

Cerkia Bramley · Estelle Biénabe
Johann Kirsten *Editors*

Developing Geographical Indications in the South

The Southern African Experience

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Preface

Reflecting on the Experience of Protecting Geographical Indications in the South

Context

The discourse on products with a regional identity expanded dramatically over the last two decades since recognition of Geographical Indications (GIs) as a distinct form of intellectual property (IP) right under the WTO Trade Related Aspects of Intellectual Property Rights Agreement (TRIPS) in 1994. Origin based products¹ are defined by Van de Kop et al. (2006 :22) as:

local products based on a strong territorial identity and reputation, and/or typical products based on specific modes of production and whose quality, reputation or any other characteristics are attributable essentially to their geographical origin.

This concept of a product-quality-origin nexus is well established in European culture, institutions and law. In contrast, so-called Southern countries² do not have a long tradition of protecting products linked to a specific quality and origin. There exists however, in many of these countries, a rich traditional heritage of production linked to origin, as reported by authors such as Giovannucci et al. (2009) and Vandecandelaere et al. (2009). This is confirmed by the authors experience as part of a 5 year research project which explored the relevance of GIs in southern Africa and South Africa and Namibia in particular. The potential for protecting and promoting products linked to a geographical origin is however largely underutilised in these regions.

¹The terms regional products and origin based products are used interchangeably throughout the book to denote products with a link to their place of origin. Use of the term geographical indication presupposes some form of legal protection under the various international and/or national frameworks.

²As a concept the “South” is understood to refer to developing countries including China and India.

This can be ascribed in part to the fact that the idea of providing legal protection to products linked to a region is largely a culturally embedded notion with its roots in southern European countries. GIs as a legal concept is foreign to the South. It is notable that, even in those Southern countries that have implemented legal protection, very few products have actually been protected. In Africa for example there exists a number of legal frameworks at country but also regional level which make it possible to register GIs. However, few African origin products enjoy any form of legal protection. This lack of implementation of GI protection at product level supports the view that the provision of legal protection is insufficient to ensure the successful development and implementation of GI strategies. Instead, the ability of Southern countries to benefit from a GI strategy depends on a range of diverse and complex factors. This should be considered in any decision making on GIs as the provision of GI protection is only one step in successfully developing GIs. In Southern countries, context-specific challenges are likely to play a strong role in the actual impact of GIs within a region. Successfully harnessing GIs require an understanding of the factors that impact on and the role they play in the development and implementation of GIs.

In contrast to Europe, where considerable empirical research on GIs has been undertaken in recent decades, there is a dire lack of empirical data on GIs in Southern countries. This has proven problematic for assessing the potential value of GIs and for decision making on their implementation, given the context specific dynamics of the instrument. This is apparent in particular from Southern countries' positioning within the broader international and bi-lateral trade negotiations, where country positions are informed more by political pressures than by empirical data on the economic impact of the tool.

This book is an effort to enrich the empirical foundation of decision making on GIs in Southern countries. It provides some key theoretical reflections from a 5 year research project on the experience of implementing GI strategies for origin based industries in South Africa and Namibia. This book goes beyond the international legal debate on GIs, which has been extensively documented in the literature, to provide considerations for countries in the South that are considering developing strategies and systems to protect origin based products. While the primary consideration of this book is to deepen the empirical foundation of GIs at local level and to derive an improved conceptual understanding from it, the proposed analysis also provides elements that underline the issues at stake internationally. The intention of this is largely to broaden the reflection on the different policy options for GI protection under the TRIPS agreement. The elements discussed will prove of significant relevance in informing Southern countries' positions within the on-going international trade negotiations, especially with regard to the relevance of aligning their negotiating positions with the EU proposal for a multilateral register for GIs and for extending the higher level of protection to products other than wine and spirits (as explored in more detail in Chaps.1 and 2). In this, this book will be of interest not only to academics but also to policy makers in the global South. Whilst empirically grounded in the Southern African context, this book derives lessons of value to Southern countries in general.

Background to the Research

Despite a rich diversity of traditional knowledge and indigenous resources (Cape indigenous flora, Mopani worms, Marula fruit etc.) and with the production of many agro-food products rooted in the use of these local resources (Honeybush tea; Rooibos tea; Karoo lamb; Boer goat; Klein Karoo ostrich), rural communities in Southern Africa generally market low value products or raw materials. Where differentiated products do exist, they are often the result of the initiative of medium or large-scale farmers and enterprises. Considering that many of these products have a given quality, reputation or other characteristic essentially attributable to their geographical origin, significant potential exists for protecting and marketing these products under a GI system. A need thus arose to explore the potential for improving and strengthening rural communities' linkages to the market through origin based strategies.

This formed the basis for the 5 year research project which was implemented between 2005 and 2010. The project was funded by DURAS, a joint GFAR–Agropolis International initiative supported by the French Ministry of Foreign and European Affairs through its Priority Solidarity Fund (PSF). The project commenced by exploring the current lack of a suitable public system for protecting GIs in Southern Africa. In contrast to the EU, the current South African legal framework only provides for the protection of GIs under trade mark law. The lack of a public system through which to valorise GIs was identified as excluding resource poor farmers (but also commercial larger scale farmers) from a potentially useful tool for improving their market access. The need for a public system of protection also emanates from the significance of the wild resources found in South Africa and Namibia, which are often the only source of income for resource poor communities and which are threatened by bio-piracy. It thus appeared important to assess the merits of developing an institutional framework for protecting GIs in Southern Africa and to evaluate the needs for a *sui generis* legal system. Secondly, an analysis was done of the local dynamics based on specific agro-food products. Two central questions were therefore addressed by the project: “How can local communities successfully protect their resources and differentiate their production through GIs?” and “What is the nature and extent of the required institutional and legal framework to achieve this objective?”. The project set out to provide conceptual and procedural considerations to the potential use of GIs in Southern Africa in order to protect and utilize indigenous knowledge and resources to the benefit of local communities.

Outline of the Book

Given the contextual specificity of GIs, this book provides extensive analysis of local dynamics at industry level and national dimensions attached to GI development. It reflects on a diversity of GI processes and dynamics by combining the local, national and international levels, thereby enriching the understanding of GI

dynamics in Southern countries. This book emphasises the main dimensions underlying the development of GIs and their potential for enhancing sustainable rural development and market participation of local producers in particular. These include considerations on the balance between State and industry involvement in GI development, collective action dynamics, the public good nature of GIs and the development and environmental stakes associated with GI protection. These dimensions provide the structure for the chapters that build on the experiences gained from different Southern African industries that have embarked, to a lesser or greater extent, on GI strategies. Insights are drawn from the trajectory of these Southern African origin based products which were selected under the research project for their potential to benefit from GI protection. The different chapters build in particular on the comparison of cases that are highly contrasted with regards to the key GI related dimensions under consideration. The discussion concludes with guidelines for selecting successful GI products.

Chapter 1, by *Cerkia Bramley and Estelle Biénabe*, sets the scene for the rest of the chapters by reflecting on why GIs are of relevance to Southern countries. The discussion traces the contours of the international GI debate and how the TRIPS agreement has introduced the GI concept in Southern countries, by requiring that all WTO Members provide minimum standards of protection for GIs within their territories. Introducing GIs as a universal concept, the discussion proceeds to reflect on how the dynamics associated with GIs hold significant potential for Southern countries with their rich heritage of traditional products rooted in localised production. By exploring the potential role of GIs for enhancing market access while promoting rural and sustainable development and aiding the preservation of biodiversity and traditional knowledge, the chapter shows how the relevance of GIs for Southern countries extends beyond compliance with international legal obligations to include significant potential for unleashing beneficial local dynamics in Southern territories.

Chapter 2, by *Cerkia Bramley, Delphine Marie-Vivien and Estelle Biénabe*, reflects on considerations in the design of an appropriate institutional framework for the protection of GIs in Southern countries. The discussion provides an analytical review of two divergent institutional frameworks, comparing in particular the EU sui generis framework with GI protection under US trade mark laws. Drawing on the comparison, the discussion explores some key considerations in designing an appropriate institutional framework for GI protection. The theoretical discussion is empirically grounded primarily on the case of South Africa, as a country with no formal recognition of GIs but which has in recent years seen strong industry initiative in obtaining GI protection within the existing framework. The discussion explores the current South African legal framework and through the experience of the Karoo lamb and Rooibos cases, the particular challenges the existing legal framework presents. The case studies are used to contextualise the theoretical insights into key considerations for the development of an appropriate institutional framework for GIs in Southern countries. The discussion is enriched with insights from institutional developments in India.

Chapter 3, by *Estelle Biénabe, Johann Kirsten and Cerkia Bramley*, aims to analyse how the quality and reputation dimension is built and sustained through collective action dynamics. It explores the key features of collective action that underlie origin based product development and their protection through GIs. The chapter departs from a literature review to identify the key dimensions of GI related collective action and structure the analysis. It then builds on the analysis of two highly contrasted cases, Karoo lamb and Karakul pelts, to deepen the understanding of the diversity of ways in which collective reputation can develop at industry level and of the different situations that this creates for implementing GI schemes. The discussion empirically confirms the importance of collective action to successfully exploit the benefits of collective reputation and shows that the capacity of industries to establish successful GIs critically depends on the collective basis on which product reputation has been built, as this determines an industry's ability to act collectively in protecting the collective reputation. It is argued that distinguishing between collective action features attached to the building of the collective reputation and those linked to maintaining and protecting this reputation creates an interesting direction for a more robust approach to collective action analysis oriented towards supporting GI implementation.

Chapter 4, by *Estelle Biénabe, Danie Jordaan and Cerkia Bramley*, explores aspects around the public nature of GIs and the associated debate on the need for public intervention in supporting GI development and implementation. The discussion draws on the communalities and differences between the Camdeboo mohair and Karakul pelts cases, both of which are Southern African luxury clothing products with sophisticated quality management systems. The cases are both endemic industries with a strong link to the region but which are not linked to national geographical indication protection schemes. They differ significantly however with respect to their approach to investment in the common resources underlying the reputation of the origin based product as well as with respect to the management of the collective reputation. The chapter provides insights into the implications of public versus privately driven origin based quality schemes, particularly with respect to potential exclusionary dynamics.

Chapter 5, by *Dirk Troskie and Estelle Biénabe*, draws on the authors' close involvement in the process of developing a GI for the Rooibos industry in South Africa. It analyses the building of a GI strategy in the context of an export oriented industry which seeks to gain international recognition of its GI through applying for registration of the Rooibos name as a Protected Denomination of Origin (PDO) within the European Union. In documenting the application process, emphasis is placed on the negotiation of local collective rules for defining the product and collectively managing its quality. The linkages between this GI initiative and actions towards biodiversity conservation which are instrumental for this industry – Rooibos being produced in a highly biodiverse region, the fynbos biome, and, at the same time, having known substantial transformations recently in terms of cultivation expansion and intensification that are seen as a serious threat to the environment – significantly contribute to inform local GI processes and trade-offs in the context

of a strong industry drive supported by different public and private stakeholders. It contributes to the understanding of the appropriate balance between State versus industry driven GI development processes. This chapter also brings insights into implications for industries of the current institutional heterogeneity at international level. It highlights the challenges of interpreting foreign legal requirements in a vacuum of formalised cooperation and support and stresses the importance in this context of informal networks and relations, thereby also raising the question of whether the current international framework sufficiently allows for the specific characteristics of Southern countries.

Chapter 6, by *Cerkia Bramley and Estelle Biénabe*, seeks to provide criteria for selecting successful GI products. The discussion makes the point that not all origin based products have the potential to benefit equally from GI development and protection. The authors' experience in selecting products for inclusion in the research project on which this book is based, but also in the subsequent process of designing industry specific GI strategies for two South African GIs (Rooibos and Karoo lamb), has shown that it is possible to identify certain factors which are predictive of an origin product and/or industry's ability to benefit from GI protection. Drawing on this experience as well as the international literature, this chapter seeks to develop guidelines which can be used in Southern countries for evaluating whether a product has the potential to develop into a successful GI and to harness the potential associated with GI protection.

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Chapter 1

Why the Need to Consider GIs in the South?

Cerkia Bramley and Estelle Biénabe

Abstract In thinking of geographical indications (GIs) in the South, this chapter reflects on why GIs are of relevance to Southern countries. The discussion traces the contours of the international GI debate and how the TRIPS agreement has introduced the GI concept in Southern countries, by requiring that all WTO Members provide minimum standards of protection for GIs within their territories. Introducing GIs as a universal concept, the discussion proceeds to reflect on how the dynamics associated with GIs hold significant potential for Southern countries with their rich heritage of traditional products rooted in localised production. By exploring the potential role of GIs for enhancing market access while promoting rural and sustainable development and aiding the preservation of biodiversity and traditional knowledge, the chapter shows how the relevance of GIs for Southern countries extend beyond compliance with international legal obligations to include significant potential for unleashing beneficial local dynamics in Southern territories.

Keywords Geographical indications • TRIPS agreement • Southern countries • Market access • Sustainable development • Traditional knowledge

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1.1 Introduction

With the protection of GIs largely a European tradition, why is there a need to reflect on the relevance of the instrument in a Southern context? This chapter shows how the answer to this derives in part from legal processes related to the internationalisation of the GI concept. The legal obligation for all WTO Member countries to provide minimum standards of protection for GIs has forced countries which are not necessarily familiar with the GI concept to consider the nature of the instrument and means for its protection. The legal processes for GI protection at international level have been unfolding within the broader trade negotiating context. The discussion raises the linkage of GIs with these negotiations as an important consideration for Southern countries. This allows for an improved understanding of the GI instrument and its dynamics, so as to better formulate strategic positions. While there has been much debate around whether the TRIPS agreement and its treatment of IP rights support a more equitable distribution of economic benefits or whether it is biased towards developed nations (see for example Chon 2006; Mulik and Crespi 2011), GIs are widely seen as an exception for being an IP right with significant potential to benefit producers in Southern countries. In considering the relevance of GIs for Southern countries, this chapter proceeds to provide an overview of the dynamics attached to GIs, as a compelling factor driving the expanding interest in GIs.

1.2 GIs as an International Legal Obligation and Linkage with Broader Trade Negotiations

The internationalisation of GIs presents an interesting paradox between legal recognition of the local and the need to elevate the concept to international level. In no other context has the local enjoyed the level of intergovernmental interest GIs have attracted on the global stage. Of course, it is precisely the processes which attach to globalisation which make legal protection of the product-origin nexus at international level necessary (as explained in more detail below).

Attempts to deal with the issue of GI protection at international level date back to more than a century. Prior to 1994, the international protection of GIs was characterised by a lack of coordination and uniformity. The Paris Convention¹ and the Madrid² and Lisbon³ Agreements (which are administered by the World Intellectual Property Organization) represented the three principle attempts at addressing the need to protect GIs beyond national borders. However, definitional differences between these agreements, the limited and varying membership of these

¹Paris Convention for the Protection of Industrial Property of 1883.

²Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods of 1891.

³Lisbon Agreement for the Protection of Appellations of Origin and their International Registration of 1958.

agreements as well as the lack of dispute settlement mechanisms meant that these agreements did not significantly advance the protection of GIs at international level. The treatment of GIs in the WTO TRIPS agreement as part of the Uruguay Round of negotiations in 1994 thus presented a significant departure from and advancement in the protection of GIs globally.

The TRIPS agreement defines GIs as “indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographic origin”.⁴ It differentiates between products in general and wine and spirits products in particular. Article 22 provides the general level of protection applicable to all GI products and prohibits the use of misleading indications or indications which constitute an act of unfair competition. Article 23 provides a higher level of protection for wine and spirits GIs in that it prohibits their use in connection with products not originating from the particular region, regardless of whether the true origin is indicated or whether it is used in conjunction with words such as “kind” or “type”. The additional protection for wine and spirits GIs under article 23 thus means that use of the GI is prohibited if the wine or spirits does not originate in the particular region, even though there may be no risk of confusion. The Agreement requires all Member countries to provide the “legal means” to provide these minimum standards of GI protection in their territories. While this is explored in detail in Chap. 2, the international legal obligation to protect GIs needs to be raised here as an important consideration for Southern countries to reflect on GIs. As is shown in Chap. 2, different dynamics attach to different institutional approaches, requiring a careful consideration of the legal means used for complying with the TRIPS provisions. It should be noted also that the protection under TRIPS is made subject to the GI being registered in its country of origin.⁵ Southern countries that do not protect their GIs will fail to benefit from the international protection provided under TRIPS. Notably a report by the TRIPS Council⁶ has found that while the number of Southern countries demanding increased protection for GIs under TRIPS has increased, many of them are yet to protect their GIs domestically and would thus not benefit from TRIPS protection. Notably the requirement that a GI be protected in its country of origin in order to qualify for protection also applies in relation to protection under EU Regulation 510/2006.⁷

The TRIPS negotiations relating to GI protection were deeply contested given the different interests at stake. The European Union (EU) emerged as the main proponent in favour of strong protection for GIs. The reasons for this are complex but are due in part to the cultural importance of the instrument within Europe. Much emphasis is also placed on the role of GIs in increasing farmers’ competitiveness within the EU’s Common Agricultural Policy (see for example Josling 2006: 359),

⁴Art. 22.1.

⁵Art. 24.9.

⁶TRIPS Council, ‘Report by the Chairman to the Trade Negotiations Committee’, 21 April 2011 (TN/IP/21).

⁷Art.5.9.

in response to the EU's international trade obligation to remove agricultural subsidies. As an Old World region, the EU also has the highest stakes in GIs and therefore a vested interest in preventing these terms from becoming generic. The US, together with countries such as Japan, Canada and Chile, strongly opposed the EU's attempts to increase GI protection. These New World countries all have big immigrant communities and many of the GIs the EU seeks protection for have already become generic within these territories. Concern over "claw-back" and the loss of valuable wine designations in particular has driven these countries to resist increased GI protection.

As a result of this division, much of the TRIPS provisions on GIs have been made subject to on-going negotiations. This 'built-in agenda' was created through a negotiating mandate under article 24.1 of the Agreement. Two main issues remain outstanding under the TRIPS Agreement namely the establishment of a multilateral register for GIs for wines and spirits and the proposed extension of the higher level of protection under article 23 to non-wine and spirits GIs. Both outstanding matters have raised the importance for Southern countries of carefully considering their positions within these on-going negotiations.

Firstly, the outcome of negotiations on the creation of a multilateral register, and in particular the legal effect of such a register, hold implications both for the ability of Southern countries to have products which are of interest to their territories protected at global level, but importantly also in terms of potential obligations which may be encountered by the creation of such a register. There are currently three proposals around the establishment of a multilateral register for wines and spirits. The EU's proposal⁸ provides for a system of notification and registration in terms of which participation is optional, but once registered the GI will have legal effect in all WTO Member countries unless specifically opposed by a particular country. A second proposal⁹ by a group of New World countries¹⁰ proposes a system of notification and the creation of a database instead of a register. Participation will be voluntary and the process will not automatically give rise to the creation of legal obligations in Members States. Hong Kong¹¹ submitted a third proposal which supports the EU proposal for a system of notification and registration but which provides that the legal effects of such a system will be limited to the creation of legal presumptions of validity.

Secondly, the outcome of the extension debate could hold significant implications for Southern countries with GI products other than wines and spirits, such as agricultural or food products and handicrafts. In fact, Southern countries are unlikely to significantly benefit from protection under TRIPS unless the higher level of protection under article 23 is extended to include also those categories of products that are generally of interest to these territories (Escudero 2001). If the protection

⁸See WT/GC/W/547, TN/C/W/26, TN/IP/W/11, 14 June 2005.

⁹See TN/IP/W/10 of 1 April 2005.

¹⁰The United States together with Argentina, Australia, Canada, Chile, Dominican Republic, Ecuador, El Salvador, Honduras, Mexico, New Zealand, Chinese Taipei.

¹¹See TN/IP/W/8 of 23 of April of 2004.

afforded to wine and spirits GIs is not extended to other products, the creation of a multi-lateral register may entail only costs and very little benefit to Southern countries that do not produce wine and spirits. These costs may entail administrative costs in lieu of reciprocal obligations but also the potential loss of existing designations and with it the cost of relabeling those products. The on-going negotiations thus provide a strong argument in favour of Southern countries properly reflecting on the relevance of the GI concept within their territories. In order to take effective positions on the issue, these countries need to have an understanding of the extent to which the instrument may be of benefit to products within their territories, and importantly also the costs associated with accessing these benefits, in particular with reference to potential reciprocal obligations.

Another important trade negotiation dynamic is the fact that the EU is consistently attempting to link the negotiations around GIs to the agricultural trade agenda by including it as part of the discussion on market access. “Clawback”¹² in particular is being pursued under the agricultural negotiations and not within the TRIPS Council. For the EU, GI extension is seen as compensation for its obligations relating to the reduction of agricultural subsidies. Despite strong US opposition to the inclusion of GIs within the agricultural negotiations, Southern countries are therefore increasingly pressed to strategically consider their positions on GIs in view of the broader political context of the trade negotiations. The Economic Partnership Agreements (EPAs) currently being negotiated between the EU and a number of Southern countries have added additional fora in which GIs are being discussed in the context of international trade and which reemphasises the importance of strategic reflection on GIs in view of the trade-offs being negotiated.

1.3 An Initial Exploration into the Socio-Economic Dynamics Attached to GIs: A Diversity of Potential Dynamics and Justifications

While Southern countries did not play a significant role in the initial TRIPS negotiations, the past decade has witnessed a substantial change in the position of these countries on the issue of GI protection. Within the Doha Round of negotiations, a number of Southern countries have come out in support of the EU proposal on GI extension. This is shifting the original divide on GI extension which initially played out along the lines of a New versus Old World division. The growing support of Southern countries for enhanced GI protection is linked to a growing recognition of the instrument’s potential to benefit local producers and territories with a rich diversity of products linked to geographical origin (see for example Rai 2009;

¹²Clawback is a term which is used to refer to the EU initiative to claim back terms which have become generic in WTO member countries, notably through a proposal in the WTO Agriculture Committee and not the TRIPS Council. See WTO Doc. JOB(03)112.

Van de Kop et al. 2006; Evans and Blakeney 2006). Greater awareness of the universality of GI dynamics, together with increased concerns over usurpation of their national heritage, have led Southern countries such as India, Thailand and Kenya to take a stronger position on GI protection internationally and to implement domestic legal measures for GI protection that exceeds their obligations under TRIPS. The multifunctional nature of GIs, proposed in the international literature (see for example Rangnekar 2004) as an instrument for strengthening market access, promoting sustainable rural development and preserving elements of biodiversity and indigenous knowledge, has gone a long way in confirming the universality of the GI philosophy and deserves closer exploration.

1.3.1 Origin Based Marketing as a Universal Concept at the Core of GI Dynamics

As mentioned above, while the concept of origin based products is deeply entrenched in European culture, products with a regional identity display similar elements worldwide, suggesting that it is a universal concept. Indeed, there are globally many examples of cases where regional origin is used in the marketing of local products. An emblematic illustration of this is the case of Darjeeling tea which is produced in the state of West Bengal, India. The tea produced in this region has become known for its distinctive flavour that is attributed to the specific agro-climatic conditions and production techniques used in this region. Another lesser known example from Benin is Gari Missé, a dried, flour like product produced from the cassava root. Although gari is produced throughout Benin, the Missé district has become known for producing a drier, less fermented gari through a unique process that is limited to the region.

1.3.2 Origin as a Quality Signal

Underlying the universality of the concept is the value of geographic words in marketing, and food marketing in particular. This fundamentally derives from the fact that place of origin is widely used as a quality signal, be it formally or informally. When the quality attributes of the product are embedded into the specific local resources of its region of production, these can be captured through signalling the origin of the product (Pacciani et al. 2001). In some cases, geographic words can generate their own utility through evocative and aesthetic uses, such that the geographic name becomes itself a desired characteristic of a good or service. Many authors such as Hughes (2003:7) acknowledge that geographic words are: “an efficient means to communicate both (a) a product’s geographic origin and (b) product characteristics besides geographic origin” (see also for example Josling 2006). The association of the two dimensions as presented by Hughes enables

communication of a product's geographical source on markets and together with it, the attributes of this product related to its geographic origin. In food markets, this aspect is of particular relevance given the importance of experience and credence attributes¹³ which lead to information asymmetry between producers and consumers. This creates an environment for opportunistic behaviour that is typically observed in these markets (Winfree and McCluskey 2005). Through signalling origin, producers can differentiate themselves from those who do not invest in quality and might otherwise free ride on their reputation, thereby both protecting themselves from unfair competition and protecting the consumer from being misled.

While the signalling role of GIs is recognised by Josling (2006:338), this author also stresses the importance of conveying information of benefit to the consumer:

The idea of including the place of origin on a label deserves to be taken seriously as a way of correcting consumer information asymmetries, by providing information about the provenance of a product that might be otherwise difficult to divine. So long as that information relates in a reasonably reliable way to a consumer attribute (real or perceived) then it can be presumed to be of benefit. So, using a GI as a proxy for information about the consumer attributes of a good may have sound economic as well as social justification.

It is essential that these products have their own identity and have specific characteristics, reputation and quality that make them distinct from other products. For this reason GIs can be seen as the opposite of global brands, though their existence is based on the same principle of helping consumers in their choice by guaranteeing a set of key predictable quality characteristics. As Van de Kop et al. (2006) emphasise, the process of establishing consumer trust is different. While global brands are uniform across locations, GIs and origin labelled products can be produced only within a given geographical area. That particular area contributes something to the end product that is unique and makes a recognizable difference.

1.3.3 The Potential for Value Addition

The relevance of GIs for Southern countries strongly derives from the marketing dimension and the economic potential attached to it. Territorial origin provides a strategic tool for differentiation and for the creation of added value based on perceived product qualities. Trends in the food sector over the past decade indicate that consumers are increasingly placing value on products they can associate with a certain place and/or special means of production (Ilberry and Kneafsey 1998). The arguments from above suggest that the use of regional identity as a value-adding strategy can be universally applied.

¹³These categories of goods have been defined by Nelson (1970). Experience goods are goods for which consumers can determine quality only after purchase through use and experience. Credence goods are products for which neither inspection nor use by the consumer enables an effective assessment of quality.

Given the global competitive environment generally characterized by long term declining agricultural commodity prices, the international marketing trend towards recognising quality products with a regional link provides producers of origin based products with the opportunity to move away from commodity markets into more lucrative niche markets through differentiation. Though commodity prices may not continue to decline, their volatility has significantly increased in recent years (HLPE 2011), and therefore the potential for disconnecting products from these international trade conditions is a powerful drive for GI based differentiation. Producers within origin labelled niche markets have the opportunity to protect and enhance their market and to potentially transform the value added into an economic rent.

1.3.4 The Importance of Official Protection

As developed by INAO (2005), the relationship between food and place is more deeply rooted than merely marketing the image. It relies on historical precedence, and on collective production, processing, trading and consumption practices (INAO 2005). This means that these products convey values and culture – an identity. This is well stated by Bérard and Marchenay (2005); quoted by Van de Kop et al. (2006: 22) in saying that “origin products do not just ‘come from’ a region; they ‘are’ from a region”. The products may (or may not) be identified by an official label or specific brand. Historically, official recognition has not necessarily been a condition for differentiating and sustaining products on the market over time. Many regional products have survived for a long period through the undocumented practices of producers, merchants and consumers (Bérard and Marchenay 2004). However, the marketing potential and income effect of GIs together with the increased presence of origin based products in different markets, and especially in distant markets and international trade, have in recent years led to an increase in instances of misappropriation and usurpation, thereby rendering protection an important issue. The US and Japan in particular have seen an aggressive increase in the trademarking of regional names. By protecting producers from dilution of the GI reputation, the defensive role of GIs has become a strong motivation for Southern countries such as India, Columbia and Thailand to pursue GI strategies in recent years.

1.3.5 The Rural and Sustainable Development Role of GIs

Building on the marketing dimension, the potential of GIs to raise rural incomes and unleash broader rural development dynamics is widely recognised, both in the international literature (see for example Pacciani et al. 2001) and in policies adopted by the EU.¹⁴ The product-place nexus and the fact that the specific climatic, human

¹⁴See the preamble to EU Regulation 510/2006.

and/or technical conditions of the region give rise to unique product attributes, mean that these products are an evident manifestation of locality. This manifestation is embodied in the market through GIs and the recognition that products from a peculiar place have additional value as compared to global brands. The idea that origin gives rise to a specific quality and value is captured by the French concept of *terroir*. While no English equivalent exists for this word, a commonly accepted definition of *terroir* is:

A geographical area with defined boundaries where a human community generates and accumulates along its history a collective production knowledge based on a system of interactions between bio-physical and human factors. The combination of techniques involved in production reveals originality, confers typicality, and leads to a reputation for a good originating from its geographical area (Casabianca et al. 2005: 8).¹⁵

This value is therefore strongly related to the community that developed those products over years. Through recognising this link, GIs have a strong potential to economically benefit local communities (Van de Kop et al. 2006). This forms the mechanism through which the instrument unleashes a range of rural development impacts.

Tregear et al. (2004) point out that territory-based product qualification such as GIs may serve as a tool for connecting local and non-local actors and is a way by which local actors can signal quality to, and earn rents from, exogenous actors and institutions. Where the place of origin is used as an attribute, resources of the region increase the value of the product. These resources may include specific resources such as production techniques, varieties and species, but also resources that are general to the region such as landscape, environment and cultural resources (Pacciani et al. 2001). These qualification processes are leveraged by engaging local resources, both natural and human, in a collective process involving many local actors, with the potential to activate different components of the rural economy, such as in particular tourism which in turn can further contribute to the promotion of the GI. Possible positive linkages with other origin based products from the same region have also been pointed out in the literature (see Mollard et al. (2001) who refer to a basket of goods; Belletti and Marescotti 2011). Réviron and Paus (2006) argue that the territorial differentiation through which GIs disconnect producers from global markets results in employment creation, environmental benefits and opportunity for other agricultural activities such as agritourism. As an illustration, Réquillart (2007) reports employment growth in the case of a French PDO cheese, the Comté.

Broadening the scope of GI potential, Sylvander (2004) observes that the evaluation of the impact of GIs on rural development should be based on the multifunctional

¹⁵This definition is in French in the original document: "Un terroir est un espace géographique délimité défini à partir d'une communauté humaine qui construit au cours de son histoire un ensemble de traits culturels distinctifs, de savoirs et de pratiques, fondés sur un système d'interaction entre le milieu naturel et les facteurs humains. Les savoir-faire mis en jeu révèlent une originalité, confèrent une typicité et permettent une reconnaissance pour les produits ou services originaires de cet espace et donc pour les hommes qui y vivent." The English translation was found in Bérard and Marchenay (2008: 17–18).

nature of origin-based products, accounting also for indirect development goals such as the preservation of biodiversity and traditional knowledge. The rural development impact of GIs go beyond the standard criteria (higher prices, higher sales, employment and income levels) to include also the spread of the economic effects within the rural area, the level of participation of local actors, the sustainability and reproduction of the social system and the environmental impacts (Sylvander 2004). These additional dimensions are further developed in the next section.

1.3.6 Aiding the Preservation of Biodiversity and Traditional Knowledge

Considerations around the potential of GIs for preserving biodiversity and traditional knowledge significantly developed during the last decade. This happened, in the first instance together with the increased importance attached socially to these two dimensions and secondly, probably also as a result of further exploring GIs potential in developing countries where these two assets are both particularly significant and under threat. An important factor that contributed to linking GIs and biodiversity has been the inclusion of GIs as an incentive tool for preserving biodiversity under the Convention on Biological Diversity (CBD).¹⁶ While this did not show results immediately, linkages are now being built into the international positioning of a growing number of countries as noted by Larson (2010: 2), who indicates that 110 countries are now “proposing to link the negotiations of access and benefit sharing at the WTO with those of a multilateral GI register and the extension of protection to products other than wines and spirits”. GI is also considered by a number of authors to be the only possible IPR with the potential to help preserve traditional knowledge given its characteristics as an IPR that relates favourably to traditional knowledge features: GIs protect collective assets and are not directly attributed to identified people but are localised within a territory; the historical depth of the knowledge embedded in the product is an asset rather than a constraint as it could be for other IPR that are based on the novelty criterion; and depending on the GI regulation in place in the country under consideration, protection may not be limited in time (see for example Addor and Grazioli 2002; Panizzon 2006; Mulik and Crespi 2011).

While it is widely recognised that GIs do not per se protect traditional knowledge¹⁷ and biodiversity, the inclusion in the GI specification of practices that are explicitly linked to them can positively affect their sustenance over time (for a more detailed analysis, see in particular Bramley and Biénabe 2012 ; Larson 2007).

¹⁶Art. 8.j.

¹⁷It is worth noting however that the incorporation of specific traditional knowledge based practices in the specification results in placing this knowledge in the public domain, thereby preventing its private appropriation.

For products whose specificity strongly relies on traditional knowledge and/ or biodiversity, the development and success of a GI strategy can be mutually beneficial to both the GI product and to the knowledge or biodiversity component attached to it. In this, the GI can add value to and support investment in these resources. It is worth pointing out, however, that GI success can also trigger a higher product demand, which can translate into increased pressure on natural resources. Higher demand may also challenge the continuity of use of traditional knowledge in cases where other practices are seen as more efficient for answering this growing demand. The capacity and willingness to face this environmental issue is dependent on the regulatory capacity at local level and national level (i.e. capacity to control and sanction practices according to the specification as well as according to broader environmental regulations). With GIs improving the capacity to trace the products back to the producers, these may feel particularly concerned that these environmental issues may affect the image of the product and as a result, their image (Williams 2007).

1.4 Conclusion

This chapter presented some considerations on why it is necessary for Southern countries to reflect on the GI concept which, at least legally, is mainly a European creation. As mentioned, the inclusion of GIs in the TRIPS agreement introduced GIs for the first time in many jurisdictions outside of Europe and elevated the discourse on GIs to an international level in an unprecedented manner. It created the legal obligation for all WTO Members to implement minimum standards of protection for GIs. The discussion first emphasised that many developing countries have actually chosen to establish legal frames that go beyond their WTO obligation but have not yet widely implemented GI protection domestically. It also showed how international trade negotiating dynamics have made it imperative for Southern countries to reflect on and gain a deeper understanding of both the benefits and costs associated with the instrument, so as to ensure more favourable positions within international trade negotiating fora.

As evident from the above discussion, many Southern countries have developed typical products based on the interaction between local know-how (including selection, production and processing) and particular environmental conditions such as the soil and climate (see for example Vandecandelaere et al. 2009; World Bank report 2004). This is reaffirmed by the experience gained as part of the 5 years DURAS project in the Southern African context which has shown that there may be many local products with a strong territorial identity for which the potential for promoting its geographical origin has largely been undeveloped and underutilised. Considering these many community based products with a given quality, reputation or other characteristic essentially attributable to their geographical origin, it is important to better understand how these countries can harness the economic benefits associated with origin based marketing in order to unleash sustainable development impacts.

This chapter has introduced the different dimensions that can be attached to harnessing GI potential. The discussion shows how the socio-economic dynamics of GIs extend the instrument's role beyond name preservation to a powerful marketing tool, that can then act as an instrument for rural development and means for preserving biodiversity and traditional knowledge (see also Hughes (2009: 6) quoting Sylvander and Allaire (2008) who describe GIs as “a legal and commercial basis for the development of rural areas, the preservation of cultural heritage [and] the promotion of small and medium firms in the rural economies context”). These dynamics confirm the universality of the GI concept and the potential policy options Southern countries could pursue through its application within their territories. Recognition of these GI related dynamics has been an important driver behind the growing number of Southern countries which develop a GI protection strategy beyond the international legal obligation to do so.

