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How Collective Marks Can Help Protect the Products of Guatemalan Artisans' Small Businesses in the Local and International Market?

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Contents

SUMMARY	1
PREFACE	3
ABBREVIATIONS	5
1 INTRODUCTION	6
1.1 Background	6
1.1.1 <i>Economic Climate</i>	6
1.1.2 <i>Intellectual Property Aspect</i>	7
1.2 Objective	9
1.3 Delimitations	10
1.4 Method	10
1.5 Outline	11
2 ARTISANS' BUSINESS ASOCIATIONS AND COLLECTIVE BENEFITS	12
2.1 Guatemalan Craftworks: From Traditional to Modern	12
2.2 Artisan Enterprises	14
2.3 Collective Efficiency	16
2.4 Small Artisans' Business Associations in Guatemala	21
2.5 Current IP Protection concerning Artisans' Works in Guatemala	25
2.6 Collective Marks: An IP Instrument for protecting Artisans' Products	26
3 COLLECTIVE TRADEMARKS: A TOOL FOR SMALL ARTISANS' BUSINESSES IN GUATEMALA	29
3.1 What is a Collective Mark?	29
3.1.1 <i>Function</i>	31
3.1.2 <i>Regulations governing the Use of a Collective Mark</i>	32
3.2 Regulation of Collective Marks in Guatemala	34
3.3 Benefits of Collective Marks for Artisans	36
3.4 Figures similar to Collective Marks	39
3.4.1 <i>Certification Marks</i>	39
3.4.1.1 What are Certification Marks?	39
3.4.1.2 Difference between Collective Marks and Certification Marks	41
3.4.1.3 Current Status of Certification Marks in Guatemala	41
3.4.2 <i>Geographical Indications</i>	42

3.4.2.1 What are Geographical Indications?	42
3.4.2.2 Difference between Collective Marks and Geographical Indications	49
3.4.2.3 Current Status of Geographical Indications in Guatemala	51
3.5 A new approach	54
4 PROTECTING COLLECTIVE MARKS ON AN INTERNATIONAL LEVEL	57
4.1 Collective marks as an Instrument for protecting Artisans' Products on the International Arena	57
4.2 Multilateral Conventions	57
4.2.1.1 The Paris Convention	57
4.2.1.2 The Madrid Agreement and Protocol	59
4.2.1.3 The Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement)	61
4.2.2 Regional Regulation	62
4.2.2.1 The EC Regulation on the Community Trademarks	62
4.2.2.2 Trademark Law in the USA	67
5 CONCLUSION	74
BIBLIOGRAPHY	81
TABLE OF CASES	88

To Sebastien

Summary

The purpose of this work was to scrutinize and investigate how collective marks can help protect works of Guatemalan artisans' small businesses in the local and international market by promoting them as an organization-association or cooperative.

The first chapter contains the introduction of this paper. It is composed by the background of the work, the objective, delimitations, method and outline.

The second chapter sets out the common characteristics of Guatemalan craftworks and artisans' enterprises. The model of collective efficiency is explained and how it has improved the performance of small enterprises generally, and particularly, the members of current artisans' small businesses organizations in Guatemala. The current IP protection of artisans' works in Guatemala is also analysed. Next, it is suggested that by taking advantage of the current business organizations, artisans might obtain optimum IP protection of their goods by making use of collective marks.

The third chapter discusses and analyses collective marks. It defines what a collective mark is, and explains its function, regulations, national legislation and benefits for small artisans' businesses. In addition, similar IP figures to collective marks are analysed and compared in order to establish why in this context collective marks were recommended.

The fourth chapter sets out the international instruments, which regulate collective marks, in order to establish if Guatemalan small artisan business can protect their works on an international level. The application of multilateral IP agreements, as well as regional legislations, particularly the E.U. and U.S. legislation are studied and analyzed.

Finally, the concluding chapter contains an analysis and discussion about how collective marks can help Guatemalan small artisan businesses protect their products in the national and international market. It remarks how collective marks can help strengthen the development of Guatemalan artisans' small business grouped in associations or cooperatives by allowing them to create a joint image that might identify their products in the local and international market, while reducing their individual investment. Such marks might also help artisans to prevent others from illegitimate using the reputation and quality of the products they manufacture.

Collective marks rarely used in the Guatemalan market, can be a great strategy to promote craftworks of local artisans. It can also represent a competitive advantage in the international market. However, it must be kept in mind that a collective mark alone would not bring the most profits unless accompanied by a strong marketing strategy.

Preface

Craftworks are part of Guatemala's culture, the product of a multicultural and multiethnic nation. The task carry out by artisans is a qualified one, which cannot be substituted by even, the most sophisticated machinery today. These works are appreciated, because of their technique and original qualities. These individual creations are preferred over massive production goods by consumers who, value such hand-made products. Thus, they do not compete unfavourable on the market against industrial products. On the contrary, is because of this difference that Guatemalan handicrafts are appreciated.

Nevertheless, with the continuing liberalization and deregulation of the world trading system freeing the flow of goods, the international business environment is becoming more competitive. This competitive trend has also reached Guatemalan artisans' small businesses, which has increased the challenges faced by artisans in successfully producing and marketing their products.

Because of this "economic phenomenon", the goal for artisans is to be more resourceful, creative and innovative. In order to achieve this aim, private and public institutions have initiated various projects to improve the performance of different artisans groups and provide a framework for cooperation between those forming the groups. These "collectives" have been formed based on the common origin and/or common characteristics of their goods. Today, many artisan enterprises have improved the quality and designs of their products considerably and, a great amount of modern Guatemalan craftworks can be found on the local and international market.

In this context, together with business improvement and marketing, the Intellectual Property (IP) aspect plays a main role. IP is the legal instrument which can be used to protect and promote artisans' creativity and avoid

“free riders” taking advantage of their work. If artisans are to get a fair return from their work it is important to integrate the protection of their IP rights to their business strategy. However, in Guatemala artisans rarely get IP protection for their works.

A successful marketing strategy is linked with the appropriate level of IP protection. This work seeks to illustrate in a practical manner how Guatemalan artisans’ small businesses can take advantage of the current IP figures available in the national legislation, and how a common marketing strategy can serve as a basis for developing their businesses. The main idea is to demonstrate how these businesses can benefit from coming together with other small entrepreneurs and collectively seek IP protection for their works in the local and international market by making use of collective marks. The purpose is to suggest an IP figure that will suit accurately the needs of Guatemalan artisans.

Abbreviations

AGEXPORT	Asociación Gremial de Exportadores
ANACAFE	Asociación Nacional del Café
APCA	Asociación de Productores de Café Antigua
AO	Appellation of Origin
CTM	Community Trademark
CTMR	Council Regulation (EC) 40/94
EC	European Community
E.g.	Example given
EU	European Union
DR CAFTA	Dominican Republic-Central America Free Trade Agreement
GI	Geographical Indication
INGUAT	Instituto Nacional de Turismo
IP	Intellectual Property
INTA	International Trademark Association
LPI	Ley de Propiedad Industrial (Industrial Property Law)
NGO	Non-Governmental Organization
OHIM	Office for Harmonization in the internal market
PTO	Patent and Trademark Office
SME	Small and Medium-Sized Enterprise
TRIPS	Trade Related Aspects on Intellectual Property Rights
UNCTAD	United Nations Conference Trade and Development
UNIDO	United Nations Industrial Development Organisation
U.S.A.	United States of America
USAID	U.S. Agency for the International Development
WIPO	World Intellectual Property Organization

1 Introduction

1.1 Background

1.1.1 Economic Climate

Guatemala is the largest economy in Central America with a population of 12.3 million, and a per capita GNP of US\$ 1,910 in 2003. Guatemala ranks in the intermediate average income group of countries according to the World Bank classification.¹ Guatemala's main export products are coffee, sugar, bananas and cardamom. Recently, it also included non-traditional products as part of its exportable supply, which includes six main groups: agricultural products, apparel and textiles, manufacturing goods, seafood products, furniture and forestry, and handicrafts.²

Besides the Central American Common Market, Guatemala has preferential market access to the United States of America and the European Union markets. Free Trade Agreements with countries like the U.S.A, Chile, Dominican Republic and Mexico also improve the market access conditions through such arrangements. The new Free Trade Agreement between the United States, the Dominican Republic and the Central American countries (DR-CAFTA), concluded in December 2003, is expected to provide further trade and investment opportunities to both parties as well as to improve economic growth.³

In this context of broader market freedom, it is required that most businesses standardize the quality of their products or services in order to compete successfully not only in the local market, but also in the international market. Consumers on the other hand have become more demanding in the quality and prices of the products they choose.

¹ http://ec.europa.eu/external_relations/guatemala/intro/index.htm. 25 September 2007.

² www.guatemala.se. 24 September 2007.

³ *Supra* note 1.

Therefore, it is important for producers to identify their goods, so that they can attract consumers and achieve their preference and loyalty. Nevertheless, placing a product in the market requires a great amount of investment, and consequently, can be very expensive and difficult, especially when businesses do not have sufficient means, knowledge or/and experience.

This economic trend has reached Guatemalan artisans' small businesses as well. Approximately one million artisans, most of them with indigenous backgrounds, living in the central and western regions of the country, produce Guatemalan handicrafts. It is estimated that female hand-weavers account for 70% of this population. Textile production is the most important handicraft in Guatemala, based on the use of waist and foot looms and including embroidery and crochet. Additionally, Guatemala offers other handicrafts such as wooden products, clay pottery, and products manufactured with natural fibers, blown glass, forged iron, candles, leather products, and jewellery⁴.

Handicraft exports generate around 20,000 jobs to artisans in the different regions and communities around the country. The United States, Europe, Central America and Mexico remain the most important export destinations.

⁵

1.1.2 Intellectual Property Aspect

Guatemalan artisans are facing obstacles when it comes to the IP protection of their products. Many of them are already organized and selling their goods directly in their workshop, stores or in markets. Others sell them directly to an intermediary or an exporter. However, these intermediaries usually label the products they acquired with their own trademark. In consequence, consumers cannot identify their entrepreneurial or

⁴ The latter mainly utilizes silver and jade, which are the country's most representative materials, although the elaboration of beaded jewellery has reached significant volumes in recent years.

⁵ *Supra* note 1.

geographical origin, and cannot properly identify and appreciate the value of their unique qualities. Some people might know who manufactured the goods, but in general, there is nothing on the product that informs the customer about the producer and the special characteristics of the product itself.

For example, if a consumer goes to the artisan's market and chooses to buy something because of its special qualities, maybe the next time he/she goes to the market to buy more of the same, that person will have problems finding the same product, since there are no signs that can distinguish one good from another. This occurs also at an international level. The exporter usually buys goods from different producers and then resells them with the same trademark at the foreign market.

Unfortunately, when it comes to IP, artisans usually do not protect their works. This may occur because of their lack of knowledge on the benefits of IP protection, or because their products under a protected distinctive, requires a significant investment, which may in reality exceed their budget. Thus, manufacturers are also affected, since the lack of protection is leading to free riding and consequently, a drop in sales. Nevertheless, the IP system is still the best instrument for creating and maintaining exclusivity over creative and innovative output in the marketplace.⁶

Hence, by working together, artisans can develop a "joint marketing campaign" for their products.⁷ Having a common strategy can help small artisan business reduce their investment, while gaining access to markets by protecting and promoting their products as a group. In this context, collective marks can be a great IP tool for this purpose. The effective use of this IP figure can help artisans obtain preference and fidelity from consumers, and at the same time improve their commercial relations in the supply and demand chain at a lower cost.

⁶ WIPO. Marketing crafts and visual arts: the role of Intellectual Property. A practical guide. 2003, Preface.

⁷ *Ibid.*, p. 82.

In Guatemala, there is a lack of knowledge concerning this IP figure. Very few enterprises have used them. Currently, there are approximately ten collective marks registered in the Registry of Intellectual Property⁸. Non of which protects artisans' works.

If artisans want to benefit from their creations in the market, they have to follow a strategy that integrates the protection of their IP rights.

1.2 Objective

The purpose of this thesis is to scrutinize and investigate how collective marks can help protect works of Guatemalan artisans' small businesses in the local and international market by promoting them as an association/organization.

In other words, the objective of this paper is to find a new and realistic approach regarding the IP protection of goods produced by Guatemalan artisans through the in-depth exploration this IP figure.

Concerning this objective, the following issues need to be addressed:

Firstly, could Guatemalan artisans benefit by placing their goods in the market as an organization, e.g. association or cooperative?

Secondly, how can collective trademarks help protect these small businesses' products in the local market?

Thirdly, what are the main benefits and obstacles?

Fourthly, what instruments protect collective marks on an international level?

Finally, is it viable for artisans to protect their collective marks in the U.S.A. and E.U?

⁸ Most of them protect coffee from different regions. Collective Marks search, Guatemala 6 August 2007.

1.3 Delimitations

This study will focus exclusively on how Guatemalan artisans can gain optimum IP protection by “joining efforts” in order to promote and protect their goods in the local and international market. This paper will focus on the Intellectual Property aspect regarding the current domestic situation. Nevertheless, a comparative legislative study of the U.S. and E.U. IP laws will be undertaken because these are the countries where handicrafts are mostly exported to.

Although many readers might tend to associate handicrafts with Traditional Knowledge, this IP aspect will not be discussed, since the focus of this paper is on the practical commercial aspect. Hence, its main objective is to find the best possible approach by focusing specifically on the current IP figures available on the national legislation and, specifically collective marks.

The reader must be aware that although many of Guatemala’s hand made production techniques are unique worldwide, dating back to pre-Hispanic times prevailing from generation to generation, nowadays most of them have been innovated and influenced by modern worldwide designs. Many of the same designs are found all over the country, produced not exclusively by indigenous people and made with local and international raw materials.

1.4 Method

The legal traditional method will be used, i.e., doctrine, legislation and case law, as well as the descriptive method. A comparative method of approach will also be applied in this paper as well, focusing mainly on the Guatemalan, U.S. and EU IP legislations, since these are the two markets where crafts are mainly exported. In addition, interviews done to experts in various institutions in Guatemala during the summer 2007 will be utilized.

1.5 Outline

Initially, the common characteristics of Guatemalan craftworks and artisans' enterprises will be set out. Next, the principle of collective efficiency will be explained and how it has improved the performance of small businesses in general and in particular the members of current artisans' small businesses organizations in Guatemala. The current IP protection available for artisans' works in Guatemala will be analysed and how artisans can take advantage of the current business organizations in order to obtain optimum IP protection through the use of collective marks.

Secondly, collective marks will be discussed, as well as its functions, regulation, national legislation and benefits for small artisan businesses. In addition, similar IP figures to collective marks will be analysed in order to establish why in this context collective marks are recommended.

Thirdly, the international instruments, which regulate collective marks, will be set out in order to establish how small artisan businesses can protect their works on an international level. The application of multilateral IP - agreements, as well as regional legislations - in particular the E.U. and U.S. legislation will be analyzed.

