

# Convergence of Geographical Indications and Biological Diversity and their Mutual Protection under Japanese Domestic Law in line with Japan's Role in the Global Arena

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I. BACKGROUND .....	1028
II. CURRENT ISSUES SURROUNDING GEOGRAPHICAL INDICATIONS AND BIOLOGICAL DIVERSITY .....	1033
III. CONVERGENCE OF GI AND CBD .....	1038
IV. JAPAN'S STAND ON THE IP ISSUES.....	1040
V. RECOMMENDATIONS.....	1042

## I. BACKGROUND

Geographical indications were first recognized in the 1883 Paris Convention for the Protection of Industrial Property.<sup>1</sup> Related international agreements that followed were the 1891 Madrid Agreement for the Repression of False or Deceptive Indications of Source of Goods;<sup>2</sup> 1958 Lisbon Agreement for the Protection of Appellations of Origin and their International

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*Cite as* 54 ATENEO L.J. 1028 (2010).

1. ALFREDO ILARDI & MICHAEL BLAKENEY, INTERNATIONAL ENCYCLOPAEDIA OF INTELLECTUAL PROPERTY TREATIES 70 (2004 ed.) (citing Paris Convention for the Protection of Industrial Property, Mar. 20, 1883).
2. Madrid Agreement for the Repression of False or Deceptive Indications of Source of Goods, Apr. 14, 1891.

Registration;<sup>3</sup> 1994 WTO Trade Related Aspects of Intellectual Property;<sup>4</sup> and the present 2001 Doha 4th Ministerial Declaration.<sup>5</sup>

Since the time geographical indications were first recognized, various incarnations of geographical indications have been protected. There are two main categories of geographical indications which have been the subject of international protection, they are: indications of source, referring to signs indicating that a product originates in a specific geographical region were protected in the Paris Convention and in the Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods 1891; and appellations of origin referring to a sign that indicates that a product originates in a specific geographic region only when the characteristic qualities of the product are due to the geographical environment, including natural and human factors, which are protected in the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration 1958.<sup>6</sup>

Other than the European signatories, wishing to protect their wines and spirits industries, the agreements did not attract much support. This was certainly reinforced in the TRIPS Agreement, which in Article 22 obliges signatories to legislate against misleading geographical indications,<sup>7</sup> but

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3. See STEPHEN P. LADAS, PATENTS, TRADEMARKS AND RELATED RIGHTS: NATIONAL AND INTERNATIONAL PROTECTION, 861-64 (1975).

4. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, LEGAL INSTRUMENTS — RESULTS OF THE URUGUAY ROUND vol. 31; I.L.M. 81 (1994) [hereinafter TRIPS Agreement].

5. WTO Secretariat, *Doha Ministerial Conference*, WT/MIN(01)/DEC/1 (Nov. 20, 2001) [hereinafter Doha Conference].

6. ILARDI & BLAKENEY, *supra* note 1 at 70.

7. TRIPS Agreement.

Article 22. Protection of Geographical Indications:

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

2. In respect of geographical indications, Members shall provide the legal means for interested parties to prevent:

(a) the use of any means in the designation or presentation of a good that indicates or suggests that the good in question originates in a

which in Article 23 provides for additional protection for wines and spirits, through the establishment of a multilateral registration system.<sup>8</sup> Article 24.1 of the TRIPS Agreement obliges members “to enter into negotiations aimed at increasing the protection of individual geographic indications under Article 23.”<sup>9</sup>

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geographical area other than the true place of origin in a manner which misleads the public as to the geographical origin of the good;

(b) any use which constitutes an act of unfair competition within the meaning of Article 10bis of the Paris Convention (1967).

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

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

*Id.*

8. See TRIPS Agreement, art. 23.

9. *Id.*, art. 24 provides:

Article 24. International Negotiations; Exceptions:

1. Members agree to enter into negotiations aimed at increasing the protection of individual geographical indications under Article 23. The provisions of paragraphs 4 through 8 below shall not be used by a Member to refuse to conduct negotiations or to conclude bilateral or multilateral agreements. In the context of such negotiations, Members shall be willing to consider the continued applicability of these provisions to individual geographical indications whose use was the subject of such negotiations.

