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An economic analysis of the welfare implications of geographic indications

Advisor –Dr. Simon Evenett

Irene Papadopoulos
irenep@nectactive.co.za

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An economic analysis of the welfare implications of Geographic Indications (GIs)

Introduction

The European Court of Justice (ECJ) recently ruled that it is illegal for the world-famous Parma ham to be sliced and packaged anywhere outside the Italian region which gives Parma ham its name.¹ The case hinged on the court's interpretation of geographical indications (GIs) –EU protected trademarks that recognise the importance of products closely associated with a particular place, whether it be Parma ham, French champagne, Spanish sherry or Stilton cheese from Britain. The Parma producers argued that slicing the ham was an important process that had to be done locally. Ultimately the court agreed.²

GIs are playing an increasingly important role for many countries as we observe the international commercial environment being characterised by a long-term fall in the relative value of raw commodities and simple manufactures. This has resulted in exporters seeking ways to market their products by making them more identifiable and interesting in international markets, by using distinctive labelling and branding to appeal to consumers.³

Protection of GIs on a multilateral level is covered under Part II, Section 3 of the WTO TRIPS Agreement (Trade-Related Aspects of Intellectual Property Rights). It has, however, in recent years developed into a controversial topic. The current debate regarding GIs in the WTO TRIPS Council is focused on the scope of protection granted to GIs. One group of countries want to negotiate extending a higher level of protection, such as that given to wines and spirits under Article 23 of TRIPS, to a wide range of other products, including agricultural products, processed foods and handicrafts. The *demandeurs* of such an extension are thus calling for a uniform level of protection, at the higher level, as a means of marketing their products. They also object to other countries “usurping” their terms.⁴

Another group of countries opposing such an extension argue that the existing (Article 22) level of protection is adequate and that providing higher levels of protection will be expensive. They

¹ ECJ, Case C-469/00 and C-108/01. Press Release No. 42/03 (2003), “The court confirms the extent of protection conferred by Community legislation on Grana Padano and Parma ham.” This press release does not bind the court. 20 May 2003. Available at <http://curia.eu.int/en/actu/communiqués/cp03/aff/cp0342en.htm>

² Economist.com. “Parma 1, Lisbon 0.” http://www.economist.com/agenda/PrinterFriendly.cfm?Story_ID=1795267

³ WTO. (2000), TRIPS Council. Communication from Australia, “Geographical indications –Article 24.2 Review of the Application of Part II, Section 3: Some Background Issues”. IP/C/W/211, October 2000

⁴ WTO. (2003), Intellectual Property Rights –Geographical Indications. Available at http://www.wto.org/english/tratop_e/trips_e/gi_background_e.htm. Among those countries advocating the extension –Bulgaria, China, the Czech Republic, the EU, Hungary, Liechtenstein, Kenya, Mauritius, Nigeria, Pakistan, the Slovak Republic, Slovenia, Sri Lanka, Switzerland, Thailand and Turkey.

argue that those countries advocating higher protection want to strengthen exclusive rights over terms with geographical reference as a form of protecting their trade interests in valuable exports. They also reject the “usurping” accusation, particularly when migrants have taken the methods of making the products and the names with them to their new homes.⁵

This paper aims to facilitate progress in this debate by providing an analysis of the welfare implications of GIs from an economic perspective. The main questions, which this paper seeks to analyse, include:

- What is a geographic indication?
 - What are the differences between trademarks, and GI's?
- Which economic theories apply to GIs and to what extent are these theories applicable in providing an economic rationale for protecting GIs?
- What are the welfare implications of protecting GIs?
 - Is there a market failure and what is the source of the market failure?
 - Can GIs be used as a tool to overcome this market failure?
 - What are the benefits and costs of protecting GIs?
 - Do the welfare gains outweigh the losses in justifying increased protection for geographic indications?