Finally, the concluding chapter will contain an analysis and discussion about how collective marks can help Guatemalan small artisan businesses protect their products in the national and international market.

2 ARTISANS' BUSINESS ASOCIATIONS AND COLLECTIVE BENEFITS

2.1 Guatemalan Craftworks: From Traditional to Modern

Craft products encompass a variety of goods made of diverse materials. The most substantial component of the finished product remains in the manual labour contribution of the artisan.⁹ The products are made of substantial raw materials and their special nature derives from their unique features, which can serve for different purposes. Artisan products can be classified based on the materials used within or based on a combination of the materials and the technique. The six main categories are basket/wicker/vegetable fibre works, leather, metal, pottery, textiles and wood.¹⁰

When Guatemalan artisan products supply is analysed, it can be observed that there are still craftworks production with traditional features. The function of these products is now basically reduced to serve as home utensils for “low income” families in order to satisfy their primary needs. Some of the main characteristics of these works are that they are made of local raw materials and the techniques used to manufacture them are rudimentary, usually coming from an ancestral time. The designs of these pieces are traditional and may have either religious or symbolic features. For example, different mud works moulded by hand, such as pitchers, comales and pots, baskets, palm hats, fishing nets or masks used in religious ceremonies and rituals. Consequently, they are usually only sold at a regional or national level.¹¹

⁹WIPO, *supra* note 6, p.5.

¹⁰ Etienne-Nugue, Jocelyne, Crafts: Methodological Guide to the Collection of Data, UNESCO, 1990, p.p. 4-5.

¹¹ AGEXPORT, La artesanía, sector tradicional y moderno, Export Data, Guatemala, August 2007, p.9.

Nowadays however, a higher number of Guatemalan craft items with modern features can be found, particularly pottery, wooden and weaving products, such as, hand blown glass, handcrafted candles, handcrafted leather products, handcrafted textiles, handcrafted toys and musical instruments. This transformation is taking place, because of the need to adjust to an ever changing market that is gradually and constantly imposing its trends, tastes and preferences.

Craftworks that are considered as descriptively modern have certain features that distinguish them from traditional craft products without using their intrinsic qualities and characteristics, such as the use of new raw materials imported from other communities or from other countries and new designs inspired in foreign trends. These products also incorporate new manufacturing techniques to help reduce the physical effort and time applied to the work. The modern crafts also widen the functionality of the product to a variety of new uses, such as tablecloths and napkins, handbags, wallets, scarves, ladies' accessories and carpets. Finally, they are able to be sold on both the local and international market.¹²

Hence, traditional and modern craftworks can be distinguished by the technique applied to them. In this sense, a product will be traditional if the technique used applies a design well-known in the market, and it will be modern, if an original design is applied. Thus, modern handicrafts are different of traditional handicrafts, because of the quality and variety of their colours characteristics and designs. Although they preserve their intrinsic characteristics, their shapes, colours and textures are modified in order to satisfy different markets demands.

In this context, based on the firsthand experience and contact with Guatemalan artisan world, Guatemalan modern crafts can be considered as being in constant transition in order to naturally adjust to the changing demands of the consumer market. Artisans much as any other entrepreneur

¹² *Ibid.*

are influenced by the behaviour of consumers. In this sense, they are constantly challenged to provide more eye-catching and ultimately better products in order to attract and retain consumers. Furthermore, in today's consumer world to obtain greater earnings from their works, artisans are focusing more upon the manufacture of modern craftworks, leaving the manufacture of traditional craftworks for strict family purposes. In consequence, modern craftworks are generally seen as those with greater commercial relevance.

2.2 Artisan Enterprises

Artisans may be defined as people who make products manually. Artisans usually learn their skills in their family or community. They can also receive skill training under government or private sector development initiatives. In Guatemala by law, an artisan is considered as a person that practices a creative and manual activity by transforming raw material according to his knowledge and technical skills.¹³

“Artisans usually work individually, but can often be helped by family members, friends, apprentices or even a limited number of workers, with whom they are constantly in close personal contact”.¹⁴ In this context, Guatemalan artisans' businesses can be considered as micro or small enterprises.¹⁵

In Guatemala, the artisan sector is composed mainly by micro and small businesses, located in all the country's region. In a minor scale, some

¹³ Ley de Protección y Desarrollo Artesanal (Law of Craftworks Protection and Development) article 2.

¹⁴ WIPO, *supra* note 6, p.6.

¹⁵In Guatemala, according to the Ministry of Economy, a micro enterprise is considered as having less than 10 workers and a small business as having less than 25 workers.

artisans' enterprises can be identified as workshops that group artisans¹⁶ producing jointly.¹⁷

Handicrafts are sold in exhibitions, retail outlets, street markets, fairs, tourist venues, and export markets. Frequently, they are promoted through entrepreneurs and intermediaries, producers' and exporters' associations. Internet facilities and websites are increasingly being used for marketing these products.¹⁸ Most Guatemalan artisans' production is market-led: that being, production is targeted and trained to observe market needs and niches, particularly the tourist sector at a domestic level and the American and European markets at an international level.

In the local market, an artisan's reputation for reliability and quality usually travels by word of mouth. Whereas in comparison on the international arena, promotion is generally done through advertising and catalogues.¹⁹

According to the Law of Protection and Development of Craftworks, local crafts should be promoted by the government through maps, posters, fliers newspapers-for its distribution within the country. Overseas, they should be distributed by diplomatic and councillor missions. In addition, permanent and temporary exhibitions and fairs must be held both inside and outside of the country.²⁰

16 In this matter, organized women's groups that manufacture textiles, located in the regions of Huehuetenango, San Marcos, Quiche and Quetzaltenango, are of particular relevance.

17 Artesanias en Guatemala.

http://www.negociosgt.com/main.php?idioma=ESP&id=1&show_item_sector=1&id_are_a=2&id_categoria_sector=10.9 October 2007.

18 WIPO, supra note 6, p.6.

19Ibid.

20 Ley de Protección y Desarrollo Artesanal (Law of Craftworks Protection and Development) article 8.

2.3 Collective Efficiency

Globalization and economic liberalization requires producers to be more efficient in the market. This demands constant innovation in product development particularly by small businesses in order to adequately compete in the market. Production now requires an increasing number of knowledge, –intensive activities such as product design, quality control, new management routines, organization of production and marketing.²¹ Firms compete not only on price, but also on their ability to innovate and promote their goods. “Continuous improvement in product, process, technology and organization has thus become the keys to sustain competitiveness in a globalizing economy”.²²

In this context, in the past two decades, SMEs have become one of the main targets of policies aimed at creating growth and employment in developing countries.²³ Helping small firms develop is not an easy task, given the constraints that SMEs face. Many of these are due to the lack of access to raw materials, finance, technology and/or product markets.²⁴ On their own, small firms find it hard to overcome these obstacles. “There is increasing evidence, however, that it is not the size of firms that is the major problem. Rather, it is their isolation, the fact that they are operating alone in a competitive environment”.²⁵

Consequently, the collective efficiency model is of great significance here since it suggests that the upgrading called for cannot be advanced by SMEs on their own. A collective action is needed.

²¹UNCTAD secretariat, promoting and sustaining SMEs clusters and networks for development. p.2.

²² *Ibid.*

²³ IDS Policy Briefing, Issue 10, April 1997.

²⁴ *Ibid.*

²⁵ *Ibid.*

According to Nadvi, “Collective efficiency²⁶ is defined as having two aspects to it: external economies that clustered agents accrue by virtue of their location and joint action benefits that arise from deliberate cooperation between local agents”.²⁷ External economies are benefits which occur purely from the concentration of firms in the same region, Such groups attract local suppliers, giving all firms better access to inputs and raw materials, and helping them create a pool of skilled workers, while joint action can be obtained through firms consciously cooperating, or joining forces in business associations and other groupings.²⁸

Thus, common collective actions can help with the improvement of small enterprises. There are two types of collective actions: a) cooperation between individual enterprises and b) group of enterprises that come together to form business associations.²⁹

Local business associations can help SMEs improve their abilities and achieve greater market efficiency by providing them with different “market-complementing” and “market-enhancing” functions.³⁰ This can be facilitated by the incorporation of more productive technologies, thus increasing their negotiation capacity with suppliers and clients, and increasing their broader knowledge. Business associations provide a forum for identifying common

²⁶ See Nadvi, Collective Efficiency and Collective Failure: The Response of the Sialkot Surgical Instrument Cluster to Global Quality Pressures, World Development, Volume 27, Issue 9, 1999, p.p. 1610. “Collective efficiency is defined as having two aspects to it: external economies that clustered agents accrue by virtue of their location, and joint action benefits that arise from deliberate cooperation between local agents. I view external economies as the “passive” dimension of collective efficiency (Nadvi, 1996). The term passive describes the nature of ties required between local agents in order to obtain externality gains. In contrast, joint action is the “active” dimension of collective efficiency requiring deliberate and active cooperation. These two aspects can also be clearly linked; joint action by some agents can generate cluster-specific externality gains for others (Nadvi 1996). It is the combination of these benefits, external economies and joint action gains, that provide a basis for enhanced competitiveness for clustered SMEs compared with similarly sized, yet dispersed producers”.

²⁷ Nadvi, Collective Efficiency and Collective Failure: The Response of the Sialkot Surgical Instrument Cluster to Global Quality Pressures, 1999, p.1610.

²⁸ *Ibid.*

²⁹ Dini and Stumpo, Pequeñas y medianas empresas y eficiencia colectiva, 2004, p.13.

³⁰ Nadvi, Facing the new competition: Business associations in developing country industrial clusters, Institute of Development Studies, Brighton 1999, p. 2.

needs, constraints and opportunities. Furthermore, associations can serve as focal points to address that needs.³¹

Consequently, through collaboration and cooperation with other enterprises within an organization, each small business member of the group can improve their performance, and become more efficient.

“Business associations are abundant, extremely varied in terms of their composition, scale and organization, and undertake a wide range of tasks (Moore and Hamalai, 1993; Doner and Schneider, 1998). There are “peak’ associations that bring together all business bodies, sector-specific and sub-sectoral associations, regional associations as well as local chamber of commerce”.³²

Thus, as evidenced, the role of businesses associations varies tremendously from simply having a very limited scope to undertaking an enormous range of activities. Local business associations can perform functions such as, seminars, information and library services, exhibitions and trade fairs, foreign contacts, contact adjudication, specialized legal advice and assistance, and certification of documentation and of product quality.³³ Furthermore, what makes local business associations interesting is that they represent a key forum for local joint action.

Association can also play a significant function in assisting local clustered producers to ease their internal constraints. In addition, this more interventionist and supportive role is also likely to involve a greater understanding of market drivers that the group faces and developing responses that help the group as whole to compete.³⁴

“In this context, there is a range of enabling activities that associations can deliver. These include the provision of:

³¹ *Ibid.*

³² Nadvi, *supra* note 26, p. 4.

³³ *Ibid.*

³⁴ Nadvi, *supra* note 27, p. 6.

“real” services such as technical and managerial advice, information services that help link producers with distant markets, including data on markets, prices, competitors, trade policies and as well as general trade information;

technology support that help local producers upgrade, both in process and product technologies as well as moving up the value chain into areas such as design and research and development;

the linking of local producers to local and global trade fairs that provide exposure to local benchmarking services that help local producers compare their performance with global best practice;

technical assistance to meet new global standards and the development of local quality labelling”.³⁵

Some recent cases have shown that a group of firms, who cooperate on a joint project, complementing each other and specializing in order to overcome common problems, achieve a greater level of collective efficiency and conquer markets well beyond their individual capacity.³⁶ This is the case of the shoe manufacturing clusters of Brazil’s Sinos Valley, Guadalajara in Mexico and Agra in India, and the surgical instrument cluster of Sialkot in Pakistan.³⁷ In each of these four clusters there appears to be a relationship between increasing joint action through the business association and subsequently improved firm performance in recent years.³⁸

³⁹

The case of Melinda: An Italian Apple reflects how the collective efficiency principle applies in the Intellectual Property Rights field. At the end of the 1980s, the apple growers of *Val di Sole* and *Val di Non* noticed that in the market there were three times as many identifiable apples known as coming from the said regions as the real quantity produced there. Hence, the producers decided to create a common strategy in order to promote

³⁵ *Ibid.*

³⁶ SME Cluster and Network Development in Developing Countries: The Experience of UNIDO. 1999 p.2.

³⁷ Nadvi, *supra* note 27, p.10.

³⁸ *Ibid.*

³⁹ What is common across the four case studies is that the pressures of new competition including trade liberalization and globalization have result in an increase in cooperation through the business associations and a greater use of some services provided by the business associations.

their products and protect them from free riders. They did by coming together under the same brand name: MELINDA.⁴⁰

The new consortium that would produce these fruits was formed by sixteen cooperatives. It imposed strict regulations concerning production in order to standardize the quality of the product. Only those who fulfilled the requirements were allowed to use the collective mark. Eventually, they managed to place in the market a product labelled by a collective mark, which today reveals a distinctive quality, image and notoriety. Furthermore, today the consortium is composed of 5 200 cooperatives and their joint sales have increased significantly.

Another example is the collective mark “Cajamarca”. Cajamarca is a region in Peru famous for its cheeses, yoghurt, blancmanges, butter and other dairy products. “The problem that arises is that the production is in the hands of small farmers and livestock breeders who had a limited corporate vision”.⁴¹ This fame consequently caused producers from other cities to improperly sell their products as genuine Cajamarca. Dairy producers in that area decided therefore to group together as a collective association and stop the so-called “free riders” from using this fame. Consequently, they registered the collective mark “Cajamarca”. By working collectively, the Peruvian farmers have improved their standards, particularly the quality and homogenization aspects of the product. Nowadays, they are working on their best marketing strategy.⁴²

Given the wide spectrum of business associations, this study will solely focus on sector specialized and geographically concentrated business associations. This means those business associations that have local presence and represent the concerns of a specific productive sector, in

⁴⁰WIPO, *Melinda: The First Italian Designer Apple*. http://www.wipo.int/sme/en/case_studies/melinda.htm. 3 October 2007.

⁴¹WIPO, *INDECOPI (Peru): The promotion of Marks and Other Distinctive Signs to Compete in the Market*. http://www.wipo.int/sme/en/best_practices/peru.htm. 2 October 2007.

⁴²WIPO, *APDL Cajamarca Peru -Dairy-by products*, http://www.wipo.int/sme/en/case_studies/apdl.htm. 20 October 2007.

particular small artisan business in Guatemala. With regard to their function, this study will focus specifically on the benefit of joint IP protection and the promotion of artisan goods through the correct use of collective marks.

2.4 Small Artisans' Business Associations in Guatemala

In Guatemala, many artisans producing similar products, pursued by both local and international organizations, have gathered into joint associations and cooperatives looking for productive, social and commercial support. Vocational training is often supplied in order to assist the artisans in structuring their business and innovating their products. This is ultimately endeavouring to help the artisans compete successfully in the market.