In the context of this book, it is worth mentioning though that the conditions on which the institutionalisation of the GI instrument developed in the European context, with a significant influence from Southern European countries, have not been considered so far in a similar way in the Southern African context. Indeed, in Southern European countries where the GI instrument originated, emblematic GI products are strongly culturally embedded and dependant on local knowledge that developed over significant periods of time in a close interaction with the environment.

Conversely, in the South African context where marketing considerations, in relation to both local and international markets, and potential price premiums have been the primary drivers behind GI initiatives, the cultural dimensions of GIs, have not to a significant extent been considered and institutionalised beyond community and family based networks. Considerations beyond marketing and rent extraction arise to a varying extent depending on the products, supply chains driving actors and local conditions as developed in the book.

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Chapter 2

Considerations in Designing an Appropriate Legal Framework for GIs in Southern Countries

Cerkia Bramley, Delphine Marie-Vivien, and Estelle Biénabe

Abstract In the context of the international debate on geographical indication protection, this chapter reflects on considerations in the design of an appropriate institutional framework for the protection of GIs in Southern countries. The discussion provides an analytical review of two divergent institutional frameworks, comparing in particular the EU *sui generis* framework with GI protection under US trade mark laws. Drawing on the comparison, the discussion explores some key considerations in designing an appropriate institutional framework for GI protection. The theoretical discussion is empirically grounded primarily on the case of South Africa, as a country with no formal recognition of GIs but which has in recent years seen strong industry initiative in obtaining GI protection within the existing legal framework. The discussion explores the current South African legal framework and through the experience of the Karoo Lamb and Rooibos cases, the particular challenges the existing legal framework presents. The case studies are used to contextualise the theoretical insights into key considerations for the development of an appropriate institutional framework for GIs in Southern countries. The discussion is enriched with insights from institutional developments in India.

Keywords Geographical indications • TRIPS agreement • Trade marks • South Africa • India • Rooibos • Karoo lamb

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2.1 Introduction

Protection of origin based products in Europe can be traced back to the medieval period when Southern European countries such as France first introduced legal protection for products linked to a geographical region. Over time, the legal frameworks protecting origin based products have become culturally embedded in these communities, so that GIs as a legal mechanism is today widely understood and accepted in this region of the world. As mentioned in Chap. 1, legal recognition of the product-quality-origin nexus has been slow to develop in countries outside Europe. However, by recognising and defining GIs as a distinct IP right at multilateral level and by obliging WTO Members to protect GIs in line with the minimum standards in articles 22 and 23 (see Chap. 1), the Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement internationalised the GI concept.

The Agreement requires in particular that WTO Members provide the “legal means” for protecting GIs according to certain minimum standards. This flexible approach was necessitated by the deep division between Members on the scope and means for protecting GIs, in particular between the European Union (EU) and the United States (US) (see Chap. 1). The EU emerged as the main proponent of *sui generis* protection for GIs, arguing in favour of protection tailored to the unique attributes of the GI right. The US conversely argues that GIs are sufficiently protected under existing trade mark laws and that there is no need for introducing a distinct registration system for GIs. The debate on the means for protecting GIs has crystallised around these two divergent approaches.¹

Within the spectrum of legal measures framed by the two divergent approaches, the position of WTO Member countries on the institutionalisation of GIs has largely been a product of the legal tradition and economic, historical and cultural conditions in the particular countries. Positions within the GI debate are often also politically motivated and linked to the broader trade negotiating agenda, so that permutations have emerged as the division and debates at international level become more complex. Varying perceptions across countries on the economic impact of GIs have also become an increasingly important factor in the choice of institutional approach to GI protection. This is particularly true for Southern countries, some of which such as India, have strongly embraced the economic and cultural (protection of national heritage) potential of GIs and invested in *sui generis* systems. Others such as South Africa remain reticent from a cost-benefit perspective. India’s realisation of the economic and cultural potential of GIs has been due in part to the threat of misappropriation of GIs such as Basmati rice and Darjeeling tea. Historical factors such as colonisation have also been a factor in Southern countries’ position within the GI debate. An example of this is Mozambique which has recently implemented a *sui generis* GI system which strongly resembles the appellation of origin system

¹While it is widely stated that the two approaches are divergent, this divergence is perhaps more related to the ideological divide on which it is based than to actual implementation. It is increasingly recognised that the approaches differ less in their implementation than initially thought.

in place in Portugal, its former colonial power (Dos Santos, Personal communication with the Director General of the Mozambique Industrial Property Institute, Maputo, August, 2011).

While there is no sign of convergence on the issue of GI protection, informal market recognition is insufficient (Bramley and Biénabe 2012) for unleashing the potential benefits associated with GIs (see Chap. 1). Instead, the literature clearly points out that the benefits associated with GIs can be strongly dependant on a process that has been referred to as the “institutionalisation of reputation” (Belletti 2000:3). This process is based on a well-defined and recognised characterisation of the product grounded in regulations and enforcement mechanisms that ensure localisation of production. Formal legal recognition plays a key role in this process. However, while it is widely acknowledged that legal protection is not a sufficient condition for the successful valorisation of GIs (see Chap. 6), it is also becoming increasingly clear that the choice of legal instrument and design of the broader institutional framework is not merely a question of politically driven semantics. Instead, the experiences of an increasing number of countries pursuing GI based strategies show that diverse and context specific factors need to be accounted for in the design of an institutional mechanism for GI protection.

In this context, the chapter departs with an analytical review of the two main institutional approaches to GI protection, i.e. the EU *sui generis* model and protection of GIs under US trade mark law. Drawing on the comparison of these models, the discussion explores some key considerations in designing an appropriate institutional framework for GI protection. The theoretical discussion is empirically grounded primarily on the case of South Africa, as a country with no formal recognition of GIs but which has, in recent years, seen strong industry initiative in obtaining GI protection within the existing framework. The discussion explores the current South African legal framework at national level, how it has been evolving and, through the experience of the Karoo lamb and Rooibos industries, the particular challenges that the existing legal framework presents. The ‘journeys’ of the Karoo lamb and Rooibos industries towards GI protection are useful in contextualising the theoretical insights into key considerations for the development of an appropriate institutional framework for GIs in Southern countries. The discussion is enriched with insights from institutional developments in India.

2.2 GI Legal and Institutional Frameworks: The EU *Sui Generis* Approach Versus Protection Under US Trade Mark Law

With the EU and US positions on and approaches to GIs framing the international debate on GI protection, it is useful to commence a discussion on GI institutional design by delineating the main operational dimensions of the GI legal and institutional frameworks in these two territories. The discussion below highlights some important differences between the two approaches, which are interpreted in section 3 as key considerations in the design of an appropriate GI framework.

2.2.1 *Sui Generis GI Protection Under EU Regulation 510/2006*

As the main proponent of *sui generis* protection for GIs, the EU has elaborated a refined legal characterisation and framework for protecting GIs for agricultural products and foodstuffs under EU Regulation 510/2006.² This regulation, which replaced the former EU Regulation 2081/92, builds on the long standing legal tradition in EU Member countries such as France, which provides formal recognition for GIs through the provision of a *sui generis* registration system. EU Regulation 510/2006 recognises two categories of origin based products, based on the strength of their link with the region and levels of quality significance. Protected Geographical Indications (PGI) indicate products for which at least one of the stages of production, processing or preparation takes place in a specific geographical area and for which “a specific quality, reputation or other characteristics [must be] attributable to that geographical origin”.³ Protected Designations of Origin (PDO) apply to products which are produced, processed and prepared in a specific geographic area and which therefore have a higher level of embeddedness within the region. The quality or characteristics of PDOs must further be “essentially or exclusively due to a particular geographical environment with its inherent natural and human factors”.⁴

The system is designed around the concept of product specificity, from which the link between the quality, characteristics and/or reputation of the product and the geographical region derives. Applications for registration must include the name of the product, a description of the product, a definition of the demarcated region, evidence linking the product to the specific region and a description of the production practices necessary to obtain the product.⁵ Notably the regulation provides that only groups of operators can apply for registration⁶ (see Chap. 3). A group is understood to consist of any association of producers or processors of the particular product or any other legal form.⁷ Provision is made however for certain instances in which a natural or legal person may be considered to be a group.⁸

PDO and PGI applications from European countries are first examined at Member state level for compliance with any national requirements. The application is then passed on to the European Commission for examination at EU level. Substantive

²Wines GIs are excluded from the Regulation and dealt with under a separate system in terms of EU Regulation 479/2008 on the Common Organisation of the Market in Wine. Spirit GIs are dealt with under EU Regulation 110/2008 on the definition, description, presentation, labelling and protection of geographical indications of spirit drinks.

³Art. 2.1.b.

⁴Art. 2.1.a.

⁵Art. 4.

⁶Art.5.1.

⁷The Regulation provides in article 16(c) for rules to be adopted to determine the conditions under which a natural or legal person may be treated as a group.

⁸Art.16.c.

Fig. 2.1 The official PGI and PDO logos for use on products registered under EU Regulation 510/2006



examination, which seeks to ensure that the GI specification sufficiently establishes a link with the region, forms an important feature in determining the validity of the claims linking the GI to the region. Following the examination and publication of the GI, and once the prescribed opposition periods have passed, the GI proceeds to registration. Once registered, any individual or entity operating in conformity with the specification is entitled to use the indication together with the words ‘protected designation of origin’ (PDO) or ‘protected geographical indication’ (PGI) and the prescribed logos associated with these words (Fig. 2.1).

Following a WTO dispute ruling,⁹ it is possible for producers and/or processor groups in non-EU countries to apply for registration under EU Regulation 510/2006 by filing an application directly at the EU Commission. The foreign GI must however be protected in its country of origin and must comply with the requirements under the EU regulation. The Colombian Coffee Growers Federation brought the first foreign application under EU Regulation 510/2006 and Columbia coffee is now protected as a GI in the EU.

EU Regulation 510/2006 determines that the GI may only be used in accordance with the product specification and prohibits use of the registered GI¹⁰:

- on products which are similar to, but which are not covered by the specification,
- on unrelated products, where such use would amount to exploitation of the GI reputation,
- through any “misuse, imitation or evocation” even where the true origin of the product is provided,
- in translated form,
- together with expressions such as “style”, “type”, “method”, “as produced in”, “imitation” etc.,
- in any other false or misleading manner as to origin or other characteristics of the product on packaging, advertising, documents or containers, or
- in any other way which is liable to mislead the consumer.

⁹EU Regulation 2081/92 determined that foreign GIs can only be registered in the EU if the particular country provided “equivalent” and “reciprocal” protection to the EU system. The WTO panel ruled that the conditions for registration under EU Regulation 2081/92 constituted less favourable treatment of foreign products and therefore violated the National Treatment principle.

¹⁰Art.13.

PDOs and PGIs are granted the same level of protection under EU Regulation 510/2006. The wide scope of protection under EU Regulation 510/2006 ensures that registered GIs are protected from becoming generic.

EU Regulation 510/2006 tasks Member States with enforcing the provisions of the regulation. The official controls are undertaken by a competent authority designated by each Member State under EU Regulation 882/2004¹¹ and/or one of the certification bodies within article 2 of EU Regulation 882/2004. The cost of verification and control procedures are borne by the users of the GI, i.e. the producers, processors etc., who are subject to these controls. Verification and control of non-EU GIs are undertaken by public authorities designated by the third countries and/or product certification bodies. These certification bodies as well as those referred to in article 2 of EU Regulation 882/2004 must be accredited in terms of ISO 65 or EN 45011. Some Member countries provide that authorities may, in instances of unlawful use of the GI, intervene in their own capacity and not only on request of an interested party.

It should be noted that the EU provides a dual system of protection as it is also possible in certain instances to register geographical terms under the Community trademark (CTM) regime.¹² Protection of GIs under EU trade mark law is however not explored in this chapter as the mechanism proposed by the EU for protecting GIs, and which has underscored the international divide, is the *sui generis* model established under EU Regulation 510/2006.

2.2.2 Protecting GIs Under US Trade Mark Law

The US philosophy of protecting GIs under trade mark law means that there is no distinct system for institutionalising GI protection in the US. Parties interested in protecting GIs need to follow the procedures set out under US trade mark law for registration of a trade mark. The federal statutes governing trademark law in the US are contained in the Lanham Act.¹³ The relevant authority overseeing trade mark registrations is the United States Patent and Trademark Office (USPTO), which states on its website that GIs can be viewed as a “subset of trade marks” and that they are functionally similar (USPTO 2012:1).

In line with the general principles for registrability of a trade mark, the US trade mark system requires that a trade mark should be capable of distinguishing (either inherently or through use) the goods or services in respect of which registration is sought. Generic or descriptive terms are therefore incapable of registration in the absence of proof that they have acquired distinctiveness through use (in which case it will no longer be use of the word in its geographical context). Despite the general

¹¹EU Regulation 882/2004 on official controls.

¹²Established by EU Regulation No 40/94 of 20 December 1993 and more recently codified in EU Regulation 207/2009 of 26 February 2009.

¹³The Lanham Act 15 U.S.C.

prohibition against registration of geographically descriptive terms as trade marks,¹⁴ the US trade mark system provides for the possibility of registering certification or collective marks,¹⁵ both of which can serve as mechanisms for protecting GIs.

2.2.2.1 Certification Marks

Certification marks are defined to include any word, name, symbol, or device used by an entity to certify the goods or services of another.¹⁶ There are three certification mark categories in the US, namely marks used to indicate (USPTO 2012):

- regional or other origin of the goods or services,
- material, mode of manufacture, quality, accuracy or other characteristics of the goods or services, and/or
- that the work or labour on the goods or services was performed by a member of a union or other type of organization.

The first two categories enable certification marks to be a vehicle for GI protection through certifying that goods or services originate from a certain region and/or that the goods or services have a certain quality characteristic. An application for registration of a certification mark must be filed by the owner of the mark or, in cases where an application is brought with an intent to use the mark, by the entity entitled thereto in US commerce. For third country applications, ownership of the certification mark in the country of origin is also considered a ground for filing an application.¹⁷ An application filed by an entity with no ground for asserting ownership to the mark on the date of filing the application is considered to be void and will be refused. Notably, there is no prohibition on ownership of a certification mark so that either a government body, private body or a natural person can apply to register a certification mark. However, where a certification mark consists of a geographical term, an enquiry will be made into the authority of the certification mark applicant to exercise control over its use, in cases where this is not apparent from the application (WIPO 2009). Certification mark applications need to indicate the general type of goods or services which will be certified. However it is recognised that this type of mark is generally used on a range of goods or services, and there is therefore no requirement to specifically limit registration in line with the Nice Agreement concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks (Nice Agreement).¹⁸

The applicant or proprietor of a certification mark cannot itself engage in the production or marketing of the goods or services¹⁹ as this would compromise

¹⁴ 15 U.S.C §1052 – Sect. 2.e. of the Lanham Act.

¹⁵ 15 U.S.C §1054 – Sect. 4.

¹⁶ 15 U.S.C §1127 – Sect. 45.

¹⁷ 15 U.S.C. §1126 – Sect. 44.e.

¹⁸ The discussion here excludes reference to international applications under the Madrid Protocol.

¹⁹ 15 U.S.C. §§1054 – Sect. 4 and 1064(5) – Sect. 145.B.

credibility of its function as certifier. The applicant or proprietor must further be in a position to effectively control the use of the mark.²⁰ Lack of control is listed as a ground for cancellation of the mark.²¹ As noted, the owner of the mark is not the user of the mark but merely the entity exercising legitimate control over its use. Any entity that meets the requirements of the mark (the standards of certification) is entitled to use it, subject to the control (but not discretion) of the proprietor of the certification mark. Should a party apply for permission to use the mark and permission is not granted even though the party meets the standards, application may be made for cancellation of the certification mark.²² Notably, protection as a certification mark under US law does not require that the geographical term be disclaimed, so that registration of the certification mark affords the proprietor exclusive control of the geographical term in relation to the goods/services for which it is registered. A certification mark can consist of word(s) only, a figurative depiction (logo) or a combination of words and logo.

Certification mark applications must state which quality or characteristic will be certified and the application must be accompanied by the actual standards against which certification will take place.²³ These standards need not have been developed by the applicant and it is possible to incorporate by reference independently developed standards, for example standards developed by public agencies. Notably, no examination is made to determine whether the standards are discriminatory (WIPO 2009).

2.2.2.2 Collective Marks

Collective marks are defined as:

[...] marks used by the members of a cooperative, an association, or other collective group or organization, or which such cooperative, association, or other collective group or organization has a *bona fide* intention to use in commerce [...], and includes marks indicating membership in a union, an association, or other organization.²⁴

The United States recognises two categories of collective marks, namely (1) collective trademarks or collective service marks and (2) collective membership marks (WIPO 2009). The Trademark Trial and Appeal Board (TTAB), a USPTO administrative body, distinguishes between the two categories as follows:^{25, 26}

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

²⁰15 USC § 1054 – Sect. 4.

²¹15 USC § 1064 – Sect. 14.

²²15 U.S.C. §1064 – Sect. 14.5.

²³US Rules of Practice – 37 C.F.R. §2.45.

²⁴§1127 – Sect. 45 of the Lanham Act.

²⁵Taken from the USPTO website at http://www.uspto.gov/web/offices/dcom/olia/globalip/pdf/gi_system.pdf

²⁶See also In re Int’l Institute of Valuers, 223 USPQ 350 (TTAB 1984).

group) for 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 the purpose of 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.

Collective trade marks or collective service marks signal that an entity providing goods or services holds membership of a particular organisation and by implication that it meets the standards for membership of that organisation. While these collective marks indicate commercial origin, the collective membership mark does not. Indeed, it is used to signal membership of an organisation but it is not actually used in trade through application to goods or services. Instead it is used by organisations that have a need to protect their rights to the mark even if it is not applied to goods or services (WIPO 2009).

Collective marks are owned by the collective entity but used by the individual members of the collective.²⁷ The collective entity merely exercises control over the use of the mark and an applicant for a collective mark needs to indicate how it intends controlling use of the mark by its members.²⁸ Collective marks are registered in relation to specific goods or services based on the classification under the Nice Agreement. Unlike in the case of certification marks, where collective marks consist solely of a geographically descriptive term, applicants need to demonstrate that the mark has become distinctive through use. A collective mark does not grant exclusive rights to the geographical term and a disclaimer is entered upon registration.

US trade mark law provides protection based on considerations of consumer protection and dilution of reputation. In this the scope of protection extends to protect a registered mark against use of an identical or similar mark on the goods or services for which the mark has been registered or in relation to goods or services, which are so similar that use of the identical or similar mark would cause confusion or deception. To protect against dilution, US trade mark law provides a higher level of protection to so called marks of renown by prohibiting the use of identical or similar marks on any goods or services, irrespective of whether they correspond to the goods or services in relation to which the well renowned mark is registered and independent of any requirement of deception or confusion. Still, it would be necessary to prove that the registered mark is indeed a mark of well renown.

The protection provided under US trade mark law is part of a system of private law. The protection is invoked on request of an interested party who bears responsibility for monitoring and enforcing its rights to the mark. The trade mark proprietor

²⁷TMEP §§1303.01 and 1303.02.c.ii.

²⁸US Rules of Practice – 37 C.F.R. §2.44.a and b.

institutes protective action and bears the cost of the legal proceedings which follow. The proprietor is also responsible for ensuring upstream compliance with the defined standards and for the costs associated therewith.

2.3 Key Considerations in the Design of an Appropriate System for GI Protection

While the frameworks presented above are region and country specific, they reflect the foundational principles on which the two main institutional approaches to GI protection are built. Notwithstanding the legal flexibility created by TRIPS in accommodating such divergent approaches, it is worth stressing that the way in which these two approaches relate to the GI philosophy unleashes important dynamics which impact differently on the GI development process. Taking note of these dynamics is of particular importance for Southern countries contemplating the introduction or evolution of GI protection, as it raises key considerations on the design of a GI system for unleashing the benefits associated with GIs.

2.3.1 Upholding the Product-Place Nexus

The rationale behind GI protection is built on a product-place nexus which gives rise to unique product characteristic(s). As a distinctive sign, GIs attach to a product from a specific region rather than to a particular producer, signalling geographical rather than commercial origin and constructing a collective rather than an individual right. Given their regional embeddedness and collective nature, *sui generis* systems respond to the GI rationale through an institutional design that allows for strong public oversight and collective right of use, and which ensures localisation of the GI right.

Concern exists on the extent to which trade mark law could serve to uphold the product-place nexus so integral to the GI concept. Trade marks as an IP right have developed from the need to legally recognise the relationship between the owner of the trade mark and his goods or services. There is therefore no requirement as to a territorial link, which contrasts with the GI claim of a unique quality attached to a territory and deriving from specific local resources. Trade marks are transferable and trade mark proprietors have the right to assign or license their trade marks. While certification marks certifying origin are necessarily linked to a specific region, they do not fully address concerns related to upholding the product-place nexus. So for example, while ownership of a certification mark would not affect the product-place nexus *per se*, its registrability and transferability to entities with no connection to the region does pose some concern from a national heritage perspective. It would be possible for example for a Japanese importer to register a certification mark for Honeybush tea (a South African origin product) and to proceed with a *bona fide* certification function, effectively placing control over a national heritage product in the hands of a foreign entity. Some jurisdictions address this concern by providing

that only entities within the area to be certified may apply for registration of the certification mark. Canada for example determines that only “administrative authorities of a country, state, province, municipality including or forming part of the area indicated by the mark”, or “a commercial association having an office or representative in that area” may register a certification mark descriptive of the region.²⁹ However, many countries do not provide for such a limitation. The difficulty does not arise in the same way with collective marks, given their functional difference in signalling membership of an organisation or association and with ownership of the mark vesting in the collective.

2.3.2 Information Signalling

A further concern in using trade marks as a vehicle for GI protection is the potential ambiguity in the information it signals. A certification or collective mark could potentially include a value proposition and quality guarantee if the rules accompanying its registration so provide. However, these instruments do not inherently include a quality or reputational dimension. Where certification marks are used to certify origin, the certification may merely serve as an indication of source. This is problematic and potentially even misleading from a consumer information perspective as the distinctive sign no longer automatically encompasses a quality guarantee linked to origin. In contrast, GI as a distinctive sign is understood as signalling a value proposition which extends beyond a mere link with the region to elements such as specific production methods, authenticity and traceability (Evans 2010). The process of substantive examination in sui generis GI systems is the foundation of this value proposition, in that it seeks, as a requirement for registration, to establish the product’s link with the region as well as the production practices or other factors that contribute to the product’s specific characteristics. In the case of certification marks for example, the standards against which products will be certified are not examined. This lack of substantive examination could in some instances lead to a tenuous link between the geographical name and the product characteristics (Marette et al. 2008). This potentially reduces the consumer information function associated with GIs. In contrast, sui generis GI systems signal information on a product’s origin and quality/reputation through a public standard which is transparent and generally broadly understood by consumers (Evans 2010).

2.3.3 Ensuring Local Value Addition

The undefined understanding of “certified origin” under trade mark law raises an important economic consideration. Sui generis systems explicitly define the required strength of the link between the GI product and its origin by setting requirements on

²⁹Section 25 of the Trade Marks Act RSC 1985.

whether the production and/or the processing and/or the preparation of the GI product needs to take place in the specific region. As explained above, in the case of the EU PDOs, production, processing **and** preparation need to take place in the region. For EU PGIs, it is only necessary that production **or** processing **or** preparation occurs in the region, and not necessarily all three activities. Trade mark law provides no such requirements so that where certification marks are used to certify origin, there is no legal requirement, beyond the prohibition on not misleading consumers attached to when a product may be considered as having a certain origin (Evans 2010). This is solely determined by the rules of use or standards against which certification takes place, the content of which is in the sole discretion of the certification mark owner. The level of local value addition built into the GI definition thus depends strongly on how the GI specificity is drafted in the rules of use as elaborated by the certification mark owner (Gandjee 2012). This forms a strong argument in favour of a distinct system for GI protection.

2.3.4 The Need for Public Intervention and Support

While, legally considered, both GIs and trade marks are private rights, the level of public intervention in defining and protecting the GI right, is generally much higher in sui generis GI systems compared to trade marks (Marie-Vivien 2010). As explored more fully below and in Chap. 4, public intervention in GI protection is justified by the public good dynamics attached to the GI right, including societal and policy considerations such as preserving the environment, job creation and local value addition. Legal recognition of a GI as a private right, in particular under TRIPS which considers the private nature of a GI on a par with other categories of IP rights, does not fully reflect or account for the public good dimension of the GI right. This is problematic for a number of reasons, as outlined in the discussion here and further developed in the following chapters.

As mentioned, GIs are built on a philosophical foundation of collective entitlement to and use of the GI reputation. As a collective asset, GIs are connected with the skills of various producers or processors as well as with locally created public goods and with the history, customs and culture of local communities (Belletti and Marescotti 2002). GIs are thus the result of a collective process that draws on the public good characteristics of certain territorial attributes to build the collective GI reputation. From an economic theory perspective, authors such as Thiedig and Sylvander (2000) and Torres (2002) argue that GIs are club goods coupled with government support (see also Chap. 3). In line with this, sui generis systems consider GIs to be collective rights resulting from collective decision making (Addor and Grazioli 2002). Trade marks in contrast are honed on the concept of private ownership. While certification and collective marks provide for collective participation, ownership of the right remains private, albeit in the name of a collective organisation or independent entity. Trade mark processes lack the dynamics of collective decision making and public examination and support, which forms a fundamental feature

of the GI process and ensures greater consideration of the public good characteristics of GIs. Indeed, an important function of public oversight or intervention in *sui generis* GI systems is to guarantee that the interests of those entitled to use the GI name are safeguarded, in particular by ensuring that the GI process is not unnecessarily exclusionary.

Despite the public dimensions to and collective nature of GIs, exclusionary dynamics form an integral part of the GI process (see also Chap. 4). The exclusion associated with a GI takes place on two levels, namely on a geographical basis but also through defining the production standards which need to be met to ensure participation. The process of determining who is entitled to use the GI has the potential to upset established market relationships, particularly in instances where the GI is in the process of development and not yet well established. The substantive examination under *sui generis* GI systems means that there is a level of public oversight in defining the parameters for participation to the GI, and therefore the level of exclusion. The framing and examination of the rules by a public authority provides grounds for reducing the risk of being unnecessarily exclusionary. The requirement under the EU system that only a group may apply for registration, thereby ensuring a collective engagement in drafting the GI specification, also contributes to this. France additionally requires that producers be fairly represented within the applicant group.

While trade mark law requires that the rules of use be submitted together with the application for registration of a certification or collective mark, the lack of substantive examination of their content means that the exclusionary dynamics, associated with the way in which participation is defined, are not constrained by public considerations. Unnecessarily exclusionary approaches conflict with the philosophy of GIs as a regional asset and threaten potential rural development impacts. Public oversight and collective participation in how the GI is defined and who its legitimate users are, should therefore be a key feature of systems for GI protection aimed at fostering development. For Southern countries pursuing a GI strategy in order to unleash sustainable development processes, the collective nature and public dimensions of GIs form a key consideration in the design of an institutional framework that will ensure that the public good dimension remains accessible to those entitled to claim the right to use it whilst simultaneously excluding non-legitimate use of the collective reputation.

From a marketing perspective, *sui generis* systems may hold significant benefits over trade mark systems. With the success of origin based differentiation strongly dependant on consumer recognition (Alavoine-Mornas 1997), it is imperative that GIs be established in the mind of the consumer. Consumer perceptions with respect to origin based products are closely linked to their perceptions regarding authenticity (Tregear and Giraud 2011). Official recognition of a GI plays an important role in this so that a publicly backed system, such as the EU PDO/PGI system which is generally well understood, provides support to producer groups trying to establish their product in the market. The right to use the PDO/PGI logos effectively amounts to public endorsement of the GI, which increases consumer trust. Efforts by the authorities to raise awareness on the meaning of these logos assist GI right holders

in communicating with consumers. In contrast, trade mark systems do not provide for the use of an instantly recognisable sign supported by public authorities together with the GI. All marketing efforts and costs associated therewith remain the responsibility of the trade mark proprietor.

2.3.5 *Insights into Cost Implications*

Varying costs associated with registration and protection abroad. With a key motivation for pursuing a GI strategy being the potential to increase rural incomes, the cost implications of different institutional approaches need to be closely considered. Trade mark registrations are territorially based and generally class specific, so that registration needs to be pursued in every jurisdiction where protection is sought and potentially for a range of related classes of goods or services to ensure comprehensive protection. Service fees are charged for each application and in relation to each class for which registration is sought. Trade marks, including certification or collective marks, need to be periodically renewed, usually every 10 years. This implies on-going costs for maintaining rights to the mark. Given limitations in the scope of protection under trade mark law (see the discussion below), multiple registrations may be necessary to protect a single GI in its original language (transliteration), in translated form as well as in design form.

These difficulties are to a varying extent addressed in sui generis GI systems. EU Regulation 510/2006 in particular makes provision for once off registration so that there is no need to renew the right. The GI right is thus of indefinite duration, provided the conditions in its product specification are upheld.³⁰ Notably this is not the case in India where GI registrations are renewable every 10 years. While EU Regulation 510/2006 provides that registration fees may be charged by Member states, France for example does not impose a registration fee for GI applications. Until such time as the negotiations for the creation of a multi-lateral register have been successfully concluded, sui generis protection for GIs mirrors the trade mark principle of territoriality so that a GI must be registered in each jurisdiction where protection is sought.³¹ Sui generis GI systems are not based on internationally recognised principles such as exist for trade marks, so that producers wishing to register their GI under foreign GI systems are likely to be confronted by significantly different legal requirements in each jurisdiction. Also, sui generis systems do not exist in all countries so that GI right holders may have to pursue trade mark protection in certain markets. The lack of consistency across protection mechanisms

³⁰Art.12 of EU Regulation 510/2006.

³¹Notably members of the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration of 1958 benefit from a multilateral registration system for appellations of origin.

is likely to raise legal costs as GI holders would need to familiarise themselves with foreign legal systems in each case. Should the outstanding issue on the creation of a multilateral register for GIs be resolved under the DOHA Round of WTO negotiations, it would be possible to extend the protection of a GI in its country of origin to all WTO Member territories through a notification procedure. The EU has emerged as the main proponent of such a register within the WTO negotiations and a number of developing countries has come out in support of the proposal (see Chap. 1). However, until such a register is created and, depending on its scope and legal effect (see Chap. 1), trade mark law arguably provides a simpler and more cost effective approach to international GI protection under the Madrid Protocol for the International Registration of Marks (though exceptions may result from specific cases where protection is only sought between countries with similar sui generis protection systems). This protocol provides a simplified filing system based on registration in a single jurisdiction and reduces the cost of obtaining trade mark protection in international markets.

Varying costs associated with administering sui generis systems. While cost considerations are significant in comparing sui generis and trade mark systems, significant differences in terms of costs exist also between different sui generis systems. Under the EU sui generis system, the high level of protection granted to GIs is justified by the stringent requirements relating to the link with the geographical region together with consistently enforced production standards. However the onerous institutional requirements relating to the administration, regulation and supervision of such a system presents a significant public burden. It can also be associated with important constraints to innovation and rigidity in land use.³² Sui generis systems such as the Australian wine registration system have a much more flexible understanding of the GI quality guarantee. The only quality guarantee under this sui generis system derives from the statutorily defined geographical origin of wines. It presents a certain level of homogeneity in the environmental conditions for producing the wine. The system provides that all wines containing at least 85 % of grapes grown in the particular region may be labelled under the geographical indication. No additional production standards are imposed. While this implies less onerous quality management processes, and therefore a reduction in costs and concomitant constraints, it raises again concerns over the information signalled to consumers. Indeed, such an approach does not necessarily embed a quality/reputational characteristic in the GI. The long run impact of this on the marketing potential of the GI should be accounted for in any decision making on institutional design.³³

³²While constraints to innovation and land use are often raised as a criticism against the EU model, particularly in the wine sector, GI specifications for products such as Roquefort have been changed a number of times to accommodate industry innovation.

³³Interestingly, the classification of American viticultural areas has shifted from a geographical delimitation to a terroir definition which includes human practices in order to guarantee the quality of wine (Le Goffic 2009).

2.3.6 *Scope of Protection*

Limitations in the scope of the protection granted under trade mark law present a powerful consideration in favour of sui generis GI protection. Trade mark law generally does not protect against use in translated form or where a registered mark is used with terms such as “style”, “type” “kind” etc. Trade mark proprietors also cannot prevent bone fide and honest concurrent use of their marks by others. Most jurisdictions further require that geographically descriptive terms be disclaimed, even as part of a certification mark. In contrast, the GI right generally offers protection against any direct and indirect commercial use of the registered name in relation to similar goods or where such use exploits the reputation of the registered name. The GI right generally also protects against “misuse, imitation or evocation”, even when used together with words such as “like”, “type”, “kind” or where the GI is used in translated form. The protection of sui generis systems such as the EU model against “evocation” is particularly powerful as it effectively amounts to protection similar to the common law action for passing off without right holders having to prove consumer confusion,³⁴ which is a very expensive process based on consumer surveys.

Further differences in the scope of protection granted relate to measures dealing with the relationship between trade marks and GIs. The principle of priority is an important feature of IP regimes and trade mark law in particular.³⁵ This principle of first-in-time, first-in-right means that, should a conflicting GI apply for registration under a trade mark system, it will be denied if there are prior trade mark rights. In contrast, the EU sui generis GI system for example provides for a co-existence mechanism which allows a GI to be registered despite the prior existence of a conflicting trade mark. This is subject to the requirement that consumers should not be misled by the co-existence. Therefore, the prior trademark, if registered in good faith, will be maintained but cannot prevent the later registration of a GI. The only exception to the registration of a later GI is when the earlier trade mark is renowned, has been used for a long time and is not liable to mislead the consumer as to the true identity of the product.³⁶

Another important factor, particularly in Southern countries, is the fact that the protection available under trade mark law is subject to requirements of use. South African trade mark law for example provides that a trade mark may be removed from the register if it can be shown that the mark has not been used in relation to the goods or services for which it was registered for an uninterrupted period of 5 years.³⁷ This may cause difficulty for communities which are in the process of developing their GIs and which may not yet be well established on their target markets. It may also happen

³⁴The European Court of Justice has ruled that it is not necessary to show the likelihood of confusion. See for example *Gorgonzola/Cambozola*, ECJ, case 87/97, 4 March 1999, (1999) ECR I, 1301.

³⁵See for example art. 16 of the TRIPS agreement.

³⁶See art. 3.4 and 14.2 of EU Regulation 510/2006.

³⁷Section 27.1.b.

that some regulatory development, relating for example to sanitary or phyto-sanitary measures, makes it impossible to release the goods onto the market. This could place the continued existence of the GI right at risk. In contrast, protection under *sui generis* systems is generally not dependant on requirements of use, so that obstacles to market participation do not threaten the continued existence of the GI right.

Finally, while trade mark law makes use of a universally accepted international classification of goods and services, such harmonisation does not exist across *sui generis* GI systems. EU Regulation 510/2006 for example only applies to specifically listed agricultural products intended for human consumption. In India, the protection under the Geographical Indications of Goods (Registration and Protection) Act³⁸ is available for more product categories in that it applies to “any agricultural, natural or manufactured goods or any goods of handicraft or of industry and includes food stuff”. Differences in product coverage may be a concern for Southern countries which seek to develop domestic GI systems so as to allow their GIs to qualify for protection in export markets. For example the famous Phu Quoc sauce from Vietnam has been registered as a PDO in Europe in 2012 whereas the Kashmir Pashmina GI from India will not be eligible for its registration in Europe. The narrow scope of product coverage is being challenged at EU level as EU Regulation 510/2006 is one of the few *sui generis* models that restrict protection to agricultural products and foodstuffs (Marie-Vivien and Biénabe 2012).

