

**Geographical Indications and Agricultural
Products: Investigating their relevance in a
South African context**

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ABSTRACT

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The European Union is proposing that the additional protection for geographical indications afforded to wine and spirits in section 23.1 of the TRIPS agreement be extended to include geographical indications of other agricultural products. Those opposing increased protection for geographical indications represent those countries which do not have a strong history of traditional food products and are generally considered new world countries. South Africa, as part of the new world, has as of yet failed to take a position on the matter. In light of this debate, this study sets out to investigate the relevance of geographical indications in a South African context in order to make recommendations for South Africa's position in the debate at multi-lateral level. The topic is approached by first contextualizing the subject matter where after the economic rationale for the protection thereof is explored. A comprehensive literature study identifies the factors which contribute to a product's potential to benefit from geographical indication protection. Based on these factors, three South African products, Rooibos, Klein Karoo ostrich and Honeybush, are analyzed and an *ex ante* judgment made as to their potential to benefit from geographical indication protection. It is hypothesized that geographical indications are indeed relevant in a South African context given that there are many South African products which are considered to be highly localized with a strong association between the region and the product. The Rooibos scenario is used to illustrate the need for timely protection of

our national assets and sets the tone for the discussion of the two further case studies. It is found that despite widespread reputation, Klein Karoo ostrich may not ideally benefit from geographical indication protection given its lack of specificity. In contrast, it is found that Honeybush tea is a highly localised product with strong specificity and therefore stands to benefit from geographical indication protection. The study concludes that there are indeed South African products which could potentially benefit from geographical indication protection. Based on this, recommendations are made for South Africa's position in the debate at multi-lateral level. It is recommended that the South African government take note of the potential of geographical indications to foster rural development and the need to protect our national assets from foreign appropriation. It is further recommended that this be done by firstly coming out in support of the European proposal for a mandatory system of registration for all products bearing a geographical indication and secondly, by providing for the development of an institutional framework within which to protect geographical indications domestically.

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CHAPTER 1

INTRODUCTION

1.1 CONTEXT OF THE STUDY

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 & Kneafsey, 1998). This renewed interest in “authentic”, “traditional”, “wholesome” and “traceable” food results from a range of factors such as increased awareness of food safety, the socio-cultural status of consuming certain foods and renewed interest in and nostalgia of culinary heritage (Ilberry & Kneafsey, 2000).

In Europe, *produits de terroir* (products of local or regional land) enjoy a small, but growing market position when compared with mass-produced agricultural foodstuffs: these products’ share of the total foodstuffs market is 10.6% in France, 10.7% in Italy, 6.7% in Spain and 5.2% in Portugal (Bérard and Marchenay, 1996). The European Regulation 2081/92¹ itself is cognizant of this growing trend as reflected in the following statement from the Preamble:

“[I]t has been observed in recent years that consumers are tending to attach greater importance to the quality of foodstuffs rather than to quantity ... [generating] a growing demand for agricultural products or foodstuffs with an identifiable geographical origin.”

Given the global competitive environment characterized by declining agricultural commodity prices, this trend towards traditional and/or quality products provides producers of origin labelled products² with the opportunity to move away from

1 Council Regulation (EEC) No. 2081/92 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs.

2 The term “origin labelled products” is used to refer to products of origin generally, without specific reference to the terminology encountered under the various enabling agreements and laws.

commodity markets into more lucrative niche markets through differentiation. However, the success of such a marketing strategy depends largely on whether there are measures in place that prevent the production of such a local product from spreading to other countries as this would change the product from niche to commodity status, eroding the premium.

As a result, international rules for the regulation of origin labelled products have become increasingly important in recent years. By including a chapter on geographical indications in the Agreement on Trade Related Aspects of Intellectual Property Rights,³ members of the World Trade Organisation (WTO) members acknowledged geographical indications as a distinct intellectual property right. However, protecting geographical indications as a form of intellectual property has proven controversial.

Since the Berne⁴ and Paris⁵ Convention attempts have been made to harmonize intellectual property protection. These attempts have been accompanied by divisive debates regarding the nature and scope of protection to be granted. Demands for intellectual property protection are often based (implicitly or explicitly) on a theory of natural law or moral right - the idea that intellectual property is owned by the person that creates it and that appropriation from that person without compensation is wrongful. However, the eventual protection of these rights is a product of national policy as opposed to natural law. National policy's desire to protect these abstract rights will be based on the perceived economic impact that protection might have and political pressures both domestically and internationally (D'Amato, 1997). This is clearly reflected in the TRIPS negotiations on geographical indications.

The conclusion of the TRIPS Agreement in 1994 resulted in a historically unprecedented level of protection for geographical indications (Lindquist, 1999). Section 3 of Part II of the TRIPS agreement deals with geographical indications and

³ *Agreement of Trade Related Aspects of Intellectual Property Rights, Apr 15, 1994, Marrakech Agreement Establishing the World Trade Organization [hereinafter TRIPS].*

⁴ *Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886.*

defines them 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” (section 22.1).

The section in TRIPS dealing with geographical indications provides minimum international standards for its protection. The European Union initiated this protection through a draft proposal submitted in 1990 that served as a model for the provisions of section 22-24 (Conrad, 1996).

In short, the TRIPS Agreement requires that WTO Members provide the legal means for interested parties to prevent the use of a geographical indication that (section 22):

- Indicates or suggests that a good originates in a geographical area other than the true place of origin in a manner which misleads the public as to the geographical origin of the good, or
- Constitutes an act of unfair competition.

Furthermore, section 23 provides for a higher minimum level of protection for geographical indications identifying wines and spirits. In terms of this section WTO Members are required to provide the legal means for interested parties to prevent the use of geographical indications even if they do not imply that the wines or spirits originate in a place other than the true place of origin. The protection is thus absolute and prohibits the translation of geographical indications or the attachment of expressions such as “kind”, “type”, “style” or “imitation”. The additional protection for wine and spirits thus means that use of a particular geographical indication is prohibited if the wine or spirits does not originate in that region even though there is no risk of confusion.

The TRIPS negotiations were marked by controversial debate between the European Union and the United States on the fundamentals of geographical indications

⁵ *Paris Convention for the Protection of Industrial Property of March 20, 1883.*

protection. The TRIPS agreement was initiated by the United States, which desired protection for its intellectual property rights abroad. The United States' initiative was supported by Switzerland and the European Union. However, the United States and the European Union disagreed regarding the protection of geographical indications. The United States, Canada, Australia and Japan were strongly opposed to the inclusion of geographical indication protection while the European Union was insistent because it was there where their greatest economic interest lies (Lindquist, 1999).

Fundamentally, the debate revolved around two different approaches to protecting geographical indications. The first method relies on existing intellectual property and competition laws. The United States was of the opinion that geographical indications are sufficiently protected within this framework. The second method for protecting geographical indications is through legislation specifically designed for this purpose. The European Union was of the opinion that geographical indications are not sufficiently protected within existing trademark laws and thus demanded *sui generis* protection in the form of a multilateral register.

This debate posed a serious obstacle to the conclusion of TRIPS. To prevent a deadlock, section 24.1 was included which provided that all unresolved issues surrounding geographical indications were to be negotiated at a later date. This "built-in-agenda" seemed the only way to overcome the deep conflicts on geographical indications (Rangnekar, 2003a).

Two aspects relating to geographical indication protection remain unresolved. The first is the establishment of a multilateral register of geographical indications for wines and spirits. Section 23.4 states that "In order to facilitate the protection of geographical indications for wines, negotiations shall be undertaken in the Council for TRIPS concerning the establishment of a multilateral system of notification and registration of geographical indications for wines eligible for protection in those Members participating in the system." This falls within the negotiating mandate of the TRIPS Council. The negotiations have since been extended to include spirits.

The second issue, which is separate from the work mandated by TRIPS under section 23.4, is the proposed extension of geographical indication protection to products other than wines and spirits. The European Union proposed that the notification and registration process initially only include wines and spirits. However, the European Union also proposed that “once the system is up and running and experience of its use has been accumulated it may then be opportune to consider launching complementary discussions with the objective of extending the multilateral register’s coverage to other goods in stages.”⁶ This issue of demanding extension of the scope of application of section 23 to products other than wines and spirits is widely referred to as “geographical indication-extension” (Rangnekar, 2003a).

Given its vested interest in geographical indications it is not surprising that the EU was first to propose a multilateral system of notification and registration for geographical indications (WTO, 1998). The European Union proposal is voluntary in that there is no obligation on member countries to participate in the process. Members must however, protect geographical indications that are on the register in their domestic markets. This proposal involves extending the European Union’s own system for protecting place names to the global arena through the WTO (Rangnekar, 2003a).

However, the European Union’s proposal has been critiqued in that the TRIPS agreement itself only mandates negotiation for a registration system for wine.⁷ Since section 23.4 falls under section 23 which deals with Additional Protection for Geographical Indications for Wine and Spirits, there exists a clear argument for the inclusion of spirits in the registration system. However, TRIPS never mentions additional protection such as a registration system for other products under section 22.

For those in favour, justification for extension can be found in a particular interpretation of section 24.1, read along with section 24.2. The reasoning is that “provisions of section 24.1 are of general application to all products and the reference

⁶ *Proposal for a Multilateral Register of Geographical Indications for Wines and Spirits Based on Article 23(4) of the TRIPS agreement, WTO Doc. IP/C/W/107, July 28 1998 (hereinafter the EU Proposal).*

⁷ *TRIPS, supra note 1, Art 23.4.*

to section 23 does not relate to products contained therein but to a means of additional protection to be provided” (WTO, 2000). Further, it is explained that a ‘narrow’ reading of section 24.1 as focused on wines and spirits would further aggravate the hierarchy in the levels of protection within section 3. In addition, section 24.2 mandates the Council to review section 3 on geographical indications with a view towards furthering its objectives. With respect to the mandated review, the TRIPS Council reported to the 1996 Ministerial that inputs from delegations on the issue of scope were permitted (WTO, 1996). Those in favour of geographical indication extension have interpreted this as permission to pursue extension (Rangnekar, 2003a).

In essence those in favour of extension propose⁸ that the following guidelines for the negotiations on 'extension' be adopted:

- The protection of section 23 of the TRIPS Agreement shall apply to geographical indications for all products;
- The exceptions contained in section 24 of the TRIPS Agreement shall apply *mutatis mutandis*;
- The multilateral register to be established shall be open for geographical indications of all products.

However, as mentioned above a nation’s desire to protect intellectual property rights (and therefore geographical indications) is a function of national policy, the perceived economic impact and political considerations. The geographical indications debate should therefore be interpreted against the political backdrop of trade negotiations.

In this regard the hierarchy in protection created by section 23 can be seen as the result of a particular negotiating history indicating the political reality of multilateral negotiations. Geographical indication protection for wines and spirits was strengthened in the Uruguay Round of trade negotiations primarily at the request of

⁸ *Communications IP/C/W/247/Rev.1 and IP/C/W/308/Rev.1*

European wine-producing Members, specifically France and Italy, in exchange for accepting reductions in export and production subsidies. The special treatment for geographical indications on wines and spirits was given only as a concession in exchange for reductions in subsidies on the part of the European Union. This view is articulated in the following quote (Rangnekar, 2003a):

“This compromise [i.e. section 23], sought by several wine-producing countries, particularly the EC, represented a significant concession by a number of Members, among them other wine-producing Members, that did not see the need to create an imbalance in geographical indication protection by conferring increased protection on wine and spirit geographical indications..”⁹

Also (Rangnekar, 2003a):

“If the extension discussion were purely one of intellectual property policy, it would make sense to treat all products in the same manner legally. However, we note that the WTO TRIPS Council discussions take place in the context of trade policy and the additional protection provided geographical indications for wines and spirits resulted from the Uruguay Round of multilateral trade negotiations.”¹⁰

Rangnekar (2003a) speaks of a negotiating “balance” achieved during the Uruguay round in that the different levels of protection within section three are the result of a specific political and trade balance negotiated during the Uruguay Round. This trade-off between reduced subsidies in exchange for increased geographical indication protection is clearly noticeable from TRIPS Council meetings where geographical indication extension has been discussed with repeated references to issues concerning liberalizing agriculture (i.e. reforming CAP). According to (Rangnekar, 2003a) it is evident from this that the European Union is conceding to review the CAP (reduce their agricultural subsidies) in exchange for enhanced geographical indication protection.

⁹ *IP/C/W/289, paragraph 9.*

¹⁰ *IP/C/W/386, paragraph 3.*

This trade-off should be seen in the context of recent reforms to the CAP. The aim of the CAP is to provide farmers with a reasonable standard of living and consumers with quality food at fair prices. Increasing international pressure has necessitated a move away from direct price supports. As a result the CAP is moving from a quantity (due to the subsidies) to a quality based approach which is better directed at market needs. The legal protection of geographical indications in the form of Council Regulation No. 2081/92 is one mainstay of this “new” European quality policy (Thiedig and Sylvander, 2000). In enacting EU Regulation 2081/92, the European Union had the following in mind:

“As part of the adjustment of the CAP, the diversification of agricultural production should be encouraged so as to achieve a better balance between supply and demand on the markets; the promotion of the products having certain characteristics could be of considerable benefit to the rural economy, in particular to the less favoured or remote areas, by improving the incomes of farmers and by retaining the rural population in these areas.”¹¹

1.2 PROBLEM STATEMENT

This objective in enacting EU Regulation 2081/92 reflects the fact that rural development has progressively become one of the major objectives of European Union policy. In this regard both widespread literature and the policies adopted by the European Union stress the importance of supporting typical products to attain this objective (Pacciani *et al*, 2001). World wide, rural communities 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 (World Bank, 2004). However, the market does not necessarily reward the value added to these traditional products and when it does the added value does not necessarily accrue to the producers. According to a report by the World Bank (2004) the reasons for this are diverse but are often due to a lack of a well defined and

¹¹ *Council Regulation No: 2081/92 on the Protection of Geographical Indications and Designations of Origin for Agricultural Products and Foodstuffs.*

recognized characterization of the product or to a lack of regulations and enforcement mechanisms.

As distinctive signs for agro-food products with specific quality, geographical indications provide an institutional tool through which to address these problems and consequently promote rural development. Identifying noteworthy products and contributing to their recognition and economic valorisation¹² means encouraging production and marketing methods that are socially fair, economically viable and respectful of the environment and that also embody cultural values (World Bank, 2004).

A series of comparative studies confirms the positive impact of geographical indications on (i) prices to producers and related farm profitability, (ii) protection of the environment and (iii) local employment generation (World Bank, 2004). This enforces the potential of geographical indications to allow small producers to benefit from market opportunities by adding value to their products and gaining market share, not only in local markets but also in export markets, thereby providing them with the opportunity to improve their living conditions. By increasing the value of the natural resource, indirect goals such as the preservation of biodiversity and traditional knowledge is also achieved.

However, in contrast to the European Union, developing countries have been remarkably slow to recognize the potential of geographical indications as a tool to promote development through trade. Not only does this mean that a useful tool for increasing rural incomes is not being utilized but it also poses the threat that these countries stand to lose valuable intellectual property in place names and the opportunity to protect traditional knowledge and local biodiversity. Various initiatives have consequently been launched by European institutions as well as the World Bank to promote this concept in the developing world (e.g. The Siner-Gi Project).

¹² “Valorisation” in the context of this study should be understood as the process whereby value is added to a product.

Unlike other traditional intellectual property rights which have been criticized as only benefiting the developed world geographical indications may actually favour developing countries. Geographical indications differ from other forms of intellectual property like patents (World Bank, 2004). They are not newly created, but only recognized, which means that investments are related only to building a reputation for an existing product whereas patents and copyrights relate to creating products in the first place. They are held in perpetuity with no time limit as long as local knowledge is sustained and the indication is prevented from being generic. They are furthermore owned by the State and do not require large investments. As such even subsistence communities with limited access to capital and technology can promote their traditional products and know-how. Furthermore, geographical indications have features that require norms for use and management of bio-resources and traditional knowledge, including norms for variety or species used, allowable yield and production and processing methods (Downes & Laird, 1999). Finally, considering that the majority of geographical indications relate to agricultural products, this intellectual property right should theoretically favour developing countries with an agricultural based economy.

Despite this and until now, for cultural and educational reasons, protection of geographical indications seems to have favoured some European countries. Developing countries continue to disagree amongst themselves regarding the need for protecting geographical indications and the benefits that may be derived from it. South Africa for one has failed to take a position on the matter in negotiations at multilateral level. Given that negotiations taking place over the next few years within the WTO will largely determine the future legal interpretation and global scope of geographical indications (Barham, 2003), there is a need for South Africa and developing countries in general, to learn more about the characteristics of this intellectual property right and how these characteristics could potentially enhance rural development policies. It is therefore envisaged that a study exploring the attributes of and conditions for the protection of geographical indications would contribute to informed decision making at policy level.

1.3 HYPOTHESIS

It is hypothesized that developing countries in general and South Africa in particular can benefit from geographical indication protection. In this regard it is argued that South Africa should join sides with those countries propagating stronger protection for geographical indications in order to protect intellectual property in South African place names as well as enhance rural development policies by providing a tool through which rural livelihoods can be improved.

In line with this general hypothesis the study also tests the hypothesis that South Africa possesses a number of agricultural products and indigenous biological resources that could benefit from geographical indication protection by protecting valuable intellectual property as well as preserving potential price premiums which may have important development implications.

1.4 OBJECTIVES

The study's general objective is to provide an analysis of geographical indications as an intellectual property right that can address developing countries' concerns, thereby contributing to improved decision making at policy level.

More specifically the objective is to:

- Explore the characteristics of geographical indications and how these characteristics enable this intellectual property right to address developing countries' concerns.
- Establish the potential of geographical indications in a South African context.
- Make recommendations for South Africa's, and developing countries' in general, position in the debate at multilateral level.

In pursuit of these objectives the following research questions will be addressed:

- What is the nature of geographical indication protection and how is this intellectual property right protected?
- What is the economic rationale for protecting geographical indications?
- How do geographical indications contribute to rural development and the preservation of traditional knowledge?
- What are the conditions that need to be present for a product to benefit from geographical indication protection?
- Are there existing products in South Africa which could potentially benefit from geographical indication protection?

1.5 RESEARCH APPROACH

This study is explorative rather than definitive in nature. The methodology for this study therefore places emphasis on qualitative analysis. Although in essence an economic analysis, the very nature of the study necessitates an investigation into the juristic nature of the subject matter. The study is therefore based on an identification and analysis of the fundamental economic and legal processes involved with protecting geographical indications. Establishing the impact of this legal-economic nexus is imperative to addressing the research objective. The divergent issues associated with the research problem necessitate an extensive literature review from various fields of the social sciences. Various economic theories are employed during the analysis based on their ability to address certain aspects of the discussion. The approach is therefore multidisciplinary encompassing various elements from both economic and legal theory. The discussion is enriched with case studies which enhance the relevance of the subject matter in a South African context. This aspect of the study is intended to test the applicability of geographical indications in the South

African context as well as highlight the complexities of establishing a geographical indication, and does not provide an in depth analysis of the products in question.

1.6 CHAPTER OUTLINE

The study commences in chapter two with an attempt to contextualize the concept of geographical indications. This is approached by defining the terminology used followed by an exposition of the legislative framework within which geographical indications operate at International, Community and National level.

In chapter three the economic rationale for protecting geographical indications is explored in order to establish a basic understanding of the economics behind geographical indication protection and to illustrate what economic benefits countries, with specific emphasis on developing countries, can expect to derive from geographical indication protection.

Following this, chapter four sets out to identify the conditions which enable a product to benefit from geographical indication protection. It concludes with a list of criteria which allows an *ex ante* judgement of the potential of a product to benefit from geographical indication protection. It is envisaged that such a list could be particularly useful to developing countries in identifying products within their borders that could potentially benefit from geographical indication protection.

In chapter five a case study approach is followed and three South African products identified and their potential to benefit from geographical indication protection discussed, based on the factors identified in chapter four. The choice of case studies was based on their apparent potential as geographical indications providing both a negative and positive findings in order to better illustrate the interaction of the factors identified in chapter four.

In the final chapter the research problem is revisited and the hypothesis concluded. This is followed by recommendations for South Africa's position in the debate at multilateral level as well as guidelines and *caveats* in dealing with geographical

indications in developing countries in general. Finally, areas for further research are identified.

CHAPTER 2

CONTEXTUALIZING GEOGRAPHICAL INDICATIONS

2.1 INTRODUCTION

Internationally, geographical indications as a form of intellectual property are defined by a wide range of terminology. As such, the purpose of this chapter is to elucidate the terminology encountered in the context of protecting geographical indications. It will start out by defining the different concepts used. The terms “indication of source”, “geographical indication” and “appellation of origin” are used in different international legal instruments. Rights and obligations flowing from these instruments exist only in relation to the category of geographical indication to which the instrument in question refers (WIPO, 2002). Given this, an attempt to define geographical indications necessarily includes a discussion of the different regulations and agreements in place for its protection. The chapter thus proceeds to contextualize geographical indications by discussing the legislative framework within which geographical indications operate. A three tiered approach is followed, discussing the protection of geographical indications at International, Community and National level. The latter is included in order to illustrate the current level of protection enjoyed by geographical indications domestically.

2.2 DEFINING GEOGRAPHICAL INDICATIONS

Unlike other categories of intellectual property rights such as patents and trademarks, there is no general definition accepted worldwide for geographical indications (Escudero, 2001):

“With the exception of design law, there is probably no category of intellectual property law where there exists such a variety of concepts of protection as in the field of geographical indications. This is maybe best demonstrated by the term ‘geographical indication’ itself, which is relatively new and appeared only recently in international negotiations.”

This section will attempt to clarify the terminology used by looking at the different types of geographical indications recognized by legal doctrine and the various characteristics of each.

2.2.1 Indications of source

The term indication of source is used in both the Paris Convention for the Protection of Industrial Property of 1883 (section 1.2 and section 10) and the Madrid Agreement for the Repression of False and Deceptive Indications of Source on Goods of 1891 (section 1). Although these treaties do not define “indication of source”, the Madrid Agreement contains language which clarifies what is meant by the term (WIPO, 2002):

“All goods bearing a false or deceptive indication by which one of the countries to which this Agreement applies, or a place situated therein, is directly or indirectly indicated as being the country or place of origin shall be seized on importation into any of the said countries.”

Consequently an indication of source can be defined as (Baeumer, 1999):

“An indication referring to a country or to a place situated therein as being the country or place of origin of a product.”

There are three key components to this concept (Rangnekar, 2003a):

- There is a clear link between the indication and geographical origin;
- Unlike other indications of geographical origin, there is no requirement for distinguishing qualities or attributes of the good;
- The protected indication can be constituted by words or phrases that directly indicate geographical origin or phrases, symbols or iconic emblems associated with the area of geographical origin.

An indication of source is distinguished from a geographical indication in that its definition does not imply any special quality, reputation or characteristic that is attributable to its geographical origin. As such, an indication of source is dependant only on the product's geographical origin and not necessarily its inherent qualities.

2.2.2 Geographical indications

Part two (section three) of the TRIPS Agreement deals with the protection of “geographical indications”. The concept is defined as (section 22.1):

“Indications which identify a good as originating in the territory of a Member [of the WTO], or region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographic origin.”

Three conditions must be met (Rangnekar, 2003a):

- The indication must necessarily identify a good and can be non-geographical names, iconic symbols, words or phrases;
- The good must necessarily possess “given quality”, “reputation” or “other characteristics” that are “essentially attributed” to the designated geographical area of origin;
- The designated geographical area must be identified by the indication.

The definition is apparently based on the definition of appellation of origin in the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration of 1958 (section 2) (WIPO, 2002). It differs, however, in that TRIPS defines geographical indications as “indications which identify a good” (section 22.1) whereas the Lisbon Agreement defines appellations of origin as “the geographical name of a country, region, or locality, which serves to designate a product [...]” (Section 2). Therefore, signs other than geographical names, for example a non-geographical name or an emblem, would not be covered by section two of the Lisbon

Agreement. They would however, fall into the category of signs that could constitute geographical indications under the TRIPS Agreement.

Furthermore, the Lisbon Agreement requires that the “quality and the characteristics” of the product in question be due exclusively, or essentially, to the geographical environment, including natural and human factors. The TRIPS Agreement covers goods which have a given “quality, reputation or other characteristic” that is essentially attributable to their geographical origin. Under the TRIPS agreement, “quality”, “reputation” or “other characteristic” are thus each in own right a sufficient condition, *ceteris paribus*, for the grant of a geographical indication (Rangnekar, 2003a). Consequently, goods which merely have a certain reputation, but not a specific quality being due to their place of origin, will be protected under the TRIPS agreement although they fall outside the ambit of appellation of origin.

2.2.3 Appellations of origin

The term appellation of origin is mentioned in the Paris Convention (section 1.2) and defined in the Lisbon Agreement as follows (section 2.1):

“Appellation of origin means the geographical name of a country, region or locality which serves to designate a product originating therein, the quality and characteristics of which are due exclusively or essentially to the geographical environment, including natural and human factors.”

The key components to this concept are (Rangnekar, 2003a):

- Appellations must be direct geographical names;
- The appellation must serve as a designation of geographical origin of the product;
- Quality and characteristics exhibited by the product must be essentially attributable to the designated area of geographical origin.

Appellations of origin can thus be regarded as a special type of indication of source in that they not only convey the geographical source of a product but make a direct link between a product's quality and its geographical origin. Table 2.1 provides a useful summary of the differences between appellations of origin and geographical indications:

Table 2.1: Comparison between appellations of origin and geographical indications.