The results show that countries will face trade offs depending on where their interests lie. The scope of protection of GIs has direct implications on the welfare effects. The gains to be had by protecting GIs include overcoming the market failure of information asymmetry on the one hand, but create other problems such as coordination difficulties, which can lead to potential anticompetitive practices, on the other hand.

This paper is divided into three sections. The next section will look at defining the basic concepts of geographic indications and trademarks, analysing the scope of protection afforded by the two concepts and drawing a comparison between the two. Section two deals with economic theories and GIs and examines three theories relevant to GIs, these being trademark theory, information theory and Shapiro's model on reputation. Section four, analyses the welfare implications of geographic indications – under different levels of GI protection, who gains and who loses? Lastly, conclusions are drawn and recommendations made.

⁵ Ibid. Those countries opposing such an extension include among others, Argentina, Australia, Canada, Chile, Chinese Taipei, Guatemala, Japan, New Zealand, Paraguay and the United States.

1. Substantive issues

This section provides an important background of the basic concepts that will be dealt with in this paper. Before moving on to the economic analysis of the implications of GIs, this section aims to define important concepts such as GIs and trademarks, the laws encompassing them and a comparison of the two concepts. This will provide the framework and basis from which an economical analysis will then be made in the sections to follow.

1.1 Historical background of marks⁶

Marks indicating the geographical origins of goods were the earliest types of trademark. Traces of markings can be found on all kinds of ancient objects and usually in great profusion. In all likelihood, the first kind of marking was the branding of cattle and other animals, long before reading and writing so that for many centuries, brands took the form of designs only. There is even a biblical reference in the Book of Genesis to branding. When Cain was expelled from the Garden of Eden after killing Abel, the Lord set a sign upon Cain.⁷ Some translations use the word "mark" instead of "sign." This may be the earliest literary reference to branding.

In the medieval period, different types of markings can be identified. Personal marks, which identified individuals from signets to coat of arms, and marks were even used to brand slaves and prisoners. Proprietary marks were used to indicate ownership of goods –when goods were packed in barrels, merchants' marks were burned into the wood. Still, another kind of mark was the appellation of geographical origin, typical of which, were the tapestries of continental Europe. These were marked with the place of origin. In addition, tapestries sometimes bore an official stamp of guarantee certifying their quality, and the personal mark of the weaver also is found on some tapestries. The cloth trade in England provides another example of the use of marks of geographical origin. By the end of the fifteenth century, these marks also became recognized as the means of identifying cloth of superior quality.

With the Industrial Revolution, international trade began to develop, and competition was largely dependant on the quality of a good, which was associated with its source of origin. To take advantage of the commercial attractiveness of local reputations, merchants branded their goods with the place of origin. This resulted in a variety of depictions such as local animals (panda beer), landmarks (Mt Fuji sake), buildings (Pisa silk) or even well known personalities

⁶ Extracted from an article by Diamond, Sidney A. (1983), "The Historical Development of Trademarks. The International Trademark Association." *The Trademark Reporter*, May-June 1983.

⁷ Genesis 4:15

(Napoleon brandy, Mozart chocolates). These brands were tantamount to a warranty of the quality of these goods.⁸

Penalty enforcement

Penalties imposed for infringement date back to the medieval times. In the fourteenth century, an innkeeper passed off a low grade of wine for a superior variety known as Rudesheimer. The Elector Palatine ordered hanging forthwith. In sixteenth century England, placing a false trademark on cloth of gold or silver was treated the same as the counterfeiting of money. The penalty was death.

