

## LEGAL PROTECTION OF SHWEBO THANAKHA IN MYANMAR

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### Abstract

Intellectual Property refers to creations of human mind and it comprises two main branches: copyright and industrial property. Industrial property includes patents, industrial designs, trademarks, service marks, collective marks, commercial name and geographical indications. Geographical indications shall be the indication that identifies certain goods as goods originating from the territory of specific country, region or a locality with such territory, where specific quality, reputation or other characteristics of the goods can be essentially attributed to their geographical origin. Legal Protection of Geographical indications (GI) enables those who have the right to use the indication to take measures against other who use it without permission and benefit from its reputation. Geographical indications of protection treaties are the Paris Convention for the Protection of Intellectual Property, 1883, the Convention Establishing the World Intellectual Property Organization (WIPO), 1995 and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), 1994, Madrid Agreement, 1891, and Lisbon Agreement (1958). Thanakha would be incomplete to leave out Shwebo whose indigenous Thanakha is said to be the best known for its superior quality. According to “Myanmar Thanakha” by U Tha Hla, Thanakha from Theinkataw region about two miles downstream of Sihataw pagoda on the western bank of Ayeyawady River in Khin U Township, Shwebo District was offered to the court on a regular basis during the region of King U Aung Zeya, the founder of the third Myanmar Kingdom and the court recognized it as the best Thanakha suited for the court to use. However, Theinkataw Thanakha is now on the verge of extinction. Therefore, Geographical indications should be enacted as a separate law. Myanmar should get Geographical Indication right in Shwebo Thanakha as a local product of Shwebo Township in accordance with the Conventions and Myanmar Domestic Laws.

**Keywords:** Appellations of Origin, Quality, Reputation and Characteristic of the Shwebo Thanakha, the Paris Convention, WIPO, TRIPs, Lisbon, Madrid.

### Introduction

The term “Intellectual Property” refers to all categories of intellectual property namely; Copyright and Related Rights, Trademarks, Geographical Indications, Industrial Designs, Patents, Layout-designs of Integrated Circuits and Protection of Undisclosed Information.

The use of geographical indications is an important method of indicating the origin of goods and services. One of the aims of their use is to promote commerce by informing the customer of the origin of the products. They can be used for industrial and agricultural products.

There are three major conditions for the recognition of a sign as a geographical indication:

- it must relate to a goods (although in some countries services are also included, for example in Azerbaijan, Bahrain, Croatia, Jamaica, Saint Lucia, Singapore and others);
- these goods must originate from a defined area;
- the goods must have qualities, reputations or other characteristics which are clearly linked to the geographical origin of goods.<sup>4</sup>

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<sup>4</sup> Geographical indications and TRIPs: 10 Years Later... A roadmap for EU GI holders to get protection in other WTO Members, p5.

Geographical indications (GI) are signs (most usually proper names) which identify a goods as originating in the territory of a particular country, or a region or locality in that country, where a given quality, reputation or other characteristic of the goods is essentially attributable to its geographical origin. It is a separate type of intellectual property.

Articles 22(1) of the Trade-Related Aspects of Intellectual Property Rights, Geographical Indications (GI) are protected under the Trade-Related Aspects of Intellectual Property Rights (TRIPs) Agreement as an intellectual property right under the jurisdiction of the World Trade Organization (WTO). “Geographical Indication” encompasses many concepts, including, but not limited to, “indications of source” and “appellations of origin”. As defined by TRIPs, “geographical indications are indications which identify goods as originating in a territory or a region or locality in that territory, where a given quality, reputation or other characteristic of the goods is essentially attributable to its geographical origin.”

Geographical indications are place names (in some countries also words associated with a place) used to identify products that come from these places and have these characteristics (for example, “Champagne”, “Tequila”, or “Roquefort”).<sup>1</sup>

### **Legal Framework of International Law**

The first efforts to adopt a common approach to intellectual property resulted in the Paris Convention on the Protection of Intellectual Property which was adopted in 1883. The Convention concerned all aspects of intellectual property and not just geographical indications.

#### **Paris Convention for the Protection of Intellectual Property, 1883**

**The Paris Convention** was the first multilateral agreement, which included “indications of source or appellations of origin” as objects of protection.

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

The Paris Convention identifies geographical indications as a separate intellectual property right, but does not clearly define this concept.

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

Article 10 (b) of the Paris Convention,

- (1) The countries of the Union are bound to assure to nationals of such countries effective protection against unfair competition.
- (2) Any act of competition contrary to honest practices in industrial or commercial matters constitutes an act of unfair competition.
- (3) The following in particular shall be prohibited:

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<sup>1</sup> <https://www.wto.org>.

1. all acts of such a nature as to create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities, of a competitor;
2. false allegations in the course of trade of such a nature as to discredit the establishment, the goods, or the industrial or commercial activities, of a competitor;
3. indications or allegations the use of which in the course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods.

The Paris Convention does mention appellations of origin expressly. However, they are covered by the term “indications of source” as all appellations of origin are considered to be indications of the source of goods.

Article 11bis of the Convention gives the basis for protection against misleading indications of source, including appellations of origin. It obliges members to provide protection against unfair competition and contains a non-exhaustive list of acts, which are to be prohibited. The Paris Convention does not provide for any special remedies against infringement of this provision.