2. The Council for TRIPS shall keep under review the application of the provisions of this Section; the first such review shall take place within two years of the entry into force of the WTO Agreement. Any matter affecting the compliance with the obligations under these provisions may be drawn to the attention of the Council, which, at the request of a Member, shall consult with any Member or Members in respect of such matter in respect of which it has not been possible to find a satisfactory solution through bilateral or plurilateral consultations between the Members concerned. The Council shall take such action as may be agreed to facilitate the operation and further the objectives of this Section.

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3. In implementing this Section, a Member shall not diminish the protection of geographical indications that existed in that Member immediately prior to the date of entry into force of the WTO Agreement.

4. Nothing in this Section shall require a Member to prevent continued and similar use of a particular geographical indication of another Member identifying wines or spirits in connection with goods or services by any of its nationals or domiciliaries who have used that geographical indication in a continuous manner with regard to the same or related goods or services in the territory of that Member either (a) for at least 10 years preceding 15 April 1994, or (b) in good faith preceding that date.

5. Where a trademark has been applied for or registered in good faith, or where rights to a trademark have been acquired through use in good faith either:

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

(b) before the geographical indication is protected in its country of origin;

measures adopted to implement this Section shall not prejudice eligibility for or the validity of the registration of a trademark, or the right to use a trademark, on the basis that such a trademark is identical with, or similar to, a geographical indication.

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

7. A Member may provide that any request made under this Section in connection with the use or registration of a trademark must be presented within five years after the adverse use of the protected indication has become generally known in that Member or after the date of registration of the trademark in that Member provided that the trademark has been published by that date, if such date is earlier than the date on which the adverse use became generally known in that Member, provided that the geographical indication is not used or registered in bad faith.

The 1891 Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods became the largest special union within the framework of the Paris Convention, attracting among 30 signatories.<sup>10</sup> For many countries, the Agreement did not significantly increase the level of protection for indications of source already provided under the Paris Convention and the exclusion of products of the vine from becoming generic appellations proved problematic.<sup>11</sup> By 1975, WIPO issued a draft Treaty on the Protection of Geographical Indications. The draft Treaty provided for the protection both of appellations of origin and geographical indications. Unlike the Lisbon Agreement, it did not require signatories to have domestic laws for the protection of appellations of origin.<sup>12</sup>

As for the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration 1958, it has been noted that

the main principle of the Lisbon Agreement was the signatory States undertook to protect appellations of origin that were protected 'as such' in the country of origin and registered in the international register administered by WIPO (Article 1 (2)). This meant that the Agreement was applicable only in those countries which already protected appellations of origin. Consequently, the Lisbon Agreement was signed only by a handful of countries. The Lisbon Agreement failed to attract support from more than a few nations. One problem was that accession was confined to those nations which protected appellations of origin 'as such.' Thus, states which protected this form of intellectual property under unfair competition or consumer protection laws were locked out. Also the Agreement did not make exception for geographic indications which had already become generic in member States.<sup>13</sup>

The protection of geographic indications was one of the categories of intellectual property protection, which was discussed by negotiators at the

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8. The provisions of this Section shall in no way prejudice the right of any person to use, in the course of trade, that person's name or the name of that person's predecessor in business, except where such name is used in such a manner as to mislead the public.

9. There shall be no obligation under this Agreement to protect geographical indications which are not or cease to be protected in their country of origin, or which have fallen into disuse in that country.

*Id.*

10. ILARDI & BLAKENEY, *supra* note 1 at 72.

11. *Id.*

12. *Id.* at 74.

13. *Id.* at 73.

