by various African countries³²⁴ in March of 2018. South Africa followed in July of 2018 and signed the agreement. A few countries still have to sign the agreement³²⁵ and only then can the agreement come into force. Even though this agreement is yet to be ratified, it would be useful to see what it has to offer in terms of intellectual property and traditional knowledge protection, as it will eventually be in force. Firstly, in the Preamble of this agreement, unlike the SADC and the TFTA legal instruments, recognition is given to intellectual property and the need for its coherence. The agreement goes on to clearly make intellectual property a specific objective for policy-making³²⁶ and negotiation.³²⁷ Though no mention is made of traditional knowledge, like the SADC and TFTA, this dissertation recommends that when the Intellectual Property Protocol is established, it should consider traditional knowledge protection, since it is of current interest to Africa and has not been catered for in African FTAs before.

³²² Article 45(1)(b) of the Agreement Establishing a Tripartite Free Trade Area among COMESA, EAC and SADC.

³²³ How disputes and negotiations are positively solved with regard to the agreement, will determine its effectiveness.

³²⁴ See Appendix D for the list of countries that have signed, ratified/acceded to the Agreement establishing the African Continental Free Trade Area.

³²⁵ See Appendix D for the list of countries that have yet to sign the Agreement establishing the African Continental Free Trade Area.

³²⁶ Article 4(c) of the Agreement Establishing the African Continental Free Trade Area.

³²⁷ Article 7(1)(a) of the Agreement Establishing the African Continental Free Trade Area.

From the SADC to ACFTA, it is observed that recognition for intellectual property has become more pronounced. Such acknowledgement indirectly recognises traditional knowledge through the intellectual property protection instrument of geographical indications. Even though the terms of geographical indications and traditional knowledge are not mentioned in the three agreements, they are recognised (in the case of the SADC-EU EPA) and will probably be recognised in the future (in the case of the TFTA and ACFTA). Since the TFTA and the ACFTA are new agreements, it is too early to criticise their efforts to promote traditional knowledge protection in light of trade growth. Once protocols and negotiations have been made and disputes confronted, only then can their effectiveness be measured.

Ultimately, both the ACFTA and the TFTA provide a step towards uniting existing regional groups into a single African Economic Community. This can bring about stronger trade ties that can develop and improve trade policies to bring about uniformity and seriously consider issues such as traditional knowledge protection and trade. At this stage however, there is not much that South Africa can take away from these agreements, in terms of incorporating minimum standards in to national law, but this cannot deter the country from developing traditional knowledge protection laws that will ensure its safeguard and sustenance.

4.3. Protection of Traditional Knowledge in South Africa

Once South Africa entered its democracy, steps towards protecting traditional knowledge were not taken immediately. Rather priorities were focused more on politics and other areas of trade, economic and social issues. When the issue of Rooibos protection arose on an international platform, the newly elected government started to grasp the importance of developing a system of protection for traditional knowledge products. This was due to the pressure imposed by protection proponents from the Rooibos community.³²⁸ As such, in 2004, the Indigenous Knowledge System Policy (hereinafter, referred to as IKSP) and the National Environmental Management Biodiversity Act 10 of 2004 (hereinafter, referred to as NEMBA) were established. The former aimed to start the process of protection for traditional knowledge while the latter

³²⁸ The Rooibos community is represented by the South African Rooibos Council, to be discussed below, under footnote 380.

imposed a form of traditional knowledge protection for products that could be patented; however it excluded the protection of other traditional knowledge material such as handicrafts, traditional cultural expressions³²⁹ and folklore,³³⁰ to mention a few.

In 2013, the Intellectual Property Laws Amendment Act 28 of 2013 (hereinafter referred to as IPLAA) was promulgated creating a space for the protection of the excluded traditional knowledge material through established intellectual property protection instruments such as copyright, trademarks, performer's protection and designs. Opponents to IPLAA, who propose a *sui generis* approach to protect traditional knowledge, established the Protection of Traditional Knowledge Bill of 2013 (hereinafter referred to as the Traditional Knowledge Bill). As such, South Africa now has enforced protection mechanisms (IPLAA) and potential protection mechanisms (Traditional Knowledge Bill) for traditional knowledge but the effectiveness of such mechanisms is yet to be tested and contested in court. The focus of this paper is not to evaluate the best protective mechanism for traditional knowledge in South Africa but rather to explore the protection that geographical indications extend to traditional knowledge. A short explanation on the IKS, NEMBA and the Traditional Knowledge Bill will be featured below since the primary focus will be on IPLAA, as this Act encapsulates traditional knowledge protection through geographical indications.

4.3.1. National Environmental Management Biodiversity Act 10 of 2004

NEMBA aims to ensure the fair and equitable share of benefits between stakeholders and indigenous communities, which give permission to use their indigenous, biological or genetic resources.³³¹ The objective is to prevent unpermitted bio-prospecting³³² and

³²⁹ Examples include: literary, musical, artistic, dramatic and spiritual expressions/works that are part of the cultural life and heritage of indigenous communities.

³³⁰ Section 2 of the Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and other Forms of Prejudicial Action 1982 (The Model Provisions). Examples include: productions (verbal, musical, actionable and tangible expressions) consisting of characteristic elements of traditional artistic heritage developed and maintained by a community of a country or by individuals of such community.

³³¹ Dean & Deyer (note 64 above; 336).

³³² United Nations Development Programme 'Bioprospecting' *United Nations Development Programme* available at

<http://www.undp.org/content/sdfinance/en/home/solutions/bioprospecting.html>, accessed on 8 November 2018. 'Bioprospecting is the systematic search for biochemical and genetic information in nature in order to develop commercially-valuable products for pharmaceutical, agricultural, cosmetic and other applications'.

the delivery of adequate compensation to the concerned indigenous community while ensuring the sustainability and conservation of biological resources.³³³ As Dean and Deyer point out, the Patents Amendment Act 20 of 2005 matches up to NEMBA as it requires all patent applicants to state whether or not the concerned invention, proposed for patent protection, is 'based or derived from an indigenous biological resource, a genetic resource, or from traditional knowledge or traditional use'.³³⁴ This requirement mirrors the protection requirement the AG is requesting for, on the WTO's TRIPS platform, as discussed in the previous chapter.³³⁵

4.3.2. The Indigenous Knowledge System Policy

In the advent of globalisation, the IKSP established South Africa's effort to 'recognise, affirm, develop, promote and protect indigenous knowledge systems',³³⁶ so that African cultural values can be sustained through the introduction of practical measures to develop traditional knowledge, in order to ensure its continued contribution to the economy, employment and wealth creation as well as its link to other knowledge systems such as biotechnology in pharmaceuticals.³³⁷ The policy, however, did not prescribe the exact form of traditional knowledge protection but it is viewed as the first step towards the development of IPLAA.

4.3.3. Intellectual Property Laws Amendment Act 28 of 2013

In 2007, the South African Department of Trade and Industry (hereinafter, referred to as DTI) published the Intellectual Property Laws Amendment Bill (hereinafter, referred to as IPLAB) for comment.³³⁸ IPLAB aimed to amend the intellectual property Acts of South Africa, so that it incorporates the protection of traditional knowledge, instead of

³³³ *Ibid* 336-337.

³³⁴ *Ibid* 338.

³³⁵ Chapter 3; page 37.

³³⁶ World Intellectual Property Organization 'Intergovernmental committee on intellectual property and genetic resources' (2006) *World Intellectual Property Organization*, available at https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_9/wipo_grtkf_ic_9_11.pdf, accessed on 30 November 2018 32.

³³⁷ A Van der Merwe 'The old and new: A concise overview of the Intellectual Property Laws Amendment Act' (2014) 2014(545) *De Rebus* 29.

³³⁸ *Ibid* 29.

creating a *sui generis* legislation.³³⁹ Despite the criticisms³⁴⁰ that surrounded it, IPLAB became IPLAA in 2013 but its application has yet to be tested in the courts.

IPLAA seeks to amend mainly the definitions of concepts that can link to traditional knowledge in order to protect the commercialism and licensing as well as the recognition of traditional knowledge.³⁴¹ The following intellectual property Acts are amended:

- The Performers' Protection Act 11 of 1967.
- The Copyright Act 98 of 1978.
- The Trade Marks Act 194 of 1993 (hereinafter referred to as Trade Marks Act).
- The Designs Act 195 of 1993.

The amendment to the Trade Marks Act will be explored in more depth below, as the Act contains the provision for geographical indication protection. The administrative structures required by IPLAA are to be included in all of the above-mentioned intellectual property Acts except for the Performers' Protection Act.³⁴² Such administrative structures include a National Council for traditional knowledge,³⁴³ a

³³⁹ *Ibid* 30.

³⁴⁰ *Ibid* 30. Some of the criticisms include: 'a) The Regulatory Impact Assessment report concluded that the costs of implementing the provisions of the IPLAB would outweigh the benefits. b) The National House of Traditional Leaders refused to receive any submissions from interested parties, and accepted and approved the IPLAB without any comment or reservation(s). c) With regard to the approval by the National Council of Provinces, about 15 reasoned submissions were made in opposition to the IPLAB, and only one (unreasoned) submission in favour thereof. In spite of this, the Gauteng Provincial Legislature came to the conclusion that it was in favour of the IPLAB. d) South Africa is seen as being completely out of line with all its neighbouring states in protecting its traditional knowledge /TCEs with reference to the ARIPO 2010 Swakopmund Protocol'.

³⁴¹ *Ibid* 29-30.

³⁴² Dean & Deyer (note 64 above; 349).

³⁴³ *Ibid* 350-351. The National Council consist of no less than 15 members appointed by the Minister of Trade and Industry. The council has to have people with expertise and extensive knowledge with regard to traditional knowledge. The Council has to be broadly representative of indigenous communities from different cultures and the Companies and Intellectual Property Commission (CIPC) will be responsible for its functions, administration and sub-committees. The duty of the Council is to provide advice to the Minister, on the integrity of the database of intellectual property with relation to traditional knowledge and registers of trademarks, copyright and designs.

National Trust³⁴⁴ and a National Trust Fund³⁴⁵ for traditional knowledge as well as a National Database³⁴⁶.

The road to IPLAA was criticised and even in its promulgation the ineffectiveness of it is advocated. Dean and Deyer criticises IPLAA by finding it to be repetitious because it introduces the same lengthy provisions thereby undermining its integrity, being badly drafted and containing numerous errors and aberrations of principles making it difficult to comprehend.³⁴⁷ The authors further express doubt as to whether it can be properly put into effect and achieve its objectives.³⁴⁸ Such critiques along with IPLAA opponents drove the development of a *sui generis* approach resulting in the Traditional Knowledge Bill of protection to be tabled for the DTI to consider. The department's portfolio committee, however, did not want to entertain two conflicting propositions for traditional knowledge protection at the same time (i.e. IPLAB and the Traditional Knowledge Bill) and therefore disregarded the Traditional Knowledge Bill.³⁴⁹ With IPLAA now in force, the Traditional Knowledge Bill does not hold any legal stead or consideration by the government, however its merits can be an interesting academic discussion.³⁵⁰ Nevertheless, this discussion is beyond the scope of this dissertation as the attention is on geographical indication protection for traditional knowledge, which is featured under the enforced IPLAA.

³⁴⁴ *Ibid* 351. The trust promotes the commercialism of traditional knowledge and provides training and awareness to communities. The trustees are appointed by the Minister and must not exceed 5.

³⁴⁵ *Ibid* 351. The national trust sets the fund up for the preservation and promotion of traditional knowledge as well as the administration of moneys flowing from the commercialization of the traditional knowledge.

³⁴⁶ *Ibid* 351-352. The database will form part of the existing intellectual property registers, where there will be separate sub-sections in the registers for the recorded information on the different manifestations of traditional knowledge, traditional terms and expressions and geographical indicators. The database is seen as a tool to curtail the loss of traditional knowledge and prevent it from being unknown.