Paris Convention in Article 19 allows the parties “to make ... between themselves special agreements for the protection of industrial property”. Two such agreements of relevance to GIs were duly made. These are the 1891 Madrid Agreement and the 1958 Lisbon Agreement.<sup>1</sup>

### **Madrid Agreement Concerning the International Registration of Marks, 1891**

In some countries geographical indications could be only protected as trademarks. Therefore, the Madrid system for the International Registration of Marks as collective marks, certification marks or guarantee marks is of relevance to the protection of Geographical indications.

#### **Madrid Agreement on Indications of Source**

The Madrid Agreement for the Repression of False or Deceptive Indications of Source of Goods is specific to indications of source.

Article 1(1) of the Madrid Agreement provides that: "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."

The Madrid Agreement was the first multilateral agreement to provide specific rules for the repression of false and deceptive indications of source.

Nationals of countries not having acceded to this Agreement who, within the territory of the Special Union constituted by the said Agreement, satisfy the conditions specified in Article 3 of the Paris Convention for the Protection of Industrial Property shall be treated in the same manner as nationals of the contracting countries.<sup>2</sup>

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<sup>1</sup> Lisbon Agreement for the Protection of Appellation of Origin and their International registration, 31 October, 1958.

<sup>2</sup> Article 2 of the Madrid Agreement Concerning the International Registration of Marks, 1891.

Article 3 (1) of the Madrid Agreement concerning The International Registration Of Marks, 1891 state that, every application for international registration must be presented on the form prescribed by the Regulations; the Office of the country of origin of the mark shall certify that the particulars appearing in such application correspond to the particulars in the national register, and shall mention the dates and numbers of the filing and registration of the mark in the country of origin and also the date of the application for international registration.

(2) The applicant must indicate the goods or services in respect of which protection of the mark is claimed and also, if possible, the corresponding class or classes according to the classification established by the Nice Agreement concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks. If the applicant does not give such indication, the International Bureau shall classify the goods or services in the appropriate classes of the said classification. The indication of classes given by the applicant shall be subject to control by the International Bureau, which shall exercise the said control in association with the national Office. In the event of disagreement between the national Office and the International Bureau, the opinion of the latter shall prevail.

(3) If the applicant claims color as a distinctive feature of his mark, he shall be required: 1. to state the fact, and to file with his application a notice specifying the color or the combination of colors claimed; 2. to append to his application copies in color of the said mark, which shall be attached to the notification given by the International Bureau. The number of such copies shall be fixed by the Regulations.

(4) The International Bureau shall register immediately the marks filed in accordance with Article 1. The registration shall bear the date of the application for international registration in the country of origin, provided that the application has been received by the International Bureau within a period of two months from that date. If the application has not been received within that period, the International Bureau shall record it as at the date on which it received the said application. The International Bureau shall notify such registration without delay to the Offices concerned. Registered marks shall be published in a periodical journal issued by the International Bureau, on the basis of the particulars contained in the application for registration. In the case of marks comprising a figurative element or a special form of writing, the Regulations shall determine whether a printing block must be supplied by the applicant.

(5) With a view to the publicity to be given in the contracting countries to registered marks, each Office shall receive from the International Bureau a number of copies of the said publication free of charge and a number of copies at a reduced price, in proportion to the number of units mentioned in Article 16(4)(a) of the Paris Convention for the Protection of Industrial Property, under the conditions fixed by the Regulations. Such publicity shall be deemed in all the contracting countries to be sufficient, and no other publicity may be required of the applicant.

Any contracting country may, at any time, notify the Director General of the Organization (hereinafter designated as "the Director General") in writing that the protection resulting from the international registration shall extend to that country only at the express request of the proprietor of the mark.<sup>1</sup> Such notification shall not take effect until six months

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<sup>1</sup> Article 3bis (1) of the Madrid Agreement Concerning The International Registration Of Marks, 1891.

after the date of the communication thereof by the Director General to the other contracting countries.<sup>1</sup>

Article 4(1) of the Madrid Agreement Concerning The International Registration Of Marks, 1891 state that, From the date of the registration so effected at the International Bureau in accordance with the provisions of Articles 3 and 3ter, the protection of the mark in each of the contracting countries concerned shall be the same as if the mark had been filed therein direct. The indication of classes of goods or services provided for in Article 3 shall not bind the contracting countries with regard to the determination of the scope of the protection of the mark.

(2) Every mark which has been the subject of an international registration shall enjoy the right of priority provided for by Article 4 of the Paris Convention for the Protection of Industrial Property, without requiring compliance with the formalities prescribed in Section D of that Article

The Madrid Agreement did not add much to the protection already given by the Paris Convention, but it extended protection to deceptive indications of source in addition to false indications. A deceptive indication of source can be the true name of the place where the goods originates from, but nevertheless confusing the purchaser in respect to the true origin and quality of the goods.