Uruguay Round of the GATT.<sup>14</sup> The competing positions were those of the EU and Switzerland which proposed a Lisbon Agreement-style of protection and the USA, which favoured the protection of geographic indications through a certification mark system.<sup>15</sup> In the end, Section 3 of the TRIPS Agreement adopted a dual approach. A general prohibition against the use of misleading geographical indications was adopted in Article 22, and additional protection for geographical indications for wines and spirits, through a system of registration, was provided in Article 23 through a process of negotiations in the TRIPS Council, which were mandated by Article 24.<sup>16</sup>

## II. CURRENT ISSUES SURROUNDING GEOGRAPHICAL INDICATIONS AND BIOLOGICAL DIVERSITY

On 21–29 July 2008, the World Trade Organization (WTO) held a mini-ministerial meeting at Geneva, Switzerland to discuss outstanding intellectual property issues (IP Issues)<sup>17</sup> arising from TRIPS, otherwise known as the 1994 World Trade Organization Agreement on Trade — Related Aspects of Intellectual Property Rights (TRIPS)<sup>18</sup> and the 2001 Doha Declaration (Doha).<sup>19</sup> The IP issues under consideration at the ministerial were:

1. the establishment of an international register of wines and spirits' geographical indications (GI)<sup>20</sup> — product names associated with places and characteristics (GI register);
2. the possibility of extending higher level GI protection (TRIPS Article 23)<sup>21</sup> to products other than wines and spirits (GI extension); and

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14. *Id.* at 74.

15. *Id.*

16. ILARDI & BLAKENEY, *supra* note 1 at 74.

17. See WTO Secretariat, *Draft Modalities for TRIPS Related Issues*, TN/C/W/52 (July 19, 2008) [hereinafter *Doha Work Programme*].

18. TRIPS Agreement, *supra* note 4.

19. Doha Conference, *supra* note 5.

20. TRIPS Online, Geographical Indications, *available at* [http://www.wto.org/english/tratop\\_e/TRIPS\\_e/gi\\_e.htm](http://www.wto.org/english/tratop_e/TRIPS_e/gi_e.htm) (last accessed Feb. 23, 2010). TRIPS defines geographical indications: “Geographical indications are place names (in some countries also words associated with a place) used to identify the origin and quality, reputation, or other characteristics of products (for example, ‘Champagne,’ ‘Tequila,’ or ‘Roquefort’).” *Id.*

21. TRIPS Agreement.

3. a proposed amendment to the TRIPS that would bring it in line with obligations under the UN Convention on Biological Diversity (CBD),<sup>22</sup> adding a requirement for disclosure of origin in patent applications, necessity of prior informed consent of indigenous and local communities, and possibly ensuring benefit-sharing with communities to deter biopiracy (CBD amendment).<sup>23</sup>

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Article 23. Additional Protection for Geographical Indications for Wines and Spirits:

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

*Id.*

22. See Convention on Biological Diversity (CBD), June 5, 1992, 1760 U.N.T.S. 79.
23. Kaitlin Mara & William New, WTO Ministerial: TRIPS Issues May Be Tackled in Smaller Groups Seeking Compromises, *available at* <http://www.ip-watch.org/weblog/index.php?p=1168&print=1> (last accessed Feb. 23, 2010).

Nonetheless, the ministerial meeting ended with a sad note since there was a collapse in the talks. No significant breakthroughs on the IP Issues were made despite seven years of continuing dialogues between the members of the WTO after Doha in 2001. While the collapse was brought about by an alleged impasse on the issue of agricultural subsidies,<sup>24</sup> the inability of the member countries to agree on the proposals regarding the IP Issues (or in the case of the GI extension and CBD amendment, the existence of a mandate to even negotiate on such issues) was, likewise, considered to be a substantial trigger for the impasse. In fact, WTO officials opined that the WTO talks on agriculture subsidies could not go forward without the IP Issues being resolved.<sup>25</sup>