2.3.7 Enforcement

The proprietor of the trade mark is responsible for monitoring similar and confusing use of the mark and enforcing its rights in the mark. Failing to do so carries the risk of dilution or cancellation of the mark. The cost of monitoring the use of a mark in local and international markets is an ongoing and significant expense. Where infringement has occurred, trade mark enforcement processes are expensive, lengthy and often with a low success rate in Court, given the onerous burden of proof on proprietors. Financial means are therefore determinative of the capacity of the proprietor to protect his/her rights. This is of particular concern for resource poor farmers and may significantly hamper rural development dynamics. Ineffective enforcement due to a lack of funding may also lead to a loss of public benefits as a result of unreliable information signalling (Giovannucci et al. 2009:12).

Through providing absolute protection to GIs, *sui generis* systems reduce the cost of enforcing the GI right as it is not necessary to establish that the infringing use is misleading. As mentioned, the requirement to establish misleading use under a trade mark system is an expensive process. Some countries such as France furthermore provide for the responsibility of certain aspects of monitoring and enforcement to be placed on public authorities which support producers during

³⁸Act 48 of 1999.

enforcement proceedings. While these measures mean that the responsibility for enforcement under the EU *sui generis* system is shared with public authorities, the costs associated with litigation and control of the GI usually remain with GI right holders. While weak and corrupt States may limit the potential role of public authorities in GI enforcement processes (Hughes 2009), particularly in some Southern countries, the level of public support in enforcing GI rights remains an important consideration given the expense of private enforcement processes (see also Chap. 4).

2.4 The South African Legal Framework for GIs

As for the majority of Southern countries, South Africa does not have a tradition of legally recognising and protecting origin based products, even if the use of geographical names to designate products originating from specific regions is fairly common. However, as a TRIPS signatory, it is obliged to provide the legal means for protecting GIs in line with the minimum standards provided under TRIPS. It complies with this obligation through a number of legal provisions ranging from the common law remedies of unfair competition and passing off to consumer protection measures and trade mark law. Of these measures, only the protection under trade mark law confers rights while the other measures are aimed at prohibiting certain conduct. Compliance with the higher level of protection required for wine and spirits products under article 23 of TRIPS is achieved through a registration scheme modelled on the EU *sui generis* system and implemented in terms of the Liquor Products Act.³⁹ This dualistic framework, which reflects the tiered approach based on product categories under TRIPS, is an important feature of the South African legislative framework for GI protection and is explored in more detail below.

2.4.1 *Common Law Measures for Protecting GIs*

The South African common law recognises both an action of unfair competition and passing off. These remedies are aimed at ensuring fair trade practices rather than guaranteeing product authenticity. They do not lead to the creation of rights in a name, but they do provide a measure of protection against the unauthorised use of GIs. Passing off as a species of unfair competition provides a remedy in cases where the goods or services of one entity is misrepresented or “passed off” as the good or services of another, with potential damage to the trade, reputation and goodwill of a business. In seeking to protect a GI on the grounds of unfair competition or passing off, claimants need to prove that the GI product enjoys reputation and that the use of the GI by third parties is likely to lead to confusion or deception of a substantial number of consumers. This onerous burden of proof means that

³⁹Which replaced the Wine, Other Fermented Beverages and Spirits Act of 1957.

unfair competition and passing off cases have a low success rate. A ruling in such cases is furthermore binding only on the parties to the case, so that repeated infringement needs to be dealt with on a case by case basis, a factor which renders these remedies ineffective as GI protection measures.

2.4.2 *Protecting GIs Under Consumer Protection Laws*

South Africa has in recent years made important progress in advancing consumer protection through laws and regulations aimed at preventing the misleading use of information on product labels and in advertising. While not specifically aimed at regulating food and food related products, the wide scope of the Consumer Protection Act⁴⁰ impacts the marketing, labelling and advertising of food products. It provides in particular for norms and standards for consumer protection, consumer information and prohibitions on unfair marketing practices and entrenches the consumer rights to disclosure, information and fair and responsible marketing. This extends to include the honest use of labelling and trade descriptions. The Act prohibits in particular the application of misleading trade descriptions⁴¹ as well as the use of ‘false, misleading or deceptive representations’.⁴²

The Foodstuff, Cosmetics and Disinfectants Act⁴³ provides for control over the sale, manufacture and importation of foodstuffs, cosmetics and disinfectants. It creates in section 5 a punishable offense for persons who:

- a) publishes a false or misleading advertisement of any foodstuffs [...].
- b) for purposes of sale, describes any foodstuff [...] in a manner which is false or misleading as regards its origin [...] quality [...] or place of its manufacture;
- c) sells or imports for sale any foodstuff [...] described in the aforesaid manner.

These provisions are reinforced by recent food labelling regulations⁴⁴ issued in terms of section 15 of the Act. Regulation 47 of R146 deals with the misleading description of foodstuffs and seeks to regulate the use of certain descriptive terms. It provides *in nomine* protection for Karoo Lamb as a descriptor and, unintentionally so, as a GI. In terms of this section it is prohibited to use the words Karoo lamb on food labels unless this is done in terms of an approved protocol registered with the Department of Agriculture, Forestry and Fisheries or in terms of the regulations issued under the Agricultural Products Standards Act⁴⁵ or the National Regulator for Compulsory Specifications Act.⁴⁶ This recent development is further elaborated on in the discussion of Karoo lamb below.

⁴⁰Act 68 of 2008.

⁴¹Section 24.2.a.

⁴²Section 41.

⁴³Act 54 of 1972. See sect. 5.

⁴⁴Regulations relating to the Labelling and Advertising of Foodstuffs – R146.

⁴⁵Act 119 of 1990.

⁴⁶Act 5 of 2008.

2.4.3 Protection Under the Agricultural Products Standards Act

The Agricultural Products Standards Act provides for control over the sale and export of certain agricultural and related products, and for related matters. It prohibits the false or misleading description of products. Section 6 of the Act prohibits the use of false or misleading descriptions for certain agricultural products in stating that:

No person shall use any name, word, expression, reference, particulars or indication in any manner, either by itself or in conjunction with any other verbal, written, printed, illustrated or visual material, **in connection with the sale of a product** in a manner that conveys or creates or is likely to convey or create a false or misleading impression as to the [...] **origin** [...] or **place of production**, of that product.

This section should be read with section 3, which provides the Minister of Agriculture with the power to prevent the sale of a product when it does not comply with labelling requirements. This would include instances of misleading labelling of origin and could therefore be invoked to provide protection for GIs.

Following a request to Government in 1998 to issue regulations for governing the use of certain geographical terms, the Agricultural Products Standards Act was amended by the addition of section 6A. The section enables the Minister to pass regulations for protecting specific geographical indications even where the indication used is true, used in translated form or together words such as “kind”, “type”, “style”, “imitation” etc. Notably, the wording of section 6A mirrors article 23 of TRIPS, without restricting its application to wine and spirits products. But given that protection under this section is extended on a case by case basis, it is unlikely that it will be invoked to provide absolute protection for all products. To date, the provision has applied merely to give effect to obligations incurred in terms of bilateral agreements.

2.4.4 Protecting GIs Under Trade Mark Law

With the signing of the TRIPS agreement, South Africa aligned its position on GIs with the US proposition that GIs are sufficiently protected under existing trade mark laws. GIs are not defined in South African law and it is not possible to register a GI per se. In line with international trade mark practices, the Trade Marks Act⁴⁷ prohibits the registration of marks which consist exclusively of a sign or indication which may serve in trade to designate the geographical origin or other characteristic of the goods or services, unless it has become distinctive through use. The Act provides however for the registration of certification and collective marks, both of which could potentially be used to protect GIs.

⁴⁷Act 194 of 1993.

Section 42(1) defines certification marks as:

(1) A mark capable of distinguishing, in the course of trade, goods or services certified by any person in respect of kind, quality, quantity, intended purpose, value, **geographical origin** or other characteristics of the goods or services, or the mode or time of production of the goods or of rendering of the services, as the case may be, from goods or services not so certified, shall, on application in the prescribed manner, be registrable as a certification trade mark in respect of such first-mentioned goods or services, in the name, as proprietor thereof, of that person: Provided that a mark may not be so registered in the name of a person who carries on a trade in the goods or services in respect of which registration is sought.

Marks capable of distinguishing geographical origin may therefore be registered as certification marks. It should be noted that a certification mark is registered in the name of the certifying organisation. The owner of the certification mark is prohibited from using the mark in order to ensure the mark's credibility. As explained earlier, the information function of a certification mark is not to signal origin in the sense of identifying the producer of the good but instead to signal that the goods or services have been certified by an independent entity and that it complies with some specified characteristics, as determined in the rules of use that accompany its registration.

Pursuant to the signing of the TRIPS agreement, the South African government amended the Trade Marks Act by providing for the possibility of registering 'geographical names or other indications of geographical origin' as collective marks. Section 43(1) of the Act describes a collective mark as "*a mark capable of distinguishing, in the course of trade, goods or services of persons who are members of any association from goods or services of persons who are not members thereof*". A collective mark is registered in the name of an association.

Importantly, collective marks are not subject to the same prohibition as certification marks with respect to the required separation between ownership and use. Producer organisations can therefore register a collective mark to signal their membership of an association, which can be framed to embed a geographical link.

Certification and collective marks thus differ under South African law (as in the majority of jurisdictions) with respect to ownership of the mark, the information signalled by the marks and legitimate use of the mark. These aspects are revisited in section 5 below where the choice of GI strategies pursued by the Karoo lamb and Rooibos industries are discussed (see also Chap. 5).

Registration of GIs as either certification or collective marks offers protection against the use of identical or confusingly similar marks in relation to the class of goods or services for which the mark has been registered, or goods or services which are so similar that use of an identical or confusingly similar mark could lead to deception or confusion.⁴⁸ Well-known marks are furthermore protected against dilution in that no person may use identical or similar marks in relation to any goods or services, where such use is likely to take unfair advantage of or be detrimental to the distinctive character and reputation of the well-known mark. This dilution

⁴⁸Sections 34.1.a and 34.1.b.

provision applies even where there is no deception or confusion. Well-known GIs will thus be protected against use on any goods or services, regardless of the absence of deception or confusion. South Africa thus effectively exceeds the minimum standards of protection required under the TRIPS agreement.

GIs have received increased political attention in recent years as international pressure mounts on the South African government to define its position both at multilateral level and in terms of the Economic Partnership Agreements (EPAs) which are currently being negotiated between the EU and African, Caribbean and Pacific (ACP) countries. From a local perspective, there has also been growing awareness of the need for and potential of GI protection for South African industries. While these dimensions have not elicited legislative response, a recent Intellectual Property Laws Amendment Bill proposed to define GIs for the first time in South African law. This Bill has however recently been withdrawn.

2.4.5 A Sui Generis Registration System for Wine and Spirits GIs

South Africa's protection of GIs for wine and spirits products precedes the TRIPS Agreement and can be traced back to the conclusion of the so called "Crayfish Agreement" in the early 1930s. This bilateral agreement concluded with France provided for the legal recognition of certain wine related GIs, including Champagne and Burgundy. During the 1950s, an administrative scheme of protection was created under the Wine, Other Fermented Beverages and Spirits Act,⁴⁹ as repealed by the Liquor Products Act.⁵⁰ The Wine of Origin Scheme applies to all wines for which a claim of origin, cultivar or vintage is made. The Scheme statutorily defines all wine production units which vary from a single vineyard to estate wines, wards, districts and regions. Certification under the Scheme is done by the Wine and Spirits Board which is responsible for verifying that all the requirements relating to origin, cultivar and vintage have been complied with. The certification process involves scientific analysis to ensure all legal requirements have been met as well as a tasting to confirm that it meets basic quality requirements. The Wine of Origin seal guarantees consumers of the veracity of all claims relating to origin, cultivar and vintage. The seal includes an identification number that can be used to identify information relating to the pressing, wine making and certification processes (Fig. 2.2).

The sui generis registration system for wine and spirits GIs created by the Scheme closely resembles the EU system, which was used as a model in its design given the need for aligning local regulations with EU standards for export purposes.

⁴⁹Act 25 of 1957.

⁵⁰Act 60 of 1989.

Fig. 2.2 The Wine of Origin Seal



In addition to the registration system for wine and spirits products, the Liquor Products Act⁵¹ provides that:

No person shall use any name, word, expression, reference, particulars or indication in any manner, either by itself or in coherence with any other verbal, written, printed, illustrated or visual material, in connection with the sale of a liquor product in a manner that conveys or creates or is likely to convey or create a **false or misleading** impression as to the [...]origin [...]or place of production, of the liquor product.

An indication is considered false if it is de facto untrue. The prohibition on misleading indications means that even indications that provide the true origin of the product may be unlawful in terms of this provision. This is in line with the higher level of protection required under article 23 of TRIPS. The South African treatment of wine and spirits GIs thus mirrors the hierarchical nature of GI protection under the TRIPS agreement and leads to a dualistic approach to GI protection in South Africa based on product categories.

2.5 A Legal Perspective on the South African Experience of Protecting GIs

This section analyses the experience of two South African industries seeking to protect their respective GIs. The Karoo lamb and Rooibos industries are the first South African industries to take steps towards obtaining protection for their GIs. While both industries have made important advances on the path to GI protection, there are significant differences in the strategies they are implementing. With its export orientation and large European market, the Rooibos industry's main objective is to obtain protection for its GI in the EU. In contrast, the Karoo lamb industry is domestically oriented and predominantly concerned with curbing increased misappropriation within South Africa. It is currently the most advanced GI case in South Africa and provides crucial insight into establishing an institutional framework for GI protection at national level.

Insights from the Karoo lamb and Rooibos cases, which are more fully developed during the course of the book, are highlighted here firstly to better comprehend the challenges that industries face in obtaining GI protection under the current

⁵¹Section 12.

South African legal framework and secondly to derive lessons for the design of an appropriate institutional framework for GI protection in other Southern countries. The discussion is enriched with insights from the Indian experience of GI protection. Contrasting it with a sui generis approach such as that of India reflects more fully the dynamics associated with a trade mark approach as applied in South Africa. The Indian case is particularly interesting as South Africa and India share a common law heritage and are both emerging economies within the BRICS⁵² grouping. India was also one of the first Southern countries to adopt a sui generis model of protection, pursuant to the TRIPS agreement.

2.5.1 The Karoo Lamb Case

The Karoo region of South Africa, a semi-arid region stretching north eastwards from the Cape Province, conjures images of wholesomeness and tradition. The reputation for quality and the values associated with the Karoo landscape has captured significant marketing potential in the word Karoo. This has in recent years led to increased misappropriation of the name and has given rise to growing awareness of the need to preserve the cultural assets of the Karoo region.

In response to this concern, the Karoo Development Foundation (KDF) was established in 2011, with the aim of protecting the IP which vests in the cultural heritage of the Karoo region. The creation of the entity was the result of a joint initiative between academia and role players interested in protecting the Karoo heritage and was not driven as such by the inhabitants of the Karoo. As a non-profit trust, the primary concern of the KDF is to protect the collective reputation which vests in the name Karoo lamb. It has approached this through the creation of a certification scheme for ensuring the authenticity and quality of sheep meat labelled as Karoo lamb. In the absence of a dedicated institutional framework for origin based products in South Africa, the decision was taken to institutionalise the Karoo Meat of Origin scheme (“the Scheme”) through application for registration in class 29⁵³ of the marks depicted in Fig. 2.3 (together or individually described as “the certification mark”).

Application for registration of the certification mark was made to the Companies and Intellectual Property Rights Commission (CIPC), as the designated entity in South Africa dealing with all trade mark applications. The application process involved completion of the standard trade mark application form which, in the case of application for a certification mark, is supplemented by submission of rules

⁵²Brasil, India, China and South Africa are members of this political grouping of leading emerging economies.

⁵³In terms of the Nice Classification system class 29 covers the following goods: Meat, fish, poultry and game; meat extracts; preserved, frozen, dried and cooked fruits and vegetables; jellies, jams, compotes; eggs; milk and milk products; edible oils and fats.

CERTIFIED KAROO meat of origin (Windmill device colour label)



CERTIFIED KAROO meat of origin & (Windmill device black and white label)



CERTIFIED KAROO meat of origin & (Windmill device) (stamp)



CERTIFIED KAROO meat of origin & (Windmill device) (meat stamp)



Fig. 2.3 The CERTIFIED KAROO MEAT OF ORIGIN mark

that govern use of the mark. The application has proceeded to registration. Interested producers, processors and marketers who comply with the rules of use can apply for certification and the right to use the mark. The South African Meat Industry Corporation (SAMIC) has been appointed to conduct the certification process. Once an applicant is certified, SAMIC may from time to time undertake additional inspections to ensure the rules of use are complied with.

Independent of the trade mark application process, the KDF also had to comply with a number of other legal procedures. Regulations⁵⁴ issued under the Agricultural Products Standards Act determine that the Department of Agriculture, Forestry and Fisheries (DAFF) needs to approve the application of any quality mark on meat. DAFF can only approve such use where it is linked to a protocol. The KDF consequently applied to DAFF for approval of the KAROO MEAT OF ORIGIN mark and protocol. SAMIC has also been appointed by DAFF to undertake inspections and audits related to the KAROO MEAT OF ORIGIN protocol. South African regulations further determine that quality marks may only be applied to meat in the form of rollermarks. KDF was granted a special dispensation to use the mark as a stamp mark on the carcasses instead of in the rollermarks.

During these processes, the KDF encountered a number of challenges, many of which remain on-going. Firstly, the legal technicalities of the process of registering the certification mark posed significant difficulties. In the absence of sui generis GI protection and with South African trade mark law providing for registration of both collective and certification marks, the first step was to decide which legal instrument within the existing institutional framework would be the most appropriate choice. Although a legal opinion was obtained, there was no compelling argument in favour of either collective or certification marks. With the industry characterised by a

⁵⁴R863 of 2006.

large number of producers spread across a vast region with no significant collective organisation, concerns were raised over the feasibility of registering a collective mark, which would require some form of membership of a collective organisation. The KDF therefore opted for registration of a certification mark. The challenge of dealing with the legal technicalities was compounded by the limited funding which constrained access to the necessary expertise. Seed funding was made available by the Western Cape Department of Agriculture but important support was provided also by private benefactors interested in protecting the Karoo heritage. The industry did not contribute financially to the registration process.

In line with the provisions of the Trade Marks Act, application for registration of the mark was accompanied by detailed rules of use that govern participation in the Scheme. While not legally required to do so, the KDF consulted widely with the industry in drafting the rules for participation in the Scheme. This was primarily driven by concern over the potentially exclusionary impact of the process. The primary difficulty in drafting the rules arose from the need to define the borders of the geographical region, which do not coincide with existing municipal borders. This was a lengthy and widely disputed process. It was eventually agreed that the borders of the region will be determined in accordance with the prevalence of certain shrubs which have scientifically been proven to contribute to the unique flavour of the meat.

The financial structure of the Scheme remains problematic. A decision was taken to charge only a minimal administration fee in order to be as inclusive as possible. With little awareness of the concept of protecting origin based products, the initial cost of participation had to be kept as low as possible, so as to convince stakeholders who are sceptical of the benefits of the Scheme, to participate. As an entirely privately driven initiative, industry acceptance of the Scheme is crucial in its eventual success. As proprietor of the mark, the KDF incurs costs in terms of the processing of applications and the provision of certification services. It also needs to invest in promotional activities, as the value of the mark is commensurate with the level of consumer recognition and acceptance it enjoys. A publicly driven Scheme would likely have experienced less difficulty in achieving legitimacy.

Once the mark is more widely recognised and participation in the Scheme becomes economically rewarding, the KDF will have to secure resources to monitor and enforce its rights to the mark and ensure the integrity of the Scheme. It is currently unclear how the Scheme will be operationalized to ensure an income stream. This difficulty might be avoided under some *sui generis* systems where ownership of the GI vests either in the State, who is then responsible for promoting, monitoring and enforcing the GI, or where GI is managed and defended by so called interprofessional organisations (a community driven approach) who may then require contributions from members to support the GI. The KDF will likely have to provide for some form of royalty to be paid for use of the mark but has not yet taken this step, as “levies” are generally negatively perceived given the particular history of Marketing Boards in South Africa.

2.5.2 Insights from the Rooibos Experience with GI Development

The Rooibos industry has been the subject of a well-known misappropriation case in the US (see Chap. 5). Following the unlawful trade mark registration of the name Rooibos, the industry was forced into a lengthy legal battle to claim back the right to use the name Rooibos in its main export market. The industry succeeded in expunging the unlawfully registered trade mark, but the experience served as an important lesson in the need to proactively protect the IP which vests in the Rooibos name. As the case drew significant attention from the media, it also served to raise awareness among other industries on the risk of misappropriation of and the need to protect national heritage products.

A major advantage for the Rooibos industry compared to the Karoo lamb case is that it is a well organised industry. Indeed, the South African Rooibos Council is representative of the majority of Rooibos producers, processors and marketers. The Council actively works towards coordinating actors across the different chain segments at local supply chain level and in developing industry wide strategies. Aware of the need to protect the Rooibos GI, the Rooibos Council cooperated with a team of researchers in order to develop a GI strategy. A GI task team, comprising a variety of industry representatives, researchers and legal specialists was consequently established to devise an appropriate GI strategy.

As the EU represents the industry's biggest export market, the strategy was designed with the objective of ultimately achieving protection for the Rooibos GI in the EU market. In order to achieve this, application had to be made for registration under EU Regulation 510/2006. As the EU system provides that GIs which do not consist of an actual geographical place name can only be registered as a PDO and given the strength of Rooibos' link with the region, the decision was taken to apply for protection of Rooibos as a PDO. As a non-EU GI, the Rooibos industry is required to show that the GI is protected in its country of origin. With no dedicated legal framework for obtaining GI protection in South Africa, the industry had to pursue protection domestically as either a certification or collective mark. Following the WTO dispute case outlined earlier, it is no longer required to show that the non-EU GI is protected under an "equivalent" system of protection and it was therefore sufficient for the Rooibos industry to prove that the GI is protected in South Africa under trade mark law. The legal opinion of a local IP law firm indicated that a collective mark would be the most appropriate form of protection (see also Box 5.5 in Chap. 5). The reasons given for this included concern over identifying an appropriate certification body and the fact that there was an existing representative industry organisation in whose name the mark could be registered. The legal opinion suggested that the application for registration of the collective mark be supported by legislation which would make it compulsory for Rooibos farmers to belong to the collective body.

However, despite a legal opinion to the contrary, the industry opted to pursue registration of a certification mark. The decision was predominantly based on the

need to ensure inclusiveness of all local role players, given the impact the introduction of GI protection is likely to have on participation. Indeed, had it been implemented, protection as a collective mark would have required every industry role player willing to use the name Rooibos for marketing its product to become a member of the organization that registered the mark, in this case the South African Rooibos Council. This would have been both legally and practically difficult to implement as legislation would have had to be passed to ensure compulsory membership to the South African Rooibos Council (again see Chap. 5 for a full discussion on this). While this organisation is fairly representative of the industry, it does not include all the producers. Furthermore, a significant number of farmers, both large and small-scale producers, market their products directly to foreign customers or on local markets (some have their own facilities for doing this and others outsource at least the packaging stage to the larger companies). It would have been perceived very negatively by some role players, had the right to continue marketing the product been made dependant on membership in the collective organisation. Instead, the GI task team established within SARC opted to be politically sensitive and not to pursue the collective mark registration which was argued to be unfeasible.

In order to be consistent, the industry decided to use the same specification both for the rules of use accompanying its registration as a certification mark in South Africa and for the GI specification that forms the core of the EU application. With no legal requirements imposed on the rules of use accompanying a certification mark application, the industry aligned the structure and content of its specification to the requirements under EU Regulation 510/2006. This was a major determinant in the balance between incorporating collective and public considerations in the specification and resulted in particular in including biodiversity conservation and management aspects in the specification (see Chap. 5 and Biénabe et al. 2009). From an industry perspective, the need to be inclusive was also a major consideration in drafting the GI specification. This resulted in recognition of the different forms in which Rooibos is produced and processed, including wild harvested Rooibos and green Rooibos. The drafting of the EU application proved to be a major challenge for the industry, both from a legal technical and practical perspective. As Rooibos only grows in a narrowly defined geographical region in the Western Cape, delimitation of the geographical region was simpler than in the case of Karoo lamb. However, a major concern was the lack of clarity on what information the application should substantively include. While the EU regulation is publically available and was used to frame the application, there are no official guidelines on the content of applications. Requirements for substantiating the link with the region are particularly obscure. In the case of EU GIs, national authorities of the Member states process the initial examination according to their own national frameworks, which in many cases are more detailed.

As this was the first South African application, contact was made with the EU Commission which provided clarification and support on a number of aspects. Concerns raised with the EU Commission included the need for precision regarding the use of the name locally and abroad (including names in translation such as red bush) and how traceability should be assured along the supply chain. The EU

Commission also provided recommendations on specifying the conditions of production, labelling of the product and on how to prove the reputation which vests in the link with the geographical region. With the support the Rooibos industry enjoyed as a pilot case for GI protection in South Africa, it managed to navigate the difficulties encountered as part of drafting the EU application. It is doubtful however that local industries with limited financial resources and no public support would be able to decipher and comply with the legal requirements under EU Regulation 510/2006.

Contrasting the Rooibos case with Darjeeling tea in India, it is clear how a *sui generis* framework such as the Indian one can ease the process of obtaining protection for GIs in export markets where *sui generis* regulations apply, notably the EU. The Darjeeling PGI application to the EU was based on the Darjeeling GI application filed in India. As the specification model for GIs under the *sui generis* system in India is very similar to the European system, there was no need to amend the specification. The GI Act in India provides for detailed criteria on the description of the product, the geographical area, the method of production and the proof of origin (historical data). As the domestic system in India resembles the philosophy of and requirements imposed by the European system, the drafting of the foreign application and examination process was significantly simplified. This expedited the process of obtaining protection for Darjeeling tea in the EU.

A further challenge which the industry encountered both in terms of the EU application and in relation to registering the local certification mark, was the need to organise the control and certification process. Indeed, given the novelty of the GI concept in South Africa, there is currently no local capacity tailored for certifying origin. Several private certification entities active in the environmental and agricultural sectors have been approached and have indicated an interest in certifying the Rooibos GI. However no final agreement has been reached yet and it remains one of the outstanding matters in completion of both the EU application and the local certification mark process.

The Rooibos case presents some important considerations for designing an institutional framework for GIs. Firstly, it shows how the lack of public support and of a dedicated institutional framework requires industry to rely on their own initiative to obtain GI protection and that this is very much reliant on the ability of industries to organise and drive the process or on ad hoc external support. In the Rooibos case, the GI process has relied strongly on the voluntary commitment of academics, industry representatives and researchers from foreign institutions as well as local public institutions such as the Western Cape Provincial Department of Agriculture. Though the costs associated with drafting the GI application have not been compiled, the process involved significant travel expenses, human resources and legal fees. These costs were funded by research projects (in particular the project on which this book is based) and directly by the Western Cape Provincial Department of Agriculture which took an interest in the case, given the potential of GIs to have broader rural development dynamics in other industries. The SARC also contributed funding to the process. The case further illustrates the challenge for non-EU GIs from countries that lack a GI tradition and dedicated institutional

framework in obtaining protection within the EU, given the onerous information requirements. The Rooibos industry was fortunate to be able to benefit from informal networks internationally. Again, local industries in Southern countries are unlikely to have access to such support. A well elaborated domestic framework coupled with public support would significantly ease the process of obtaining GI protection in export markets (this is more fully discussed in Chap. 5). Finally, it should be noted that the Rooibos industry is a well-established industry with a strong presence in its export markets. These factors, together with the existence of an active representative organisation which could take the lead in pursuing GI protection, all worked in favour of the industry. Industries that lack these characteristics are likely to find the challenges listed above even more trenchant.

2.6 Insights from the Indian Experience

In contrast with the South African approach, India provides a *sui generis* GI framework, which is strongly State driven (Marie-Vivien 2010). While implemented in response to India's obligations under the TRIPS Agreement, recognition of the need for *sui generis* protection resulted from the country's experience of international misappropriation, notably in the Basmati case (Rangnekar and Kumar 2010; Marie-Vivien 2008). This is reflected under the preamble of the Act which directly refers to the danger of infringement related to international trade in Indian products. Following the lengthy legal battle over Basmati rice (during which India contested the patent applications of an American multinational company for new Basmati rice varieties), the Indian GI Act was adopted in 1999 and entered into force on 15 September 2003. Since the Act's adoption, India has been one of the most active Southern countries registering GIs first at national level and also in Europe.

Prior to the adoption of the Indian GI Act, GIs were protected in India under the common law remedy of "passing off" and under trade mark law. As explained in the case of South Africa, an action for passing off results from a business presenting its product as being that of a competitor. Behaviour which misleads the consumer stands central to this action. While the famous Scotch Whisky Association succeeded in defending the GI Scotch Whisky by showing consumer confusion, the level of proof required would not allow lesser known GIs, or those recently introduced in the Indian market, to obtain protection through an action for passing off. The Trade mark Act⁵⁵ provides for registration of GIs as certification marks. However, protection of GIs under this Act is subject to the same concerns raised earlier in this chapter on the private nature of the process, including that the criteria for participation is determined by the applicant (usually a private entity) with no government oversight and that enforcement depends on costly private action. This raised the need for a system of protection that could be administered publicly by a centralized authority

⁵⁵Act 47 of 1999. Sect. 2.e.

(Balganesch 2003). Implementation of the Indian GI Act was thus viewed as a major advance in the protection of GIs in India.

While the Act is significant for a number of reasons, including that it extends the scope of protected products beyond agricultural products and foodstuffs to include also handicrafts, manufactured and natural products, its most salient feature resides in the level of State intervention. The protection of GIs under the Act is very much a top-down process driven by the State. As for sui generis systems more generally, public authorities are tasked with conducting both a formal and a substantive examination of the GI application. The GI application contains the technical standards, comprising an in-depth description of the characteristics of the product, its methods of production and the geographical area of production. The common denominator of all Indian GIs is their reference to history, which serves to prove the link to the origin, the “uniqueness” of the product, the value of the know-how involved and the reputation of the production zone. In addition, natural factors also contribute in many cases to establishing product specificity but are not a requirement.

The famous example of Darjeeling is illustrative in this respect of the limitations of protecting GIs under trade mark law and how the substantive examination provisions under the Indian GI Act better accommodates the need for establishing a link with the region. Prior to the Indian GI Act, Darjeeling was registered in India as a certification mark. The specification or standard for Darjeeling was initially developed by the Tea Board, proprietor of the Darjeeling certification mark. It determined that only blends containing at least 60 % of tea from the Darjeeling region may be certified as Darjeeling tea. This standard was amended in 2002 to determine that only 100 % Darjeeling tea may be certified as Darjeeling and that blends may only claim to contain Darjeeling if the teas included in the blends are certified as Darjeeling. The specification for the Darjeeling GI under both the Indian GI Act and the EU Regulation 510/2006 determines that a tea must consist of 100 % Darjeeling leaves to be entitled to the GI Darjeeling. Contrary to sui generis systems, under the trade mark system, the standard was determined and modified solely on the initiative of the proprietor. It is unlikely that a standard of 60 % would have succeeded in demonstrating the link with the region. This shows the difference between a system with substantive examination by public authorities and one in which this is absent.⁵⁶

The GI Act further distinguishes between the applicant of the GI, who will be the registered proprietor, and the authorized user, who can be any person legitimately claiming to be a producer of the good in relation to which a GI has been registered.⁵⁷ Significantly, of the 153 GI applications registered by December 2011, two thirds have been brought in the name of the State or other State organs. The first GI to be registered in India and one of its most important GIs, Darjeeling Tea was filed in the

⁵⁶It may be noted that the Darjeeling certification mark was maintained even after implementation of the Indian GI Act so that Darjeeling now enjoys protection under both trade mark law and the sui generis system. This appears to be significant from a marketing strategy perspective as the dual protection eases the process of obtaining protection in markets which do not have sui generis systems. Also, trade mark protection facilitates a strong licensing policy with traders.

⁵⁷Section 17.

name of the Tea Board, a statutory body. This body administers all tea produced in the tea-growing areas of India. The fact that most GI applications are brought in the name of the State was a surprising feature of GI implementation under the Indian GI Act. While the Vietnamese *sui generis* system explicitly provides that GI applications should be made in the name of the State, no such provision is included in the Indian GI Act. Interestingly, this contrasts with the European case where GI applications may not be brought in the name of the State under EU Regulation 510/2006. The State in this region significantly intervenes in overseeing the content of the standard as an examiner of applications lodged by private entities but never acts as an applicant. In India, the State conversely participates both as an applicant and as an examiner. This may disempower producers. However it is likely to be a temporary feature of the Indian GI system which can be expected to evolve towards greater producer participation as capacity around GIs increases. This is coherent with the use of GIs as a public policy instrument in support of the protection of national heritage.

State ownership of GIs however raises a number of important legal questions, in particular whether the State can be considered a legitimate applicant for GI registration. This relates in particular to the nature of GIs as a collective right and to the potential exclusionary dynamics. The latter can attach to the drafting of the product specification (see Chap. 3) but also to the approval of the registration of authorised users in cases such as India. To avoid unnecessary exclusion, *sui generis* systems generally provide for representativity of producers and for examination by public authorities. The Indian GI Act specifically provides that the applicant shall be any association of persons, producers, any organization or authority established by or under any law representing the interests of the producers of the concerned goods. Legally speaking, it is not certain whether the list of various legal forms would include the “State of India” as applicant. In the absence of case law and objections, it is assumed that the State of India, in its different forms, complies with the definition of the applicant, merely because it is considered theoretically to represent all citizens, therefore also the producers. However, the implementation of GIs with the State being the applicant shows a more complicated reality. Indeed, concern arises as to whether the State actually represents all the producers or mainly those that have a privileged relationship with the State. The GI Kancheepuram Silk, registered in the name of the Department of Handloom and Textiles of the government of Tamil Nadu, demarcates a geographical area that mainly includes government cooperatives, located in the centre of the city, and excludes the master weavers who are located on the outskirts. In the case of the textile GI Mysore silk which was filed in the name of a government entity, the Karnataka Silk Industries Corporation (KSIC), opposition has been lodged by artisans who fall outside the delimited area which only includes the factory of KSIC. The GI specification was furthermore worded to allow only for a very restricted method of production used exclusively by KSIC. The GI Registry rejected the opposition on the unofficial justification that government enterprises work for the general interest and are the only ones to produce quality products. Similar patterns were observed regarding the registration of the Kashmir Pashmina GI by the Craft Development Institute (CDI), an entity

created by the Indian government. This application was challenged through an opposition filed by the Kashmir Handmade Pashmina Promotion Trust (KHPPT), comprising 300 Kashmiri artisans, on the grounds that CDI is unrelated to the production of Kashmir Pashmina as no artisans form part of CDI. In response, CDI stated that it is an institute legally established by the Government of India and the Government of Jammu and Kashmir, with the objective of pursuing integrated developments of the handicraft sector. It indicated that the registration of the GI under its name does not deter artisans from being registered as authorised users. These cases illustrate how, in India, GIs are considered to be tools dedicated to State interests, with the GI registry as a State entity strongly supporting the registration of GIs in the name of the State.