Appellations of origin (as defined in the Lisbon agreement)	Geographical Indications (as defined in the TRIPS agreement)
AOs are necessarily <i>geographical names</i> of a country, region or locality, such as Tequila, Porto, Jerez.	GIs can be any <i>indication</i> pointing to a given country, region or locality and could therefore include symbols.
AO <i>designates</i> a product. The product's name is the same as the AO. For instance, "Champagne", "Bordeaux", etc.	GI <i>identifies</i> a good. That means that a GI could be any expression -not necessarily the name of the place where the product originated- that could serve the purpose of identifying a given geographical place. For instance the French flag for identifying wines of certain quality or reputation.
To qualify as an AO both the quality <i>and</i> characteristics of a product must be attributable to its geographical origin.	The quality, characteristics <i>or</i> reputation of a product that is attributable to its geographical origin is each in own right a sufficient condition for the existence of a GI.
Mere <i>reputation</i> is not sufficient to qualify as an AO.	It is possible to qualify as a GI if a product has a certain <i>reputation</i> essentially attributable to its geographical origin.
AO specifically refers to the <i>geographical environment</i> where the product comes from, including natural and human factors.	GIs only refer to geographical origin in general.

Source: Adapted from Escudero (2001).

From the above discussion it is clear that indication of source is the broadest term. It includes both geographical indications and appellations of origin. In turn, geographical indications are more broadly defined than appellations of origin. Thus all appellations of origin are geographical indications but some geographical

indications are not appellations of origin. This can be presented diagrammatically as follows:

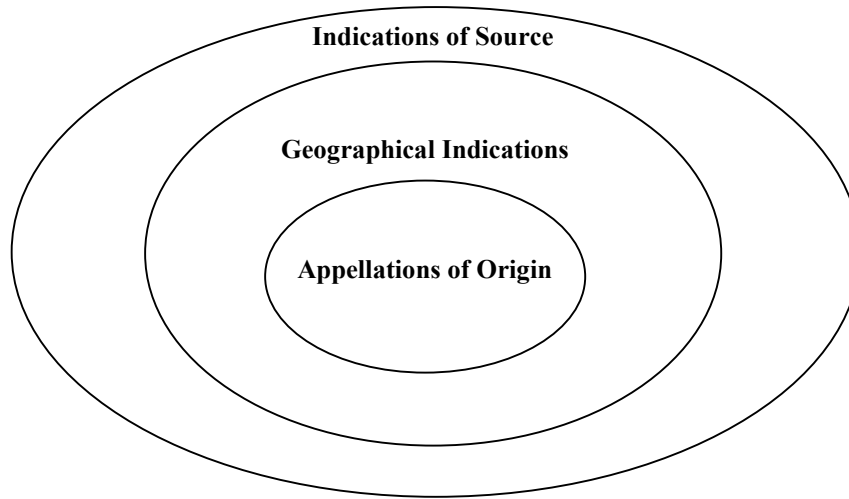


Figure 2.1: Schematic presentation of the relationship between appellations of origin, geographical indications and indications of source

For purposes of this study the term geographical indication will be used in the broad sense. However, it is emphasised that different terminology is used in the different international legal instruments and that the rights and obligations flowing from these instruments exist only in relation to the category of geographical indication to which the instrument in question refers. It will therefore sometimes be necessary to make a distinction in the context of the regulation or agreement under consideration (WIPO, 2002).

2.3 LEGISLATIVE FRAMEWORK¹³ WITHIN WHICH GEOGRAPHICAL INDICATIONS OPERATE

2.3.1 Protection at International level

International protection for geographical indications consists in principle of four multilateral agreements, each with a varying member base. These international agreements do not have a uniform approach to geographical indication protection as some protect against confusing or misleading use and others have established a system of proprietary rights. They are discussed here in chronological order in a timeframe before 1994 and thereafter.

2.3.1.1 Prior to 1994

Paris Convention

The beginning of international protection of geographical indications dates back to the conclusion of the Paris Convention for the Protection of Industrial Property in 1883 (Paris Convention), which included as an object of protection “indications of source” or “appellations of origin” (Conrad, 1996). Although this ensured that the principle of national treatment specified in section 2 of the Convention would apply to geographical indications (Bodenhausen, 1968), protection for geographical indications under the Convention is very limited.

The Convention originally provided a qualified prohibition on false indications of origin only in cases where the false indication of origin was joined with a fictitious trade name or was used with fraudulent intent. This requirement of fraudulent intent was attacked as being too narrow and at the 1958 Lisbon Revision Conference it was proposed that section 10 prohibit importation of “any product which bears directly or indirectly a false or misleading indication of origin...” The proposal was rejected due to an objection by South Africa that the term “misleading” was vague and uncertain as it would have to be interpreted by the courts of each nation (Bendekgey & Mead,

¹³ *The phrase “legislative framework” is used here in the broad sense in that it is not limited to legislation but includes all legal instruments through which*

1992). However, the prohibition was expanded to the present provisions of section 10 which requires the seizure or prohibition of importation of goods “in cases of direct or indirect use of a false indication of the source of the goods or the identity of the producer, manufacturer or merchant.” Fraudulent intent is thus not presently required in terms of section 10. Also, at the 1958 conference, a new section 10 *bis* was proposed which included a prohibition against:

“[I]ndications or allegations, the use of which in the course of trade is liable to mislead the public as to the nature, the origin, the manufacturing process, the characteristics, the suitability for their purpose or the quantity of the goods.”

The United States vetoed the word “origin” and it was accordingly struck out and the proposal passed to become paragraph 3.3 of section 10 *bis*. As presently worded, the Paris Convention thus requires each signatory nation to prohibit the importation of goods which bear a false indication of source. The present prohibition in section 10 *bis* of “liable to mislead” indications does not apply to misleading geographical indications. As such, the Convention does not provide protection in cases where the indication is used in translated form or accompanied by terms such as “kind”, “type”, or when it is deceptive, *i.e.* likely to mislead the consumer (OECD, 2000). The Paris Convention thus only prohibits the importation of goods containing false geographical indications but is not applicable to indications that are merely misleading (Conrad, 1996). Consequently, the importation of goods marked with a geographic indication that might be liable to mislead without rising to the level of being false, need not be protected by the Paris Convention (Benson, 1978). The decision when a representation is false is left to the Member country (OECD, 2000). Sanctions provided for include seizure upon importation, prohibition of importation or seizure within the country (section 9). This seizure shall take place at the request of the public prosecutor, or any other competent authority or interested party (WIPO, 2002). Originally signed by eleven countries, the Convention now has 169 Members.

The Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods

The unwillingness of a number of countries to strengthen the prohibition in the Paris Convention resulted in the conclusion of the Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods (Madrid Agreement) in 1891. This was facilitated by the Paris Convention expressly reserving for Members of the Paris Union the right to make special agreements among themselves for the protection of industrial property (section 19). The proposal for the Madrid Agreement was submitted at the Madrid Revision Conference of the Paris Convention of 1890 on behalf of those countries which had expressed dissatisfaction with the then narrow protection afforded indications of origin by the Paris Convention. The Madrid Agreement provides that (section 1.1):

“All goods bearing a false or misleading indication, by which one of the countries to which this Agreement applies, or a place situated therein, is directly or indirectly indicated as being the country or place of origin, shall be seized on importation into any of the said countries.”

While the mechanisms for enforcement were basically those as provided for in section 9 of the Paris Convention, the Madrid Agreement goes beyond the Paris Convention in that its provisions are not restricted to false indications but also included misleading indications (WIPO, 2002). Also, while indications are excluded from the Madrid Agreement that in the domestic context are deemed descriptive or generic, no such exclusion was to be applied to appellations of wine and wine-related products. In this regard, section 4 prohibits national courts from considering geographical indications of wines as generic. The difference is important because it demonstrates how the Madrid Agreement serves as a link between the Paris Convention, which recognizes geographical indications without proprietary protection, and the Lisbon Agreement¹⁴, that is solely based on the concept of proprietary rights for appellations of origin (Heath, 2002).

¹⁴ See discussion under section 2.3.1.1.

In essence, the Agreement thus exceeds protection under the Paris Convention in three respects (Conrad, 1996):

- It extends protection to misleading geographical indications;
- Section 3*bis* prohibits the use of false representations on the product itself and in advertising or other forms of public announcements;
- Section 4 prohibits Member countries from treating geographical indications of wines as generic terms.

The Madrid Union, as it became known, did, however, not receive much support. The main source of criticism against the Madrid Agreement is its approach towards appellations that have become generic (Bendekgey & Mead, 1992). Under its provisions each country can decide whether appellations have become generic except for products of the vine (section 4):

“The Tribunals of each country shall decide what appellations, on account of their generic character, do not fall within the provisions of this agreement, regional appellations concerning the source of products of the vine being, however, excluded from the reserve specified by this article.”

According to Mcharthy and Devitt (1979) this explains the United States’ reluctance to join the Madrid Agreement, since many foreign appellations have become generic in the United States for a wide variety of wines. In contrast, the Agreement was based on a French proposal clearly reflecting their vested interests. Fear that strengthening section 10 of the Paris Convention might cause other countries to renounce the Madrid Agreement with its higher protection for geographical indications of wine explains French opposition to the revision of the Paris Convention to include appellations of origin. It has been said that the Madrid Agreement is of minor importance except for certain regional wine appellations (Benson, 1978). Initially signed by eight countries, it now has 34 Members.

The Lisbon Agreement for the Protection of Appellations of Origin and their International Registration

In a further attempt to improve the international protection of geographical indications within the framework of the Paris Convention and the Madrid Agreement, the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration (Lisbon Agreement) was concluded in 1958. The Agreement was proposed at the time of the Lisbon Revision Conference of the Paris Convention in 1958 and provides for an international system of registration and protection of appellations of origin not unlike the one adopted by the Madrid Agreement on the International Protection of Trade Marks. It has been referred to as a radical departure from both the Paris Convention and the Madrid Agreement in that it is not restricted to border measures (Benson, 1978) but also includes the adoption of a registration system comparable to that for trademarks created under the Madrid Agreement on the International Protection of Trade Marks. The Lisbon Agreement pertains only to appellations of origin as defined in section 2.1:

“the geographical name of a country, region or locality which serves to designate a product originating therein, the quality characteristics of which are due exclusively or essentially to the geographical environment, including natural and human factors.”

This definition is based on the French “*appellation d’origine*” and as such restricts protection to indications of which the quality and characteristics are “exclusively or essentially due to the geographical environment, including natural and human factors” (Conrad, 1996). There are two basic requirements for an appellation to be protected under this Agreement: (1) the appellation should be protected in its country of origin and (2) the appellation should be registered in the International Register of WIPO (Escudero, 2001).

Member countries have limited discretion to deny protection of a valid registration. Following the receipt of a notification of registration, a Member State is given a period of one year to object to its registration (WIPO, 2002). If no objection is raised the State is obliged to protect the appellation which was the subject of the notification for as long as it is protected in its country of origin. The implication is that it only

applies to appellations of origin that are already protected at national level in the country of origin (Conrad, 1996). It is thus the courts in the country of origin that determine whether an appellation qualify for protection. The courts in the country where protection is sought have no jurisdiction over whether the indication may be protected. This is in contrast to the position under the Madrid Agreement where protection against false or misleading indications is a domestic matter that has to be decided not upon protection in the country of origin, but the country of importation, use or sale.

The Lisbon Agreement allows Member countries to adopt any registration procedure, be it judicial or administrative. Once registered, a geographical indication is protected in other Member countries “in accordance with this Agreement” (section 1). International registration is valid for as long as the appellation remains protected in its country of origin. There is no requirement for renewal of international registration (Escudero, 2001).

The Agreement prohibits use of an appellation even if the true origin of the product is indicated or if the appellation is used in conjunction with terms such as “type” or “style” (Mcharthy & Devitt, 1979). Also, no geographical indication can be deemed generic in any other country as long as it is protected in its country of origin (section 6). This Agreement thus achieves absolute protection for appellations of origin, regardless of whether another’s use is liable to mislead or not. The only issue is whether there was in fact use of the registered appellation by someone unauthorized to use it (Benson, 1978).

The system is notable insofar as it has been used both for European legislation protecting geographical indications in general and those for wines in particular and also because bilateral agreements¹⁵ on the protection of geographical indications follow the same pattern. Its main shortcoming is however, its small membership base with only 23 members by 2005. Conrad (1996) highlights two critical points that have prevented nations from joining. The first point is that protection is granted only if the geographical indication is protected in the country of origin as such. As a result,

¹⁵ *For example the EU/SA Wine and Spirits Agreement.*

protection through the law of unfair competition or the law of advertising is not recognized. Consequently, a number of States would have to transform their system of protection in order to be compatible with the provisions of the Lisbon Agreement. The second point is that the Agreement does not make exceptions for terms that have already become generic in some Member countries.

In summary, protection under these international conventions results in three concentric groups of states (adapted from Conrad, 1996):

- A small number of members of the Lisbon Agreement with strict protection under an international register of geographical indications;
- A larger number of member states of the Madrid Agreement with the scope of protection mainly circumscribed to border measures and to prevent the dilution of geographical indications into generic terms;
- An even larger number of member states of the Paris Convention with protection limited to border measures for false indications.

2.3.1.2 After 1994

The agreements discussed above have only a limited number of members that varies from one agreement to another. In addition, no provision is made for a dispute settlement mechanism. Consequently these agreements do not afford significant protection to geographical indications. The Uruguay Round of the General Agreement on Tariffs and Trade (GATT) provided an opportunity to include geographical indications in an international agreement that would guarantee protection in all WTO Member countries.

The conclusion of a separate agreement for intellectual property within the WTO framework was initiated by the United States who desired protection for its intellectual property rights abroad. However, given that little stood to be gained by United States industry from the protection of geographical indications it showed little interest in including geographical indications within the TRIPS provisions (Heath,

2002). As such, it was mainly the European Union and Switzerland who pushed for the topic to be placed on the agenda of the TRIPS negotiations (Conrad, 1996). A draft agreement was presented by the European Union, which would form the foundation for the provisions on geographical indications. The following section will discuss the most important changes TRIPS brought about in the field of international protection for geographical indications.

TRIPS Agreement

Part two (section 3) of the TRIPS agreement deals with the provisions relating to geographical indications. Geographical indications are defined as:

“ indications that 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 characteristics of the good is essentially attributable to its geographical origin.”

According to Spivey (1997) this definition subsumes both the concept “indications of source” (denoting the origin of a product) and “appellations of origin” (which assumes that a product has certain characteristics associated with its place of origin). The result of the inclusion of this definition is that Member countries are obliged to respect and protect names falling within its ambit at national level according to the requirements set out in sections 22, 23 and 24 (OECD, 2002). Table 2.2 provides a layout of these provisions followed by a short discussion on each.

Table 2.2: An outline of the TRIPS provisions relating to geographical indications

Field	Section 22	Section 23	Section 24
Definition of subject matter	Section 22.1: defines the concept “geographical indication”	-	-
Basic Protection	Section 22.2-22.4: sets out the general standard of protection that applies to all products.	-	-

Additional Protection	-	Section 23: Sets out the additional protection available to geographical indications of wine and spirits products.	-
Exceptions	-	-	Section 24.3-24.9: Provides for exceptions to obligations.
Further negotiations	-	-	Section 24.1-24.2: Outlines provisions for future negotiations.

Source: Adapted from Rangnekar (2003a).

Section 22

After defining geographical indications, section 22 continues to state that:

“Members shall provide the legal means for interested parties to prevent (a) [...] the use of any means [...] which misleads the public as to the geographical origin of the good [...] or (b) any use which constitutes an act of unfair competition [...].”

Section 22 pertains to the general level of protection afforded all agricultural products and goods. Protection under this section is non-proprietary with section 22.2.a aimed at consumer protection and section 22.2.b aimed at protecting producers. Two requirements must be met in order to constitute a violation (Conrad, 1996). Firstly, there needs to be a geographically descriptive indication on a good and secondly, this representation should be false or misleading. Under this section, use of a geographical indication is thus permissible as long as the true origin of the product is indicated or if used in conjunction with words such as “type” and “like.” The only requirement is that such use must not be “misleading” and should not constitute an “act of unfair competition” (Conrad, 1996). Under this section, whether a name is misleading or not, is judged according to the perception of the general public in the country where protection is sought (Conrad, 1996). This means that if the public in the country where protection is sought regards a geographical indication as generic (i.e. indicative of a product not a place) there can be no question of misconception. Use of such

indication would thus not be considered misleading under section 22 and would consequently not be prohibited. As long as public perception of a name is determinative for protection, foreign products are likely to be protected to a lesser degree than domestic products. In this respect, protection follows the system introduced by the Madrid Agreement.

Section 22.2 is supplemented by section 22.3 and 22.4. Section 22.3 makes provision for the refusal or invalidation of trademarks which contain or consist of a geographical indication if the use of the geographical indication in the trademark misleads the public as to the true place of origin of the product. Section 22.4 stipulates that the protection under Section 22.1 to 22.3 must also be made available in respect of the use of deceptive geographical indications i.e. geographical indications that are literally true, although they falsely represent to the public that the goods on which they are used originate in a different territory (WIPO, 2002).

Section 23

Section 23 provides additional protection for geographical indications of wine and spirits in cases where they are used to identify wine and spirits not originating in the place indicated by the geographical indication. This hierarchical nature of protection is the most prominent feature of the TRIPS provisions relating to geographical indications.

Section 23 stipulates that:

“Each Member shall provide the legal means for interested parties to prevent use of a geographical indication identifying wines for wines not originating in the place indicated by the geographical indication in question [...] even where the true origin of the goods is indicated or the geographical indication is used in translation or accompanied by expressions such as ‘kind’, ‘type’, ‘style’, ‘imitation’ or the like.”

The protection afforded under section 23 is thus independent from any requirement of deception or unfair competition and more comprehensive than under section 22, as use of a geographical indication for wine or spirits is prohibited regardless of whether

the true origin is indicated or whether it is used in conjunction with words such as “kind” and “type” (Rangnekar, 2003a). It seems that this section’s *raison d’être* lies in the prevention of the degeneration of geographical indications into generic terms. Although section 23 cannot claim back terms that have already become generic, it seems to implement a fairly effective method for preventing further geographical indications from becoming generic terms (Conrad, 1996).

In addition, section 23.2 provides for the refusal or invalidation of trademarks that contain or consist of geographical indications for wine and spirits on wine and spirits products not originating from the indicated origin (WIPO, 2002). Other than under section 22, this protection is available regardless of whether the public is misled. Both section 22 and 23 should be read together with the exceptions provided for in section 24. The TRIPS agreement allows each Member to determine how it will incorporate the provisions of the Agreement into their legal framework (section 1.1). It is thus possible for countries to apply their own national regimes in order to comply with the provisions of TRIPS (Conrad, 1996).

Section 24

Section 24 is partly the result of a failure to reach agreement on the method and level of protection of geographical indications at the time when Part two (section three) was negotiated. It contains a number of exceptions to the obligations under section 22 and 23 which can be broadly divided into three categories, namely continued and similar use of geographical indications for wine and spirits, prior good faith trademark rights and generic designations (WIPO, 2002).

Since the negotiations were deeply contested, the only way forward was to agree on a built-in-agenda for future negotiations (Watal, 2001). The first provision for further negotiations can be found under section 23.4 in terms of which Members have to agree to engage in negotiations to establish an international register for notification and registration for geographical indications for wines and spirits (Rangnekar, 2003a). Notably, the obligation is for negotiations and not to establish a system of notification and registration (Gervais, 1998). In this regard, the European Union has tabled a proposal based on a register for geographical indications administered by the WTO

Secretariat. Member states would be responsible for supplying geographical indications to the Secretariat, and protection would become automatic in other Member states unless objections were raised within one year. The procedure thereby closely resembles the one under the Lisbon Agreement (Heath, 2002).

Proposals tabled by the United States and Japan also calls for an international register, yet without any binding effect on WTO Member states (Heath, 2002). In terms of this proposal Member countries will agree to refer to the WTO's register but the denominations in the register will not be binding on the domestic producers. Significantly, any action based on the misuse of a geographical indication will be instituted under the national regulations for intellectual property infringement in the offender's country and not before the WTO¹⁶. The United States thus responded to the European Union's proposal with a proposal founded on the law of trademarks, the United States' system of protection.

Furthermore, section 24.1 obliges Members to enter into negotiations aimed at increasing the protection of geographical indications under section 23. Although section 23 deals only with wine and spirits products, some countries have noted that to limit the mandate for further negotiations under section 24.1 to wine and spirits products would be "narrow" and "legalistic" and that it should instead be read as a reference to the means of protection and not the category of goods (Rangnekar, 2003a). This interpretation has been contested within the TRIPS Council and the issue remains unresolved (Rangnekar, 2003a).

In conclusion, TRIPS's contribution to the international protection of geographical indications can be summarized as follows (adapted from Conrad, 1996):

- The provisions relating to enforcement promise that protection will be more effective than under any of the previous agreements;

¹⁶ *WTO Document MTN.GNG/NG11/W/70.*

- Although border measures are familiar from the Paris Convention, Madrid Agreement and Lisbon Agreement, the inclusion of substantive measures and the opportunity for each Member to police other Member's national laws to the extent provided by TRIPS is completely new;
- The number of Member States is far greater than that of any previous agreement on the protection of geographical indications.

2.3.2 Protection at Community¹⁷ level

The most comprehensive protection for geographical indications at regional level is found in the European Union. Prior to implementation of the current European system, Southern and Northern European countries followed a distinctly different approach to protecting geographical indications. Northern European countries based their protection on unfair competition laws while Southern European countries followed the Romanistic system of registration. The current European Union system for protecting geographical indications is based on the Southern approach and is mainly derived from the French system (Conrad, 1996). Thiedig & Sylvander (2000) consequently remark that the current European Union system for protecting geographical indications essentially pushes Northern European countries into a Romanistic system.

Although a number of directives and regulations deal either directly or indirectly with the protection of geographical indications in the European Union, two regulations serve as the mainstay of protection. The first is Council Regulation (EEC) No 2081/92 (EU Regulation 2081/92) which recognizes and sets out a protection procedure for protected geographical indications (PGI) and protected designation of origin (PDO) (Tinlot & Juban, 1998) and the second is Council Regulation (EEC) No 2082/92 dealing with products of specific character. Given its relevance for purposes

¹⁷ *Community is used here to refer to protection granted to geographical indications in the European Union.*

of this study and the inevitable time and space constraints this section will limit itself to a discussion of EU Regulation No 2081/92.

Scope

The Regulation applies to agricultural products and foodstuffs as specified in the Regulation, notably excluding wine and spirits.

Definitions

In terms of section 2, a distinction is made between protected designation of origin (PDO) and protected geographical indications (PGI). PDO is defined as (section 2.2.a):

“the name of a region, specific place or country describing a product originating in that region, specific place or country and the quality or characteristics of which are essentially or exclusively due to a particular geographical environment with its inherent natural and human factors and the production and processing and preparation of which take place in the defined geographical area.”

PGI is defined as (section 2.2.b):

“the name of a region, specific place or country referring to a product originating in that region, specific place or country and which possesses a specific quality, reputation or characteristics attributable to that geographical origin and the production and/or processing and/or preparation of which takes place in the defined geographical area.”

The fundamental difference between PDO and PGI is thus that the geographical link must be established in all stages of production, processing and preparation for the first and in at least one for the latter (Ilbery and Kneafsey, 2000). The European Union thus protects two denominations, which relate to two different levels of link between product and geographical origin. Interestingly, the reputation element is only found in the definition for PGI, despite this being a fundamental element in the economic theory underpinning special labelling systems (OECD, 2000).

In order to qualify for a PGI or PDO designation, the Regulation provides that a product must comply with a specification which shall include at least the following (section 4):

- the name and description of the product;
- the definition of the geographical area;
- proof that the product originates in the said area,
- the methods of preparation;
- details indicating the link with the geographical area,
- details of the inspection structures in place
- specific labelling details and legislative requirements that must be met.

Registration Procedure

Protection under this Regulation takes place by way of registration through competent national authorities, similar to the systems previously in place in Southern Europe. In order to enjoy protection in all the Member States, geographical indications have to be registered at Community level. The register is kept by the Commission of the European Communities (Schwab, 1995). The Regulation provides that any group of producers, irrespective of its legal form or composition or, in exceptional circumstances, a natural or legal person, may apply for registration of a PGI or PDO (section 5.1). Two registration procedures are provided for: a normal and a simplified procedure (Schwab, 1995).

Under the normal procedure the application is sent to the Member State in which the geographical area in which the product originates is located. The Member State checks that it satisfies the requirements and forwards it to the other Member States and the Commission. The latter examines it within a period of six months to ensure that it contains all the specifications laid down in section 4. It also controls if the name is not generic within the meaning of section 3. In assessing whether a name has become generic, account is taken (1) of the situation existing in the Member State where the name has its origin (2) the existing situation in areas of consumption and (3) the situation existing in the other Member States (section 3). It is thus not impossible for a name that has become generic in one part of the European Union to

be registered at Community level. Subsequent to these inspections, the Commission informs the Member States of its conclusion and if satisfied that the name fulfills the requirements for protection, it is published in the Official Journal of the European Communities. If no objections are notified within six months, the PGI or PDO is entered in a register called the “Register of Protected Designations of Origin and Protected Geographical Indications”. Once registered, names are protected in all Member States in terms of section 13.

Section 17 provides a simplified procedure in terms of which Member States are given a six month period from the date of entry into force of the Regulation to notify the Commission of those names protected nationally which they wish to register under the section 17 procedure. This period expired on 26 January 1994.

Objection Procedure

In terms of section 7, Member States may object to registration within six months of publication of the application. Also, any natural or legal person may object to registration, lodging a statement to that effect with the competent authority in the Member State in which he resides. The Member State then decides whether the opponent has a legitimate interest and whether the objection is duly substantiated. Member States are required to forward to the Commission any objection that satisfies these conditions (Schwab, 1995).

It is up to the Commission to determine the admissibility of an objection. In order to be admissible, a statement of objection has to (Schwab, 1995):

- Indicate that the conditions laid down in section 2 with respect to the definition of protected geographical names have not been satisfied;
- Show that the registration of the name would jeopardize the existence of a trademark or other sign;
- Set out the features that cause the name to be considered generic.

If an objection is found to be admissible, Member States have three months within which to reach agreement. After agreement is reached the denomination is registered and publicized by the Commission. In the event of no agreement being reached the section 15 procedure is followed.