While there is no question that there is a clear mandate from Doha that the member countries should negotiate for the establishment of a multilateral system of notification and registration of GIs for wines and spirits, the member countries cannot agree on the nature and legal effect of such register. The European Union and Switzerland (EU Block)<sup>26</sup> are strongly pushing for the establishment of a mandatory and legally binding register for wines and spirits.<sup>27</sup> However, the United States (U.S.) and Japan (Opposers) opposed such proposal, contending that the register, at most, should only be voluntary and consist of mere encoding in a database for consultation purposes. Allowing the mandatory nature of the GI register would raise issues on extraterritoriality, clearly running counter to the territorial nature of trademark laws.<sup>28</sup>

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24. Lynne Beresford, *Geographical Indications: The Current Landscape*, 17 FORDHAM INTEL. PROP. MEDIA & ENT. L.J., 979, 986-7 (2007). It is posited that the reason why the EU Block is seeking the extension of GI protection to products other than wines and spirits is to compensate the possible eradication of agricultural subsidies with market subsidies in the form of additional earnings that can be earned from extended GI protection.
25. William New, Collapse of WTO Talks Washes Away Hope for TRIPS Changes, available at <http://www.ip-watch.org/weblog/index.php?p=1181&print=1> (last accessed Feb. 23, 2010).
26. Kaitlin Mara, Reports on WTO IP Negotiations Released, available at <http://www.ipwatch.org/weblog/index.php?p=1085&print=1> (last accessed Feb. 23, 2010). It is worth stressing that more than 100 of the WTO's 153 members backed the proposal of the EU Block regarding the IP Issues.
27. ILARDI & BLAKENEY, *supra* note 1 at 74.
28. William New, Members Seek to Raise TRIPS Amendments in WTO Negotiations, available at <http://www.ip-watch.org/weblog/index.php?p=859&print=1> (last accessed Feb. 23, 2010).



But the more controversial issues are the GI extension and CBD Amendment. The EU Block interprets Article 23.4 of TRIPS as allowing the extension of the higher protection accorded to wines and spirits to other products such as coffee, cheese, tea, ham, and chocolate.<sup>29</sup> The EU Block

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29. GRAHAM DUTFIELD, *INTELLECTUAL PROPERTY RIGHTS, TRADE AND BIODIVERSITY* 85-6 (2000).

Under French law, there is the Appellation d'Origine contrôlée (AOC) that governs geographical indicators. As for EU law, there are different classes of GIs, such as Protected Geographical Indications and Protected Designation of Origin, which is further subdivided into Protected Designation of Origin (PDO); Protected Geographical Indication (PGI); and Traditional Speciality Guaranteed (TSG). The urge by the EU Block to extend the protection to products other than wines and spirits can be attributed to the fact that the European Continent is known to have numerous products associated with its rich culture and long existing history, thus, it is the "old culture" as opposed to the "new culture" of U.S. and Japan.

Appellation of origin was originally a French system for regulating geographical indications. It applied to products considered to be distinctive due to a combination of traditional know-how and highly localized natural conditions. The system evolved in that country in response to problems of illegal labelling and over production. A government agency validates Appellation d'Origine contrôlée (registered designations of origin), so that producers of wines, cheeses, and other foodstuffs, whose goods are renowned for their distinctive qualities and geographic origins, are protected from those who would undermine or exploit their good reputation by making similar, but false, claims. For example, wines from the Champagne region of France are protected this way; local producers acting collectively have prevented the use of the word 'Champagne' on bottles of perfume, English wine, and German shampoo. However, some other wine-producing countries do not accept the necessity for an appellations system. In the U.S., it is considered allowable under certain circumstances to use a French appellation preceded by the origin of the wine (e.g. Californian Chablis).