Such a strong level of State intervention is in strong contrast to the South African case. Both the need to protect Indian national heritage and farmers and artisans as underprivileged members of the population are justification for State intervention in India. While this is in accordance with the tradition of interventionism so typical of India, it is widely debated whether this strong level of State intervention actually works for or against the interests of resource poor farmers. While registering GIs in the name of the State means that it will bear the cost of any potential litigation in enforcing the GI rights, it also means that the State can decide on the content of the GI specification without involving industry role players, and that it may do so according to its own agenda with potential discrepancies with role players' interests. The danger of this is reflected in the discussion above, but also in Chap. 4 where the linkages between the design of the GI specification and exclusionary dynamics are explored in more detail.

Concerns arise in India with regards to the lack of producers registered as authorized GI users. With GI registration in India characterised by public intervention before the involvement of industry role players, the latter can generally only participate to the GI process by requesting to be registered as authorized users once the GI has been registered. This contrasts with the European case, where GI applications are first elaborated by private entities before being examined by the relevant public authority. This is a clear illustration of the current diversity in terms of the level and nature of State intervention observed in different *sui generis* systems. There are signs however that the Indian Government is seeking greater participation of producers in the GI system through increased awareness of the concept. The GI registry is organising in this respect workshops and seminars around the country, and its website provides a wealth of information to assist potentially interested parties to submit their traditional products for GI registration.

Notably, this high level of State intervention and support contrasts with the scope of protection granted to GIs in India. The protection provided to Indian GIs under the GI Act is equal to that of the general level of protection required for all GIs under article 22 of TRIPS. However, a mechanism exists for extending the higher level of protection, granted to wine and spirits GIs under article 23 of TRIPS, to other GI products in India through Government notification. It is worth noting however that, despite numerous requests from stakeholders, this mechanism has not yet been invoked. The lack of political will to grant a high level of protection to GIs

serves to confirm that GIs are viewed more as a way of identifying and documenting traditional Indian products than as a means to aggressively pursue their protection. The question of enforcement has not yet arisen significantly so that there is not yet a clear indication of which strategy will be used to fight misuse of the indication.

2.7 Conclusion

The intractable discourse which developed at international level on the means for protecting GIs has led to the appropriateness of *sui generis* GI versus trade mark systems being debated widely. This chapter highlights a number of important considerations for Southern countries in considering the design of an appropriate legal system for protecting GIs, including potential ambiguity in the information signalled, conceptual differences between the public and private nature of GIs and trade marks, and the consequent need to properly account for the associated collective and public good properties of GIs. The experience of the Karoo lamb and Rooibos industries as well as the debate on the important role of the State in Indian GI processes confirm that the most important consideration with regard to GI institutional frameworks derives from the public versus private nature of *sui generis* and trade mark systems. The South African case illustrates in particular how the lack of a dedicated institutional framework and the need to resort to private trade mark processes challenge producers and present strong arguments in favour of greater State intervention or support. The Indian case conversely balances the discussion in highlighting the risks associated with a strongly publicly driven system. This leads the discussion to conclude that appropriate legal frameworks should allow for strong industry participation and drive of the GI process with State support for ensuring the legitimacy of the GI and the capacity of this instrument to act as an important development tool.

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Chapter 3

Collective Action Dynamics and Product Reputation

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Abstract This chapter aims to analyse how the quality and reputation dimension is built and sustained through collective action dynamics. It explores the key features of collective action that underlie origin based product development and their protection through GIs. The chapter which departs from a literature review which identified the key dimensions of GI related collective action and structure the analysis. It then builds on the analysis of two highly contrasted cases, Karoo lamb and Karakul pelts, to deepen the understanding of the diversity of ways in which collective reputation can develop at industry level and of the different situations that this creates for implementing GI schemes. The discussion empirically confirms the importance of collective action to successfully exploit the benefits of collective reputation and shows that the capacity of industries to establish successful GIs critically depends on the collective basis on which product reputation has been built, as this determines an industry's ability to act collectively in protecting the collective reputation. It is argued that distinguishing between collective action features attached to the building of the collective reputation and those linked to maintaining and protecting this reputation, creates an interesting direction for a more robust approach to collective action analysis oriented towards supporting GI implementation.

Keywords Geographical indications • Collective action • Reputation • Quality management • Karoo lamb • Karakul pelt

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3.1 Introduction

This chapter explores the key features of collective action dynamics that underlie origin-based product development and geographical indication (GI) schemes. Collective reputation is the foundation on which GI strategies are built and sustained. It derives from the product and the efforts of all producers in the region. It is often argued that collective branding is a useful way for protecting this collective reputation (Winfree and McCluskey 2005). This however implies the need for collective action. Building on empirical evidence from Southern Africa, the chapter investigates the nature of and processes through which collective action takes place. In order to properly address these processes, the chapter first proceeds with a review of the literature to identify their key dimensions in relation to GI development. The discussion then builds on a structure derived from this review to analyse two cases of origin-based products that are highly contrasted in their collective action features, namely Karoo lamb and Karakul pelts. It puts forward the different collective action processes that in the first instance underlie the building of the collective reputation and that secondly operate to maintain and protect the collective reputation. This serves to deepen our understanding of the diversity of ways in which collective reputation can develop at industry level and the different situations this creates for implementing GI schemes.

3.2 The Different Roles of Collective Action for Successful GIs: Insights from the Literature

Due to the close link with the geography of the region, origin-based products are characterized by a “collective dimension” in the sense that they are linked with the efforts and skills of the different producers and/or processors as well as with local resources and the history, habits and culture of the local community (Belletti and Marescotti 2002). The local resources can extend to include the know how which attaches to the inhabitants of the region, skills linked to the specific natural resources and particular environmental and geographical attributes. This pool of shared local resources forms the foundation of the origin-based product differentiation on which the GI collective reputation is built and represents the first level on which collective action takes place.

As rightly pointed out by Winfree and McCluskey (2005), collective reputation is a key dimension in the success of products with a regional and local identity. It is constructed through the building of local resources including local know how and skills that are developed in the process of adaptation to the potential of a specific region. It can be equated to a common resource that is built over time in a specific region by a community, the members of which may not all be producers but have together contributed to the collective resources on which the collective reputation is built.

In regions and countries with a long standing history of protecting origin-based products, GIs build upon collaborative networks through which supply chain actors collectively manage the GI product (Barjolle and Sylvander 2002). The collective

action manifests in different forms, taking place horizontally between groups of producers or processors, but importantly also vertically between role players at different stages of the value chain. Network studies show that independent and competing firms take the decision to strategically cooperate in order to increase efficiency through economies of scale and to increase the economies of scope by opening up new possibilities (Koza and Lewin 1999). In the case of GIs, cooperation between supply chain actors allows for the protection of a collective reputation, through adherence to the agreed upon code of practices that serves to ensure a consistent level of quality throughout the value chain. This harmonization of practices over a delimited region enables the GI product to be properly differentiated based on its unique qualities which are linked to the local resources of the region.

Importantly, the actors who participate in GI networks can be highly heterogeneous in that they may or may not be directly involved with the production and distribution activities. Also, they may be of an individual or collective nature and, if they are of a collective nature, they may be public institutions or producer/processor organizations (Pacciani et al. 2001). The GI process further often includes non-local actors. Although actors involved in the production of a GI remain economically and legally independent while producing and marketing a good with a shared protected reputation, they are linked in that their activities result in a particular product whose main characteristics are determined in the code of practices, or specification, of the GI. This peculiar independence/interdependence between producers of the same GI, each pursuing its own objectives while being linked to the others through the sharing of the collective reputation, with the overarching need to arrive at a product with specific and agreed upon characteristics, is a clear manifestation of the fact that GI products stem from a collective process and that coordination and cooperation among the various supply chain actors form the basis on which the GI is built.

While there is no requirement in the TRIPS Agreement for collective organisation – and certain jurisdictions allow for registration of a GI in the name of an entity, many national GI frameworks require the creation of a representative organisation.¹ Apart from legal requirements, collective action has been shown to have strong economic benefits for actors generally (Ostrom 1990; Ménard 2000) and origin-based supply chain participants in particular (Paus and Révion 2010). Collective action, or the process through which a group of interdependent actors organise and manage each other to face the risk of opportunistic behaviour, has been identified in the literature as one of the main factors determining the potential success of a GI product (see Chap. 6). It is a key dimension of the potential role of a GI to bring about positive rural and territorial impacts (Tregear 2003; Révion and Tseelei 2008).

Too often we do not properly recognize that GIs primarily serve as a distinctive sign which identifies a product linked to a specific region and which protects against misappropriation. It is not a panacea that automatically enhances product quality or

¹ See notably Article 5 of EU Regulation 510/2006 which only permits groups to apply for registration of a GI.

magically stimulates demand for the product (Hughes 2009). On the contrary, origin-based product dynamics worldwide have shown that the success of a GI depends strongly on tireless collective value addition and inclusive strategies for protecting the collective reputation. Without strong and effective collective action towards enhancing and promoting the product differentiation in the chain, GI strategies are likely to prove unsuccessful.

The collective reputation is the result of a collective process of value addition (Barjolle and Sylvander 2002) attached to recognition of the specificity linked to the territory by both producers and consumers. It increases the “immaterial dimension of food consumption” for consumers (Réviron et al. 2009: 12) and creates grounds for a price differentiation. The potential commercial value associated with the collective reputation raises the issue of the extraction of the benefits derived from the collective reputation. Under unrestricted access conditions, potential beneficiaries of the collective reputation face similar issues to the well-known “tragedy of the commons” (Hardin 1968) dilemma faced by communities utilising common resources such as grazing, fishing waters, etc. (Winfree and McCluskey 2005). It is therefore necessary to create institutions for dealing with opportunistic behaviour and for collectively managing and coordinating access to and use of the common resource.

GIs operate on the basis of a “collective monopoly” (Thiedig and Sylvander 2000: 431) which is formalised in the GI specification. By excluding actors outside of the demarcated region and those who do not comply with the product specification, a GI provides an exclusion mechanism that grants members of the collective a monopoly in the marketing of the particular good under the protected name (see also Chap. 1). In this way a GI potentially enables those actors participating in the collective monopoly to capture an economic rent. These participating actors therefore stand to benefit from the collective reputation as a shared resource. Building and maintaining the collective reputation from which the economic rent is potentially extracted when marketing the GI requires the participation and commitment of the entire supply chain in achieving and maintaining consistent quality. This implies a process of collective agreement on and commitment to the quality standards to be included in the product specification when applying for GI registration (Das 2009). Following a differentiation strategy generally increases production and marketing costs (Chamberlin 1933) including the cost of advertising, as the value of the differentiation is dependent on consumer recognition of the product-place-quality link (Alavoine-Mornas 1997). The collective rules underlying production and marketing should enable GI producers to achieve a sufficient level of output and return to justify the investment in developing and marketing the differentiated product. This issue is particularly relevant as GIs are often labour intensive, making it difficult to achieve economies of scale.

The need to protect and uphold collective reputation as a common resource through quality control, resource management, promotional activities and monitoring of misappropriation and enforcement of GI rights emphasises the importance of strong collective action in support of the GI process. Building upon the above, we argue that it is important to consider and distinguish two main dimensions of collection action embedded in GI processes: firstly in building the product’s collective

reputation and secondly in managing and protecting it. This distinction is used to structure the following two sections which build on empirical evidence.

As developed below, the contrast between the Karakul pelts and the Karoo lamb cases provides interesting grounds for deriving insights into analysing the diversity of ways in which this collective reputation is developed and for showing effectively how different collective action features determine different outcomes and potential for developing GIs. Indeed, both products qualify as origin-based products since they have a specific link with a region and derive a collective reputation from it. However they operate under very different management systems and the collective reputation attached to the product has been built through completely different processes. Collective supply chain organization and management were fundamental in building the collective reputation for Karakul pelts and have enabled the industry to capture a premium associated with effective market differentiation. This contrasts strongly with the Karoo lamb industry, which has historically been characterised by weak or no collective action, both in building the collective reputation and in maintaining it. The lack of collective action has prevented the collective reputation of Karoo lamb from being significantly harnessed and has increased the threat of misappropriation. Only recently an externally driven collective action process has emerged in the Karoo lamb case to address these concerns.

3.3 Source of Reputation: How Is Collective Reputation Established?

This section considers the nature of collective reputation by trying to understand the factors or resources that give rise to the uniqueness of GI products. The reputation of a GI product is based on the expectation of a particular quality attached to a certain geographical region. As stressed in the introduction, it is not linked to the efforts of a single producer but to all producers within the region that collectively share a production ethic. Drawing on the two case studies, this section explores in more detail the source and nature of the reputation that vests in the names “Karoo lamb” and “Karakul pelts” respectively. The discussion looks at the historical factors which have given rise to the products’ collective reputation. It analyses in particular the reliance on and building of shared local resources that have contributed to constructing the link with the region.

3.3.1 Karoo Lamb: A Cultural Product with a Distinctive Flavour

The great, semi-arid Karoo area covers nearly 50 % of the total area of South Africa and is a remote and sparsely populated region. Typographically, the region consists of flat, dry shrub land with grass land restricted to the occasional mountain ranges

which have relatively higher moisture levels. Rainfall is sporadic, less than 500 mm a year, in some places a great deal less. Periods of drought last for several years, affecting the region and its plant growth. Its arid ecology makes sheep farming one of the few feasible ventures and as a result it has become this remote region's main economic activity. The farming system of a typical Karoo sheep farmer is an extensive and low-input system in an area with very low grazing capacity. The natural pasture varies from mixed grass and shrub land to Karoo shrub land and is described by Acocks (1988) as arid Karoo. The official grazing capacity is estimated at 35 ha per large stock unit for most of the region. The climate is characterised by dry and cold winters and hot summers.

Windmills and wire fencing entered the farming practices of the north-eastern Karoo towards the end of the nineteenth century. A new grazing system developed around the use of artificial water sources and camps in which sheep and other livestock ranged freely. By the late 1920s this had displaced the old *shepherding-plus-kraaling* arrangements. At the time, it was predicted that the new methods would raise stocking rates, improve land cover and lessen soil erosion. Most of the farmers producing Karoo lamb operate farms in excess of 1,000 ha and flock sizes above 200 ewes. Ram and ewe lambs are usually sold to registered abattoirs as soon as they have reached a body weight of approximately 30–40 kg. These abattoirs have links with meat distributors and wholesalers that sell into the retail and catering trade. Production is virtually organic, with the exception of low dosage medication administered to control typical sheep diseases such as Blue tong, etc. Karoo lamb is marketed straight from the *veldt*² and limited additional feed is provided.

Product specificity and quality management The flocks of sheep graze freely amongst the scattered Karoo shrubs which are palatable and meet the nutritional needs of the grazing animals year round (Le Roux et al. 1994). Karoo lamb enjoys a reputation for being a quality meat with a distinctive flavour. It is widely argued that Karoo lamb's distinctive flavour derives from the Karoo shrubs on which it grazes (see for example Esler et al. 2006), given that sheep fattened in a feedlot do not have the same distinctive taste attribute. The perceived unique flavour attributes of Karoo lamb may also be due to the way the farmers finish the animals in free-range environments. Sensory analysis and fatty acid tests (Biénabe et al. 2010) established that there is a statistical significant difference between the sensory attributes of sheep originating from the Karoo and those from Namibia, Kalahari and the Free State. These tests provide scientific evidence for the perception that Karoo lamb is of distinct quality. By all accounts most chefs agree that South Africans have something special in Karoo lamb.

The reputation of Karoo lamb also has a strong cultural dimension and has been part of both *Afrikaner* and Cape style cuisine for more than a century. Many Karoo towns, restaurants and guest houses are promoted as “the home of the Karoo lamb”, and Karoo lamb dishes are found on the majority of menus in the Western and Northern Cape provinces. For South Africans that have migrated from rural areas to

²Term used to describe an open grazing area in Southern Africa.

urban centres over the past 40 years and long for the wholesomeness, authenticity and goodness associated with the Karoo region, a cultural product such as Karoo lamb offers the opportunity to reconnect with their cultural heritage. The collective reputation of Karoo lamb is therefore constructed not only based on its unique taste attributes but also on a nostalgic association and cultural link with the region. This is in line with the observation that the reputation which attaches to a GI is a shared asset which is determined by the product's historical presence in the region, its specificity and consumers' perceptions (Barjolle and Sylvander 2002; see also Chap. 6).

Until recently, there was no institutional guarantee that product sold as Karoo lamb, actually originates from the Karoo region and when it does, that it has been produced according to the free ranging principles implicit to the taste of the product. In fact, there is widespread evidence of misappropriation of the designation by butchers and retailers. As the Karoo region covers such a vast area, Karoo producers and other role players such as the abattoirs have never established a collective organisation to protect the name and reputation of the Karoo and its unique products and practices. Furthermore, with production located a great distance from the urban centres where the product is sold, it has been a challenge to maintain reputation and identity across the country. The threat to the collective reputation due to these challenges is more fully discussed in Sect. 3.4.1, including difficulties encountered as part of a current initiative that seeks to address the need to protect the collective reputation through a collective quality management process.

3.3.2 *Karakul Pelts*

The main production region of Karakul pelts has similar natural characteristics to the Karoo with its dry semi-arid landscape. The development of the Karakul industry in the northern parts of South Africa and in the former German territory of South West Africa³ was driven mainly by strong State intervention and support – largely via the Karakul Board. State institutions in collaboration with producer organisations played an important role in creating the specific local resources on which the reputation of Karakul pelts, and specifically the Swakara brand, is built (see below). The specificity of the product derives from the adaptation of the breed to local conditions and a long term breeding policy through collectively managed genetic resources. However, the key differentiating factor is the collective quality management of the pelts.

3.3.2.1 History and Overview

The Karakul sheep (*Ovis aries platyura*) is believed to be one of the oldest breeds of domesticated sheep in the world. Originally from the steppes of Turkistan, this broad tailed sheep (so called because of the reserves of fat stored in its tail)

³Under political control of Apartheid South Africa until Namibian independence in 1990.

gradually spread to other regions of Central Asia. The breed is named after the village Karakul, which lies in the former emirate of Bokhara (now Uzbekistan). Today Karakul sheep are farmed predominantly in Afghanistan, central Asian republics of the former Soviet Union and Namibia. They are possibly the only animals that can survive the harsh, arid conditions of these regions while providing both a source of food and income to local people.

Karakul sheep were introduced to Namibia in 1907. Due to the proximity, suitable rangeland conditions and economic integration in terms of the Southern African Customs Union (SACU), Karakul sheep production expanded to the member states, in particular to South Africa and Botswana. Today, Botswana produces about 5 %, South Africa 27 % and Namibia the remaining 68 % of Karakul pelts. The main reason for the expansion of the breed can be attributed to their ability to adapt to the harsh grazing conditions of the short shrub savannah in the western and southern parts of Namibia and the Kalahari region of South Africa. In fact, the quality characteristics of the skin, including the length, thickness and colouring, are directly related to the availability of grazing. It favours a hot and dry climate. Pests and diseases are more common in areas of dense vegetation and high rainfall. The grazing habits of the Karakul, compared to other breeds, are less strenuous on pasture. This, together with the fact that the sheep can be used for mutton production, contributes to the popularity of the breed.

Because of the climatic conditions, only a small proportion of new-born lambs (20–30 % depending on the region and the severity of the weather) can be kept and raised to maturity without leading to overgrazing of the natural *veldt*. In Namibia, 3–12 ha of land are needed to graze one adult sheep. The young lambs that cannot be sustained naturally are slaughtered shortly after birth, producing meat, wool, leather and the Karakul lamb pelt. In the majority of cases, Karakul sheep are bred by farmers in areas where natural conditions negate other viable forms of agriculture. Single lambs are the rule, but occasionally twins are produced.

Besides the fact that the Karakul breed is smaller in both size and mass, the lamb is used for pelt production. It means that Karakul sheep have fewer lambs that need to be raised and therefore, the comparative energy demand of a herd is considerably less compared to mutton and wool sheep breeds. This is then also the reason why the Karakul breed is found in the more arid areas where one would normally not expect any livestock farming activities. The Karakul lamb pelt is distinctive for its softness, its water-silk markings and lustrous, wavy curls. Most pelts are black, due to a dominant black gene, but other natural colours include grey, white, silver-grey, pink and brown. Karakul pelt is also known as Persian lamb, or occasionally as Astrakhan.

The Karakul breed has been selectively bred, in line with intensive research work done by AD Thompson in the 1920s, to produce the flat “broadtail look” that became popular on international markets. Broadtail is the term used by the fur trade to describe the pelt of a still-born Karakul lamb, where the mother has aborted naturally as a result of the harsh weather conditions, natural illness or pregnancy difficulties. Broadtail pelts are extremely rare and only account for a very small percentage of overall Karakul production. The broadtail pelt is flatter, softer and

silkier than the traditional curly young lamb pelt. The term “broadtail” is also used to describe the pelt of a young lamb that has been specifically bred to achieve the same look but the pelt is from a naturally born Karakul lamb rather than a still-born. The flat curl type is still sought after and contributes to the higher prices obtained compared to other Karakul producing countries’ average prices. These selection practices oriented towards achieving this peculiar characteristic for the pelt have contributed to consider the Southern African Karakul lamb as being different from the ones originating from other countries. This is a key dimension in the differentiation of the Karakul pelts produced in Southern Africa (mainly Namibia).

Swakara is the brand name for the pelt produced from Karakul lamb in Namibia (and also small quantities from Botswana and South Africa). The name is derived from South-West Africa, the former name of Namibia (South-West African Karakul). The unique characteristic of the locally produced pelts makes Swakara pelts easily distinguishable from Karakul pelts produced in Central Asia and Eastern Europe. While little is known on the production methods in the Asian countries, i.e. Afghanistan, Uzbekistan, Kazakhstan and Romania, it is widely accepted that Southern African production methods are unique to the region and far more advanced not only in terms of breeding policy but also of farming methods, herd management and rangeland management. These characteristics are the result of unique local production techniques that were developed over more than 100 years of Karakul production in Southern Africa and which have contributed to the reputation of the product as a clear quality signal in the mind of consumers. All Swakara producers in Southern Africa generally follow the same production techniques. This applies to all sizes of farming units. Range management is an exception.

Producers have moved away from a throughout-the-year breeding season to two to three shorter controlled seasons. This allows time for other farm work and periods of rest for the animals. Breeding stock is normally obtained from the many stud breeders. All breeding stock that is sold at auctions must be approved by the Namibian Karakul Breeders Society (KBS). The KBS has since 1929 required that all stud lambs have a full pedigree of ancestors as well as a detailed description of hair and curl qualities accompanied by two photos (back and side view). By way of this detailed progeny history, producers decide on a breeding program for each sheep.

The treatment of the raw pelts is standard amongst all producers. Pelts are washed in clean water. No chemicals or preservatives are allowed. The wet skin is put on a frame made from hessian and allowed to dry in the shade for 2 days. The frames are kept in a well-ventilated room. Gauze doors and windows keep flies out. The dried Swakara skin has a unique square shape, because the wet skin is trimmed along the sides. Besides that it gives a better appearance, the straight sides prevent damage during handling.

Other Karakul producing countries do not make use of the hessian frame for drying, but instead the skins are put on the ground, flesh side up, and covered with saw dust. No trimming is done. The dried skin has an irregular shape and is not free from saw dust.

All production techniques were developed by Namibian Karakul producers. There was no contact with Bukhara in Central Asia where the Karakul sheep

originated from, with the result that no technology transfer occurred. Today other Karakul producing countries in Asia and Eastern Europe know that the Southern African Karakul farmers have developed scientific Karakul farming, breeding, production and research techniques. Requests from Romania and Uzbekistan have been received for technical advice and transfer of technology. Furthermore, they desperately want to get hold of local genetic material. Namibia has a ban on the export of Karakul genetic resources.

3.3.2.2 Product Specificity and Quality Management

An important dimension in the uniqueness of the Swakara Karakul pelts is that the pelts of all producers (after the pelts have been identified by means of a bar code) are aggregated before undergoing a very refined selection and assortment process. Like a fingerprint, every Karakul skin is unique. Meticulous care is taken to produce lots that offer the manufacturer the highest degree of uniformity in size, fibre formation, length, weight, quality and pattern excellence. One bundle may have skins from different producers. The more uniform the bundles of skins, the bigger the likelihood that processed skins matches to make up a garment. The opposite is also true. Too much variation within a bundle will result in a lower quality product and lower prices for the raw skin. Uniformity of the bundle is thus an important dimension of quality in the fur market and critical to product differentiation. This confirms the importance of the collective assortment and collective marketing of the pelts.

The system of pelts assortment provides for different classes of pelts based on curl development and fibre length for each of the black, grey, white and brown pelt assortments. Each class is then further graded for fibre quality and pattern excellence. Large and small pelts are not mixed but assorted in separate classes. In practice this could mean that more than 100 bundles of different classes and grades are on offer at the auction. Agra Co-operative, the official marketing agent of the Namibian Karakul Board, makes use of this assortment system (for further information on the structure of this parastatal body see Chap. 4).

This system of aggregation of all producers' skins and sorting into homogenous classes and grades is not practiced in other Karakul producing regions and as a result bundles of skins do not match in size, curl type, pattern and quality. The Swakara assortment system has been used by the industry for decades and it is believed that it originates from well before 1920. While the modern Karakul assortment system has been refined to a science, all measurements are done by hand and eye and are, therefore, subjective. The sorting of Karakul is and will remain artisanal and will not be mechanised. Over time the system has become more complex and changed to provide for the flat curl that was developed in Southern Africa. Changes to the assortment are possible and this would be initiated either by producers of Swakara (this would include producers from South Africa or Botswana), the Namibian Karakul Board, marketing agent or the auction house. The final decision would lie with the marketing agent. The assortment system is unique to the Karakul industry of Southern Africa and lies at the core of the industry's collective reputation.

3.4 How Is the Collective Reputation Managed and Maintained?

This section investigates the nature of and processes through which collective action takes place in order to determine its role in the development of the origin product's identity and reputation and how it has contributed to maintaining the collective reputation. As quality control is a crucial dimension in managing and maintaining product reputation, the discussion places an emphasis on the different approaches taken to manage quality and how quality is built into the supply chain. Institutionalisation plays an important role, both in terms of codifying the production practices and in dealing with the threat of opportunistic behaviour.

The Karoo lamb and Karakul pelts cases differ with respect to the level at which the collective reputation is constructed. In the case of Karoo lamb the reputation is predominantly constructed at the local level. In the case of Karakul pelts, dynamics at both the local and national levels contribute to the construction of reputation. While Karoo lamb enjoys a strong national identity, the reputation has gone unprotected, resulting in commoditisation of the product and loss of a valuable differentiation opportunity. In the case of Karakul pelts, strong collective action at industry level is supported by government processes for managing product quality, thereby sustaining the collective reputation of the product.

3.4.1 *The Karoo: A Collective Reputation Not Managed*

The Karoo lamb case is characterised by mostly individual management at farm level, and a lack of coordination among farmers and vertically amongst role players in the supply chain (including a lack of traceability). This lack of cohesion is in large part due to the diversity and lack of geographic proximity. Farmers are typically organized in district farmers' unions, and many of the producers of Karoo lamb are members of the national Red Meat Producers Organization (RPO). The RPO is primarily a national lobby organization concerned with government policy matters, animal health, prices, standards and general market issues for the red meat industry as a whole, and therefore represents different interests and stakes. It is a national organisation with provincial bodies affiliated to it. The sheep meat producers of the Karoo are thus affiliated to either the Northern Cape RPO or the Western Cape RPO and Eastern Cape RPO. Neither of these organisations can manage the collective reputation of the Karoo region as the members of these organisations include also producers from regions outside the Karoo. The lack of collective management of the origin based reputation has led to Karoo lamb being integrated within the broader sheep meat commodity supply chain without being differentiated from other carcasses.

As a consequence of the lack of collective action and collective management of the reputation of the Karoo in particular, misappropriation and abuse of the name

have been on the rise. As mentioned, several cases have been documented in which meat originating from other parts of South Africa is sold under the name Karoo lamb. The lack of traceability makes it impossible to establish whether meat sold as Karoo lamb actually originates from the Karoo or whether it is sheep meat from areas as far as the wheat fields of the Western Cape, Kalahari, Namibia or the Free State. The high incidence of free riding has led to the dilution of the collective reputation and has prevented producers from extracting a price premium from the collective reputation, as the lack of traceability makes it impossible to credibly signal authenticity to consumers, given the lack of traceability. As a result, Karoo lamb is currently sold at the same price as lamb from other regions in South Africa and Namibia, despite many arguing that, with proper distribution and marketing and with a mechanism for regulating access to the common resource, the financial returns could be improved. As lamb is already relatively expensive compared to other meat products and purchased only by higher income South Africans, its potential to attract a premium would need to be confirmed by further studies. Further scientific work is needed in particular on the perceived aroma and taste differences between Karoo lamb and lamb from other regions as well as the nature of consumers' perceptions regarding the reputation of Karoo lamb. A preliminary study (Van Zyl 2011) in the form of an experimental auction in South Africa indicates that more wealthy consumers are prepared to pay anything between R5⁴ to R13 per kilogram (between 5 and 15 %) extra for different lamb cuts originating from the Karoo.

The fact that Karoo lamb has until now been unable to attract a premium illustrates the observation by Hardin (1968) and Winfree and McCluskey (2005) that, in instances where there is unrestricted access to a "resource" – in this case collective reputation – agents perceive its shadow value to be zero and extract it too rapidly. This implies compromised quality, or in the Karoo case, defrauding consumers as to the origin of the product. This situation has caused some farmers in the Karoo to doubt whether there is a price premium to be extracted from the collective reputation. This has in turn resulted in a situation of the lowest common denominator (the absence of a collective differentiation strategy and commoditisation of the product) with no premium for reputation being extracted.

The lack of collective action within the industry is further evident from the fact that no legal action has been instituted against the entrepreneurs who have misappropriated the name. As discussed more fully in Chap. 2, South Africa has a well-elaborated legal framework for dealing with misleading descriptions of origin and which affords legal recourse to aggrieved parties. The point is that, even in those instances where legal mechanisms for managing the collective reputation embedded in names of origin are available, the absence of a collective drive, as in this case, is likely to compromise management of the collective reputation. In response to these shortcomings, an important process has been initiated for bringing about the necessary collective organisation to ensure the collective reputation of Karoo lamb is optimally harnessed and maintained. This is discussed more fully in the next section (see also Chap. 2).

⁴South African Rand. Approximately R9 to the US\$.

The process to establish a collective organisation for Karoo lamb During earlier discussions with stakeholders some 7 years ago, great interest and support were shown for valorising Karoo lamb as an origin-based product. At that stage, the initiative was entirely driven by a team of outsiders consisting of government officials and academics. Years of research and various consultative meetings between producers, academics, concerned citizens and representatives of the provincial departments of agriculture in the Eastern Cape, Northern Cape, Free State and Western Cape followed. Agreement was reached in March 2009 to move ahead with the idea of protecting the Karoo heritage and image embedded in the agricultural products from the Karoo, including Karoo lamb (and mutton) as the region's flagship product.

One of the outcomes of these discussions was the establishment of a not-for-profit entity, namely the Karoo Development Foundation (KDF). The purpose of the KDF is to protect and promote the Karoo across institutional and geographic boundaries. The rise in misappropriation of the Karoo name emphasised the need for some form of intellectual property right protection on behalf of the farming community of the Karoo. As elaborated on in more detail in Chap. 2, legal advice suggested that, given the lack of a sui generis legal mechanism for registering origin based names in South Africa, the best available option would be registration of a certification mark under South African trade mark law.

As application for a certification mark needs to be accompanied by the submission of rules of use. This required agreement within the industry on a number of aspects. A crucial first step was defining the production area. A decision was taken in this respect to be as inclusive as possible by defining the Karoo region according to geological and botanical descriptors. In the end the Karoo was defined in terms of existing municipal districts which matched the defined and agreed upon botanical descriptions. This proved to be the most challenging dimension of the process. Agreement also had to be reached on the code of production practices which ultimately included provisions on allowable levels of supplemental feeding, requirements around free range grazing and good agricultural practices. These processes were funded with the support of the Western Cape Department of Agriculture. The rules were presented at a stake holder meeting, amended and approved by the industry. Application for registration of the mark Certified Karoo Meat of Origin was made towards the end of 2011. As mentioned in Chap. 2, all relevant opposition periods have passed and the registration certificate has now been issued.

The success of a certification mark of this nature depends to a large extent on an independent certification process and the enforcement of rules by the producer collective and role players throughout the supply chain. The South African Meat Industry Company (SAMIC) has been appointed as independent certifier. Audit check lists were developed in collaboration with producers and officials from SAMIC. During July 2011 application forms were distributed to interested producers, abattoirs and retailers. By the end of July 2012, a total of 108 applications were received, all of which were subsequently audited by SAMIC. Notably, a number of butcheries and abattoirs failed to pass the inspection but all farms that applied for certification were approved. A further process has been initiated to establish the first

consortium of Karoo producers and abattoirs that will manage the collective reputation. It is envisaged that the consortium's activities will include enforcement of the rules of use and that it will undertake steps to claw back the name Karoo lamb where it has been misappropriated. This organisation could ultimately control the supply chain of Karoo lamb (and mutton) by introducing central procurement and logistics systems and a dedicated marketing and promotional programme. It is hoped that this consortium will fulfil the need for a representative organisation dealing with issues related to the production and marketing of Karoo sheep meat.

3.4.2 Karakul – Collective Reputation Well Managed via Public Institutions

The collective dimension in the Karakul pelts case is mainly provided by Namibian public institutions or at least enjoys strong backing by Namibian public bodies and policies. As explained earlier, it is the sharing of common resources that gives rise to the product's specificity and collective reputation. Collective behaviour and supply chain organisation therefore lie at the core of the Karakul pelts case. The strong collective dimension, both in terms of the sharing of local resources and the management of those resources, that gives rise to the product's specificity is clearly in line with the GI philosophy. At the same time there are clear benefits derived in terms of price premium associated with the effective differentiation in the market.

Collective action and effective supply chain organisation is at the core of the management and maintenance of the collective reputation of Karakul pelts. The aspects of relevance here are: the joint marketing of pelts; the pelt centre; an official marketing agent and the Namibian Karakul Board.

Joint marketing of pelts Ever since pelts were produced in Southern Africa, the same marketing channels have been used. Over the years Namibia has developed into the main production area and consequently the marketing structures of Namibia became the accepted market institution for producers from all three countries (Namibia, South Africa and Botswana). Pelts from within Namibia, South Africa and Botswana are delivered to the nearest Namibian Agra Co-operative branch. From these collection points the pelts are transported via the Co-operative's main branch to the Pelt Centre in Windhoek. This Pelt Centre is an institution registered in the name of Agra Co-operative (see below). The sole purpose of the Centre is to assort the Karakul pelts into more than a 100 homogenous classes. As explained earlier, the basis of the classification of pelts are the four main colours, namely black, grey, white and brown as well as the size of the pelts, fibre (hair) length, quality of the hair, pattern excellence and curl type.

Marketing agent The Namibian Karakul Board has officially appointed Agra Co-operative as its marketing agent. Agra Co-operative is registered under the Namibian Co-operatives Act of 1996. It is an agricultural marketing, service and input provider, and comprises of Namibian citizens only. The co-operative operates only within the boundaries of Namibia. It has 7,291 members and 378 staff. Karakul

is the smallest business enterprise of the co-operative. Agra Co-operatives has branches across the production area, and its head office and main branch is situated in Windhoek. The Pelt Centre is fully integrated administratively and operationally with Agra Co-operative. This implies that pelts that are delivered at the branches are automatically electronically registered at the branch as well as with the Pelt Centre. Furthermore, once the pelts are sold, the payments are processed via the Co-operative's financial department. There is no duplication of transactions and administration.