³⁴⁷ *Ibid* 347.

³⁴⁸ *Ibid* 347.

³⁴⁹ Van der Merwe (note 337 above; 29).

³⁵⁰ X Mpanza 'Protecting traditional knowledge: feature' (2014) 2014(542) *De Rebus* 24. The Traditional Knowledge Bill is also believed to be capable of establishing a specially made traditional knowledge system, customised to the unique and widely divergent demographic of the South African population and capable of actually protecting traditional knowledge and financially benefitting the indigenous communities from where it hails.

4.4. The Protection of Geographical Indications under the Intellectual Property Laws Amendment Act 28 of 2013

Sections 7 to 10 of IPLAA amends the Trade Marks Act 194 of 1993 so that traditional terms and expressions³⁵¹ can be protected as certification marks or collective marks or as geographical indications.³⁵² According to IPLAA, a geographical indication is defined as:³⁵³

‘...in as far as it relates to indigenous cultural expressions or knowledge, means an indication which identifies goods or services as originating in the territory of the Republic or in a region or locality in that territory, and where a particular quality, reputation or other characteristic of the goods or services is attributable to the geographical origin of the goods or services, including natural and human factors’.³⁵⁴

This definition is already familiar at first sight as it imbibes the TRIPS definition of a geographical indication, as featured in chapter two,³⁵⁵ thereby exemplifying the compatibility which can act as a motivating factor for the WTO to recognise South African geographical indication protected products, including those that are of a traditional knowledge origin. The problem, however, lies with the issues of unequal treatment of non-wines and non-spirit products and the absence of a multilateral register for all geographical indication products, as highlighted in the previous chapter.³⁵⁶

Unlike TRIPS, which allows countries to adopt their own geographical indication protection system, IPLAA calls for the protection of geographical indications under

³⁵¹ A traditional term or expression is defined as ‘an indigenous term or expression and a derivative indigenous term or expression’, under s8(h) of IPLAA which amends s2(1) of the Trade Marks Act 194 of 1993. See Appendix E for the definitions of ‘indigenous term or expression’, ‘derivative indigenous term or expression’ and ‘indigenous cultural expressions or knowledge.’

³⁵² S9 of IPLAA amending the Trade Marks Act 194 of 1993 by insertion of s43(B)(2). S9 of IPLAA adds the following new part to the Trade Marks Act 194 of 1993, after s43: Part XIIA – Certification Trade Marks and Collective Trade Marks.

³⁵³ S8 of IPLAA amending s2(1) of the Trade Marks Act 194 of 1993.

³⁵⁴ S9 of IPLAA amending the Trade Marks Act 194 of 1993 by insertion of geographical indication definition under s2(1).

³⁵⁵ Chapter 2; page 17.

³⁵⁶ Chapter 3; page 42, 48, 49.

trademarks. IPLAA allows for the registration of a traditional knowledge geographical indication as a certification or a collective trademark as long as the traditional term or expression has a distinguishable nature, which means that the goods or services need to be distinguishable,³⁵⁷ and that the Registrar clearly indicates in the register that the mark is a geographical indication.³⁵⁸ Before a traditional term or expression can be registered as a trademark or a geographical indication, specific requirements have to be met, namely *inter alia*:

- The existence and disclosure of the traditional term or expression.³⁵⁹
- Consent of the indigenous community.³⁶⁰
- An account of community protocol.³⁶¹
- Benefit-sharing agreements.³⁶²

If a traditional term or expression has fallen into genericity or is exclusively descriptive, then it cannot be registered as a geographical indication or a trademark.³⁶³ The traditional knowledge geographical indication can be protected for perpetuity³⁶⁴ or it may need to be renewed,³⁶⁵ depending on the nature of the traditional term or expression and how it relates to the requirements set out in the Trade Marks Act. The penultimate provision of IPLAA's amendment, to be mentioned, is the idea of a national database which will encompass a register for traditional terms or expressions and geographical indications.³⁶⁶ Finally, attention needs to be drawn to IPLAA's requirement for compliance with international agreements.³⁶⁷ This requirement sees that certain provisions of IPLAA, with regard to amending the Trade Marks Act, mirror that of TRIPS. To illustrate this, a geographical indication cannot be recognised if it has fallen into genericity and a database is an initiative of shared interest to both South

³⁵⁷ S9 of IPLAA amending the Trade Marks Act 194 of 1993 by insertion of S43(B)(3).

³⁵⁸ S9 of IPLAA amending the Trade Marks Act 194 of 1993 by insertion of s43(B)(4)and(5).

³⁵⁹ S9 of IPLAA amending the Trade Marks Act 194 of 1993 by insertion of s43(B)(8)and (6)(b).

³⁶⁰ S9 of IPLAA amending the Trade Marks Act 194 of 1993 by insertion of s43(B)(6)(a). See Appendix E.4. for the definition of an indigenous community.

³⁶¹ S9 of IPLAA amending the Trade Marks Act 194 of 1993 by insertion of s43(B)(7) and (6). See Appendix E.5. for the definition of a community protocol.

³⁶² S9 of IPLAA amending the Trade Marks Act 194 of 1993 by insertion of s43(B)(6)(c).

³⁶³ S9 of IPLAA amending the Trade Marks Act 194 of 1993 by insertion of S43(C).

³⁶⁴ S9 of IPLAA amending the Trade Marks Act 194 of 1993 by insertion of s43(E)(2).

³⁶⁵ S9 of IPLAA amending the Trade Marks Act 194 of 1993 by insertion of s43(E)(1).

³⁶⁶ S9 of IPLAA amending the Trade Marks Act 194 of 1993 by insertion of s43(D).

³⁶⁷ S9 of IPLAA amending the Trade Marks Act 194 of 1993 by insertion of s43(K).

Africa and the proponents for the geographical indication extension under TRIPS. The importance of this common interest will be discussed in further detail in chapter five.³⁶⁸

4.5. The South African Experience with Geographical Indications

Prior to establishing IPLAA, South Africa faced a trademark issue with an American Company related to Rooibos. The experience with Rooibos, to be discussed below, takes precedence over other products linked to geographical indications as Rooibos is a product of traditional knowledge, which is the focus of this dissertation. Other distinguishing factors of this experience is that the protection of Rooibos was in discussion for years and it was one of the factors that spawned the call for traditional knowledge protection in South Africa. Owing to the magnitude of the Rooibos experience its contribution to South Africa's traditional knowledge protection jurisprudence, calls for it to be discussed in detail below, followed by a brief discussion on the Honeybush and handicraft industry in South Africa, which have the prospective to advance the potential of traditional knowledge trade.

4.5.1. Rooibos

Known as *aspalathus linearis* in the scientific field, Rooibos³⁶⁹ is an indigenous plant to South Africa.³⁷⁰ Found in the Cederbeg Mountains, Rooibos can only flourish and be grown in such a region due to the unique geographical conditions present there.³⁷¹ The array of traditional knowledge linked to Rooibos starts with the indigenous inhabitants of South Africa, the Khoi-San, who discovered the plant and the assortment of health benefits stemming from it.³⁷² The process of making tea from the bush is believed to be developed by the early farmers who established traditional knowledge to cultivate and process the bush into tea, with such methods being used historically and currently by small-scale farmers.³⁷³ The unique traditional knowledge

³⁶⁸ Chapter 5; page 93.

³⁶⁹ See Appendix F for pictures of the Rooibos plant.

³⁷⁰ World Intellectual Property Organization 'Disputing a Name, Developing a Geographical Indication' (4 April 2011) *World Intellectual Property Organization* available at <http://www.wipo.int/ipadvantage/en/details.jsp?id=2691>, accessed on 7 September 2018.

³⁷¹ *Ibid.* See Appendix G for a map of Rooibos production areas.

³⁷² *Ibid.*

³⁷³ *Ibid.*

expertise and the distinctive geographical area and climate linked to Rooibos, pronounces the true South African identity of such a plant.³⁷⁴ The above factors illustrate the ability of Rooibos to be protected as a geographical indication so that the misuse and imitation of it would be prevented;³⁷⁵ the value,³⁷⁶ quality³⁷⁷ as well as the marketing³⁷⁸ of Rooibos would be increased and the unique biodiversity of the region would be protected.³⁷⁹ Such protection of Rooibos through a geographical indication was what the South African Rooibos Council (hereinafter, referred to as SARC)³⁸⁰ pioneered to accomplish.³⁸¹

The impact that Rooibos had, in terms of carving a way for South Africa to achieve protection for traditional knowledge products, is what this dissertation calls ‘the Rooibos phenomenon’.³⁸² After a lengthy and costly international dispute over the use of the name ‘Rooibos’,³⁸³ the increased awareness of the bush and the need for its protection made the South African government consider steps to protect this uniquely South African traditional knowledge product. As such, this gave rise to the IKSP, IPLAA and the SADC-EU EPA, discussed earlier. The Rooibos phenomenon managed to: survive an international dispute,³⁸⁴ be an inspiration to and one of the main considerations for South Africa legislation promulgation for the protection of traditional knowledge products, be the first non-wine and non-spirit product to be

³⁷⁴ *Ibid.*

³⁷⁵ *Ibid.* The South African rooibos industry (farmers and producers) will be able to use the name and product for manufacturing purposes without the fear of foreign litigation.

³⁷⁶ *Ibid.* The increased value will give more power to farmers and producers.

³⁷⁷ *Ibid.* In order for a product to be considered for geographical indication protection, specific guidelines for its production needs to be followed thereby ensuring the maintenance of high quality.

³⁷⁸ *Ibid.* A geographical indication links a geographical area to a product thereby acting as a powerful marketing tool for ideas such as tourism.

³⁷⁹ *Ibid.*

³⁸⁰ *Ibid.* The SARC is an independent, non-profit organisation that promotes the interests of the South African Rooibos industry locally and international. Through research and communication, the organisation has managed to engage and co-operate with key industry stakeholders as well as have disseminated information to consumers to protect their interests.

³⁸¹ Since, wines are already protected by geographical indications and the questioned posed by the SARC was whether this could be applied to the protection of Rooibos.

³⁸² See Appendix H outlining a brief timeline of the Rooibos journey to protection.

³⁸³ E Biénabe & D Marie-Vivien (note 17 above; 60). South Africa had to contest a misappropriation issue against the USA in 1997, as a USA company claimed the right to exclusively use the name of ‘Rooibos’ and demanded royalties from South African companies for the use of the name. South Africa instituted legal action to cancel the trademark assigned to the USA Company.

³⁸⁴ *Ibid.* 60. After years of expensive litigation the USA Company, Burke International, surrendered the rights to the rooibos trademark due to exorbitant legal costs and several additional law-suites pending.

recognised as a geographical indication,³⁸⁵ and be a part of an array of products recognised for international geographical indication protection through the SADC-EU EPA.³⁸⁶

The above phenomenon was realised due to the intensive work of the SARC to ensure the protection of Rooibos through geographical indications but the phenomenon does not stop here. Bramley and Biénabe developed a list of factors or criteria to select products that could become successful geographical indications.³⁸⁷ Such a guideline was created through the study of the Rooibos issue in South Africa and other instances from Southern Africa³⁸⁸ as well as the review of comprehensive international literature that examined geographical indication success stories.³⁸⁹ The factors that were established include 'product specificity, reputation, the level of industry co-ordination, institutional support, supply chain characteristics or market attractiveness, type of producers and a product's environmental impact'.³⁹⁰ All of these factors support the growth of a successful product protected by a geographical indication.³⁹¹ Therefore such factors can be used to evaluate and weigh the suitability of products to be protected as a geographical indication. The authors do highlight that a weakness of any factor will not automatically exclude a product from profiting from geographical indication protection as such weakness can be compensated with the strength of another factor, since no single factor defines and determines the outcome of the geographical indication process.³⁹² The guideline can further aid in geographical indication and investment decision-making and can also form the foundation for the evaluation and assessment of the costs and benefits of a geographical indication policy and institutional framework.³⁹³ Based on a Southern African reality,³⁹⁴ the

³⁸⁵ In 2014, Rooibos was given geographical indication status.