In the last years, their techniques have been updated to increase production capacity. The artisan export sector has radically changed its products - without losing its intrinsic characteristics, in order to comply with the consumers' demands in both the local and international markets. New designs and the use of new materials allow these producers to offer more attractive goods that vary from ornamental to functional products.⁴³ Additionally, many local artisans have received technical assistance in international standards.

In the private sector, the Guatemalan Exports Association –AGEXPORT- Handicraft Commission has knowledge of all the experienced handicraft exporters and artisans' organizations in the country and is continually in contact with them. Currently the organized artisan sector, through AGEXPORTS Handicraft Commission has a membership of one hundred SMEs organized individually or through associations and cooperatives. It offers its members training programmes and technical assistance in specific

⁴³Artesanías en Guatemala, *Supra*, Note 20.

areas of production.⁴⁴ Additionally, this commission brings together foreign importers and fair trade buyers with local exporters and artisans.

An example of one of these projects is AGEXPORT'S "*Programa de Encadenamientos Empresariales*" (Supply Chain Program). What this novel project intends to do is promote work at a local level by changing the traditional model based on the producer's offer to a new one based on the market's demand.⁴⁵

This project supports small and medium producers in different regions of the country and from different sectors, e.g. agriculture, handicrafts, forestry, to gain access to different markets.⁴⁶ In order to benefit from this initiative, producers have to fulfil certain requirements: They have to be small entrepreneurs, have a productive activity already defined and be organized⁴⁷ with other producers from the same sector.⁴⁸ It links the actors in the supply chain, provides technical assistance and vocational training to improve the competitiveness of producers and exporters as a group.⁴⁹ After giving them of all the proper tools for the improvement of their business there is a six-month follow up, which intends to monitor group development.

The program seeks the development of supply chains and the consolidation of partnerships, especially for those products with "market potential" for the small and medium producers' sector. It works with the support of different international organizations such as USAID⁵⁰, DANIDA⁵¹ and FIDA⁵², and other local entities.

⁴⁴ *Ibid.*

⁴⁵ Interview with Ligia Rosales, Coordinator of "Encadenamientos Empresariales Program", Guatemala 16 July 2007.

⁴⁶ *Ibid.*

⁴⁷ The organization must not have a legal structure at that time. It is enough to have the will to work together.

⁴⁸ *Supra* note 36.

⁴⁹ EncadenamientosEmpresarialesHomepage
<http://www.encadenamientoempresariales.com/Portal/Home.aspx>, 10 October 2007.

⁵⁰ U.S. Agency for the International Development

⁵¹ Danish International Development Agency

⁵² International Found for Agricultural Development.

In the handicraft sector, the project is focusing mainly on two regional handicraft associations: *Kawok* and *San Antonio Palopo*. The latter is in the process of legalizing its status as an association. Both of these organizations work in the pottery and textile fields. In order to improve their businesses and innovate their products, national and international designers were hired to update them on the latest trends. In consequence, they learned what consumers were demanding and are now creating new crafts designs to satisfy these consumers.

In the public sector, Guatemala also has government entities that support artisan groups through different initiatives. These initiatives include a SMEs division working under the Ministry of the Economy⁵³, a handicraft regional centre from the Ministry of Culture and Sports, and a Handicrafts Market provided by the Tourism Institute of Guatemala –INGUAT-.”⁵⁴

Finally, a high number of spontaneously conformed regional or sector specialized associations can be found all over the country. These SMEs have joined together after realising the substantial benefits arising from cooperation between its members. One of these is “*Asociación de Artesanos Aj Quen*” (Association of Artisans *Aj Quen*”. It was founded in 1989 by the initiative of representatives of various artisans’ organized groups from different regions of the country. Today, this association represents more than 800 artisans and 95 per cent of its members are women. They belong to four ethnic groups: Kakchiquel, Kekchi, Tzutujil and Quiche.⁵⁵

This organization has three main functions. Firstly, it facilitates the marketing of the products manufactured by the members of the

⁵³ The Ministry of Economy shall promote the formation of sector association and cooperatives on a municipal, state and national level. It shall also promote the creation of regional commissions of craftworks protection and the creation of a fund to grant artisans with loans for the development of their business. Ley de Protección y Desarrollo Artesanías (Law of protection and development of craftworks) article 3 a) d) e).

⁵⁴ AGEXPORT, Handicrafts *Exporting Sector*, <http://www.export.com.gt/Portal/Home.aspx?tabid=2020>. 16 September 2007.

⁵⁵ AGEXPORT, *Asociación de Artesanos Aj Quen*, Export Data, Vol.178, Guatemala August 2007, p.7.

organization. Secondly, it promotes the collective production of goods in order to find the best and most efficient methods of production with the aim being to improve their members' income. And, finally, it contributes to the technical training of its members in order to improve the production and marketing of artisan products. Because of their efforts, they have been able to export their craft items to the U.S.A, Sweden, Denmark, Finland, Holland, Germany, Spain, Switzerland, Italy and Australia.

TRAMA Textiles, the Association of Women for Artisan Development in Back Strap Loom Weaving is also a good example. They work directly with 17 weaving cooperatives, representing 400 women from five regions in the western highlands of Guatemala: Sololá, Huehuetenango, Sacatepéquez, Quetzaltenango and Quiché.⁵⁶ The quality and performance of their businesses has increase considerably since they got vocational training from different international volunteers.

Finally, there is the Carpenters Association of San Juan Sacatepéquez (*"Asociación de Carpinteros de San Juan Sacatepéquez"*). San Juan Sacatepéquez is a county in Guatemala City, that is well known for the quality and price of the wood works manufacture by some carpenters in that area. Many local people visit this region in order to buy or order manly wooden furniture produce there. However, recently people from other parts of the country are now going all over the land offering their products and assuring that they are from San Juan Sacatepéquez. This has greatly affected this group, which are facing the reality of free riding and in consequence, a drop in sales. In order to address this problem and promote their products collectively, they have now formed an association.

⁵⁶ <http://www.xelapages.com/asotrama/story.html>, 31 October 2007.

2.5 Current IP Protection concerning Artisans' Works in Guatemala

As mentioned before, the artisan sector in Guatemala is composed mainly by SMEs, located in the country's entire region. Regardless of the quality of the goods, artisans' SMEs face many obstacles. Firstly, gaining access to retail stores, local markets and distribution networks can prove to be a difficult task. Secondly, making products known among consumers requires a significant investment that may exceed their budget. Thirdly, the cost of creating, applying for registration, legal follow-up and marketing of their trademark can be of a substantially high cost. Given the small scale of production, many artisans will also find it difficult to gain a reputation for their products, which in turn would attract consumers, because they are not financially secure enough to develop and produce a successful marketing campaign.

Nevertheless, as mentioned previously, over the past decades encouraged by international and national institutions, both public and private or voluntarily, an increasingly number of artisans' SMEs have been voluntarily forming or joining regional and sector based associations and cooperatives. This evidences substantial beneficial recognition by artisans' SMEs in ensuring common standards and a joint marketing strategy in order to reach collective efficiency. They are also more frequently realizing that by promoting their products as a group lowers the initial individual investment required and increases the possibilities of obtaining consumer recognition and customer loyalty.

Consequently, these collective organizations are starting to focus on brand marketing, with some collectives, even labelling their products to show where they originated from, and how they were produced. However, neither of these associations nor cooperatives has ensured their marks are protected.⁵⁷ Some have distinctive signs that identify their products, but

⁵⁷Search at the Registry of Intellectual Property, Guatemala 6 August 2007.

they are not registered in the Registry of Intellectual Property. Others do not even have a distinctive sign. This occurs mainly due to the lack of knowledge about the IP figures established by the national legislation. As *Elias* remarks to a small business owner: “The instant a business or product name or any other identifying device is used in the marketplace-be it in advertising, on a label, on an internet site, or in other any way intended to reach out potential customers-it falls within the reach of trademark law”.⁵⁸ However, the need for IP protection is not acknowledged by most of these manufacturers.

“The main reason for acquiring IP protection is to be able to reap the benefits of their creations”.⁵⁹ This only can happen when their IP rights can be enforced. Therefore, ultimately the conclusion is that identifies IP protection as a necessary tool for the progressive development of artisans’ SMEs.

2.6 Collective Marks: An IP Instrument for protecting Artisans’ Products

Artisans’ small businesses can take advantage of obtaining membership in an association by developing a joint marketing campaign for their products. For this purpose a basic collective mark may prove to be a useful tool. Most likely the artisans’ craft items will have certain characteristics, which are specific or common to the given group located in certain region. Collective marks can be used to communicate these common special features and origin, and become their basis for marketing such products, thus benefiting all of the member’s party to a given association.

If artisans make use of this figure, the association is the owner of the mark and its members are the only ones authorized to use it. Consequently, its use

⁵⁸ *Elias, Stephen, Trademark. Legal care for your business and product name, 2005, p.1/3.*

⁵⁹ *WIPO, supra note 6, p. 105.*

and recognition excludes others from using their distinctive sign or from stealing and/or imitating their ideas, concepts or designs.

Many would argue that one of the central challenges for SMEs is not so much their size but their isolation.⁶⁰ The challenge for artisans is not just found in the production and marketing of their new products (in order to satisfy changing consumer tastes), but also in the prevention of “free riding” on their creative ideas and reputation.

However, in Guatemala unfortunately there is little awareness about collective marks. Very few businesses consider them as a marketing option. In fact, there are very few of them registered in the Registry of Intellectual Property Law.⁶¹ Currently there are approximately ten collective marks registered, with most of them identifying coffees from different regions⁶², two of them identifying lemon products⁶³, one for tourism purposes and one to identify meat and fish.

Although goods in Guatemala are rarely labelled under a collective mark, this figure has benefited the Guatemalan coffee sector enormously. Those collective marks identifying coffee belong to the Guatemalan National Coffee Association-(ANACAFE)-. Each current mark represents one of the eight coffee regions in Guatemala. These regions have unique characteristics forged from a combination of distinct natural and human elements, such as its microclimates, volcanic soils, consistent rainfall patterns and high altitudes that give the coffee a fine and versatile quality.⁶⁴

⁶⁰ WIPO, How can collective marks, certification marks and geographical indications be useful to SMEs?, http://www.wipo.int/sme/en/ip_business/collective_marks/index.htm, 9 October 2007.

⁶¹Collective marks' search made at the Registry of Intellectual Property, Guatemala 6 August 2007.

⁶² New Oriente, Fraijanes Plateau, Antigua Coffee, Acatenango Valley, Traditional Atitlan, Rainforest Cobán, Volcanic San Marcos and Highland Huehue.

⁶³These collective marks-COELMON- belong to a Cooperative of Lemon production.

⁶⁴ANACAFE, *Guatemalan Coffee Atlas 2007-2008*, Guatemala, p. 1.

Since 2000, ANACAFE has initiated a program with the cooperation of USAID to geo-position the coffee farms of the entire country with useful tools for tracing the origin of their coffee, and assuring that the farmers receive the premium prices available in the market.⁶⁵ To date, 95 per cent of cooperatives have been identified. Those farmers, who are located in certain regions, fulfil the standards and belong to ANACAFE, are also entitled to use the respective collective mark.⁶⁶ The use of collective marks has been a very successful initiative for coffee producers and buyers. It benefits producers as the use of these marks also promotes their product and adds value to them, while preventing coffee farmers from other regions misusing the distinctive sign. Furthermore, it assures consumers that they are buying a legitimate product. Overall, it demonstrates how this IP figure can bring enormous benefits to a substantial productive sector.

The challenge now is to introduce this figure in the business strategy of artisans' organizations. Collective marks may provide a useful tool for associated artisans who are manufacturing similar products and are searching to further enhance product recognition and build a reputation for their products.⁶⁷ All artisan organizations should be aware of the options available for their members and their benefits. Collective marks can be a great IP tool for developing artisans' business strategies. To have a better understanding of this IP figure, the next chapter will study collective marks in depth.

⁶⁵ *Ibid*, p. 3.

⁶⁶ Interview with Edith Molina de Flores, IP lawyer of ANACAFE. Guatemala 6 July 2007.

⁶⁷ WIPO, *supra* note 51.

3 COLLECTIVE TRADEMARKS: A TOOL FOR SMALL ARTISANS' BUSINESSES IN GUATEMALA

3.1 What is a Collective Mark?

There is scarce academic attention and literature on the subject of collective marks. To this day no single international treaty adequately defines collective marks. “While the definition may vary from one country to the other, collective marks are usually defined as signs which distinguish the geographical origin, material, mode of manufacture, quality or other common characteristics of goods or services of different enterprises using the collective mark. The owner may be either an association of which those enterprises are members or any other entity, including a public institution or a cooperative”.⁶⁸

A collective mark is a particular figure from trademark law to which the same principles of law as that of trademarks apply. In this matter, it can consist of any word, name, symbol or device, slogan, package design or combination of these that serves to identify and distinguishes a specific product from others in the market place or in trade. A sound, colour combination, smell or hologram can also be, under some circumstances a trademark.⁶⁹

Nevertheless, the main difference between a collective mark and an individual mark is that a collective mark can be used in relation to products of different enterprises which are members of an organization, and all of which produce or provide the same or very similar products. Whereas in comparison, an individual trademark is solely used for products or services

⁶⁸ WIPO, Collective Marks, http://www.wipo.int/sme/en/ip_business/marks/collective_marks.htm, 21 November 2007.

⁶⁹ INTA Homepage, 8 October 2007. http://www.inta.org/index.php?option=com_simplefaq&task=display&Itemid=60&catid=284&page=1&getcontent=1#FAQ49, 8 October 2007.

provided by just one enterprise.⁷⁰ In most countries, there are provisions regulating collective marks.⁷¹

Collective marks can mainly be observed from two different angles: Firstly, from its function, as any sign that distinguishes the geographical origin, material, mode of manufacture or other common features of goods and services of several different enterprises using the same mark under the supervision of its owner. Secondly, from its owner, as a mark which identifies its owner as an association, -or any other entity, including a public institution or a cooperative, of which its members are allowed to use the mark.

In this order of ideas, a collective mark can be defined as a mark used to distinguish similar products or services provided by a group of enterprises, who are members of an organization, generally an association, under the supervision of its owner.

The ownership of the mark is held by one organization, but overall the use of the mark is collective, because all of the members of the organization are the ones entitled to identify their products with it. An association may own a collective mark-or any other entity, which itself does not use the collective mark on its products, since the spirit of the figure is to promote cooperation and development between its members. Furthermore, its members will be the ones entitled to use it on their products once they comply with the requirements fixed in the regulations concerning the use of the collective mark.⁷² However, the collective organization might also use the mark for merely informational purposes such as conducting advertising or other promotional programs that refer to the mark itself for the promotion and publicizing of the mark and to further promote the individual businesses of its members. E.g. A cooperative does not sell its own goods with the

⁷⁰ WIPO, *supra* note 6, p. 82.