Agra Co-operative, as the marketing agent, negotiates the agreement with the auction house that auctions the Swakara pelts. Due to the small number of white pelts, Agra Co-operative negotiated a sales agreement for a specific period with a furrier. The price for the white pelts is by way of a formula linked to the prices fetched for the top range of black pelts at the auction. The marketing agent is also responsible for the packing and shipping of the pelts consignment to Denmark, where the pelts are exhibited and auctioned by Copenhagen Fur, the auction house.

Institutional support Since the industry's inception, the Namibian government has been a major actor in the Karakul industry. In 1907 the then colonial German government introduced the very first sheep to Namibia. Since the early days of the previous century, there were government research farms for Karakul pelts. These farms were used to improve the quality of the national flock and to make available quality breed stock to farmers. The unique flat curl is a result of government research and breeding programmes. In 1929, the government declared the Karakul Breeders Society as the sole breeder organization for Karakul sheep and appropriated funds for the administrative work to the Karakul Breeders Society. In 1930, the government issued a ban on the exportation of Karakul genetic material. The ban is still in place today. This ban applies to Southern African Customs Union member states in terms of the 1969 SACU Agreement. The Karakul Industry Advisory Board was established in 1939 under the old South African Marketing Act and later renamed and reconfigured as the Karakul Board in terms of the revised South African Marketing Act of 1968.⁵

Due to the political constellation between Namibia and South Africa at that point in time, the Board comprised both South Africans and Namibians. With promulgation of the Karakul Pelts and Wool Act of 1982, both the Marketing Act and the marketing schemes created there under were abolished. This included the Karakul pelts and wool schemes.

Today the government of Namibia still owns Karakul research farms and it possesses valuable Karakul genetic material. In 2006, the Namibian Government agreed with the Karakul pelts industry to jointly manage and further develop government facilities for research and training, and to further improve the state genetic Karakul resource to the benefit of emerging, resettled and small holder farmers and its neighbouring states. Other industries like the meat and agronomy sector enjoy similar privileges but to a lesser degree.

⁵Act 59 of 1968.

Quality control In its founding Act, the Karakul Board instituted a quality control body comprising producers, the marketing agent and the Karakul Board, with the aim to assure that only pelts that meet the criteria are being sold under the trade mark Swakara. Quality control is a requirement in terms of the Karakul Pelts and Wool Act, but the quality criteria themselves are set by the quality control body. Producers from South Africa and Botswana make contributions if they feel a need to adjust the quality standard (see the section below on farmer participation in standard setting).

The pelt characteristics have been researched ever since the sheep was introduced into Namibia in 1907. Research work is well documented and training institutions like the agricultural colleges and government's extension services use the documentation for courses and demonstrations. Furthermore, the Karakul norm day was introduced to communicate in theory and by way of practical demonstration of the characteristics of the breed and the pelts, and to explain the quality control selection criteria and standards. The norms set for the industry and the standards agreed on by the industry as well as the quality control criteria are, therefore, unique in the world and applies only to the Karakul industry of Southern Africa.

Pelts that do not meet the minimum quality standard are destroyed to ensure that they do not enter the market. Quality is defined in terms of hair length, curl and follicle development, lustre and elasticity of fibre as well as biological, mechanical and chemical damage. About 1 % of skins are rejected for not meeting pelt characteristic standards and another 1 % is rejected due to biological and mechanical damage.

Code of practice, production manual and product guide The Karakul Board developed a *Karakul Production Manual* in 1998 to inform on and illustrate production methods and techniques to newcomers to Karakul production. The topics addressed in the manual include:

- range management and grazing density;
- herd composition;
- selection and purchase of rams;
- herd management:
 - breeding seasons
 - clinical and progeny testing of rams
 - lamb season
 - selection of lambs
 - weaning of lambs;
- breeding with white, brown and grey sheep; and
- record keeping.

In 2004 a *Product Guide* was published. The *Product Guide* is aimed at buyers as well as producers of Swakara pelts. It provides information on the pelt assortment, grade categories and quality aspects. Swakara skins are sorted into over 100 categories. The photographs contained in the guide are also available on posters. The book and posters are very popular among producers as well as skin dealers and fur traders.

A *Code of Practice for the Care and Handling of Karakul Sheep* was also compiled in 2006. This document is currently being discussed by the industry before submitting it to Cabinet for endorsement. This document aims to guide producers on minimum standards of farming and production techniques applied in the industry. The basis for the code of practices is animal welfare issues and aspects of environment, rangeland management and matters pertaining to social and labour issues.

Farmer participation in standard setting There are two regular events which provide a forum for stakeholders of the Karakul pelt industry, in particular producers, to bring matters of interest to the attention of the Karakul Board. In September of each year, the Karakul producers gather for 2 days. This meeting is normally well attended by large, small scale and resettled farmers. During the 2 days, the Karakul Breeder Society holds its AGM and, on the day after the meetings, the Keetmanshoop Elite Karakul Ram auction takes place. The main event culminates in the Karakul Forum meeting which lasts 1 day and ends with a formal dinner and price awarding ceremony. Awards are made for the ten best pelt producers. In some years, the Karakul Board's highest award, the Golden Lamb, is awarded to a person or organization which has made an outstanding contribution to the industry.

The agenda of the forum provides for the Karakul Board to inform on its annual activities, particularly relating to its promotional activities. It also provides an overview of the international fur trade as well as an analysis of the prices fetched at the three regular pelts auctions held in Kopenhagen. Experts inform the forum on matters of interest, including the latest fashion trends, colours and manufacturing techniques and the latest research (e.g. identification of the genes responsible for certain characteristics). Outcomes of the discussions at the forum have included the production manual and code of practices mentioned earlier.

A further occasion is the norm day which is held every other year. This day is organized under the joint auspices of the Karakul Breeders Society and the Karakul Board and is devoted to matters relating to quality standards of breeding material, pelts characteristics and pelt assortment. Members of the Quality Control body are present on that day in order to adjust quality standards if so agreed by the producers. The norm day is popular and attended by breeders, pelt producers and beginner farmers and there is a standing invitation to producers from South Africa and Botswana to attend.

The Swakara trade mark Circumstances that eventually led to the adoption of a trade mark are of interest because it reinforces the uniqueness of the product. At the first international pelt exhibition in Leipzig in 1930, the Iranian Pelts Association (IPA) had difficulty in securing the right to describe its product as real Persian lamb (i.e. Karakul lamb), given how the Karakul breed in Namibia had evolved beyond the initial characteristics. In order to market this newly developed product in the United States, the name Swakara was suggested. Swakara developed an identity as a brand and was consequently registered as a trade mark.

As explained also in Chap. 4, the Swakara trade mark is applied only to pelts originating from Namibia, South Africa and Botswana. Although there is no formal inter-state agreement recognizing the marketing channel under Namibian legislation,

the governments of the three countries are aware of the marketing system in place and actually support this type of cross border marketing arrangement.

The trade mark is registered in the name of the Namibian Karakul Board. It is registered in the Southern African Customs Union member states, i.e. Botswana, Namibia, South Africa and Swaziland. In addition, the trade mark is also registered in Italy, France and Germany. For practical reasons, in the latter three countries, the trade mark is registered in the name of IMCO, a wholly owned subsidiary of the Karakul Board. Some 30 years ago the trade mark was registered in other countries as well, like Canada, Switzerland, Estonia, France, Great Britain, Georgia, Hong Kong, Lithuania, Latvia, Japan and the USA. However, due to the shrinking of the local industry and the high cost of maintaining the trade mark registrations, it was decided to only register the mark in the major export markets.

The trade mark has the advantage that the trade recognises the logo and is assured of the quality of each pelt and a high degree of homogeneity of colour and quality. A further aspect which is important to customers is the fact that the buyer can actually refer back to the Karakul Board in case of legitimate claims of losses due to damage. Chapter 4 explores in more detail the disadvantages of the costs associated with maintaining the trade mark.

As the Karakul Board appointed agents in most of the European countries to promote the product Swakara, the misuse of the trade marks were limited in these markets. Nowadays, misappropriation of the Swakara trade mark is widespread in that the mark is now also being used to promote pelts originating from other Karakul producing countries. So despite strong reputation and strong collective action as well as strong public institutions and public support – the Karakul pelt industry still faces the threat of misappropriation.

3.5 Discussion

Empirical evidence in this chapter came from two Southern African products with strong historical presence and reputation – Karoo lamb and Karakul pelts – but with historically highly contrasted approaches to collective quality and reputation management. The cases confirm firstly the importance of collective action in promoting origin-based products and secondly provide further insights into the diversity of collective approaches. The distinction between the collective action attached to the building of the collective reputation and the collective action for maintaining and protecting it, which was used for structuring the empirical analysis, proved important for appropriately contrasting the cases.

In the case of Karoo lamb, the product specificity developed over time around the collectively shared local know-how that sheep grazing on the unique *veldt* of the Karoo produce meat products with unique sensory and quality attributes. The uniqueness of the product has been culturally reinforced through the association consumers have with the region. However, the lack of a concerted collective effort for managing the collective reputation as a shared resource has led to the dilution of

the reputation and current trends towards complete commoditisation of the product. Until very recently, this dilution of the collective reputation has gone unchecked with no collective effort aimed at protecting the reputation and with widespread misappropriation as a result. In contrast, the product specificity and collective reputation of Karakul pelts resulted from and are carefully managed through collaborative efforts between Government and industry stakeholders which collectively define and implement production and quality management systems.

The two industries thus differ significantly with respect to the state of collective organisation prior to embarking on a GI based strategy. Karoo lamb is in this respect illustrative of the observation by Vandecandelaere et al. (2009) that the majority of potential GI products are characterised by low collective decision making (see also Ackerman and Russo 2010). The different levels and nature of collective action observed in the two industries lead to significantly different outcomes for the two products. The collective effort in positioning Swakara Karakul as a product of unique quality has enabled the industry to extract a premium linked to the product origin. The risk of erosion of this premium is carefully managed through quality control and an intellectual property protection strategy involving the use of the Swakara trade mark. The lack of collective mobilisation within the Karoo lamb industry has conversely resulted in the loss of a valuable differentiation opportunity with the product being sold at the same price as conventional lamb/mutton originating from other Southern African regions.

With both products deriving from the use of shared local resources, the differentiating factor clearly lies in the level of cooperation and collective action in the industries. It is also important to point out that collective action has been widely supported and organised in the Karakul pelt case through State involvement as further discussed in Chap. 4. The capacity to collectively manage the shared resources determines the ability of industries to benefit from a GI strategy. The Karakul case clearly illustrates the value of developing an institutional framework for managing common resources to avoid facing the “tragedy of the commons” problem as developed in the first section. This is in line with the approach developed by Elinor Ostrom of regulatory frameworks that can work under collective property features and be more effective than private property based regulation. The Karakul case confirms the theoretical perspective that effective rules can govern collective action for the management of commons over time.

The Karoo lamb case also illustrates the importance of these rules for ensuring collective management of the collective reputation. Indeed their absence until very recently as a result of the lack of collective action has significantly undermined the value of the reputation for producers and other supply chain actors. The recent initiative by the KDF is the first step towards such an institutional framework, as it provides rules and practices together with an enforcement mechanism for rebuilding and reclaiming the collective reputation of Karoo lamb. The certification system created by the KDF has the potential to bring about the collective action needed for dealing with technical, marketing and regulatory issues in order to effectively valorise the collective reputation. The experience in establishing and pursuing the objectives of the KDF confirms the observation by Paus and Révillon (2010) that the

building of collective action is not an automatic process but requires significant and dedicated energies. It is vital that, in the absence of any other representative organisation, the KDF's efforts will serve as the necessary catalyst for building a collective organisation for strengthening and protecting the collective reputation. In the case of Karakul, the legislatively entrenched collective organisation which pre-existed the GI based process, significantly simplifies the deepening of collective action in support of the GI strategy.

3.6 Conclusion

The EU experience emphasises the fundamental role of strong collective action in the success of origin-based products. In this chapter, the aim was to investigate the nature of and processes through which collective action takes place and to determine its role in the development of the origin-based product's reputation and GI through building and managing product quality, managing the common resources and preventing usurpation by building on empirical evidence from Southern countries.

This chapter provides strong empirical evidence based on the analysis of the two case studies that collective action is also critical to successfully exploiting the benefits of collective reputation in the Southern African context. However, while the role of the so-called "inter professional organisation" has been shown to be a strong determinant both in building and in maintaining the collective reputation in the European case, this chapter shows that the nature and role of collective action can be diverse and that it can vary drastically during these two phases with different implications. It is therefore argued that it is useful to analytically distinguish these two phases – the building of the collective reputation that happens prior to the GI establishment on the one hand and the sustaining of the collective reputation to which the GI aims to contribute on the other hand – when examining GI related collective action processes and their implications for successfully implementing GI strategies. By doing this, the chapter better highlights the disjunction between the two cases. It shows that it is not necessarily the same actors that drive the process and that the collective dynamics have developed differently over time for the two industries. It therefore presents different perspectives on how to protect GIs based on varying capacities to build on collective action dynamics and on who leads the protection process.

The discussion further contributes to better recognising the difficulties associated with collective action for developing and protecting GIs. As evident from the contrasted analysis, the significant difficulties observed in the Karoo lamb case derive from the collective features that underlie the building of its collective reputation. These rely mainly on locally shared natural resources and management practices built over time in this specific environment with almost no concerted collective effort to support it. A central message of this chapter is then that the capacity of industries to establish successful GIs critically depends on the way in

which the origin-based products have been developed. It depends in particular on the collective basis on which product reputation has been built, as this determines an industry's ability to act collectively in protecting the collective reputation. We therefore clearly demonstrate the relevance of distinguishing between collective action features attached to the building of the collective reputation and those linked to maintaining and protecting this reputation. This creates an interesting direction for a more robust approach to collective action analysis oriented towards supporting GI implementation.

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Chapter 4

Private Versus Public Quality Schemes for Origin-Labelled Products: Insights from the Karakul Pelts and Camdeboo Mohair Industries

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Abstract This chapter explores aspects around the public nature of GIs and the associated debate on the need for public intervention in supporting GI development and implementation. The discussion draws on the commonalities and differences between the Camdeboo mohair and Karakul pelts cases, both of which are Southern African luxury clothing products with sophisticated quality management systems. The cases are both endemic industries with a strong link to the region but which are not linked to national GI protection schemes. They differ significantly however with respect to their approach to investment in the common resources underlying the reputation of the origin based product as well as with respect to the management of the collective reputation. The chapter provides insights into the implications of public versus privately driven origin based quality schemes, particularly with respect to potential exclusionary dynamics.

Keywords Geographical indications • Club good • Exclusion • Collective monopoly • Quality management • Branding • Value chain

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4.1 Introduction

The WTO's flexible approach to GI protection divided WTO members in their domestic implementation of GI protection. The institutional contours of the two predominant approaches to GI protection at national level – trade mark law versus protection under a *sui generis* system – are explored from a legal perspective in Chap. 2. Building on this legal foundation, this chapter explores some implications of the public versus private nature of GIs. It stresses in particular the role of public intervention and support in GI development and implementation with regard to equity considerations and exclusionary dynamics. To explore this question which lies at the heart of GI institutional design, the discussion more specifically analyses quality dynamics. Indeed, these dynamics form the foundation of the GI concept. Through contrasting the cases of Karakul pelts and Camdeboo mohair, the chapter highlights the implications of public versus privately driven sophisticated origin-based quality schemes.

Following an initial conceptual exploration of GI quality dynamics and their implications based on a review of the literature, the chapter draws on empirical insights from the two above mentioned Southern African cases. The Camdeboo mohair industry from South Africa and the Karakul pelts industry predominantly based in Namibia, present both interesting commonalities and differences with regards to industry features and quality management. Both products are produced by local industries involved in the production of well-known luxury clothing products that are well established on international markets and that enjoy significant reputation for their origin linked qualities. These industries have both introduced sophisticated quality management processes as part of their branding strategies.

With neither South Africa nor Namibia having a tradition of GI protection and with a lack of legal recognition for GIs as a distinct IP right, neither of these products were explicitly conceptualised as GIs. Both industries rely on trade mark law for supporting their origin based branding strategies and protecting the collective reputation of their product. The industries differ however in the strategies on which the collective reputation is built. They have followed significantly different approaches to investment in the common resources underlying the reputation of the origin-based product as well as the management of the collective reputation. In the Karakul pelts case, an origin based collective branding strategy developed around the use of the trade mark Swakara. The quality and reputation of Karakul pelts derive from a process of significant public investment. Camdeboo mohair presents a more nuanced case with regard to GI features, as Camdeboo mohair's quality and reputation results mainly from a corporate strategy. However, the case provides interesting insights into the dilemma encountered by industries engaging in origin based differentiation in territories where the GI concept has only recently been introduced. Indeed, it presents a case of private ownership of a GI-like branding strategy that is dependent on collective participation in terms of ensuring a supply of high quality product and it builds on territorial features, while currently not properly institutionalising these collective and territorial attributes.

As explored in Chap. 1, GIs potentially fulfil a number of roles depending on the context and nature of the GI product. These range from signalling, controlling and differentiating quality to fostering rural development dynamics and supporting the preservation of traditional knowledge, cultural and biological diversity as well as the environment. Public intervention in GI development and protection is widely justified based on considerations of the potential public benefits which may flow from GIs. This is particularly true of the rural development dynamics associated with GIs (see among others Pacciani et al. 2001; Belletti and Maressotti 2011). It is important to point out that, while national rural development objectives are at the heart of the rationale behind public intervention in the Karakul pelts case, the insights into public intervention in GI development and protection presented in this chapter instead focus on the role of GIs in quality signalling, control and differentiation. While both cases feature dimensions of GI products in terms of quality signalling attached to a place, they reflect very different conceptions and drive of the collective dimension attached to quality management and value chain governance. They differ drastically in terms of public intervention and nature of the participation in the chain, as developed below. Following the empirical insights, the scope of the discussion is broadened by returning to the literature on the public versus private features of GIs, thereby deepening the understanding of the conceptual differences attached to different GI institutional approaches.

4.2 The Creation of a Collective Marketing Monopoly for Product Differentiation in Support of Market Penetration and Value Addition

As pointed out in Chap. 3, GIs revolve around the capacity to collectively harness origin-based differentiation and to transform territorial resources into quality attributes recognised by consumers (Pacciani et al. 2001). Successful GIs are traded as differentiated products which capture a premium as a result of the higher value attributed by consumers to these products (see for example Marette 2005). GIs thus represent a dynamic “*collective process of value creation*” that embeds local resources into the product and builds its reputation (Barjolle and Sylvander 2002: 3).

As mentioned, several authors have analysed how GI protection results in the formation of “*collective monopolies*” (see in particular Moran 1993 and Thiedig and Sylvander 2000). This has been discussed in Chap. 3 from a collective action perspective. This monopoly formation is the mechanism through which the GI differentiation is sustained. Indeed, GIs drastically reduce competition through market segmentation and the creation of barriers to entry. These barriers function on two levels, excluding producers located outside the demarcated region while also excluding producers within the region who do not adhere to the production practices. These barriers are institutionally established during the GI registration process and the drafting of the product specification in particular. The product

specification determines the geographical boundaries of the production area as well as the code of practices, therefore determining “who” can produce the product and “how” it should be produced. The product specification thus forms the foundation of the monopolistic market structure which results from GI protection. It delimits the collective monopoly and improves market access for those producers entitled to use the denomination, provided there is consumer demand for the GI product. This is reinforced by the fact that the GI specification (through delimiting the production area and restricting acceptable production practices) also plays a role in controlling supply both in quantity and quality, which contributes to sustaining the attractiveness of the product.

GI-based collective monopolies have been viewed by some authors (see in particular Thiedig and Sylvander 2000) as club goods. Following Buchanan’s seminal article (1965), Cornes and Sandler (1996: 347) followed by Thiedig and Sylvander (2000) and by Torre (2002), define a club as “*a voluntary group of individuals who derive mutual benefits from sharing one or more of the following: production costs, membership characteristics or a good characterized by excludable benefits*”. GIs are considered club goods in that they exhibit properties of excludability (based on the need to meet predefined conditions) and at least partly, non-rivalry (use of the GI by an additional actor does not directly affect its use by the other members of the group). While congestion considerations potentially apply to GI products that become too attractive, the exclusion mechanism introduced in the GI specification generally serves to prevent this. GIs are therefore characterized by both the *sharing* among producers of the club good (the GI reputation) and the limitation of congestion and rivalry through restricting access based on the *exclusion mechanism* embedded in the GI. This mechanism underlies the *exclusivity* of the club good. GI products are therefore associated with a limited group of producers that both produce the GI reputation and the potential attached to it to capture a rent when marketing the product (or “*acquisitional potential*” as stated by Thiedig and Sylvander (2000: 428)).

Building further on club good theory, other GI characteristics include *voluntarism* in joining the club and adhering to the rules of the GI (Torre 2002). Participation is not compulsory, it is subject to the condition of earning a net benefit from it; however not joining the GI club will preclude use of the GI name. On the other hand, there is a cost associated with participation (the cost of complying with the GI specification). The potential for benefiting from GI labelling clearly depends on operating in remunerative markets. Actors trading on local markets are often found to be less likely to benefit from the GI sign than those trading in more distant markets. The potential benefits associated with participation may therefore differ across actors and chains. This is further developed below. Importantly, GIs also feature specific characteristics with regard to typical club goods in that, as noted by Thiedig and Sylvander (2000: 434), “*once the club is established, the club becomes (legally) inclusive for the delimited region*”. This means that the actual number of GI club members is not determined directly through membership rules but indirectly through the GI specification. Contrary to other forms of collective branding such as collective marks in particular, GIs are not attached to people but to what

constitutes the GI based territory (a combination of a geographical area and of the practices included in the specification).

The development above clearly highlights the importance attached to the way GI specifications are defined (who define them and how) as this determines the nature of the exclusion and of the GI good (sharing and limitation of rivalry). In this regard, Thiedig and Sylvander (2000), in analysing the EU GI instruments, argue that the rules defining specification for the PDO club are more successful in limiting the risk of congestion than the less requiring rules associated with the PGI club. Torre (2002) also stresses that the definition of the rules is dependent on the governance and coordination in the chain, and in particular on the nature of the relationships and transactions between actors from different chain segments, namely primary producers and processors. Under marked asymmetric relationships, the dominant players, usually downstream players in the chain, are likely to exert their power in the chain for designing rules tailored to their interests. Thiedig and Sylvander (2000) further point out that illegitimate use of the indication can decrease the benefits significantly, which raises the issue of enforcement. These dimensions are closely inter-linked with the question of how to handle origin-based quality management processes. This relates in particular to the nature and level of public intervention. The analysis of the two cases presented below will assist in providing insights into the practical implications of these questions. It considers in particular how the quality management processes of the two cases have been built and the role of public sector involvement in these processes.

4.3 Public Versus Private Origin-Based Differentiation Strategies for High Quality Products

4.3.1 Karakul Pelts: A Public Based Approach

Chapter 3 presented a detailed description of the Karakul pelt industry and the Swakara brand. The discussion also introduced the role of the public sector in developing the quality scheme for Karakul pelts. It was explained that the industry's marketing structure was institutionalised by the Namibian Government through promulgation of the Karakul Pelts and Wool Act of 1982 which created the Namibian Karakul Board. The Board consists of eight members appointed by the Minister from nominations submitted by the respective organizations. The Karakul Producers Forum nominates four producers representing large and small-scale farmers. The Karakul Breeders Society nominates one representative and the marketing organization, i.e. Agra Co-operative, nominates one person. Furthermore, the Ministries of Agriculture, Water and Forestry as well as Trade and Industry appoint one representative each. In addition the Minister may appoint any other person by virtue of his/her knowledge on the international fur trade. This provides for the opportunity to appoint non-Namibian citizens to the Karakul Board. The Board is thus

representative of the industry. As the Board is established in terms of legislation, it has the status of a statutory body but is not funded by Government. Instead, the Board is empowered by its founding Act to impose producer levies and implement quality controls. The main objective of the Board is to promote the Karakul Industry within Namibia and on international markets. The role of the Namibian Government is thus significant in terms of creating an enabling environment conducive to the production of Karakul pelts and promotion of the industry. The Karakul Board spends a large part of its budget on information and promotion, illustrating again the importance of public support for this industry. Interestingly, the Government is showing important responsiveness with regard to market related issues arising in the chain. A separate hangtag, the “Origin Assured” (OA) mark has been developed for farmed and wild fur to assure fur customers that the origin of their new fur is from a country where regulations or standards governing fur production are in force. The program represents an initiative launched in 2006 by the international industry to offset anti-fur sentiments by animal rights organizations.

As illustrated by the evidence provided above and from the broader analysis in Chap. 3, the Karakul pelt case highlights how the reputation of this origin-based product is being managed through a combination of public support, publicly regulated quality schemes, and publicly funded marketing and information campaigns that strengthen and frame the practices and behaviours of the Southern African Karakul pelt producers. In addition to significantly intervening in the chain, the Namibian government utilises the Swakara trade mark to protect the identity and reputation of Karakul pelts, which is very much in line with a GI strategy. A critical point highlighted here is that the origin based product Karakul pelts is well supported by Government through regulations on quality and various government systems and bodies to manage the marketing and distribution of the product. This provides a clear example of formal public investment and recognition of the potential associated with strategies that feature at least some important GI principles in the Southern African context. This includes protecting and upholding the product reputation through a sophisticated collective quality management system. Public intervention was also critical in building the product reputation in this case. It is important to point out though that the quality management strategy and product specification attached to Karakul pelts do not include an explicit geographical delimitation. While the inclusive strategy pursued by the board fits well with the GI approach and while a territory could be identified, it has not so far been explicitly defined.

4.3.2 Camdeboo Mohair: Private Governance by a Corporate Entity

The main features of Camdeboo origin based quality and differentiation: The word *Camdeboo* refers to an area within the Eastern Cape Province of South Africa which is not administratively bounded but is locally identified both culturally and botanically (see Box 4.1 below). Well suited to the farming of Angora goats, the

Fig. 4.1 The Camdeboo trade mark owned by the Camdeboo Mohair Company



Camdeboo region in the Eastern Cape Province has been perceived, both locally and internationally, as a superior mohair producing area.

Box 4.1: The Origin of the Word Camdeboo

Originating from the Khoi San language, “Camdeboo” is an old name for the eastern plains of the arid and starkly beautiful Karoo region of South Africa. It was the book by Eve Palmer “The Plains of Camdeboo” which firmly established the name. The word Camdeboo is also described as a Hottentot word meaning “thirst-land” characterising the dry and arid climate of this specific region of South Africa.

Although the area known as Camdeboo was first conceptualised in literature in the 1940s, the area between Jansenville, Aberdeen and Graaff-Reinet is also commonly referred to as the Camdeboo Plains from a botanical perspective (Vlok and Euston-Brown 2002). Over 218 different species of plants were identified in this area, which include Camdeboo Escarpment Thicket, Eastern Lower Karoo and Lower Karoo Gwarrieveld veld-types (Campbell, 2008, personal communication).

This is due, in part, to a well-established infrastructure suited to rearing fibre producing animals, suitable vegetation and topography and healthy climatic conditions with a low incidence of small stock diseases commonly found in other areas of South Africa. The presence of grazing herbivores has in turn been found to have a beneficial impact on the endemic vegetation, so that a finely balanced animal-plant-human dynamic can be observed in the region. This dynamic has both created and maintained the distinctive geographical area that is so specifically suited to mohair production.

In contrast with the Karakul case which exhibits a strong collective dimension and public support for quality management and value chain coordination, Camdeboo mohair results from the private business initiative of the Camdeboo Mohair Company. A private trade mark, as depicted in Fig. 4.1 has been registered in the name of this company and forms the basis of the differentiation strategy. At the time of its creation, the Camdeboo Mohair Company’s shareholders constituted six mohair producers who had the shared vision of differentiating superior mohair and marketing it as a luxury material. However, given divergent views on the required investments, both financial and human, for establishing the brand and its reputation, all but one of these founding shareholders have since sold their shares in the entity to the sole remaining shareholder.

The superior quality of the mohair, which bears the Camdeboo mark, is the result of a sophisticated and strictly enforced quality management system implemented by the Camdeboo Mohair Company. This strategy, which is explored in more detail below, is based on the values of full traceability, superior quality and strict quality control. These factors differentiate Camdeboo from other mohair on the market and have served as the basis for the development of a globally recognisable brand. Approved producers who follow the company quality specification obtain the right to define their raw product as Camdeboo mohair.

The patrimony which vests in the mark Camdeboo is the property of the Camdeboo Mohair Company. However, approved producers benefit from the differentiation signalled by the mark, in that the right to describe their produce as Camdeboo mohair enables them to extract the quality based rent attached to this brand when recognised and valued on the market. This can directly consist of higher market prices and/or indirectly of preferred supplier status. These producers pay a fee of 0.8 % of the final product price to the Camdeboo Mohair Company for maintaining and building the reputation of the trade mark. The positioning of Camdeboo mohair as a superior product is supported by an exclusive licensing agreement negotiated by the Camdeboo Mohair Company with one of the world's largest luxury goods groups.

It is important to reflect on the use of the word Camdeboo as a brand and on the conditions for participation in the associated chain. While the word Camdeboo is a geographical place name, the mohair which is sold as Camdeboo mohair is not necessarily sourced only from the Camdeboo region, and according to company policy delivering producers are not bound by explicitly defined geographical boundaries. However, in practice, the premier mohair producing region coincides with what is considered to be the Camdeboo region. It is also worth noting that the whole mohair production is bound by specific climatic, geographic and vegetation boundaries. While regional dimensions intervene in the production process and in the quality of the product, the link to the region is not explicitly institutionalised as part of this individual trade mark strategy as it would be under a *sui generis* GI approach.

This case draws on some GI features as part of a private branding strategy. Indeed it builds on a private brand that incorporates a regional name which partially corresponds to the region of production and based on which a reputation has been built. It also constitutes a departure from the GI based territory approach. As in the Karakul pelts case, it does not include geographical boundaries for the production area as part of the specification. Furthermore, it is currently not clear to what extent the Camdeboo brand is or intends to be inclusive of all the producers who could potentially produce Camdeboo mohair and benefit from it, as inclusion is subject to approval by the company and to a process which includes a probation period as further developed below. This contrasts with the Karakul case which clearly established and incorporated inclusiveness in its design.

As in the Karakul case, the uniqueness of the product strongly relies on the implementation of a superior quality system to differentiate the product on the market. It is sustained through a sophisticated quality management system. To participate in the chain, producers must comply with minimum and objectively measurable quality requirements as well as a set of additional best practices that was established by the

Camdeboo Mohair Company (for more details on this, see Box 4.2 below). This includes but also extends beyond adherence to the official classification and packaging standards determined by the mohair industry under the protection of the Marketing of Agricultural Products Act.¹ The Camdeboo Mohair Company also determined the quality rules based on client requirements. Mohair from an approved producer that passes the value system is labelled with a “C” to identify it as Camdeboo mohair.

The Camdeboo management system and its implementation in the chain: To enforce its quality management strategy, the Camdeboo Mohair Company has entered into an agreement with the operators in charge of verifying mohair production for marketing purposes in South Africa. These operators are the Wool Testing Bureau that tests and certifies the quality of all wool and mohair offered for sale in South Africa, and the two brokers that facilitate the sale of the mohair between the producers and the first stage processors – CMW (Cape Mohair and Wool) and BKB Limited² (an agribusiness firm). The latter two actors, verify the methodology used to present the clip for sale. CMW and BKB agents are also licensed to assist in the identification and verification of Camdeboo mohair. They verify and certify that the clips that are supplied as being of Camdeboo standard by approved producers can effectively be labelled with a “C” before being baled and transported to the auction floor. Generally, the agents must be present at shearing to ensure that the standards are met. They receive commission on the price paid (as with all mohair for which they control the marketing). The Camdeboo Mohair Company’s value system therefore operates throughout the conventional supply chain based on specific measures to ensure and guarantee the quality. The Camdeboo Mohair Company further utilises contractual agreements³ to drive certain activities along the chain so as to ensure that Camdeboo mohair is eventually utilised in only pre-determined products.

Box 4.2: Main Features of the “Best Practices”

- Progressive breeding to improve the genetic quality of the Angora goats with a view to improve the quality of the mohair that is produced (no coloured fibres and no kemp).
- Optimal shearing schedules to improve the quality of the mohair that is shorn (optimal fibre lengths).
- Husbandry practices that are conducive to high quality mohair production (zero vegetable contamination).

(continued)

¹Act 47 of 1996.

²BKB was formed on 1 July 1975 with the amalgamation of three farmers’ organisations, namely Farmers’ Co-operative Wool and Produce Union Limited (FCU), Boere-Saamwerk Beperk (BSB) and Koöperatiewe Wolmaatskappy Beperk (KWB). FCU was established in 1919, BSB in 1920 and KWB in 1927. Boeremakelaars (Koöperatief) Beperk was registered in 1975. On 30 June 1998, Boeremakelaars (Koöperatief) Beperk was transformed into a full-fledged company with shareholders. This company is known as BKB Limited.

³The company does not contract for the buying or selling of the mohair BUT for the **right** to process and sell the specific raw mohair, intermediary or final products as made from ‘Camdeboo Mohair’ (provided that this is indeed the case).

Box 4.2 (continued)

- Producers must take preventative action to eliminate pollution from the grazing area through production to the point of delivery.
- Producers must adhere to accepted grazing systems that are environmentally friendly and conducive to sustainability. Specific stocking densities and rotational grazing systems are applied to ensure the long-term sustainability of this particularly dry area vulnerable to over-grazing.
- High standard of classing (clean shearing and baling sheds, zero contamination, no smoking).
- The consistency of the bales is checked before baling.
- Bale samples are sent for fibre diameter testing.
- The bales are delivered along with all other mohair to the Auction floor but marked with a “C” to be differentiated.

Through implementation of this value system and the sophisticated quality management approach, Camdeboo mohair has been shown, and is considered, by chain actors to have achieved a verifiable difference in the physical attributes compared to the mohair produced by conventional producers who do not participate in the Camdeboo group (see Box 4.3 below).

Box 4.3: The Complexity of the Determinants Behind Camdeboo mohair Quality

Evidence is available to show that the value-system that is being used to differentiate Camdeboo mohair from the general clip is successful in presenting a unique product to the market. Tests were conducted by the South African Wool Testing Bureau on pure Camdeboo mohair tops and on standard non-Camdeboo tops, both of similar high conventional quality. Scientific tests revealed that mohair fibre produced by Camdeboo producers would generally be stronger (i.e. fewer breakages) and more uniform along its length than the conventional mohair fibre, which enables the spinning of a finer and more uniform yarn. Furthermore, Camdeboo mohair is certified free from impurities and is better classed. In other words, a Camdeboo mohair lot is more uniform throughout the bale. This is a particularly important feature when mohair tops are being made up, since inconsistencies cannot be corrected after the top-making processing step, and high-end fabric manufacturers require a uniform, sheer and “pill-free” final fabric. The comfort factor of the Camdeboo yarn was also found to be significantly higher than for a “standard” yarn despite both yarns being spun from similar tops. In all of these instances the Camdeboo mohair was found to have superior processing and

(continued)

Box 4.3 (continued)

final product attributes of like “quality” standard mohair (Reynolds, 2005, personal communication). Camdeboo mohair does not possess these characteristics solely because of the genetic make-up of the Angora goats used or nutrition that these animals receive. Instead, it is believed that Camdeboo mohair’s unique characteristics derive from a combination of the genetic make-up of the Angora goats found in South Africa, the unique vegetation and climate of the Camdeboo and surrounding regions of the Eastern Cape and the stringent animal management and clip handling practices used.