³⁸⁶ The SADC-EU EPA bilateral agreement came into force in 2016. It recognised the an array of South African products to be protected by a geographical indication, with Rooibos, Honeybush and Karoo lamb being the only products falling beyond the scope of wines and spirits.

³⁸⁷ C Bramley & E Biénabe 'Guidelines for Selecting Successful GI Products' in C Bramley...et al (ed) *Developing Geographical Indications in the South* (2013) 123.

³⁸⁸ See examples of Honeybush, Karoo lamb, Camdeboo mohair, Karakul pelts, Kalahari melon seed oil in Bramley & Biénabe (note 384 above; 131-134).

³⁸⁹ *Ibid* 124,125.

³⁹⁰ *Ibid* 134.

³⁹¹ *Ibid* 134.

³⁹² *Ibid* 135. The factor of product specificity is important but may not cause a product to develop into a successful geographical indication as the perception of a product in the markets or the lack of institutional support might be an issue.

³⁹³ *Ibid* 135.

³⁹⁴ *Ibid* 134.

guideline may only work in Southern African countries but this does not deter countries from outside of the area from considering the criteria included in the guideline. The Rooibos phenomenon can thus be seen to have inspired the development of a guideline that can be used to seek new traditional knowledge products for geographical indication protection.

The popularity of Rooibos was initially restricted to a local level but as time went by, it reached an international platform.³⁹⁵ With Rooibos now being protected as a geographical indication, economic growth in South Africa and competitiveness in international markets are achieved.³⁹⁶ Currently, the Rooibos industry has the ability to participate in national and international trade with an output of 10 000 to 18 000 tons per year, with 5 000 tons destined for local markets and the remainder exported to over thirty countries, with Germany, Netherlands, Japan, UK and the USA being the top five importers.³⁹⁷

The Rooibos industry employs over five thousand people across the 300 commercial farms and 101 small-hold farms.³⁹⁸ Besides the industry's contribution to job creation in the country, it has also helped with the progress of communities. Small-hold farmers reinvest their premiums into social and business development activities such as building schools and supporting disadvantaged people to ensure that their cultural and social-economic well-being are met.³⁹⁹ Commercial farmers use their premiums to uplift their workers and promote their social development.⁴⁰⁰

Considering the success with Rooibos and the positive domino effect it has on the community and economy, it can be deduced that if a similar success is received by another traditional knowledge product, South Africa will benefit exceedingly.

³⁹⁵ World Intellectual Property Organization (note 367 above).

³⁹⁶ *Ibid.*

³⁹⁷ *Ibid.* See Appendix I for statistics on Rooibos exports to certain countries.

³⁹⁸ *Ibid.*

³⁹⁹ *Ibid.*

⁴⁰⁰ *Ibid.*

4.5.2. Honeybush

The three species of *Cyclopia* (*Cyclopia intermedia*, *Cyclopia genistoides*, *Cyclopia subternata*) are all native plants to South Africa.⁴⁰¹ Known more commonly as Honeybush (or *Heuningbos* in Afrikaans) and hailing from the narrow regions of the Western Cape coast bounded by the Cederberg Mountains in the north, the Cape Peninsula in the south and Port Elizabeth in the Eastern Cape,⁴⁰² it is yet another example of an agricultural product that has a traditional knowledge background.

Honeybush was first documented as being used by man in 1705 but its actual use precedes this date, since it was, as in the case of Rooibos, first used by the native Khoi-San people of South Africa for the 'treatment of coughs and other upper respiratory symptoms associated with infections'.⁴⁰³ Despite its early discovery, it was not until 1996 that it was harvested for commercial use and not until 1999 when the Honeybush industry was established, by the South African Honeybush Tea Association (hereinafter referred to as SAHTA).⁴⁰⁴ Prior to this, the industry was cottage-based with a traditional source of employment and income and consumption reserved only for the locals in the area.⁴⁰⁵ Currently, the bush is sold as a tea product but investigations are being carried out to develop it into cosmetic and pharmaceutical products.⁴⁰⁶

There are 10 commercial producers which contribute to 30% of the annual production, and 5 commercial processors, while the wild harvest sees 150 to 200 entrepreneurial workers and 10 entrepreneurial transporters.⁴⁰⁷ In terms of employment, the workforce

⁴⁰¹ South African Honeybush Tea Association 'Honeybush cultivation and industry' (8 November 2011) *South African Honeybush Tea Association* available at <https://www.sahta.co.za/publications/file/7-honeybush-industry-brochure.html>, accessed on 29 October 2018 3. See Appendix J for a picture of a Honeybush plant.

⁴⁰² *Ibid* 1, 3.

⁴⁰³ *Ibid* 8. Harmony Honeybush 'About Honeybush' *Harmony Honeybush* available at <https://harmonyhoneybush.co.za/honeybush/>, accessed on 29 October 2018.

⁴⁰⁴ South African Honeybush Tea Association (note 398 above; 2, 5). The SAHTA is a non-profit organisation that 'co-ordinates and promotes the development of industry and involves a variety of sectors which include agriculture, horticulture, food, beverage, wholesale, retail and catering'.

⁴⁰⁵ South African Honeybush Tea Association (note 398 above; 4).

⁴⁰⁶ *Ibid* 2.

⁴⁰⁷ Department of Agriculture, Forestry and Fishers, Republic of South Africa 'A Profile of the South African Honeybush Tea Market Value Chain' (2013) *Food and Agricultural Organization on the United Nations* available at <http://www.fao.org/sustainable-food-value-chains/library/details/en/c/262871/>, accessed on 30 October 2018 3-4.

is steadily growing with skills transfer and broad-based black economic empowerment being evident.⁴⁰⁸ On an empowering front relating to employment and entrepreneurship, a commercial farm initiative called 'Mooi Uitsig Trust' allows females to purchase land on a farm, while still continuing to be employed by such a farm,⁴⁰⁹ and establish Honeybush plantations with the help of the farmer who will also purchase the cultivated bushes from them.⁴¹⁰

Further, South Africa produces around 400 tons of Honeybush tea per year, with 50 tons being for local consumption and 150 tons for export.⁴¹¹ Germany, USA and Netherlands are the top importers⁴¹² of the tea but if supply can keep up with the demand or even exceed it, then trade can be enhanced even further.⁴¹³

With the DTI declaring the unauthorised use of Honeybush and Rooibos, being a criminal offence under the Merchandising Marks Act 1941 and with the EU recognising 'Honeybush' as a geographical indication under the SADC-EU EPA,⁴¹⁴ the protection of the traditional knowledge product seems to be the determining factor for the enhancement of its trade but this is not the case. Reportedly, 75% of the Honeybush harvest comes from the wild which causes pressure on the wild reserve.⁴¹⁵ Currently the demand is exceeding the supply due to this.⁴¹⁶ Further, breeding programmes and improved production methods⁴¹⁷ need to be introduced in order to circumvent the supply issues and the pressure on the sustainability of the wild growth. In order to carry out such a task, while ensuring employment is sustained and increased, farmers should be empowered to start commercial seeding nurseries that can create employment for workers to run and sustain it.⁴¹⁸

⁴⁰⁸ *Ibid* 3-5. South African Honeybush Tea Association (note 398 above; 5).

⁴⁰⁹ Department of Agriculture, Forestry and Fishers, Republic of South Africa (note 407 above; 12).

⁴¹⁰ *Ibid* 4.

⁴¹¹ *Ibid* 13.

⁴¹² See Appendix K for a table showing the top importers of Honeybush.

⁴¹³ See Appendix L for a graph showing the amount of Honeybush exports from 2003-2012.

⁴¹⁴ 'South African IP Innovation to be presented at WIPO Congress Geneva' (4 October 2016) *Audacia* available at https://www.audacia.co.za/downloads/article_oct.pdf, accessed on 30 October 2018 2-3.

⁴¹⁵ South African Honeybush Tea Association (note 398 above; 5). Department of Agriculture, Forestry and Fishers, Republic of South Africa (note 407 above; 15).

⁴¹⁶ South African Honeybush Tea Association (note 398 above; 6).

⁴¹⁷ *Ibid* 6.

⁴¹⁸ Department of Agriculture, Forestry and Fishers, Republic of South Africa (note 407 above; 4).

4.5.3. Handicrafts

Traditional knowledge is not only rooted in agricultural products but in handicrafts as well, as mentioned in chapter one.⁴¹⁹ Hand-made products that result from traditional knowledge, are culturally rooted with a distinct quality and inherent character which differentiate it in the global market.⁴²⁰ Because of its uniqueness, it can be subject to misappropriation therefore, protection is necessitated.

The European Commission is in the process of evaluating the feasibility of the protection of non-agricultural goods through geographical indications, however countries such as Columbia have already registered approximately 43 handicrafts under a geographical indication protection system.⁴²¹ According to Arzuza and Giuliani, 'factors such as suitable use of natural resources...and maintaining local traditional knowledge (producing and processing of handicrafts) bring an opportunity for protecting geographical indication handicraft products'.⁴²² In light is this, the protection of traditional knowledge handicrafts can be a reality if steps are taken to develop a system that allows for it.

South Africa has already enacted IPLAA, which allows for a traditional knowledge product to be registered as a geographical indication, through a certification or collective mark, as explained above.⁴²³ If traditional knowledge handicrafts are attempted to be protected through the geographical indication system under IPLAA, then an analysis and way forward can be made from the success or failure of such attempt.

With no court-case on which to base a conclusion, this dissertation will turn to the discussion of the government's role in the promotion of traditional knowledge

⁴¹⁹ Chapter 1; page 4, 5, 14.

⁴²⁰ A Joffe & M Newton 'The Creative Industries in South Africa' (2008) *Department of Labour South Africa* available at http://www.labour.gov.za/DOL/downloads/documents/research-documents/Creative%20Industries_DoL_Report.pdf, accessed on 8 November 2018 35, 40.

⁴²¹ JM Arzuza & A Giuliani 'Geographical Indications of Handicrafts: A Tool to Improve Livelihood and Protect Biodiversity in Remote Communities?' (2014) *Bern University* available at https://www.bfh.ch/fileadmin/data/publikationen/2014/11_Giuliani_Geographical_Indicators.pdf, accessed on 29 October 2018 1.

⁴²² *Ibid* 1.

⁴²³ Chapter 4; page 66-67.

handicrafts and its protection. Trade and industry departments are more concerned with economically viable and profitable industries that do not consider general crafts let alone traditional knowledge crafts,⁴²⁴ while the Arts and Culture Department are concerned with social cohesion, cultural diversity and artistic development.⁴²⁵ A recommendation is that the trade and industry departments work together with the arts and culture sector⁴²⁶ so that cohesion can be created between traditional knowledge handicraft development and trade. Furthermore, investments in the traditional knowledge creative industries in terms of finance and development and promotion programmes, need to be introduced. The DTI has recognised the importance of creative industries in general, by establishing the Craft Sector Programme⁴²⁷ and the Creative Industry Sector Desk,⁴²⁸ within the industrial trade division but no specific sector or desk was created to solely focus on traditional knowledge creative products. Previous Design Indabas, Johannesburg Art Fairs and local trade events, have built networks with international platforms in London, Chicago and Frankfurt.⁴²⁹ If such fairs include and promote traditional knowledge products or if fairs are created specifically for traditional knowledge products, both nationally and internationally, then the showcase of local creative products will get international market exposure thereby creating consumer awareness and recognition of such products.