### **Lisbon Agreement for the Protection of Appellation of Origin and their International Registration, 1958**

The Lisbon Agreement provides for the protection of appellations of origin, that is, 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 geographic environment, including natural and human factors”.<sup>2</sup>

#### **Appellations of origin**

Article 2(1) of the Lisbon Agreement, Appellations of origin is protected under the Lisbon Agreement for the Protection of Appellations of Origin through registration under the jurisdiction of the World Intellectual Property Organization (WIPO). Appellation of origin means “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”.

Article 2(2) of the Lisbon Agreement, furthermore, “the country of origin is the country whose name or the country in which is situated the region or locality whose name constitutes the appellation of origin which has given the product its reputation”

Geographical Indication generally protects agricultural products, foodstuffs, wines and spirits, handicrafts, and industrial products. A Geographical Indication is not a trademark with geographical significance, such as NORTH POLE for Bananas or HYDE PARK for men’s suits, nor is it a generic term such as Swiss cheese.

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<sup>1</sup> Article 3bis (2), Ibid.

<sup>2</sup> Article 2 of the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration, 1958.

Basically, a geographical indication is a notice stating that a given product originates in a given geographical area. The best known examples of geographical indications are those used for Wines and spirits. For instance, the geographical indication Champagne is used to indicate that a special kind of sparkling Wine originates in the Champagne region of France. In the same way, Cognac is used for brandy from the French around the town of Cognac, also tobacco from Cuba, cheeses from Roquefort. They may also be used for industrial products, as Sheffield is for steel.

An appellation of origin is a special kind of geographical indication generally consisting of a geographical name or a traditional designation used on products which have a specific quality or characteristics that are essentially due to the geographical environment in which they are produced. Example for protected appellations of origin are “Bordeaux” for wine, “Noix de Grenoble” for nuts, “Tequila” for spirit drinks, or “Jaffa” for oranges. Consumers are familiar with these products and often request them even unknowingly using their geographical name. The Following examples may ring a bell.

One such appellation of origin is Prociutto di Parma or Parma ham. For ham to receive the Parma name, it must be produced in the province of Parma – in the Emilia – Romagna region of north – central Italy using exclusively pigs from that area. Each step in production, from the breeding of the pigs and their diet through processing to the final packaging, is closely monitored and controlled by the Instituto Parma Qualita. Only the Instituto can be brand the finished ham with the seal of Parma’s five-pointed ducal crown, qualifying the ham as true Parma ham.<sup>1</sup>

In addition, Thailand the geographical indication obtained is tamarind fruit, rice, silk, etc.,. Similarly, Indonesia got the white papper, Amen Bali Salt, Flores Bajawa Arabica Coffee, and so on. Malaysia achieved ginger, Sarawak pepper, Doi Chaang Coffee, etc....

Appellations of the origin are specific types of geographical indication. A geographical indication is a notice stating that a given product comes from a particular area. For example, the expression “Made in Japan” is a geographical indication. An appellation of origin is a more precise indication which qualities are due essentially or exclusively to its place of origin. Their products are special qualities to the place that they come from. This is very common with agricultural products such as Roquefort cheese. All appellation of origin are geographical indication but not all geographical indications are appellations of origin.

### **Trade-Related Aspects of Intellectual Property Rights Agreement, 1994**

The essential elements of the standards concerning the availability, scope and use of rights involving geographical indications include the following:<sup>2</sup>

As a general rule;

- Members must provide the legal means for interested parties to prevent the use of indications that misleadingly indicates or suggests that goods originate in a geographical area other than the true place of origin.
- Members shall refuse or invalidate the registration of a trademark which consists of a misleading indication, and provide means to prevent any use which constitutes an act of unfair competition within the meaning of Article 10bis of the Paris Convention, 1883.

<sup>1</sup> [https://www.wto.int/Famous\\_appellation\\_of\\_origin](https://www.wto.int/Famous_appellation_of_origin).

<sup>2</sup> Section 3 (Article 22 to 24) of TRIPS Agreement, 1994.

- Protection shall be applicable against a geographical indication which is literally true but misleading and in the case of wines or spirits, 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’, or ‘style’, ‘imitation’ or the like.
- Protection is not required in respect of a geographical indication of another Member which is identical with the common name for goods or services, or, for products of the vine, which is identical with the customary name of a grape variety existing in the territory of that Member as of the date of entry force of the WTO Agreement.
- There is no obligation 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.
- Guidelines are provided for additional protection for geographical indications for wines and spirits, including concurrent protection of homonymous geographical indications for wines, certain exceptions to substantive rights such as prior rights and the right to use personal names, and time limits for registration in certain cases.

Article 22 of the TRIPs Agreement provides a definition of geographical indications. They are: “geographical indication are indications which identify a goods 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 goods is essentially attributable to its geographical origin”.

### **Protection of Geographical Indications**

Originally, Geographical Indications were protected in accordance with national laws developed locally. As the law was national it was limited in effect to the state territory. It became quickly apparent, once commerce expanded in the 19th century, that national protection was not sufficient as products were often imitated outside of the country of origin. Therefore, international cooperation was required to ensure that Geographical Indications were also protected internationally and that there was mutual reciprocity in the level of protection between states.