Section 15 procedure

Section 15 provides for a Committee composed of the representatives of the Member States to assist the Commission. If no decision is reached within three months from the date the objection was referred, the Commission either rejects the application or enters the denomination into the register. In the event of the denomination being rejected on grounds that the name has become generic, the decision is published by the Commission in the Official Journal of the European Communities. Appeal against both Commission and Committee decisions may be lodged with the Court of Justice by either the Member State or by any natural or legal person concerned with the decision.

Non-member countries may, subject to certain conditions, request entry in the Community register for their own geographical indications or designations of origin (Bendekgy and Mead, 1992) by following a similar procedure. In order to register a PGI or PDO under EU Regulation No 2081/92, the non-member country must be able to give guarantees comparable to those given by Member states, specifically that the product meets the appropriate specifications, that the third country has the necessary inspection arrangements and that the third country can provide equivalent protection for EU products (section 12). As a result many other countries are adopting similar systems in order to access and provide protection for their denominations in European markets.

Regarding the relationship between EU Regulation No 2081/92 and national laws, it should be noted that the Community regulation supersedes national laws. This is in line with the Community goal of ensuring conformity and equal competition between the different PDOs and PGIs. As such, once a name is registered under the Regulation, national protection ceases to apply (Schwab, 1995). In this regard section 17.3 states that Member states may maintain national protection for names

communicated until a decision on registration has been taken. Nationally protected names that are not communicated within the six month period as well as names which have been refused registration cease to be protected. Although it is possible to apply for registration for names not communicated within the six month period, these names will remain unprotected until a decision on registration has been taken (Schwab, 1995).

2.3.3 Protection at National Level

Despite the growing importance of the issue of protection of geographical indications at international level, the term geographical indication *per se* has not yet been introduced into South African legislation or been considered in case law. There are no statutory provisions which explicitly protect the unauthorized use or registration of geographical indications. Despite this lack of explicit protection there are piecemeal measures available for protecting geographical indications, both at common and statutory law.

2.3.3.1 Common law measures for protecting geographical indications in South Africa

Unlawful competition

The delict unlawful competition in South African law is derived from the provisions of the *lex Aquilia*. Its recognition as a form of *Aquilian* liability is the result of a series of judicial decisions. In seeking protection for a geographical indication under the action unlawful competition, the plaintiff will have to establish that there was an unlawful act and that such act was attributable to the fault of the wrongdoer (Van Heerden & Neethling, 1995). Such conduct must result in or constitute a false representation which causes, or which is likely to cause confusion or deception of a substantial number of consumers. In addition, this false representation must result in financial loss to the plaintiff (*William Grant & Sons Ltd & Another v Cape Wine & Distillers Ltd & Others*, 1990). A serious shortcoming of this action is however that in order for someone to have *locus standi in iudicio* in an action for unlawful competition he/she has to trade or have business activity in South Africa since

someone who does not is not considered a competitor (*Tie Rack plc v Tie Rack Stores (Pty) Ltd & Another*, 1989). This severely limits the scope of the protection.

Passing off

The action of passing off in the South African law can be defined as (*Capital Estate and General Agencies (Pty) Ltd and Other v Holiday Inns Inc and Others*, 1977):

“The wrong known as passing off consists in a representation by one person that his business (or merchandise, as the case may be) is that of another, or that it is associated with that of another and in order to determine whether a representation amounts to a passing off, one enquires whether there is a reasonable likelihood that members of the public may be confused into believing that the business of one is, or is connected with, that of another.”

As mentioned, the right infringed by unlawful competition is the right to attract custom which can involve the right to an existing goodwill (Webster and Page, 1986). The wrong of passing off is a species of unlawful competition which specifically involves infringement of another’s rights in an existing goodwill (*Draper v Trist & Tribestos Brake Lining Ltd*, 1939). What stands to be protected is a right in the reputation or goodwill of a name, mark or symbol. Goodwill as the subject of a proprietary right is incapable of subsisting by itself. It has no independent existence apart from the business to which it is attached (Webster and Page, 1986). This raises the issue that protection is only afforded under an action for passing off whilst business is conducted. In the case of *Kean v McGivan* (1982) it was said of passing off that:

“The property which is said to be injured in that situation is not the name or description of the goods but the right to the goodwill of the business which results from the particular commercial activity. Therefore the courts do not in the general interfere to protect a non trader. I hasten to add that of course the word “trade” is widely interpreted to include persons engaged in a professional, artistic or literary occupation.”

It is thus clear that persons not engaged in a business will have no redress under the action of passing off. In addition, it is necessary in order to establish the existence of goodwill, to show that it is associated in the minds of the public with the business in question (Webster and Page, 1986). This reputation must extend to a substantial number of members of the public (*John Craig (Pty) Ltd v Dupa Clothing Industries (Pty) Ltd*, 1977). The extent of the reputation is limited geographically to the territory in which it is known as indicative of the goods, services or business in question (*Greaterman's stores Ltd v Marks & Spencer (SR) Ltd*, 1963). It is thus not necessary that the plaintiff should actually carry on business in the jurisdiction where relief is sought. It is sufficient if his goods are sold within the jurisdiction as long as he enjoys reputation there. The locality of the business is however, not irrelevant and is an important consideration in determining whether a misrepresentation could do his business harm (*Caterham Car Sales & Coachworks v Birkin Cars (Pty) Ltd and Another*, 1998).

2.3.3.2 Protection under statutory law

Trade Practices Act of 1976

The Trade Practices Act stipulates that (Section 9.b):

“[N]o person shall in connection with the sale of goods, directly or indirectly make any statement or communication or give any misleading description or indication in material respects in respect of the nature, properties, advantages or uses of such goods...”

The purpose of the Act was to protect members of the public from being misled. In addition, the Act serves to protect traders or producers of goods from actions of competitors who might mislead consumers into rather purchasing their goods. This section thus gives *locus standi* to traders and producers of goods against an offending competitor. In the case of *Long John International Ltd* (1990) the Court applied section 9.b of the Trade Practices Act to a case where the defendant was producing, distributing and selling “Ben Nevis Scotch Whisky Liqueur”. The applicant was seeking an interdict on the ground that the respondent was falsely representing to the

public that “Ben Nevis” was a Scotch whisky. It was argued that such a misrepresentation arose out of all the surrounding circumstances which bore upon the interpretation of the label and get-up. It was held that as a result of the nature and get-up of the product, the product had been misrepresented as a Scotch whisky as a result of which a substantial number of members of the public could be confused into thinking it was a Scotch whisky. The respondents were consequently found guilty of contravening section 9.b of the Trade Practices Act. This Act therefore provides some form of protection to geographical indications in that no person is allowed to make false representations as to the properties or nature of a good. As a result the legitimate users of a geographical indication could institute action under this Act if for example someone represents his product as having characteristics similar to a well known geographical indication in which reputation has been accumulated.

Liquor Products Act 60 of 1989

This Act defines liquor products (which includes wine and spirits) and sets out the requirements for each liquor product. Furthermore, it states that any person is prohibited from (section 12.1):

“[U]sing any name, word, expression, reference, particulars or indications 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 liquor product, in a manner which conveys or creates, or is likely to create, a false or misleading impression as to the nature, substance, quality, composition or other properties, or the class, cultivar, origin, age, identity, or manner or place of production of that liquor product.”

It is this article that provides the higher level of protection required by TRIPS for geographic indications for wines and spirits (Stern, 2000) in that the "false or misleading" standard means that a geographic indication need not be misleading in order to be prohibited. Even a statement that provides the true origin of the product may be unlawful under this provision.

It is under this Act that the Wine of Origin Scheme has been established (Stern, 2000). This scheme, administered by the Wine and Spirits Board, came into operation well before TRIPS and is charged with defining and demarcating areas of production (regions, districts, wards and estates) and specifies the indications which may or may not be used on labels. It is this scheme that defines certain areas as wine producing areas and which registers the names of the South African wine producing estates. Since it has final approval of all wine labels, it can in this manner prohibit any reference to geographical indications which appear on such labels and which are either not accurate or which have not been approved by the Wine and Spirits Board as formed under this Act or which do not comply with TRIPS.

Merchandise Marks Act 17 of 1941

This Act prohibits the application of false trade descriptions to goods and the sale of goods bearing false trade descriptions. It provides that any person who applies any false trade description to goods shall be guilty of an offence (section 6.1). It also stipulates that “[A]ny person who sells any goods to which any [...] false trade description is applied [...] shall be guilty of an offence (section 7). “Trade description” and “false trade description” are defined as follow (section 1):

“Trade description” means any description, statement or other indication, direct or indirect, as to the number, quality, measure, gauge or weight of any goods, or as to the name of the manufacturer or producer or as to the place or country in which any goods were made or produced, or as to the mode of manufacturing or producing any goods or as to the material of which any goods consists or as to any goods being the subject of an existing patent, privilege or copyright and includes any figure, word or mark which, according the custom of the trade, is commonly taken to be an indication of any of the aforementioned matters.”

“False trade description” means any trade description, whether or not it consists of or includes a trade mark or part of a trademark which is false in a material respect as regards the goods to which it is applied and includes every

alteration of a trade description, whether by way of addition, effacement or otherwise, if that alteration makes the description false in a material respect.”

Trade descriptions therefore include indications as to the place or country in which goods were made or produced thus providing a measure of protection to geographical indications.

Trade Marks Act 194 of 1993

Although not dealing specifically with geographical indications, this Act does, to a lesser extent, provide some protection to geographical indications under trademark law. The Act provides for registration of a mark under section 9 on condition that it be capable of distinguishing the goods or services in respect of which registration is sought from the goods or services of another person either inherently or by reason of prior use. Reference is made in section 10.2.b. to marks indicating geographical origin. However, section 10 specifically deals with unregistrable marks and provides in section 10.2.b that “[a] sign or an indication which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value and geographical origin of a product” shall not be capable of registration.

Further provisions relevant to geographical indications include section 10.12 and section 10.13, which provide respectively that a mark which is “inherently deceptive” and “[...] would be likely to cause deception or confusion” shall be unregistrable. However, the proviso to section 10 states that a mark referred to in section 10 may be capable of registration provided that it has acquired distinctiveness through use. Given that geographical indications are in principle not distinctive of a specific business, they are inherently incapable of registration in the absence of proof that they have acquired distinctiveness through use.

Also, if a geographical name is used in a fanciful manner in such a way that it couldn't possibly lead to confusion in the mind of the consumer, it would be possible to protect such a geographical name as a trademark. An example could be where a producer of bananas registers the name Antarctica Bananas. In such a case there is no likelihood that consumers could be misled into believing that the bananas originate

from Antarctica. The important issue is thus whether the inclusion of a geographical term in a trademark connotes geographical origin in the mind of the consumer, in which case it has to be disclaimed.

The Act also makes provision for the protection of both certification trademarks (section 42) and collective trademarks (section 43). In terms of section 43.2 read with section 3, a geographical name or other indication of origin may be registered as a collective mark. This effectively overrides the prohibition in section 10.2.b against registration of a geographical name as a trademark. Rules governing the registration of a collective trademark must specify the person authorized to use the mark, the conditions of membership of the association and, where applicable, the conditions of use of the mark including any sanctions against misuse. In the case of a certification mark, it is required that the person in whose name the mark is registered not trade in the goods or services in respect of which the mark is registered. The limited circumstances in which a geographical name can be registered as a trademark, is based on public policy considerations given the public good characteristics of a geographical name.

2.4 CONCLUSION

In this chapter an attempt was made to define the concept geographical indications with reference to the different terminology encountered. An exposition of the legislative framework within which geographical indications are protected followed in which protection at International, Community and National level was explored. Apart from contextualizing the subject matter, the discussion highlights the fact that despite the growing importance of geographical indications internationally and the comprehensive protection afforded to geographical indications in the European Union, there is still very limited protection available to geographical indications in South Africa.

CHAPTER 3

EXPLORING THE ECONOMIC RATIONALE FOR PROTECTING GEOGRAPHICAL INDICATIONS

“The enduring competitive advantages in a global economy lie increasingly in local things – knowledge, relationships, motivation – that distant rivals cannot match”

(Porter, 1998)

3.1 INTRODUCTION

Chapter 2 provided a discussion on the debate at international level in which some countries are favouring increased protection for geographical indications while others oppose the idea. In order to understand the increasing importance of geographical indications in the European Union and further a field, this chapter attempts to elucidate the economic fundamentals underlying their protection. Those calling for increased protection are motivated by various socio-economic objectives such as increased rural incomes and consumer protection. This chapter proceeds to illustrate how these objectives can be achieved through the use of geographical indications by addressing the following points consecutively: information asymmetry and the role of reputation, formation of niche markets, monopoly formation and value added. The discussion draws from different economic theories in an attempt to explain the economic fundamentals underlying the protection of geographical indications. The issue is necessarily addressed from an economic perspective and does not include advantages at national level such as the preservation of biodiversity. The chapter concludes with an analysis of how the introduction of geographical indications can contribute to rural development within a region.

3.2 THE ECONOMICS OF INFORMATION AND REPUTATION

Marks indicating the geographical origin of goods are the earliest type of trademark used by traders as a means to exploit local reputation through the use of distinctive signs to evoke a particular geographical origin (Rangnekar, 2003b). Although a distinct form of intellectual property rights, this association suggests similarity in the economic rationale for protecting geographical indications and trademarks. The economics underlying the protection of these distinctive signs is founded on the economic theories of information and reputation. These theories demonstrate the importance of (1) preventing the market distortions that arise when there is asymmetry of information between producers and consumers and (2) averting the consequences of such asymmetry of information on the level of output quality (OECD, 2000).

The assumption of perfect information is fundamental to the neo-classical economic theory and its prediction of perfectly clearing markets. The increasing realization that the real world does not exhibit characteristics of perfect information prompted a number of scholars to analyse the consequences of information being incomplete and unevenly distributed between agents/actors in the economy. In line with this, Stigler asserted in 1961 that information is a resource with a value (and thus a cost) associated with it (OECD, 2000). Nelson (1970) shows that consumers do not have perfect access to information regarding the prices of goods, and even less so as to the quality of the goods (OECD, 2000). He classified goods on the basis of how information is accessed by and/or conveyed to consumers as summarised in table 3.1:

Table 3.1: Classification of goods based on access to information

Search goods	Consumers can ascertain quality prior to purchase through inspection and/or research.
Experience goods	Consumers can ascertain quality after purchase through use and experience.
Credence goods	Neither prior inspection nor subsequent use is sufficient to ascertain quality.

Search and experience goods refer to characteristics of products that can only be identified after purchase or consumption. Credence goods refer to characteristics that can only partially be detected even after consumption. In the latter case, given that consumers cannot fully determine the intrinsic characteristics of the product, their decisions will be based mainly on the information provided by the producer. Independent certification becomes important as a guarantee to the consumer that the quality descriptions provided by the producers are accurate. In terms of this categorization, food products display characteristics of all three types of goods (Rangnekar, 2003b).

The problem of asymmetrical information stems from the fact that product attributes are known to the producer while consumers do not know them and can only determine them through search or experience (OECD, 2000). This information gap gives rise to typical market information problems in the form of adverse selection and moral hazard.

The concept adverse selection is best explained with reference to Akerlof's (1970) "model of lemons". He explains that in a market of heterogeneous goods where the quality of the goods is known to the producers alone, goods end up being sold for the same price. As a result, the producers of high quality goods are driven from the market or, in terms of Akerlof's model, "bad cars drive out the good cars" (OECD, 2000). Hence, in the case of a market characterized by different qualities, if only the producer is aware of the product's quality in advance, there is a risk that the consumer may get an inferior product due to adverse selection. With regard to moral hazard, products and services sold at the same price initially possess the same level of quality (OECD, 2000). This does not prevent a producer from subsequently selling his inferior product for the same price given that only he carries full knowledge of the product's quality in advance. By doing this the producer can gain the difference between the market price and the lower production cost (OECD, 2000).

It is clear that information asymmetry impacts negatively on the market: the quality of total supply drops, higher-quality products are driven out of the market and some consumers will no longer be able to satisfy their preferences (OECD, 2000). Producers maintaining the quality of their products are exposed to unfair competition

from producers who sell lower quality products at the same price. In order to protect themselves against such behaviour consumers adopt various strategies. These include the making of repeat purchases, developing a strong sense of brand loyalty and a willingness to pay a premium for reputation. In response, producers adopt strategies for creating reputation in their products.

The concept of reputation, widely used in analysis of markets characterized by imperfect information [Stiglitz, 1989; Tirole, 1989], serves to an extent to bridge the market failure associated with asymmetry of information. In his model on reputation Shapiro (1982 and 1983) analyses the firm's choices regarding the quality level of its production, with a view to maximizing profits in a situation where it is assumed that markets are perfectly competitive but information is imperfect (OECD, 2000). He stresses the importance of the dynamics emerging among the following three elements: firm reputation, consumer learning and the seller's choice of product quality (OECD, 2000). It should be noted that the concept of reputation has use only in a context of imperfect information (OECD, 2000). If product quality cannot be observed in advance, consumers tend to use the quality of products offered by the same producer in the past as an indicator of future levels of quality. According to Shapiro (1983) reputation thus embodies expected quality in that individuals extrapolate past behaviour to make inferences about likely future behaviour. This value judgment develops over time, creating an intangible asset whose value is given by capitalisation of future price premiums (Belletti, 1999).

In instances where purchase decisions are based on product reputation, producers who decide to produce for the high quality market are forced to invest in reputation. Often this period of investment requires the producer to sell his product below production costs until reputation has been established (OECD, 2000). The need to make initial investments means that in an equilibrium scenario, high-quality goods must be sold at premium prices (OECD, 2000). This premium represents the returns on the initial investment to establish the reputation (Shapiro, 1983). Given this, products which enjoy reputation earn a premium that is sustained even at equilibrium (Rangnekar, 2003b). This premium indicates that price is greater than marginal cost (OECD, 2000). This differential, which causes a reduction in well-being as compared to a situation of perfect information, should not be considered a market failure, but rather

as a cost stemming from the fact that information is imperfect (OECD, 2000) in that costs stemming from a lack of information are just as real as production costs (Shapiro, 1983). According to Shapiro (1983), consumer learning and information is central to this and the sooner a consumer perceives a product's true quality, the smaller the differential between its marginal cost and the premium price. Rangnekar (2003b) concurs that the premium earned is proportional to the lags associated in consumers learning the true quality of a product. It follows from this that a producer will only be motivated to improve its product quality if consumers undergo a learning process regarding the quality of its products. The premium can thus be justified based on the role reputation plays in reducing information asymmetries and its role in dissuading short term compromises in quality, thereby lowering the actual price paid by reducing search costs for the consumer. In the context of information asymmetry reputation thus becomes both an inducer and indicator of quality.

However, the successful use of reputation to restore efficiency to the market through averting the consequences of information asymmetries requires that reputation be protected through a process which can be viewed as the "institutionalisation of reputation". Distinctive signs such as geographical indications are one way of achieving this by making use of a process which requires formalisation of the relationship between the product and the region and/or tradition. This formalisation derives from the use of legal instruments to prevent the misappropriation of benefits.

These quality signals embody reputation in that they signal a certain level of quality. The quality signal reduces the information and search cost for buyers if it reveals quality differences. It is through this function of signalling certain quality standards (and thus reputation) that consumers are induced to return and purchase new products, that a trademark (and thus a geographical indication) becomes an asset to the firm, embodying its accumulated goodwill (Grossman and Shapiro, 1988). The collective nature of geographical indications as a quality signal means that use of the sign is not limited to a single producer but to all producers within the designation adhering to the code of practice. Product reputation is thus the result of the actions of different agents active in the same area of production and is projected through tradition over a period of time (Marty, 1998). As such, the asset value of an origin labelled product's

reputation is not only determined through the actions of a single producer but through the action of all the other producers in the supply chain.

Closely linked to the institutionalisation of reputation through the use of quality signals is the issue of credibility. The credibility of a quality signal should be understood as a continuous commitment by producers to deliver a certain level of quality. Credibility allows quality signals to reduce *ex ante* the issue of adverse selection. However, credibility simultaneously creates an *ex post* risk of moral hazard. Common quality signals are particularly vulnerable due to the potential for free riding which can reduce product reputation (Raynaud & Valceschini, 1998).

In conclusion it could thus be said that geographical indications are the result of a process whereby collective reputation is institutionalised in order to solve certain problems that arise from information asymmetry and free riding on reputation. As such, the abovementioned theories of information and reputation highlight two important features of the protection of geographical indications, i.e. that it functions as both a consumer protection measure (through addressing information asymmetries and quality) and a producer protection measure (through its role in protecting reputation as an asset).

3.3 IMPROVED MARKET ACCESS

Apart from its role in overcoming the detrimental effects of information asymmetries and free riding on reputation geographical indications also reflect inherent values associated with a region and thus regional quality. As such, territory goes beyond its purely informative role and acquires the characteristics of an attribute (Pacciani *et al*, 2001). The resources of the region (landscape, cultural and historical resources and local *savoir faire*) become encapsulated in the origin labelled product thereby synthesizing the territorial attributes in the product name. It is this characteristic of territory as an attribute that translates into improved market access for products bearing a geographical indication.

The link between geographical indications and improved market access is reflected in various bilateral trade agreements. The improved market access from the use of

geographical indications derives mainly from increased competitiveness in the market and the development of a sustainable competitive advantage. This section explores the economics behind improved market access for products bearing a geographical indication with reference to the formation of niche markets, monopoly formation and value added.

3.3.1 Formation of niche markets

Decreasing prices, changing consumer preferences and increased competition on commodity markets have created a need for an alternative approach to the production and marketing of agricultural products. As a result, producers are moving away from commodity production and entering more lucrative niche markets. These producers firstly face the challenge of finding a market with consumer appeal and economic value and secondly of protecting the market against competitors that would eventually erode any premiums. The second challenge derives from the fact that once competitive advantage has been created other producers enter the market to capture the higher profits. As more producers enter the market the product begins to move from niche to commodity status thereby eroding any premiums earned.

The advantage associated with niche production is evident if one compares the position of a cereal producer and maize farmer (Hayes *et al*, 2003). The first has absolute control over supply and must decide on the price. Typically one that covers costs and gives a reasonable return to capital. The latter cannot influence the price as no single commodity producer can alter the market price. He must inevitably accept the market price even though it doesn't cover costs. The difference is that the cereal manufacturer has differentiated itself and consumers view its product as unique whereas the farmer sells an undifferentiated product. From a consumer perspective, if faced with a commodity product, decisions will be based on price. The benefit of differentiation and niche production is clear: differentiation allows a producer to move away from being a price taker towards being a price maker and thus brings freedom from the price fluctuations associated with commodity markets.

Why then do farmers refrain from differentiating? According to Hayes *et al* (2003) farmers are often faced with a lack of price incentives due to commingling. Even

where wholesale buyers provide price incentives to farmers to produce high quality products, competition from other farmers eliminates the profitability thereof. Also, the scale of any individual farmer's output is too small to justify the cost of creating and maintaining a brand that is recognizable by consumers and that cannot easily be imitated.

Based on these problems Hayes *et al* (2003) conclude that any instrument designed to differentiate agricultural produce must meet a number of criteria. Firstly, it should allow price signals to be transmitted from consumer to producer. Secondly, it should achieve a scale of production sufficiently large to justify the cost of creating and maintaining the differentiated image among consumers. Thirdly, it should prevent imitation of the differentiated product. Lastly, if profits associated with the differentiated product are to be captured by farmers rather than other actors in the supply chain the farmers must own the rights to the differentiated product.

Through the creation of a set of institutions geographical indications are instrumental in affording producers pursuing a niche based strategy an opportunity for place-based product differentiation. In discussing place-based marketing strategies, Thode and Maskulka (1998) mention that, although product positioning based on product attributes and image is still viewed as a necessary and viable strategy, marketers increasingly lament that there are simply too many parity products (Giges, 1988). Porter (1980) argues that the "parity trap" can be avoided through strategic marketing in order to create a sustainable competitive advantage. His method of matching a company's strengths with market opportunities to create a sustainable advantage is followed internationally. However, in a world characterized by escalating competition, this approach has been challenged on the grounds that a sustainable competitive advantage is becoming more difficult to achieve and, more importantly, to maintain (D'Aveni, 1994). Thode and Maskulka (1998) acknowledge that the level of competition world-wide has intensified, but proposes that sustainable competitive advantage based strategies are still viable as long as they are unique, truly differentiable and directly tied to the tangible quality of the product.

In this regard place of origin provides a unique positioning opportunity. The premise on which place-based niche marketing rests is the fact that the economic value of

certain products can be attributed to the unique environment where they originate. Place could thus be used as a basis for differentiation if there is a perceptible, not necessarily quantifiable, link between the product's place of origin and the presumed quality of the product (Thode & Maskulka 1998). The potential economic value of this approach is reflected in the fact that the market value of quality goods identified with a specific territorial indication of origin is estimated to be around 7.5% of the European market (Euro 45 Billion) with an estimated increase of Euro 1-2 billion per year (Trognon *et al*, 1999). Trognon *et al* (1999) emphasises that this should not be perceived as merely a fashion phenomenon but as a growing trend.

The potential of geographical indications as a quality label facilitating place-based differentiation, thereby creating niche markets, is further evident if measured by the abovementioned conditions for differentiation as set out by Hayes *et al* (2003). The central tenet on which geographical indications operate is that of supply control both through demarcating the geographical area within which production may take place as well as limiting the yields within the demarcated area. By limiting supply producers entitled to use the geographical indication obtain reasonable premiums. A low level of production coupled with high prices will provide incentives to other producers to increase production, but increased production will lead to lower prices and profits. This poses the biggest challenge facing niche producers, that is, ensuring that entry into the market is limited thereby preventing the erosion of any premiums. This challenge derives from the fact that once competitive advantage has been created other producers enter the market to capture the higher profits. As more producers enter the market the product begins to move from a niche to a commodity product thereby eroding any premiums earned. The success of any niche market will in the long run depend on its ability to limit production. In the case of geographical indications, appropriate regulations serve to limit entry and yields. The institutional framework within which geographical indications operate thus provides a legal framework within which producers can obtain property rights on the differentiated product, thereby preventing other producers from entering the market and allowing the producers entitled to use the geographical indication to appropriate the benefits. This framework further facilitates collective production and marketing, providing the necessary scales of production required to justify the cost of creating and maintaining the differentiated product image. This is particularly important in the case of artisanal

products (with the majority of geographical indications being artisanal) which are labour intensive rather than capital intensive and therefore cannot benefit from economies of scale. This is confirmed by research (Barjolle & Chappuis, 2000) which indicates that these producers increase their chances of success by adopting a common market strategy, which allows them to attain a scale of production large enough to justify the investments in product image.