⁷¹ WIPO, The value of collective marks and certification marks for small players, WIPO magazine/July-September 2002, p.6.

⁷² WIPO Intellectual Property Handbook, 2004, p. 69

collective mark, but can refer to the mark while promoting the goods of its members

The owner of the collective mark is responsible for assuring compliance with certain standards, which are under the intellectual property law of most countries, fixed in the regulation concerning its use.⁷³ Most countries require that a copy of the regulations concerning its use accompany the mark application.

The creation and use of a collective mark reveal the development of certain standards and a common strategy set by the organization.⁷⁴ It is important to highlight that an enterprise entitled to use a collective mark to identify its products might also use its own trademark for the same products.

3.1.1 Function

As mentioned previously, collective marks carry out the same functions as trademarks and share the same principles. Nevertheless, because it is used by enterprises, different from its owner, it has some particular functional features. The basic function of a collective mark is to indicate the origin from which the products or services stemmed and to identify the members of the association who are legally authorized to use the particular sign as a their trademark.⁷⁵

Because collective trademarks are mainly used to indicate the affiliation of the enterprises using that mark, they subsequently inform the public about certain common characteristic of the goods or services, which they identify. This characteristic can be its geographical origin, mode of fabrication, the materials used, or the simple membership to an organization.⁷⁶ In other

⁷³ *Supra* note 61.

⁷⁴ *Supra* note 61, p. 7.

⁷⁵ De Sousa Borda, *Estudio de las indicaciones geográficas, marcas de certificación y las marcas colectivas – su protección en Brasil e importancia en el contexto internacional*, 2003 p. 35.

⁷⁶ WIPO. *Taller de la OMPI sobre signos distintivos como herramientas de competitividad empresarial*. (OMPI/PI/GUA/06/1), 2006, p.2.

words, collective marks denote that a member of a specific group manufactured those goods, bearing the designation,⁷⁷ and tends to reveal the unique and common qualities of the labelled items.

As “regular” marks, collective marks reveal information about the characteristics of the product, such as price, quality, origin⁷⁸, and any other specification that distinguishes one product from another. Such marks create a reputation for the product, facilitating consumers in the decision-making process while choosing between different goods. Collective marks much akin to trademarks also promote products sales, pursue customer loyalty and assist the artisans in gaining and/or maintaining the market share.⁷⁹

3.1.2 Regulations governing the Use of a Collective Mark

The essential element concerning collective marks is the Regulation governing its use, established by legislations as a *sine qua non* requirement for its registration.⁸⁰

Each regulation governing the use of a collective mark is the particular norm ruling the internal relation between the owner of the mark and its users and the relation between all the users alone. Any conduct contrary to these regulations will have the consequences envisaged in the regulations.⁸¹

This instrument sets the standards that will regulate the use of the mark in the market and the members authorized to use it. This body also establishes the common characteristics or qualities that the products must meet in order to bear the collective mark. Furthermore it stipulates the sanctions to be imposed in the case of regulation abuse.

⁷⁷Smith, Trademark Valuation, 1997 p. 41.

⁷⁸The trademark must indicate what enterprise or person manufactures the product.

⁷⁹WIPO, *supra* note 6, p. 32.

⁸⁰WIPO, *supra* note 66, p. 3.

⁸¹Largo Gil, Comentarios a los Reglamentos sobre Marca Comunitaria., 2000, p. 672.

The regulation of mark use specifies norms that unify and standardize the use of the collective mark. It identifies the information that the members of the organization want to reveal to the consumers, such as, quality, origin, price or homogeneity of the products. It essentially sets the standards for promoting the products bearing that mark.

These regulations further allows the owner of the mark to limit the access to the use of the mark to any person or enterprise apart from the members of the organization, or to those members, that do not comply with the standards set in the instrument. Nevertheless, this facility should be based on an objective criterion in accordance with the instrument itself. If it is a matter of membership, the regulations governing the organization should be key reference document.

Through this system, a control mechanism is established in order to collectively approach the market. The State does not impose the rules, but rather the members of the organization voluntarily accept to comply with the regulations set by the owner so that their products can be labelled with the collective mark.⁸²

The content of the regulations governing the use of collective marks varies significantly depending on the activities of each group or association that owns it, the products the organization distinguishes and the laws of each country/region. Normally the minimum requirements are the following:

- Characteristics or qualities common to the products or services distinguished by the sign;
- Members authorized to use the mark;
- Affiliation conditions;
- Standards to secure and control the use of the mark;
- Sanctions for not complying with the regulations;
- List of members.⁸³

⁸² WIPO, *supra* note 66, p. 3.

⁸³ *Ibid.*

3.2 Regulation of Collective Marks in Guatemala

In Guatemala, the Industrial Property Law (LPI), which came into force on November 1, 2001, contains those provisions concerning trademarks. On May 2006, the legal reforms for the implementation of the DR- CAFTA⁸⁴ reformed some articles of the legal body mentioned earlier. It introduced some new ideas and concepts concerning the IP aspect, such as smell and sound trademarks.

In principle, aside from the special provisions for collective marks, the provisions applicable to trademarks are also applicable for collective marks, particularly those in relation to the procedures, duration, renewal, expiration and modification of the mark.⁸⁵

In this order of ideas, a collective mark may consist of any denominative, figurative, three-dimensional, smell, sound or combined sign that is capable of distinguishing the products or services of a natural person or legal entity from others, which can further be object of graphical representation.⁸⁶ The following signs may consist of a trademark: words, combination of words, letters, numbers, monograms, figures, portraits, labels, prints, stamps, vignettes, borders, lines and combination of colours, and any combination of these.⁸⁷ The duration of the mark is 10 years from the date of registration, which is indefinitely renewable⁸⁸ for a further continuous 10-year periods⁸⁹.

The special provisions regarding collective marks state that these marks may be registered by any legal entity.⁹⁰ Any association of producers, artisans, manufacturers, farmers, service providers or merchants, which

⁸⁴ Decreto 11-2006 emitido por el Congreso de la Republica de Guatemala. (Decree 11-2006 issued by the Congress of the Republic of Guatemala).

⁸⁵ Industrial Property Law (LPI), Article 48.

⁸⁶ *Ibid*, article 16.

⁸⁷ *Ibid*.

⁸⁸ Renewal is to be applied during the last year of a running period, or, with surcharge, during a grace period of six months after expiration of the running period.

⁸⁹ LPI, Article 31.

⁹⁰ LPI, Article 4.

according to Guatemalan legislation have legal personality, may own a collective trademark.⁹¹

On filing an application for the registration of a collective mark, three copies of the regulations governing the use of the mark must be filed.⁹² These regulations must specify the common characteristics or qualities of the goods or services for which the mark is to be used, the terms and conditions under which the mark may be used, and the persons entitled to use the mark. The regulations must contain provisions destined to assure and control that the mark is used in accordance with the regulations, and the sanctions for non-compliance with them.⁹³

The Registry⁹⁴ will examine whether the regulations comply with the said requirements.⁹⁵ A copy of the regulations concerning the particular collective mark must be kept on file.⁹⁶ The owner of a collective mark must communicate to the Registry any amendments on the regulations on use of the mark; such amendments will then be effective from the date of their presentation to the Registry.⁹⁷

In Guatemala, a collective mark may not be licensed to persons other than those authorized to use the mark in accordance with the regulations.⁹⁸ Something interesting is that, contrary to other legislations⁹⁹, the owner may use the mark only if the persons authorized to use the mark,(in accordance with the regulations), also use it.¹⁰⁰ However, the owner does not itself sell goods or perform services under the collective mark, but may advertise or promote the goods sold by its member under the mark. The spirit of a

⁹¹ Reglamento de la Ley de Propiedad Industrial (Regulations governing the Intellectual Property Law), article 29.

⁹² LPI, Article 49.

⁹³ *Ibid.*

⁹⁴ The Registry of Intellectual Property is the trademark authority in Guatemala.

⁹⁵ LPI, Article 50.

⁹⁶ LPI, Article 51.

⁹⁷ LPI, Article 52.

⁹⁸ LPI, Article 53.

⁹⁹ In other legislations the owner is not entitled to use the collective mark. Only the members are allowed to use it.

¹⁰⁰ LPI, Article 54.

collective mark is that the owner (an association of producers, artisans, industrials, etc.) collaborates with small producers, so that they are able to market their products easier by using a common sign to distinguish the goods they produce.¹⁰¹ If an association wants to promote its own goods or services, it will own a trademark. This is the case with ANACAFE; it owns several collective marks for different coffee regions in Guatemala, but at the same time it owns “individual” marks to identify those goods it produces or the services it renders.¹⁰²

When it comes to the specific provisions regarding collective marks, the DR-CAFTA introduced a novel concept. That is by establishing where a geographical indication identifies a product or service as originating from a particular country, or a region or locality of a country, and its quality, fame or other characteristic can be fundamentally imputable to its geographical indication, it may be registered as a collective mark.¹⁰³

3.3 Benefits of Collective Marks for Artisans

A collective mark is a figure that carries great benefits for any group of entrepreneurs, especially for SMEs with similar marketing needs, which is the case of the Guatemalan artisan sector. To face the market they can come together and offer common products, which are going to be recognized as possessing certain qualities. These craftworks can be promoted as being manufactured by a member of a collective entity that maintains certain standards from which other enterprises are also part to.

Collective marks allow distinction between the products carrying the association’s sign from those of other competitors by inherently denoting the geographical origin or its common qualities or features of the mark. Collective marks serve as a beneficial marketing tool that can add economic

¹⁰¹ Flor Diaz, Secretary of the Registry of Intellectual Property, 22 October 2007.

¹⁰² *Ibid.*

¹⁰³ LPI, Article 16.

value to Guatemalan artisan works through the conveyance of a collective identity by using the region of origin or by acknowledging the value of specific skills, techniques or resources in the production process. Hence, in short collective marks create a unique identity for the products.

For the group, the use of collective marks becomes a mechanism for reducing the development and promotion costs of the mark. This is because all of the members of the organization and the owner share the investment costs. At the same time, it allows to direct ‘competitive efforts’ to common targets, reaching in most cases the necessary group strength to cover the expectations of the most demanding markets. This can be achieved, by sustaining the quality, origin or any other unique quality of the product, and by complying with commercial requirements, such as amount, quality and time of delivery.¹⁰⁴

In this sense, because they create a joined image, the group is forced to maintain and even improve those standards fixed in the regulation. If, a member does not comply with the standards or does not sustain the group’s vision, he or she will not be able to benefit from the collective mark.

As mentioned earlier, a collective mark may be used together with the individual trademark of the producer of a given good. This allows companies to differentiate their own products from those of competitors, while at the same time benefiting from the confidence of the consumer in products or services offered under the collective mark.¹⁰⁵ The label used as a collective mark will denote that the enterprise’s products meet those standards required by the association.¹⁰⁶

Collective marks also prevent “free riding” on the reputation of the goods that comply with the particular association’s standards. They guarantee consumers that the products have certain qualities and characteristics

¹⁰⁴ *Supra* note 49, p.3.

¹⁰⁵ *Supra* note 43, p.7.

¹⁰⁶ *Ibid.*

attributable directly to the conditions in which they were produced, since under the regulations they are forced to comply with the organization's fixed standards. Collective marks provide consumers with information about different types of products thus helping them to base their choices. Producers benefit because on the market collective marks give their products recognition for their distinctiveness¹⁰⁷, thus adding value to them. They are also a clever option which can ultimately facilitate the identification of their products in the export markets.

An example of how a collective mark can benefit artisans is the Mglass case. Mglass is a collective mark that is used to promote the glass industry from the region of Marinha Grande in Portugal.

Marinha Grande is well known for its glass industry. Artisans in this region have created more than 250 years worth of mouth-blown glass and crystal works of art. In 1994, a group of private and government organizations came together, forming the Vitrocrystal project, which aims to benefit glass factories belonging to Marinha Grande by promoting and publicising the potential of the companies belonging to that area. It established the marketing of quality and design as its defining characteristics. This was accomplished by setting standards for the use of the collective mark Marinha Grande Mglass, as well as by promoting design and quality campaigns and training.¹⁰⁸ Today, Vitrocrystal distributes the pieces of the Marinha Grande Mglass collection throughout the world, which have been developed by designers who worked in the member companies. They bear the seal of the collective mark and represent the tradition of this industry, which has benefited enormously the sales from this group.

Another example is the case of Mexican Artisans in Michoacán. "*El Fondo Nacional para el Fomento de las Artesanías*" (The National Fund for the Promotion of Artisan Products), which implemented a collective mark

¹⁰⁷They comply with certain standards set by the organization.

¹⁰⁸ WIPO, *supra* note 6, p.189.

programme in order to address free riding by illegitimate producers. This initiative aims to provide intellectual property protection of the goods, maintain their quality and avoid free riding. For artisans this strategy represents the possibility to associate and ensure high standards of production and quality. This will also help to finance the acquisition of more raw materials in order to decrease production costs and increase compliance with consumers' demands. Opposite to GIs like Tequila, collective marks are not strict on the origin of raw materials, which allows protecting more artisans.¹⁰⁹

3.4 Figures similar to Collective Marks

Collective marks are a figure of Intellectual Property Law that can have functions similar to those of geographical indications, appellations of origin and certification marks. All of these figures reveal information about the product origin; quality and characteristics, thus helping consumers make their choices when purchasing the goods. For producers, the use of these IP figures depends on the products they manufacture, their national legislation and the market strategy they adhere to. These figures will be analysed next in order to clarify why in the context of artisans' small businesses organizations, collective marks are preferred.

3.4.1 Certification Marks

3.4.1.1 What are Certification Marks?

A certification mark is a distinctive sign, which indicates that the quality or other characteristics of the product or the service has been controlled, verified or certified by the owner of the trademark.¹¹⁰ It guarantees that the quality of a product or service meets certain standards, while also assuring consumer in the products offered under the mark. Certification marks also reveal that there is continuous quality verification by the owner.

¹⁰⁹ Becerri, Omar, *Firman convenio para impulsar la protección de artesanías mexicanas*, El Empresario, 13 July 2007.

¹¹⁰ WIPO, *supra* note 66, p.5.

Trade associations and other entities often use certification marks. The mark must be available for the use of anyone who meets the standards promulgated for certification. Hence, the use of a certification mark cannot be limited to a single producer.¹¹¹ As a famous certification mark, WOOLMARK can be mentioned, which certifies that the products that bear it are made of 100 per cent wool.¹¹²

In Guatemala, a certification mark is defined as a sign, which is applied to goods, or services whose characteristics or quality are controlled and certified by the owner of the mark.¹¹³

In principle, any person or organization competent to certify certain products can apply for the registration of a collective mark. In Guatemala, a national, regional or international entity or institution (of private or private law), being competent to carry out quality certification activities, may apply for registration of a certification mark.¹¹⁴ The regulations of the mark (which have been previously approved by the competent administrative authority in view of the product), must be also filed with the application.¹¹⁵

With regard to collective marks, the same principles as those applying to individual marks apply to this IP figure. In addition, certification marks also may be used together with the individual trademark of the producer of a given good. The label used as a certification mark will be evidence that the enterprise's products fulfil the specific standards required for the use of the certification mark.¹¹⁶

¹¹¹Torsen, *Apples and Oranges: French and American Model of Geographic Indications Policies demonstrate an International Lack of Consensus*, 2005, p.1433.