Developing countries contribute very little to the global market in terms of creative products, with South Africa contributing less than one percent in the global trade of crafts.⁴³⁰ This, however, does not prevent such countries to seek the potential to develop niche markets.⁴³¹ In South Africa, the local market for crafts shows growth and expansion due to the rise of African trends and styles.⁴³² Tourist flea-markets and outlets are thriving grounds for traditional knowledge products, with micro, small and medium businesses creating employment for women, broad-based black economic

⁴²⁴ Joffe & Newton (note 420 above; 35, 117).

⁴²⁵ *Ibid* 117.

⁴²⁶ *Ibid* 117.

⁴²⁷ *Ibid* 34.

⁴²⁸ British Council et al 'SA/EU Creative Industries Trade Dialogue Project: A Summary of Findings and Proposed Action' *The South African Department of Trade and Industry* available at https://www.thedti.gov.za/industrial_development/docs/eusatraefinalreportssummary.pdf, accessed on 29 October 2018 42, 46.

⁴²⁹ *Ibid* 42, 48.

⁴³⁰ Joffe & Newton (note 420 above; 37, 116).

⁴³¹ *Ibid* 116.

⁴³² *Ibid* 38.

empowerment and poverty alleviation.⁴³³ In light of this, measures should be taken to promote traditional knowledge trade in tourist areas so that businesses can thrive and such empowering employment can be sustained.

4.6. Geographical Indications and the position of African countries

Indeed geographical indications can provide the needed protection for African traditional knowledge-related agricultural goods and handicrafts, based on the European experience⁴³⁴ and a few success stories from the continent itself.⁴³⁵ However, not enough research has been conducted in Africa that focuses on geographical indication protection for general products let alone traditional knowledge products. This makes it difficult to measure the definite success of geographical indications on the continent, but by looking at what authors⁴³⁶ have to say about the current position of Africa and geographical indications a reasonable analysis can be drawn.

A starting point will be to consider the benefits that geographical indications can bring to an African country before delving into suggestions to further the research on geographical indication protection in Africa. Firstly, geographical indications promote sustainable development, agro-tourism and rural development from which employment and income can be sought.⁴³⁷ Secondly, once a reputation is built around a product, markets are created and if it reaches an international level, the economy can be improved.⁴³⁸ This is evident in the fact that consumers are willing to pay more for a geographical indication protected product due its 'prestige', 'safety and authenticity' and local consumers, specifically, find cultural heritage and identity in such products.⁴³⁹ Thirdly, geographical indications offer protection for products against

⁴³³ *Ibid* 36, 39.

⁴³⁴ Martens (note 29 above; 12). Geographical indication protection for traditional knowledge has worked in Europe where there is a positive impact on and development for producers and the community. The economy is stimulated with consumers willing to pay high prices for quality products assigned an origin thereby having a reputation.

⁴³⁵ Example: Rooibos from South Africa and Penja pepper from Cameroon.

⁴³⁶ Authors such as Chinedu, Manyise, Moruzzo and Martens.

⁴³⁷ Chinedu, Manyise & Moruzzo (note 77 above; 83).

⁴³⁸ *Ibid* 83-84.

⁴³⁹ *Ibid* 84, 89. In Malawi, urban dwellers purchase foods coming from their state of origin and in Mali, people show preference for highly priced shallots as opposed to onions since the shallots serve as a cultural heritage and identity.

infringement, usurpation and further monitor geographical indication usage, thereby saving costs. If the certification and protection of geographical indications are entrenched, then lengthy legal cases and exorbitant legal costs can be avoided.⁴⁴⁰

The benefits mentioned above paints a rather beneficial picture of geographical indications but due to the lack of awareness of geographical indications by African developing countries, adequate geographical indication laws are not promulgated.⁴⁴¹ According to Chinedu the institutional environment poses the biggest challenge for the development of geographical indications in Sub-Saharan Africa, therefore geographical indications are not given the required attention by governments calling for regional institutions, such as ARIPO and OAPI to provide a system of identification and registration.⁴⁴² Regional groups endeavour to find a harmonised geographical indication protection system but a lack of agreement on a geographical indication protection method, either a trademark certification regime following suit with the USA or a *sui generis* geographical indication system following that of the EU, 'tends to compromise the regional effort for enforcing a common intellectual property rights regime'.⁴⁴³ There is therefore a need for mutual co-operation and consensus between ARIPO and OAPI in achieving a unified legal framework.⁴⁴⁴

As seen above, the general positives of geographical indication protection have been highlighted by literature⁴⁴⁵ but the determination of country specific economic benefits and geographical indication potential need to be explored in future studies, as the actual benefits accrued will differ from country to country.⁴⁴⁶ These future studies will need to consider the following:⁴⁴⁷

⁴⁴⁰ *Ibid* 84. The Rooibos issue between South Africa and the USA was only settled after ten years with nearly one million dollars wasted in legal fees.

⁴⁴¹ Martens (note 29 above; 9).

⁴⁴² Chinedu, Manyise & Moruzzo (note 77 above; 80).

⁴⁴³ *Ibid* 90.

⁴⁴⁴ *Ibid* 90.

⁴⁴⁵ *Ibid* 80. ARIPO and OAPI have carried out research but there is yet to be a comprehensive list of identified potential geographical indications in the regions therefore many geographical indications still face the risk of infringement.

⁴⁴⁶ *Ibid* 90. Martens (note 29 above; 12). South Centre (note 184 above; 17). Many least developed African countries are low income nations that may experience a pressure on government revenue when attempting to develop a geographical indication protection system. Research into the benefits and potential of geographical indications will therefore need to be carried out so that decisions made, on geographical indication protection systems, will be based on evidence.

⁴⁴⁷ Martens (note 29 above; 11-12). Chinedu, Manyise & Moruzzo (note 77 above; 91-93).

- Institutional constraints.
- The effectiveness and efficiency of existing legal frameworks (including issues of registration, a database and policing of the quality of products).
- Organisational capacity (the education, training and funding of producer groups needs to be evaluated).
- Administration and legal dispute costs.
- The knowledge of value chain activities.⁴⁴⁸
- Skilful and knowledgeable human resources.
- Sanitary and phytosanitary measures.
- Liability and cost of marketing and promoting the geographical indication protected products.

Geographical indication is a new concept to the African continent, with countries having little or no experience with it, therefore it is important that awareness⁴⁴⁹ and progressive experts be sought to ensure that effective geographical indication developments can be made thereby urging the continent to see the benefits of geographical indications and its contribution to economic development based on traditional knowledge protection. As a positive consequence of this, developing nations will consider the geographical indication extension proposal put forward to the TRIPS Council and not use its lack of experience as a factor hindering its influence⁴⁵⁰ in the extension debate. If the development of geographical indications stagnates, then many products and terms that are unique to Africa will fall into genericity⁴⁵¹ resulting in economic loss, loss of identity and distinctiveness for the continent. Furthermore, according to Chinedu, a legally certified and effectively marketed geographical indication protected product will have the capacity to access markets easily, increase

⁴⁴⁸ Chinedu, Manyise & Moruzzo (note 77 above; 91). 'The majority of cases of imitation and bio-piracy as well as misuse of geographical indication names are a result of unclear and inadequate knowledge of what happens when a product leaves the farm gate. A number of studies found that the majority of producers are not aware of the destination of their products, let alone port of export and retail prices. These studies suggest that most of the rural stakeholders who are supposed to be involved in the registration and management of geographical indication products have limited knowledge of value chain and activities which is a challenge for the development of geographical indications'.

⁴⁴⁹ Chinedu, Manyise & Moruzzo (note 77 above; 90-91). South Centre (note 184 above; 17).

⁴⁵⁰ South Centre (note 184 above; 17).

⁴⁵¹ Chinedu, Manyise & Moruzzo (note 77 above; 92). 'Karoo' and 'safari' were rejected by the USA as being geographical indications rather they were considered generic terms. The same occurred with Ethiopian coffee with the company Starbucks.

sales and achieve a higher selling price.⁴⁵² Chinedu's proclamation urges the need to quicken the pace towards developing geographical indication protection systems in Africa since economic losses are being incurred by the continent because their traditional knowledge products are few or non-existent in the global markets.

4.7. Conclusion

In order to prevent the loss of traditional knowledge terms and products, its protection is imperative and South Africa has sought ways to fulfil this need, through the IKSP, NEMBA and IPLAA. As the focus of this paper is on traditional knowledge protection through a geographical indication system, IPLAA became the focus of this chapter as it speaks to the protection of traditional knowledge through geographical indications being registered as a certification or a collective mark. IPLAA has its criticisms but such cannot be justified as there is an absence of supportive case law, hence the abilities of IPLAA can only be evaluated once it has been applied to a traditional knowledge product and the positive or negative outcome of such is determined.

With regard to what is known and successful, the Rooibos phenomenon illustrates the ability of a traditional knowledge product to reach trade, economic and protection success, through geographical indication recognition, government involvement and the SARC's effort. Further, Honeybush and handicrafts show potential to grow as tradable traditional knowledge products but the hindering factors of agricultural sustainability and lack of recognition, affect the success of the industries respectively. Slow research or the lack of it, is another factor obstructing both industries' successes. A positive contribution that these industries make along with that of Rooibos, is that they contribute to employment and the empowerment of the disadvantaged and the under-represented.

⁴⁵² *Ibid* 89. '... Oku white honey of Cameroon, the selling price increased 100 percent in five years from €40,000 to €80,000. The reason of this is that the uniqueness of the honey became recognised by the inhabitants of the territory where it is produced. Unlike previously where it was considered defective by the local people due to its white colour, the revalorisation through geographical indication registration improved its market value. More so, they reported that the demand for the product is growing in large cities. This is similar to the case of Penja pepper where both production and price increased by 50 percent, and the products are currently being exported. Finally, for Ziama Macenta coffee of Guinea, the geographical indication development equally opened the international market for the product'.

In addition to the advantages mentioned above, geographical indications is seen to give due recognition to the exclusive quality of a traditional knowledge product and can further increase tourism to a location, where a traditional knowledge product originates. These benefits can boost the economy of a country if traditional knowledge products reach international markets but due to the lack of awareness in African countries, such ideals cannot be achieved. Studies, on geographical indication potential and traditional knowledge protection, and expert advice should be honed in and prioritised by regional groups and countries, in order to determine the practicality and achievability of a geographical indication protection system. This can provide developing countries with statistics and solutions so that when they reach the TRIPS platform, they can negotiate with the evidence of case studies. This idea is just one step that developing countries can take in order to see the success of the extension debate. More recommendations and the way forward will be discussed in the next chapter.

Chapter 5

Recommendations and conclusion

5.1. Introduction

As illustrated in the previous chapters, international agreements and national laws as well as literature have recognised the ability of geographical indications to protect traditional knowledge. Therefore, the issue lies with the inability of traditional knowledge to be furnished with enhanced protection under TRIPS. This chapter therefore aims to provide possible recommendations to see the fulfilment of the geographical indication extension of Article 23.

From recommending ways in which developed nations can compromise and cooperate, to highlighting the importance of unity among African developing countries, this chapter seeks to provide a positive way forward to ensure legal certainty, uniformity, equality and fairness in protecting traditional knowledge on an international platform. Therefore the role that all players, such as the EU, USA, South Africa and other key opponents and proponents of the geographical indication extension, need to play are illustrated below.

Chapter one⁴⁵³ introduces the topic of this dissertation as well as provides a background and overview of the issues and arguments central to it. Chapter two⁴⁵⁴ proves the ability of geographical indications to protect traditional knowledge and expresses the importance of traditional knowledge to African developing countries, specifically South Africa. Chapter three⁴⁵⁵ speaks to the geographical indication extension debate and the role of FTAs in fostering the link between geographical indications and traditional knowledge. Chapter four⁴⁵⁶ continues the FTA discussion, with a prime focus on South African FTAs and further illustrates Africa's position on traditional knowledge and geographical indication protection. Specific traditional knowledge issues, relevant to South Africa, such as Rooibos, Honeybush and

⁴⁵³ Chapter 1; page 1-15.

⁴⁵⁴ Chapter 2; page 16-33.