The economic value of geographical indications is thus to a large extent based on the economics of differentiation and niche marketing. It is a socially constructed differentiation which is exogenously validated and allows small producers to create a competitive advantage similar to that of a brand. However, the success of place-based differentiation through quality labels depends to a large extent on whether consumers are familiar with the label and knowledgeable regarding its informational content. A study done by Fotopoulos and Krystallis (2003) provides a sample of buyers' opinions regarding the PDO label. The results are presented in table 3.2.

Table 3.2: Sample of consumers' overall opinions about PDO label (n=257 buyers).

The PDO label guarantees	% totally agree ...of which PDO aware		% agree of ...which PDO aware		Total %
A product's stable quality	52.6	12	36.2	10.3	88.8
Higher product prices	39.7	8.6	26.7	6.9	66.4
Product's authenticity	50.0	12	37.9	10.3	87.9
The area of origin	51.7	12	39.7	10.3	91.4
That the product is handmade	49.1	10.3	42.2	12	91.3
More job opportunities in the production area	53.4	10.3	36.2	8.6	89.6
The avoidance of products' imitations	57.8	13.7	33.6	6.9	91.4
An overall higher quality	56.0	12	37.1	10.3	93.1
Higher agricultural income	46.6	6.5	35.3	12	81.9
Product's uniqueness	54.3	8.6	38.8	13.8	93.1
Production method's traditional image	54.3	8.6	37.1	12	91.4
% average(n=257)	51.4	10.4	36.4	10.3	87.8

Source: Fotopoulos and Krystallis (2003).

They conclude that on average 87.8 per cent of the sample (totally) agree with a series of positive effects of the PDO label. However, their study further indicates that only 10 per cent of consumers are familiar with the PDO label. Therefore, even if consumers are theoretically willing to accept the PDO label and pay a premium for it,

its limited market penetration and the absolute lack of promotional activities may limit its effectiveness (Fotopoulos and Krystallis, 2003).

In this regard the words of Alavoine-Mornas (1997) "...the originality a typical local area brings to a product can only lead to a differentiation, if clients recognize its value . . .", highlights the fact that in some instances niche marketing through origin labelling may require an extensive awareness campaign in order to capture the benefits associated with differentiation. Also, it should be noted that various factors can weaken the territorial associations consumers have with a product. These factors include aspects such as packaging, processing, distribution and marketing. In certain instances technical aspects of production and/or processing can override features of the product that are intrinsically linked to its area of origin (Rangnekar, 2003a).

The following section further explores how a geographical indication can improve market access for those producers entitled to use it by investigating the market structure which results due to the differentiation facilitated by origin labelling. The issue is approached by investigating the *sui generis* nature of geographical indications within the broader context of understanding the economic rationale behind geographical indication protection.

3.3.2 Monopoly formation

In terms of neoclassical economic theory geographical indications are considered to be collective monopolies (Moran, 1993). Seemingly a *contradictio in terminis*, the existence of monopolies consisting of a group of firms was argued by Olsen (1962): "The concept of industry in pure competition, which is everywhere acknowledged, is based on assumptions that are perfectly parallel to those required for the concept of industry in monopolistic competition, which is often denied".

The collective nature of geographical indications is well explicated with reference to Buchanan's (1965) club theory and the case of PDO/PGIS created under EU Regulation 2081/92. Cornes and Sandler (1996), as cited by Thiedig and Sylvander (2000), 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". This definition reflects a few important characteristics of club goods (Cornes & Sandler, 1996) as summarized in Thiedig and Sylvander (2000):

- Voluntarism is needed to distinguish between a pure public good and a club good. A club member joins voluntarily if the benefits he receives are greater or equal to the cost of joining the club. Voluntarism is less important if the club good is publicly provided.
- Sharing leads to rivalry through crowding or congestion and to a finite number of members.
- Exclusivity distinguishes between member and non-member and gives the non-member the option to join another club or not to join at all.
- From exclusivity derives the existence of an exclusion mechanism.
- The provision (decision to provide the club good) and the membership decision (how many members join) must be determined simultaneously to result in the club optimum.

Legally protected geographical indications like the PGI/PDOs under EU Regulation 2081/92 are considered to be club goods coupled with government support to provide it whilst geographical indications protected only by competition law are club goods with no or little governmental support for a more or less latent group (Thiedig & Sylvander, 2000). In comparing PDO/PGI clubs to the characteristics of a club as identified by Cornes & Sandler (1996), Torres (2000) makes the following observations:

- *Voluntarism*: The decision to provide a PDO/PGI is voluntary. However, once the group is established, all the producers using the protected name within the delimitation are compulsory members, even if they have not applied for the protection. All involuntary members have to contribute to the control costs.

However, all members also share in the benefits. Members are free to leave the club by ceasing to use the denomination.

- *Sharing*: The PDO/PGI is shared by members of the group of producers in the demarcated area. It is not evident whether extension leads to signs of congestion. It is assumed that at the beginning new members increase the utility for everyone due to camaraderie, but after a critical number of members congestion will occur. PDO clubs are less at risk given that membership and volume of production of the club good is limited by geographical delimitation and product specification. PGI clubs are more likely to show signs of congestion given weaker constraints. Illegitimate use of the denomination can decrease the benefits significantly. Also, crowding appears to be a danger for the origin labelled sector in general for as the list of recognized indications grows, profits for existing indications may decrease. According to Thiedig and Sylvander (2000) this raises the issue of “hostclubs” which they define as “clubs of clubs” such as the French *Institut National Des Appellations D’Origine* (INAO) as well as the European Register created under EU Regulation 2081/92.
- *Exclusivity*: The group itself defines exclusivity by delimiting the production area as well as by agreeing on product specifications in the code of practice. Consequently, only producers within the demarcated region complying with the code of practice can join the club.
- *Exclusion mechanism*: The PDO/PGI legislation provides for exclusion by making provision for private or public inspection bodies which ensure that members comply with the rules while authorities oversee all uses of the denomination. Under EU Regulation 2081/92 the exclusion mechanism is territorially bound and therefore limited by the borders of the European Union. This limits its effectiveness and explains the importance for the European Union of extending the protection provided under TRIPS.

This discussion on club theory confirms the collective nature of geographical indications as is reflected in the widely articulated view that geographical indications are a collective process of value creation (Barjolle & Sylvander, 2000). This means

producers belonging to the collective are faced with a unique collective *cum* competitive situation in that not only do they collectively produce a common good they also compete within the collective at individual level. Consequently, further differentiation often takes place within the denomination through the use of private brands.

These collectives further exhibit the characteristics of a monopoly in that they segment the production market and erect entry barriers on producers both within and outside the relevant geographical area. The monopoly formation observed in origin labelled supply chains takes place by way of institutional barriers which limit entry at two levels: Firstly, only producers within the demarcated area qualify for participation. This is followed by another barrier in that, within this region, only producers who comply with the code of practice fall within the collective. These institutional barriers which are created by limiting the use of the denomination and defining the product and production process therefore facilitate the formation of a monopoly which encompasses all producers within the denomination who comply with the code of practice. As a result, protection of geographical indications imposes, with reference to producers outside the denomination, a monopolistic market structure given the causal link between a product and its origin which results in a proprietary right for those entitled to use it. By limiting entry and functioning as a barrier to trade these collective monopolies thus eliminate competition from similar products produced elsewhere, thereby improving market access for those producers entitled to use the denomination.

In their discussion on club theory, Thiedig and Sylvander (2000) mention that producers' motivation for joining a club is the fact that the perceived benefits exceed the membership costs. These costs include both erection and exclusion costs whilst the perceived benefits of joining clubs such as the PDO/PGIs is closely associated with what is known as the acquisitional potential of a product. They explain this concept as the binding ability, consisting of both rational and irrational factors, which certain products possess, and which is similar to the term "unique selling proposition" widely used in marketing. In this context Hausladen (2000) argues that regional products can similarly find a unique local proposition. This is confirmed in research which indicates that origin labelling can influence the purchase decision at many

levels (Obermiller & Spangenberg, (1989) and Papadopoulos & Heslop, (1993)). As such, it is stressed that geographical origin must have an acquisitional potential and thus a monopolistic gap similar to that of a brand or any other differentiated product.

The collective monopoly which results from the institutionalisation process serves to reinforce the monopolistic gap and thus the acquisitional potential of origin labelled products. Based on this, Thiedig and Sylvander (2000) ascribe an economic rent to collective monopoly formation in origin labelled supply chains. This is illustrated in figure 3.1.

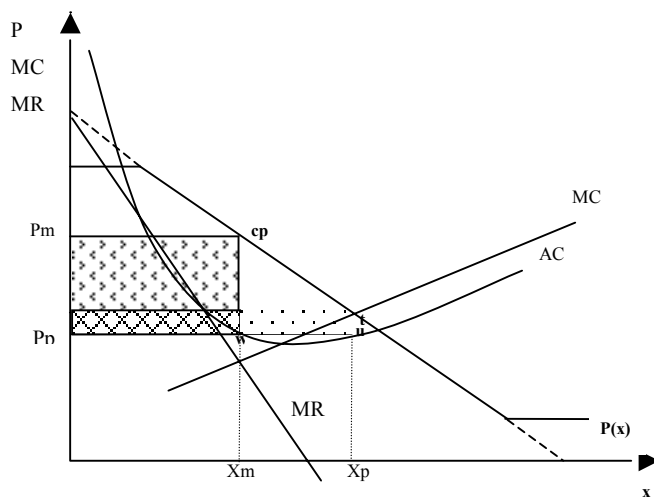


Figure 3. 1: Short term monopolistic and polypolistic equilibrium

Source: Thiedig and Sylvander (2000).

Figure 3.1 displays the price-sales curve $p(X)$ with a monopolistic gap. The optimum level of output $X(m)$ for monopolistic producers is where the marginal revenue curve (MR) intersects with the marginal cost curve (MC). The Cournot point (cp) on $p(X)$ shows the product price $p(M)$. For producers displaying monopolistic behaviour profits are indicated by the area $p(M)$ -cp-w-v. For polypolistic producers optimum output $X(p)$ is given by price $P(p)$ on MC as indicated by point t. Polypolistic profits are given by the area $P(p)$ -t-u-v.

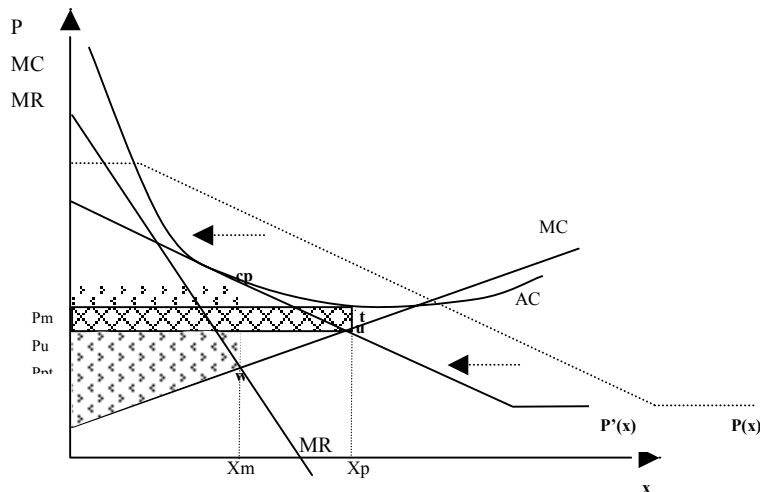


Figure 3. 2: Long term monopolistic and polypolistic equilibrium

Source: Thiedig and Sylvander (2000).

However, in the long run (Figure 3.2), substitution effects may cause the price-sales curve to shift from $P(x)$ to $P'(x)$ where it touches the AC curve. At this point the monopolistic producers make no profit but the product is still produced. The polypolistic producers are forced to cease production as the total average costs are not even covered. According to Thiedig and Sylvander (2000) this is a case of destructive competition where only a monopoly secures supply and loss is at a minimum ($P_u - t - u - P_{pt}$). The producer surplus of the monopolistic group is indicated by the area $P(m) - cp - w - v$.

From this discussion, Thiedig and Sylvander (2000) draw three important conclusions: Firstly, a geographical indication can favour monopolistic behaviour due to its acquisitional potential. Secondly, monopolistic profits for a group of producers are only possible through collective action. Thirdly, in some cases only monopolistic action might secure supply.

3.3.3 Value added

It is clear from the discussion on monopoly formation in origin labelled supply chains that the institutional barriers limiting the use of a denomination act as a protective belt whereby origin labelled supply chains are collectively monopolized. The discussion based on the work of Thiedig and Sylvander (2000) indicates the premium which can

result in the case of origin labelled monopolies. That there is indeed a premium to be captured in locality is reflected by the fact that French origin labelled cheeses earn an average of 2 euros per kilo more than French non-origin labelled cheeses. French *Poulet de Bresse* has a market price 4 times higher than regular French chicken. Producers of milk used for Comté cheese are paid 10% over regular milk prices. Similarly, producers of Italian Tuscano olive oil have managed to earn a premium of 20% since registration as a geographical indication in 1998 (EU Background Note, 2004).

The size of the premium is dependent on a number of factors, such as market size, degree of competition with substitutes, consumer perceptions about the linkage of an indication with product attributes, and demand elasticity (Correa, 2002). However, in all instances the premium seems to favour authentic and distinctive products linked to a specific area (Correa, 2002). The premium captured by products displaying a geographical indication suggests that some form of value is embedded in the use of this intellectual property right. This value is a mixture of economic, cultural and social values which derive from locality. Those actors using a geographical indication are thus pursuing a valorisation strategy whereby intellectual property is harnessed in an attempt to appropriate these values which allow for the extraction of rent.

Different attempts have been made to determine the economic value added through use of an intellectual property right. According to Smith and Parr (1994) the economic value of an intellectual property right is, for the user thereof, the representation, on a given date, of all the future benefits obtainable from such a right, expressed as a single sum of money. Such value is an objective and quantifiable concept based on the value added by the intangible assets protected by intellectual property rights. It is not, therefore, a subjective valuation (by the holder of the right or the user), but an estimate of the value of those intangible assets as reflected in factors' remuneration (Correa, 2002).

It is difficult to quantify the current as well as the potential value added through the use of a geographical indication since the values may differ depending on the sector, means of production, marketing methods, product typology and demand elasticity. According to Correa (2002) geographical indications often improve the marketing

conditions of luxury goods for which consumers are prepared to pay a price considerably higher than for substitutes, but this is not always the case. He adds that this may be attributable to the fact that geographical indications, like trademarks, may in some cases play a decisive role in generating a premium over and above the price of equivalent goods, while in other cases their contribution cannot be distinguished from that attributable to the product itself. In an attempt to evaluate the value added through the use of geographical indications Correa (2002) identifies the following approaches which may be used to determine the value added by an intellectual property right:

Price of the final product

This elementary method of using the price of the final product as indicator provides an approximate if somewhat rough estimate of the value added by an intellectual property right. However, Correa (2002) warns that the price of a product is influenced by the cost of production, distribution and marketing as well as profit margins. The greater a firm's market power (as influenced by the number of suppliers, product differentiation, promotion and advertising) the greater the cost/benefit ratio is likely to be, though this does not necessarily reflect a greater value of the intellectual property. Similarly, a producer who competes on the basis of price may realize a final price lower than that of his competitors, which does not necessarily reflect a smaller intellectual property content. It could thus be concluded that the final price of the product that incorporates an intellectual property component is a poor indicator of the value of the intellectual property itself.

The Market Value Approach

Correa (2002) explains that this approach involves establishing at which price the intellectual property right will be exchanged in a situation where both parties have freedom to contract (in the sense that there is no compulsion to do so) with reasonably full information and where the price fixed does not favour one party over another. For this method to be applied there should ideally be an active market with a certain number of transactions that can be taken as a basis of reference, information must be accessible on the terms of such transactions, and the values must be adjusted over a

period of time, in particular, to allow comparability between various transactions on intellectual property (Smith and Parr, 1994). However, given that geographical indications may only be used by producers within a specific territory, this method is not of much assistance.

The Cost-Based Approach

According to Correa (2002) this approach evaluates the value added by an intellectual property through determining the cost of constructing a replica of the particular product. In terms of this approach the cost of an intellectual property right is determined by examining (a) the cost of acquisition (b) the book value of the asset (if recorded) and (c) an estimate of cost needed to create a replica of the right in question (in terms of generating net profits). The latter can be determined by estimating the costs that would have to be incurred such as overheads, advertising etc. This approach is in essence an estimate of the historic cost of investing in the development of the intellectual property right. In the context of geographical indications such costs may include the cost of providing the necessary infrastructure and quality control, costs incurred in acquiring and defending rights, market research to determine consumer preferences, packaging costs and costs for launching and advertising the product. Correa (2002) however warns that the cost of reproducing an intellectual property asset reveals little about the profits that may be earned from such an asset. Also, despite being relatively simple to use, the cost-based approach does not consider impediments such as potential market and profitability trends (Smith and Parr, 1994).

Contribution to Profits

A final method identified by Correa (2002) which may be used to establish the value added by geographical indications, is to calculate the contribution made by different types of intellectual property to a firm's profits. This can be done by dividing the firm's assets into four groups: monetary assets, tangible assets, intangible assets and intellectual property (for example a producer may make simultaneous use of a geographical indication and trademark). Geographical indications may typically perform as an active intellectual property right, that is, a right that enables producers to generate a price premium. Correa (2002) explains this approach as follows: It is

based on the calculation of the weighted average cost of capital, also known as the minimum weighted rate of return that should be realized for every group in order to fulfil the expectations of investors. In interpreting a firm's economic and financial data, interest payments are excluded in order to reflect only profits gained from commercial operations. In order to estimate the contribution of each group, including that of intellectual property, a rate of return is allocated to each. This entails assigning a value to each group of assets, with book value as the reference point, and then estimating the excess profits, defined as the residual capital flow value, created beyond the normal returns of the particular business. Correa (2002) identifies the following difficulties which may be encountered in use of this method: Firstly, firms may sell a range of products that are each affected differently by intellectual property rights. Also, it is fairly difficult to estimate the profit for purposes of determining the rate of normal return in a specific sector. Similarly, for purposes of calculating the rate of return, it is not easy to determine the asset value of the intangible assets or the intellectual property. Lastly, the viability of this method depends on the availability of reliable economic and financial data for the firm.

The work of Correa (2002) indicates the difficulties encountered in determining the value added by a geographical indication. Apart from these difficulties a further problem encountered is how this added value is distributed between the different stakeholders. The problem is based on the fact that it is a case of remunerating an impure public good produced by both private and public actors. Belletti (1999) highlights the fact that the achievement of a PDO/PGI generates winners and losers, as it deeply affects the ability of the various actors involved in the production system of the typical product to appropriate the rent of origin, and strongly modifies the distribution of the rent connected to the typical product. Based on their location in the supply chain as well as factors such as size and liquidity, firms within origin labelled supply chains differ regarding economic endowments (Rangnekar, 2003b) and thus bargaining power.

The Parmigiano-Reggiano supply chain illustrates how these differences in economic endowments between firms at different points along the supply chain influence the distribution of returns. According to De Roest (2000) cheese ripeners and wholesalers enjoy stronger bargaining power compared to dairy farmers mainly because they are

smaller in number and have better access to physical and financial capital. Despite some vertical integration of dairy farmers into ripening in an attempt to improve their bargaining position, wholesale-ripeners still control the trade. In this regard 76% of dairies contact a single wholesale-ripeners to sell the majority of their stock (77%). De Roest (2000) explains this as the result of trustworthy relationships that compensate for adverse distribution of returns.

Given that the value added by a geographical indication takes place at local level, it is further important that an equitable share of the added value of the product accrues to local actors. The amount of added value accruing to local actors is not only dependant on the collective action created by local actors but on various other exogenous factors. Pacciani *et al* (2001) identifies the following factors as of particular importance: the nature of the typical product, for example the level of elaboration; the characteristics of the production process; the length of marketing channels that can be used based on the nature of the product; the impact on the landscape and the environment; the product's role in local culture and tradition, but also in non-local imaginary (i.e. "wine" portrays a different image than "spinach"); the structure of the supply chain; the presence of non-local dominant firms in a position to appropriate the rent; the presence of an institutional framework that allows for the extraction of the benefits at global level (institutional protection against appropriation) but also at local level (i.e. distribution of property rights); and, finally, the characteristics of the area of origin (economy, society, environment, landscape, culture).

3.4 RURAL DEVELOPMENT POTENTIAL

Apart from and partly a consequence of the factors identified above, the most fundamental rationale for protecting geographical indications in the European Union is found in the rural development potential of origin labelled products. Both widespread literature and policies adopted by the European Union stress the importance of supporting origin labelled products to attain this objective (Pacciani *et al*, 2001). Origin labelled products per definition, reflect a strict link between product and origin, given that the product derives its unique characteristics from the climatic, human and technical environment of the region. As such, origin labelled products are one of the most evident manifestations of locality and are often considered useful

instruments through which to preserve local culture and traditions and to foster rural development, especially in disadvantaged areas (Pacciani *et al*, 2001).

The concept of rural development is synthesized in three words: endogenous, integrated and sustainable (Pacciani *et al*, 2001). The word endogenous highlights the fact that rural development mainly depends on local resources and the ability of local actors to facilitate community participation and sharing of objectives. The word integrated reflects the fact that rural development does not only entail agricultural development but is a multifunctional approach in that it strives to integrate all economic and social activities at local level (including tourism, industrial manufacturing and craft). Use of the word sustainable highlights the need for rural development to take place in such a way that the resources used in the production process are not used in an exhaustive manner. Respect for the natural and social environment thus becomes important in rural development (Pacciani *et al*, 2001). As such, any framework for rural development should be based on mobilizing local resources through the action of local actors by means of a collective process integrating all components of the rural economy.

Based on this, geographical indications clearly present a useful tool through which to stimulate rural development. This is further evident in light of the discussion above on how geographical indications improve market access and allow producers to earn a premium for their products. In a rural development context, geographical indications provide a tool by which rural producers can enter niche markets and earn the concomitant premiums, thereby contributing to improving their living conditions. Furthermore, the link between an origin labelled product and its territory derives not only from paedoclimatic specificities and its strong link with localised specific production assets; it also derives from local culture when it characterizes the “historical memory” of the local population, and it represents a catalyst of identity (Berard and Marchenay, 1995). As such, geographical indications engage local resources, both natural and human, in a collective process involving all local actors, thereby activating all the components of the rural economy. In analyzing the rural development potential of geographical indications it is necessary to distinguish two potential impacts. The first relates to the remuneration of specific assets directly involved in the production process. In this regard, the link between an origin labelled

product and its area of origin allows for the creation of rents based on the “qualities” of the product, allowing for the remuneration of the specific assets used in the production process. The second impact on rural development relates to an inclusive territorial benefit to all actors within the region. The latter refers to the indirect benefits which may flow from establishing a geographical indication for certain regional products as reflected in, for example, employment levels and income support. Furthermore, geographical indications may contribute to the local economy by maintaining economic and social activities in underprivileged areas, thereby stabilizing the activities it promotes.

According to Pacciani *et al* (2001) these effects rely on the extent to which local actors succeed in appropriating the rent with respect to actors located outside the territory. Given that the assets from which origin labelled products derive are employable by a plurality of actors without the possibility of individual appropriation, the potential of appropriating this rent is closely tied to the ability of local actors to create institutional processes that can regulate the use of these free goods (Pacciani *et al*, 2001). The possibility of enhancing rural development through the use of geographical indications is further dependent on exogenous factors such as the nature of the product as influenced by the level of elaboration, the characteristics of the production process, the marketing channels allowed by the nature of the product, the impact on the landscape and environment, the role of the product in the local culture, as well as the structure of the supply chain (Pacciani *et al*, 2001). In addition, the possibility of activating endogenous, integrated and sustainable rural development strategies based on an origin labelled product depends on how pervasive and strong the association between the product and the local community is. In this regard not all products are alike, depending on their symbolic content and identity within the local community and their presence and importance in the local economy (Pacciani *et al*, 2001). It should furthermore be added that it is not the institutionalisation of the resource origin itself that sets the conditions for development (Sylvander, 2004). Instead, it is argued that it depends on how this process is developed and on the effectiveness of the valorisation strategies built upon it (Sylvander, 2004).

The evaluation of the impact of origin labelled products on rural development should be based on the multi-functional nature of origin labelled products (Sylvander, 2004).

Assessment of the impact should not be limited to the standard criteria (higher prices, increased sales and employment and income levels). 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 impact are all factors which should be considered (Sylvander, 2004) in evaluating the impact of origin labelled products on rural development.

3.5 CONCLUSION

In summary it can thus be said that the economic rationale for protecting geographical indications derives from the fact that place of origin may be used as a quality signal or alternatively the resources of the region may be captured in the origin labelled product as quality attributes. In the first instance the informative meaning of the geographical name is emphasized in order to reduce information asymmetries. Where place of origin is used as an attribute, resources of the region are used to increase the value of the product. These components 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).

The added value derived from these resources leads to a differentiation based on product “qualities” and consequently to the creation of niche markets. The collective monopolies which result from the institutionalisation process provide producers within origin labelled niche markets the opportunity to protect and enhance the acquisitional potential of these markets and to transform the value added into an economic rent. Although this premium may be small, a geographical indication, by differentiating products by their area of origin, restricting supply and creating barriers to entry, acts as a powerful marketing tool by which to improve a product’s market access, thereby securing a certain amount of market share. This may hold significant benefits for export oriented producers.

To illustrate the relevance of the factors identified above, reference is made to a study (OECD, 1995) in which a number of factors that influence the success of small, rural enterprises that target niche markets have been identified. While numerous factors have an influence, two main factors emerge: market access and differentiation. The

study finds that one approach to addressing these factors is to work collectively in order to develop a competitive advantage. This chapter indicates that this approach is well accommodated within an origin labelled valorisation strategy confirming the factors identified as the economic rationale for protecting geographical indications.