¹¹²WIPO, *supra* note 6, p. 84.

¹¹³ LPI, Article 4.

¹¹⁴ LPI, Article 56.

¹¹⁵ LPI, Article 57.

¹¹⁶WIPO, Certification Marks, http://www.wipo.int/sme/en/ip_business/collective_marks/certification_marks.htm, 21 October 2007.

3.4.1.2 Difference between Collective Marks and Certification Marks

In a number of countries, the main difference between collective marks and certifications marks is that the former may be used only by certain enterprises-those members of an association, cooperative or other legal entity, while the latter may be used by anyone who complies with the standards fixed by the owner. . “Thus, the users of a collective mark form a club” while, in respect of certification marks, the “open shop” principle applies.¹¹⁷

In other words, a collective mark can be only registered and used by an organization and/or association. The object of the association, the conditions of membership and relationship of each member, as well as the sanctions that may be administered upon the misuse of the mark are just some of the pre-requisites required for the registration of a collective mark. On the other hand, a certification mark can only be registered under the name of a person or entity that does not carry on the trades in the goods certified.

In Guatemala a certification mark cannot be used by its owner, while in contrast to this collective mark can be used by its owner, if is also used by those authorized to use it.

3.4.1.3 Current Status of Certification Marks in Guatemala

In Guatemala, to date there is not a single certification mark registered. There is only one application required for the inscription of certification marks. The main reason for this is because in Guatemala there are not multiple certification organs.¹¹⁸

¹¹⁷WIPO, *supra* note 62, p. 69

¹¹⁸ Flor Diaz, *supra* note 91.

Certification marks can be helpful to artisans as well. They may help artisans promote their goods based on an “improved image”. They can certify that for example, women made the products; no children were employed in the manufacture of the goods; or the handicrafts have fulfilled certain ecological requirements.

However, a certification mark does not reveal the origin of the products, which is fundamental for those artisans who are trying to place their goods on the market as geographically identifiable that is those who want to identify their products as unique. As mentioned earlier, a certification mark can be used by anyone who fulfils the requirements, while a collective mark can only be used by those artisans who integrate as a group. A certification mark can give artisan’s products a “plus”, while coexisting with an individual trademark or a collective mark, nevertheless this alone it does not attribute anything about the origin of the products. By itself, a certification mark does not give the product enough distinctiveness.

So far, there is not one certification mark registered in Guatemala, so it is not a viable or suitable option for artisans yet. For the purpose of collective IP protection, the accurate figure in the domestic legislation is a collective mark.

3.4.2 Geographical Indications

3.4.2.1 What are Geographical Indications?

A geographical indication (abbreviated GI) is a sign used on goods that have a specific geographical origin and which possesses qualities, characteristics or a reputation that is identifiable with their place of origin.¹¹⁹ Most commonly, a GI consists of a name or sign used on certain products, which corresponds to a specific geographical location or origin (e.g. a town,

¹¹⁹ WIPO, *Geographical Indications Gateway*, http://www.wipo.int/geo_indications/en/ 16 October 2007.

region, territory or country). The use of a GI may act as a certification that the product possesses certain qualities, or enjoys a certain reputation, due to its geographical origin.

“Geographical Indications are Intellectual Property Rights which identify a good as originating in certain territory or a region where a given quality, reputation or other characteristic is essentially attributable to its geographical origin”.¹²⁰

GIs have been primarily used to identify primarily agricultural products or products that derive their qualities from their place of production and are influenced by specific local factors, such as climate and soil, for example Idaho potatoes, Chianti, Roquefort or Bordeaux. Agricultural products however, those are not the only products that can be or are identified by GIs. Unique qualities in relation to the materials used and/or labor performed in connection with the place where they were manufactured, have also successfully characterized products such as “Belgian” chocolate, “Swiss” watches or “Sheffield” Sterling. These GIs are however less common, and their protection is more controversial than the more traditional agricultural products.¹²¹

GIs serve as a marketing tool that can add economic value to products by conveying a cultural identity using the region of origin, acknowledging the value of specific human skills and natural resources in the production process, and creating a unique identity for the products.¹²² This geographical link between the GI and the particular qualities or reputation of the products it identifies grants a special type of right to their beneficiaries. Due to the relative connection with a particular geographical area being the main component of a GI, it cannot be owned by just one or a few owners. The GI

¹²⁰ Addor, *Geographical Indications: Important Issues for Industrialized and Developing Countries*, 2003.

¹²¹ Calboli, *Expanding the Protection of Geographical Indications of origin under TRIPS: Old Debate or New Opportunity*, p. 185.

¹²² Addor, Thumm, Grazioli, *Geographical Indications: Important Issues for Industrialized and Developing Countries*, 2003, p.4.

cannot be licensed, because use of same depends strictly on the territory the GI identifies with. Thus, GIs are traditionally owned and their use is exercised collectively by those who manufacture products in a certain geographical area. Nevertheless, producers must comply with certain quality standards.

GIs are legally protected in accordance with international treaties and national laws under a wide range of concepts. This protection might be under laws specifically relating to the protection of GIs¹²³ or Appellations of origin¹²⁴, trademark laws in the form of collective marks or certification marks¹²⁵, laws against unfair competition, consumer protection laws, or specific laws or decrees that recognize individual GIs.¹²⁶

On the international level, the most notable treaties that provide for the protection of GIs are the Paris Convention for the Protection of Industrial Property, the Madrid Agreement for the Repression of False and Deceptive

¹²³ WIPO standing committee on the law of trademarks, industrial designs and geographical indications. Ninth Session. The definition of geographical indications, 2002, p.3. A geographical indication generally consists of the name of a country, region or locality that serves to designate a product originating therein, the quality, reputation, or other characteristic of which is essentially attributable to the geographical origin. This means that products protected under this special title originate from a specific area and owe a specific quality, reputation or other characteristic to that place of origin. In order to ensure that the products satisfy the specified criteria, a control mechanism may be set up by competent authorities, and products are monitored regularly. Only products which satisfy the definitional criteria are protected by a geographical indication. In some countries, geographical indications are limited to agricultural products and foodstuffs, but the concept may be applied to other products as well.

¹²⁴ WIPO standing committee on the law of trademarks, industrial designs and geographical indications. Ninth Session, The definition of geographical indications, 2002, p.3. An appellation of origin (sometimes called designation of origin) generally consists of the name of a country, region or locality that serves to designate a product originating therein, the quality and characteristics of which are due to the geographical environment, including both natural and human factors. This means that products protected under this special title originate from a specific area and owe their specific quality and characteristics to the geographical environment of their place of origin. In order to ensure that the products possess the specified qualities, a control mechanism may be set up by competent authorities, and quality controls are carried out regularly. Only products which comply with the defined standards are protected by an appellation of origin. Originally, appellations of origin only concerned wines and spirits, but the concept has since been extended to include other products (such as dairy products, mainly cheese and butter), poultry and plant products.

¹²⁵ E.g. The United States offer geographical protection generally through registration as a collective or certification mark. *See also*, Geographical Indication in the United States. USPTO.

¹²⁶ WIPO, Geographical Indications Gateway, http://www.wipo.int/geo_indications/en, 16 October 2007.

Indications of Source on Goods and the Lisbon Agreement for the Protection of Appellations of Origin.

The Paris Convention for the Protection of Industrial Property does not in itself specifically include the notion of a geographical indication. Article 1 paragraph (2) defines as subjects of industrial property; *inter alia*, indications of source and appellations of origin.¹²⁷ This terminology is still used in conventions and agreements administered by WIPO.¹²⁸ In addition, it must always be kept to mind that the terms “indication of source”, “appellation of origin”, and “geographical indication” are used flexibly in different international legal instruments. Rights and obligations flowing from those instruments exist only in relation to the specific term to which the instrument in question refers. Therefore, it may not always be possible to speak broadly of “geographical indications”; rather, a distinction must be made whenever reference is made to a particular international instrument.

Neither the Paris Convention, nor the Madrid Agreement defines “indications of source”. However, there are three key elements that can constitute the notion: a) there is a clear link between the indication of origin and geographical origin (e.g. made in...); rather than other criterion of origin (e.g. made by...). b) unlike other GIs, there is no requirement for distinguishing qualities or attributes of the good and c) the protected indication can be constituted by words or phrases that directly indicate geographical origin or phrases, symbols or iconic emblems associated with the area of geographical origin.¹²⁹

The Lisbon Agreement, concluded on 31 October 1958, establishes an international system for the protection of appellations of origin. The term “appellations of origin” can be found in article 1(2) of the Paris Convention. However, it is also defined in article 2 of the Lisbon Agreement, which provides that “appellation of origin” means the geographical name of a

¹²⁷WIPO, *supra* note 62, p. 120.

¹²⁸ *Ibid.*

¹²⁹Rangnekar, Dr. Dwijen, *Geographical Indications. A Review of Proposals at the TRIPS Council: Extending Article 23 to products other than Wines and Spirits*, 2003, p.9.

country, region, or locality, which serves to designate a product originating therein, the quality and characteristics of which are due exclusively or essentially to the geographical environment, including natural and human factors. Again, three elements constitute the notion: a) appellations must be direct geographical names; b) the appellation must serve as a designation of geographical origin of the product and; c) quality and characteristics exhibited by the product must be essentially attributable to the designated area of geographical indication.¹³⁰

The Lisbon Agreement protects not only consumers, but also aims to protect producers from the illegal misuse and abuse of the appellation. This is done by ensuring protection for same even if the true origin of the product is indicated or if the appellation is used in a translated form or accompanied by terms such as "kind," "type," "make," "imitation," or "the like".¹³¹ It also creates a system of international registration. The protection conferred by international registration is unlimited hereunder this agreement. Further, an international registration of the appellation ceases to have effect in two cases: firstly, when either the registered appellation has become a generic term in the country of origin or secondly, when the international registration has been cancelled by the International Bureau at the request of the Registry Office of the country of origin.¹³²

The Lisbon Agreement, as well as the Madrid Agreement, boasts a high degree of IP protection. This would in turn require major changes in the laws of many countries for ratifications to take place, thus explaining why both treaties have very few signatories at present.

To this date Guatemala is neither party to Lisbon Agreement, nor to the Madrid Agreement. However, Guatemala did become part of the WTO on

¹³⁰*Ibid.*

¹³¹Lisbon Agreement, Article 3.

¹³²Lisbon Agreement, Articles 5-7.

21 July 1995.¹³³ It also adopted the TRIPS Agreement under Decree 37-95 of the Congress of the Republic.

The 1994 TRIPS Agreement is probably the most important instrument for the protection of GIs.¹³⁴ It sets the bare minimum standards for intellectual property rights protection, which all members of the WTO must, in principle, respect. Article 22 provides a general definition of GI stating that they 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. In contrast to article 2 of the Lisbon Agreement, this definition extends to indications that confer only “reputation”, but not necessarily “quality and characteristics” to the goods which they are affixed. We can also note that this provision appears to exclude services.

Furthermore, article 22 forbids the use of false GIs within the territories of Member States in order to prevent use of misleading information on the market that might subsequently cause consumer confusion about the product’s origin. It also prevents the misrepresentation of a product originating in a geographical area other than the true place of origin. Due to the vast diversity in the legislations of WTO Member States, Article 22 (in accordance with Article 41) leaves the decision of GI implementation, protection and enforcement up to each individual Member State.

¹³³WTO Homepage, *Guatemala and the WTO*,

http://www.wto.org/english/thewto_e/countries_e/guatemala_e.htm , 18 October 2007.

¹³⁴ WIPO standing committee on the law of trademarks, industrial designs and geographical indications. Ninth Session, The definition of geographical indications, 2002, p.1. The question of the definition of “ geographical indications” has been raised in discussion during the seventh and eighth sessions of the SCT,³ as well as in previous SCT documents prepared by the International Bureau.⁴ At its eighth session, the SCT resolved to base further consideration of the topic on the definition provided by Article 22.1 of the TRIPS Agreement. The practical reasons cited for this decision include the fact that quite a number of countries now use the TRIPS definition as the basis for their national legislation on geographical indications, thus establishing it as a common denominator in this field of law.⁵ However, whatever the TRIPS definition is referring to, the substance of the concept of geographical indications is that a geographical indication is used to demonstrate a link between the origin of the product to which it is applied and a given quality, reputation or other characteristic that the product derives from that origin.

At a national level the definition of “geographical indication” varies enormously from country to country. In Guatemala a GI is considered to be any indication which identifies a product as coming from a particular country, a region or locality of that country, where a certain level of quality, reputation or other characteristic of the product given fundamentally relates to its geographical origin.¹³⁵

The IPL contains some prohibitions concerning the use of GIs in commerce. Firstly, a GI may not be used in trade in relation to a product or service, if such indication is false or deceptive with regard to a product or service, or if its use may cause confusion amongst the public with regard to the geographical identity or the qualities of the product or service, or if its use may cause confusion amongst the public with regard to its origin, source, characteristics or qualities.¹³⁶ Secondly, a GI may not be used in publicity or in commercial documentation relating to the sale, exposition or offer for sale of products or services, if it is liable to cause confusion with regard to the geographical origin or the qualities of the products or services.¹³⁷

However, every trader is allowed to indicate his name or domicile on the products he/she sells, even if the goods come from a different country, provided the name of the manufacturer is also sufficiently mentioned (with prominent characters) so as to avoid any mistake with regard to the real origin of the products.¹³⁸

In Guatemala, an appellation of origin is considered to be any sign or combination of signs, which, in any way is a geographical name, expression, image or sign that designates or refers to a country, a group of countries, a region, a locality or a particular place, and it identifies a certain product as coming from that region, locality, or particular place, when the qualities or characteristics of the product are exclusively or essentially due to the

¹³⁵ LPI, Article 4.

¹³⁶ LPI, Article 78.

¹³⁷ LPI, Article 79.

¹³⁸ LPI, Article 80.

geographical environment in which it is produced (including natural, human or cultural factors).