⁴⁵⁵ Chapter 3; page 34-56.

⁴⁵⁶ Chapter 4; page 57-80.

handicrafts are also articulated. The findings of these chapters will be featured below, followed by the recommendations put forward by this dissertation and finally ending with the conclusion.

5.2. Findings

In chapter two,⁴⁵⁷ it is found that there is a need to protect traditional knowledge against misappropriation so that it can be recognised as a tradable asset. This chapter demonstrates that geographical indications share socio-economic, cultural and environmental similarities with traditional knowledge as well as functional and structural compatibility, thereby allowing traditional knowledge to be protected by a geographical indication regime, either through trademarks or a *sui generis* system. Moreover, the chapter establishes that geographical indication protection can be beneficial to a product that has a traditional knowledge and/or biodiversity component (for example, handicrafts and agricultural products) as it can mutually protect the geographical indication factor and the knowledge factor.⁴⁵⁸ Furthermore, geographical indications allow for the protection and preservation of cultural diversity in the marketplace, where product differentiation occurs and instils awareness, appreciation and value in the minds of the traditional knowledge right-holders as well as incentives for innovation.⁴⁵⁹ The chapter further went on to speak to the benefits of traditional knowledge in South Africa, citing the following to be of importance: traditional knowledge trade, the increasing of income in the realm of employment and rural development, benefit-sharing opportunities, tourism and embracing the uniqueness of an indigenous community.

Chapter three,⁴⁶⁰ extensively discusses the inconsistent protection levels, of Article 22 (providing a low level geographical indication protection for all products) and Article 23 (providing absolute geographical indication protection for wines and spirits only) of

⁴⁵⁷ Chapter 2; page 16-33.

⁴⁵⁸ Bramley & Biénabe (note 96 above; 11).

⁴⁵⁹ Sanders (note 81 above; 82). Panizzon (note 163 above; 14-15). Dagne (note 79 above; 103, 192). D Milius 'Justifying Intellectual Property in Traditional Knowledge' (2009) *UCT Department of Private Law* available at http://www.privatelaw.uct.ac.za/usr/private_law/attachments/djims_report1.pdf, accessed on 8 November 2018 187.

⁴⁶⁰ Chapter 3; page 34-56.

TRIPS due to no systematic and legal reason. The need for legal certainty and uniformity is the main theme of the chapter that speaks to the compelling arguments for geographical indication extension. The benefits of the geographical indication extension do not only extend to traditional knowledge protection but also to trade enhancement, improved consumer choice with ensured quality of products and the uniformity and ease of dispute settlement with the decrease in costs. A single undertaking comprising of the following are put forward by developing country proponents, the AG and the EU: the call for the extension of Article 23 of TRIPS so that it can provide equal protection for all products beyond wines and spirits, the establishment of a register for wines and spirits and the possible extension of such register to other products, and the requirement of the disclosure of traditional knowledge when making a patent application.⁴⁶¹ Such a single undertaking is opposed by the USA and its supporters for a number of reasons. Therefore, chapter three sets out the arguments of both the opponents and proponents to the extension debate and finds that WTO members are not staunchly committed to the negotiations. Countries such as India, Kenya, Thailand and South Africa, to name a few, do show some initiative to propel the negotiations forward but unfortunately the situation is stagnant and the extension topic is absent from the agenda of TRIPS council meetings. In light of this, alternative ways must be sought in order to see the progress of negotiations. Such will be discussed in the recommendations, below.

Chapter three further initiated the discussion of FTAs as an alternative route to traditional knowledge protection through a geographical indication system and chapter four continued such discussion. FTAs are seen as relationship builders creating a unified platform where interests converge. Notably, it is found that African regional agreements, discussed in chapter four,⁴⁶² do not blatantly recognise the need for geographical indication and traditional knowledge protection which is a contrast to the EU's EPAs, as discussed in chapter three, which actively recognises products from developing countries that require geographical indication protection. Interestingly, South Africa has obtained a geographical indication protection in the EU before it could in any African FTA or EPA or the WTO.

⁴⁶¹ South Centre (note 184 above; 15).

⁴⁶² Chapter 4; page 58-61.

Chapter four⁴⁶³ establishes that developing countries can use geographical indications as a socio-economic tool to safeguard traditional knowledge, encourage industrial policy, promote rural and employment development and develop distinct, quality products enabling such countries to enter global markets. As such, chapter four illustrates Rooibos, a South African traditional knowledge agricultural product, as being South Africa's first socio-economic geographical indication success that reaped protection on an international level, through the SADC-EU EPA. Handicrafts as well as Honeybush were also discussed in order to illustrate the potential of local and international trade of South African traditional knowledge products. The chapter goes on to discuss the need for expert opinion and research to be conducted in Africa so as to evaluate the potential and extent of success of geographical indications in Africa and its ability to protect traditional knowledge. This point opens a way for the recommendations to be put forward by this dissertation.

5.3. Recommendations

Based on the research aims of this dissertation as posed in chapter one and the findings featured in chapters two to four, this dissertation will proffer some recommendations that can be sought to ensure that the TRIPS geographical indication extension is realised.

Owing to the WTO negotiations being plagued with 'irreconcilable contrary positions', Frantz has highlighted that bilateral and multilateral agreements, outside of the WTO, are more suited as a 'feasible and more realistic way' to seek geographical indication protection for products beyond wines and spirits.⁴⁶⁴ As seen in chapter three,⁴⁶⁵ the EU is establishing FTAs with relation to traditional knowledge and geographical indication protection but an international trade policy is preferred as multiple bilateral agreements are divergent and cannot 'distribute opportunities and costs of geographical indication protection more evenly and fairly' than the WTO.⁴⁶⁶ Owing to this the WTO negotiations have to recognise and acclimatise to the new realities of

⁴⁶³ Chapter 4; page 57-80.

⁴⁶⁴ Frantz (note 37 above; 110).

⁴⁶⁵ Chapter 3; page 51-54.

⁴⁶⁶ Gunzel (note 264 above). Frantz (note 37 above; 114).

FTAs in order to create a reasonable platform for all its members. The lowering of tariffs and trade barriers to traditional knowledge products by means of special and differential treatment⁴⁶⁷ is not sufficient as the core of the geographical indication extension debate will not be solved. The need for developed countries to co-operate during geographical indication extension negotiations and the need for developing countries to unite, are two important recommendations put forward by this dissertation.

5.3.1. The need for developed countries to co-operate

The debate between the old world and the new world regarding the TRIPS geographical indication extension, reveals the dominance of the more developed countries in this area of multilateral trade. In this respect, the views of Frankel is pertinent as the author argues that TRIPS is imbalanced as it protects the developed countries' knowledge and assets while treating traditional knowledge as a 'free for all' to use with global trade intensifying such inequality.⁴⁶⁸ In order to overcome the imbalance, Frantz suggests a compromise be sought by the western world, so that all the diverging interests are considered and balanced in order to reap fairness and fulfilment of developing country needs (i.e. the preservation and protection of traditional knowledge).⁴⁶⁹ Articles 22-24 of TRIPS and the WTO as a whole have been built on compromise and the balancing of legitimate and contrary interests.⁴⁷⁰ The success of 'compromise' on the WTO platform has informed Frantz's suggestion who understands that it is not perfect from a national standpoint but beneficial for developing countries as it stands for the 'greater good'.⁴⁷¹ Ultimately, what the compromise is calling for is for the developed countries to not exert in their decisions to the extent that they dictate the power of the negotiations resulting in pertinent issues relating to developing countries, such as traditional knowledge protection and geographical indication extension, being excluded or side-lined from the agenda.

⁴⁶⁷ Panizzon (note 163 above; 14-15).

⁴⁶⁸ Frankel (note 74 above; 254).

⁴⁶⁹ Frantz (note 37 above; 114).

⁴⁷⁰ *Ibid* 114.

⁴⁷¹ *Ibid* 114.

According to Dagne, developing countries have a limited role and influence in the WTO due to the decision-making being dependent upon consensus rather than on votes.⁴⁷² A compromise, according to him, is not the solution, as a compromise can be reached through consensus and not a vote, an act which sees the negligible influence of developing countries due to the western-stronghold. Frantz also mentions that the extension should not just be a trade-off of interests during negotiations,⁴⁷³ which, to an extent, supports Dagne's 'non-compromise' belief. Dagne's argument holds truth but changing the decision-making procedure from consensus to a voting system, calls for chaos. If countries cannot agree on a geographical indication extension, a total change of a codified procedure spells disaster. Therefore, this dissertation prefers to side with Frantz's idea of compromise. It will be difficult for both proponents and opponents to the extension to reach a middle-ground but it is not impossible. If USA and its supporters cease in their evasion of the issues at TRIPS council meetings and discontinue being stubborn to suggestions and negotiations put forward by developing countries, then a way forward can be sought. The EU on the other hand, should not promulgate its interests but should rather use its strong power and influence to push forward the interests of developing countries in negotiations. Therefore, in light of the EU wanting the geographical indication extension to apply to all products and the USA wanting no extension, a consensus should be reached based on the interests of developing countries. This consensus should comprise of a compromise where each party agrees to see the extension being applied to products of traditional knowledge origin that is eligible to be protected by a geographical indication. Such can be seen as a middle ground that also fulfils the interest of developing countries.

Besides working towards a compromise, developed nations need to also provide technical assistance to developing nations. The EU has shown interest in Africa (as illustrated in chapter three⁴⁷⁴), with regard to establishing a geographical indication

⁴⁷² Dagne (note 79 above; 199). A Zappalaglio 'The Protection of Traditional Knowledge within WTO Legal Frame: (Again) a TRIPs' Failure?' (23 May 2014) *Social Science Research Network* available at <https://ssrn.com/abstract=2476049>, accessed on 8 November 2018 8. In July of 2008, countries led by India, Brazil and Switzerland called for 'procedural decisions to join the negotiations for reform of geographical indications' and the general rights of traditional knowledge, in order to establish a link between geographical indications and traditional knowledge, reform geographical indications and protect traditional knowledge. The request was supported by two thirds of the WTO member states but the USA and the remaining countries did not support this decision so the idea was abandoned.

⁴⁷³ Frantz (note 37 above; 116).

⁴⁷⁴ Chapter 3; page 53-54.

protection initiative, through the liaison with African regional groups and research projects. The USA, however, has shown no attentiveness in delving into Africa's geographical indication protection system and providing assistance.

Traditional knowledge owners, holders, producers and processors require assistance in obtaining access to information related to the markets and in the facilitation of fair and equitable business partnerships.⁴⁷⁵ This dissertation agrees with Martens, that aid for trade is needed in terms of technical and financial support (provided that projects pertaining to such is properly designed and based on the needs, interests and ownership of the local communities) in order to assist developing countries in increasing their exports and forming complex trade rules, which can in turn lead to more opportunities.⁴⁷⁶ In light of this, this dissertation similarly recommends that trade-related technical assistance should aim to upgrade market-access and value chains in a win-win approach to business partnerships, which include helping local traditional knowledge owners and co-operatives to comply with lead firms and developed country standards.⁴⁷⁷ With regard to the need for technical assistance, countries such as the USA can still show initiative in helping African countries such as South Africa seek a geographical indication protection system or alternatively help such developing countries develop a traditional knowledge protection law or policy. Such involvement by the USA can help it see the position of African developing states, and why they push for the extension of geographical indications and the protection of their traditional knowledge. However, there is a caution attached to this recommendation as the USA can shrewdly exert her own agenda by influencing African countries to accept the USA's construct of the geographical indication extension debate. Such can therefore tip the scales in the negotiations resulting in the extension not being realised. Therefore, there is a need for African countries to accept help and assistance cautiously from the USA or any other country that opposes the geographical indication extension and should further have the ability and knowledge to firmly question the intentions of such countries.