Finally, sight should not be lost of the rural development potential encapsulated in origin labelled products. That this potential has indeed been recognized by the European Union is reflected in the various policies and widespread literature dealing with the topic. This rural development potential indeed constitutes a very powerful rationale for developing countries to embrace and support origin labelled products within their territory.

CHAPTER 4

CONDITIONS THAT ENABLE A PRODUCT TO BENEFIT FROM GEOGRAPHICAL INDICATION PROTECTION

The buyer of an advertised good buys more than a parcel of food or fabric; he buys the pause that refreshes, the hand that has never lost its skill, the priceless ingredient that is the reputation of its maker."

Brown, (1948).

4.1 INTRODUCTION

In chapter 3, the economic rationale for protecting geographical indications was highlighted. However, the economic benefits identified as associated with the protection of geographical indications are not equally evident for all products bearing an origin label. The question is whether there are certain characteristics or attributes which contribute to the ability of a product to benefit from protection as a geographical indication and thus contribute to its success as an origin labelled product. As such, the aim of this chapter is to explore the possibility of establishing geographical indications for South African products by identifying the attributes of a product which lends itself to the successful use of a geographical indication. The objective is to establish a check list against which South African products can be evaluated in order to establish whether they could benefit from protection as geographical indications. This will give an indication of the importance for South Africa of the debate at international level as discussed in chapter 2.

Fundamentally, the success of any product entering a niche market depends on the consumer recognizing and appreciating its value and on his willingness to pay a premium for it. In the case of geographical indications, certain factors, both endogenous and exogenous to the product, can either serve to strengthen the product's niche status or erode its uniqueness, ultimately leading to its failure as niche product. The following discussion is the result of a comprehensive literature study which was

done in order to identify the enabling factors that would facilitate an *ex ante* judgment of a product's potential to benefit from protection as a geographical indication.

4.2 PRODUCT SPECIFICITY

The primary question that needs to be addressed in establishing the potential of a product to benefit from the valorisation of origin is its degree of product specificity. This refers to the ease with which a product can be defined and thereby differentiated from similar products. What becomes important is to establish the characteristics of the product that differentiate it from a similar product produced in another region. This differentiation forms an *essentialia* of any product of origin as reflected in the relevant agreements¹⁸ which explicitly refer to the qualities or characteristics of the product. These characteristics are referred to as the product's specificity and play a fundamental role in its ability to exploit the benefits of establishing a geographical indication.

According to Barjolle and Sylvander (2002) the concept of specificity is similar to the idea of differentiation as found in Industrial Economics: the product is said to be differentiated if it has specific characteristics and if consumers perceive it as such. Barjolle and Sylvander (2002) further refer to Sylvander & Lassaut (1994), who identify a number of conditions on which a product's specificity is dependent. Firstly, the product should have *measurable characteristics* which are genuinely different from those of similar products. In this regard two categories can be distinguished: (a) those characteristics that are *measurable* and *discernable* which the consumer can identify during purchase and consumption and (b) *indiscernible* characteristics. In the latter case, a distinction may be drawn between intrinsic characteristics which often by law have to appear on the label (such as nutritional composition) and production characteristics which are voluntarily provided by the producer. These production characteristics are strongly influenced by technology and often differentiate the product from substitute products. Secondly, the product must be perceived as different by consumers. This perception should reflect on product attributes such as taste and nutritional values, but also on the product designation, which should be distinct.

¹⁸ Including the TRIPS Agreement and EU Regulation 2081/92.

The French concepts of *terroir* and *typicity* are implicit to specificity. In order that psychologically rooted existential needs for identity and security be realized we have to develop a sense of place (Sack, 1988 and Giddens, 1990). Given that “place” is increasingly compromised in the globalizing world (Thrift, 1994), the stronger the link to the region the more attractive a geographical indication will be as it becomes a manifestation of locality. Closely related to this is the French concept of *terroir*.

The concept of *terroir* encompasses the belief that specific territories have certain characteristics which are due to a particular geographical environment with its inherent natural and human components. Products that originate from these unique environments are believed to be special and distinct. Scheffer and Sylvander (1997) define *terroir* as “a homogenous geographical entity founded on natural and human factors where particular natural conditions conjugate with an original and ancient know-how”. According to the French Sustainable Development Commission (Brodhag, 2002), *terroir* can be defined as “a territorial entity with patrimonial values that stem from the complex and long term relationships between cultural, social, ecological and economic features”.

The concept *terroir* thus reflects a distinct relationship between communities and the natural environment that has shaped their landscape. As such, *terroir* has historical, traditional, social and cultural dimensions as well as agronomic and environmental ones (De Roest & Dufour, 2000). According to Barjolle *et al* (1998) a *terroir* consists of (1) a natural site, (2) a set of knowledge and human practices and (3) deep rooted traditions and cultural customs.

These different characteristics of a particular region which are encompassed in the concept of *terroir* serve as inputs in the production process, shaping the product and making it specific to a certain area. These characteristics are not only *specific* but also *typical* because they depend on a place, have a link to an origin and are the result of production conditions which are located in a particular spot (Barjolle *et al*, 1998). Some countries such as France and Italy have gone further than specificity by referring to *typicity* (Scheffer, 2002). Barjolle and Sylvander (2002) propose two meanings to the term *typicity*: horizontal *typicity* means that a good is both specific in that it is different and unique and therefore relates to a given region (typical of ...).

Typicity in a vertical sense supplements horizontal typicity by emphasizing its determinants i.e. the combination of natural and human production factors used in the production of the good (Salette, 1997). The latter factors are related to local *savoir faire* and are not easily separated from natural factors. As such, they are not easily reproduced elsewhere.

Typicity is thus an intrinsic component of the product, rooted in an historical and geographical context specific to the region of origin. In determining a product's typicity one takes into consideration both aspects of the natural environment from where the product originates as well as any local *savoir faire*. Interestingly however, a study done on the success of geographical indications in the European Union (Lee & Rund, 2003) indicates that typicity derived from a production process contributes more to the success of a geographical indication than typicity based on geography.

Clearly typicity is more narrowly defined than specificity which differentiates without necessarily reflecting *terroir* and origin. Figure 4.1 serves to illustrate the relationship/interaction between the general characteristics, specificity and typicity of a product:

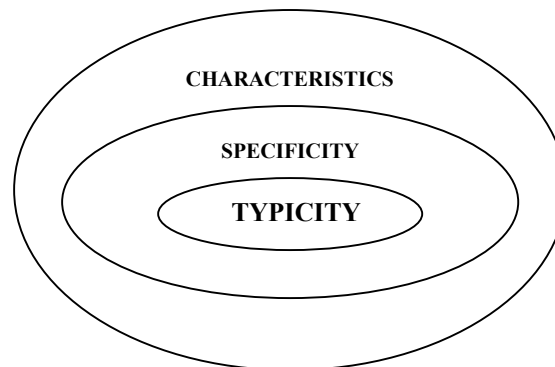


Figure 4. 1: Relationship between general characteristics, specificity and typicity.

Source: Barjolle, et al, (1998) as cited in De Roest & Dufour, (2000).

The existence of a link between a product and *terroir* as reflected by its typicity is at the core of any geographical indication, contributing to the product's specificity. In order to maximize and preserve this specificity, producers of geographical indications

need to agree on a production code in which the typicality of the product is well documented through the characterization of the product. The more narrowly defined the product description and the smaller the delimited area (in order to strengthen the link to *terroir*), the stronger the product's specificity will be. A well defined and regulated production code ensures that the product is highly specific in that it is consistently of the same quality.

In this regard it should be noted that origin labels are not "quality labels" in that the product does not have to be of a higher quality than substitute products. Quality in the context of origin labels rather implies specificity. Reference to quality should thus be understood as those unique characteristics or "qualities" of a product which differentiates it from similar products and which are the result of a shared standard. The more consistent these qualities are the stronger the product's specificity will be.

The importance of specificity in the success of a geographical indication derives from the need to precisely define a product in order to facilitate differentiation. To be competitive a firm needs to have a strategy based either on price or on quality (Porter, 1985). Given that most products bearing a geographical indication are characterized by high production costs (either due to the artisan nature of the product or the remoteness of the area of production), differentiation through quality may be the only option. In order to effectively compete against cheaper substitutes an origin labelled product therefore has to differentiate itself based on a quality which will give him its uniqueness, its specificity. Reinforcing specificity as part of a differentiation strategy should be viewed as a quality approach. In contrast, competition at price level could result in decreasing quality and a loss of its typicality, since quality and typicality entail additional production costs. This would eventually erode the uniqueness of the product, changing it from niche to commodity status. As a result, strengthening specificity has proven to be the most efficient strategy for these products, despite a potential increase in production costs (Barjolle & Chappuis, 2000).

4.3 PRODUCT REPUTATION

Closely related to the ability of a product to differentiate itself based on its specificity is the concept of reputation. As in the case of specificity, reputation is based on the distinctive characteristics of a product that facilitate differentiation. The stronger a product's identity based on its specificity, the more likely it is to develop reputation. This is because the product's distinguishing features linked to the region has allowed it to acquire identity which has been transformed into reputation.

The symbiotic relationship between 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. The literature on origin labelled products often indicates reputation as a factor which allows a producer to earn a premium based on product specificity. According to Bérard & Marchenay (1998) reputation is at the base of the "value chain" of an origin labelled product as it constitutes the condition for 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).

Reputation's contribution to establishing a geographical indication is clearly reflected in the provisions of the most prominent agreements and regulations dealing with the protection of geographical indications. Both the TRIPS agreement and EU Regulation 2081/92 recognizes reputation as a constituent factor in qualifying as a geographical indication. Section 22 of the TRIPS agreement, in defining geographical indications, states that:

"Geographical indications are, [...], indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, *reputation* or other characteristic of the good is essentially attributable to its geographical origin".

Section 2.2.b of Council Regulation 2081/92 defines Protected Geographical Indications as:

“the name of a region, specific place or country referring to a product originating in that region, specific place or country and which possesses a specific quality, *reputation* or characteristics attributable to that geographical origin and the production and/or processing and/or preparation of which takes place in the defined geographical area”.

This reputation in geographical indications originates from the behaviour of a number of agents and becomes an asset shared by a network of firms (Raynaud & Valceschini, 1998). As production initially took place in close physical and cultural proximity to the consumers, it was easy to establish product quality. However, the fact that consumption is no longer limited to the area of production leads to reputation assuming the nature of a collective asset, making producers interdependent on each other for the value of their reputation. By choosing to comply with the code of production, a producer chooses to invest in reputation as a collective asset. The decision to maintain traditional methods of production despite the availability of modern technology could be based on an explicit decision to preserve the cultural identity of the local product. This choice would be encouraged by strong social cohesion and by the symbolism of the product for local producers. In most instances however, traditional methods are preserved due to limitations imposed by the particular environmental conditions of production or by the lack of capital necessary to adapt the process. The more widespread the commitment to traditional methods among producers in the area of production, the greater the effectiveness of this investment in preserving the identity of the product and therefore the greater the collective value of the investment (Belletti, 1999).

At a practical level, in order to establish whether a product has reputation for purposes of establishing a geographical indication, a few factors should be considered. Firstly, the history surrounding the origin and development of the product would have to be explored in order to establish a historical presence of the product in the geographical area and thereby reputation. In this regard the initial uses of the denomination as well as the first descriptions of the product and its production method will serve as useful

information. Literary references as well as oral accounts could serve to confirm the historical presence of the product in the geographical area.

Secondly, reputation is based on the distinctive character of the product i.e. its capacity to differentiate itself from other products. The better a product is characterized, the easier the established reputation is displayed and the easier it is to prove that the product is perceived as distinct. The product's specificity thus enables the product to bear a geographical name as its designation and to acquire an identity which has been transformed into an established reputation.

Finally, building on the previous two factors, reputation is determined by the consumer's perception of the geographical indication i.e. on the consumer's ability to distinguish the protected product as a geographical indication in relation to similar products. In the absence of characteristics that enable a consumer to differentiate a product from similar products, no reputation would be established.

Assessing whether a product has reputation for purposes of establishing a geographical indication differs from system to system. As such, the assessment of reputation can be made on a local, national or international basis. In order to assess whether a product would qualify for protection as a geographical indication, it seems that it would be sufficient if there is evidence that the product enjoys local reputation amongst consumers. However, in order to fully derive the benefits of geographical indication protection the product would, in addition to local reputation, need to enjoy some form of reputation in the relevant foreign markets. In contrast to the initial reputation needed to establish a geographical indication, the latter reputation can be built through promotional campaigns etc.

In conclusion it should be remarked that for reputation to be a factor contributing to the success of an origin labelled product it should enjoy some form of legal protection. This requires a process whereby a product's reputation is recognized through legal instruments and state action. This process can be viewed as the institutionalisation of reputation and constitutes a prerequisite to the success of a geographical indication.

4.4 EFFECTIVENESS OF COORDINATION AND COOPERATION

The third factor contributing to the potential of an origin labelled product to benefit from geographical indication protection relates to the issue of coordination. In contrast to trademarks which are distinctive signs identifying goods of an enterprise and thus not limited by any territorial link, geography is at the heart of geographical indications (Marsden, 1998). This geographically intertwined nature of geographical indications has certain implications for the coordination of origin labelled supply chains. As Belletti and Marescotti (2002) mention, origin labelled products are very often characterized by a “collective dimension” in the sense that they are linked not only with the skills of many producers and/or processors but also with locally created public goods and with the history, habits and culture of the local community. This requires the creation of collaborative networks through which many actors jointly manage the common product in the same way a single firm might do (Barjolle & Sylvander, 2002).

These actors 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). It is often assumed that the activities associated with producing an origin labelled product are endogenous to the territory. However, this discounts the many non-local actors that participate in the production of an origin labelled product.

This diversity of actors leads to a diversity of objectives which are pursued through valorisation of the origin labelled product. Often these objectives go beyond the goal of profit maximization to include other socio-cultural objectives. This diversity is well illustrated with reference to the valorisation system in place in the European Union. Protection for origin labelled products under EU Regulation 2081/92 is structured around three groups of participants: producers/processors, regulators and inspection agencies (Fig 4.2).

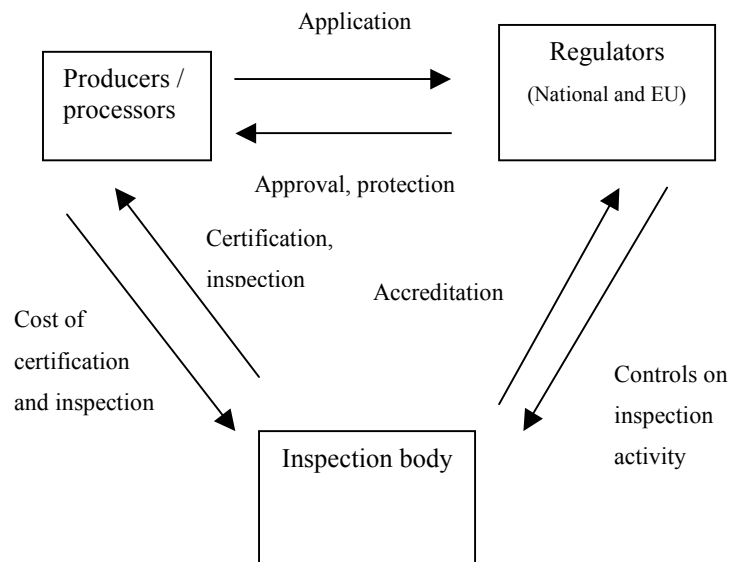


Figure 4.2: EU protected designation of origin and protected geographical indications system

Source: Hayes et al, (2003).

Although these actors remain economically and legally independent while producing and marketing the common good, they are linked in that their activities result in a particular origin labelled product whose main characteristics are determined in the code of production. This peculiar manifestation of independence/interdependence between producers of the common good, each pursuing its own objectives, emphasizes the fact that origin labelled products stem from a collective process. Menard (2000) states that there are various advantages associated with cooperation and collective production: (1) economies of scale in the acquisition of information, (2) risk-bearing among the group when facing unanticipated contingencies, (3) mitigation of adverse selection and moral hazard and (4) increased productivity due to a more developed “sense of responsibility”. However, he highlights that there are also limits and costs to cooperation, resulting from: (1) free riding strategies through selection of members (ex-ante) and malingering behaviour once selected (ex-post), (2) collective decision-making that may hamper the advantages of command, (3) incentives to collude and develop side payments and (4) the high cost of processing information and communicating in a team-oriented organization.

These advantages and limits associated with collective action bring to a fore the importance of co-ordination in producing an origin labelled product. The importance

of co-ordination has been reiterated throughout the research on typical products (Barjolle & Chappuis, 2000). In this regard Chappuis and Sans (2000) have identified co-ordination in the supply chain as a prerequisite for the success of typical products and for the competitiveness of the firms producing and marketing it. Factors indicated by research as contributing to the need for co-ordination in origin labelled supply chains include the type of product, in that they are strongly differentiated and with high value-added; the seasonal nature of a number of origin labelled products; and the location of some producers in regions where production costs may be higher. The most compelling reason seems to be the need to arrive, at the end of the processing stage, at a product with specific characteristics. In order to achieve the latter Chappuis & Sans (2000) refer to the following aspects that need to be addressed at collective level, further emphasizing the need for coordination:

Defining the Origin Labeled Product

Before establishing a geographical indication, the relevant group of producers and/or processors needs to define the relevant product by achieving consensus as to the characteristics of the product and the delimitation of the production area. Definition of the product should take place in accordance with the market and differentiation objectives. Consensus on the product definition can be considered the minimum level of agreement between participating actors as it determines the product characteristics as well as those entitled to produce it. Product specification will determine aspects such as future innovation and thus limits producers regarding product development. As such it forms an important aspect of the negotiation between participants establishing the geographical indication. The product definition is embodied in a code of practice which constitutes the first act of coordination within the supply chain. A liberal code will allow for the production of a wide range of products using the same designation. This should be avoided as it could lead to unfair competition and mislead consumers. In contrast, a strict code strengthens the image of a unique product and reduces differences in production techniques between firms. Defining the product necessarily raises the issue of exclusion further, necessitating collaboration and coordination between all stakeholders in defining the common good.

Controls

Once a code of practice has been agreed upon, consensus is needed on how to ensure conformity to the product specifications. The collective nature of the production process necessitates controls to prevent free riding and opportunistic behaviour. Each of the firms entitled to use the designation is dependant on the good practice of all the other firms in order to guarantee the quality and reputation of the product bearing the designation. The control function can be undertaken by external or internal institutions. In terms of EU Regulation 2081/92 provision is made for certification bodies which check that controls are conducted properly and in accordance with what the group using the designation has defined in the product specification (section 10).

Information

Producers generally do not possess sufficient information on technical aspects of the product, market prices or market opportunities. Such information is essential for quality improvement and to reduce uncertainty in the marketing environment. In Europe, some interprofessional bodies have been able to set up services that compile and synthesize information for producers. In some instances extension services may also be offered. Improved information leads to improved product quality and marketing and reduces uncertainty in the supply chain. The collective search for information requires some form of coordination.

Promotion

Firms producing origin labelled products are often small and consequently lack the necessary resources to adequately promote their products. In addition, collective use of the designation may prevent any one firm from engaging in the cost of promoting a product to the benefit of all other users of the designation. The collection of fees at collective level allows all firms to benefit from promotional expenses. These fees are usually collected on the basis of production volumes.

Political lobbying

The European experience has shown that the success of a PDO product is partially dependent on strong support from political authorities and public institutions (Sans, 1997). Although this factor cannot alone guarantee the success of the PDO product it can help to improve its competitiveness when important investments like infrastructure in rural areas are supported with public funds. Coordination has a strong role to play in lobbying political support. A supply chain which appears to be of general public interest will have better access to political support. This aspect is of particular importance in the case of countries which still envisage protection for geographical indications through institutional measures.

Management of production volumes

Research has highlighted the difficulty of exercising control over production volumes in origin labelled supply chains (Esposito, 1997). The objective with a supply ceiling approach in origin labelled supply chains is not to limit supply in order to achieve a higher price but to stabilize the market, thus avoiding large fluctuations in supply. Large producers may be able to withstand such fluctuations but often small producers cannot. As origin labelled products are closely associated with the practices and *savoir-faire* of small producers this poses a real threat to the survival of typical products. The management of production volumes takes place at collective level both in determining the allotted production volume as well as in implementing these quotas.

These issues that need to be addressed at collective level highlight the need for coordination within origin labelled supply chains. According to Barjolle and Sylvander (2002) coordination in the context of origin labelled supply chains should be understood as the ability of firms to achieve collective and efficient product and market management. In assessing how effective coordination and cooperation is with regard to product management, Barjolle and Sylvander (2002) consider two factors: (1) the capacity to bring out the product's differentiation potential and (2) the ease with which each actor can appropriate the collective process. The latter refers specifically to the ability of the actors to adapt their individual strategies to the

collective strategy. The first step to be taken in this regard will be the negotiation of a code of practice where after they must comply with the constraints imposed by the code and submit to the inspections agreed upon.

In judging coordination with reference to market management, the main issue is that of consistency. Barjolle and Sylvander (2002) for example highlight the fact that a promotional policy will not succeed if the product is not differentiated, poorly defined or inadequately controlled. They also mention that quality grading will only be effective if payment for the raw materials is directly dependant on compliance with the quality criteria agreed upon. A further issue regarding coordination with reference to market management is the relationship between collective action and the scope left for each firm to vary product quality to suit its own strategy, as this allows firms to manage competition in segmented markets. In conclusion it can be said that effective coordination allows producers to collectively define a common marketing strategy, build up a competitive advantage by developing a strategy to valorise the product's specificity, promote the product and face the market power of retailers have. Coordination thus becomes both a condition for and a result of the agreement between actors. As such, the capacity of producers to effectively coordinate has been identified (Barjolle & Sylvander, 2002) as one of the most important factors enabling a product to benefit from protection as a geographical indication.

4.5 INSTITUTIONAL SUPPORT

The fourth factor having been identified as contributing to the potential success of an origin labelled product is institutional support. Products bearing a geographical name have several public good characteristics (as they are in essence public brands put at the disposal of private actors) which require the intervention and support of public and/or private institutions (Barjolle *et al.*, 1998). This support may take many forms such as regulations, financial assistance with the procedure, advisory boards as well as financial support for individuals or applicant groups. In countries where geographical indications are a new concept the State may need to provide support and advice to producers applying for registration. The most important role played by the State in protecting geographical indications however, is its role in facilitating protection by means of legislation thereby providing the instruments of institutional guarantee. An

institutional barrier is created whereby firms that are unable to fulfil the required standards are driven out of the market. By providing the institutional framework within which a product is valorised the State thus becomes a producer of rights. Relevant in this regard is the role the State plays in supply control. In chapter 3 a discussion is provided on the importance of limiting supply in niche markets. The State, through the institutional framework it provides, plays an indispensable role in limiting supply, thereby preserving niche markets.

Furthermore, public institutions play an important role in decision-making and negotiation processes and in the effectiveness of valorisation strategies for origin labelled products. Local public institutions play a role in strengthening the region's image through the use of territorial planning and financial tools. In this regard public institutions can play a large role in ensuring the distribution of benefits within the region. However, in some cases the interests of public institutions may diverge from those of the producers. As such it has been argued that "the policy dimension does matter" in determining the ultimate success of these valorisation strategies (Belletti & Marescotti, 2002). Attention should thus be paid to the general structure and organization as well as objectives pursued within these institutions.

The need for institutions stretches further than public institutions but refers also to the existence or creation of producer and/or processor organizations, referred to in the European context as interprofessional bodies. These bodies are considered to be coordination institutions that 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 production code agreed upon. An industry which lacks such or similar bodies will be unable to display the cohesion needed to successfully market a common product.

As mentioned, the actors involved with producing an origin labelled product are heterogeneous not only regarding the stage of production in which they participate, but also the size and type of ownership (family versus agribusinesses). This heterogeneity of actors along with that of the quality of the product makes institutionalisation an extremely complex process, generating conflicts and bargaining between the interests of the actors and the institutions involved. As a result strong,

independent institutions are crucial for the successful valorisation of an origin labelled product. As such, institutional support can be seen as one of the factors that contribute to the success of a geographical indication (Barjolle & Sylvander, 2002).

4.6 ATTRACTIVENESS OF THE MARKET

Attractiveness of the market as a factor contributing to the success of a geographical indication refers to the characteristics of the market in which the product is to be sold. For specificity it is required that consumers should perceive the product as distinct from its substitutes. To assess the attractiveness of the various markets the following factors should be considered (Barjolle *et al*, 2002): 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, intensity of competition, and the image of the sector and the region.

According to Barjolle and Sylvander (2002) it is essential for the success of origin labelled products that they are perceived positively by consumers and that consumers share cultural affinities with them. Also, the image of a region plays a central role in the attractiveness of the market for an origin labelled product. Regional images are representations of place involving meanings which may vary spatially between individuals and change over time (Jenkins & Parrot, 2000). As such, the image of a region has the potential to evoke emotions relating to products which originate in the region. The question should thus be asked whether the product will be able to benefit from the image of the territory from which it derives. A strong product image will reinforce the region's image and *visa versa*. This could enhance the multifunctionality of activities such as agriculture and tourism, reinforcing the identity of the locals and providing them with a means of exchange, namely a product that represents their culture and values. In contrast, an origin labelled product may find it difficult to benefit from the region if the region consists of many cultural identities, as this dilutes the region's image and poses an obstacle to collective action. Regarding product image, it should furthermore be noted that a consumer's perception of a product is influenced by any negative impact the product may have on the environment. Products that could potentially impact negatively on the environment would thus be less likely to succeed as an origin labelled product.

4.7 CONCLUSION

Based on a comprehensive literature study, this chapter attempts to identify the factors that contribute to the potential of a product to benefit from geographical indication protection. Specificity, reputation, the effectiveness of coordination and cooperation, institutional support and the attractiveness of the market have all been identified as necessary if not sufficient factors for the success of an origin labelled product.