Producers who are part of the Camdeboo mohair supply chain produce 12 % of the global mohair clip and almost all of the most exclusive quality mohair available in the world. Since its inception, the Camdeboo Mohair Company has built a very strong reputation as a global player in the high quality mohair sector. The exclusivity of its brand stems from the adherence to the Camdeboo Mohair Company’s value system and from the scarcity of mohair in general, and of Camdeboo mohair in particular. This translated into and has been supported by the establishment of strong links with exclusive apparel brands. This exclusivity and unique quality is also recognised through the various prestigious international awards that Camdeboo mohair growers are awarded. Because of the perceived quality difference, Camdeboo mohair fetches on average a premium of 5–12 % on the auction floor. Indeed, price analyses reveals that, during 2001, 2002 and 2003, producers delivering mohair under the Camdeboo brand earned on average 7, 13 and 16 % more than the average mohair market price for the same period (Reynolds, 2005, personal communication). Price increases for Camdeboo mohair have outperformed the rise in the price for mohair in general, as the Camdeboo initiative has gained momentum.

Despite the quasi monopoly that the two first stage processors (top-makers) enjoy in the world,⁴ the Camdeboo Mohair Company managed to negotiate tailor made processing of labelled Camdeboo mohair clips to the needs of the customers who request Camdeboo mohair. The company also negotiated directly with several fabric manufacturing firms and final designers on the final presentation of the product. Thus, specific relations have been built with downstream players to move Camdeboo mohair through the value chain whilst retaining control on the way the clip is managed and processed until the final product is manufactured or retailed. Interestingly, the company never owns the mohair from production through to retail. Currently it performs a service for the approved growers who deliver Camdeboo mohair and pay a fee for this service. The Camdeboo Mohair Company aims to channel more of the clip through this process and therefore add more value to high quality local mohair production.

⁴Stucken and SAMIL (both South African companies) account for 80 % of first stage world mohair processing globally.

Organisation of participation in the value chain In contrast with the Karakul reputation, which has been built and maintained through a system of public institutions over a period of several decades, the Camdeboo quality offering has its roots in the recognition by a few growers of the value of a collective marketing strategy for differentiating the product. When initiated, the realisation of the potential associated with a differentiation strategy was not widely shared inside the domestic mohair industry, neither was it driven by downstream players in the value chain. This initiative from growers inside the industry resulted in a corporate strategy, which makes the Camdeboo mohair case singular with regard to GI dynamics and manifests itself in particular in terms of specific patterns of exclusion and participation.

As mentioned above, six mohair producers established the Camdeboo Mohair Company in 2002 with a vision to create a global brand for superior quality mohair. Incorporated as a private company under South African law, the Camdeboo Mohair Company received no external or industry support in building its product reputation and in establishing the brand. Significant distrust was even experienced, with most chain actors not believing in the potential for South Africa to promote high quality mohair and develop a niche market strategy. The whole process of establishing the quality and the reputation was therefore driven and financed from within the company. As a result of the departure of all but one of the initial shareholders, the Camdeboo Mohair Company is currently wholly owned by a private individual who has since the company's inception invested significant financial resources and time in building the brand. While the mark Camdeboo is therefore privately owned by this sole shareholder, the company statutes drafted at the time of its creation by the initial six shareholders circumscribes to some extent the private nature of the process. In terms of the company statutes, the entity is to be used to establish and grow the Camdeboo brand to the benefit of the growers who produce and are entitled to market their production as Camdeboo mohair. Currently 75 growers deliver under the brand and benefit from it. This private initiative developed as a result of the lack of industry investment in promoting and rewarding quality mohair in a context where a demand exists for it internationally.

Rules for producer participation in the Camdeboo chain are currently as follows: approval to become a Camdeboo producer is obtained on payment of a R4 500 joining fee to the company, followed by permission granted to the two brokers – CMW⁵ and BKB Limited – to do background research to monitor the quality of the mohair produced by the producer willing to market mohair labelled as Camdeboo and check it against the requirements set by the company. Approval is granted after a probation period during which the producer has to demonstrate his continued capacity to produce within the required parameters, i.e. the minimum Camdeboo quality-related standards prescribed by the Camdeboo value system, and to maintain its performance at least to this level over the probation period. Approved producers

⁵SA Mohair Brokers Ltd trading as Cape Mohair & Wool (CMW).

voluntarily pay a fee to the company and are subject to trials assessed by BKB and CMW agents to ensure that they maintain conformity to the quality standards that the company sets. As already indicated, agreements are in place between the Camdeboo Mohair Company and BKB and CMW agents to ensure that all the mohair from approved Camdeboo mohair producers that meets the exacting Camdeboo mohair standards finds its way, properly sorted and labelled, to the auction floor. This way, it is recognised by buyers at the auction as Camdeboo mohair, that is mohair that has been produced adhering to the Camdeboo Mohair requirements, and producers can enjoy the higher prices which may result from this.

The rules for becoming an approved producer are an instrumental part of the quality management policy of the company and define the way through which segmentation takes place. These rules have been set up by the company and are enforced under its control. The company therefore governs the exclusionary mechanism. However, in the current context of a growth in the demand for Camdeboo mohair and the intention of the company to channel more mohair through the Camdeboo chain, this scheme also appears to be a mechanism to organize the possible inclusion of new producers as part of the Camdeboo mohair approved producers, which is informally known as the Camdeboo producer group. All currently existing marketing channels have been approached to contribute to the process of assisting mohair farmers in delivering top quality fibre to the end market and get proper recognition for it. This goes together with the fact that the South African conventional mohair industry has not entered into a quality strategy. It does not foster segments of quality from South Africa or from selected groupings within South Africa.

The industry body, Mohair South Africa, was established to perform functions aimed at the advancement of the entire mohair industry. To achieve this objective, their vision is to seek international partnerships and alliances that will enhance the consumption of Cape mohair (colloquial for South African Mohair), and lead to sustainable demand and profitability for all role players – from producer to processor, buyer to manufacturer – which could have provided a vehicle for oversight. Mohair South Africa has thus focused on balancing the conflicting needs and interests of producers and processors, particularly in terms of quality. Due to this positioning, the gap in recognising and certifying quality has been filled privately both to fulfil customer needs and to develop differentiation options for producers. Due to the dilemma that the industry body has and the consequent lack of interest and intervention both at industry and public levels, the initiative has so far been driven by a private entity which is governing the differentiation process and enjoying the benefit of its investment.

Currently, the core of Camdeboo's approved growers consists of leading South African mohair producers that have proven themselves as producers of the most exclusive quality mohair currently available. Camdeboo producers vary in size but most mohair producers delivering under the Camdeboo Mohair Company brand are established and large scale dedicated producers. They are not small-scale or occasional growers. Farms in which mohair is produced can vary between a few hundred hectares in parts of the region with high carrying capacity to farms that stretch over many thousands of hectares in parts of the region that are very dry and arid, and have a low carrying capacity.

4.4 Main Lessons from the Camdeboo Mohair and Karakul Pelts Cases: Product Differentiation and Exclusion

Both the Camdeboo mohair and Karakul pelts industries feature strong differentiation and quality signalling strategies which, in the first instance, result in highly remunerative markets compared to the conventional commodity chains and secondly, increase the capacity of stakeholders to participate in price setting. These industries are strongly grounded in sophisticated quality management systems which ensure that only superior production upholds quality throughout the supply chains. The strong coordination systems in place for managing quality are very much in line with what Barjolle and Sylvander (2000) and Chappuis and Sans (2000) consider critical factors for the successful development of a GI and industry competitiveness (see also Chap. 6).

While there are shared characteristics in terms of the importance attached to a rigorous and value-based quality management system, the two industries differ significantly with respect to governance of this system and of the supply chain. Participation and exclusion are well defined in both industries. It is important however to consider the implication of differences in ownership and governance structure on the way in which exclusion takes place. In the case of Karakul pelts, the system is based on strict inclusivity, only subject to respect of the quality rules established by the Karakul board. In contrast, as a result of the lack of public intervention and an industry wide drive to create the mechanisms and incentives for segmentation based on place of origin and quality, Camdeboo is a privately driven initiative by a company with its own definition of the mechanisms for deciding on participation. These include not only compliance with quality rules but also a set of rules for determining approval of producers to be acknowledged as suppliers of Camdeboo mohair.

The continued existence of the Camdeboo brand on the market highlights the relevance of a quality-based differentiation strategy for this product with a focus on its origin. Furthermore, in its current growing phase, participation in the Camdeboo differentiated chain is widely open to all producers who are in capacity to deliver a product of sufficient quality for acceptance in the high value supply chain under the conditions defined by the company. The approved producers who meet the quality standard receive recognition for this at the auction, which currently results in a price differential.

Notably, for both industries, there is no geographical restriction imposed on potential suppliers of the raw material. While this departs from a GI approach as already mentioned, it can also be seen as a sign of inclusiveness. Camdeboo mohair must however be pure South African mohair from selected growers. Moreover, the highest quality mohair according to international standards comes from the area within which the Camdeboo region is located, and many mohair growers are located in the Camdeboo and surrounding regions. Though not explicitly defined, there is a strong link between the region and the production of quality mohair. While the current phase of expansion provides for inclusiveness, from a long term perspective the

reliance on a corporate strategy may raise issues, particularly in periods of shrinking demand. A different structure in the shareholding in the Camdeboo Mohair Company could determine a different level of participation of the Camdeboo growers in the governance of the branding and quality management strategy. However, as it is a private company, this would require the consent of the current sole shareholder.

It is interesting to point out that the current structure governing participation and exclusion from the Camdeboo group resulted from the lack of consistent vision and commitment of the initial group of shareholders who opted to sell their shares in the company while only one individual persisted in investing in an asset which could have developed into a more collective effort. All except one of the initial shareholders considered as too cumbersome the responsibilities attached with the effort of developing a differentiation strategy. Lack of actual participation and absenteeism from these shareholders was constraining the building of the brand and more generally of the business operations of the company. Furthermore, other considerations came into play such as issues of potential conflicts of interest as one of the shareholders was also the Chairman of Mohair South Africa. Their departure as shareholders eased the business operations and governance management as it clarified leadership. At the same time it drastically limited formal collective action in relation with brand management. However, as well stressed already, the Camdeboo producer group consists of 75 growers that all market their product under the Camdeboo brand and derive benefit from it. Importantly, the initial shareholders who withdrew from the company are still part of the Camdeboo producer group.

While both the Camdeboo and Karakul reputations draw strongly on some elements of the GI philosophy, such as embedding the reputation of the product in the natural and human characteristics of a region – even though mostly symbolic under the current approach – in the Camdeboo case, the initiative and financial investments to build the Camdeboo brand has relied on the efforts of one individual with the support of a group of dedicated growers. The initiative has been particularly requiring in terms of financial and time resources. It is important to stress that, while the Karakul pelts scheme has been in place for several decades, the Camdeboo initiative was initiated only recently. Depending on future orientations of the different role players in the chain – industry body, company, preferred suppliers, downstream customers, etc. – as well as possible changes in the GI public frame, the Camdeboo system could evolve in different directions. The current trend towards a corporate and individually driven strategy could well be pursued and result in an increasing departure from a GI approach, with challenges likely to be faced in case of less favourable market conditions for Camdeboo mohair or mohair in general. Indeed, the nature of the exclusionary mechanisms would then become important, as market exclusion would likely become a major concern. Alternatively increased public and/or industry interest in the Camdeboo initiative could lead to a more widely shared and territorially based strategy. The individual brand strategy could also transform more purposively into a GI with potential to consolidate the origin-based differentiation strategy and benefit more inclusively local role players.

4.5 Applying the GI Philosophy Through a System of Private Rights

In order to properly understand what is at stake in the debate on the nature of GI protection, in particular dimensions related to the level of public intervention, it is crucial to comprehend differences in the relevant features of trade marks and GIs (this has been developed in Chap. 2 from a legal perspective). The analysis of the two case studies above presents interesting insights for approaching this question again and for discussing it further with regards to equity and efficiency considerations. Both cases build on individual trade marks, which are typically private rights but with a distinctly different approach to supply chain governance. While the Karakul pelts case involves a high level of public intervention, this contrasts with the strong company drive in the case of Camdeboo mohair.

A first consideration in revisiting the difference between trade marks and *sui generis* GIs would be differences in how the two IP rights deal with quality. *Sui generis* systems such as the EU model very much evolve around detailed rules of use which ensure product specificity. This includes demarcation of the production area but also other quality requirements built into the very nature of the GI. In this way GIs provide a quality guarantee of the product attributes elaborated in the product specification. In contrast, the primary function of trade marks is to distinguish the goods (or services) of one competitor from another. In this, trade marks do not automatically embed a quality offering. Both collective and certification marks are registered together with detailed rules of use. In the case of collective marks, these rules primarily determine membership of a collective, which could include a geographical dimension. Where certification marks are used as a mechanism to protect GIs, the rules of use will evidently include provisions dealing with geographical origin and in generally also quality standards to uphold the specific quality of the product. However, there is no legal requirement that certification marks certifying origin should include additional quality attributes. In this, trade marks are less directly related to a specific origin-based quality (Maskus 2003). This clearly differs from the well elaborated EU GI system which provides a public standard for origin-based products, which is broadly understood and more transparent than the protection provided under trade mark laws (Giovannucci et al. 2009).

GIs and trade marks are further founded on a fundamental conceptual divergence in the public versus private nature of the rights and in how the collective and public mechanisms underpinning the value proposition are approached. Importantly, trade marks are private property rights used by persons or entities to distinguish their goods or services from those of others in the course of trade. This also applies to certification marks (distinguishing goods and/or services certified against a particular standard from those that are not) and collective marks (distinguishing the goods/services of members of an association from those that are not). Significantly and closely related to the private nature of the right, private actors define the rules for participation to these marks with no public considerations necessarily included in the way these marks are established (see also Chap. 2). In contrast, an important

feature of GIs, as defined in particular in the long standing European *sui generis* approach, and which has to a greater or lesser extent been adopted by a number of other countries, is that there is substantial examination of the specification (including the delimitation of the area) by public institutions. This effectively means that the exclusion which arises from the nature of the instrument has to be justified as being essential for maintaining the product-quality-origin nexus. Such systems allow for participation by all producers within the designated area that adhere to the GI specification.⁶

Giovanucci et al. (2009) point out that the protection of GIs as private rights possibly leads to the loss of some public advantages as such protection typically entails that very little public control is exercised over how the GI is defined. It is thus possible for an industry to define a GI in a very exclusionary way that runs counter to the GI conception of the link of the product to the territory and does not recognise the contribution of different actors to this link. These exclusionary implications have been pointed out as potentially leading to the loss of valuable rural development opportunities. Indeed, as noted by Bramley and Kirsten (2007), the rural development potential associated with GIs is linked to the effective participation of different local actors to GI-based economic processes. This is not automatically accommodated through private trade mark processes. However, in saying this, studies have found that this is also a problem for GI supply chains, particularly in the case of industry captains. Various studies actually indicate that GI benefits often do not flow to producers (Moschini et al. 2008; Réviron et al. 2009). A number of other authors such as Gopalakrishnan et al. (2007) (in referring to India), Ilbery and Kneafsey (2000) (in referring to the UK) and Kaplinsky and Fitter (2001) (with reference to the coffee sector) further show that downstream actors such as processors, traders and retailers are more likely than producers to capture GI benefits.

In the same vein, Jain (2009) also stresses that if the financial benefits of a GI only flow to a few of the powerful actors in the supply chain and are not shared equitably among the stakeholders, the GI is likely to have a limited development impact. Furthermore, Bowen (2010) stresses the increasing risk that non-local actors capture the GI benefits in an increasingly globalised environment. As noted by Hinrichs (2003), successful GI development is likely to foster long distance trade relations and increase the gap in bargaining power faced by local players in their market relations, therefore contributing to the appropriation of benefits by external players. Collective action, among GI actors at supply chain level and with respect to the investment in and control of locally shared resources, has been stressed as playing a significant role in providing for a fair share of GI benefits (Barjolle et al. 2007;

⁶This collective dimension attached to a territory contrasts with the traditionally private nature of the intellectual property rights (IPR) system. Classified as a distinct IP right under TRIPS, GIs are essentially considered to be private rights. This to an extent belies the unique nature of a GI as discussed in Chap. 2 and it is widely argued that classification as a private IP right does not account for the characteristics of a GI that is based on public good considerations and collective ownership.

Réviron et al. 2009; Giovannucci et al. 2009). However, gaps in bargaining power can detract from collective action dynamics, with adverse consequences for resource-poor producers in particular.

Given the equity and development considerations implicated in GI exclusion mechanisms and the varying ability of different actors to capture GI rents, it is often argued that government is the only appropriate body to oversee the use of the public good and to intervene when required to guarantee that public interests and those of all stakeholders are protected (see among others Jena and Grote 2010). The nature of the legal framework is important in this respect. Gopalakrishnan et al. (2007) highlight for example that Asian legislative frameworks restrict the 'right to use' to producers and that this potentially increases the bargaining power of these producers in relation to downstream actors. Under European legislation, the different PDO and PGI requirements in the localisation of production and/or processing also change the capacity to derive benefits for local actors. On the other hand, Hughes (2009) and Giovannucci et al. (2009) stress the risk of GI rent capture by the state and other powerful entities that could be associated with strong government intervention. By way of illustration, Hughes (2009) refers to the Ethiopian case, how the fact that the central government in Addis Ababa owns the individual trade marks for certain well known coffee GIs may result in producers not receiving the GI premium due to the absence of local control in the process. He therefore argues for positioning the control over the GI as close as possible to the producers and emphasises the importance of transparency.

Efficiency considerations and state failure Some authors have been pointing out other efficiency considerations in the balance between privately-oriented and publicly-based GI schemes and have argued that private systems of protection may hold some advantages in this respect. Indeed, efficiency considerations are often linked to capacity and administrative concerns, especially in a developing country context. This is particularly the case where the size and bureaucratic characteristics of a government may lead to delays in enforcement proceedings, as noted by Giovannucci et al. (2009). In those cases where they have the capacity to do so, trade mark owners are in a position to take immediate action. Giovannucci et al. (2009) also point out other possible political failures such as the risk for government to exert their control over a GI in their own interests (e.g. as a form of economic or political control over a region) when the democratic process is not fully operational. This brings us back to the argument of the risk of rent capture by the state indicated above. Hughes (2009) also cautions about the ability of government to implement an effective regulatory quality control system. This leads the author to identify certain roles which he considers may be more effectively undertaken by the private sector rather than by government. These processes include defining the production standards, monitoring compliance and certain marketing functions. These arguments run counter to the justification for public intervention previously developed. This reflects the contrasting dimensions found in the literature on the risks associated with state failure and those associated with a more privately driven system. Both need to be considered and balanced according to the specific national and local contexts.

4.6 Conclusion

In considering the design of an appropriate GI framework, a strong point for consideration in deciding between trade marks versus *sui generis* style protection is the so called public versus private nature of the protection. While in both cases the industries under focus in this chapter have been signalling and protecting their specific quality through individual trade marks, the Karakul pelts case illustrate a strong public involvement in managing the quality system of Swakara. On the other hand, the Camdeboo mohair case is currently solely a private initiative.

Important considerations relating to GIs certainly to the link with the territory and the way it is being approached. Mohair production is tied to specific geographical and micro climatic regions with specific vegetation. These regions are the only areas where mohair is produced in South Africa. This contributes to Camdeboo mohair having natural ties to the region. In both cases, specific production practices are also being used and have been codified as part of the quality management system. However, the link with the territory appears to be weaker in terms of human factors. Interestingly, in both cases, the relation between the quality of the product and territorial dimensions, such as geography, localised know-how or micro-climatic conditions, has not been institutionalised as part of the quality management strategy. No geographical boundary has been explicitly defined and there is therefore no territorially based exclusion mechanism in place. Despite the lack of geographically based delimitation, producer participation in the differentiated chain is managed in different ways. In the Karakul case, a public body representative of the industry – the Karakul board – defined the quality system and rules with all producers being entitled to participate in the chain. Exclusion in this case only arises as a result of non-compliance with the publically established rules. In the Camdeboo case, the quality standard has been established and is governed by a private company as part of an individual trade mark strategy.

Notably the Camdeboo case differs significantly from a GI approach, in relation to the manifestation of exclusion and participation, in that the right to use the mark rests in the discretion of an individual as its sole proprietor. The lack of public oversight due to the private nature of the trade mark and to its ownership by a private company means that the Camdeboo brand is governed by the trade mark proprietor, who therefore decides on the rules for participation and consequently who benefits from the initiative. The company developed a stringent quality standard, which uses the mohair industry guideline as a minimum specification, together with the control and guarantee scheme to enforce it. This corporate system includes a procedure for approval of producers' participation to the differentiated chain. Given the high level of sophistication of the quality schemes in place for these two products, participation in these chains ensures entry into the luxury goods markets and a premium for producers. This is being observed both for the producers that supply the raw material to the Karakul board and for those operating within the Camdeboo Mohair Company supply chain. It means that participation to these chains has a huge impact on the benefits producers derive from producing the respective products.

In the Camdeboo mohair case, all producers who channel their production through the Camdeboo Mohair supply chain retain ownership of their product until the auction and benefits from price premiums in recognition of their adherence to the company's quality system. The company retains a fixed proportion of the final price as a fee for the use of the name (brand) and of the reputation attached to it. This at least partly serves to maintain and promote the brand internationally, with synergistic features between the preferred suppliers who deliver the quality product and the company which manages the differentiation strategy. In a context of a rise in the demand for quality, the private governance of participation to the differentiated chain does not seem to raise significant concerns but this could be challenged with a change in market conditions.

Although the Camdeboo Mohair Company system has succeeded in building the perception of a strong geographical link to the product, it could be argued that there is nothing substantially different between this brand and other instances of private label or non-origin based certification initiatives. This relates to a number of questions on who provides and oversees the public good dimensions related to the territorial link. As stressed by Josling (2006: 342), while the responsibility for quality maintenance can be assumed by the public authorities or be left to the private sector, the protection of the GI is "essentially a public policy". There are however no public rules and processes in place for Camdeboo mohair, in contrast with the Karakul pelts industry. Future changes in the company strategy or evolutions in the producer group and industry as a whole with regard to quality and market dynamics internationally, may eventually mean that the privately driven process as currently observed could be just a transitory step in evolving to a more collective approach which more strongly resembles a GI strategy. The business is evolving and growing in sophistication with regard to its reputation building around concepts of quality and place of origin. The Camdeboo mohair case has developed as a private initiative firstly because of the good knowledge and recognition of end consumer needs and, more generally of quality needs in the mohair value chain, by a group of actors initially who saw an interesting economic opportunity and secondly due to a lack of interest from the rest of the industry. The future of the branding strategy and its evolution towards becoming a GI, with stronger collective and territorial features being involved, is dependent on the value that the market is able to consistently place on origin as a factor of differentiation as well as the local industry and public recognition of these collective and territorial features as factors for the development of the whole industry.

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Chapter 5

Institution Building and Local Industry Dynamics: Lessons from the Rooibos GI Initiative

Dirk Troskie and Estelle Biénabe

Abstract This chapter draws on the authors' close involvement in the process of developing a GI for the Rooibos industry in South Africa. It analyses the building of a GI strategy in the context of an export-oriented industry which seeks to gain international recognition of its GI through applying for registration of the Rooibos name as a Protected Denomination of Origin (PDO) within the European Union. In documenting the application process, emphasis is placed on the negotiation of local collective rules for defining the product and collectively managing its quality. The linkages between this GI initiative and actions towards biodiversity conservation are instrumental for this industry. Indeed, Rooibos is produced in a highly biodiverse region, the fynbos biome, and at the same time, has known substantial transformations recently in terms of cultivation expansion and intensification that are seen as a serious threat to the environment. These linkages significantly contribute to inform local GI processes and trade-offs in the context of a strong industry drive supported by different public and private stakeholders. It contributes to the understanding of the appropriate balance between State versus industry driven GI development processes. This chapter also brings insights into implications for industries of the current institutional heterogeneity at international level. It highlights the challenges of interpreting foreign legal requirements in a vacuum of formalised cooperation and support, and stresses the importance in this context of informal networks and relations, thereby also raising the question of whether the current international framework sufficiently allows for the specific characteristics of Southern Countries.

Keywords Geographical indications • Rooibos • Indigenous industry • Biodiversity

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5.1 Introduction

The authors of this chapter were intimately involved in the process of developing a GI for the Rooibos industry in South Africa. As this industry is predominantly export oriented and has suffered from intellectual property usurpation abroad, this process of building a GI at industry level was initially predominantly focussed on achieving international recognition for and safeguarding the intellectual property embedded in the Rooibos designation. What makes this case of specific interest for purposes of this book is how the objectives of the industry for pursuing GI protection evolved over time as understanding of the instrument deepened. The impact of this process on collective action and the relatively unsupportive institutional environment at national level played a significant role in the observed dynamics.

In order to capture what is at stake in developing a GI for the Rooibos industry, the chapter starts with a historical overview of the industry. This is followed by a section analysing the on-going process of applying for registration of the Rooibos name as a Protected Denomination of Origin (PDO) in the European Union under EU Regulation 510/2006. As developed in this section, this search for protection triggered a process of negotiation of local collective rules for defining the product and managing its quality characteristics, aspects central to the application procedure. The dualistic nature of the South African agricultural landscape and the multi-faceted power asymmetries in the industry (see Box 5.1) complicated this consensus-seeking process. Another feature is that, notwithstanding all these differences, a strong link between the GI application and the collective biodiversity initiative soon developed. This presented an important dimension given the unique and highly biodiverse Fynbos ecosystem within which Rooibos production takes place. In the final part of this chapter, the major lessons derived from this case are discussed. This includes an exploration of the nature of, and challenges presented by, the domestic and international institutional framework. The discussion also deals with the changing perspectives and the reasons behind these changes as well as with the challenges in defining the scope of the GI. It is found that, in the final instance, the interventions to address these challenges lead to a higher level of collaboration and a greater understanding for the need for collective action. It is also shown that the ability of the Rooibos industry to develop a GI strategy derives from a strong industry drive and substantial external support.

5.2 Setting the Scene: Main Features of the Rooibos Industry

5.2.1 *Attributes of the Production Region*

Rooibos is an herbal tea produced from a Fynbos shrub, *Aspalathus linearis*, which is commonly known locally as “Rooibos”. The Fynbos Biome contributes 80 % of the plant varieties to the Cape Floral Kingdom, one of only six (and the smallest) floral kingdoms of the world. The South Western tip of Africa where it is located is

the only sub-Saharan region with a Mediterranean climate. The patterns of precipitation, which consist of a rainy season during winter months and a subsequent annual summer-drought together with extremely high temperatures (temperatures in excess of 40 °C is quite common in the summer), and the unique geology of the region resulted in the unique flora of the Fynbos Biome.

5.2.2 The History of Rooibos

The ancient history of Rooibos is difficult to establish. As the original inhabitants of this area (the Khoi and San people) lived an oral tradition, their history, culture and practices were never documented. The first written confirmation of their use of Rooibos was made in the eighteenth century by the Swedish adventurer Carl von Thunberg, who described their use of Rooibos for “beverage purposes” (Thunberg 1795). Ginsberg (1976) also indicates that the properties of Rooibos were first discovered and used by these original inhabitants.

Commercialisation of Rooibos started in the early twentieth century by the local dealer Benjamin Ginsberg who traded in wild-harvested tea. Cultivation only started in the 1930s following the research done by Dr le Fras Nortier (after whom the main cultivated variety is named) and the domestic demand for Rooibos received a major boost as a result of shortages in imported “black” tea during World War II. However, at the end of the war, imported teas became freely available with the result that a Rooibos glut developed. This led to the establishment of the “Clanwilliam Koöperatiewe Tee Maatskappy” (Tea Cooperation). In 1954, the Rooibos Tea Control Board, with statutory single channel marketing powers, was also established (Van Putten 2000). The Control Board received the statutory powers to be the only national and international marketer of Rooibos, but the production of Rooibos seldom exceeded 4,000 tons per year and the volume of exports was limited (Rampedi and Olivier 2008).

5.2.3 Recent Evolutions: A Production and Export Boom in the Last Two Decades

The situation in the Rooibos industry changed dramatically following the liberalisation of the Rooibos marketing environment in 1993 (see Fig. 5.1 and Sect. 5.2.4). The production of Rooibos increased by 366 %, from 4,293 tons in 1993 to reach a peak of just about 20,000 tons in 2009.

This raised significant concerns regarding both the capacity of absorption of that volume on the markets and the quality of the tea (due to unsustainable practices and expansion to marginal Rooibos production areas). The contraction of production to around 13,500 tons in 2011, is considered by the industry to be a positive outcome. This expansion in production was associated with new market development and, more specifically, export growth. From 760 tons in 1993 to its peak of 7,176 tons in 2007, the 844 % growth in export volume far outstripped production growth.

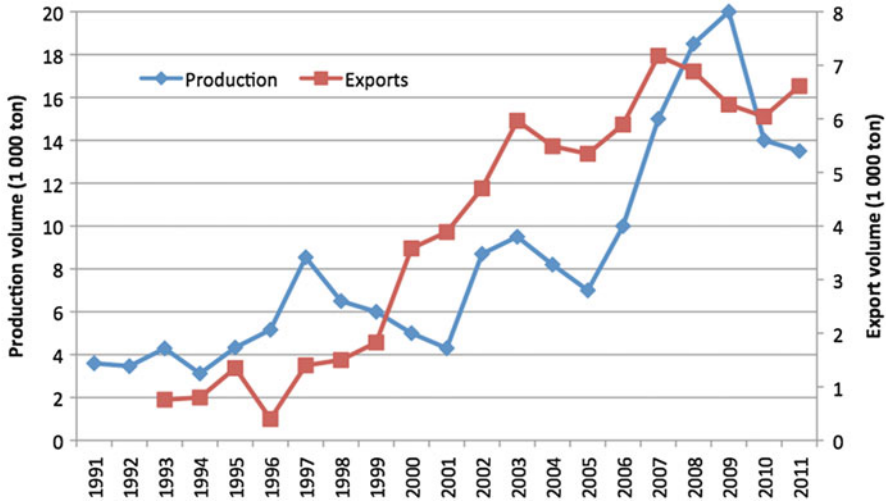


Fig. 5.1 Production and export of Rooibos (1991–2010) and estimates for 2011 (Calculated from Brand, Personal communication, Technical Manager, Rooibos Ltd, 2011; PPECB 2011; Van Zyl and Schreuder 2007)

However, due to the unfavourable international market climate, export volume has since declined by 16 % (1,133 tons) to just over 6,000 tons.

Together with the rapid increase in export volumes, two important trends are also taking shape in the export market. The first trend is market diversification in terms of which a significant reduction in the dominance of Germany took place: whereas 76 % of all exported Rooibos ended up in Germany in 2003, by 2010 only 42 % of exported Rooibos was destined for the German market. The other Rooibos markets also witnessed a change in position. The second position, formerly held by Japan, was taken by the Netherlands (18 %) and the third by the UK (14 %). The increasing diversification of the export market is also underlined by the fact that the category “other” countries increased from 4 % in 2003 to 14 % in 2010. The second trend is product differentiation. This is particularly significant with Rooibos increasingly being commercialised on different niche markets. This differentiation manifests itself in that the export of conventional Rooibos declined from 92 % in 2003 to 82 % by 2010. In the meantime, organically certified and green Rooibos grew from only 7 % and 1 % respectively to 14 % and 4 % (PPECB 2011).

5.2.4 The Rooibos Value Chain

The process of how Rooibos reaches the consumer is described in Fig. 5.2. As Rooibos seeds are extremely small, the climatic conditions harsh and Rooibos seedlings tender, the production process usually starts in a Rooibos nursery before the plants are transplanted.

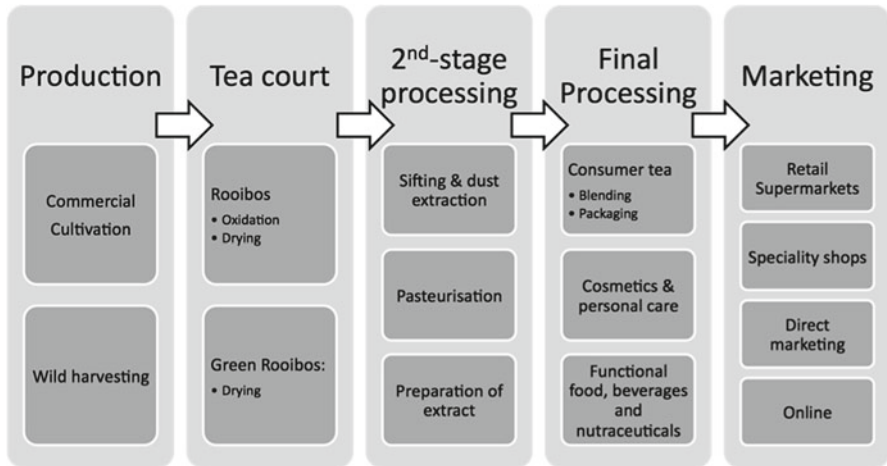


Fig. 5.2 The process of moving Rooibos from field to consumer (Adapted from Kaiser 2010; Biénabe and Troskie 2010)

Different types of Rooibos are being produced as herbal tea. Although the biggest part of Rooibos production is currently cultivated, a small part of it is still being harvested in the wild, and wild harvested Rooibos is differentiated on the market for its specific flavour. Hence, like organically produced Rooibos, it receives a premium. While wild harvesting has raised biodiversity concerns, sustainable wild harvesting practices have been established and implemented by the two small-scale producers' cooperatives present in the industry. Harvesting of both cultivated and wild Rooibos usually takes place during the hot and dry summer months of December to May. Green Rooibos is another differentiation from conventional Rooibos. While cultivation practices are the same in this case, the major difference lies in the processing. At the tea court, the Rooibos (organic, wild harvested and conventional) is cut in 1–10 mm lengths and oxidised in moist conditions for up to 16 h. Following oxidation, the Rooibos is sun-dried to moisture levels of below 10 % before it is stored. In the case of green Rooibos (whether organic, wild harvested or conventional), the same procedure is followed with the exception that no oxidation takes place (Biénabe and Troskie 2008). Rooibos is then sifted, and the dust is extracted and then pasteurised. The bulk of Rooibos is packed (blended, infused or pure) for retailing via supermarkets, specialty shops (ethical, health, body, etc.), direct marketing or via online channels (Kaiser 2010). Before being exported, all Rooibos is inspected according to the standards of the importing country by the Perishable Products Export Control Board (PPECB) of South Africa. By-products, such as Rooibos dust, are also processed for use by the cosmetic or food industry.