The State of Guatemala is the owner of the appellations of origin of Guatemala, and the Registry of Intellectual Property supervises that these appellations of origin are only used by those entitled thereto. Similar to collective and certification marks, appellations of origin may only be used by those authorized to do so by the competent administrative office. In this case only the producers, manufacturers or craftsmen who carry out their activities in the place designated by the appellation and have met the required authorization issued by the Registry are allowed to use the appellation.¹³⁹

3.4.2.2 Difference between Collective Marks and Geographical Indications

As mentioned previously, the definition of a collective mark may vary from country to country however generally they are owned by a private entity. On the other hand GIs are not owned by an organisation, rather they are collectively owned through the Government. In Guatemala, the State is the owner of GI's. In this context, collective marks constitute private property rights, while GI's are public rights, since they belong to the State, a town council or other governmental institution.¹⁴⁰

Collective marks, on the condition that certain rules are followed, and under the control of the owner, may be used by certain number of persons or enterprises.¹⁴¹ GIs can be used by any person or enterprise that fulfils the conditions of use. An administrative State organ will supervise the use of the GIs to ensure that producers' act in compliance with the norms of use.

¹³⁹ LPI, Article 81.

¹⁴⁰ Bifani, *Breves consideraciones sobre obstáculos y posibilidades del ADPIC par alas pymes: El caso de las marcas y denominaciones de origen*, 2007, p.5.

¹⁴¹ Gevers, *Geographical names and signs used as trade marks*, p. 4.

A collective mark has a limited period of validity¹⁴² that can be renewed indefinitely if it is properly used (usually every ten years), while GIs have an unlimited validity period if the conditions for their use are maintained. In addition, the existence of a GI depends on the officials who determine the area of production. The existence of a collective mark depends on the strategy of the owner.

A GI identifies products that originate from a specific region. It informs consumers that a product is produced in a certain region and has certain characteristics that are due to that place of production. It may be used by all producers who manufactured their products in that particular place designated by a geographical indication and whose products share typical qualities. On the other hand, a collective mark is a sign used to distinguish products or services with common characteristics and provided for by a group of enterprises, generally members of an association. It gives the owner the right to exclude others from using the mark. In addition, a collective mark may identify products or services that come from the same region, but not necessarily. Products of the members of the association must fulfil certain standards; however they must not necessarily come from the same region, although they usually do. In addition, a collective mark covers products and services while a GI covers only products, mainly agricultural but not exclusively. Unlike a collective mark, the name used as a GI will usually be predetermined by the place of merchandise production.

In the case of collective marks the owner is the one who controls the use of the mark and ensures it is in accordance with the regulations governing its use, while in the case of GI's the performance control is undertaken by an independent third party or governmental agency. Finally, the initial application in obtaining a collective mark (both nationally and internationally) is generally easier and cheaper, while the corresponding application needed to obtain a GI can be complicated, expensive and requires more time.

¹⁴² In Guatemala the valid period is 10 years.

3.4.2.3 Current Status of Geographical Indications in Guatemala

In Guatemala, there is not one single GI or appellation of origin registered. According to the law, an extensive amount of information has to be attached when filing GI or an appellation of origin application. Namely, the region that will identify with the GI (with indications of altitudes and latitudes applicable, regions, locations or other places it may cover), as well as its particular characteristics such soils, rainfall, climate variation and any other natural factors that affect the product.¹⁴³ The method of production, manufacturing and extraction, with special indications detailing the elements that directly affect the qualities of the product (including human and cultural factors) connected to each case must also be attached to the application.¹⁴⁴ This requires ample studies to be performed by a variety of different experts.

In addition to this, all stages of production (raw material, processing and preparation) must be specified in the designated area of the application when obtaining an appellation of origin.¹⁴⁵ In this sense, it is a requirement that the raw materials, for example, in an application for grapes it must be proven the grapes originated from the area in question and the processes and preparation of the grapes was performed within the region, in order to get the final grape product.

Currently there is only an application for the registration of an “appellation of origin”, that being “*Café Genuino Antigua*” (Antigua Genuine Coffee) made by APCA (Association of Producers of Antigua Coffee). The recognition of Genuine Antigua Coffee, as the best Guatemalan Coffee and as one of the best coffees in the world, dates back more than a century.¹⁴⁶

¹⁴³ Regulations of the Intellectual Property Law, Article 48.

¹⁴⁴ *Ibid.*

¹⁴⁵ Flor Díaz, *supra* note 91.

¹⁴⁶ Sánchez, *Café genuino Antigua: la denominación de origen como una herramienta para protegerse de las malas prácticas comerciales*, 2004, p.2.

However, the application to obtain an appellation of origin has been a very arduous process. This is because it has occupied an increasingly high amount of resources. A significant amount of funding has been spent just to delimit the “Antigua region” using the geo-position system. USAID donated funds so this study could be completed. In addition, many studies by a diverse variety of experts had to be executed in order to adequately present the noteworthy qualities of the region, including but not limited to natural features (such as rivers, contour lines and other topographic features); geographical characteristics (such as soil, drainage, climate, irrigation, and elevation); human features (such as choice of varieties and methods of production) and lastly the historical and traditional factors from the region. The process of gathering the required information was very costly and took a considerable amount of time, between one and two years.¹⁴⁷

As can be observed from this study, the application for a GI or an AO can be problematic in Guatemala. It is evident the application must be accompanied by a substantial amount of information. This information, in turn, requires a large investment of resources¹⁴⁸, which can prove to be very expensive for a group or small businesses in general due to their limited budget.

Another problem is that, in Guatemala to date there are no goods that fulfil the requirements established by law, which are needed to obtain an AO. This is because the AOs characteristics are not exclusively connected with a geographical area, and if when they are, they can be found in many different regions within the country or even in other countries.¹⁴⁹ Some academics indicate that coffee is the only product that qualifies for an AO. However, as mentioned previously, the criterion for an AO is that all stages of production must take place in the area of origin, which requires that coffee must be

¹⁴⁷ Interview with Maria Mercedes Sanchez, CEO APCA, 25 July 2007.

¹⁴⁸ For example a geo-position study.

¹⁴⁹This is the general criterion in Guatemala. Members of AGEXPORT, Officers from the Ministry of Economy and the Registry of Intellectual Property, and Experts in the IP field agree that not a single product in Guatemala qualifies to be protected under an appellation of origin.

grinded and packed in the area of production – this is unfortunately not the case with regard to the use of Guatemalan coffee.¹⁵⁰ Parchment coffee is exported in grain form; the exporter is the one that grinds it and does the mixes, which means that not all stages of production are done in the place of origin.¹⁵¹ In this context, coffee, such as “*Café Genuino Antigua*” could hypothetically be protected under a Geographical Indication, but not under an AO.

Finally, in Guatemala although GIs as well as collective marks search for the collective protection of certain products and aim to reveal the geographical origin of the goods, GIs and AOs belong to the State, which in turn would involve the modification or creation of internal systems in order to monitor and enforce GIs. This would be expensive, especially for the Guatemalan developing economy. On the contrary, collective marks are monitored by the owner, hence facilitating their enforcement and transferring the responsibility of their success to the respective members of the organization.

In this order of ideas, most craftworks do not qualify for protection under a GI or an AO. This is because most of the works could be qualified as “contemporary” or “modern”¹⁵². Nowadays, most of the craft designs do not belong to a particular region; and if they do, they have been combined with the designs of other regions or foreign designs. Furthermore, their production and manufacture are usually common to many different artisan groups all over the country, with incorporates a plethora of local and foreign raw materials.

¹⁵⁰ Interview with Edith Molina de Flores, IP lawyer ANACAFE, 6 July 2007 and interview with Flor Diaz, Secretary of the Registry of Intellectual Property, 6 August 2007.

¹⁵¹ *Ibid.*

¹⁵² Contemporary craftworks or neo-craftworks are those who have appeared to satisfy the new material or spiritual needs by combining old designs with new creative designs. Ley de Protección y Desarrollo Artesanías (Law for the Protection and Development of Craftworks) Article 2.

Lately, artisans have modified their designs in an effort to meet the demands of the international market. This is the case with the association of San Antonio Palopó, which is part of the “*Encadenamientos Empresariales* project” by AGEXPORT. For a revived innovation of their products a Spanish designer was hired to teach artisans new techniques and designs that would prove adaptable to changing foreign demands and tastes.¹⁵³ . Another example is the CHILAM-BALAM company. This artisans’ company gathers artisans from all over the country that have been given weaving and business training. It manufactures mostly decorative products, such as home interiors and ladies accessories (for example, tablecloths, napkins, pillow cases, curtains, handbags, make-up cases and scarves).¹⁵⁴ The Company’s main concept is to combine local traditions with newer European trends and then own these designs. For this purpose, CHILAM-BALAM has the financial support of ICCO¹⁵⁵ from Holland and the technical support from Marjolein Keijsper, a Dutch designer in charge of the production department, who helps artisans innovate their products and maintain them to a high quality.¹⁵⁶

As can be seen Guatemalan artisan products do not comply with GI or AO regulations and criteria that stipulate all stages of production must be in the designated area.

3.5 A new approach

As mentioned earlier in the study, with help from public and private institutions more artisan associations and cooperatives are spontaneously emerging in Guatemala. These organizations are formed based upon a backbone of common geographical origin and/or common characteristics of the goods they are producing.

¹⁵³ Ligia Rosales, *supra* note 36.

¹⁵⁴ AGEXPORT, *Textiles Mayas con Tendencias Europeas*, Data Export, Vol. 178, Guatemala August 2007.

¹⁵⁵ Interchurch Organization for Development Cooperation

¹⁵⁶ AGEXPORT, *supra* note 142.

Craftworks producers can employ many advantages from this organization when working on a collective marketing strategy. Hence, due to their limited budget, they can share IP protection and all marketing expenses. In this context, the group can also register a collective mark in order to promote their products together. This may consequently give them a stronger presence in the market by presenting a unified quality of product and furthermore a better overall enterprise image.¹⁵⁷

Applied as a market strategy, collective marks will link the artisans' products to their history, traditions or/and cultures of a particular regions. They will also serve as a guarantee of the nature and quality of its producers, raw materials utilized and/or the method of manufacturing applied to the product. Thus, as a result collective marks will implicitly reveal to consumers a vast amount of information with regard to the quality of the craft items.

On the other hand, collectively artisans can also benefit from the sharing of expenses, such as market research, market updates, marketing; trademark registration and trademark follow up when using collective marks as part of their marketing strategy.

In addition, collective marks protection can serve to enhance domestic economic policies and improve the national development of artisans' small businesses. Collective marks would foster the advancement and promotion of value to local craftworks because in recent years, marketers as well as consumers are starting to distinguish and prefer commodities from different regions in line with the collective marks that identify them.

The greatest benefit a collective mark would provide for producers is that it would discourage "free riding" by illegitimate producers. For consumers, the greatest benefit would be that they are fully informed when making their

¹⁵⁷ WIPO, *supra* note 6, p.32.

purchase selections. This is because the product mark would indicate the qualities of the product and further guarantee these qualities by reputation the organization that owns and promotes the distinctive figure. It will ultimately allow consumers to recognize the authentic product.

There is no doubt that collective marks add value to products. It is undeniable that collective marks carry benefits to both producers and consumers. Collective marks reward those artisans who produce authentic quality products that have gained a good reputation over time. Consumers are also able to purchase goods with unique qualities that are usually not found in ordinary products.

However, collective marks owners have to compete in the market just like everyone else. This means the success of these artisans' small businesses on the local and international market will depend (like any other entrepreneurial) foremost on their marketing strategy and secondly on the quality of their products.. In order to benefit commercially from collective marks effort is required by the artisans' organizations in order to build and sustain a worthy reputation for the products. "A successful business is one that makes bigger profit after understanding and meeting the needs of consumers better than its competitors".¹⁵⁸ This can only be achieved if there is a quality product; a distinctive brand and an effective marketing scheme in place.

¹⁵⁸*Ibid.*, p.13.

4 PROTECTING COLLECTIVE MARKS ON AN INTERNATIONAL LEVEL

4.1 Collective marks as an Instrument for protecting Artisans' Products on the International Arena

The benefits of collective marks for small artisans' business on a domestic level were addressed in the previous chapter. However, these businesses are also exporting their products; hence this means they also need IP protection on an international level. Therefore this chapter will provide an overview to the multilateral conventions concerning collective marks. An analysis of the EU and U.S. provisions on collective marks will be done as well, as these are the two main export markets of Guatemalan crafts, in order to establish the viability for artisans' associations to register their collective marks abroad.

4.2 Multilateral Conventions

4.2.1.1 The Paris Convention

The Paris Convention for the Protection of Industrial Property (1967) was adopted in order to achieve a basis of uniform legislation in the field of Industrial Property. To this date, it has 172 contracting parties.¹⁵⁹ Guatemala is currently a member state of this treaty. The Convention came into force on 5 February 1982.¹⁶⁰

The provisions of the Paris Convention may be divided in three categories: national treatment, right of priority and common rules.

¹⁵⁹ WIPO. Contracting Parties, http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=2, 24 October 2007.

¹⁶⁰ WIPO, http://www.wipo.int/treaties/en/Remarks.jsp?cnty_id=238C, 24 October 2007.

Firstly, concerning national treatment, each country party to the Convention must grant – with regard to IP protection – the same rights to nationals of any other member State as it grant its own nationals.¹⁶¹ However, nationals of non-contracting States are also entitled to national treatment under the Convention if they are domiciled or have a real and effective industrial or commercial establishment in a contracting State.¹⁶² Nowadays this rule is fundamental for a great number of international treaties, for example, the EC or WTO; this is because it is imperatively important for international trade relations.¹⁶³

Secondly, article 4 of the Paris Convention establishes the right of priority. This means that, on the basis of a regular first application filed in one of the contracting States, the applicant may, within a certain period of time (6 months for marks), apply for protection in any of the other contracting States; these later applications will then be regarded as if they had been filed on the same day as the first application. In other words, the first application will have priority over applications which may have been filed during the said period of time for the same figure.

Finally, the Paris Convention lays down a few common rules which all the contracting States must follow. It contains provisions on collective marks in its article 7bis. This article obliges member states to accept for filing and protection (in accordance with its own legislation) collective marks belonging to associations. These will generally be associations of producers, manufacturers, distributors, sellers or other merchants, of goods that are produced in certain regions and have certain common characteristics or both.¹⁶⁴ “Collective marks of States or other public bodies are not covered by the provision”.¹⁶⁵

¹⁶¹ Paris Convention, Article 2.

¹⁶² Paris Convention, Article 3.

¹⁶³ Gausmann, *Protection of trademarks under International Law*, Lund University, 2005, p.10.

¹⁶⁴ WIPO, *supra* note 63, p. 256.

¹⁶⁵ *Ibid.*

Article 7bis (1) also provides that the existence of the association must not be contrary to the law of the country of origin. A collective mark may be refused if it is found the existence of the association is not in accordance with its domestic law.¹⁶⁶ Nevertheless, it is not a requirement that this association has an industrial or commercial establishment.

Additionally, the Convention states the right of each State to apply its own criteria of protection to each application and to refuse protection if the collective mark is contrary to the public interest.¹⁶⁷

Finally, article 7bis (3) ensures that collective marks are able to be admitted for registration and protection in countries other than the country where the association owning the collective mark was originally established. This means that if an association has not been established in accordance with the law of the country where protection is sought; there is no reason for refusing such protection.