In accordance with the territoriality principle, and in line with Article 1(1) of TRIPs that stresses that “members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice”, various countries and regions have adopted a variety of mechanisms for the protection of geographical indications, including *sui generis* registries, single-purpose laws, collective marks, and certification marks. Such rights may exist in parallel or in combination, thereby providing complementary protection, and generally prescribe the requirements for registration and the public or private persons and entities that are entitled to own and control such designations under applicable national laws. Geographical Indications protection as an Intellectual Property right differs depending on the jurisdiction or region. Jurisdictions that provide a regulatory scheme to register Geographical Indications (the European Union, for example) offer an enhanced “*sui generis*” protection that requires specific labeling and certification. Other countries protect marks with geographic significance as trademarks and/or allow protection of geographic terms as collective and/or certification marks subject to specific standards and/or user requirements.<sup>1</sup>

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<sup>1</sup> International Trademark Association, Protection of Geographical Protection, Sponsoring Committee: Geographical Indications Committee, November 2019, p3.

Unlike trademarks and Patents, there's a wide variety of type of protection available for geographical indications they can be protected either through "*sui generis*" Legislation or decrees that is the system used by France and Portugal. Another register of geographical indications, possibility again is to rely on the law against "unfair competition" or the tort of "passing off". To use a geographical indication for product that does not originate in the region named would be very good examples of an "unfair trade Practice". If protection is sought under tort law, there are no formalities to be observed such as registration or decree, the injured party goes to court and puts this case.

Geographical Indication can also be protected by the registration of collective marks or certification marks. Unlike individual trademarks, collective marks belong to a group of traders or producers. It does not belong to anyone; anyone who meets the specified conditions is allowed to use it.

Geographical Indications and Traditional Knowledge go hand and hand, as Traditional Knowledge means the knowledge of a particular community passed on from generation to generation and Geographical Indications refer to recognizing the art and culture practiced by a particular community residing in that region.

Geographical Indications acts as a tool in protecting Traditional Knowledge and encourages the communities with such knowledge to continue to practice and promote the same to their future generations. It helps to bridge the gap between the older generations of the society and the upcoming generations.

### **Materials and Methods**

A review was made of the various concepts to intellectual property rights and geographical indications and an analytical study of the International Conventions, Domestic Laws, Jurist's books, Journal, Paper, Article and Internet Website related means of protection for Shwebo thanakha product in Myanmar. Therefore, Geographical Indications should be enacted as a separate law for the protection of products in Myanmar.

### **Findings**

Geographical indications is an important issue to have legal protection of the products of Myanmar not only need to educate and awareness to understand about Geographical Indications for the local producer and community but also need to cooperate and coordinate with local and international organizations to promote the reputations and enter the international market of our products. In some ASEAN countries have adopted the geographical indications law to manage their infringement of intellectual property rights. Myanmar being a member of the ASEAN Framework Agreement on Intellectual Property Cooperation should be adopted as a separate law on the geographical indications arena.



### Discussion of Myanmar Thanaka

Myanmar Thanakha is derived from the word “Thanaka”, “Thana” which means “unclean” and “Kha” means “discharge”, so Thanakha is a means of disposing of bad impurities. It is written in Maung Mya Nan (Yesakyo) article on “Myanmar Nanthar Myay.”<sup>1</sup>

The names and classifications of Thanakha can be observed as follows:<sup>2</sup>

- (1) Myanmar name - Thanakha
- (2) English name - Chinese Box Tree
- (3) Origin - Ruaceac
- (4) Seed - Limonia
- (5) Species - Acidissima
- (6) Scientific name - Naringi crenulata (Roxb.)

Shwebo is a city in Sagaing Region, Myanmar, 110km north-west of Mandalay between the Irrawaddy and the Mu-rivers. The city was the origin of the Konbaung Dynasty, established by King Alaungpaya in 1752, that was the dominant political force in Myanmar after the mid-18<sup>th</sup> century. It served as Alaungpaya’s capital from 1752 to 1760. As of 2021, it has a population of 88,914. It is located the coordinates: 22°34’0”N 95°42’0”E in Myanmar.

Thanakha would be incomplete to leave out Shwebo whose indigenous Thanakha is said to be the best known for its superior quality. According to “Myanmar Thanakha” by U Tha Hla, Thanakha from Theinkataw region about two miles downstream of Sihataw pagoda on the western bank of Ayeyawady River in Khin U Township, Shwebo District was offered to the court on a regular basis during the reign of King U Aung Zeya, the founder of the third Myanmar Kingdom and the court recognized it as the best Thanakha suited for the court to use. However, Theinkataw Thanakha is now on the verge of extinction.<sup>3</sup>

There are other kinds of Thanakha from other regions, for example, Shinmataung Thanakha from the central region of Myanmar is famous for being used by Princess Vishanu and is widely used in lower parts of Myanmar.

Thanakha is also grown on a large scale in Kyaukse, Pakokku, Taungdwingyi, Monywa and Ayadaw. However, their barks are not as smooth as those of Shwebo Thanakha and their fragrance is also incomparable with Shwebo Thanakha’s.

### Quality

Thanakha is widely liked either by the rich or the poor, single or the married. It is common that female manual workers and paddy-growing lasses apply Thanakha on their faces and bodies to prevent themselves from sunburn, chapped skin and freckles.