⁴⁷⁵ Martens (note 69 above; 10, 13). Upgrading efforts, to collate farmers and producers into co-operatives that will help them participate in export chains more effectively, require supportive governments and business environments which can defend valuable intellectual property rights.

⁴⁷⁶ *Ibid* 10, 13.

⁴⁷⁷ *Ibid* 13.

5.3.2. The need for African developing countries to unite

In Europe, traditional knowledge protection through a geographical indication system has worked and created a positive impact on the economy, producers and the community.⁴⁷⁸ Africa has yet to see the extensive benefits of a geographical indication system of protection, especially for traditional knowledge products. As mentioned in chapter four,⁴⁷⁹ geographical indication is a new concept in Africa, and therefore awareness needs to be created among producers. A survey, commissioned in 2007 by the EU's Trade Directorate General, identified an array of products that have unique qualities and reputation but are not registered as geographical indications or even protected.⁴⁸⁰ This shows that Africa runs the risk of losing out economically due to having not protected its traditional knowledge. Before probing into the steps that Africa needs to take in order to preserve and protect its traditional knowledge, it is important that the African youth's perception of traditional knowledge be addressed.

As such, Panizzon interestingly reveals that the younger generations in developing countries do not see the potential of traditional knowledge in their respective economies and choose to follow the idea of modernising in their career choices in order to promote their economy.⁴⁸¹ Therefore, this dissertation recommends that African developing nations, such as South Africa, need to educate the youth about traditional knowledge and get them involved with traditional knowledge appreciation, understanding and goods production. It is important for African developing nations and its citizens, especially the youth, to realise that in the current 'knowledge-based economy, where the value of the product is measured on its intellectual property content', geographical indication instruments can act as a key for economic expansion beyond raw commodities.⁴⁸² The promotion and protection of geographical indication products can further result in the fostering of quality production and equitable distribution of profits for rural communities, as stressed in chapter two.⁴⁸³ Essentially,

⁴⁷⁸ Martens (note 29 above; 12).

⁴⁷⁹ Chapter 4; page 78.

⁴⁸⁰ Mengistie & Blakeney (note 12 above; 212-213). Some products identified include: *Kisii* soapstone and *Akamba* carvings from Kenya, white honey from Cameroon, *Korhogo* fabrics from Cote d' Ivoire, *Ambositra* handicraft and *Antananarivo* handicraft from Madagascar, *Maasai* attire and beads.

⁴⁸¹ Panizzon (note 163 above; 20).

⁴⁸² Dagne (note 7 above; 283).

⁴⁸³ Gunzel (note 264 above). Chapter 2; page 31-32.

geographical indications can introduce and stimulate developing countries' participation in international trade.

Developing countries need to develop and implement a legal framework that protects not only their valuable resources, but contributes to their development as well.⁴⁸⁴ Domestic level protection should be based on needs and specific circumstances that necessitates the recognition of geographical indication rights.⁴⁸⁵ According to Dagne, a properly designed geographical indication system can be used to recognise traditional knowledge based on creativity, practices and innovations; therefore the author suggests geographical indication protection through a trademark system, as it can act as a bridge to a *sui generis* system and vice versa.⁴⁸⁶ Biénabe and Bramley correctly point out that developing and maintaining a successful geographical indication system is not an easy process as 'context specific challenges' need to be faced.⁴⁸⁷ Some of these include marketing and trade, culture, legal and institutional capacity, and territorial, environmental and social policies.⁴⁸⁸ Biénabe and Bramley therefore propagate that a 'well informed and locally grounded approach in the design' of a geographical indication system is needed.⁴⁸⁹ As such, this dissertation similarly argues that it is vital for developing countries to develop a strong geographical indication protection system, if they want to evidence the importance and success of it on the TRIPS negotiating platform in order to push for geographical indication extension beyond wines and spirits.

Because the task of developing a geographical indication system is not simple and can appear daunting, there is a need created for African countries to work together in order to realise the common goal of traditional knowledge protection. The influence, assistance and advice from developed nations can, without a doubt, help developing countries to develop geographical indication and traditional knowledge protection systems but if developing countries help each other see the benefits of geographical indication and traditional knowledge protection then more countries, which are plagued

⁴⁸⁴ Martens (note 69 above; 10).

⁴⁸⁵ Dagne (note 79 above; 209).

⁴⁸⁶ *Ibid* 209-210.

⁴⁸⁷ Bramley, C & Biénabe, E 'Developments and Considerations around the Geographical Indications in the Developing World' (2012) 2(1) *Queen Mary Journal of Intellectual Property* 33.

⁴⁸⁸ *Ibid* 33.

⁴⁸⁹ *Ibid* 33.

with reservations, will be more confident. Regional groups, such as ARIPO and OAIP, have already stepped in as facilitators and advisors, as discussed in chapter four.⁴⁹⁰ This re-ignites confidence on the African continent with regard to geographical indication development and traditional knowledge protection but more needs to be achieved.

In this respect Martens states that developing countries need to learn from each other by using benchmark techniques, especially with respect to the study of institutional frameworks and developmental strategies.⁴⁹¹ He further states that countries need to also consider the following:⁴⁹²

- The benefits of establishing a geographical indication system should outweigh the costs of implementing and the carrying out of such a system.
- The economic impact a geographical indication system may have on communities.
- The strengthening of producer organisations within the realm of geographical indications.
- The provision of partnership-based technical assistance concerning aid for trade developmental actions which include: the implementation and maintenance of registration, certification, marketing, inspection and quality control systems.

The last point highlighted by Martens, gels with the need for developed countries to provide technical assistance to developing countries, as discussed above. The benchmarking technique and the other considerations mentioned by Martens is indeed a positive way forward. Zappalaglio adds more ideas that can help as he suggests that producers and right-holders should network and share experiences with one another and that public opinion and communication with the public are imperative.⁴⁹³

⁴⁹⁰ Chapter 4; page 77.

⁴⁹¹ Martens (note 29 above; 12).

⁴⁹² *Ibid* 13.

⁴⁹³ Zappalaglio (note 467 above; 10)

These suggestions show the importance of communication and technology in order to share knowledge and opinion which is essential to develop dialogue about globalisation, the preservation of cultural diversity and trade.

5.4. Steps that South Africa can take to enhance its traditional knowledge trade

After having provided recommendations for the international players, the focus is now turned to South Africa.

As is the case with other African countries, as discussed above, the youth do not readily seek economic endeavours with traditional knowledge. The perception of traditional knowledge's inability to enhance trade and the economy should be extinguished by government and other influential actors such as politicians, non-governmental organisations and traditional knowledge producers. The use of media and statistics should be used to promote and evidence the benefits of traditional knowledge. Educational workshops and the introduction of the importance of traditional knowledge in educational syllabi should also be established. The awareness, acceptance and promotion of traditional knowledge can lead to its success which can impact positively on the employment aims of South Africa. The current unemployment rate, the need for women empowerment and the call for broad-based black economic empowerment can all be reduced if traditional knowledge enters as a strong trade-player in South Africa. Benefit-sharing agreements should be utilised also as it could result in the expansion of a particular market while ensuring that the traditional knowledge holders receive some benefit (monetary or opportunity) in exchange for the use of the traditional knowledge product.

The agricultural traditional knowledge industry has been explored by South Africa to be protected as a geographical indication, as seen with the Rooibos and Honeybush issues in chapter four,⁴⁹⁴ but the traditional knowledge craft industry has yet to be tested as a geographical indication. South Africa needs to take more proactive steps to ensure the merging of the development of trade and of creative arts. The trade and industry and the culture and tourism departments of government should all work

⁴⁹⁴ Chapter 4; page 68-73.

together in order to promote traditional knowledge awareness, trade and protection. Such integrated workings can result in harmonious decisions regarding traditional knowledge trade which can then flourish due to consensus being reached by all interested and key departments.

Conferences and talks with the EU is a suggestion that can be put forward for the fulfilment of the bigger picture, which is traditional knowledge recognition, promotion and protection but this is not enough. Simple improvements need to be made as well, such as the DTI endeavouring to make available traditional knowledge trade statistics and updated information on the craft industry. Furthermore, the SAHTA should make available on their website, updated statistics on the Honeybush trade. If statistics are available on local websites, then access to interested parties and researchers will be more effective and efficient.

The suggested criteria to choose successful geographical indications, as proposed by Biénabe and Bramley in chapter four,⁴⁹⁵ can be adopted by traditional knowledge producers wanting to protect their traditional knowledge through a geographical indication. The criteria set by the two authors are not set in stone and they can be changed and/or extended. Such amendments can be carried out by non-governmental organisations who have taken upon a study of such criteria and tested it on specific industries. Such studies will encompass academics, scientists, traditional leaders, NGOs and communities who will all need to collaborate and develop a policy or document that can indicate a way forward with regard to traditional knowledge protection and geographical indications.

With regard to IPLAA, this dissertation will refrain from criticising it as it is already codified law that will not be replaced by government. Hence, on a positive stance, this dissertation purports that the negativities of IPLAA can only be tested once it is made use of by traditional knowledge right-holders and once it is disputed in court.

On the regional front, South Africa can lend its hand to provide advice to other African countries still pending on a geographical indication regime or traditional knowledge

⁴⁹⁵ Chapter 4; page 70.

protection. It will not be wise for South Africa to purport ultimate success when advising other countries as traditional knowledge protection is still in its infant stages, but South Africa can draw on successful cases such as Rooibos and current cases such as Honeybush to provide advice. Despite the differences in the interpretation between the definitions of traditional knowledge,⁴⁹⁶ South Africa can further learn about traditional knowledge protection for handicrafts from other developing countries and developed countries.

With regard to South Africa's position on the TRIPS geographical indication extension debate, her small voice is uttered during negotiations. It can be assumed that South Africa is tactically not choosing a definite side,⁴⁹⁷ as she wishes to maintain good trade relations with both the EU and the USA but, as time goes by and once she develops an array of successful traditional knowledge protected geographical indication products, she will have to take a firm stand. South Africa has stood with the proponents for geographical indication extension at TRIPS council meetings, as seen in chapter three,⁴⁹⁸ but is not as proactive as India and Kenya. Even though South Africa may want to take precautions, it is imperative that she is assertive in her stance of traditional knowledge protection on a global level and should take a confident stand during negotiations by providing evidence, experiences and success stories to the TRIPS Council. A route that can be recommended for South Africa to take is to first pick a side with regard to the multilateral database register under TRIPS. South Africa should support and propel for the idea of an international database of traditional knowledge registered products in the WTO, which can act as *prima facie* evidence for the recognition of such products and as proof of valid registration. Such implementation can assist in disputes and prevent misappropriation as well as add to the idea of Africanisation, where such a technological tool (the database) can help with the preservation and protection of indigenous traditional knowledge hailing from different countries.

⁴⁹⁶ Chapter 2; page 17.

⁴⁹⁷ Bramley & Biénabe (note 487 above; 19-20). Currently, the TRIPS negotiations have two contrasting views on the multilateral register. The first view is that all members must treat the geographical indication register as a document of *prima facie* evidence that shows the valid registration of a registered product, unless an objection is raised. The second view is that the multilateral register should only act as a database which will be available to all members to consult, when making a decision on a trademark or a geographical indication. SA presently, supports both views.

⁴⁹⁸ Chapter 3; page 50.

5.5. Conclusion

With the power of the geographical indication extension debate being with the western world, which exert their decisions and agendas independent to that of the developing countries' needs, the call for a balanced and fair negotiating process is imperative and must be sought. The unity of African nations and the co-operation and compromise of the developed nations may bring about such balance along with the recommendations put forward by this dissertation but it should be noted that success is not inevitable. If decision-makers are not willing to be flexible and developed nations are not willing to let go of their self-centred needs then cohesive, logical and unified decisions for the benefit of developing nations, especially African countries, cannot be realised. Therefore, the political culture, relationships and understanding between nations must be symbiotic and this can only be achieved if all parties are willing to see the negotiating process through.