While initially channelled only through the Control Board, the industry has developed after the liberalisation of the marketing environment into a more sophisticated value chain represented in Fig. 5.3. Approximately 450 farmers cultivate Rooibos. In some instances these farmers have their own tea court for the first-stage processing,

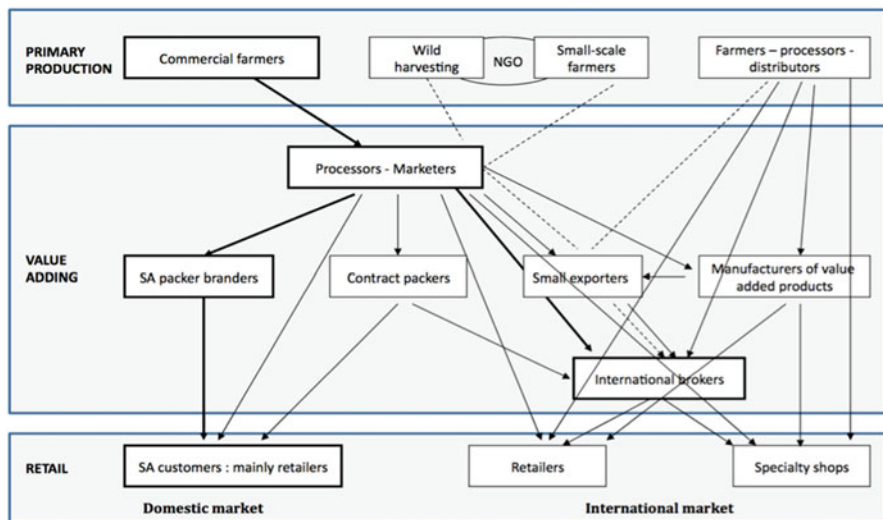


Fig. 5.3 The Rooibos value chain (Adapted from Biénabe and Troskie 2008)

but the majority of farmers still deliver their freshly harvested Rooibos to processors. Three farming companies have integrated the whole supply chain, including secondary processing and distribution. These operations have also developed their own branding strategies through the use of trade marks. There are about 150 small-scale farmers of Rooibos tea. These farmers are either independent producers or are organised in cooperatives based on the communities in which they live (of which Wupperthal and Heiveldt are the two major ones). These communities are also involved in wild harvesting and generally receive support from non-governmental organisations (because of biodiversity concerns and interests in organic farming practices). This support relates to social organisation and marketing assistance (fair trade).

The eight processing companies (including the vertically integrated farming operations mentioned above) are responsible for approximately 95 % of Rooibos being marketed (TISA 2004). Rooibos Limited, the company that inherited the assets of the Control Board, represents approximately 70 % and is therefore still in a dominant position within the chain (see Box 5.1). Genis (2011) reports that a ninth plant, with the capacity to process 3,000 tons of Rooibos (about 20 % of the average crop over the last few years), was recently established at Nieuwoudtville in the Northern Cape Province. These companies also market their own tea and four of them package Rooibos (pure, blended or infused) for the consumer market, either under their own brands or on contract.

In addition to these integrated packers, there are also a number of independent packers who do not exclusively focus on Rooibos tea. In some instances these packers are some of the largest players in the South African food processing scene. It is important to note that the biggest portion of Rooibos tea is exported in bulk and is packed abroad before being distributed under foreign trade marks. Domestic and

Box 5.1 Unequal Power Relationships in the Rooibos Industry

One important feature of the Rooibos supply chain is the dominant position of a specific player. At the demise of the Rooibos Tea Control Board in 1993, the assets of the Board and the Tea Cooperative were transferred into the hands of the shareholders of a company with the name Rooibos Limited. As it remains the dominant player and supplies a number of packers with Rooibos, allegations of uncompetitive behaviour has been made (Payne 2009). A case was brought before the South African Competition Commission and settled without penalty on the condition that Rooibos Limited adheres to certain undertakings (Competition Tribunal 2010). Within the South African context, where the Competition Commission is not afraid to dish out heavy penalties, this decision is close to a bill of clean health.

Another important feature of the Rooibos industry and of the South African agricultural sector in general, distinguishing it from a number of other countries with similar size and farming conditions, is its duality. A legacy of South Africa's Apartheid policy of the twentieth century is the fact that commercial agriculture is in the hands of 39,966 (predominantly "white") farmers while the 1.29 million small-scale (mainly "black") farmers usually create subsistence livelihoods (DAFF 2011). Small-scale farmers from disadvantaged communities in the Rooibos production region live either in communities centred on former missionary stations or are the beneficiaries of land reform projects. These farmers produce a very small share of the total Rooibos crop.

international distribution are undertaken either by the players described above or by independent local or international distributors (Biénabe and Troskie 2010).

In recent years, Rooibos extract has increasingly been used in personal care, cosmetics, functional and health food, beverages and nutraceutical products. As research indicates significant health benefits, these products constitute a potential growth area for Rooibos. Nevertheless, it currently accounts for only a small part of the Rooibos crop as well as a small part of the portfolio of the manufacturers. It is interesting to note that this small portion of the industry has posed the biggest threat to the local ownership of the intellectual property embedded in Rooibos (See Box 5.2). It is in the context of this sophisticated value chain that the authors of this chapter embarked on the development of a GI Rooibos as summarised in the next section.

5.3 The Process of Applying for a Rooibos GI

The main features of the Rooibos industry, which influence the development of the Rooibos GI, were described in the previous section. The Rooibos industry is a relatively young but complex industry firmly embedded in the indigenous habitat of *Aspalathus*

linearis. It is currently rapidly expanding on two fronts, i.e. in terms of the number of players in the industry as well as in the number, variety and nature of both products and markets, as evident from the above discussion. Finally, the three fault-lines in the industry – dominance of individual players, producer versus processor relationships and the South African agricultural duality (see Box 5.1) – pose challenges to any consensus-seeking activity. The purpose of this section is to highlight the lessons learned in the process.¹

5.3.1 Misappropriation of the Name Rooibos as a Strong Industry and Political Driver

Although an unfortunate and costly experience, the Rooibos IP dispute in the United States, which played out at the turn of the century (see Box 5.2), did have some positive effects. It highlighted the need for cooperation within the industry and emphasised the need to find a mechanism for the protection of indigenous intellectual property. This resulted in the creation of the South African Rooibos Council (SARC) and the emergence of a number of intellectual property initiatives.

The SARC was established in April 2005 as a not-for-profit organisation. The vision of the SARC is “a stable, cohesive and internationally competitive Rooibos industry that will ensure future sustainability to the benefit of all stakeholders”. The SARC Board is elected and consists of two producers (one commercial and the other small-scale), two processors, two marketers/manufacturers and a transformation facilitator, therefore presenting a fair reflection of the whole industry. The activities of SARC are currently being funded through a voluntary levy at the first point of sale, but application for the introduction of a statutory levy is being considered (SARC 2011). Given its representativeness, it was decided that the SARC is the best vehicle through which to drive collective action as required for the development of a Rooibos GI.

The wine industry, also located in the Western Cape Province of South Africa, already had a long history of protecting wine GIs under the statutory Wine of Origin Scheme. The Province raised the issue of whether a similar system could be used to prevent a repetition of the Rooibos case (see Box 5.2), not only for the Rooibos industry itself (in the same or another market) but also for the wide spectrum of other indigenous products and names linked to the unique climate, geography and biodiversity of the Province. This resulted in draft Provincial legislation, but this law was challenged on constitutional grounds by national authorities in 2000. The Province proceeded with additional research, the gathering of legal opinions and attempts to develop alliances with other provinces and entities. The multi-institutional and multi-national research alliance that developed this case study fell very well into this orientation.

¹For more details on the process of developing a GI Rooibos see also Biénabe and Troskie (2010).

Box 5.2 Protecting Rooibos Intellectual Property: 1

In the late 1990s the so-called “Rooibos case” underlined the vulnerability of South Africa’s indigenous intellectual property. The origins of the dispute date back to 1994 when a South African company, Forever Young, took the gap created by the deregulation of the industry and registered the mark “Rooibos” in the United States in relation to, among other things, herbal teas. This, in effect, gave Forever Young the exclusive right (monopoly) to market products labelled Rooibos in the United States. This was problematic as Rooibos is a descriptive term used to refer to the type of product. Furthermore as Forever Young was actually only interested in using Rooibos in a particular segment of its skin care products (leading to a derived US demand of about 1 ton of Rooibos per year), the granting of this mark potentially closed the US market for the rest of the Rooibos industry. The rights to the mark were subsequently assigned to a United States citizen, Virginia Burke-Watkins, principle owner of Burke International.

No longer able to market its products under the Rooibos name in the United States, Rooibos Limited instituted legal action in the United States in order to cancel this registration on the basis that it was generic and therefore non distinctive. After years of expensive litigation, the dispute finally came to a head when Burke-Watkins, faced with mounting legal costs and several additional law-suites pending, agreed to voluntarily surrender her rights to the trade mark. The Rooibos trade mark was eventually removed from the US register in June 2005, but the industry is still suffering from a decade of lost market development opportunities as a young industry and reeling from the approximately \$1 million in legal costs.

The Rooibos case was one of the factors that gave rise to the overhaul of certain elements of South African legislation. More specifically, the National Environment Management: the Biodiversity Act 10 of 2004, the Patents Amendment Act 20 of 2005, the Consumer Protection Act 68 of 2008 and the Intellectual Property Rights from Publicly Financed Research and Development Act 51 of 2008 were introduced.

5.3.2 Building of the GI Initiative: An Industry Based Task Team

Although the protection of the Rooibos name is one of the key objectives of SARC, actual discussions in the industry on establishing a GI only commenced via the processes of this project (see Box 5.3). Two workshops were conducted to initiate the discussions with the industry, a capacity building workshop for small-scale

farmers followed by a meeting attended by the whole industry. The purpose of these meetings was to raise awareness in the industry on the GI potential of Rooibos and to assess the industry's interest in proceeding with the development of a GI. As the whole industry was represented at the second meeting, this was the ideal opportunity to agree on mutual commitments to explore Rooibos' potential as a GI.

This meeting resulted in a task team or committee being appointed during the SARC Annual General Meeting. This task team consisted of five industry representatives (one for each of the following categories: processors, marketers, commercial farmers, emerging farmers and NGOs). We, as researchers from the IPR DURAS project, supported it by facilitating the debate and providing, when asked for, information on GI related issues. An important part of the facilitation consisted in putting into perspective different possible choices to be made by the task team in preparing its application based on the knowledge gained from other GI developments in different contexts around the world. As the process progressed, a consultant from the provincial nature conservation agency, Cape Nature, in charge of implementing the Rooibos Biodiversity Initiative also joined the team. This resulted from the synergies that were envisioned between the two initiatives as further developed below. The researchers had affiliations with the University of Pretoria, CIRAD (French Agricultural Research Centre for International Development) and the Western Cape Department of Agriculture.

5.3.3 Main Milestones of the GI Process and the Way Forward

The process followed was shaped by the aim of accompanying the industry in following the full route towards submitting a GI application in the EU and applying for intellectual property protection in South Africa. It follows that the core activity of the task team was to develop a product specification for Rooibos which would be used for the application of protecting the Rooibos name in South Africa and subsequently in the EU. To this end, a series of meetings were held. These were structured to allow the members of the task team to take ownership of the key dimensions involved with developing the product description and the application and labelling process, and to make informed choices relevant to the industry as a collective. The observations made and the lessons learned during this process form the content of the following section.

The process took substantially longer than initially envisaged, at least by the industry, and it was only towards the end of 2010 that the draft GI specification was considered sufficient for circulation. The draft was informally circulated to contacts of the DURAS team at various institutions in Europe. Based on their feedback, the GI specification has since been revised. The next part of the process will be progressing through the various legal processes and levels of application in the country of origin and abroad. The first step will be to apply for a Rooibos certification mark in South Africa and the contents of this application will be based on the GI specification developed during this process. This mark is applied for to fulfil

the condition of protection in the country of origin. Once it is granted, the same product specification will be used to file an application for third-country GI registration in the EU.

5.4 A Unique Experience and Its Institutional Implications

The Rooibos industry was the first industry to embark on a GI strategy, with the exception of the existing wine initiative in South Africa. And according to our knowledge, it is still the only industry in Southern Africa seeking EU recognition of its GI. The actual development of a GI was a novel process for all the stakeholders involved: industry role-players, researchers and consultants. This, at least partly, explains why it was a long process and a number of blind avenues were explored. However, it is also worth pointing out that the researchers had a good theoretical background on the topic and an important international network for sharing experiences in other Northern and Southern countries. Perhaps due to the exploratory nature of this process, an unnatural number of observations were made and lessons learned. The main insights from these experiences hold relevance for other Southern countries to enrich different and subsequent processes.

5.4.1 *A Unique and Valuable Experience in Itself*

Although South Africa has a strongly developed Wine of Origin Scheme (see Chap. 2), the systematic linking of a specific *terroir* to agricultural products other than wines and spirits was never attempted. As a pilot case, the Rooibos industry's experience provides interesting insights. The GI task team elaborated a GI specification which would fulfil the conditions for obtaining protection both within South Africa as a certification mark and in the EU under EU Regulation 510/2006. It is expected that, depending on the lessons learned in the Rooibos industry, other initiatives (such as Honeybush tea) may follow.

Through the extensive process followed in the Rooibos case, it became clear that South Africa potentially possess strong GIs. For this reason, this case has been widening the research debate and pointing to new (unsolved) questions in the fields of law, economy, geography/soil science, sociology and agronomy. This case study provides particular insights in terms of public and private skills requirements, support structures and institutional mechanisms (or the lack thereof). The need for public institutions to assess GI applications, monitor their use and avert unlawful use became evident. At a private level, certification bodies and other actors need to be in place and skilled to control the implementation of the GI specification. Also highlighted based on the case, is the level of public and private engagement and collective action required to pursue a meaningful GI strategy (see also Sect. 5.6.1). With the GI development process, different

problems had to be approached by the task team. This case study contributes to the body of knowledge and to the effectiveness of subsequent attempts by documenting how these concerns were eventually solved and why specific decisions were taken (see in particular Sect. 5.5.3).

The case study challenges the general perception at national level that South African agro-food industries stand to lose from protecting GIs.² As such it enriches the political debate by providing ‘insider’ insights and thus contributes to arguments for an improved GI institutional framework. The questions posed by the industry in the political domain, which relate to the capacity of South Africa to protect GIs with the objective of securing international recognition, are forcing decision-makers to re-consider commonly accepted paradigms. The fact that these questions are raised by an industry, and not by an organisation with an obscure agenda, should not be underestimated. As a result, the project has been instrumental in the evolution of the policy arena – from a clear lack of interest or even a negative view on GI – to a much more open attitude. The task team has, for example, been invited to make presentations to the Portfolio Committee on Trade and Industry regarding the protection of GIs under current South African legislation. However, as all policy decisions are, in the final instance, trade-offs between various interests and as an intricate political dimension has developed at international level, it remains to be seen whether a more supportive domestic institutional framework will eventually materialise.

5.4.2 Navigating the Institutional Environment: The Domestic System

The South African government has generally taken a negative position on GIs and has not invested in a strong (and potentially costly) institutional and public support framework for GIs. The reasons for this are found to an extent in the negative experience of South Africa in negotiating the Wine and Spirits Agreement (see footnote two) and in alternative national spending priorities. South Africa thus opted to comply with its TRIPS obligations under existing trade mark laws without introducing a dedicated institutional framework for GIs (see also Chap. 2).

A major implication is that knowledge, institutional and organisational support have been totally lacking for accompanying local industry initiatives. While domestic protection is a requirement to achieve recognition abroad under TRIPS and the EU system, it can be sought via a certification or collective mark under the South African legal framework. However, this lack of public support complicates attempts to apply for GI protection abroad.

²This perception has its origins to a large extent in the negative experience of the wine industry under the Wine and Spirits Agreement which was concluded under the Trade, Development and Cooperation Agreement between South Africa and the European Union in 2002. The Agreement resulted in the loss for South Africa of a number of important spirits designations including Grappa, Ouzo and Sherry.

Box 5.3 Protecting Rooibos Intellectual Property: 2

A another case of the potentially challengeable exploitation of Rooibos by a foreign company is the allegations against Nestlé that it has transgressed South Africa's biodiversity legislation by filing a number of patents (the results of research on Rooibos and Honeybush) without obtaining the necessary permits to conduct bio-prospecting on indigenous biological resources. Van Harmelen (2010) argues that this case exposes a number of shortcomings in South Africa's legislation which was recently overhauled to ensure that indigenous communities receive fair benefits from bio-prospecting. More specifically, it is argued that no protection is provided if an indigenous product is produced outside the country or if a foreign company obtains it via normal trade. Furthermore, the requirements under the Biodiversity Act only become applicable once the process of commercialisation has commenced.

It follows that the development of a GI for Rooibos posed substantial challenges for the industry and for those individuals supporting the industry. The first challenge that the industry faced was to make the choice between a collective mark and a certification mark. As it was foreseen that any industry or group wanting to register a GI in South Africa would face this particular choice, the Western Cape Department of Agriculture obtained a legal opinion on the most appropriate mechanism to be used for the domestic protection of a GI³. While the implications of choosing between a collective and certification mark were extensively discussed in Chap. 2, a summary of the legal opinion on the matter is provided in Box 5.4, as this was an important point in the implementation of the GI strategy for the Rooibos industry.

Despite the recommendation in the legal opinion that a collective mark, supported by legislated compulsory membership of SARC, is the most appropriate option, the task team decided to proceed with registration of a certification mark. The reasons for this decision were:

- A collective mark requires membership of a particular association. Given South Africa's historical background and the fissures in the industry (as discussed above), the chance that all role players will voluntarily agree to become members of an association is remote. In the case of a certification mark on the other hand, any player in the industry, irrespective of affiliation, can use the mark once it has been certified to be in compliance with the rules. In this regard, a certification mark is more in line with the inclusive approach followed by the industry in developing the Rooibos GI.
- By linking the Rooibos name to a specific association, it can be perceived that a situation resembling the Control Board era is recreated. The implication is that the power associated with the elected positions in this association would be

³It should be noted that the choice between a certification and collective mark will very much depend on industry specific characteristics.

Box 5.4 Choice Between a Collective and Certification Trade Mark for the Domestic Protection of a GI: Legal Opinion

On request of the Western Cape Department of Agriculture, a legal opinion was obtained on the choice between a collective and a certification mark for the domestic protection of the Rooibos GI in South Africa (see Laing 2009). In summary, the legal opinion stated that either a certification or a collective mark can be used in South Africa to protect a GI. Due to the descriptive nature of “Rooibos”, it will not be possible to register an individual trade mark for the Rooibos GI.

The legal opinion pointed out that a certification mark becomes the property of an independent body, but that this body is not allowed to conduct trade in the goods carrying the certification mark. During application, the owner of the certification mark must file rules governing the use of the mark. The implication is that any person duly certified to comply with the rules has the right to use the certification mark. The opinion raised concern on identifying a proper independent certification body in the South African context.

A collective trade mark, in turn, becomes the property of a collective body (applicant). This collective association may trade in the goods and the use of the mark is limited to the members of the association complying with the rules filed in the application. These rules are usually more shaped towards membership of the association than governing the production of the good.

The legal opinion recommended that the Rooibos industry apply for a collective mark and that this application be supported by legislation (either national or provincial), making it compulsory for Rooibos farmers to belong to a collective body, i.e. the South African Rooibos Council.

ratcheted one level higher and the consequences of (unintended) wrong decisions made more severe. A certification mark would lead to a much more flexible (also at institutional level) situation.

- By legislating for compulsory membership, the industry would be at the behest of government processes to pass the appropriate legislation. Although provinces have the power to pass the required legislation, the delimited area includes part of the territory of two provinces. The result is that identical legislation must either be passed in both provinces, or it must be enacted at national level.
- Furthermore, should use of the name Rooibos be made conditional on compulsory membership of an association, it is likely to result in a legal challenge on the ground that it contravenes section 18 of the South African Bill of Rights which enshrines freedom of association as a constitutional value.⁴

With a view to move forward with establishing its GI and as part of its lobbying activities, the industry sent a letter to the Department of Trade and Industry (DTI)

⁴South African Constitution Act 108 of 1996.

to inform them about its decision to register a GI in SA and in the EU, and to ask for a more appropriate legal framework. A local law firm was then instructed to take the necessary legal steps towards ensuring appropriate GI protection domestically.

One further institutional matter identified by the task team as part of implementing its GI strategy that still needs to be addressed, is the question of ensuring the control of the specification in a cost effective manner. As GIs have never been implemented in South Africa, there also exists no institutional framework in this regard. With Rooibos industry being a relatively small industry, financial constraints significantly limit its capacity for comprehensive quality checks. The task team is therefore considering making provision for spot checks in the product description, with comprehensive scientific analysis taking place only in the case of legal disputes.

Two potential avenues for inspection are foreseen. On the one hand, the Perishable Products Export Control Board (PPECB) is a statutory organisation that is responsible for ensuring that all exports of perishable products (except products of animal origin) comply with the standards of the importing country. As more than 60 % of Rooibos is exported, it means that the PPECB is already inspecting a significant part of the Rooibos harvest. At the same time, the industry is in the process of establishing an inspection service as part of the Rooibos Biodiversity Initiative. As the product standard in this initiative is linked with the quality standard identified in the GI process (as further discussed below in Sect. 5.4.3), these inspectors could play an important primary or complementary role. However, it is important to note that the possibility to modify the quality down the supply chain and the power imbalance between South African role players and the big international brokers clearly compromise the capacity to enforce the GI requirements along the supply chain.

One additional important comment is that, as there is no publicly supported organisation in South Africa dedicated to the development of GIs other than wines and spirits, the task team members had to participate in the GI-related activities in addition to their other daily responsibilities. This is true for the industry members as well as for the researchers and other participants. As the various individuals often had to combine actions with other duties, the process of developing the GI specification took significantly longer than initially expected. On the other hand, the long term involvement and interactions between the different actors contributed to evolving perspectives on the benefit of a GI and increased appropriation of the GI tool.

5.4.3 Navigating the Institutional Environment: The European Union System

In addition to the lack of domestic support at national level, the second institutional challenge the task team faced, was translating foreign rules and regulations into a local product specification, or at least ensuring sufficient compliance with these regulations for achieving protection abroad. The objective was from the outset that the Rooibos GI should eventually be registered in the European Union (EU). It was

therefore considered logical that the rules embedded in the South African registration should be of such a nature that the registration in the EU could proceed based on it. For this reason, it was decided to base the rules filed in South Africa on a specification which meets the EU requirements. The implication is that the filing of the South African application for a certification mark could only start once the specification reached an acceptable quality from an EU perspective.

It can be argued that a consequence of South Africa not having a dedicated institutional framework for GIs is that domestic production rules defined for the purpose of establishing and protecting a GI abroad are being written by industries merely based on the conditions specified by a foreign power. If the South African government had elaborated a more detailed system which would enable sufficient specificity for protection of GIs under *sui generis* systems, this situation would not have arisen. In such circumstances, local rules could have been developed based on what is considered more appropriate under domestic conditions, and their definition could have been much less dictated by the need to comply with foreign rules. The current situation can be seen as an unintended consequence of South Africa's current position regarding GIs and presents an argument in favour of South Africa taking a firmer stand on the nature of its GI regime.

It was a fairly easy for the task team to obtain the EU rules regarding GIs. Similarly, summarised examples of European GIs are readily available on the official website of the EU. Based on these requirements, a template of a GI specification was developed. This formed the basis on which, during each meeting, the Rooibos industry progressed in drafting its application for a GI to the EU. The capacity to reach consensus on the GI specification was the result of a very pragmatic approach in the industry. Decisions were made based on the need to ensure an interesting balance between not excluding farmers, being able to take advantage of new opportunities (such as future innovations that could intervene in the different activities, and new market outlets and positioning) and ensuring a strong enough specification for acceptance by the EU and for sustaining the Rooibos reputation.

However, it is also important to stress that guidelines regarding the specific criteria based on which the EU assesses applications are lacking, in particular regarding requirements for substantiating the link of the product to its region of origin. This contributed to the fact that, during the whole process, the interpretation of some of the requirements, and of their implications on the acceptability of the specification, created long and serious debates. One area of particular concern was the level of requirements in terms of defining the product and its acceptable quality. Uncertainty firstly arose from the requirement to link the quality criteria to the region of origin and secondly, from the requirements to link the product definition with specific quality criteria and associated protocols to test them. Another area of uncertainty resulted from the actual name to be protected. "Rooibos" is the common name, but in some instances "Red bush" is also used. Similarly in the local vernacular language (Afrikaans), the flexional forms "Rooibostee" and "Rooitee" are sometimes used, and the archaic form "Rooibosch" was common a few decades ago. Other forms such as "Bush tea", "Bossie tee", "Naald tee" and "Speld tee"

(reflecting the structure of the plant and leaves of *Aspalathus linearis*) were used in the past. The task team was faced with the question of whether the inclusion of all these names will detract from, or strengthen, the application. An answer to such questions could often not be found in the text of the EU regulations or in the abbreviated summaries of other GI applications to the EU that are the only form in which other GI applications can be accessed officially. If answers to some of these questions were readily available, the specification could have been completed much quicker.

Faced with the lack of a domestic support structure and the lack of harmonisation between the South African legal framework and EU Regulation 510/2006, reliance on informal networks with European officials and experts played an important role to answer these questions. Over the years, the industry and the researchers succeeded in building extremely good relationships with counterparts abroad, and these parties could advise on how to respond to these nagging questions. The value of these informal networks appears to be significant and, under certain conditions, they can even supplant formal agreements, albeit at a cost. This contributes to the fact that the capacity to successfully build an export oriented GI strategy in a context of a lack of a domestic system critically depends on external resources, including not only financial resources but also expertise and social capital.

5.5 Different Phases in the Process and Achievements: Changes in Perspectives and Definition of the GI

This section documents the different phases in the process of establishing a GI dispensation for the Rooibos industry. This illustrates how and why the objectives and perspectives of the industry for pursuing GI protection evolved over time and broadened, as understanding of the instrument deepened.

5.5.1 From IP Protection to Biodiversity Concerns and Business Facilitation

The threats to the Rooibos name as well as the reactions at industry and government levels have been described above. The origins of the GI initiative are to a large extent founded on the need to reserve the Rooibos name and to prevent potential delocalisation of production outside South Africa. This led to the creation of the GI task team and the elaboration of the research activities on which this chapter builds. The need for an institutional and organisational support structure arose as part of the GI process. The industry therefore commenced to lobby Government to address the shortcomings at institutional level as described above. This articulation between the understanding and support of local dynamics at industry level (captured through the case study development) was one of the initial focuses of the task team. It resulted in

interesting synergies throughout the process and converged in the broadening of the views and understanding of different role players, not only those involved directly in the GI process but also other researchers, other industry role players and policy makers.

Interestingly, as time progressed, some subtle changes in the GI strategy took place. One of these changes came about during the discussions on which production processes should be included in the specification. It was initially agreed that the quality of Rooibos is primarily determined during harvesting and the first stage of processing at the tea court. Production practices were however also discussed as part of existing, in particular, sustainability and biodiversity considerations. It should be noted in this respect that, at the time of the creation of the GI task team, the Rooibos Biodiversity Initiative (RBI) was moving towards defining a biodiversity friendly labelling strategy as an incentive for Rooibos producers to protect biodiversity. The idea was that this initiative would be modelled on the biodiversity labelling scheme in place for the wine industry. The consultant in charge of implementing the Rooibos Biodiversity Initiative (on behalf of Cape Nature) was therefore invited to participate to the task team meetings and activities as already mentioned. It turned out that the depth of knowledge of the different Rooibos production practices that he had gained from working with producers to implement the RBI was very useful for informing the task team process. A natural synergy between these two initiatives developed (Biénabe et al. 2009).

As the Rooibos industry is young and growing, it is expected that the observed intensification of production practices and the expansion of the production area will continue. With the Rooibos production region located in a sensitive biodiverse area, this constitutes a significant environmental challenge, especially from a biodiversity perspective (see Sect. 5.2.1). The Rooibos industry is aware of its potential environmental impact as this poses a potential threat to its reputation. Thus, in addition to the promotion of biodiversity best practices *per se* as part of the Cape Nature activities, biodiversity related elements have also been inserted into the development of the GI specification to reinforce the biodiversity strategy of the industry (Biénabe et al. 2009).

In deciding on the inclusion of biodiversity related matters in the Rooibos specification, the Cape Nature consultant initially compiled a list of biodiversity relevant issues and actions related to Rooibos production practices based on general biodiversity conservation priorities and official documents. The content of this list was then discussed with a sample of producers from the different production areas. The outcome of this consultative process was extensively debated during a series of task team meetings and the most relevant biodiversity related practices were incorporated into the specification for Rooibos. Decisions were based either on the contribution of these practices to the uniqueness of Rooibos and to its link with its region of production or on their capacity to mitigate the threat to biodiversity loss and therefore, to the industry reputation. This consultative process also deepened consultation on the GI strategy for Rooibos more broadly. It assisted in conveying the importance of, and objectives to be achieved through, the GI, to a wider audience within the industry.

Interestingly, in the process of reflecting on how to include biodiversity components into the GI specification, the members of the task team were confronted with the issue of the complexity flowing from a wide variety of certification standards and associated codes of practices developed with regard to Rooibos. Some of the most common standards are those for Rooibos Good Agricultural Practice (GAP), Organic farming standards and Fair Trade. In addition, producers would be confronted with GI and Biodiversity Certification, a proliferation of controls, fees and paperwork that impact farmers and demoralise many of them. To deal with this risk of certification complexity and fatigue, the task team entered into consultation with some of the existing private certifiers to develop a “menu” of certification standards and to harmonize control procedures across the various schemes. The implication is that, whilst the producer will have a choice between various certifiers, the certifier of choice will be able to control for more than one standard. It is foreseen that this solution will serve to combat certification fatigue and the proliferation of paperwork. It follows that, in addition to the mandatory standards (Rooibos GAP and in future the Rooibos origin certification scheme), producers may choose whether to add organic and fair trade certification or not. As part of the industry biodiversity strategy, biodiversity related standards, while initially voluntary, are also meant to become mandatory over the medium term.

5.5.2 Quality Management Becoming an Integral Part of the Process

A further important progression from the original drive towards name protection was the realisation that quality plays an extremely important function throughout the value chain. Whereas standards and grades were prescribed in the era of statutory protection (1954–1993), the liberalisation of the industry led to a significant proliferation of privately developed standards. As a result, individual and collective strategies dictated the grades and standards used, and the nebulous and untested terms “the market wants” or “the market dictates” were often fielded to argue why certain classes of product quality were acceptable. In the Rooibos industry, the quality of individual products became directly related to individual branding strategies and business positioning in the market place – of the processing companies as well as of a number of producers who integrated the different chain segments at domestic level – rather than collectively agreeing upon quality standards.

It has conversely been shown that different collective and territorial issues are important at industry level, especially in relation to the need to codify practices. The need to sustain increased demand and the entrance of new role players, especially within South Africa, over the last decade as a result of export developments, have been associated with increased quality concerns. In particular, some brands have been used to package and market products foreign to the brand proprietor and of low quality. The increased complexity of the supply chain both increases the need for traceability and renders it more difficult to handle. The problem of quality control and traceability is exacerbated by the fact that a significant part of

the Rooibos production is blended with other teas, or aromas are added to it, and this happens mainly at export level (for example in Germany) (Biénabe et al. 2009). The intensification of production practices and expansion of the Rooibos production area constitute another issue of collective concern, both from an environmental and marketing perspective.

The idea of developing a GI appeared to constitute a relevant framework for discussion and negotiation around these different issues, as evidenced by its capacity to be sustained over time despite its much longer duration than initially expected. However, it is also worth stressing that the industry highly values freedom of trade as enshrined in section 22 of the South African Bill of Rights, particularly following deregulation of the agricultural marketing environment. Hence, the GI quality debate had to proceed with care. The first phase of the quality discussion took place in the task team and the questions continuously revolved around two matters:

- What matters are of real importance to determine the level of acceptable quality for Rooibos?
- With the likelihood of these standards being challenged under the Constitution, how can compliance be scientifically and objectively measured without placing an insurmountable burden on a small and developing industry?

To decide upon the main criteria for defining the product quality, the task team decided to consult with quality experts in the industry. Eight senior executives of companies, seven quality managers and 14 marketers from the industry were invited to participate in an on-line panel using the Delphi technique. Based on the results from this panel, a workshop was held to consolidate the results. In the final instance it was decided that:

- A set of colour cards of dried and fermented Rooibos tea can be used to determine the minimum acceptability of a consignment of Rooibos;
- A set of colour cards can also be used to determine the minimum acceptable colour of the extract of Rooibos tea; and
- An expert tasting panel could be used to evaluate the aroma and taste of the extract of Rooibos tea.⁵

During this process, it became clear that the purpose of the GI quality standard should be to establish a minimum quality standard for Rooibos. Once this minimum standard is met, individual or collective players in the industry are free to use or determine the specifications of their own grades and specific-issue standards according to their perception of market demands. They can therefore proceed with their individual differentiation strategies. Once it passed the minimum requirements, a wide range of quality grades would therefore still exist, enabling the different actors to pursue their individual quality strategy while appropriating the collective one. Barjolle and Sylvander (2002) strongly point out the importance of properly articulating individual and collective quality management strategies as an important

⁵To support this process, a scientific research project on the sensory characterisation of Rooibos has been funded by SARC.

element of coordination and cooperation among firms. Based on collectively agreed upon minimum standards that still allow for further differentiation of the different actors, the existing (and potentially) different strategies of quality differentiation inside the industry and the GI collective qualification can then work synergistically towards improved quality, and capacity to benefit from it, in the chain. Future prospects could be to consider the GI as an umbrella under which different specifications could be defined collectively to account for the different qualities associated with different *terroirs*.

The debate on quality had a number of interesting implications. This process resulted in engagement with different industry players beyond the task team. These actors confirmed the capacity of the industry to appropriate the key dimensions of GI protection and labelling. They could foresee its merits with regard to the current challenges that they are facing. This was instrumental in the growing awareness by a broad set of actors in the industry of their strong common interest in facing key collective industry challenges, and in particular those related to quality. More particularly, this stressed the role that a GI could play in collective quality management and control, and in the associated management of the collective reputation, especially on the export market. It is clear that, by its very nature, the process to determine minimum quality standards exhibited significant tendencies towards collective action.

5.5.3 Defining the Logical Limits of Protection: What to Protect and Where to Stop

The debate to determine the logical limits of protection probably constitutes one of the most interesting experiences during the development of the Rooibos GI strategy. It was shown in Sect. 5.2.4 that Rooibos production undergoes a number of phases and that the products derived from *Aspalathus linearis* end up in products ranging from tea (pure, blended or infused) to nutraceuticals, extracts, beverages and skin care products. The Rooibos industry as well as its products constitute a rapidly changing value chain, with new products being developed on a continual basis. Therefore, one recurring question was how to find a balance between regulating the production of Rooibos (and name preservation) and allowing space for innovative value adding opportunities.

5.5.3.1 Defining the Product

The limits for defining Rooibos could have been drawn either at farm gate or at retail level. As some of the most important interventions are taking place during first-level processing at the tea court, limiting Rooibos definition to farming operations would be meaningless and the inclusion of operations up to the retail level would be stifling to innovation and close to impossible to define or regulate. Following long

and intense debates in the Task Team as well as discussions with various players in the industry and consultations with persons in the informal international network, it was decided to define the production of Rooibos up to the stage where it is oxidised (excluding the case of green Rooibos), dried, cleaned and pasteurised. This was determined together with the following labelling strategy: pure Rooibos tea would carry the PDO label when marketed in Europe and other products containing Rooibos and produced in a consistent way with the Rooibos specification would carry an inscription “contains Rooibos PDO” on the front label in a less prominent type than the product designation or the brand name.

An important drive behind this choice is that it creates the scope for an increased demand for Rooibos by allowing new value adding opportunities to be explored. This is viewed as a positive outcome locally given its potentially for fostering the economy of the Rooibos area. It is expected in particular to create higher returns to agricultural households, an important dimension in a country and region suffering from rural poverty and in need of incentives for rural development. While the potential impact of this growing demand on increasing the pressure on natural resources is of special concern in this sensitive area, it is considered that the production and biodiversity rules included in the product specification will serve to combat this concern. The GI is in this regard seen as an interesting tool in that it allowed for an elegant balance between accommodating innovation and protecting elements of importance.