Consequently, a Guatemalan artisans' association that is legally registered in accordance with Guatemalan legislation, even if it does not have a physical establishment and has not been established in accordance to the other country's legislation (i.e. where collective mark protection is sought) may apply for the registration of its collective mark. However, ultimately the protection of the collective mark will depend on the criteria of the country where protection is being sought. It is up to each individual country's legislation to grant protection of the given collective mark within its jurisdiction.

4.2.1.2 The Madrid Agreement and Protocol

The system of international registration of marks is governed by two treaties: The Madrid Agreement concluded in 1891 and amended in 1979, and the Madrid Protocol relating to that Agreement, which was concluded in 1989. The aim of Madrid Protocol is to render the Madrid system more

¹⁶⁶ *Ibid.*

¹⁶⁷ Paris Convention, Article 7bis (2).

flexible and compatible with the domestic legislations of certain countries which had not previously been able to accede to the Agreement.

The Madrid Agreement and Protocol are open to any State which is party to the Paris Convention for the Protection of Industrial Property. Both treaties are administered by WIPO. Furthermore, the two treaties are both parallel and independent - States may adhere to either of them or to both. In addition, an intergovernmental organization which maintains its own Office for the registration of marks may become party to the Protocol. States and organizations which are party to the Madrid system are collectively referred to as “Contracting Parties”.¹⁶⁸

The Madrid system makes it possible to protect a mark in a large number of countries by obtaining an international registration which has effect in each of the Contracting Parties that has been designated under the agreement.¹⁶⁹

Moreover, the system of international registration of marks has several advantages for trademark owners:

“Instead of filing many national applications in all countries of interest, in several different languages, in accordance with different national procedural rules and regulations and paying several different (and often higher) fees, an international registration may be obtained by simply filing one application with the International Bureau (through the Office of the home country), in one language (either English or French) and paying only one set of fees”.¹⁷⁰

Another advantage is that if registration is refused in one of these countries, it will not affect registration of the mark within the remaining countries if they are also stated in the application where registration is sought.¹⁷¹

¹⁶⁸ Summary of the Madrid Agreement Concerning the International Registration of Marks (1891) and the Protocol Relating to that Agreement (1989), http://www.wipo.int/treaties/en/registration/madrid_protocol/summary_madrid.html , 22 October 2007.

¹⁶⁹ *Ibid.*

¹⁷⁰ *Ibid.*

¹⁷¹ Elias, *supra* note 49, p.13/25.

Similar advantages exist when the registration has to be renewed: this involves the simple payment of the necessary fees, every 10 years, to the International Bureau. Likewise, if the international registration is assigned to a third party or any other change, such as a change in name and/or address, has occurred, this may be recorded with effect for all of the designated Contracting Parties by means of a single procedural step.

Under these instruments, applications for collective marks can be made. However, to this date Guatemala is not a party to either of these agreements. This effectively blocks the means by which artisans associations in Guatemala can apply for international registration. This system also prevents brand holders from seeking international protection using these instruments. A recommendation of this paper would be that Guatemala becomes part of the Madrid system in order to benefit all the brand holders that want to protect their products on an international level. Many Guatemalan SMEs face strenuous obstacles when it comes to obtaining international protection because the legal costs often exceed their small budget. Under the Madrid Agreement these obstacles might be reduced considerably.

4.2.1.3 The Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement)

Article 2.1¹⁷² of the TRIPS Agreement incorporates certain provisions of the Paris Convention (1967). Hence, many jurisdictions have been required to amend their trademark legislation in order to accommodate the requirement of protection of collective marks under TRIPS.

Guatemala became part of the WTO on 21 July 1995.¹⁷³ It adopted the TRIPS Agreement under Decree 37-95 of the Congress of the Republic. In

¹⁷² Trips Agreement article 2; “1. In respect of Parts II, III and IV of this Agreement, Members shall comply with Articles 1 through 12, and Article 19 of the Paris Convention (1967)”.

¹⁷³ WTO, http://www.wto.org/english/thewto_e/countries_e/guatemala_e.htm, 25 October 2007.

consequence, the State must comply with Articles 1 through 12 and Article 19 of the Paris Convention.

Thus, Guatemala, as a signatory of the TRIPS Agreement is required, in accordance with Article 7bis of the Paris Convention," to accept for filing and to protect collective marks belonging to associations the existence of which is not contrary to the law of the country of origin, even if such organizations do not possess an industrial or commercial establishment."

4.2.2 Regional Regulation

4.2.2.1 The EC Regulation on the Community Trademarks

The Council of the European Union adopted Council regulation 40/94 on the community trademark (CTRM) on 20 December 1993.¹⁷⁴ This Regulation introduces a system for the award of Community trade marks by the Office for Harmonization in the Internal Market (OHIM).¹⁷⁵

The Community Trade Mark (CTM) offers the opportunity to protect a trademark in all of the countries party to the European Union (EU) via the filing a single application. The countries covered are Austria, Benelux (Belgium, the Netherlands and Luxembourg), Bulgaria, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Malta, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and the United Kingdom.

The CMT does not replace the national system of trademark protection, but is an additional instrument for protection throughout the EU. For example, an enterprise filing for mark protection can choose whether to apply for protection under national law, the CMT system or both. Nevertheless, a trademark protected by national law cannot be replaced by a further CMT.

¹⁷⁴ Bowman, *Trademark Distinctiveness in a Multilingual Context: Harmonization of the treatment of marks in the European Union and the United States*, 2003, p. 2.

¹⁷⁵EUROPA, <http://europa.eu/scadplus/leg/en/lvb/l26022a.htm> , 26 October 2007.

Applicants domiciled in the EU may file applications directly or through their agents. Applicants outside the EU must file the application through an agent in any EU country. Those applicants filing through an agent must provide a signed Power of Attorney with their application.¹⁷⁶

A Community trademark may consist of any signs capable of being represented graphically (particularly words, designs, letters, numerals, and the shape of goods or of their packaging provided that such signs are capable of distinguishing the goods or services of one undertaking from those of other undertakings.¹⁷⁷

Both natural and legal persons (including authorities established under public law) may be proprietors of Community Trade Marks.¹⁷⁸ A person who has filed an application for a trademark in any State party to the Paris Convention or to the Agreement establishing the World Trade Organization enjoys a right of priority for the purpose of filing a Community application in respect of the same trade mark during a period of six months from the date of filing of the first application.¹⁷⁹ The proprietor of an earlier trademark registered in a Member State who applies for an identical trademark for registration as a CTM may invoke the seniority of the earlier national trademark.¹⁸⁰

An application for a CTM may be submitted, at the choice of the applicant, with either the OHIM which is located in Alicante, Spain, at the central industrial property office of a Member State, or the Benelux Trade Mark Office.¹⁸¹ The office concerned must then forward the application to OHIM within two weeks of filing. It must be accompanied by various documents

¹⁷⁶ *Ibid.*

¹⁷⁷ CRTM article 4.

¹⁷⁸ CRTM article 5.

¹⁷⁹ CTRM article 29.

¹⁸⁰ CRTM article 34.

¹⁸¹ CRTM article 25.

and information. The payment of an application fee may also be made at this office.¹⁸²

EC Regulation No 40/94 contains many provisions on collective marks in its articles 65-72. When an application is filed, a Community trademark may be designated as collective if it is capable of distinguishing the goods or services of the members of the proprietary association. Associations of manufacturers, producers, suppliers of services or traders, as well as legal persons under public law, are entitled to register Community collective marks.¹⁸³

Signs or indications belonging to the entities mentioned before which may serve, in trade, to designate the geographical origin of the goods or services may constitute Community collective marks.¹⁸⁴ The provisions of the CTMR apply to Community collective marks, unless articles 65 to 72 provide otherwise.

The applicant of the community collective mark must include the regulation governing the use of the mark. These regulations must state the persons authorized to use the mark, the conditions of membership of the association and, where they exist, the conditions of membership of the association including any sanctions for unscrupulous conduct.¹⁸⁵ Any amendment made by the owner of the mark must be submitted to the Office.¹⁸⁶

Something novel is that the regulation governing the use of a collective mark, which designates the origin of the products or services, must authorize any person whose goods are produced in the geographical area concerned to become a member of the association that is the owner of the mark.¹⁸⁷

¹⁸²CRTM article 25.

¹⁸³ CTRM article 64.

¹⁸⁴*Ibid.*

¹⁸⁵ CRTM article 65.

¹⁸⁶CRTM article 69.

¹⁸⁷ *Ibid.*

As stated previously, the CTMR sets out the provisions governing the filing of an application for a CTM and the Office examines the conditions of filing the application (established under article 23 of the CTMR).¹⁸⁸ The application is then examined by the Office for any possible grounds of refusal, which are specified in article 7 of the Regulation.¹⁸⁹ In addition to the grounds for refusal of a CTM application, an application for a Community collective mark will be refused if does not satisfy the requirements established for a community collective mark, or if the regulations governing the use of the mark are contrary to public policy or to accepted principles of morality.¹⁹⁰ An application for a Community collective mark may also be rejected if the public is likely to be misled as regards the character or the significance of the mark – in particular if it is likely the mark is to be recognized as something other than a collective mark.¹⁹¹

The registration of a CTM is only possible if it meets all of the requirements. In other words, if the mark application satisfies all of the relevant conditions, the application for a CTM will then be published in the CTM Bulletin.¹⁹²

The CTMR establishes the conditions associated with the entitlement of the proprietor and the possibility for third parties to make written observations to the OHIM and to oppose the registration of a mark. In particular, the Regulation establishes the "searching" system designed to identify any conflict with other earlier rights.¹⁹³

The initial registration period is ten years from the date of filing the application and it can be renewed indefinitely and consecutively for further

¹⁸⁸CTM article 37.

¹⁸⁹CTM article 38.

¹⁹⁰CTM article 66.

¹⁹¹*Ibid.*

¹⁹²CTM articles 40 and 85.

¹⁹³CTM, articles 39, 41 and 42.

periods of ten years. Concerning the use of community collective marks, article 68 of the Regulation provides that: “Use of a Community collective mark by any person who has the authority to use it shall satisfy the requirements of this Regulation, provided that the other conditions which this Regulation imposes with regard to the use of Community trade marks are fulfilled”.

Europe is the second largest importer of Guatemalan craftworks. Guatemala is part of the Paris Convention and the Agreement establishing the World Trade Organization. In consequence, a Guatemalan artisan association that wants to gain access to the European market can benefit from the use of a community collective mark. This is because one application will cover an increasingly large number of European countries. A single application to OHIM is required in order to get a mark protected throughout the EU. Hence, the Community trade mark has unity in the sense that it ensures the same results in all of the Member States, which simplifies the procedure and the costs of an application at a European Level.

Another advantage of the CTM is the amount of time and money saved. This is of substantial value to small enterprises associations that often have very tight budgets. The initial cost of filing an application to register a CTM is much less than filing several separate national applications in all of the EU Member States.¹⁹⁴ The economic advantage of the CTM also increases according to the number of countries where the enterprise might use the mark. Furthermore, under the CTM system, use of a mark is not required to secure registration or renewal. Additionally, under the CTM system injunctions against infringement cover the entire EC. Lastly, a CTM that is refused registration may be converted into a national application while still maintaining the priority of the original CTM application

¹⁹⁴Filing Fee for 3 classes of goods and/or services is Euro (€) 900 (750 via filing). Registration for 3 classes is Euro (€) 85. Additional classes (per class) Euro (€) 150. *See*, http://www.inta.org/index.php?option=com_content&task=view&id=189&Itemid=59&getcontent=1, 10 November 2007.

A disadvantage of the CTM system is that the registration procedure of the CTM can take a long time.¹⁹⁵ Another disadvantage is that if there is a ground for refusal (e.g. a prior national right or a linguistic difference) the registration fails. In other words, one ground for refusal in one country prevents the registration of the mark in the entire E.C. Thus, if the association is only willing to promote its products in certain Member States (four or less), it should consider seeking registration only in those countries, hence reducing the risk of refusal and lost time and money. Finally, if the application is met with several oppositions, the cost of the application can be very high, especially for SMEs dealing with a tight budget.

4.2.2.2 Trademark Law in the USA

In the United States, trademarks may be protected by Federal statute, states statutory¹⁹⁶ and/or common laws¹⁹⁷. The Lanham Act (15 U.S.C. § 1051-1127) of 1946, establishes a procedure for the federal registration of trademarks. Congress enacted the Lanham Act under its Constitutional grant of authority to regulate interstate and foreign commerce.¹⁹⁸ A mark registered under the Lanham Act has nationwide protection.¹⁹⁹

A trademark is defined in 15 U.S.C. § 1127 as including: “any word, symbol, or device or any combination thereof used by any person to identify and distinguish his or her goods, including unique product, from those manufactured or sold by others and to indicate the source of the goods, even

¹⁹⁵INTA, Community Trade Mark, http://www.inta.org/index.php?option=com_content&task=view&id=189&Itemid=59&getcontent=1 , 10 November 2007.

¹⁹⁶ Elias, *supra* note 49, p.1/24. “State trademark statutes and the state rules against unfair competition usually dictate that the first to use distinctive mark will have trademark precedence over a second user when the potential for customer confusion exists. State trademark rights apply on a state-wide basis only”.

¹⁹⁷ Elias, *supra* note 49, p. Q/4. “A common law trademark is any device that is being used to identify a business’s goods or services in the marketplace and has not been registered with a state government or with the federal government”. P. 1/24. “Common law claims alone, seldom provide the basis for modern trademark decisions-judges usually based on state or federal law”.

¹⁹⁸U.S. Constitution, Article 1, Section 8, Clause 3.

¹⁹⁹ Lanham Act (15 U.S.C. § 1115).

if that source is unknown”. In order to be registered a mark must be capable of distinguishing the applicant’s goods from those of others (§ 1052).²⁰⁰

Under the Lanham Act, the term “collective mark” means a trademark or service mark used by the members of a cooperative, an association, or other collective group or organization.²⁰¹ It can also denote a cooperative, association, or other collective group or organization that has a *bona fide* intention to use the mark in commerce. Furthermore, applied to the register of the principal register; it may include marks indicating membership in a union, an association or organization.²⁰² Collective marks are treated like regular trademarks under the Lanham Act.²⁰³

There are two types of collective marks in the United States: collective trademarks or collective service marks, and collective membership marks. The Trademark Trial and Appeal Board (TTAB), a USPTO administrative tribunal, explains the distinction between these two types as follows:

“A collective trademark or collective service mark is a mark adopted by a “collective” (i.e., an association, union cooperative, fraternal organization, or other organized collective group) for the use only by its members, who in turn use the mark to identify their goods or services and distinguish them from those of non members. The “collective” itself neither sells goods nor performs services under a collective trademark or collective service mark, but the collective may advertise or otherwise promote the goods or services sold or rendered by its members under the mark.