Thanakha can cool the skin, provide protection from the sunray, and its fragrance makes the people fresh. Most of the Myanmar girls apply Thanakha after bathing, or they wear it whenever they go to pagodas or religious occasions.

<sup>1</sup> Myanmar Alin Newspaper, 2020, page 24.

<sup>2</sup> Ibid.

<sup>3</sup> The New Light of Myanmar, 12 May 2013, p8.

Thanakha is full of refreshing and refreshing aroma. Cooling the skin, Smoothing the skin, the ancient countries and cultivators could not let go of Thanakha because of its beauty and beautification properties. Therefore, the ancient Burmese women used to say, “You get Thanakha Skin”, when you see a person whose skin is moisturized due to the constant application of Thanakha.<sup>1</sup>

Thanakha can protect the human body from heat-related problems. The fragrance of Thanakha can also cure the headache, dull pain, neck pain and nasal congestions. If the women suffer from the menses, they can apply Thanaka with the turmeric. If they have high body temperature, they can take liquid Thanaka with the nectar of *Mesua Ferrea*. If the men suffer from the headache, dull pain, toothache and blurred vision due to urinary disease, they can take liquid Thanakha by grinding the root of Thanakha.

### Reputation

Thanakha's reputation is mentioned as Thanakha, people immediately ask if it is a product of Shwebo. If Shwebo is out of thanakha product, they sing the song of “Shwebo Thanakh”.

“I've taken Thanakha from Shwebo to Yangon; however black one's complexion is, Shwebo Thanakha can turn it into fair and fresh one; it helps ladies from Pazundaung, Kyimyindine and Mandalay have beautiful and glowing complexion.”

Composed by Nandawshae Saya Tin and sung by Mandalar Myint, “ Shwebo Thanaka” is a famous song amusingly written about Thanakha from Shwebo and the nature of women who want to be beautiful.

### Characteristics

The shape of the Thanakha tree is a medium-sized tree. It rises to a height of 20-30 feet and is about half an inch in height on the stems and branches. It has hard thorns about an inch long. When the plant is young, it does not run, and when the plant matures, it runs. The leaves are compound and deciduous. Two to three pairs of leaflets, one at the apex. The leaves are smooth and firm. It is dark green. The flower is small. Light yellow, the lungs open. It is depending on the climate of the water. Tagu, the flowers bloom during the month of Kason, Waso and Wakaung, the fruit ripens in the new moon. The water source is long. The roots are also contains bark. Tumors usually grow from the root.<sup>2</sup>

Plant shape is a medium-sized tree up to 20-30 feet height. The branches of the trunk have sharp spines that are ½ to 1 inch long. When the plant is young, it does not run and as the plant matures, it grows thicker. In Thanakha, there is a male tree. There are two types of female plants, the male tree does not bear fruit and the female tree bears fruit leaves compound, deciduous. It is 3 to 5 inches long and has wings on the petiole. It has two to three pairs of leaflets and a single leaf. The leaves are smooth, firm and dark green.

At three and a half month of age, the seedlings are about 10 inches in size and are most suitable for transplanting into the field. Twice a year, weeding and cultivating Thanakha plants

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<sup>1</sup> <https://www.my.m.wikipedia.org>.

<sup>2</sup> [https://www.my.m.wikipedia.org/characteristics\\_of\\_the\\_plant](https://www.my.m.wikipedia.org/characteristics_of_the_plant).

after planting. Natural fertilizer feeding, if sprayed with pesticides, the plants will be 7 years old. Thanakha tree can be sold in about 8 years. Unfinished Thanakha plants have been on the market for more than 10 years.<sup>1</sup>

White Thankha is fragrant and yellow Thanakha is beautiful on the face. Oily bark is the most fragrant of all Thanakha. Kyout Kone bark is similar to oily bark. The most popular of the Thanakha is ShinmaTaung Thanakha. Because of the fragrance of ShinmaTaung Thanakha, every Myanmar person loves Shinma Taung Thanakha. In addition to ShimaTaung Thanakha, they also like Shwebo Thanakha. Shwebo Thanakha is not as fragrant as Shinma Taung Thanakha, but Burmese women also like Shwebo Thanakha because of its yellowish texture. There is also a fruit tree (*limonia acidissima*) which has the same name as the Thanakha tree and is also called Thanakha. The fruit tree is called wood apple. Myanmar is a fruit tree and plum. They are often mixed and eaten. Blood is also applied to the bark of the fruit tree as Thanakha. Although it does not smell like. ShimaTaung Thanakha, Myanmar women also like the fruit because it moisturizes the skin applied to Kyaukpyin. Chet bark is very rare. Its aroma is fragrant and oily. The appearance of the bark is small.



**Figure 1:** Yellow Thanakha



**Figure 2:** White Thankha



**Figure 3:** Oily bark



**Figure 4:** Chet bark

<sup>1</sup> [www.thefarmermedia.com](http://www.thefarmermedia.com).

## Legal Framework of Myanmar

Myanmar legal framework of geographical indication concerning with laws are,

- (1) Penal Code, 1861
- (2) Specific Relief Act, 1877
- (3) Competition Law, 2015
- (4) Consumer Protection Law, 2019
- (5) Trademark Law, 2019.