However, as mentioned by Barjolle and Sylvander (2002), no single factor can guarantee that a geographical indication will be successful. Rather a combination of factors is needed. This is reflected in the fact that although specificity is important, many highly specific products are not successful. This is usually due to the product not being well perceived by the market. Also, despite the important role played by market attractiveness, several products positioned in relevant markets fail to thrive if they are not specific enough. In conclusion it should be noted that the weakness of any of these factors does not necessarily mean that the products cannot benefit from protection as a geographical indication. Instead, it is possible for a weak factor to be substituted by another strong factor (Barjolle *et al*, 1998).

In the following chapter the relevance of geographical indications in a South African context is further explored by applying the factors identified above to three South African case studies. This is done with the aim of determining the potential of selected South African products to benefit from protection as a geographical indication.

CHAPTER 5

CASE STUDIES ON THE POTENTIAL OF SOUTH AFRICAN PRODUCTS TO BENEFIT FROM GEOGRAPHICAL INDICATION PROTECTION

5.1 INTRODUCTION

In the preceding chapters geographical indications as a concept was explored with reference to the juristic nature thereof, the economic rationale for its existence and the factors that enable a product to benefit from geographical indication protection. In this chapter, the concept is placed in a South African context to determine the potential of South African products to benefit from geographical indication protection. A case study approach is followed whereby the potential of South African products to benefit from geographical indication protection is judged based on the factors identified in chapter 4.

Given its relevance for the discussion at hand the chapter commences with a brief sojourn into the well publicized dispute surrounding the use of the name Rooibos. A brief exposition of the legal principles underlying protection of the name is provided. The latter is enhanced by a brief analysis regarding the *prima facie* potential of Rooibos to benefit from geographical indication protection. This discussion illustrates the relevance and importance of protecting South African intellectual property and sets the stage for the rest of the chapter, where an in depth analysis of the potential of two South African products to benefit from geographical protection is presented. The choice of the two products as case studies was based on the products' *prima facie* ability to qualify as a geographical indication as well as their potential to illustrate the discussion at hand. For this reason the cases were chosen in such way as to illustrate the interaction of the factors identified in chapter four providing both a negative and a positive finding. The case studies proceed by first providing a background to the relevant industry, followed by an analysis of the potential of the product to benefit from geographical indication protection. The chapter concludes with an *ex ante*

assessment, based on the factors identified in the previous section, as to the potential of these products to benefit from geographical indication protection.

5.2 CASE STUDY 1: ROOIBOS

5.2.1 Introduction

No analysis of the potential of geographical indications in a South African context would be complete without reference to South Africa's well renowned Rooibos. Mention geographical indications and the product most likely to come to mind for South Africans is Rooibos. Unfortunately, this is in part a consequence of a long-standing dispute over the use of the name. The origins of the dispute date back to 1994 when a South African company, Forever Young, registered the mark Rooibos in the United States in connection with among other things herbal teas. This in effect gave Forever Young the exclusive right to market products labelled Rooibos in the United States. As all Rooibos products are marketed under the name Rooibos (as a generic name) this gave Forever Young a virtual monopoly over the marketing of Rooibos products in the United States. 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 name Rooibos in the United States, a South African company Rooibos Limited instituted legal action in the United States in order to cancel this registration on the basis that it is generic and therefore non-distinctive. After years of expensive litigation the dispute finally came to a head when Burke-Watkins lost a lawsuit against a United States based company, Republic of Tea, in the District Court of Missouri. With mounting legal costs and several additional law-suites pending, Burke-Watkins agreed to voluntarily surrender her rights to the trademark.

In light of this dispute it is necessary to highlight two possible legal responses to the assertion of exclusive rights in the name Rooibos. One would be that of national trademark law. In dealing with protection in terms of trademark law it should be noted that trademarks are accorded protection based on their ability to serve as an indicator of source. As such, generic terms which are universal in their description of a service

or product are incapable of being registered as a trademark (Silver, 2002). This principle of trademark law includes foreign language generic terms in terms of the doctrine of foreign equivalents (Holland v C & A Import Corp, 1934). The likely end result of this reasoning is that a court is unlikely to recognize and uphold exclusive rights in a term denoting a generic species of product from a foreign country (Silver, 2002).

The other legal response to asserting rights in the name Rooibos would involve the TRIPS agreement as discussed in chapter 2. Although trademark law allowed South African producers to claim back the rights to market Rooibos in the United States, protection under the TRIPS agreement may provide a better long term instrument for ensuring that Rooibos remains the property of the South African people. The latter approach involves protecting Rooibos as a geographical indication under section 22 of the TRIPS agreement. In terms of TRIPS, WTO members must ensure that geographical indications are neither appropriated for exclusive use by entities in their jurisdiction nor applied to products not originating in the relevant region. In order to qualify for this protection, the quality and characteristics of Rooibos must be closely linked with its growth and production in the Cederberg region of South Africa. In order to test the possibility of protecting Rooibos as a geographical indication a short analysis of the geographical indication potential of Rooibos follows based on the factors identified in chapter four.

5.2.2 Background

5.2.2.1 Historical overview of the South African Rooibos industry

The unique Rooibos plant or *Aspalathus Linearis* was first utilised by the Khoi people of the Clanwilliam region in the Western Cape. The brewing of the plant as a tea with numerous beneficial properties by the indigenous KhoiSan people is well documented and can be traced back three centuries (Ismail and Fakir, 2004). Initially, the tea was used as a medicinal beverage until Russian immigrant Benjamin Ginsberg, as a descendant of a tea trading family in Europe, realized the market potential of the “mountain tea” (Wilson, 2005). By 1904 the tea was traded commercially within

South African markets. Today, Rooibos is cultivated on large scale for the production of Rooibos tea.

5.2.2.2 Organizational structure

There are four main role-players in the Rooibos industry namely producers, processors and manufacturers, marketers and regulatory bodies as well as a variety of research institutions. By 2003 there was an estimated 300-500 commercial farmers, with 20% of the producers accounting for 80% of the output (Rooibos Trade and Investment Report, 2004). Prior to deregulation there was a single channel for the supply, processing and marketing of Rooibos through the Rooibos Control Board at Clanwilliam (Rooibos Trade and Investment Report, 2004). After deregulation in 1993 the Board's assets were distributed to producers who previously belonged to the co-operative in the form of shares in the newly formed public company, Rooibos Limited. A number of new role-players entered the market as operations expanded to the broader Cedarberg area and Cape Town. Today Rooibos Limited, Khoisan Tea, Coetzee & Coetzee, Cape Natural Tea Products, King's Products, Red T Company, Big Five Rooibos Company, and Maskam Redbush are responsible for an estimated 95% of total annual supply and sales (Rooibos Trade and Investment Report, 2004). *Rooibos* Limited remains the largest (representing approximately 75% of the market) despite good market growth for some of the new players. Cape Natural Tea Products is a prominent processor/marketer in the South African market (Rooibos Trade and Investment Report, 2004). It supplies Rooibos tea for house brands such as that of the Spar Group in addition to its own retail product range (Rooibos Trade and Investment Report, 2005). A number of smaller companies are targeting farm stalls, health shops, chemists and tourist kiosks (Rooibos Trade and Investment Report, 2004). These actors are represented in producer and processor organizations.

5.2.2.3 Reference market

Next to water, tea is the most widely consumed beverage in the world. According to industry reports consumer demand for herbal teas is outstripping production and is seeing an upward trend in price levels (Rooibos Trade and Investment Report, 2004). In light of these trends Rooibos has enormous export potential. It could be positioned

as an herbal, green or organic tea depending on how it is cultivated and processed (Rooibos Trade and Investment Report, 2004). Its biggest potential however lies in the health sector, as it is becoming increasingly known for its beneficial properties. Germany, the Netherlands and Japan accounted for approximately 90% of all international Rooibos sales in 2003 (Rooibos Trade and Investment Report, 2004).

5.2.3 Analysis of geographical indication potential

5.2.3.1 Specificity and reputation

Various factors contribute to Rooibos being a highly specific product. The first, most apparent factor relates to its geographical dispersion. The Rooibos plant or *Aspalathus Linearis* requires specific climatic conditions and can only be grown at a certain altitude and in deep sandy soils. In addition to this it requires little rain. Rooibos is cultivated in a 300 kilometre radius from Nieuwoudtville in the north to Malmesbury in the south, including the Wupperthal, Clanwilliam, Citrusdal, Piketberg, The Suid-Bokkeveld and Vanrhynsdorp districts. The specific combination of conditions only prevails in this specific region and as a consequence it is the only region in the world where Rooibos grows naturally.

The qualities of the Rooibos differ within this region. A Rooibos of higher quality is generally produced on the Eastern side of the Cedarberg Mountains including the Wupperthal region. The tea derived from this area is darker due to a much faster fermenting process. Regarding the production process, De Villiers (2005) mentions that apart from mechanization, the process for processing Rooibos has not changed much from the way the Khoi people processed the plant. In this regard, the Rooibos branches and leaves are still harvested, bruised by hammering and then fermented. The final stage consists of sun drying the product in an open area. Processing thus still takes place in a traditional way according to the local *savoir faire* that has existed for many centuries, further strengthening the product's specificity. The Wupperthal production process can be differentiated from that of producers delivering their production to Rooibos Limited or the Red T Company. Wild harvesting makes up approximately 10 tons out of the 90 tons produced by the Wupperthal community. Less than one percent of Rooibos delivered to processors Rooibos Limited and Red T

Company is harvested in the wild. The wild harvested tea differs in taste and colour from the cultivated product. A potential has been identified for wild Rooibos tea and the Wupperthal community is planning to market it as pure wild Rooibos tea. In addition, all the production is harvested by hand in the Wupperthal region. This is considered a sign of quality by the Wupperthal producers. All the tea in this region is produced organically whereas only 15% of Rooibos Limited's production and between 20 and 30 % of Red T Company's production is organic. This illustrates an even higher level of specificity for certain areas of production, raising the possibility of deeper differentiation within a potential geographical indication for Rooibos. Due to differences in fermentation from day to day and from farmer to farmer, blending has become an important step in ensuring consistent taste and colour. Despite slight variations in qualities the tea has a highly specific taste and colour which is sought after internationally.

In addition to its strong specificity, Rooibos enjoys a well established reputation based on its beneficial properties and pleasant taste. The fact that Rooibos is caffeine free as well as a powerful antioxidant has made it a sought after drink both locally and internationally.

5.2.3.2 Effectiveness of coordination

The Rooibos industry has been described as "fairly complex and multi-layered". Since deregulation the industry has become highly fragmented and competitive with few structures in place to address industry concerns and act as a mouthpiece for the industry (Rooibos Trade and Investment Report, 2004). In an attempt to coordinate matters of common interest, the majority of processors have formed the Rooibos Forum (Rooibos Trade and Investment Report, 2004). However, the Rooibos Forum does not represent the broader industry and is as such perceived as an exclusive club benefiting only a select few. The lack of coordination in the Rooibos industry was clearly evident during the recent trademark dispute. Lack of coordination has been identified as a weakness of the industry and the majority of the role-players welcome the possibility of forming a body that will be representative yet independent from all players in the supply chain (Rooibos Trade and Investment Report, 2004). Improved

collaboration and coordination in the industry would be a prerequisite in any attempt to successfully establish a geographical indication for Rooibos.

5.2.3.3 Institutional support

The Rooibos industry receives significant institutional support from various institutions such as the Agricultural Research Council (ARC), academic institutions, government departments, as well as from certain non-governmental organisations. These institutions have made significant contributions in terms of capacity building, business development and research activities. With specific reference to intellectual property in the name, institutions such as the Western Cape Department of Agriculture and the Department of Trade and Industry have contributed financially to the legal costs incurred in the trademark dispute. Within the Rooibos Forum there is strong support for protecting the intellectual property in the name Rooibos. The proposed representative organization may be the ideal forum within which to initiate the process for implementing a geographical indication for Rooibos and take responsibility for coordinating and facilitating the product characterization.

5.2.3.4 Market attractiveness

Regarding the market attractiveness of the Rooibos industry it is firstly important that the product be perceived positively by the consumer. The image of the region plays an important role in this regard, as it has the potential to evoke emotions relating to products which originate in the region. The region from which Rooibos derives provokes strong, indigenous associations with a rural people. This regional product is furthermore regarded as a product which can contribute to rural development and the preservation of bio-diversity. Care should, however, be taken to emphasize the sustainable use of the resource as this could be a concern for some consumers. In this regard, studies by the University of Cape Town are currently underway to investigate the potentially negative impact that Rooibos cultivation may have on biodiversity. Furthermore, Rooibos, as part of the larger herbal tea industry, is perceived as a product with significant health benefits (Rooibos Trade and Investment Report, 2004).

Market attractiveness secondly depends on the size and growth potential of the product. In the case of Rooibos, it is clear that the industry is still relatively small (with 9 500 tons produced in 2003) with significant potential for growth (Rooibos Trade and Investment Report, 2004). Local consumption is growing steadily at around 5% per year, while international demand for Rooibos has surged since 2001 with an annual growth rate of more than 30% (Rooibos Trade and Investment Report, 2004). However, despite the fact that Rooibos is successfully cultivated and does not rely on wild harvesting, the issue of sustainability of production might arise in the context of expanding markets.

The final factor to be considered in determining Rooibos's market attractiveness is the level of current and/or potential competition. South Africa is significantly the only producer of Rooibos worldwide. Given the difficulty in cultivating the Rooibos plant elsewhere coupled with relatively cheap land, setup and labour costs, South Africa should retain exclusivity of production (Rooibos Trade and Investment Report, 2004). As such it is possible to position Rooibos in high valued niche markets as there is no competition from other countries as of yet (Rooibos Trade and Investment Report, 2004). However, regarding the marketing of Rooibos, there is potentially large scale competition over the right to appropriate the name Rooibos, necessitating imminent steps to secure South Africa's rights to the name.

5.2.3.5 Economic and environmental impact

The region where Rooibos grows is typically characterized by communities with limited opportunity for economic growth and formal employment, often resulting in few inhabitants being economically active. As a result, Rooibos cultivation provides an important economic activity in these resource poor communities. Rooibos has strong commercial links benefiting both large corporations and the indigenous people. Being a labour-intensive industry, the Rooibos industry benefits the lives of around 25 000 people. As such, Rooibos is one of the few indigenous plants that have made the transition from a local wild resource to an economically important crop (Rooibos Trade and Investment Report, 2004).

The increasing demand for Rooibos raises the issue of sustainable practices, as an increase in demand would lead to an increase in production. This requires an increase in hectares under cultivation. It has been predicted that an increase in production over the medium term would mainly be driven by increased geographical spread, rather than through improved cultivation techniques. Concern has been raised over the impact of land clearing in the fynbos areas on biodiversity. Further concerns over sustainability arise in areas such as Wupperthal where there is limited land available for cultivation as the community is situated in a natural reserve. Despite the potentially negative impact that improved market access and demand for Rooibos may have on sustainability, a geographical indication may actually improve sustainability by regulating production practices in the code of practice. As mentioned previously, the image of a product is strongly influenced by any potentially negative impact on the environment. Care should be taken that the large scale commercialisation of Rooibos does not become associated with harmful environmental practices. Closely associated with this point is the potential of eco-tourism built around the Rooibos industry. Geographical indications could go a long way in promoting tourism in the region, with further economic benefit to the community.

5.2.4 Summary

Judged by the factors identified in chapter four, Rooibos has significant potential to benefit from protection as a geographical indication. In the first instance it is a highly specific product given its limited geographic dispersion. Secondly, it has a distinct and unique flavour and colour. Rooibos furthermore has strong links with the indigenous Khoi people and tea from the Rooibos plant is still produced in much the same way as it was almost three centuries ago. There is thus a fair amount of local know-how involved. In addition to strong specificity, Rooibos enjoys widespread reputation both locally and internationally based on its beneficial properties and pleasant taste. A potential weakness in the industry is the lack of coordination and collaboration. This could pose a serious obstacle to establishing a geographical indication for Rooibos. Also regarding market attractiveness, Rooibos seems to be ideally suited as a geographical indication. However, a source of concern is the potentially negative impact that the establishment of a geographical indication may

have on sustainability and thus the environment. This could be prevented by a well defined code of practice establishing boundaries in production and as such may actually contribute to environmentally sound production.

The trademark dispute surrounding Rooibos highlights the danger of not protecting the name Rooibos against misappropriation. The legal outcome of the dispute has prevented the use of Rooibos as a trademark, at least in the United States. However, in order to protect the name Rooibos against misappropriation it would further be necessary to prevent the generic use of the name. Returning to the two legal responses mentioned earlier, there exists the possibility of protecting Rooibos as a geographical indication under the TRIPS agreement in the WTO. The analysis done indicates the strong potential of Rooibos to benefit from protection as a geographical indication. However, from a legal perspective concern remains as to the possibility of protecting the name Rooibos as a geographical indication. The concern derives from the fact that the legal victory in the United States was the result of the Court finding that the term Rooibos is a generic and non-distinctive term and therefore unable to qualify for registration as a trademark. The South African Department of Trade and Industry supported efforts to deregister the mark based on the same reasoning in that they came out as saying that “Rooibos is a generic name for an indigenous herbal plant” (Amin *et al*, 2005). Rooibos Limited instituted action on similar grounds, insisting that the trademark Rooibos should be deregistered as it is a generic term. Individuals involved in the herbal market, including trade associations, industry leaders, and attorneys generally agreed that the term Rooibos is generic and merely descriptive, based on the relatively long history of traditional use of the plant, and the name by which it is widely known in its native region and other countries to which it is exported (Amin *et al*, 2005).

A generic term is usually incapable of denoting source because of its reference to a species of product rather than a particular product (Amin *et al*, 2005). Given its non-distinctive character it is unable to be registered as a trademark. It would for example not be possible to register Rooibos as a trademark in South Africa or elsewhere due to its generic nature. The fact that Rooibos has been argued and proven to be generic poses a serious obstacle to protecting Rooibos as a geographical indication because as mentioned above, a generic term is usually incapable of denoting source, the latter

being an implicit element of a geographical indication. As a consequence, it is a well established principle in laws dealing with geographical indications that generic terms cannot be protected as a geographical indication. An example of the latter is the case of Cheddar which was found to be a generic term for a certain type of cheese, and therefore incapable of being protected as a geographical indication. It thus seems doubtful that it would be possible to protect Rooibos as a geographical indication, given its widely professed generic nature.

That said, Rooibos does convey a strong indication of geographical source as it is only found in a very specific region in South Africa. Rooibos tea is produced only in a particular region of South Africa based on indigenous methods, and should therefore not be used as the name of any product not produced in the same region but using the same process (Silver, 2002). The fact that there is no Rooibos region should not stand in the way of establishing a geographical indication for the name Rooibos as it is not impossible for such terms to rise to the status of a geographical indication. If it can be proven (and it will be very difficult to do so in light of all the evidence led by industry leaders as to its generic nature in the United States' dispute) that the name Rooibos rises above being a generic term and indeed serves to indicate source, then it would theoretically be possible to protect Rooibos as a geographical indication. One way of arguing this could be to say that while Rooibos is generic for purposes of registering a trademark as it refers only to tea produced from the *Apalathus linearis* in South Africa using traditional techniques, it is not used to refer to all red-coloured herbal teas in general. The argument is thus that what is generic for purposes of registering a trademark is not necessarily generic for purposes of establishing a geographical indication. It should be noted however that a country is not obliged to protect a term as a geographical indication under the WTO if the term has become generic in that country (TRIPS section 24.6). The United States would thus not be obliged to protect Rooibos as a geographical indication if the term is generic in the United States, as has just been found by the Court of Missouri. This raises doubts as to the effectiveness of protecting Rooibos as a geographical indication and whether it is not too late to protect South Africa's rights to the name Rooibos.

A more appropriate, albeit less desirable course of action, would probably be to establish a geographical indication for South African Rooibos. This could be done for

South Africa generally or more narrowly defined such as for Wupperthal Rooibos or Suide Bokkeveld Rooibos. This provides an opportunity for producers in specific areas within the region where Rooibos is grown to exploit these names as geographical indications based on the particular quality or other characteristics of Rooibos produced and processed within that area. However, it should be noted that only the specific combination of the place name together with the name Rooibos will then be protected and not the name Rooibos as such. Given that Rooibos is not yet on the Strategic Plant List and thus being sold to foreigners, the door is left open for the eventual production and/or marketing of “Rooibos” by other countries. Furthermore, in order to qualify for geographical indication protection under the TRIPS agreement it is necessary for the name to be protected in its home country (section 24.9). In order to protect Wupperthal Rooibos as a geographical indication in terms of TRIPS it would thus be necessary to prove that measures are in place to protect the name domestically.

The lesson to be drawn is the importance of establishing protection for South African names before they have become generic. The Rooibos experience highlights the need for proactive measures in order to protect our national assets. In light of this, the chapter now proceeds with an analysis of the potential of two further South African products to benefit from geographical indication protection in order to identify other South African products which may potentially run the same risk of misappropriation as does Rooibos.

5.3 CASE STUDY 2: KLEIN KAROO OSTRICH

5.3.1 Background

5.3.1.1 Historical overview of the South African Ostrich industry

The ostrich or *Struthio camelus* is endemic to most of Africa, especially the desert areas with its vast open plains. The historical presence of ostriches across Africa is confirmed by drawings found in Egyptian tombs, the decorative feathers worn by Roman generals and their wives and by the San rock paintings in South Africa (NAMC, 2003).

Despite its geographical dispersion, South Africa was the first to exploit the commercial potential of ostriches by exporting the feathers to Europe from as early as 1838 (NAMC, 2003). Uncontrolled hunting led to a reduction in the number of wild ostriches. This resulted in efforts to tame and breed ostriches from around 1850. Ostrich breeding activities were largely confined to the area surrounding Oudtshoorn, known as the Klein Karoo. However, ostrich feather farming as an organized undertaking only became established from 1863 and by 1870 turned into an extremely profitable industry (NAMC, 2003).

During the second half of the nineteenth century, various shipments of ostriches were taken from their natural habitat to Australia, New Zealand, Europe and South America (Nel, 1996). Before the ostrich was domesticated and for many years thereafter Cape ostrich feathers were not of the highest standard available on European markets. By 1877 the best feathers were still those from wild ostriches (Nel, 1996).

Towards 1910 the American and especially the Californian ostrich breeders were offering competition to the South African breeders who realized that they might lose their place in the world market unless they could produce a feather of superior quality through cross breeding (NAMC, 2003). The Cape consequently imported a number of wild ostriches from North Africa to be used in cross breeding attempts. These attempts led to the highly successful Evans type plume which became famous world wide for its density, gloss, strength and curl (NAMC, 2003).

By 1913 ostrich feathers were the fourth most important export product after gold, diamonds and wool (Nel, 1996). Commercial ostrich farming was largely confined to the area surrounding Oudtshoorn, firmly establishing Oudtshoorn as the ostrich capital of the world. In 1914, with close to a million ostriches in South Africa, the industry collapsed (NAMC, 2003). Poorly coordinated marketing, changing fashions, excessive supply of feathers and a disruption of exports because of World War 1 caused a rapid decline and collapse of the industry (NAMC, 2003). By 1930 the ostrich population had dropped from 770 000 to 23 000 (SAOBC, 2004). This slump continued until after World War II in 1948. While most farmers got rid of their ostriches the farmers in the Klein Karoo who kept birds of a better quality held on to their ostriches, hoping for a revival of the industry (Nel, 1996).

The period after 1945 eventually saw the revival of the ostrich industry in the Klein Karoo while the rest of the world's ostriches apparently fell into oblivion (Nel, 1996). The revival of the Klein Karoo industry was initiated by the formation of the Klein Karoo Agricultural Cooperative in 1945. From 1959 the Klein Karoo Agricultural Co-operative had total control over the industry (Nel, 1996) in accordance with a one channel delivery system for all ostrich products. The motivation used for the granting of sole marketing rights to the Klein Karoo Agricultural Co-operative was that farmers around Oudtshoorn needed to be protected because there was no other manner in which they could earn a satisfactory income (NAMC, 2003). Entry into the ostrich industry was consequently highly regulated and controlled by one organization, the Klein Karoo Agricultural Cooperative in Oudtshoorn. Furthermore, the breeding of ostriches were limited by legislation to the Oudtshoorn area and the export of eggs and chicks were prohibited to protect the South African ostrich industry.

The suitable geography of the region coupled with these legalities has led to geographical dispersion of commercial ostrich farming activities in South Africa historically being limited to the area surrounding Oudtshoorn, known as the Klein Karoo. For a long time and to an extent even today, South African ostrich products became synonymous with the Klein Karoo district. However, the success of the ostrich business and a weakening in the prices of other agricultural products such as red meat, mohair and wool industries urged farmers elsewhere in South Africa to turn to ostrich farming (NAMC, 2003). Farmers outside the traditional ostrich farming area looked with new interest at the profitable ostrich industry (Nel, 1996). Initially farmers in the traditional area of production cooperated with farmers located outside the Klein Karoo region by transporting ostrich chickens to other areas and later back again to be slaughtered at Oudtshoorn (Nel, 1996). However, as the industry became more established, there was growing dissatisfaction with the system of compulsory delivery to the Klein Karoo Agricultural Cooperative and gradually producer associations in other areas started to put pressure on the Minister of Agriculture to abolish the one channel marketing system in the ostrich industry (NAMC, 2003). These objections coincided with the general trend towards deregulation in agriculture and led to the lifting of legislation in 1993.

Since deregulation ostrich activities have spread from the Klein Karoo region (which maintains its prominent role) into the Southern and Western Cape, to the Eastern Cape, the Free State, Gauteng, Limpopo, Mpumalanga, North West and the Northern Cape (SAOBC, 2004). Today the Klein Karoo remains the commercial centre of ostrich farming in South Africa although ostrich farmers are now found across the country. Processing facilities have since been built at Magaliesburg, Graaff-Reinet, Grahamstown and Port Elizabeth with similar facilities envisaged elsewhere (Nel, 1996). The industry is now based on free market principles and the only limitation is the remaining prohibition on the export of eggs and live ostriches under the Livestock Improvement Act.