In July 1992, the European Community adopted a resolution on the protection of geographical indications and designations of origin for agricultural products and foodstuffs other than wines and spirits. The European Commission's register of geographical indications and designations includes those from EC member countries. According to Schwab (1995), the aim is 'to encourage the diversification of agricultural production and promote products having certain characteristics to the benefit of the rural economy.' Adoption of such regulations implies acceptance of what Moran calls 'the underlying philosophy of the distinctiveness of local and regional products and

alleged that such extension should be done since there should be no discrimination between alcohol products and non-alcohol products.<sup>30</sup> However, the Opposers contend that there is no clear mandate to negotiate, whether from TRIPS or Doha, the possibility for an extension of the GI protection for wines and spirits to be applied to other products.<sup>31</sup>

Opposers also contend that there is no clear mandate to negotiate under TRIPS or Doha for the CBD Amendment and refused to discuss the issue in the last ministerial meeting.<sup>32</sup> While at first glance the CBD Amendment should be a separate and unrelated issue, it has become intertwined with the issues concerning GI, since the countries pushing for the CBD Amendment, such as Brazil, India, and Peru (CBD Countries),<sup>33</sup> have agreed to support

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some of the assumptions that underlie these arguments.' Thus, 'globalisation of such artisanally-based principles counters the standardisation of products which is normally considered the outcome of the internalisation of the agro-food industries [and] assists small family firms to resist the industrialization and corporatisation of production.' It is interesting to consider whether this type of intellectual property right could be used to resolve a recent controversy, the Basmati rice case.

A model law developed in 1985 by the UN Educational, Scientific and Cultural Organization (UNESCO) and WIPO is somewhat relevant. In Section 6 of the Model Provisions for National Laws on Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions, 'prejudicial actions' include failure to indicate the ethnic and geographic source of an expression of folklore in printed publications and other communications to the public, and deliberately deceiving the public about the ethnic source of a production. Although not explicitly stated in the document, a law to implement the model provisions could include traditional cultivars as 'expressions of folklore' to be protected if national lawmaking bodies felt it desirable to protect such resources.

*Id.*

30. Council Regulation 510/2006 on Protection of Geographical Indications and Designations of Origin for Agricultural Products and Foodstuffs, 2006 O.J. (L 93) 12-25.
31. MICHAEL BLAKENEY, INTELLECTUAL PROPERTY HARMONIZATION WITHIN ASEAN AND APEC 14 (2004).
32. Kaitlin Mara, US Will Not Negotiate on Extension of Geographical Indications at WTO, *available at* <http://www.ip-watch.org/weblog/index.php?p=1165&print=1> (last accessed Feb. 23, 2010).
33. Doha Work Programme, *supra* note 17. Other countries supporting the CBD amendment are China, Columbia, Cuba, Pakistan, Thailand, and Tanzania.

the EU Block's campaign for the mandatory GI register and GI extension in exchange for the EU Block's support for CBD Amendment.<sup>34</sup> Another major reason why the CBD Countries are strongly pushing for the CBD Amendment is the perception that TRIPS is binding on the member countries engaged in the trade negotiations, while CBD, being neither intellectual property nor trade related, has no legally binding effect on the member countries of TRIPS.<sup>35</sup>

### III. CONVERGENCE OF GI AND CBD

Another possible area for GI and CBD to converge are suggestions that violations of the CBD can actually be considered as cases of infringement of geographical indications,<sup>36</sup> as seen in the case involving the *Cupuaçu* fruit.<sup>37</sup>

In the *Cupuaçu* case,<sup>38</sup> Asahi Foods filed and registered the name *Cupuaçu* as a brand name for an edible oil product under Class 29. *Cupuaçu* is a known biological ingredient that is used to make butter and edible oil in Brazil. In cancelling the registration of Asahi Foods, the Japanese Patent Office ruled that *Cupuaçu* is a generic term and cannot be exclusively appropriated by any person or entity. Further, in the event that Asahi Foods does not actually use *Cupuaçu* as its main ingredient for its edible oil product and uses other sources, consumers would be misled into thinking that the product *Cupuaçu* would automatically contain the raw ingredient *Cupuaçu*.

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34. William New, WTO Members Continue Debate on Geographical Indications Register, *available at* <http://www.ip-watch.org/weblog/index.php?p=874&print=1> (last accessed Feb. 23, 2010).

35. Kaitlin Mara & William New, Norway Chairs As Europe Replies GIs A WTO 'Must', *available at* <http://www.ip-watch.org/weblog/index.php?p=1167&print=1> (last accessed Feb. 23, 2010).