Section 28 The Penal Code provides that, “A person is said to “Counterfeit” who causes one thing to resemble another thing, intending by means of that resemblance to practice deception or knowing it to be likely that deception will thereby be practiced”.

Explanation 1. It is not essential to counterfeiting that the imitation should be exact.

Explanation 2. When a person causes one thing to resemble another thing, and the resemblance is such that a person might be deceived thereby, it shall be presumed, until the contrary is proved, that the person so causing the one thing to resemble the other thing intended by means of that resemblance to would thereby be practiced.

Section 54 of the Specific Relief Act, 1877 mention that, Subject to the other provisions continued in, or referred to by, this Chapter, a perpetual injunction may be granted to prevent the breach of an obligation existing in favor of the applicant, whether expressly or by implication. Such obligation arises from contract, the Court shall be guided by the rules and provisions contained in Chapter II of this Act. When the defendant invades or threatens to invade the plaintiff’s right to, or enjoyment of, property, the Court may grant a perpetual injunction in the following cases (namely):

- (a) Where the defendant is trustee of the property for the plaintiff;
- (b) Where there exists no standard for ascertaining the actual damage caused or likely to be caused, by the invasion.
- (c) Where the invasion is such that pecuniary compensation would not afford adequate relief;
- (d) Where it is probable that pecuniary compensation cannot be got for the invasion;
- (e) Where the injunction is necessary to prevent multiplied of judicial proceedings.

Explanation - For the purpose of this section a trademark is property.

The basic principle of Competition Law, 2015 mention that the section 4(g) concerning with the geographical indication is “Encouraging the innovative capability by protecting intellectual property rights of investors, inventors and producers”.

No businessman shall carry out any of the following acts which mislead the consumers;

- (a) Carrying out with intention to complete with the use of deceptive information which mislead the legally registered name of the goods, business organ, logo, packaging, geographical indication and other elements.
- (b) Carrying out business such as production of goods and services by using the information contained in sub-section (a).<sup>1</sup>
- (c) No businessman shall, for the purpose of unfair competition, carry out any of the following advertising acts:

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<sup>1</sup> Section 18 of the Competition Law, 2015.

- (a) Comparing directly goods or services of a business with those of the same type of other business;
- (b) Misleading customers by imitative advertising of the goods of others;
- (c) Broadcasting false or misleading information to the customers on one of the following matters;
  - (1) Price, quantity, quality, utility, designs, varieties, packaging, date of manufacture, durability, origin, manufactures, place of manufacture, processors or place of processing;
  - (2) Usage, service, warranty period.<sup>1</sup>

Any businessman who violates the prohibitions contained in section 23, section 24 or section 29 shall, on conviction, be punished with imprisonment for a term not exceeding three years or with fine not exceeding kyat one hundred and fifty lakhs or with both.<sup>2</sup>

Any person who violates the prohibitions contained in section 18, section 20, section 21, section 25 or section 28 shall, on conviction, be punished with imprisonment for a term not exceeding one year or with fine not exceeding kyat fifty lakhs or with both.<sup>3</sup>

Section 8 of the Consumer Protection Law, 2019 states that, “Goods mentioned improperly in respect of place of yield or place of production”.

The Trademark Law including Geographical Indications (GI) protection was promulgated by Union Law No. 3/2019 on 30 January 2019. This Law will be enforced at the date when the president issues an order. Goods mentioned improperly in respect of place of yield or place of production.

Geographical Indication means any indication which identifies goods as originating in the territory of a country or a region or a locality in that territory where a given quality, reputation or other characteristics of the goods is essentially attributable to its geographical origin.<sup>4</sup>

Any legally formed organization, representing the following persons within the area where the related goods are produced, must apply to the Registrar for the registration of the geographical indications, in accordance with stipulations:

- (a) manufacturers who produce goods using natural products or natural resources;
- (b) producers of agricultural products;
- (c) manufacturers who produce handicrafts or industrial products;
- (d) authorities from relevant government departments and governmental organizations in the Republic of the Union of Myanmar who represent the persons described in subsections (a) to (c).<sup>5</sup>

The registration of geographical indications must be applied for in accordance with the following stipulations:

- (1) applicant organization or representative’s name, nationality and address;
- (2) geographical indication for which the application is submitted for;
- (3) region of origin of the geographical indication in question;

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<sup>1</sup> Section 23 (c), Ibid.

<sup>2</sup> Section 40, Ibid.

<sup>3</sup> Section 42, Ibid.

<sup>4</sup> Section 2(o) of the Trademark Law, 2019.

<sup>5</sup> Section 53, Ibid.