5.5.3.2 Delimiting the Area

The second issue faced in defining what to protect was to determine the designated area. This question was complicated by the fact that, whilst the origins of the commercial use of Rooibos can be found in the Cedarberg region, it has lately expanded to include areas such as the Swartland and Sandveldt. Private Rooibos production trials were even planted as far in the South as Elim in the Rûens area. To complicate matters, stands of wild Rooibos have been found in localities close to these areas as well as in the Cape Peninsula. To address this issue, the industry experts on the task team initially identified five geological, soil and climatic elements of importance for Rooibos to grow. A Geographical Information System (GIS) specialist from the Western Cape Department of Agriculture created a series of map overlays based on these criteria, and the first draft of a designated area was produced. As this draft resulted in a series of unconnected production areas not representative of the actual production area and of its potential areas of expansion, these elements were eventually relaxed to only two criteria. It was finally decided that the borders of the region should align with where the winter rainfall area intersects with the Fynbos biome. As for the other dimensions of the product definition, one of the reasons for this decision was that it allows for including all of the current South African producers and makes provision for potential production developments in a context of expansion. At the same time, it assists in controlling expansion and quality by limiting the potential to expand based on the most critical geological and soil prerequisites for the successful production of Rooibos.

As some players in the Rooibos industry clearly are of the opinion that the elevation at which Rooibos is produced as well as the production region have an impact on the quality of Rooibos, the task team debated the question of whether the designated area should be broken down into a series of smaller *terroirs*. However the development of such smaller *terroirs* would require an extensive series of debates and consultations that would delay the application of a GI. Indeed, it would impact on a number of different quality strategies that are already well-established, and many different conceptions exist in the industry in relation to the *terroirs*. The task team therefore decided to rather follow the Wine of Origin example. This consists in creating the mechanism, for the producers in an area, to apply for the recognition of a specific *terroir* rather than identifying all possible *terroirs* up front. It also introduces more flexibility in the system, which appears to be an important consideration for this industry that is still at an early stage of acting collectively, especially with regard to marketing related issues. The same approach was followed to make provision for “Estate Rooibos”.

It is important to note that defining smaller *terroirs* could reinforce small-scale farmers’ communities which have built a unique differentiation strategy and market access for their production based, in particular, on fair trade, but which could soon face competition in their niche due to fair trade certification of large commercial plantations. Indeed, the uniqueness of small-scale farmers’ production not only stems from their social attributes but also from their settlement in one of the best *terroir* for Rooibos production. This could therefore be reinforced through such a GI ‘sub specification’. This would provide interesting grounds for the differentiation to be maintained and could even lead to a strengthening of market position.

5.5.3.3 Combining the GI and Individual Trade Marks

Another question that also entered the debate at this stage is the relationship between the GI and individual trade marks in relation to the name Rooibos. As the legal aspects relating to this are discussed more fully in Chap. 2, the technicalities of the matter will not be repeated here. What is important is that, by setting out to expunge irregularly registered trade marks, the Rooibos case in the United States highlighted the possibility of acting offensively against misappropriation. With the growing awareness surrounding irregular trade mark registration, the threat of misappropriation is lower. However, there is anecdotal evidence that observed misappropriation of the name Rooibos in the EU is on the increase.

As a result of the industry choice to explicitly follow an agreed upon collective minimum quality standard approach, it is expected that the development of a GI strategy will result in a symbiotic relationship between, on the one hand, Rooibos as a GI and on the other hand, legitimate trade marks that form part of specific industry players’ strategies of differentiation. These trade marks, including or excluding the name Rooibos, can co-exist with the GI mark on the same label as long as the content of the product adheres to the specification. This can again be equated with strategies followed in wine marketing where there are different levels of branding.

5.6 Major Insights from the Case: Taking the Lead, Ownership and Creating a Flag to Rally Behind

This section stresses some important features of how the Rooibos industry took ownership of the GI process. It first reflects on the collective dynamics associated with Rooibos GI development. It then highlights important features of the appropriation process.

5.6.1 Strengthened Collective Action and Industry Dynamics

From the discussion throughout this chapter, there is one recurring theme that is particularly important to highlight, namely that the process of developing a GI for Rooibos significantly contributed to the dialogue in the industry and that it became a vehicle towards collective action. Prior to the GI initiative, the efforts for organizing and improving coordination among Rooibos producers and processors concerned mainly research aspects. Interestingly this happened despite the fact that one of the explicit reasons why the SARC was founded was to prevent further instances of name usurpation. The GI initiative presented the opportunity for a strong move towards new forms for collective action at industry level. Despite seemingly wide heterogeneity of producer actors, which has been argued by Tregear et al. (2007) to be associated with conflicts in product qualification, discussions regarding the GI qualification process have been characterized by constructive debates, and a consensus over most of the GI specification was reached relatively easily. This can most probably be linked to the quite homogenous production practices at processor level across the industry. These practices are considered to be the most significant for the GI specification and the processors have been leading most of the discussions.

It is interesting to highlight how the current industry organization with a major role player, Rooibos Limited, together with a number of recent entrants that are in a competitive position, has influenced the dynamics towards this collective strategy. Rooibos Limited, which is in a clearly dominant position at processing level, has been instrumental in the way in which the GI strategy has evolved, i.e. with a strong focus on developing a proper collective minimum quality standard together with means of control. Rooibos Limited has been assuming the role of custodian with regard to name protection. Indeed, being the industry's single largest role player, Rooibos Limited is the most exposed to risks associated with industry reputation loss. This is therefore a strong incentive for acting as a custodian and strongly supporting the creation of a collective quality management system. Rooibos Limited is likely to significantly benefit from the type of differentiation that the GI initiative is promoting, i.e. differentiation of Rooibos with regard to other herbal teas. Indeed, compared to other role players who position themselves on quality niche markets, Rooibos Limited mainly sells conventional Rooibos. In addition to this, it is worth pointing out that implementing the GI quality management strategy should not

require specific efforts and costs for Rooibos Limited. Indeed this company operates a sophisticated quality management system that served, to a large extent, as a model for the GI definition. However, although the dominant position of Rooibos Limited in the industry remains unchallenged, the GI initiative and arena allowed discussion between players of various sizes and levels of power which was in itself a valuable contribution.

5.6.2 Appropriation of the Process as a Key to Harnessing GI Potential

The task team-based process that developed was instrumental in the awareness by the industry actors of their common interest in facing key industry challenges beyond name reservation and in their appropriation of the GI initiative. More specifically, the following points were critical in the process that developed:

- While awareness on the need to protect the Rooibos name was present from the start, the industry support of SARC actually increased as a result of the inclusive debate and of the broadening of the scope of the GI.
- The quality dimension reinforced the industry interest in the GI tool. The increasing risk of low quality Rooibos reaching the market poses a serious threat to all actors through the concomitant loss of reputation. As most players in the industry are looking for international protection and control against quality abuse and misuse, the development of an envelope of quality standards was strongly supported. This generic differentiation of Rooibos and positioning as a distinct herbal tea in international markets stands to benefit the entire industry. It is clear to most players that individual and collective strategies have a complementary role to play.
- The existence of small-scale farmers and the need to integrate their specific needs and quality dimensions into the debate, in a context of political pressure in this regard, also intervened in framing the debates. This goes together with an improved understanding developed amongst local organisations (research, government, commercial operations, NGOs and the farmers themselves) on the market access needs for small-scale farmers and the role that a GI can play in addressing them.
- The role the industry is playing in terms of political lobbying for the government to establish a more appropriate institutional framework for the protection of GIs has been an integral part of the process. The relationship between the industry and government was enhanced by the GI initiative.

In this context, the GI initiative, although firstly introduced through a research program, became rapidly driven by the industry. The substantial industry dynamics that the initiative triggered clearly illustrates the potential that GI has for local communities beyond its name reservation function. However it is worth reminding again that this case also clearly illustrates that, in a context of lack of local knowledge

and of national organisational and institutional support for GI development, this process could never have prospered without strong external support. It is also important to stress that all these dynamics took place in a context of a well organised industry with already significant market penetration abroad and awareness of at least some of GI related stakes, the need for name reservation in particular.

5.7 Conclusion

The main emphasis of this chapter was the experience and lessons learned through the process of implementing a GI for Rooibos in South Africa. While *Aspalathus linearis* can only be grown in South Western part of Africa, Rooibos specificity can also be traced back to specific geo-climatological conditions and to the impact of the evolution of human interventions on the product. When the vulnerability for expropriation of its specificity and reputation was highlighted by the so-called “Rooibos case” in the United States, different reactions at industry, provincial and national level were triggered but in essence all realised the importance of protecting this unique South African product – hence the inception of an initiative for the development of a Rooibos GI.

As it was the first time that the development of a GI for a product other than for wine or spirits was attempted in South Africa, this case was extremely valuable in itself. It did not only highlight potentially new and multidisciplinary areas of research but also questioned certain political perceptions and institutional realities regarding GIs in South Africa. It particularly highlighted the challenge of how to interpret the legal requirements (both local and international). In the absence of public support, informal networks and relations proved to be of immense value in designing the GI rules and standards.

It is significant to note that, although the initial position was merely to reserve the Rooibos name, the process soon included other important dimensions such as biodiversity conservation and product differentiation. Furthermore, with the increased awareness of the importance of protecting the specificity of the product, and hence its position on international markets, defining the concept of quality during the production process required significant debate. In the final instance, consensus was reached to protect specificity up to the level where it will have the required impact without limiting the growth and development of the industry and individual role players in it. Similar arguments were used to address questions pertaining to specific *terroir*, estates and the co-existence between GI and existing and future private trade marks.

One of the most important outcomes of the process of developing the Rooibos GI was the interactions within the industry and the realisation of the value of collective action. As the process required from the industry the regular provision of new inputs and insights to debate on specific elements of the product specification, ownership of the Rooibos GI was not only entrenched but also became a rallying point for the industry.

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Chapter 6

Guidelines for Selecting Successful GI Products

Cerkia Bramley and Estelle Biénabe

Abstract This chapter seeks to provide criteria for selecting successful GI products. The discussion makes the point that not all origin based products have the potential to benefit equally from GI development and protection. The authors' experience in selecting products for inclusion in the research project on which this book is based, but also in the subsequent process of designing industry specific GI strategies for two South African GIs (Rooibos and Karoo lamb), has shown that it is possible to identify certain factors which are predictive of an origin product and/or industry's ability to benefit from GI protection. Drawing on this experience as well as the international literature this chapter seeks to develop guidelines which can be used in Southern countries for evaluating whether a product has the potential to develop into a successful GI and to harness the potential associated with GI protection.

Keywords Geographical indications • Selection criteria • Southern countries

6.1 Introduction

The discussion in this book has highlighted the relevance of GIs for countries in the South as well as the diversity of forms that it can take and based on this, considerations for the design of appropriate institutional frameworks towards the successful development and protection of GIs within these territories. It points out issues that

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question the capacity of different products to actually benefit different stakeholders as a result of GI development. This puts forward the relevance of the issue of selecting potential GI products. While the initial discussions in the book mention the fact that Southern countries have a rich cultural heritage of products linked to origin, the question of how to select these successful GI products have not been addressed per se.

Not all products with a link to their origin have the necessary attributes or currently fulfil the conditions to ensure benefit from GI protection. This may be because they do not legally qualify for GI protection in terms of either the international or domestic legal framework. It may also relate to other factors that are crucial in the ability of GI products to harness the potential benefits associated with the GI process as identified in Chap. 1. A number of authors have observed that while legal protection is an increasingly important factor in the successful commercialization of the GI product, it is by no means a sufficient condition for GI development (see for example Bramley and Biénabe 2012; Hughes 2009; Das 2009). The experience of Southern countries that have advanced towards implementation of GI frameworks show that having an institutional framework is not sufficient to ensure successful implementation of GI protection at product level. Musungu (2008: 11) also refers to this in asking why many African countries, which have joined the call for enhanced protection of GIs at international level and have implemented domestic legal regimes, have failed to register GIs either in their own territories or in a third country. This is also highlighted in the case of India as developed in Chap. 2 where, as also noted by Das (2009), Indian producers in many cases are not actually participating and benefitting from the vibrant GI registration trend that arose since the adoption of the *sui generis* GI law in 2003.

As widely evident from the different chapters of this book, the ability of Southern countries to benefit from a GI strategy is contingent on a number of complex and often interrelated factors. It is therefore crucial to base investment decisions, both relating to the legal framework at country level but also to industry specific efforts in potential GI products, on an accurate a priori assessment of the potential of local products to provide additional benefit based on GI protection. While Southern countries may have a rich heritage of production linked to an origin, it is likely that very few of these products will ultimately develop into successful GIs. The choice of selecting products with the highest chance of success as a GI is likely to be an important step for Southern countries considering the implementation of GI strategies within their territories.

The authors' experience in selecting products for inclusion in the research project on which this book is based, but also in the subsequent process of designing industry specific GI strategies for two South African GIs (Rooibos and Karoo lamb), have shown that it is possible to identify certain factors which are predictive of an origin product and/or industry's ability to benefit from GI protection. Drawing on this experience as well as on the international literature (see also Vandecandelaere et al. 2009; Barjolle and Sylvander 2002), this chapter identifies and proposes a characterization of the factors related to a product which underlie the successful use of a GI. In this, it intends to provide different stakeholders in Southern

countries – policy makers, local industries, NGOs, donors, etc. – with guidelines against which these actors can evaluate products in order to establish whether they could develop into successful GIs and harness the potential associated with their protection.

6.2 Criteria for Assessing a Product’s Potential to Benefit from GI Protection

This section presents the different factors, both endogenous to the product and its chain and those factors that form part of its wider environment, that have been identified for their contribution to a product’s ability to ensure benefit from a GI strategy. The factors listed here were developed based on a comprehensive literature review of what drives the success of different GIs. The factors identified in the literature were adapted during our research project development, with additional insights being gained both from the project implementation during which a selection process was conducted as further explained below as well as from the analysis of the cases. The discussion below thus presents the application of internationally identified success factors in a Southern African context.

6.2.1 Product Specificity

In identifying a potential GI product, it is critical to depart with an assessment of the degree of product specificity or “uniqueness”. The importance of product specificity derives from the need to establish the characteristics of the product that differentiate it from comparable products produced in other regions (Sylvander and Lassaut 1994) as a way to capture its market potential. This is linked to the capacity to define the typicity of the product and its link to a particular *terroir* as generally referred to in the European conception. The capacity to differentiate the product and associate it with its origin, forms an essential dimension of any product of origin as reflected in the relevant agreements which explicitly refer to the qualities or characteristics of the product for defining GIs. It is however also important to point out that, legally speaking, this requirement varies widely across regulations. While TRIPS protection is based on a relatively weak link in that it merely requires that a good “originate” in a specific geographical area and that “*a quality, reputation or other characteristic of the good be essentially attributable*” to that geographical area, EU Regulation 510/2006 conversely requires a much higher level of product specificity for registration of a PDO¹ in requiring that the good originates in a specific region and that the “*quality or characteristics of [the good] are essentially or exclusively due to a*

¹See Chap. 2 for an explanation of the terms PDO and PGI under EU Regulation 510/2006.

particular geographical environment with its inherent natural and human factors” and that the “*production, processing and preparation*” of the good occurs within the geographical area. As in the case of the EU which also provides for registration of a PGI based on a weaker specificity, a distinction can be made between different degrees of specificity within a particular regulation (see also Chap. 2). This distinction has also been adopted by other countries such as, for example, Mozambique which distinguishes between designations of origin and geographical indications.

These characteristics, which relate to the existence of a link between a product and a *terroir* or a region as reflected by its typicity, are at the core of any GI and build a product’s specificity. Factors that can contribute to a product’s specificity include the region’s particular geography, environmental factors related to the production area and specific production practices as well as other human factors (such as broader landscape management practices that indirectly impact on the product) or the species utilised. The uniqueness of a product, which can build on this diversity of resources, is a critical factor in gaining and justifying market recognition (as discussed in Chap. 1), and in meeting legal requirements for protection.

6.2.2 Reputation

The TRIPS Agreement introduced the concept of reputation as a dimension linking a product to its origin.² EU Regulation 510/2006 also includes a reference to reputation as constituting an element of a PGI.³ The literature on origin based products emphasises reputation as a factor which allows a producer to earn a premium based on product specificity. According to Bérard and Marchenay (1998), reputation forms the foundation of any GI supply chain as it enables transformation of a cultural surplus value (linked to the identity of a local product and to its “quality” recognized within the area of production) into an economic surplus value (Prost et al. 1994).

The concept of reputation is closely related to the ability of a product to differentiate itself based on its specificity and to sustain its differentiation on the market. Reputation derives from the consumers’ past purchasing and consuming experience of the product. It thus very much builds on recurrent consumptions patterns that frame the expectation of the consumer. It derives from the distinctive characteristics of a product that underlie its differentiation. The stronger a product is characterized, the easier the reputation can be established and the easier it is to prove that the product is perceived as distinct. The strength of a product’s identity thus not only enhances product specificity but also builds and asserts its reputation. The product’s distinguishing features linked to the region allows it to acquire an identity which is transformed into reputation through the behaviour of the different actors in the chain at horizontal and vertical levels, and so becomes a collective asset shared by a network

²This is a departure from previous international agreements such as the Lisbon Agreement which made no reference to reputation.

³Art. 2.1.b.

of firms (Raynaud and Valceschini 1998. See also Chap. 3 and below). These firms therefore hold both cooperative and competitive relations. The symbiotic relationship between the two elements of specificity and reputation is clear, in that a product's specificity leads to its reputation, which in turn allows the benefits associated with specificity to transpire. This encourages benefitting actors to invest in maintaining the specificity, and therefore in the underlying specific resources. This has been referred to as an "*origin linked quality virtuous circle*" (Vandecandelaere et al. 2009: 3).

Beyond the physically embedded specificity of the product, the history and culture surrounding the origin and development of a product within the region is a strong contributing factor to a product's reputation. In this regard the initial uses of the indication as well as the first descriptions of the product and its production method serve as useful information. Literary references as well as oral accounts can be used to confirm the historical presence of the product in the geographical area. This is important during the GI application process, at least in those countries which provide for substantial examination, as historical depth proves important in justifying the link of the product to the territory.

While the capacity to prove reputation at any level – local, national or international – is sufficient to meet the conditions for protection under the legal instruments that include reference to reputation, the degree of reputation required for the GI to be successful depends on an industry's trading scope and objectives. Though not legally required, international reputation is crucial for industries seeking to establish their GI product on foreign markets. As stressed by Tregear et al. (1998), consumer perceptions of a GI depend not only on its legally recognised status but also on the product's physical specificity as described above and on the information conveyed to the consumer regarding the product's cultural embeddedness. While reputation can be developed through promotional campaigns, these are costly, especially in the context of smallholder farmers (Zografos 2008), and entails important risk given the transient nature of consumer demand, at least over the short term (Yeung and Kerr 2011). As can be deduced from the above discussion, reputation is an asset that builds over time together with the product specificity. Existing reputation reduces the cost of establishing the product in the mind of foreign consumers and reduces conjecture on how a product will be perceived. Though not per se a requirement, reputation together with specificity is at the core of GI potential.

6.2.3 *Collective Action and Coordinating Institutions*

The relation between reputation and specificity holds as long as the specificity of the product is maintained, with changes in it posing a threat to the reputation. This is especially important given the collective feature of origin based product reputation. Although producers retain their economic and legal independence in the production and marketing of the common good, they are linked through their activities that result in a particular origin based product which main characteristics determine the reputation. This peculiar manifestation of independence/interdependence between

producers of the common good, each pursuing its own objectives, emphasises the importance that origin based products stem from a collective process. With the aim of GIs being to protect this collective reputation and with the specification being the core instrument for regulating practices that impact on the product specificity and therefore on its reputation, this strongly stresses the need for coordination in establishing and implementing GIs. Chapter 3 clearly demonstrates the critical role played by the industry's ability to act collectively.

The importance of co-ordination has been reiterated throughout the research on origin based products (Barjolle and Chappuis 2000; Canali 1997; Boccaletti 1992). In this regard Chappuis and Sans (2000) conceive coordination in the supply chain as a prerequisite for the success of origin based products and for the competitiveness of the firms producing and marketing it. As discussed in more detail in Chaps. 3 and 5, factors that need to be addressed at collective level and require coordination include defining the GI product, ensuring conformity to the product specification, ensuring access to information and promoting the GI product. In the Southern European context, coordination is generally undertaken by "interprofessional" bodies, which represent the different segments of the industries involved in the product management. These bodies, by organising coordination, can reduce transaction costs and convey information to all parties involved, thereby reducing uncertainty and preventing potential market failures. It is within these bodies that the product is defined and the specification agreed upon. An industry lacking some form of representative body will hardly display the cohesion needed to successfully market a common product. Chapter 4 provides interesting insights in this with regard to the nature of the participation in the governance of the product and the implication it holds for the different actors in the chain. In this sense, the ability of an industry to organise around a coordinating body forms an important predictor of its ability to ensure shared benefit from GI protection.

6.2.4 Institutional Support/Driving Organisation

In connection with the previous paragraph and as discussed in several chapters of the book (see Chap. 1 for a general discussion and Chap. 5 for a specific illustration), products bearing a geographical name can be connected to different dynamics which display public good characteristics such as rural development, biodiversity conservation and traditional knowledge and heritage preservation. The recognition of these public good dimensions had widely led to calls for state intervention and support from public and/or private institutions (see for example Barjolle et al. 1998). This support can take various forms including the provision of regulatory frameworks, financial contributions and assistance with registration and enforcement procedures, and many different types of actors can contribute to providing this support, be it public institutions or civil society organisations (notably local or international NGOs oriented towards development and/or environmental conservation).

Even within public institutions, institutional diversity exists, as for example in the Rooibos case presented in Chap. 5, with national and international institutions being involved as well as provincial bodies.

The need for institutional support is particularly pronounced in Southern countries where actors are very often unfamiliar with the GI concept and generally do not have access to the required technical and financial resources. This has been observed in India for example where producers have been slow to take advantage of the legal framework for registering their GIs. This has been attributed in particular to a lack of understanding of the GI concept among producers (Das 2009). As a result the large number of GI registrations in India has been driven mostly by the State (Marie-Vivien 2010; see also Chap. 2). The Rooibos case presented in Chap. 5 provides an in depth illustration of the importance of different types of actors' involvement and support even in the context of a well organised industry with a strong interest in developing a GI. As illustrated above based on the Southern European experience and evident from the Karakul pelt case discussed in Chap. 4, other institutions such as 'interprofessional' and parastatal bodies which contribute to the chain governance, also play an important role supporting the development of GIs. While the involvement of NGOs and academic institutions can provide vital assistance to local communities, the issue of continuity should be considered, especially when dealing with emerging industries and resource poor communities.

6.2.5 Market Attractiveness and Supply Chain Characteristics

While GIs are useful tools for the marketing of differentiated products, their success depends to a large extent on market demand related factors as already suggested above and widely recognised in the literature. Barjolle and Sylvander (2002) point out that it is essential for the success of origin based products to be perceived positively by consumers and that consumers relate to, if not share, the same cultural values associated with the GI product. This refers back to the point raised by Tregear et al. (1998) on the importance of the information conveyed to the consumer regarding the product's cultural embeddedness.

The image of a region plays an important role in establishing favourable market demand. Regional images evoke meanings which may vary spatially between individuals and change over time (Jenkins and Parrott 2000). As such, the image of a region has powerful evocative value in establishing a product in the mind of consumers. In assessing the potential of a product to benefit from GI protection, it should be assessed whether the image of the region will have a positive effect on consumer demand. As a positive regional image may reinforce the GI product, so too does a GI product strengthen the image of a region. This reinforces the multi-functionality of a GI in that it encourages links between agriculture, landscape and tourism, as stressed in Chap. 1. Conversely, an industry may find it difficult to benefit from the regional association of its origin based product if the geographical area is linked with a plurality of cultural identities, as this dilutes the region's image and

may in certain instances pose an obstacle to collective action. Negative environmental association with the production of the GI can also adversely impact consumer demand and product reputation. As illustrated in Chap. 5, this creates a strong drive for industries and supporting organisations to link GI and environmental strategies. GIs are considered a potential instrument for environmental conservation (see Chap. 1), particularly from the angle of biodiversity conservation. The environmental impact of a GI as a guideline for product selection is considered in more detail below.

As developed by Barjolle and Sylvander (2002), other market related factors to be considered are similar to that of any other product and include: size and growth potential of the market, structure of the partners downstream in the supply chain, barriers to entry in the market, margins realized in the past, economic stability of the market and the degree of competition. These are notably related to power relations within the chain.

In addition to market factors, supply chain characteristics should also be comprehensively considered with a view to assessing a GI's capacity to successfully harness equitable development (Jain 2009) by ensuring primary producers receive a fair share of the value added in the chain (Jena and Grote 2010). Different supply chains (i.e. high value niche markets versus bulk commodity, export oriented versus domestic or local markets) reflect different behaviours and interests which impact on their governance structure. Gereffi (1994: 97) distinguishes for example between buyer driven and producer driven chains. They are also likely to involve different dynamics in terms of quality, with the capacity to define quality and control in the chain being instrumental in the chain governance of differentiated products (Ponte and Gibbon 2005). These factors all potentially play a role in the ability of a product to benefit from GI development and protection. Notably, in the context of developing countries and emerging chains, the size of an industry may also be a determining factor, as industries with limited output may find it difficult to establish a market presence.

6.2.6 *Type of Producers*

With GIs widely supported as a tool for rural and more generally sustainable development, it is important to specifically consider the profiles of the industries involved as these can differ significantly and may impact on the equitable development potential of a GI, as already suggested in the above discussion. Some origin based industries consists mainly of large commercial enterprises with little potential for benefitting small scale farmers. Others are almost entirely characterised by small scale production linked to indigenous communities.

Depending on the particular policy objectives pursued, some industries may be a more likely choice for public investment as part of development initiatives. The ratio of smallholder to large farmers and the relationship between these groups hold important implications for collective decision making and cohesion within the collective. Industries entirely based on the participation of small holders or wild harvesters with

lack of commercial expertise and bargaining power can have more difficulty in establishing the necessary chain coordination, both vertically and horizontally, for successful participation on the market. Local community dynamics would in such cases be an important dimension, with social cohesion and solidarity among small-holder farmers or harvesters being potential assets on which to ground collective efforts to build more established chain dynamics. Industries with more balanced representation of large and small scale interests favourably influence the equitable flow of benefits along the chain. Balanced representation within an industry also assists in building the necessary collective structures for sustained cooperation and product development. However, the conditions for ensuring this balanced representation are not obvious to achieve and may require external intervention, for example by public authorities (see above and the Karakul pelts case as discussed in Chap. 4).

6.2.7 Environmental Impact

Environmental features can act in different ways with regard to product development and GI potential. Potentially adverse environmental impacts have already been discussed as a factor likely to stand in the way of successful GI commercialisation. On the other hand, environmental assets can be core resources of the product specificity (endemic species, emblematic landscape, etc.) and therefore of GI development, notably through the GI specification as evident from the Rooibos case (see Chap. 5).

Where GI strategies are pursued in support of development, the environmental impact of an industry plays an important role in the sustainability of the initiative. In the context of the research project, a pre-assessment of the environmental implications attached to the products was included as a criterion for selection in order to reflect on the potential of GIs to link smallholder farmers to markets in a sustainable way, and therefore gain a better view on sustainability related issues when attached to GI development. This provides useful insight, in particular, into the interactions between different actors and their objectives in negotiating the GI specification and in defining the characteristics of the GI product but also its potential in connection with other labelling initiatives (organic production, biodiversity friendly labelling etc.) as is more and more frequent for products which combine different quality attributes related to both their environmental and human underpinnings. These dimensions ultimately contribute to product characterisation, market positioning and chain structuring, all of which play an important role in building successful GIs.

6.3 Observations on and Application of the Criteria to Southern African Products

A first step in developing the research project on which this book is based was to identify and select the potential case studies for inclusion in the analysis. This effectively amounted to a scoping exercise to better comprehend the diversity of

localized resources, through compiling an inventory of indigenous knowledge and resources which communities in South Africa and Namibia claim are unique. Information was collected based on a submission which was widely disseminated to consult a large audience (NGOs, government departments, farmer magazines, producer organizations etc.) and which invited people to submit potential case studies. This information was then organized based on a set of criteria which sought to distinguish cases based on their relevance and GI specific characteristics, and which, was designed around the guidelines developed above. By modelling the criteria on these success factors, the project team sought to ensure that the chosen case studies have a real potential for being recognised and protected as GIs and for unleashing the benefits associated with GI protection in the relevant communities.

Based on the information gathered, the following products were eventually chosen for their a priori potential to ensure benefit from GI protection: Rooibos tea, Karoo lamb, Nguni hides, Karakul pelt, Kalahari melon seed oil and Honeybush tea. The chapters in this book provide critical insights into certain key themes and theoretical frameworks that arose from the comparative analysis of most of these cases. This allowed for reflection on the role of the above criteria in supporting successful GI development. As an illustration of the relevance of the selection process proposed in this chapter and of how it was actually used as part of the project development, the following presents the main characteristics of the different cases that were considered as a result of the selection process.

The Karoo lamb case, for example, was selected primarily on the basis of an existing reputation that is widely recognised and misappropriated. Concerns in this case related to establishing the source of the product's origin based reputation, in particular whether the idea that Karoo lamb tastes differently and/or better than lamb produced elsewhere vested in folklore or whether it was true and scientifically verifiable. For this, further analysis was needed to verify that Karoo Lamb is a distinctive product with a scientifically verifiable link to the region. Determining product specificity was further complicated by the lack of accepted borders for the geographical production area. Reaching agreement on what region should be considered the Karoo for purposes of the GI eventually proved to be an important step in building the GI. But the primary concern for selection of this case was the lack of existing collective action. Chapter 3 elaborates on this in more detail. While Karoo lamb thus provided a strong case for developing a GI based on a very strong existing reputation and favourable demand factors, building product specificity and ensuring collective action remain important dimensions which needed to be strengthened.

Rooibos provided an even clearer case for GI protection. It has a very distinctive colour and taste and, given that production is endemic and geographically limited to a very particular biome, the product is considered to be highly specific. Rooibos also has an established reputation both on domestic and international markets where it is highly sought after for its reputed health properties and unique flavour. As explained in more detail in Chaps. 2 and 5, the industry has a strong collective organisation in the form of the South African Rooibos Council (SARC). Smallholders, wild harvesters and commercial farmers participate in this collective. Despite the fact that governance of the SARC rests with the large role players and with

smallholders only representing a very small part of the production, these smaller actors are actively involved in the chain. Since embarking on its GI strategy, the industry has also received significant institutional support both from Government who contributed financially to the cost of litigating the famed trade mark dispute in the US and on a more on-going basis from the Western Cape Department of Agriculture and the University of Pretoria in drafting the EU application. Concerns over the potential biodiversity impact of the industry have been dealt with through the inclusion of biodiversity considerations in the code of practices.

The Honeybush case was selected for its apparent specificity both in terms of flavour and geographical distribution. However, the limited size of the industry and the fact that it is still in its infancy soon proved weaknesses in the ability of the industry to build a GI. This relates both to its limited productive capacity to satisfy market demand but also to a lack of collective drive within the industry, which has yet to establish effective coordinating structures. This is complicated by the fact that Honeybush production is primarily undertaken by wild harvesters on an informal and small scale basis, with only a few large wild harvesters. A further challenge which emerged was how to strengthen the product specificity while standardising the quality of Honeybush which varies significantly from harvest to harvest as well as across the different varieties and regions of production.

Camdeboo mohair was initially selected for inclusion based on its strong reputation as a distinctive quality product in international luxury markets. However, while the name Camdeboo mohair evokes strong connotations to the region, it has since emerged that the product reputation derives mainly from a corporate branding strategy largely driven by one individual, with limited linkages with the rest of the industry. These linkages consist of the 75 approved growers who produce and derive benefit from Camdeboo mohair. Furthermore while many of them produce within the region known as Camdeboo, this is not required and the geographical delimitation of the region of production does not form part of the branding strategy. While the product quality depends on the interplay between humans, animals and the geographical region, these linkages only implicitly and symbolically intervene in the current company strategy.

The Karakul pelts case represents a well established niche product in international markets featuring a strong differentiation based on origin and specific quality that relate to sophisticated quality management and skills. It presents similarities with the Camdeboo mohair case and is also not attached formally to a delimited region of production. However, the significant public drive that critically contributed to the chain development, constitutes an important the differentiating factor.

The Kalahari melon seed oil case was chosen because of the increased recognition it is receiving internationally as a product originating from local communities from the Kalahari region with specific practices and links to their environment. The product endemicity and genetic diversity as well as threats arising from its increased exploitation, were furthermore seen as important elements to take into consideration in a project aimed at exploring the different facets of GI potential with regard to development issues. Given the Kalahari Melon Seed oil industry's very early stage of commercialization and organization, the project ambition with regard to GI

potential exploration had to be clearly targeted and could not be developed as extensively as for more consolidated industries with established product reputation. Emphasis was placed on facilitating a strategic planning workshop for the industry, during which participants were briefed on intellectual property and GI related matters. This was seen as an important step in fostering collective action across the different communities involved in the production of the product and for moving towards developing a shared local approach to chain development with a view to supporting sustainable development strategies.

In the context of this chapter, the cases which did not make it to the analysis phase also present interesting perspectives. So for example, a number of the products lacked sufficient product specificity. Klein Karoo Ostrich, while strongly associated with the region due to historic and cultural reasons, lacks any attribute other than reputation for linking it to the region. Driven by a single corporate entity with no geographical basis to its procurement processes, there appears to be no factual basis for considering it a GI.

Though hides from Nguni cattle were initially selected for inclusion primarily based on their strong cultural association and significance, it soon became apparent that, despite these factors, this product lacked sufficient specificity. Indeed, its geographical association is very broad with the Nguni breed prevalent and emblematic throughout Southern Africa. This product to a certain extent combines the weaknesses of the Karoo lamb case, in terms of not being sufficiently supported by a collective organisation, and the Karakul pelts case, in which production is spread over a large territory which no clear delimitation.

6.4 Conclusion

In this concluding chapter, the discussion explores the important step of selecting potential GI products. Drawing on the authors' experience in the Southern African region but also on the international literature, a number of so called success factors or criteria are presented as a guideline for the selection of GI products in Southern countries. The discussion shows that factors, both endogenous and exogenous to the product and to the chain, such as product specificity, reputation, the level of industry coordination, institutional support, supply chain characteristics or market attractiveness, the type of producers and the product's environmental impact, all contribute to the successful development of a GI and the ability of a product to ultimately benefit from GI protection. It is important to point out that as the book is empirically grounded in the Southern African reality, elements attached to GI implementation have been less deeply empirically explored than elements supporting the establishment of GI strategies. So for example, issues related to the capacity of control and sanction of the different actors, while dealt with in Chaps. 4 and 5 where supply chain and public interventions are addressed, were not fully developed across the chapters. This reflects the still emerging nature of GIs in the context of Southern countries, and more specifically Southern Africa.

As emphasised by Barjolle and Sylvander (2002), the success of a GI depends on a combination of factors and no single criterion determines the outcome of a GI process. So for example, while product specificity is very important, many highly specific products do not develop into successful GIs. This may be linked to how the product is perceived on the market or to a lack of institutional support. However, it should be noted that, the weakness of any of these factors does not necessarily exclude a product from benefitting from GI protection. The weakness of one of the factors may be compensated for by the strength of other factors (Barjolle et al. 1998) so that assessment should take place on a case by case basis. While not conclusive in its application, a check list or guideline of the kind provided in this chapter should form an important aid in any GI decision making in Southern countries. Not only could it assist industry specific investment decisions, but it may lead to a more considered a priori assessment of the number of products that stand to benefit from GI institutional frameworks. This should form the foundation of any attempt to weigh the costs and benefits of different GI policy options and institutional frameworks in Southern countries.

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