36. Tove Gerhardsen, Brazil Fights to Make Case for International Biodiversity Protection, *available at* <http://www.ip-watch.org/weblog/index.php?p=322&print=1> (last accessed Feb. 23, 2010).

37. *See* Michael Shmidlehner, *Cupuaçu — A Case of Amazonian Self-Assertion*, *available at* <http://www.grain.org/seedling/?id=234> (last accessed Feb. 23, 2010), and other related articles. A challenge has been submitted against the Japanese trademark number 4126269 *Cupuaçu*, of Asahi Foods, at the Japanese Patent Office. On Mar. 1, 2004, the Japanese Patent Office cancelled the trademark. This case has been considered as a biopiracy case by advocates of the protection of Amazon's biological diversity.

38. *Id.*

Examining the *Cupuaçu* case, the author is of the view that protection of traditional knowledge and biological diversity<sup>39</sup> can actually be made through GIs. While there is no argument that biopiracy and misappropriation of traditional knowledge is a global problem and an amendment of TRIPS for the mandate for disclosure is the direct remedy for this problem,<sup>40</sup> the prevailing deadlock on the agricultural subsidy issue among the member countries will definitely stall any possible immediate agreement on disclosure. Since there is already a clear mandate to negotiate on the establishment of a GI registry, it can be predicted that a resolution on the GI issue would be made before the disclosure issue regarding CBD. Thus, for the interval when the CBD Amendment issue has not been resolved, the author proposes that biopiracy violations be curbed with available protection under the GI system.

In the event there is an international registry of GIs and that the protection extends beyond wines and spirits, an incident like *Cupuaçu* will not have taken place. The Japan Patent Office would have a copy of the list and would have known that *Cupuaçu* is actually the generic name of a fruit plant in the Amazon forest and thus, not susceptible for exclusive appropriation as a trademark.

Aside from the *Cupuaçu* case, Japan should have other reasons to call for stronger protection of its own GIs. In 2008, there were reported incidents of Chinese firms illegally using Japanese sake brand names for Chinese wines.<sup>41</sup> Famous trademarks belonging to Japanese sake and shochu brewers have been registered or are in the process of being registered in China by Chinese firms and individuals without the consent of the genuine brewers. Sake and shochu brewers are usually regional in origin, such as *Koshino Kanbai* from Niigata prefecture, *Nanbu Bijin* from Iwate prefecture and *Sakura Masamune* from Hyogo prefecture. Again, if there were an existing international registry of GIs, the Chinese firms would be barred to register the Japanese sake brand names in the first place.

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39. Convention of Biological Diversity, *supra* note 22, arts. 8 (j) & 10 (c).

40. Kaitlin Mara, Lamy Restarts Informal WTO Process on Proposals on IP and Biodiversity, GI Extension, *available at* <http://www.ip-watch.org/weblog/2009/03/12/lamy-restarts-informal-wto-process-on-proposals-on-ip-and-biodiversity-gi-extension/> (last accessed Feb. 23, 2010).

41. The Yomiuri Shimbun, Chinese Firms Plundering Japanese Sake Brand Names, *available at* <http://www.asianewsnet.net/news.php?id=2908&sec=2> (last accessed Feb. 23, 2010).

More importantly, an interesting viewpoint was held by Graham Dutfield.<sup>42</sup> Dutfield was of the view that “although so far the use of geographical indications has been confined mainly to certain beverages and foodstuffs, the principles of geographical indications could guide laws to protect certain traditional know-how and help to maintain the economic value of locally produced goods including herbal formulations.”<sup>43</sup>

#### IV. JAPAN’S STAND ON THE IP ISSUES

With the current impasse, there is now a big cloud of uncertainty over the future of the IP Issues. Failure to complete the agenda mandated by Doha this time could cause a delay in the implementation of any agreements as far as 2020. As long as the venue is the WTO, it seems the movement on the IP Issues would depend on the progress on the main issues of agricultural and non-agricultural market access. However, pursuant to the *single undertaking rule*,<sup>44</sup> the main issues on agriculture cannot proceed without an agreement being reached on the IP Issues.