5.3.1.2 Organizational structure

Since abolishing the single channel cooperative marketing system in 1993, the industry has undergone significant organizational changes (SAOBC, 2004). Up to that time entry into the ostrich industry was highly regulated and controlled by one organization, the Klein Karoo Agricultural Cooperative in Oudtshoorn. Today, the industry is organized into an umbrella organization called the South African Ostrich Business Chamber (SAOBC), established in 1998, with headquarters in Oudtshoorn (SAOBC, 2004). It generates its income from collecting a contribution paid on each slaughter bird at participating abattoirs (SAOBC, 2004). In addition, producers belong to ostrich producer organizations according to provinces (NAMC, 2003). These provincial organizations are members of the South African Ostrich Producers Organization (SAOPO) (SAOBC, 2004). The processors (ostrich abattoirs and tanneries) are represented in the National Ostrich Processors Organization of South Africa (NOPSA). The SAOBC represents both SAOPO and NOPSA:

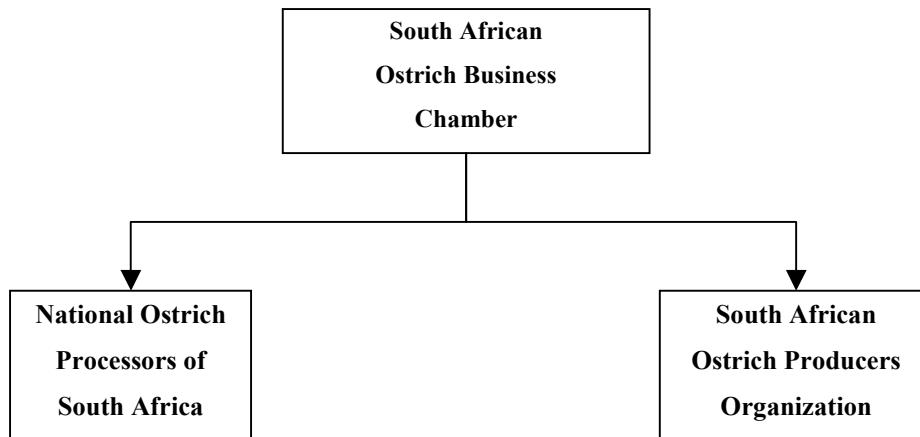


Figure 5.1: Current organization of the South African Ostrich industry

Source: NAMC (2003)

The major role-players in the Klein Karoo ostrich industry include Klein Karoo Cooperative Limited (the old Klein Karoo Agricultural Cooperative) based in Oudtshoorn, Mosstrich in Mosselbay and Swartland Ostriches at Malmesbury (part of the Roelcor group) with some producers occasionally delivering to Camexco located in Graaff-Reinet and Port Elizabeth (Kruger, 2005). Of these Klein Karoo Cooperative Limited is by far the largest with 90% of producers in the Klein Karoo region delivering to them (Kruger, 2005). Klein Karoo Cooperative Limited is a holding company whose shareholders include the members of the Klein Karoo Agricultural Cooperative. One of its subsidiaries is Klein Karoo Trading International Pty Ltd which is responsible for 70% of the world's ostrich product exports (Klein Karoo International Pty (Ltd), 2004). Approximately 90% of South African ostrich product exports are handled by Klein Karoo Trading International Pty Ltd (Klein Karoo International Pty (Ltd), 2004).

5.3.1.3 Reference Market

Since deregulation ostrich products have been marketed through a free market system. The South African ostrich industry is an export oriented industry with as much as 90% of all leather, feathers and prime cuts of meat destined for overseas markets. The main market for ostrich meat is restaurants, wholesalers and supermarkets (NAMC, 2003). The clothing, fashion and upholstery industries make up the market for leather

products while the feathers are marketed to the fashion, household and carnival industries (NAMC, 2003).

The main reason for the majority of ostrich meat being exported is that most of the South African population cannot afford ostrich meat due to its higher price compared to other meat. In addition, South Africans are still largely unfamiliar with ostrich meat and uninformed regarding the associated health benefits. The market for leather is mainly in Japan, Korea and China and for feathers it is Italy and South America. South African tanneries export around 90% of finished leather to manufacturers abroad. The remaining 10% is destined for South African manufacturers. Around 75% of the latter is later exported and 25% sold in the local market, mainly to tourists. The automotive upholstery industry is a growing market for finished leather locally. Demand for leather products is sensitive to levels of disposable income.

Ostrich products are expensive compared to substitute products and it remains the industry's greatest challenge to develop new markets and to maintain the high value of its products, as competition from other countries is increasing as commercial production takes off. Although opportunities to sell in the domestic market do exist, they are unlikely to support a sufficient scale of operation or generate the required returns. The South African and thereby also the Klein Karoo ostrich industries therefore depend for their survival on the development of profitable export markets.

5.3.2 Analysis of geographical indication potential

5.3.2.1 Specificity and reputation

The argument for establishing specificity for the Klein Karoo ostrich is wrought with difficulty. The ostrich bred in the Klein Karoo remains the *Struthio Camelus* var. *domesticus*, commonly known as the South African Black ostrich. This domesticated ostrich originated from a cross between *Struthio camelus australis* from South Africa and *Struthio camelus camelus* (or barberry ostriches) from North Africa (Swart *et al.*, 1987). The South African Black ostrich is known for its docility, high egg production, early sexual maturity and premium hide and meat. Although the South African Black ostrich remains the species of choice in South Africa, farmers outside the Klein Karoo

have in small numbers started breeding with the Blue Neck (*Struthio camelus australis*) usually referred to as Somalia or South African ostriches. Despite the fact that farmers in the Klein Karoo exclusively breed the sought after South African Black ostrich the particular species farmed in the Klein Karoo cannot be said to attribute any unique characteristic to Klein Karoo ostrich products as the species is not unique to the area but widely farmed across the rest of South and Southern Africa.

Regarding the geography of the region one should note that the natural habitat of ostriches is arid regions across Africa. As such, the Klein Karoo is particularly suitable for ostrich farming. There is however no particular aspect of the region's geography which contributes to a unique characteristic in the Klein Karoo Ostrich. Klein Karoo ostriches are no longer reared on the *veld* but are fed lucerne in feed lots. This means that they no longer graze the *veld* thereby excluding any possibility of a unique characteristic (e.g. taste of the meat) due to the consumption of local shrubs. Some argue that the water of the region may contribute to the quality of Klein Karoo ostrich products although this seems doubtful. A similar argument is the possibility that the ostrich's habit of consuming stones from the region may contribute an uniqueness to Klein Karoo ostrich products.

That said, South African ostrich leather is known to be of superior quality in the world market. This perception seems to be based on the tanning techniques and know-how employed by local processors. However, although these activities are concentrated in the Klein Karoo they are by no means limited to the area. It would thus be difficult to argue that Klein Karoo ostrich leather has a unique "quality" based on local *savoir faire* as opposed to ostrich leather from other regions of South Africa. Also, there seems to be no additional know-how regarding the rearing, selection or other aspect of ostrich farming and processing which bestows unique characteristics on ostrich products from the Klein Karoo.

Given that neither a unique natural environment nor any human *savoir faire* contributes to any unique characteristics in the Klein Karoo Ostrich, one can thus conclude that Klein Karoo Ostrich lacks typicity derived from the *terroir* and therefore the specificity which is so crucial in establishing a geographical indication. This said, Klein Karoo ostrich products still enjoy widespread reputation based on the

region's historical significance as the ostrich capital of the world. This reputation is not only enjoyed locally where South Africans still strongly associate the region with the riches built during the ostrich boom but also internationally where Klein Karoo ostrich is regarded as of superior quality. Interestingly however, it should be asked whether this reputation is the result of the marketing efforts and quality control of Klein Karoo Cooperative Limited or indeed connected to the quality of the region's products. Despite its use of name, Klein Karoo Cooperative Limited sources its ostriches from across South Africa and provides no guarantee of origin. The quality reputation captured in the name Klein Karoo Cooperative Limited, which is responsible for 95% of South African ostrich exports, is thus rather a reflection on the quality of South African than Klein Karoo ostrich.

5.3.2.2 Effectiveness of coordination

Apart from the problems encountered in establishing specificity, the potential of the Klein Karoo ostrich industry to successfully establish a geographical indication will be greatly affected by the potential of the industry to coordinate. In this regard the industry exhibits strong potential for coordination given the existing strong organizational structure. Furthermore, the industry does not exhibit strong diversity in actors as it consists mainly of commercial farmers and corporate businesses that follow similar goals. This undoubtedly contributes to the organizational and networking potential of the industry. However, role players in the ostrich industry have a strong 'each for himself' approach. This has resulted in a lack of coordination regarding industry issues such as generic marketing (NAMC, 2003). Furthermore, undercutting of prices take place, negatively impacting quality and income levels (NAMC, 2003). Klein Karoo producers would need to overcome these issues and develop a sense of cohesion in order to successfully establish and derive the benefits of a geographical indication for Klein Karoo ostrich.

5.3.2.3 Institutional support

Apart from research support activities, institutional support in the ostrich industry consists mainly of support from the SAOBC and the respective producer and processor organizations. The SAOBC's objectives include the promotion and

coordination of the interests of all parties in the production and processing of ostrich products as well as providing marketing support and encouraging a code of conduct (NAMC, 2003). As indicated in chapter 4, the success of a geographical indication depends strongly on the ability of the relevant industry to elicit institutional support in the form of producer and/or processor organizations similar to the European interprofessional bodies. As mentioned, producers in the ostrich industry belong to producer organizations according to provinces. These existing structures may easily be converted to resemble the European interprofessional bodies and take responsibility for the facilitation and coordination of product characterization. Furthermore, strong, independent institutions are needed to ensure credibility in the certification process. In this regard, existing inspection services from the National and Provincial Department of Agriculture seem insufficient and an alternative, independent inspection body would need to be identified for certification purposes. Finally, any potential geographical indication for Klein Karoo ostrich would be strengthened through support from local public institutions in actively promoting the region.

5.3.2.4 Market attractiveness

In order to determine the market attractiveness of the Klein Karoo ostrich industry the following factors need to be considered. Firstly, in order for Klein Karoo ostrich to benefit from protection as a geographical indication it is essential that the product is perceived positively by consumers. In this regard the image of the industry plays an important role. Issues such as the potentially negative impact of the industry on the environment and/or local communities become important. A problem the ostrich industry might encounter is the potentially damaging effect ostrich farming has on the local environment. Studies (e.g. Hoffman and Ashwell, 2001) have shown the negative impact of domesticated ostriches on the natural *veld*. This could negatively affect how the product is perceived by consumers. Furthermore, the image of a region has the potential to evoke emotions relating to products which originate in the region. In this regard, the Klein Karoo region evokes strong images of a bygone era when man was living close to the earth, and alludes to wholesomeness, authenticity and goodness. Also, ostrich meat is increasingly becoming known for its health benefits

given its low fat and cholesterol content, and is therefore positively perceived by health conscious consumers.

Secondly, the size and growth potential of the market for ostrich products need to be considered. In this regard, the market for feathers is unlikely to grow. However, the market for ostrich meat shows huge potential for growth as generic marketing of ostrich meat is undertaken nationally and internationally. This has led to a growing acceptability of ostrich meat and an increase in global demand. Ostrich leather markets have seen increased competition internationally. However, good opportunities for growth remain if quality can be maintained.

Thirdly, the level of current and/or potential competition needs to be considered. As mentioned, the Klein Karoo region no longer holds a monopoly on ostrich farming. As there are no distinct features, apart from its historical significance, which differentiate Klein Karoo ostrich from ostriches elsewhere in South Africa, the Klein Karoo producers are placed in direct competition with producers located elsewhere in South Africa. This, in addition to the spread of ostrich farming internationally, has led to strong competition for Klein Karoo ostrich producers.

5.3.2.5 Existing intellectual property in the name

Although South African trademark law prohibits registration of a geographical name¹⁹, Klein Karoo Trading International Pty Ltd has registered a trademark which consists of a distinctive blue ostrich used in combination with the words Klein Karoo Hallmark of Quality.

¹⁹ *Barring a few exceptions such as the fanciful use of a geographical indication (e.g. Antarctica Bananas).*



Figure 5.2: Klein Karoo Trading International Pty (Ltd)'s registered trademark
Source: Klein Karoo International Pty (Ltd), (2004).

This mark does not function as a guarantee of origin with about 95% of Klein Karoo Trading International's ostriches truly from the Klein Karoo, the remaining 5% sourced from across the country. However, this should be considered a potential source of conflict in an attempt to establish a geographical indication for Klein Karoo ostrich given the captured investment by Klein Karoo Trading International Pty Ltd. As the latter is the largest role player in the Klein Karoo industry this poses further problems related to industry collaboration in any initiative of establishing a geographical indication for Klein Karoo ostrich.

5.3.2.6 Economic and environmental impact

The discussion on market attractiveness alludes to the potentially negative environmental impact of ostrich farming. In addition, ostrich farming does not contribute positively to environmental issues such as the preservation of biodiversity etc. Furthermore, ostrich farming is traditionally a commercial undertaking with little benefit other than employment to the local people. Although attempts have been made within the industry to provide opportunities for previously disadvantaged communities, the size of the required undertaking largely hinders significant ownership by the local communities. As such, the Klein Karoo ostrich industry remains centred in the hands of commercial farmers. Establishing a geographical

indication for Klein Karoo ostrich may thus have limited benefits for local rural development.

5.3.3 Summary

According to the NAMC (2003) the South African ostrich industry is faced with growing competition, limited opportunities for diversification and a cost price squeeze. Establishing a geographical indication for the Klein Karoo region would provide producers in the region with a unique opportunity for differentiation as well as an opportunity to increase their returns. Concluding the case study on Klein Karoo ostrich, factors in favour of establishing a geographical indication include the strong reputation Klein Karoo ostrich enjoys based on the historical significance of the region in the industry. Furthermore, the structure of the industry and the strong organization coupled with fairly homogenous actors indicates the possibility of good coordination within the region. However, a potential obstacle to establishing a geographical indication for Klein Karoo ostrich is the lack of specificity which has been identified as a fundamental factor determining the success of a geographical indication. There is, apart from its reputation, no clear link that binds the product to the region either by way of the unique natural environment or local *savoir faire*. There is thus no basis other than historical significance, from which to differentiate the Klein Karoo ostrich industry from the South African ostrich industry in general. Barjolle *et al* (1998) mentions that if one of the success factors identified in their study, as discussed in chapter 4 is weak, it can be substituted by the strength of another. However, given the importance of specificity linking the product to the region thereby strengthening the association in the minds of the consumer, the benefits associated with establishing a geographical indication for Klein Karoo ostrich remain doubtful. The fact that use of the intellectual property captured in Klein Karoo currently vests in the industry's largest player together with the perceived negative impact ostrich farming has on the environment, casts further doubt on the potential and success of establishing a geographical indication for Klein Karoo ostrich.

5.4 CASE STUDY 3: HONEYBUSH TEA

5.4.1 Background

5.4.1.1 Historical overview of the South African Honeybush industry

Honeybush tea is an indigenous herbal beverage similar to Rooibos tea, produced from the *Cyclopia* species found in the unique South African fynbos biome. The Honeybush plant was first noted in botanical literature in 1705 (Kies, 1951), at which time it was believed that the Khoisan tribes of South Africa gathered the plant from the wild for its sweet flavour and soothing properties. International interest in Honeybush is traced back to the tea trade of the Dutch and the British (Dharmananda, n.d). The colonists soon recognized its potential as a substitute for ordinary tea, probably by observing the indigenous practices. In 1806, the British occupied the Cape Colony, having defeated the Dutch. As English became the official language, knowledge of South Africa spread to England and America. In King's American Dispensatory of 1898, under the heading of tea, Honeybush is already listed as a substitute, with reference to a report from 1881 indicating use of Honeybush as a tea in the Cape Colony of South Africa (Dharmananda, n.d). At that time the South African Khoisan were already using the tea for the treatment of coughs and other upper respiratory symptoms associated with infections. Despite a long history of production by indigenous people, the industry was only formalized and the tea popularized in the late 1990's with the advent of improved technology resulting in the creation of Honeybush tea bags as well as interest from international tea brokers (Honeybush Trade and Investment Report, 2004).

There are 4 commercially utilized species, which occur in a broad band from the Baviaanskloof in the Eastern Cape through to the Bredasdorp area in the Western Cape. The wild harvested and commercially grown species occurring naturally in the Eastern Cape are *Cyclopia intermedia* and *Cyclopia subternata*, whilst *Cyclopia sessiliflora* occurs in the Heidelberg/Riversdale region and *Cyclopia genistoides* along the coastal regions of the Western Cape (Trade and Investment report. 2004). It is estimated that there are approximately 30 000 ha of mountainous land, including the Tsitsikamma, Kouga, Baviaans, Langeberg and Swartberg mountain ranges, where

wild Honeybush grows sporadically within the greater fynbos biome. The Honeybush plant is easily recognized by its trifoliate leaves, single-flowered inflorescences, and sweetly scented, bright yellow flowers (Dharmananda, n.d). The flowers have prominent grooves on the petals, a thrust-in (intrusive) calyx base, and two bracts fused at the base around the pedicel (Dharmananda, n.d). The genus name *Cyclopia* alludes to the intrusive base of the calyx, which contributes to the flower's unique appearance (Dharmananda, n.d). Honeybush plants have woody stems, a relatively low ratio of leaves to stems, and hard-shelled seeds. The most desirable components for the tea are the leaves and flowers (Dharmananda, n.d). During spring and autumn, the plant is covered in bright, yellow flowers which smell like honey, thus the name Honeybush.

5.4.1.2 Organizational structure

The Honeybush industry is concentrated in the Langkloof in the Eastern and Western Cape with most of the wild tea growing in the Tsitsikamma and Kouga mountain ranges (Honeybush Trade and Investment report, 2004). The Honeybush industry is made up of seven categories of role players namely growers, wild harvesters, processors, packers, marketers, regulatory bodies, and research institutions (Honeybush Trade and Investment report, 2004). Most harvesting and first level processing occurs on farms within the region, with the exception of one on-farm processor in Riversdale (Honeybush Trade and Investment report, 2004).

There are currently 8 commercial growers of Honeybush tea who contribute 20 % to annual production (Joubert, 2005). Approximately 230-hectare Honeybush tea is under cultivation and consists mainly of *Cyclopia subternata* and *Cyclopia genistoides* (Joubert, 2005). Today, 80% of all Honeybush tea is still wild-harvested. Wild harvesters gather in small teams and negotiate harvesting rights with commercial apple farmers, or apply for harvesting tenders with SAFCOL and/or the Department of Forestry (Honeybush Trade and Investment report, 2004). A price is negotiated with the owner of the source in addition to which a fee is paid for transporting of the wet tea to the processors.

The secondary and tertiary level processing and marketing occur in Port Elizabeth, Mossel Bay and Cape Town (Honeybush Trade and Investment report, 2004). At secondary level processing the tea is subjected to steam pasteurisation, sieving and dust extraction. Many secondary level processors have also positioned themselves as marketers. Tertiary level processing encompasses packing the tea as well as certain value added functions such as instant teas, cool method green tea processing, pharmaceutical extracts and novel products (Honeybush Trade and Investment report, 2004).

5.4.1.3 Reference market

Prior to the first commercial crop in 1995, Honeybush tea was sold only at farm stalls in the region of production (Honeybush Trade and Investment report, 2004). Processing of the plant has increased from +/- 5 tons in 2001, 10 tons in 2002, to 52 tons in 2003 (Honeybush Trade and Investment Report, 2004). This increase mainly reflects the growth in international demand, although local demand is also steadily increasing. Over the past 5 years large companies such as National Brands and Unifoods have entered the retail market with Honeybush or blends thereof (Honeybush Trade and Investment report, 2004). Big multinational and local companies have launched Honeybush under their own brand name (e.g. Lipton, Freshpak, and Five Roses). In addition, national retail groups (SPAR, Woolworths) are stocking private label brands of Honeybush and blends of Honeybush and *Rooibos* (Honeybush Trade and Investment report, 2004). However, the market for herbal teas is largely an export market with Germany and the United States the largest importers. Large brands in the United States such as Celestial Seasonings, Stash, Tazo, Numi and the Republic of Tea have launched *Rooibos* and Honeybush brands or blends. Marketing in export markets is done mainly by tea brokers who export both *Rooibos* and Honeybush and retail brokers who include packed Honeybush tea as part of a basket of other products e.g. Fair Trade (Honeybush Trade and Investment report, 2004). Some marketing is also undertaken by the processors themselves who export directly in bulk, and industry export and investment facilitators e.g. Wesgrow and the Department of Economic Affairs and Tourism (Honeybush Trade and Investment report, 2004). The major obstacle preventing export growth in the Honeybush tea

industry is the lack of sustainable supply of high quality tea in large quantities (Honeybush Trade and Investment report, 2004).

5.4.2 Analysis of geographical indication potential

5.4.2.1 Specificity and reputation

As with Rooibos, there is no difficulty in establishing specificity for Honeybush. The first, most apparent factor relates to its geographical dispersion, as Honeybush is grown exclusively within the unique South African fynbos biome which consists of a narrow coastal region in the Eastern and Western Cape, from Darling to Port Elizabeth, bounded on the north by the Cederberg, Koue Bokkeveld, Klein Swartberg, Groot Swartberg and Kouga mountain ranges.

As mentioned, there are 4 commercially utilised *Cyclopia* species. The variety favoured by the export market is the *Cyclopia intermedia* (Honeybush Trade and Investment report, 2004). However, it has proven difficult to cultivate commercially and wild harvesting is still widely practiced. Each *Cyclopia* species has adapted to different geographic areas and micro-climatic conditions within the fynbos biome. As each of these species has a unique taste the product differs between regions within the fynbos biome. Due to differences in the climate e.g. dry seasons etc. different sub-species tend to be more plentiful than others from year to year. Given the wild harvesting practices there is no consistent use of a particular species or combination of species, which results in differences in quality in the form of taste, colour and draw speed from harvest to harvest within the same region (Honeybush Trade and Investment report, 2004). The variation in qualities (i.e. taste and colour) should not be viewed as detracting from Honeybush's specificity but could instead be promoted as a unique characteristic of the product by promoting the practice of wild harvesting with the concomitant variation in product qualities as a unique quality of Honeybush tea thereby serving to further strengthen the product's specificity.

Regarding production processes, Honeybush tea has traditionally been processed in a variety of ways. Processing of Honeybush tea, which entails harvesting, cutting off the plant material, fermentation and drying, is important for the development of its

characteristic sweet aroma, flavour and red-brown to brown colour. Today, the leaves, stems, and flowers of the *Cyclopia* species are processed to obtain Honeybush tea in much the same way as it has been for centuries. The production of Honeybush tea is thus to a large extent based on traditional practices and know-how.

Establishing reputation for Honeybush is still somewhat problematic. Reputation exists to a certain extent in the historical presence of the product, which connects the product to the region and the indigenous people. As a result Honeybush is regarded as a wild tea. The product is also increasingly becoming known for its associated health benefits and valued for its traditional methods of harvesting both locally and in export markets. However, it seems that despite its unique taste and colour, Honeybush is still not well established as a distinct herbal tea in the minds of consumers, who still often confuse it with Rooibos tea. As a result the product lacks its own identity. This is the case even for the local market, with consumers outside the region largely unfamiliar with Honeybush tea. However, what is ultimately important for a product to benefit from a geographical indication is consumer willingness to pay for it rather than existing reputation. A well designed marketing campaign could establish Honeybush as a distinct herbal tea by building on the product's unique selling points, namely its labour intensive harvesting, the fact that it grows in a remote, mountainous region, benefits local resource poor farmers and has no negative attributes. This would complement rather than prevent the establishment of a geographical indication for Honeybush tea.

5.4.2.2 Effectiveness of coordination

The industry is generally characterized by good coordination between the various stakeholders. A South African Honeybush Tea Association (SAHTA) has been established with links to previously disadvantaged communities through the signing of memoranda of understanding (Honeybush Trade and Investment report, 2004). With +/- 40 active members, it represents the interests of the Honeybush tea industry and is elected from producers and marketers of Honeybush tea. The objective of the organization is: (1) to promote small scale farmers, (2) to promote organic Honeybush production, (3) to apply responsible use of wild reserves, (4) to grow the industry as a whole through a marketing campaign and the opening up of export markets and (5) to

shift from bulk supply to value added products (Honeybush Trade and Investment report, 2004). To this end there is close cooperation between SAHTA members, research institutions such as the ARC, Department of Agriculture in the Western Cape Province and producers. Co-operation also exists in producing a quarterly newsletter and in addressing issues related to trade marking of the name Honeybush tea (Honeybush Trade and Investment report, 2004). In all these cooperative initiatives there is a high level of community involvement, clearly indicating a willingness and desire to grow the industry and bring about benefit sharing and sustainable use of the wild resource. These factors all allude to the potential of the Honeybush industry to form the necessary collaborative networks essential for the joint production and marketing of the common good, identified as critical to the ability of an industry to benefit from geographical indication protection.

5.4.2.3 Institutional support

Institutional support in the Honeybush industry is generally limited to research support activities undertaken by government institutions such as the Agricultural Research Council, with limited funding provided by the Department of Agriculture. However, no institutional support has been provided in the context of regulations protecting the public good properties of the name Honeybush as well as financial assistance with possible legal procedures. The name consequently remains unprotected at present apart from the limited protection afforded in terms of unfair competition laws. It is here where the need for institutional support from the State is most evident in order to ensure that the economic benefits associated with use of the Honeybush name accrues to the local population.

The success of Honeybush as a geographical indication will further depend strongly on the ability of the industry to establish institutional support in the form of producer and/or processor organizations similar to the European interprofessional bodies. In this regard, the existing South Africa Honeybush Tea Association (SAHTA) may easily be converted into a similar organization responsible for coordinating and facilitating the product characterization. In addition, strong, independent institutions are needed to ensure credibility in the certification process. The Perishable Products Export Control Board currently controls quality and standards for Honeybush exports.