(4) goods which are indicated as geographical indication.<sup>1</sup>

The following must be attached to said application:

- (1) distinguishing characteristics, quality, or reputation of the goods;
- (2) a goods' accurately defined quality, reputation or relation between its characteristics, origin and production process;
- (3) other stipulated matters.<sup>2</sup>

The stipulated registration fee must be paid when applying.<sup>3</sup>

The Geographical Indications is ineligible for registration if it meets any of the following conditions:

- (a) it does not conform to the definition of a geographical indication stated in subsection (o) of section 2;
- (b) the goods for which the geographical indication is used has become common usage or customary in the Republic of the Union of Myanmar;
- (c) it is a geographical indication that is contrary to public order, morale or public policy.<sup>4</sup>

Any stakeholder or relevant department or organization may apply to the Registrar to make an invalidation announcement or cancel the registration for a geographical indication for the following reasons:

- (a) it does not conform to the definition of a geographical indication stated in subsection (o) of section 2;
- (b) failure to ensure conformity with the requirements in subsection (b) of section 54 and related requirements;
- (c) a foreign geographical indication which is not protected or for which protection has been terminated in the foreign country of origin or which is no longer used in said country;
- (d) it is a geographical indication which is contrary to public order, morale or public policy.<sup>5</sup>

Section 57 (a) of the Trademark Law, 2019 A registered geographical indication may be used in the course of trade only by producers who carry out their activities in the region described in the registration for the goods described in said registration. Such goods must meet the quality, reputation or other characteristics stipulated in the registration records.

- (b) For homonyms in geographical indications, protection shall be granted only if there is a significant difference, in practice, between the name of the geographical indication which is already registered and that of the geographical indication which is registered later. Protection shall be rendered by considering the need to treat relevant producers fairly and to not mislead consumers.

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<sup>1</sup> Section 54 (a), Ibid.

<sup>2</sup> Section 54(b), Ibid

<sup>3</sup> Section 54 (c), Ibid.

<sup>4</sup> Section 55, Ibid.

<sup>5</sup> Section 56 of the Trademark Law, 2019.

- (c) The right holder of a registered geographical indication is entitled to prohibit the following:
- (1) use of a geographical indication in any manner by falsely describing that a product is from the region stated in said geographical indication even though it is from another place of origin in order to deceive the public;
  - (2) any use of a registered geographical indication which creates unfair competition;
  - (3) the use of a disputed geographical indication for goods that are not from the region indicated in said geographical indication for indicating the origins of goods, for use after translating said geographical indication, or for the use of a geographical indication together with the description of the type, group, form, imitation or similar descriptions.
- (d) Though the region, zone or territory of a goods is accurately described, other geographical indications, which mislead the public by incorrectly stating that the goods are produced from another region, shall not be granted rights under subsections (a) and (c).

The Registrar must examine whether an application is in conformity with the provisions of sections 53, 54 and 55. If all requirements are fulfilled, he must publicize the information and facts contained in the application in the manner prescribed. Provisions relating to the objection of registration of a mark shall be applied as necessary to the objection of registration of a geographical indication. The Registrar must register a geographical indication if he does not receive an objection or if he refuses such objection.<sup>1</sup>

The term of a registered geographical indication shall receive protection under this Law as long as its distinguishing characteristics, quality or reputation for which protection was initially granted exists.<sup>2</sup>

According to section 60(a) of the Trademark Law, if the registration of a mark is applied for after the application for the registration of a geographical indication has been submitted in accordance with this Law, the Registrar must refuse the mark registration application which violates section 57 or where the mark will be used for an identical goods.

(b) Registered marks shall be announced as invalid if they fulfill the conditions of subsection (a).

(c) Notwithstanding any provisions relating to the registration of geographical indications, a mark, which has been registered or applied for registration in good faith before the submission of the registration application for a geographical indication, is permitted to be used continuously even if it violates section 57 provided that it does not fulfill the provisions in Chapter XV. In such cases, the Registrar shall allow the use of geographical indication as if it were the use of the mark related to it.

The relevant department and organizations shall supervise the protected geographical indications. They may assign some of the supervision work to another person.<sup>3</sup>

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<sup>1</sup> Section 58, Ibid.

<sup>2</sup> Section 59, Ibid.

<sup>3</sup> Section 61(a) of the Trademark Law, 2019.

Supervision shall include the following:

- (1) Consistency between the descriptions of the products registered as geographical indications and the relevant products;
- (2) The use of the names of registered geographical indications in the market.<sup>1</sup>

The stakeholders shall pay the expenses for supervision required to ensure conformity with the descriptions of the products.<sup>2</sup>

Regarding the violation of the rights of geographical indications, action must be taken according to the provisions on taking action against the violation of rights of a mark if the stipulations in addition to the provisions in this Law are violated.<sup>3</sup>

### **Procedure for Registration**

The proceedings for the registration of the appellation of origin and geographical indication shall be initiated by the appropriate application.

The application for the registration of an appellation of origin or geographical indication may be filed by the following persons:

- (1) natural or legal persons who produce within a specified geographical area the products that bear the name of that geographical area,
- (2) associations of persons referred to in item 1 of this paragraph, chambers of commerce, associations of consumers and the authorities interested in protection of an appellation of origin or a geographical indication, within their activities;
- (3) foreign natural or legal persons or foreign associations, if an appellation of origin or a geographical indication were registered in the country of origin or where it stems from the international agreements.

The application for registration of an appellation of origin or a geographical indication may be related to only one geographical indication or a name and to only one type of product.