A collective membership mark is a mark adopted for indicating membership in an organized collective group, such as a union, an association, or other organization. Neither the collective nor its members uses the collective membership mark to identify and distinguish goods or services; rather, the sole function of such a mark is to indicate that the person displaying the mark is a member of the organized collective group”.²⁰⁴

²⁰⁰See *Two Pesos, Inc v. Taco Cabana, Inc* (91-971), 505 U.S. 763 (1992).

²⁰¹Lanham Act (15 U.S.C. § 1127).

²⁰²*Ibid.*

²⁰³Lanham Act (15 U.S.C. § 1054).

²⁰⁴*Aloe Crème Laboratories, Inc. v. American Society for Aesthetic Plastic Surgery, Inc.*, 192 USPQ 170, 173 (TTAB 1976).

Collective marks shall be registrable in the same manner and with the same legal effect as that of trademarks. Registration may be by persons, nations, States, municipalities, and the like, who are exercising control over the use of the marks sought to be registered – even if not actually possessing an industrial or commercial establishment.²⁰⁵ The Lanham Act provides that the term “mark” include any trademark, service mark, collective mark or certification mark.²⁰⁶ In the U.S.A., the first business to use a mark owns it. There are two ways to qualify as a first user of a mark: actual use or intentional use.²⁰⁷ Actual use means that the person requesting for protection is the first to use the mark in commerce.²⁰⁸ The first to use the trademark on a product that is distributed in the marketplace or, in the case of a service mark, the first to use the mark in connection with advertising or marketing of a service available to the public. On the other hand, intent to use refers to the first to file “intent-to use”- application with the U.S. PTO provided that the applicant files the application before the mark is actually used by another party and subsequently actually uses the mark.²⁰⁹ In both cases, if the applicant is not domiciled in the U.S. the applicant may designate a representative to receive notices or be duly served process in proceedings affecting the mark.²¹⁰

Registration is not mandatory in order to receive trademark protection but federal trademarks on the Principal Register receive significantly stronger intellectual property protection than unregistered trademarks. Federal registration is not mandatory to receive trademark protection, but a mark owner seeking to enforce trademarks in US federal court needs either a federal registration or a violation of the Lanham Act's specific sections on false advertising or unfair competition.

²⁰⁵ Lanham Act (15 U.S.C. § 1054).

²⁰⁶ Lanham Act (15 U.S.C. § 1127).

²⁰⁷ Elias, *supra* note 49, p.1/9.

²⁰⁸ Lanham Act (15 U.S.C. § 1127). “The term “use in commerce” means the bona fide use of a mark in the ordinary course of trade, and not merely to reserve a right in a mark.

²⁰⁹ Lanham Act (15 U.S.C. § 1051 (a)).

²¹⁰ Lanham Act (15 U.S.C. § 1051 (e)).

The Patent and Trademark Office (PTO) keeps two lists of the marks it has decided to register- if the Supplemental Registered mark meets certain qualifications, it can be registered on the Principal Register, which provides more benefits, since it bestows various rights on the trademark owner to prevent others from infringing the mark.

To be placed on the Principal Register the mark must be in actual use in commerce involving two or more states or across territorial or international borders. “Even if an application has been filed for registration based on intended use, the mark will not actually be registered until it is put into actual use”.²¹¹ In addition, the PTO must consider the mark distinctive²¹²; it must not conflict with an existing registered mark; and the mark must not be considered scandalous, immoral or deceptive.²¹³

Registration on the Principal Register provides the following benefits: an exclusive nationwide ownership of the mark; official notice that the mark is unavailable; the right to put an ® after the mark (which also make users aware that the mark has been registered) and; a legal presumption that the registrant is the owner of the mark (this means that the registrant does not have to prove ownership in a dispute over the mark).²¹⁴

Other trademarks can be listed on the Supplemental Register, which primarily exists to allow trademarks that are not distinctive enough to qualify for the Principal Register under Sub chapter I, but may be registered in the future, e.g. descriptive marks.²¹⁵ “This lack of distinctiveness means that the courts are unlikely to give the mark much protection in the event of a lawsuit”. However, this form of registration, while not granting the protection of the Principal Register, will give notice to other users that the

²¹¹ *Ibid.*

²¹² See *Two Pesos, Inc v. Taco Cabana, Inc* (91-971), 505 U.S. 763 (1992) Marks are often classified in categories of generally increasing distinctiveness; following the classic formulation set out by Judge Friendly, they may be generic, descriptive, suggestive, arbitrary and fanciful.

²¹³ Lanham Act (15 U.S.C. § 1052 (a)).

²¹⁴ Elias, *supra* note 49, p.p. 1/13 -1/14.

²¹⁵ Lanham Act (15 U.S.C. §§ 1091 and 1095).

mark is in use. It also allows the owner to use the ® after his/her mark.²¹⁶ Finally, if the mark continues to be used and remains on the Supplemental Register for five years, the owner can apply for registration on the Principal Register.

Under the Lanham Act, a mark application is filed with the Patent and Trademark Office (PTO).²¹⁷ As mentioned earlier, the mark may already be in use or may be intended to be used in the future. The mark will be examined, and if approved by an examiner, it will be published in the Official Gazette of the Trademark Office to notify other parties of the pending approval.²¹⁸ Any person/entity who believes they would be damaged by the registration of the mark can oppose.²¹⁹ Unless registration is successfully opposed, the mark must be registered in the PTO, a certificate of registration must be issued and notice of the registration shall be published in the Official Gazette of the PTO.²²⁰ An appeal process is available for rejected applications.²²¹ When the collective mark is registered the owner shall be entitled to the same level of protection as provided for trademarks.²²²

The duration of a registered mark is ten years unless the mark is cancelled by the Director of the PTO for non-compliance with certain provisions detailed within the governing instrument.²²³ Each registration may be renewed by the owner for periods of ten years in duration upon expiration of the previous registered period.. An application for mark renewal can be made at any time provided it is within one year before expiration of the previous ten-year period for which the registration was originally issued or subsequently renewed.²²⁴

²¹⁶ Elias, *supra* note 49, p.1/14.

²¹⁷ Lanham Act (15 U.S.C. § 1051 (b)(1)).

²¹⁸ Lanham Act (15 U.S.C. § 1062).

²¹⁹ Lanham Act (15 U.S.C. § 1063 (a)).

²²⁰ Lanham Act (15 U.S.C. § 1063 (b)(1)).

²²¹ Lanham Act (15 U.S.C. §§ 1070-1071).

²²² Lanham Act (15 U.S.C. § 1054).

²²³ Lanham Act (15 U.S.C. § 1058).

²²⁴ Lanham Act (15 U.S.C. § 1059).

There is no statistical information regarding the volume and the value of Guatemalan craftwork importations made by the U.S.A because this data is distributed in a different chapter of the Harmonized customs system.²²⁵ However, the tendency of the American craft market is towards the consumption of ornamental and practical-use artisans' products. For example there is a significant reported growth on consumer sales of crafts such as handbags, clothes made with traditional textiles, wooden products and furniture.²²⁶ However, it is estimated that around 60 per cent to 70 per cent of the total sales from Guatemalan craftworks in the foreign market is oriented towards the U.S.A.²²⁷ With the new Free Trade Agreement DR-CAFTA most of Guatemalan craftworks have immediate access to the U.S. market and a zero per cent export tariff.

Although the American market provides great prospects for Guatemalan works, there exists a strong element of competition from Chinese and Indian produced products, which can ultimately be sold at very low prices. Products protected by a collective mark may be a very good option for the U.S.A consumer market because they will reveal their origin and qualities. On the other hand, for artisan's it could be a form to conserve and expand its sales, while protecting and promoting their goods. Collectively, it would be easier and cheaper²²⁸ to get IP protection through a collective mark in the U.S.A, instead of each artisan's small business in particular. Registration should be searched at a federal level, since it brings more benefits and is valid throughout the whole U.S. territory. Placement of a mark on most State registers, unlike federal registration, confers few benefits other than an

²²⁵ El Mercado de los Estados Unidos, Visión Global, <http://infoartesanas.com/content/view/18/27/>, 1 November 2007.

²²⁶ *Ibid.*

²²⁷ *Ibid.*

²²⁸ The filling fees for a trademark application are as follows: 1) U.S.D. 275 per class for a TEAS Plus application. 2) U.S. D. 325 per class for an application filed electronically using the Trademark Electronic System (TEAS); or 3) U.S.D. 375 per class for an application filed on paper. These fees will be charged not only when a new application is filed, but also when payments are made to add classes to an existing application. If an application is filed based on a bona fide intent to use the mark in commerce, additional forms and filing will be required at a later time. http://www.uspto.gov/main/faq/index_feefaq.html, 6 November 2007.

indication of when trademarks rights in the first mark were first claimed by the registrant.²²⁹ In order to protect the collective mark on a federal level, the association must have a legal representative in the U.S. The contract can be directly or through a Guatemalan firm.

²²⁹ Elias, *supra* note 49, p.1/14.

5 CONCLUSION

Although Guatemalan craft items are of a high quality, unique nature and are well regarded by consumers they still lack a satisfactory level of IP protection on both the domestic and international level. This reality has led to free riding and consumer deception, not only in the local market, but on an international level as well. Today, it is most important for artisans to identify their products, so that they can attract consumers and achieve their preference and loyalty.

Over the past few years, a considerably high number of artisans' enterprises have effectively improved the quality of their products and hence the overall performance of their businesses. This is mainly due to different projects presently being backed by local and international organizations (both public and private), working with different artisans' small businesses. Although these projects have tremendously aided the development of artisans' enterprises a major problem has also been detected. These programs have unfortunately failed to take into account IP protection for the artisans' works as part of their marketing strategy, which is the base for a sound business performance. IP rights must be considered an integral part of any business strategy. In other words, a quality product together with an effective marketing scheme requires a distinctive brand to identify it. To compete effectively, a craft enterprise must achieve both market recognition and respect for its products. This only can be achieved by creating, implementing and nurturing an enterprise image linked primarily to the business and its products.

In this order of ideas, it is very important that these programs make artisans sufficiently aware of the IP element. Consequently, it is recommended that those projects working with artisans' enterprises highlight the importance of IP protection to these organizations and provide adequate information, so these enterprises can obtain proper legal protection.

If artisans want to obtain and maintain optimum business efficiency, they must obtain IP protection. For this purpose collective marks can play a key role. Similar to trademarks, collective marks indicate who the producer of the goods is and they also guarantee the quality of products, which in turn helps promote them to the consumer market.

The use of a collective mark by a cooperative or an enterprise association allows the member SMEs to benefit from the reputation acquired based on the common origin or other common characteristics of the goods produced by different enterprises.

This is particularly the case where the origin or/and other common characteristics are the main factor in determining the quality and identity of a product, which is exactly the case with regard to Guatemalan artisans' business organizations. The use of such marks may also foster an alliance or facilitate cooperation with other SMEs and take advantage of common resources.

For the group, the use of collective marks might become a mechanism for reducing the individual costs of developing and promoting the mark, since all of its members and the owner share in the investment. At the same time, this distinctive sign allows for direct 'competitive efforts' to common targets, enabling in most cases the necessary group strength to cover the expectations of even the most demanding markets. In this sense; because collective marks create a joint image, the group is forced to maintain and continuously improve the standards fixed in the regulations of the mark.

Collective marks also prevent the "free riding" by others on the reputation of the goods that do actually comply with the association standards. They guarantee consumers the products have certain qualities and characteristics attributable directly to the conditions in which they were produced, since

they have to comply with the organization's fixed standards. Collective marks provide consumers with information about different types of products thus helping consumers to base their choices.

Most of the success stories concerning enterprises labelling their products with collective marks can be found in the agricultural sector. Some examples of this include "MELINDA", identifying apples from the region of *Val de Non* and *Val di Sole* in Italy; "Chirimoya Cumbe", identifying *Chirimoya* (a fruit) from the region of Cumbe, and "Cajamarca, identifying dairy products from the region of Cajamarca, both in Peru. In the region of Central America most of the collective marks identify fine quality coffee, such as Cerro Amatec, from the Cerro de los Amates region in El Salvador. In Guatemala, ANACAFE has registered collective marks that identify coffee coming from eight different coffee regions. These are: New Oriente, Fraijanes Plateau, Antigua Coffee, Acatenango Valley, traditional Atitlan, Rainforest Coban, Volcanic San Marcos and Highlands Huehue. In addition, the cooperative of lemon production registered the collective mark COELMON to identify lemon products. Hence highlighting that nowadays, some artisans' SMEs are beginning to realize the benefits of craft items bearing collective marks.

On the international plane, however, few collective marks are used to identify craftworks. Nevertheless, we can still find success stories of craftworks protected by collective marks in Portugal and Mexico. Small artisans' businesses have made use of collective marks in order to identify the geographical origin of goods from certain areas. This strategy has encouraged business growth from all the members of the group, as well as stimulating a strong brand in the consumer market.

Currently, in Guatemala there are approximately ten collective marks registered with the Registry of Intellectual Property, none of which protect craftworks. In this context, collective marks could be viable option to facilitate the identification of Guatemalan craft items in the export markets.

When it comes to the International Level, there are international conventions, as well as regional legislation that provide for the accurate protection of collective marks. The main multilateral treaties that contain provisions on collective marks are the Paris Convention, the Madrid Agreement and Protocol and the TRIPS Agreement.

A disadvantage for Guatemalan businesses is that Guatemala is not a party to the Madrid System administered by WIPO (which enables the filing of international trademark registrations), because it has ratified neither the Madrid Agreement nor the Madrid Protocol.

The good news is that it is both feasible and practicable to protect collective marks on a regional level, especially in the U.S.A. and Europe – the two main export markets of Guatemalan handicrafts. Registering a collective mark in the U.S.A. can be done under the Lanham Act. In Europe, the registration can be done under the Community Mark system. Both of these mechanisms provide sufficient protection, the process is not so long or difficult, and the fees in both cases are affordable – especially since the expenses are shared between all the members of the association or cooperative.

Collective marks can help strengthen the development of Guatemalan artisans' small businesses grouped in associations or cooperatives. This could allow them to create a joint quality image that identifies their products in the market, while also helping them prevent other producers from illegitimately using their reputation. In contrast with GIs, collective marks do not require the use of national raw materials, which ultimately allows for the protection of more artisans.

To face different market tendencies, Guatemalan artisans can take advantage of the current artisans' organizations in order to offer common products, which are going to be recognized as possessing very particular

qualities. In the case of handicrafts, their origin and unique characteristics will be their main features. If these associations and cooperatives do not fulfil the business needs of certain artisans, they can come together and create other associations that would adjust to the needs of their enterprises. This can be embarked upon by taking into account the common features of their goods and/or their geographical location.

Finally, this paper will conclude by remarking that collective marks, which are at present rarely used in the Guatemalan market, can be a great marketing strategy to promote the craftworks of local artisans. Such an integral strategy can also create a competitive advantage on the international market. However, ultimately it must be kept in mind that a collective mark alone would not bring the profits desired unless it was accompanied by an overall strong marketing strategy.

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