A similar body would have to be identified as an independent certification body, ensuring compliance with the code of production and credibility of the product. Lastly, local public institutions can contribute to the success of a geographical indication for Honeybush by strengthening the region's image through territorial planning and promotional tools.

5.4.2.4 Market attractiveness

In order to determine the market attractiveness of the Honeybush industry the following factors need to be considered. Firstly, in order for Honeybush to benefit from protection as a geographical indication it is essential that the product is perceived positively by consumers. The image of the region plays a very important role in this regard given that the image of a region has the potential to evoke emotions relating to products which originate in the region. Honeybush's strong indigenous associations provide an opportunity by which to promote Honeybush as an indigenous crop with rural development potential and which could lead to job creation and the preservation of biodiversity. Care should however, be taken to emphasize the sustainable use of the wild resource as this could be a concern for some consumers. Furthermore as part of the herbal tea industry, Honeybush is part of a sector which is increasingly known for its health benefits (Honeybush Trade and Investment Report, 2004). Honeybush can in this regard benefit from the positive image of other herbal teas such as Rooibos and Green tea.

Secondly, the size and growth potential of the market needs to be considered. In this regard, the industry has shown a 20% annual growth with total annual production for 2003 comprising 221 tons. Of this 52 tons were packed for local consumption with an approximate value of R7.6 million, and 169 tons for export with an approximate bulk loose tea value of R4.4 million (Honeybush Trade and Investment report, 2004). From current plantations, there is a dry yield of 2 tons per hectare and it is anticipated that there is a market potential of 9000 tons per annum over the next 15 - 20 years (Honeybush Trade and Investment report, 2004). Estimates are that the industry could potentially grow by 15 to 25% per year into a R300 million industry over the next 20 years (Honeybush Trade and Investment report, 2004). Regarding size, the industry thus shows enormous potential for growth as it is still very young. Issues regarding

sustainability will however need to be dealt with in order to determine whether the natural resource allows for an increase in production.

Thirdly, the level of current and/or potential competition needs to be considered. As mentioned, the Honeybush industry forms part of the larger herbal tea industry. Its main competitors are thus the better known teas such as Rooibos and Green tea. However, given the growing popularity of herbal teas, fruit and herbal infusions as a result of the increased awareness of health and the beneficial properties of tea consumption, the herbal tea market shows unlimited potential for growth. However, it is predicted that long-term sustainability and growth will be determined by flavour and taste (Honeybush Trade and Investment Report, 2004). Clearly, Honeybush tea has huge potential given its pleasant taste and perceived health benefits. Furthermore, Honeybush tea has the potential to position itself within other growing niche markets such as the organic market. Currently, approximately 130 hectares of cultivated Honeybush tea has been certified organic. Organic production can thus complement certification as a geographical indication by incorporating it as a condition into the code of practice. Furthermore, the geographic dispersion of the Honeybush plant provides a natural barrier to entry into the market, easing competition from potential producers of Honeybush elsewhere.

5.4.2.5 Economic and environmental impact

The region where Honeybush is found is typically characterised by communities with limited opportunity for economic growth or formal employment, often resulting in only a few inhabitants being economically active. As a result, the harvesting of Honeybush, which is labour intensive, is traditionally an important economic activity in these resource poor communities. Honeybush tea has a long tradition of production by indigenous people. Even today the commercial cultivation of Honeybush tea is limited and 80% is still harvested by local resource poor farmers. From a development perspective Honeybush tea offers a less expensive alternative to the more traditional crops grown in the Western Cape Province. The low capital outlay and Honeybush's ability to flourish in a mountainous region with low rainfall such as the Langeberg Mountains, makes Honeybush an ideal crop for improving rural livelihoods. In addition, wild harvesting provides entrepreneurial opportunities for harvesters. A

community empowerment packing plant is currently being established in a Government Private Enterprise Partnership and will create employment and profit sharing in the value-adding sector, whilst serving the greater Honeybush community as a local contract pasteurizing- and packing- facility (Honeybush Trade and Investment report, 2004). Regarding employment figures, approximately 651 workers are currently involved in the production of Honeybush tea. A further 87 jobs have been created in the areas of distribution, marketing and local and export sales, whilst approximately 41 staff members are involved in research throughout the country and at various institutions. It is thus estimated that approximately 780 staff are directly involved with the Honeybush industry (Honeybush Trade and Investment report, 2004).

Clearly, the Honeybush industry with its strong indigenous ties has strong regional development potential. However, despite the potential economic benefits for these communities, unsustainable harvesting practices have in recent years meant that harvesters have to venture further into the surrounding mountains to obtain economically viable amounts of tea due to the decreasing natural population of the *Cyclopia* species. The lack of sustainable practices is aggravated by the fact that the *Cyclopia* species does not fall under the Nature Conservation Ordinance 19 of 1974 and it is not a protected plant species, so that harvesters only have to obtain permission from land-owners to harvest (Honeybush Trade and Investment report, 2004). In this regard it should be noted that the image of a product is strongly influenced by any potentially negative impact on the environment. A criticism against establishing a geographical indication for Honeybush is that improved market access may lead to unsustainable harvesting practices. One should realize that as the industry is currently very small with only 8 commercial growers and limited opportunities to increase production due to cultivation not being very successful, an increase in demand for the product would act as a further incentive for unsustainable use of the wild resource. However, instead of aggravating environmental concerns a geographical indication for Honeybush may actually contribute to the preservation of the natural resource by stipulating clear rules regarding sustainable practices in the code of practice. The collective process through which these rules are developed should serve to create greater awareness among beneficiaries of the importance of preserving the wild resource.

5.4.2.6 Existing intellectual property in the name

Honeybush is currently trademarked in Japan. This should be considered in any potential process for establishing a geographical indication as it could potentially impact on the right to use the geographical indication in that market.

5.4.3 Summary

It is clear that, measured by the success factors identified in the previous chapter, Honeybush tea has enormous potential to benefit from protection as a geographical indication. The product is highly specific not only due to its geographic dispersion but also based on its unique attributes, including its taste and colour. Although the variation in quality may be a concern in the context of establishing a geographical indication, it should not stand in the way of Honeybush benefiting from such a marketing tool. Rather, since geographical indications are about typicity and not homogenization, these differences should be built into the product definition as contributing to the uniqueness of the product and be marketed as such. Furthermore, the production process is still, to a large extent based on traditional practices and know-how. This further serves to strengthen the product's specificity. The product also enjoys a limited yet growing reputation based on its links with an indigenous people and its beneficial properties. Steps would however need to be taken in order to differentiate Honeybush from the more well known Rooibos in the minds of consumers.

Regarding market attractiveness, the product is generally well perceived by consumers based on its links to an indigenous people, traditional practices and potential health benefits. A potential concern for establishing a geographical indication for Honeybush would be the size of the industry. The Honeybush industry is currently still very small and, due to difficulty in cultivation, shows limited potential for growth. As a geographical indication for Honeybush may increase demand and/or the price of the product there is concern regarding sustainability. However, unsustainable practices can be avoided through regulation in the code of practice. As such, a geographical indication for Honeybush may actually impact positively on the environment as it could contribute to the preservation of biodiversity

and sustainable use of the wild resource but also on the communities dependant on Honeybush for their livelihoods by adding value to the region as a whole. These factors, coupled with the fact that Honeybush is strongly associated with an indigenous people in rural areas, provides an ideal opportunity to promote the product as an indigenous product which favours the environment and improves livelihoods for the indigenous people.

Regarding the effectiveness of coordination the industry is generally well coordinated and shows good potential for successfully collaborating on establishing a geographical indication. In conclusion, it should be mentioned that the process of establishing a geographical indication for the Honeybush industry is very much in line with the industry's vision to transform the industry from a bulk producer competing in the mass black tea market to becoming a supplier of value-added niche products in line with global market trends (Honeybush Trade and Investment Report, 2004). More importantly there is clearly a willingness to change in the industry, a factor which will ease the process of collectively defining and producing the product in order to fully realize the economic potential of the product. This is an important factor, given that the process for establishing a geographical indication is a bottom up approach rather than a top down approach as in the case of food safety regulations, and that the ultimate success thereof depends largely on the extent to which the process is driven by the community itself.

In summary, it could therefore be said that Honeybush shows remarkable potential as a geographical indication. However, given the similarity between Honeybush and Rooibos it needs to be stated that the same potential difficulties in protecting the name Rooibos may be encountered in an attempt to protect Honeybush based on potential claims of genericism. It may therefore again only be possible to protect the name Honeybush in conjunction with a regional indicator such as Lang Kloof Honeybush tea, in which case the name Honeybush will remain available for use by foreigners. This again proves the need to protect the name before it becomes generic.

5.5 CONCLUSION

The chapter commenced with a discussion regarding the trademark dispute surrounding Rooibos followed by a brief analysis of Rooibos's potential to benefit from geographical indication protection. The purpose of the discussion on Rooibos was to illustrate certain legal principles underlying the protection of a name as a geographical indication as well as to highlight the importance of protecting South African intellectual property in place names before it is appropriated by others or becomes generic.

Following the importance of this, the discussion proceeded with an analysis of the potential of two other South African products to benefit from geographical indication protection. As mentioned, the case studies were chosen based on the products' *prima facie* ability to qualify as a geographical indication as well as its potential to elucidate the discussion at hand. For the latter reason the products were chosen in such a manner as to provide both a negative and positive conclusion regarding its potential for establishing a geographical indication. The analysis found that despite the apparent potential for establishing a geographical indication for Klein Karoo ostrich, certain factors which have been identified as crucial to the success of a geographical indication, are lacking. The most important of these is the lack of any identifiable specificity which stands in the way of differentiating the product from ostrich products found elsewhere in South Africa. In contrast, the Honeybush case study found that, based on the factors identified in chapter four, Honeybush has strong potential as a geographical indication. The results of the discussion indicate the advantage indigenous products with strong links to indigenous people have in establishing a geographical indication in contrast to more commercialised products. The stronger the connection between the product and the region, as facilitated through its link with the indigenous people, the stronger the competitive advantage. This is in line with a study which found that geographical indications show the greatest potential to benefit local producers where traditional small-scale production is still present, on the supply side, and where end-use products are marketed directly to consumers. In other words, they are less likely to be appropriate when the product is a commodity traded primarily in bulk (Downes and Laird, 1999).

The analyses succeed in illustrating how the criteria identified in chapter four can be applied in order to make an *ex ante* judgement of the potential of a product to benefit from geographical indication protection. Similar analyses of other potential geographical indications in South Africa such as Grabouw boerewors, and Kwa-Zulu Natal Amadumbe will consequently aid in establishing the extent to which South African products may benefit from geographical indication protection.

CHAPTER 6

CONCLUSION AND RECOMMENDATIONS

6.1 INTRODUCTION

The objective of this study was to establish the relevance of geographical indications for agricultural products in a South African context and to illustrate the need for developing countries to protect geographical indications, not only to preserve their national assets but also for its potential as a powerful development tool. This chapter revisits the research problem and objectives set out in chapter one and evaluates these in light of the discussion and analysis conducted in chapter two, three, four and five. This is followed by a conclusion as to the relevance of geographical indications in South Africa and developing countries in general. Based on this, recommendations are made as to South Africa's position in the debate at multilateral level. The chapter concludes by identifying areas for future research.

6.2 REVISITING THE RESEARCH PROBLEM

Chapter one provided a background to the current debate at multi-lateral level in which the European Union is insisting on increased protection for geographical indications while the United States and Japan (supported by a number of other countries) are maintaining that geographical indications are sufficiently protected within existing trademark laws. Countries that have created important export markets for products already protected by geographical indications support the European proposal and insist on extending the additional protection granted to wine and spirits to all products. These countries are of the opinion that the legal system provided under TRIPS is insufficient to protect geographical indications to the same extent as it does trademarks. However, another group of countries feel that geographical indications are not a well developed category of intellectual property rights. These countries oppose the idea of extending additional protection to products other than wine and spirits. Notably, the majority of developing countries support the latter view. The latest statement on the matter from the South African Department of Trade and

Industry reads as follows (Issue paper, 2005): “It is important for South Africa that a system should be adopted that is voluntary, flexible and would not place an administrative and costly financial burden on us and that does not jeopardize our rights as currently contained in the TRIPS agreement”. The South African government is clearly not taking any significant stance on the matter and if anything this is a diplomatic way in which to indicate support for the United States’ point of view.

In light of this, the objective of this study was to indicate the relevance of geographical indications in a South African context and for developing countries in general. It was hypothesized that developing countries in general and South Africa in particular can benefit from geographical indication protection. In line with this general hypothesis the study also tests the hypothesis that South Africa possesses a number of agricultural products and indigenous biological resources that could benefit from geographical indication protection by protecting valuable intellectual property as well as preserving potential price premiums which may have important development implications.

6.3 CONCLUDING THE HYPOTHESIS

The analysis undertaken in chapter two, three, four and five served to address this hypothesis by investigating and discussing different aspects of geographical indication protection. The investigation proceeded by first contextualizing geographical indications though clarifying the relevant terminology encountered followed by an exposition of the legislative framework within which geographical indications are protected. The discussion provided a deeper understanding of what geographical indications are and the current level of protection this intellectual property right enjoys at International, Community and National level. The discussion on the protection of geographical indications at National level highlighted the limited protection that geographical indications currently enjoy in South Africa in comparison to protection provided at Community level and in contrast to the growing importance of geographical indication at International level.

Chapter three set out to investigate the economic rationale for protecting geographical indications and found that the economic rationale is to a large extent to be found in the theories on information and reputation as well as in factors associated with improved market access. It was found that geographical indications serve to address information asymmetries through its role in preserving reputation through what is known as the “institutionalisation of reputation”. This highlighted two important features of geographical indication protection i.e. that it functions as both a consumer protection measure (through addressing information asymmetries and quality) and a producer protection measure (through its role in protecting reputation as an asset).

It was furthermore found that territory goes beyond its purely informative role and acquires the characteristics of an attribute. It is this characteristic of territory as an attribute that translates into improved market access for products bearing a geographical indication. The improved market access from the use of geographical indications derives mainly from increased competitiveness in the market and the development of a sustainable competitive advantage. In this regard it was found that the economic rationale for protecting geographical indications further derives from its potential to facilitate place-based differentiation thereby allowing a producer to access niche markets and the concomitant benefits associated with it.

The discussion proceeded to investigate how geographical indications contribute to improved market access by investigating the market structure which results from this place-based differentiation. It was found that the collective nature of geographical indications is well explained with reference to club theory. These collectives further exhibit the characteristics of a monopoly in that they segment the production market and erect entry barriers on producers both within and outside the relevant geographical area. By limiting entry and functioning as a barrier to trade these collective monopolies thus eliminate competition from similar products produced elsewhere thereby improving market access for those producers entitled to use the designation. The discussion based on the work of Thiedig and Sylvander (2000) indicated the premium which can result in the case of origin labelled monopolies. It was also mentioned that the size of the premium is dependent on a number of factors such as market size, degree of competition with substitutes, consumer perceptions about the linkage of an indication with product attributes and demand elasticity. In

discussing the final factor related to improved market access, it is mentioned that the premium captured by products displaying a geographical indication suggests that some form of value is embedded in the use of this intellectual property right. This value is a mixture of economic, cultural and social values which derive from locality. In this regard the rationale for protecting geographical indications is further derived from actors pursuing a valorisation strategy whereby intellectual property is harnessed in an attempt to appropriate these values which allow for the extraction of rent.

In concluding the discussion on the economic rationale for protecting geographical indications, chapter three added the rural development potential of geographical indications as a very powerful reason for protecting geographical indications. This is especially relevant in the context of our investigation into the relevance of geographical indications in a developing country context. As one of the most evident manifestations of locality, origin labelled products are often considered useful instruments through which to preserve local culture and traditions and to foster rural development, especially in disadvantaged areas. It was explained that geographical indications engage local resources, both natural and human, in a collective process involving all local actors thereby activating all the components of the rural economy.

Attention was focused on the twofold impact of geographical indications on rural development in that geographical indications firstly allow for a remuneration of specific assets directly involved in the production process. In this regard, it was shown that the link between an origin labelled product and its area of origin allows for the creation of rents based on the “qualities” of the product, allowing for the remuneration of the specific assets used in the production process. The second impact of geographical indications on rural development relates to an inclusive territorial benefit to all actors within the region. It was explained that the latter refers to the indirect benefits which may flow from establishing a geographical indication for certain regional products as reflected in for example employment levels and income support. Attention was focused on the fact that the impact of geographical indications on rural development relies on the extent to which local actors succeed in appropriating the rent with respect to actors located outside the territory. Given that the resources from which origin labelled products derive are available to a plurality of actors without the possibility of individual appropriation, the potential of

appropriating this rent is closely tied to the ability of local actors to create institutional processes that can regulate the use of these free goods. This serves to further illustrate the importance for developing countries of providing the institutional framework within which origin labelled products can be valorised and protected against misappropriation. However, it was added that it is not the institutionalisation of the resource origin itself that sets the conditions for development. Instead it was argued that it depends on how this process is developed and on the effectiveness of the valorisation strategies built upon it. Developing countries should thus take note that the process of successfully establishing and protecting geographical indications does not only depend on the existence of a legal framework for its protection. Rural communities would need to be assisted in identifying their intellectual property, coordinating and facilitating the drafting of a code of practice, identifying reference markets and marketing their product as a geographical indication.

In support of the hypothesis, chapter four proceeded with a comprehensive literature study in an attempt to identify a list of factors that enable an *ex ante* assessment of the potential of a product to benefit from geographical indication protection. The intention was to create a check list, drawn from the long standing experience of protecting geographical indications in the European Union, against which products of developing countries may be tested to determine their potential to benefit from geographical indication protection. The following factors were identified as crucial to the success of a geographical indication: product specificity, reputation, coordination, institutional support and market attractiveness. However, it was mentioned that weakness in any of these factors should not be considered determinative as a weak factor may be substituted by the strength of another.

Based on the factors identified in chapter four, chapter five set out to determine the potential of South African products to benefit from geographical indication protection. A case study approach was followed in which the factors identified in chapter four were applied to South African products in order to make an *ex ante* assessment of their potential to benefit from geographical indication protection. The chapter commenced with a discussion on the well published trademark dispute surrounding the South African product, Rooibos. The discussion on Rooibos was necessitated by its use in illustrating the legal principles underlying the protection of a

geographical indication and the risk South Africa, and developing countries in general, stand of losing valuable intellectual property in their national assets. In this regard, the discussion illustrated the importance of timely protection otherwise developing countries may find themselves in a position where their intellectual property has been appropriated by foreigners or where it has become generic, thereby rendering it incapable of protection. In order to determine whether there are other South African products which have valuable intellectual property locked up in their name and therefore face the risk of misappropriation, the chapter proceeded to analyze the potential of two other South African products to benefit from geographical indication protection. The products were chosen for the analysis based on their *prima facie* potential to benefit from geographical indication protection and their ability to illustrate the application of the factors identified in chapter four.

The analysis of Klein Karoo ostrich found that factors in favour of establishing a geographical indication include the strong reputation Klein Karoo ostrich enjoys based on the historical significance of the region. However, it was found that the product lacks specificity. In contrast, the analysis of Honeybush found that Honeybush is a highly specific product with strong potential to benefit from geographical indication protection. The analyses indicated the potential that indigenous products, with strong ties to the rural population, have in establishing a geographical indication given that the stronger the link to the region the stronger the competitive advantage. This further emphasizes the importance of geographical indications in a developing country context where there may be many indigenous products which stand to benefit from geographical indication protection and which are currently unprotected from foreign appropriation.

The analysis undertaken in chapter two, three, four and five thus serves to confirm the hypothesis made in chapter one that “developing countries in general and South Africa in particular can benefit from geographical indication protection”. In this regard it was shown that geographical indications have the potential for improving livelihoods in communities who have access to indigenous resources, through its role in fostering rural development by way of improved market access and increased rural incomes. The study also confirms the further hypothesis that “South Africa possesses a number of agricultural products and indigenous biological resources that could

benefit from geographical indication protection by protecting valuable intellectual property as well as preserving potential price premiums which may have important development implications". By applying the factors identified in chapter four, it is shown that there are indeed South African products that could benefit from geographical indication protection. The case studies further indicate that it is specifically products with strong links to the indigenous communities that stand to benefit from geographical indication protection. This highlights the potential of geographical indications in a developing country context where there are often many indigenous communities who are the proprietors of traditional products that could benefit from geographical indication protection.

6.4 RECOMMENDATIONS

In this final section the study concludes with recommendations regarding South Africa's position in the debate at multilateral level as well as some general remarks concerning developing countries' approach towards geographical indications. This is followed by suggestions for further research.

In concluding the hypothesis it was shown that South Africa indeed has products which could potentially benefit from geographical indication protection. These products are often indigenous products with strong links to the rural people. As indicated, the successful valorisation of these products through the use of a geographical indication could lead to improved market share and/or the potential to earn a premium. However, due to the current lack of an institutional framework within which to valorise these products, an important rural development tool is not being utilised, in addition to which producers stand to lose valuable intellectual property in their products as highlighted by the recent Rooibos dispute. In light of this, it is recommended that the South African government take note of the potential of geographical indications to foster rural development and the need to protect our national assets from foreign appropriation by firstly coming out in support of the European proposal for a mandatory system of registration and notification for all products bearing a geographical indication. As South Africa hardly makes generic use of geographical indications protected in other WTO countries, and given that some South African products could potentially benefit from geographical indication

protection, the European Union's proposal is most suitable. Secondly, the South African government should provide for the development of an institutional framework within which to protect geographical indications domestically. This should be done by way of a *sui generis* system for protection of geographical indications and should not be limited to protection under the existing trademark system as proposed by the United States and Japan. Such *sui generis* protection may resemble the system in place in the European Union under EU Regulation 2081/92. The need for the *sui generis* system is based in part on the fact that were the European Union's proposal to the WTO of a mandatory system of registration and notification successful, all countries would have to adopt a similar system and lists of the protected products would have to be exchanged. South African compliance would thus be eased by the fact that domestic protection is already based on a similar system of registration.

However, it is emphasized that this does not suggest that South Africa merely adopts a system based on the European version for protecting geographical indications. As Boisvert (2003) mentions, the transplantation of institutions is even more problematic than the transplant of technology. According to her, the embeddedness in a local environment and the entanglement of tradition of local foods in developing countries are not sufficient unto themselves to ensure the commercial success of these products. The local production system should likewise be embedded into larger networks and they should be able to adapt to the vagaries of the market (Boisvert, 2003). It should thus be ensured that any potential system for protecting geographical indications in South Africa has been adapted for local conditions, bearing in mind local conventions and community structures. Furthermore, and in support of the aforementioned, it is recommended that steps be taken to foster a geographical indication culture amongst South Africans. This may be done by making South Africans aware of local products and the history and traditions surrounding them. This would avoid a top-down legislative approach, created by multilateral obligations, that does not command enough national ownership for effective enforcement.

The recommendations made above are provisional on the following *caveats*: Firstly, it is essential that a participatory approach is followed in order to discuss policy goals and to provide for appropriate measures at local level. This is in line with the fact that

geographical indication protection is a collective initiative and that collective dynamics seem more important to its success than a mere legal framework.

Secondly, it should be kept in mind that the instrument remains limited to very specific products and areas. Also, significant organizational and networking skills are expected from participating actors. In addition, there may be significant administrative costs in setting up and running the system. It is thus advisable that prior to adopting a relevant system, a clear assessment be made regarding the potential costs as opposed to the benefits of such protection in the South African context.

Furthermore, expectations regarding the impact of geographical indications should be realistic. In this regard it should be realised that geographical indication protection itself does not guarantee access to export markets, nor does it necessarily result in a price premium. Its value should initially be seen as ensuring that national assets are preserved for the exclusive use of the right holders. Also, for those developing countries which, in addition to rural development goals, intend using geographical indications for protecting indigenous knowledge and biodiversity, it should be noted that in order to act as an incentive for sustainable use, specific guidelines need to be specified in the code of practice, as merely establishing a geographical indication does not automatically promote sustainable practices. In the latter regard, it should be guarded against that farmers do not become the warders of traditions, thereby locked into practices while farmers elsewhere are free to develop. The impact of geographical indications on innovation should thus be kept in mind in designing the code of practice.

6.5 AREAS FOR FURTHER RESEARCH

The complexity of the research matter has made it difficult to address all possible aspects thereof without exceeding the scope of the study. The study has provided a basic understanding of important issues related to geographical indication protection. However, much research remains to be done. A few suggestions for further research follow.

Firstly, this study followed a legal-economic approach to geographical indication protection. However, existing research on geographical indications can be enriched by further interdisciplinary research regarding amongst others the link between the natural characteristics of the production area and the technical quality of the product. This would require research on both the technical aspects of quality as well as market research in order to determine consumer perceptions regarding product quality. Such research is important in the WTO context in order to defend the specific quality of an origin labelled product in allegations of the creation of trade barriers.

Furthermore, the study emphasized the possibility of enhancing rural development through the use of geographical indications. However, an in depth analysis in the South African context of possible rural development dynamics needs to be conducted. In this regard questions such as who are the actors that initiate protection, are South African origin labelled products located in rural areas, will only commercial producers make use of the origin label or will local small farmers also choose to make use of it and who derives the benefits from the initiative, need to be addressed.

The study identified the factors which contribute to the success of an origin labelled product. However, more research needs to be done regarding the weight of each individual factor in the success of an origin labelled product. In this regard it should for example be asked if specificity is the deciding factor or if coordination is crucial. Related to this, research needs to be done on the collective dynamics within the South African environment and the potential of developing a collective culture capable of supporting origin labelled initiatives as has been developed in Southern European countries over many centuries. This would entail research on the ability of local actors to construct social networks in an attempt to valorise their resources.

Finally, the study confirmed that there are indeed South African products with *prima facie* potential to benefit from geographical indication protection. However, further research needs to be done in order to draw up a South African database of local products based on local traditions. This would give policy makers a clearer indication of what stands to be lost if protection is not provided. In the last instance, this should be coupled with a comprehensive cost/benefit analysis, adapted for the South African

environment, in order to have a clear understanding of the eventual benefit South Africa can expect to derive from geographical indication protection.

Consumatum est...

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