The prescribed fee shall be payable for the application for the registration of the appellation of origin or a geographical indication.<sup>4</sup>

The following shall be the essential elements of the application:

- (1) request for the registration of an appellation of origin or a geographical indication;
- (2) description of the geographical area;
- (3) information on specific characteristics of the product.<sup>5</sup>

The ASEAN region registration process is

- (1) Formal examination
- (2) Substantive examination
- (3) Publication (for opposition purpose)
- (4) Opposition
- (5) Registration (GI certificate by some ASEAN Countries).

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<sup>1</sup> Section 61(b), Ibid.

<sup>2</sup> Section 61(c), Ibid.

<sup>3</sup> Section 62, Ibid.

<sup>4</sup> Article 14 of the Law on Indications of Geographical Origin, Official Gazette No.15/95 and 28/96.

<sup>5</sup> Article 15, Ibid.



Duration of the Registration of geographical indications is 6 months to 12 months in ASEAN level.

Geographical indications protected under the Trademarks Law as collective or certification marks, the Pyidaungsu Hluttaw Law No.3, which enacted on 30 January 2019.

The objective of the provision is to improve the quality of regional products of Myanmar and to promote the economic development by penetrating the global market through protection of geographical indications.

The requirement of the information shall be submitted for the Geographical Indications application, are

- (a) Name, nationality and address of the application entity or representative;
- (b) The geographical indication for which registration is sought;
- (c) The applied area to which the geographical indication;
- (d) The good designated by the geographical indication;
- (e) The specific characteristic of the good or quality or its reputation;
- (f) The link between the prescribed specific quality, its reputation or characteristic and original area and technology of production;
- (g) A copy of payment receipt of fees;
- (h) Related documents required by the Department of Intellectual Property (if needed)
- (i) Other prescribed particulars.<sup>1</sup>

When the application of the registration of Geographical Indications the following elements is complied with, the geographical indication is not entitled for registration.

- (a) Not complying with the definition of geographical indication in section (2) subsection (o) of the trademark law,
- (b) Being a generic term or customary in common language of the good that are to use such geographical indication in the Union.
- (c) Being a geographical indication, which is contrary to public order or good morals or public policy.

If the application complies with all regulations, the Registrar shall publish the contents of the application and specifications as prescribed in the regulation. In case of objection, the Registrar will follow the same regulations of objection of the mark as necessary. In case of no objection or the objection is rejected, the geographical indication shall be registered.

A product of Geographical Indications registration in Myanmar, any legal entity representing the following persons of the locality in which the relevant good is produced, desirous of registration a geographical indication shall apply to the Intellectual Property Office of Myanmar for registration in conformity with the stipulations:

- (a) Persons who produce goods of natural products natural resources;
- (b) Producers of agricultural products;
- (c) Producers who make handicrafts or industrial products;
- (d) All national competent authorities on benefit of the persons indicated under (a) to (c).

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<sup>1</sup> <https://www.ipd.gov.mm/IPD-Myanmar>.

## **Conclusion**

International Convention on Geographical indications is Paris Convention, WIPO and agreements are Madrid, Lisbon and TRIPs. Myanmar has become a signatory member in WIPO since 25, November 1994. As a member of these organizations, it is necessary to abide by the TRIPs agreement. Myanmar should sign to the Paris Convention for the protection of Industrial Property. Industrial Property includes Patents, Industrial design, trademarks, service marks, collective marks, commercial name and Geographical Indications. In domestic law concerning with Geographical Indication are Consumer Protection Law 2014, Competition Law 2015 and Trademark Law 2019. But there is no separate law on geographical indication in Myanmar. In Trademark Law, there is only one chapter for geographical indication. Therefore, Geographical indication should be enacted as a separate law. If enacted as a separate law, it would greatly protect for local protect in Myanmar. In addition to, if enacts as a separate law on Geographical indication, it will protect not only in the world but also in the ASEAN. For example, Thailand the geographical indication obtained is tamarind fruit, rice, silk, etc... Similarly, Indonesia got the white pepper, Amen Bali Salt, Flores Bajawa Arabica Coffee, and so on. Malaysia achieved ginger, Sarawak Pepper, Doi Chaang Coffee. Myanmar should also get for all local products in terms of geographical indication. Therefore, Shwebo District wants to get Geographical Indication right as Shwebo Thanaka as a local Product. No mitigation is allowed on the product, promoting the product by saying the name of a region, improving the quality of the product, guarantee that the buyer will not be harmed in the transaction, manufacturers can also benefit from expending their market. It is an important issue to have legal protection of the geographical indications of Shwebo Thanakha product in Myanmar. It will need to educate and awareness to understand about Geographical Indications for the local producers and community. It is also need to cooperate and coordinate with local and international organizations to promote the reputation and enter the international market of our Geographical Indications products.

## **Acknowledgements**

The authors would like to express the most sincere gratitude to Dr Myo Myo, Rector, Shwebo University. And we would like to mention Pro-rectors Dr Khin Thidar and Dr Tin Tin Yi, Shwebo University for their permission to review and submit this research article. We also thank to all, Daw Mar Lar Oo, Tutor and Daw Aye Aye Myat, staff, Department of Law, Shwebo University from the early stage to final writing up of this paper for kindly and helping all valuable suggestions.

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