Nonetheless, it is quite surprising (and interesting) to see that Japan, despite having an agricultural sector and having its share of products, whether in the nature of wines, spirits, or otherwise, that corresponds to a specific geographical location or origin within the country, has shown a firm unwillingness to consider any of the IP Issues together with the U.S. for the past seven years. Japan has been one of the countries which pushed the developing countries for the earlier implementation of TRIPS, contending that the current level of protection for IPRs provided by TRIPS should not be reduced and TRIPS should be improved, properly in line with new technological development and social needs.<sup>45</sup> Whether it is a matter of state policy, reservations on the possible cost repercussions, administrative burdens

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42. GRAHAM DUTFIELD, *INTELLECTUAL PROPERTY RIGHTS, TRADE AND BIODIVERSITY* (2000).

43. *Id.* at 85 (citing Laurence Berard & Philippe Marchenay, et al., *Tradition, Regulation, and Intellectual Property: Local Agricultural Products and Foodstuffs in France*, in *VALUING LOCAL KNOWLEDGE: INDIGENOUS PEOPLES AND INTELLECTUAL PROPERTY RIGHTS* 230 (Stephen B. Brush & Doreen Stabinsky, eds., 1996)).

44. Robert Wolfe, *The WTO Single Undertaking as Negotiating Technique and Constitutive Metaphor*, available at <http://jiel.oxfordjournals.org/cgi/content/abstract/jgp038v1> (last accessed Jan. 31, 2010). The *single undertaking rule* provides: “[N]othing is agreed until everything is agreed. Negotiations in the World Trade Organization (WTO) proceed simultaneously, not sequentially, and all Members must accept all the results.” *Id.*

45. BLAKENEY, *supra* note 31, at 13.

of disputes, and/or the establishment of the multilateral register, it has never been clear to the author what Japan's viewpoint on the IP Issues really is on the international level. Is it primarily because if Japan agreed to the GI register and extension, it would have no choice but to agree to the CBD Amendment? Does Japan stand to benefit given the unresolved status of the trade negotiations which centered on the IP Issues? Are the IP Issues simply the concern of *developing countries* only? Is it a matter between old culture versus new culture? While Japan's disinterest in the CBD Amendment can be attributed to the fact that Japan, as compared to Brazil, India, and Peru, has fewer genetic resources and traditional knowledge that would require imminent protection, it seems Japan does have a sufficient number of products with tremendous potential as GIs, considering Japan's rich heritage of products that are often more than just economic commodities and reflect the heritage, tradition, and culture of a place or region in Japan. Or are the number of GIs in Japan not that many that would require Japan to prioritize it during the WTO negotiations?

It cannot be denied that Japan has an existing system where GIs can be protected on the national level. GIs are protected in Japan through a combination of existing laws within the trademark system and related laws rather than through a separate *sui generis* system of protection under TRIPS. Such laws, among others, include the JAS Law<sup>46</sup> and the Trademark Law.<sup>47</sup> More importantly, Japan has a new law in 2006 concerning Regionally Based Collective Marks.<sup>48</sup> However, do these laws adequately protect GIs of Japan?

Japan was one of the signatory countries to the CBD while U.S. never signed the convention.<sup>49</sup> Therefore, it is now a question whether Japan is actually bound to support the move of the CBD Countries and work towards the strengthening of the protection over genetic resources and biodiversity by amending TRIPS in line with CBD.

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46. JAS Law (Law No. 175 in 1950 as amended) or the Law Concerning Standardization and Proper Labeling of Agricultural and Forestry Products.

47. Japanese Trademark Law (as amended) of 1959.

48. Dev Gangjee, Protecting Geographical Indications as Collective Trademarks: The Prospects and Pitfalls, *available at* [http://www.iip.or.jp/e/e\\_summary/pdf/detail2005/e17\\_14.pdf](http://www.iip.or.jp/e/e_summary/pdf/detail2005/e17_14.pdf) (last accessed Feb. 23, 2010).