It is without a doubt that South Africa has the potential to enhance her traditional knowledge trade, if only the awareness and protection of traditional knowledge products are sought through the various marketing and educational methods as well as legislation mentioned in this dissertation, respectively. South Africa has not announced her presence forcefully on the international platform with regard to the geographical indication extension debate. Being one of the trade leaders in Africa, South Africa has to voice her opinion on the geographical indication extension matter, on the TRIPS platform, so as to be one of the African torch bearers for traditional knowledge protection. Once the TRIPS geographical indication extension is realised, traditional knowledge trade can be liberalised resulting in the fair treatment of African developing countries such as South Africa, thereby enhancing their confidence on a global level.

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Appendices

Appendix A

The ACP countries are: Angola, Antigua and Barbuda, Belize, Cape Verde, Comoros, Bahamas, Barbados, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Central African Republic, Chad, Congo (Brazzaville), Congo (Kinshasa), Cook Islands, Cte d'Ivoire, Cuba, Djibouti, Dominica, Dominican Republic, Eritrea, Ethiopia, Fiji, Gabon, Gambia, Ghana, Grenada, Republic of Guinea, Guinea-Bissau, Equatorial Guinea, Guyana, Haiti, Jamaica, Kenya, Kiribati, Lesotho, Liberia, Madagascar, Malawi, Mali, Marshall Islands, Mauritania, Mauritius, Micronesia, Mozambique, Namibia, Nauru, Niger, Nigeria, Niue, Palau, Papua New Guinea, Rwanda, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Solomon Islands, Samoa, Sao Tome and Principe, Senegal, Seychelles, Sierra Leone, Somalia, South Africa, Sudan, Suriname, Swaziland, Tanzania, Timor Leste, Togo, Tonga, Trinidad and Tobago, Tuvalu, Uganda, Vanuatu, Zambia, Zimbabwe.⁴⁹⁹

Appendix B

Joint Declaration on Development Cooperation under the EPA between the CARIFORUM States and the European Community and its Member States 2008:

'Pursuant to both the EU Aid for Trade Strategy adopted in October 2007 and the funding instruments enumerated in Article 7 of Part I of this Agreement, the Member States of the European Union confirm their intention to ensure that an equitable share of Member States' Aid for Trade commitments will benefit the Caribbean ACP States, including for funding programmes related to the implementation of this Agreement. The Parties agree on the benefits of regional development mechanisms, including a regional development fund, accessible to all CARIFORUM States, to mobilise and channel Economic Partnership Agreement related development resources from the European Union and other potential donors...'

⁴⁹⁹ The African Caribbean Pacific (ACP) entered into a partnership agreement with the European Union (EU) in 2000. 'Secretariat ACP' *African, Caribbean, and Pacific Group of States* available at <http://www.acp.int/content/secretariat-acp>, accessed on the 29 of July 2018.

Chapter III, Article 12(4) of the EPA between the European Union and its Member States and the SADC EPA States 2016:

‘The Member States of the European Union collectively undertake to support, by means of their respective development policies and instruments, development cooperation activities for regional economic cooperation and integration and for the implementation of this Agreement in the SADC EPA States and at regional level, in conformity with the principles of complementarity and aid effectiveness such as those contained in the Paris Declaration on Aid Effectiveness of 2005 and the Accra Agenda for Action of 2008’.

Appendix C

The following is an extract from Agreement Revising the Bangui Agreement of March 2, 1977, on the Creation of an African Intellectual Property Organization.

Annex VI: Geographical indications

Article 1: Definitions

“For the purposes of this Annex,

(a) “geographical indication” means an indication that serves to identify a product as originating from a territory, a region, or a locality within that territory, in those cases where the quality, reputation or other specific characteristic of the product may be essentially attributed to such geographical origin;

(b) “product” means any natural, agricultural, craft or industrial product;

(c) “producer” means

— any producer of agricultural products or any other person exploiting natural products,

— any manufacturer of products of craft or industry,

— any trader dealing in such products.”

Appendix D

Countries which have signed, ratified/acceded to the Agreement establishing the African Continental Free Trade Area:⁵⁰⁰

Algeria, Angola, Burkina Faso, Burundi, Cameroon, Central African Republic, Cape Verde, Chad, Côte d'Ivoire, Comoros, Congo, Djibouti, Democratic Republic of Congo, Egypt, Equatorial Guinea, Ethiopia, Gabon, Gambia, Ghana, Guinea-Bissau, Guinea, Kenya, Libya, Lesotho, Liberia, Madagascar, Mali, Malawi, Morocco, Mozambique, Mauritania, Mauritius, Namibia, Niger, Rwanda, South Africa, Sahrawi Arab Democratic Republic, Senegal, Seychelles, Sierra Leone, Somalia, South Sudan, Sao Tome & Principe, Sudan, Eswatini, Tanzania, Togo, Tunisia, Uganda, Zimbabwe.

Countries that have yet to sign the Agreement establishing the African Continental Free Trade Area:⁵⁰¹

Benin, Botswana, Eritrea, Guinea-Bissau, Nigeria, Zambia

Appendix E

Appendix E.1.

Section 8(e) of IPLAA amends section 2(1) of the Trade Marks Act 194 of 1993, after the definition of 'deed of security', by inserting the following definition:

'derivative indigenous term or expression: means any term or expression forming the subject of this Act, applied to any form of indigenous term or expression recognised by an indigenous community as having an indigenous or traditional origin, and a

⁵⁰⁰ 'List of countries which have signed, ratified/acceded to the Agreement establishing the African Continental Free Trade Area' available at https://au.int/sites/default/files/treaties/34248-sl_agreement_establishing_the_african_continental_free_trade_area.pdf, accessed on 7 September 2018 1-2.

⁵⁰¹ 'List of countries which have signed, ratified/acceded to the Agreement establishing the African Continental Free Trade Area' available at https://au.int/sites/default/files/treaties/34248-sl_agreement_establishing_the_african_continental_free_trade_area.pdf, accessed on 7 September 2018 1-2.

substantial part of which was derived from indigenous cultural expressions or knowledge irrespective of whether such derivative indigenous term or expression was derived before or after the commencement of the Intellectual Property Laws Amendment Act, 2013’.

Appendix E.2.

Section 8(e) of IPLAA amends section 2(1) of the Trade Marks Act 194 of 1993, after the definition of ‘device’, by inserting the following definition:

‘indigenous cultural expressions or knowledge means any form, tangible or intangible, or combination thereof, in which traditional culture and knowledge are embodied, passed on between generation, and tangible or intangible form of creativity of indigenous communities, including, but not limited to –

- (a) phonetic or verbal expressions, such as stories, epics, legends, poetry, riddles and other narratives, words , signs, names and symbols;
- (b) musical or sound expressions, such as songs, rhythms, and instrumental music, the sounds which are the expressions of rituals;
- (c) expressions by action, such as dances, plays, ceremonies, ritual, expressions of spirituality or religion, sports, traditional games, puppet performances, and other performances, whether fixed or unfixe; and
- (d) tangible expressions, such as material expressions of art, handicrafts, architecture, or tangible spiritual forms, or expressions of sacred places’.

Appendix E.3.

Section 8(e) of IPLAA amends section 2(1) of the Trade Marks Act 194 of 1993, after the definition of ‘device’, by inserting the following definition:

‘indigenous term or expression’ means a literary, artistic or musical term or expression with an indigenous or traditional origin and a traditional character, including indigenous cultural expressions or knowledge which was created by persons who are or were members, currently or historically, of an indigenous community and which is regarded as part of the heritage of the community.’

Appendix E.4.

Section 8(e) of IPLAA amends section 2(1) of the Trade Marks Act 194 of 1993, after the definition of 'device', by inserting the following definition:

'indigenous community means any recognisable community of people originated or historically settled in a geographic area or areas located within the borders of the Republic, as such borders existed at the date of commencement of the Intellectual Property Laws Amendment Act, 2013, characterised by social, cultural and economic conditions which distinguish them from other sections of the national community, and who identify themselves and are recognised by other groups as a distinct collective'.

Appendix E.5.

Section 8(e) of IPLAA amends section 2(1) of the Trade Marks Act 194 of 1993, after the definition of 'collective trade mark', by inserting the following definition:

'community protocol means a protocol developed by an indigenous community that describes the structure of the indigenous community and it claims to indigenous cultural expressions or knowledge and indigenous terms or expressions or geographical indications, and provides procedures for prospective users of such indigenous cultural expressions or knowledge or indigenous terms or expressions or geographical indications, to seek the community's prior informed consent, negotiate mutually agreed terms and benefit-sharing agreements'.

Appendix F



A picture of a Rooibos plantation.⁵⁰²



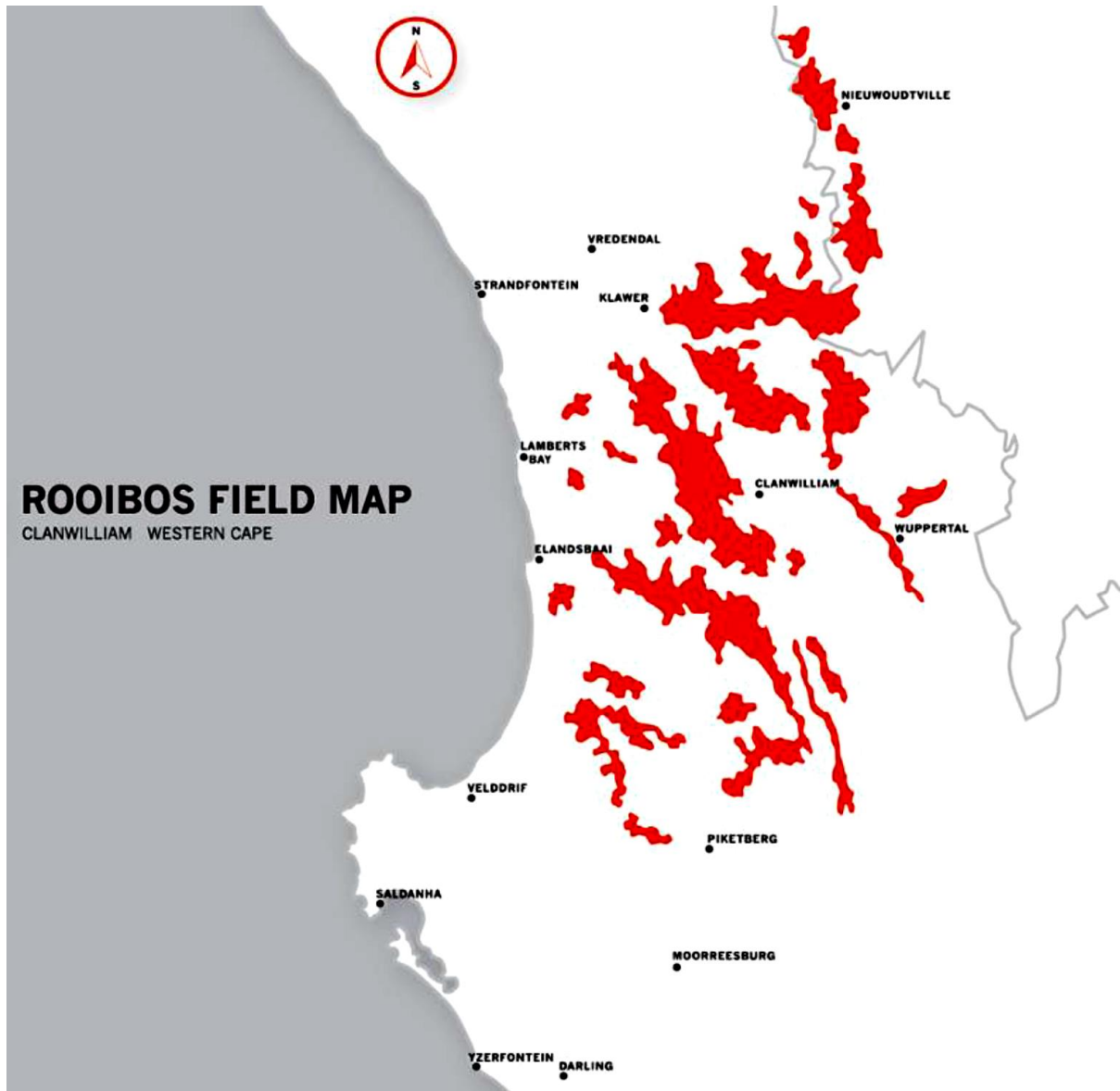
A close up picture of a Rooibos plant.⁵⁰³

⁵⁰² 'Gallery' SA Rooibos available at <https://sarooibos.co.za/photo-gallery/>, accessed on 30 October 2018.