49. *See* Center for Biological Diversity, The United States and the Convention of Biological Diversity, *available at* [http://www.defenders.org/resources/publications/programs\\_and\\_policy/international\\_conservation/the\\_u.s.\\_and\\_the\\_convention\\_on\\_biological\\_diversity.pdf](http://www.defenders.org/resources/publications/programs_and_policy/international_conservation/the_u.s._and_the_convention_on_biological_diversity.pdf) (last accessed Feb. 23, 2010).

## V. RECOMMENDATIONS

Considering the foregoing reasons, it is proposed that more in-depth research should be made and conducted on what are the possible reasons for Japan's continuing reluctance and absence of desire to agree to the IP Issues. Also, whether it is indeed beneficial and in the best interest of Japan in the long run to continue to oppose the IP Issues and the potential implications and ramifications on Japan for its refusal. Further, there should be an examination of the connection between GIs and the CBD and the interplay between these two issues so much so that violations of the CBD can actually be considered as infringement of GIs and therefore, subject to protection under Japanese domestic law for GIs. Possible consequences on Japan should likewise be examined if it has to accept and agree on the CBD Amendment together with the GI register and GI extension, given the single undertaking and horizontal process rule of the WTO. Lastly, alternative options for the IP Issues should be explored, such as bilateral talks or WIPO negotiations, and recommend the best alternative option for Japan.

It is noted that there is significantly scarce research material or papers regarding the possible connection of GI and CBD issues and the mutual influence of both issues on one another's successful acceptance by all of the signatories to the TRIPS. The key literature used by the author for the preparation of this Essay did not contain an extensive discussion on the possible connection of GI with CBD and how the protection of these two intellectual property rights can actually result in the protection of one another. Considering that both are regarded as new intellectual property rights, and are the most important current issues in the IP field which are stalling the successful negotiations in WTO, it is but fitting that a study should be made on both subjects. Moreover, the case involving the *Cupuaçu* fruit shows that violation of GI or CBD can possibly result in the violation of the other. The author sees the need to explore this angle in depth further under international law and Japanese law perspectives.

In the same way, research on this topic would have a practical usage for the Philippines considering that the Philippines also opposes the IP Issues with U.S. and Japan.<sup>50</sup> Thus, any findings in relation to this research would shed light on the situation of the Philippines and its intellectual property system vis-à-vis GIs and the CBD as well.

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50. See Council for Trade-Related Aspects of Intellectual Property Rights, *Proposal for a Multilateral System for Notification and Registration of Geographical Indications for Wines and Spirits Based on Article 23.4 of the TRIPS Agreement*, TN/IP/W/5 (Oct. 23, 2002). Other countries that oppose the IP issues are Australia, Argentina, Canada, Chile, and New Zealand.

The author is of the view that Japan will benefit in the long term by accepting the EU proposal on GIs and supporting the Developing Countries' campaign for the amendment of TRIPS in line with the CBD. While Japan seeks to protect GIs under its domestic laws, Japan should realize that it should likewise support a mechanism that will protect its GIs outside Japan and includes more than wines and spirits.

As for the CBD, unlike U.S. which was not a signatory to the said convention, Japan is a signatory and is therefore mandated to observe and comply with the covenants of the convention. Japan would not want to have the reputation of promoting biopiracy and, thus, might agree to the amendment of TRIPS to make it in concordance with the CBD. Such action would be consistent with Japan's policy in furthering the advancement of intellectual property rights in line with current pressing world issues such as biodiversity, genetic resources, and traditional knowledge.

Lastly, Japan has to realize that its domestic laws for GIs cannot always address violations in relation to the CBD. Thus, Japan would need to enact a special legislation on GI and biodiversity entitled to *sui generis* protection and an amendment to TRIPS shall be required for the enactment of such special legislation.