⁵⁰³ *Ibid.*

Appendix G

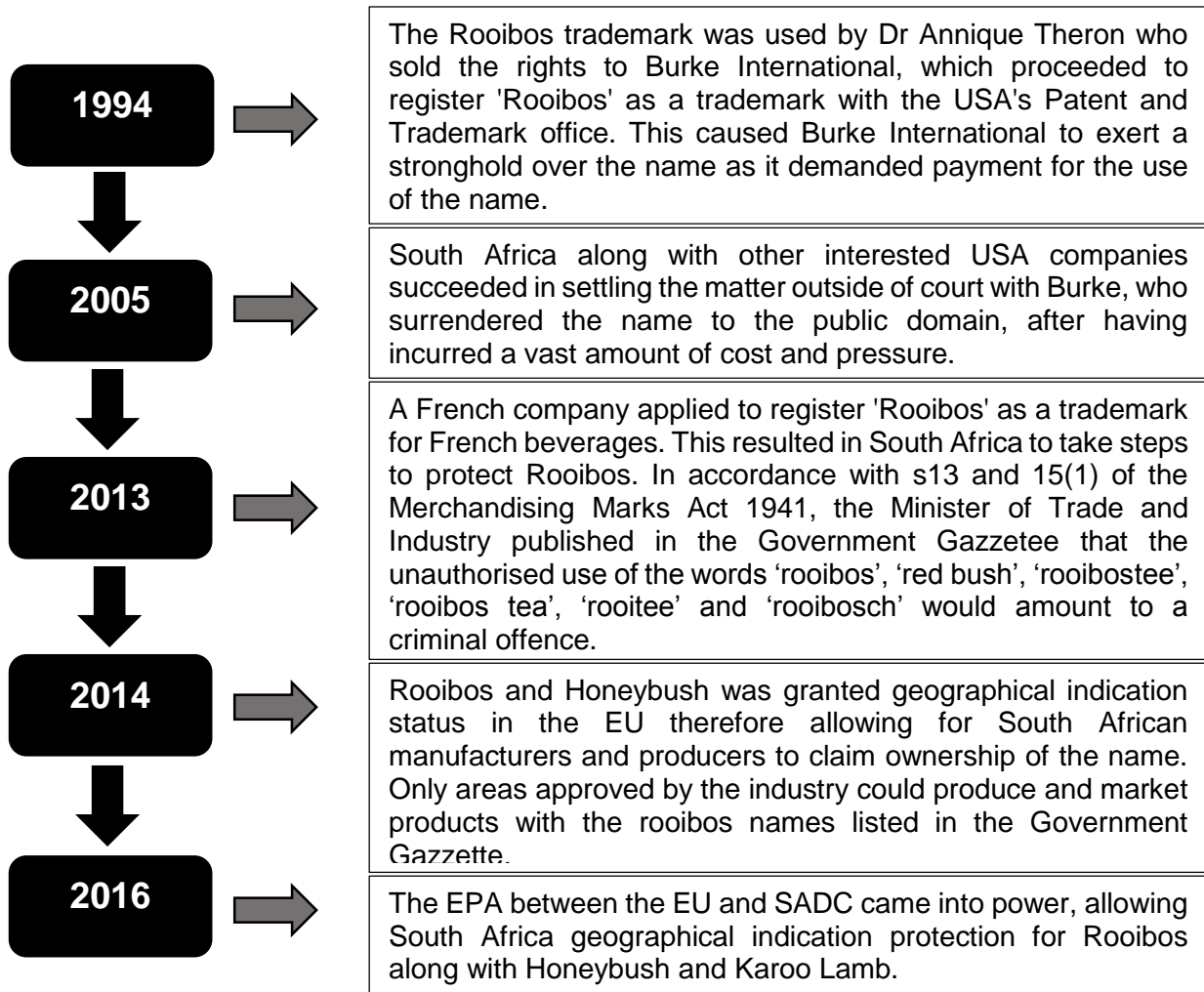
Map showing the areas of Rooibos production in the Western Cape and Northern Cape of South Africa.⁵⁰⁴



⁵⁰⁴ South African Rooibos Council 'Rooibos Industry Fact Sheet 2017' *SA Rooibos* (2017) available at <http://sarooibos.co.za/wp/wp-content/uploads/2017/11/SARC-2017-Fact-Sheet.pdf>, accessed on 30 October 2018 4.

Appendix H

Timeline of the Rooibos GI Protection Journey.⁵⁰⁵



⁵⁰⁵ 'South African IP Innovation to be presented at WIPO Congress Geneva' (4 October 2016) *Audacia* available at https://www.audacia.co.za/downloads/article_oct.pdf, accessed on 30 October 2018 2-3.

Appendix I

Table showing the volume and percentage of total Rooibos exports to certain market destinations in 2016.⁵⁰⁶

<i>Rank</i>	<i>Country</i>	<i>Volume (Kgs)</i>	<i>Percentage of total export</i>
1	Germany	1644198	25,94%
2	Japan	1399230,64	22,07%
3	Netherlands	842251,22	13,29%
4	UK	634254,6	10,01%
5	USA	554990,5	8,76%
6	Poland	153000	2,41%
7	Zimbabwe	145200	2,29%
8	Belgium	119500	1,89%
9	Australia	111564,8	1,76%
10	Sri Lanka	100041,5	1,58%

Appendix J

A picture of a flowering Honeybush plant.⁵⁰⁷



⁵⁰⁶ South African Rooibos Council 'Rooibos Industry Fact Sheet 2017' (2017) SA Rooibos available at <http://sarooibos.co.za/wp/wp-content/uploads/2017/11/SARC-2017-Fact-Sheet.pdf>, accessed on 30 October 2018 9-10.

⁵⁰⁷ 'General honeybush photos' South African Honeybush Tea Association, available at <https://www.saha.co.za/photos/general-honeybush-photos.html>, accessed on 30 October 2018.

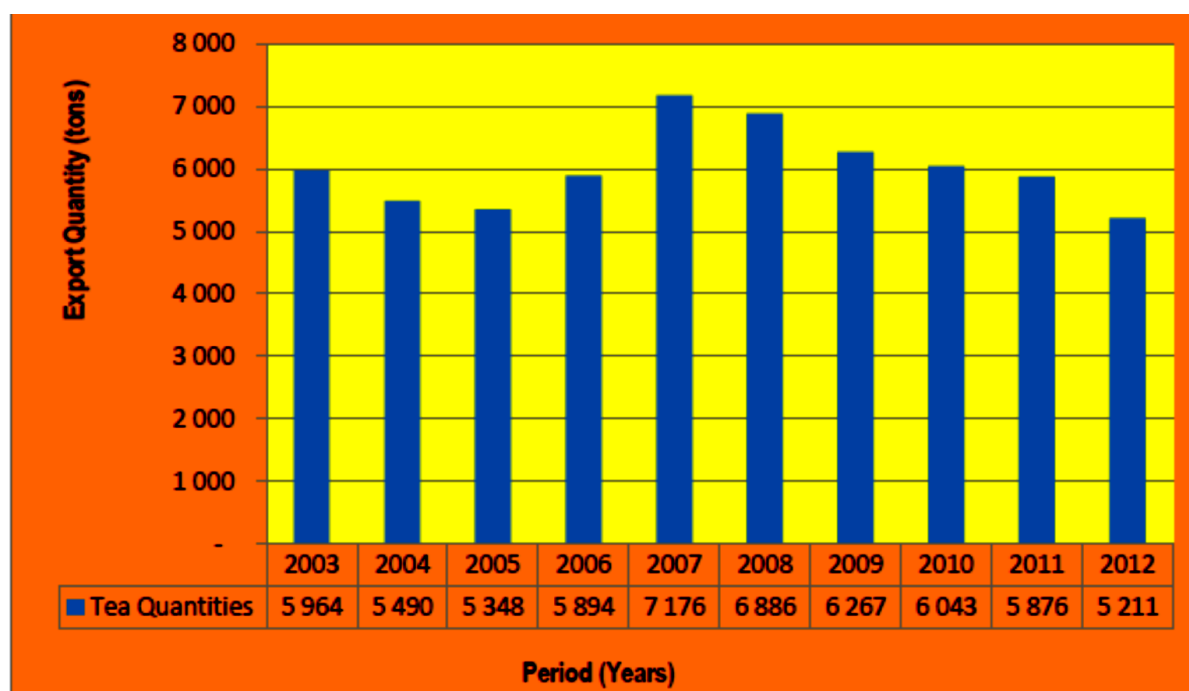
Appendix K

Table showing the top importers of Honeybush tea in 2010.⁵⁰⁸

	Country	Total (Kilograms)	Percentage
1	Germany	50.478	55.02
2	USA	17.213	18.76
3	Netherlands	14.382	15.68
4	Bulgaria	6.005	6.55
5	Canada	1000	1.09
6	UK	900	0.98
7	Malaysia	720	0.78
8	Australia	366	0.40
9	Norway	336	0.37
10	France	182	0.20
11	China	90	0.10
12	Switzerland	50	0.05
13	New Zealand	18	0.02
	Total	91 740	100.00%

Appendix L

Graph showing the exports of processed bulk Honeybush tea to the world from 2003-2012.⁵⁰⁹



⁵⁰⁸ Department of Agriculture, Forestry and Fishers, Republic of South Africa 'A Profile of the South African Honeybush Tea Market Value Chain' (2013) *Food and Agricultural Organization on the United Nations* available at <http://www.fao.org/sustainable-food-value-chains/library/details/en/c/262871/>, accessed on 30 October 2018 8.

⁵⁰⁹ *Ibid* 6. 'Export volumes of Honeybush tea from South Africa to the world declined substantially in 2012 to lower levels of about 5211 tons. The figure also indicates that there was an 11.3% decline in export volumes of Honeybush tea from South Africa to the world in 2012 as compared to 2011'.

3 September 2018

Ms Sujata Balaram 213511859
School of Law
Howard College Campus

Dear Ms Balaram

Protocol reference number: HSS/1414/018M

Project title: Enhancing South Africa's traditional knowledge trade through the extension of geographical indications under the TRIPS agreement

FULL APPROVAL – No Risk/Exemption Application

In response to your application received 2 August 2018, the Humanities & Social Sciences Research Ethics Committee has considered the abovementioned application and the protocol has been granted **FULL APPROVAL**.

Any alteration/s to the approved research protocol i.e. Questionnaire/interview Schedule, Informed Consent Form, Title of the Project, Location of the Study, Research Approach and Methods must be reviewed and approved through the amendment /modification prior to its implementation. In case you have further queries, please quote the above reference number.

PLEASE NOTE: Research data should be securely stored in the discipline/department for a period of 5 years.

The ethical clearance certificate is only valid for a period of 3 years from the date of issue. Thereafter Recertification must be applied for on an annual basis.

I take this opportunity of wishing you everything of the best with your study.

Yours faithfully



.....
Professor Shenuka Singh (Chair)
Humanities & Social Sciences Research Ethics Committee

/pm

cc Supervisor: Clydenia E Stevens
cc Academic Leader Research: Dr Shannon Bosch
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