Legislation which sought to protect the commercial reputation of traders in discrete geographical localities evolved principally in Europe, into systems for the protection of GIs. The eighteenth century Industrial Revolution in Britain saw the emergence of the modern trademark. The registered trademarks system was thus developed to permit individual traders to enforce their marks as private proprietary rights. This contrasted with the system for the protection of GIs, which conferred public rights upon producers in defined localities.⁹

1.2 Geographic indications -defined

In order to fully understand the meaning of GIs and how the term is derived, there are at least two other important concepts linked to the idea of GIs that must be analysed, these being; “indication of source” and “appellation of origin”. Long before a multilateral agreement was reached on the definition of GIs, and how they are to be protected i.e. TRIPS Agreement, the concepts of “indication of source” and “appellation of origin” were incorporated in other international treaties, such as the Paris Convention for the Protection of Industrial Property of 1883 (Paris Convention), the Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods of 1891 (Madrid Agreement), and the Lisbon Agreement for the Protection of Appellations of Origin and their International registration of 1958 (Lisbon Agreement).

⁸ Blakeney, Michael. (2001), “Proposals for the International Regulation of Geographic Indications”, *The Journal of World Intellectual Property*, Vol.4, No. 5, p. 629

⁹ *Ibid.*, p.630

Indication of source

Refers to a sign that indicates that a product originates in a specific geographical region.¹⁰ An example being, Paris Perfume, which refers only to geographic origin.

It is the broadest concept when compared to GIs and appellations of origin, and appears in both the Paris Convention and the Madrid Agreement. Neither agreement however gives a definition for indication of source. Reference is made in Article 1 (2) and Article 10 of the Paris Convention, where the latter Article in dealing with false indications of goods, states that the provisions dealing with goods unlawfully bearing a trademark and their seizure:

(1) *“...shall apply in cases of direct or indirect use of a false indication of source of the goods or the identity of the producer, manufacturer, or merchant.”*

(2) *“Any producer, manufacturer, or merchant, whether a natural person or a legal entity, engaged in the production or manufacture of or trade in such goods and established either in the locality falsely indicated as the source, or in the region where such locality is situated, or in the country falsely indicated, or in the country where the false indication of source is used, shall in any case be deemed an interested party.”*

A further clarification of the notion of “indication of source” is found in Article 1(1) of the Madrid Agreement:

“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.”

Three key elements constitute the notion:¹¹

1. There is a clear link between the indication and the geographical origin for example, ‘made in...’ rather than any other criterion of origin such as ‘made by...’
2. There is no requirement for distinguishing qualities or attributes of the good.

¹⁰ Ibid., p.631

¹¹ Rangnekar, Dwijen. (2003), “Geographic Indications –A Review of Proposals at the TRIPS Council: Extending Article 23 to Products other than Wines and Spirits”. International Centre for Trade and Sustainable Development (ICSTD), 2003. http://www.ictsd.org/iprsonline/unctadictsd/docs/rangnekar_may2003_final.pdf, p. 22

3. Indication of source can be constituted by words or phrases that directly indicate geographic origin or phrases, symbols or iconic emblems associated with the area of geographical origin.

Article 1(2) of the Paris Convention defines objects for protection of industrial property, and refers to both “indication of source” and “appellation of origin”, which may suggest that both expressions could be synonymous. There are however distinct differences between the two.

Appellation of origin

Refers to a sign that indicates that a product originates in a specific geographical region only when the characteristic qualities of the product are due to the geographical environment, including natural and human factors.¹² An example being, ‘Roquefort’ cheese, which refers to both geographic origin and product characteristics.

Unlike an indication of source, which is only subject to the condition that a given product originates in the place designated by the indication of source, the use of appellation of origin requires a quality linkage between the product and its geographical origin. This means that certain characteristics of the product should be essentially or exclusively attributable to its geographic origin, such as climate, soil, or traditional methods of production etc.¹³

The term “appellation of origin” is mentioned in Article 1(2) of the Paris Convention and is defined in Article 2 of the Lisbon Agreement as:

(1) “...‘*appellations 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.”

(2) “*The country of origin is the country whose name, or the country in which is situated the region or locality whose name, constitutes the appellation of origin which has given the product its reputation.*”

¹² Blakeney, op. cit. n. 8, p.631.

¹³ Escudero, Sergio (2001), “International Protection of Geographical Indications and Developing Countries,” South Centre Working Paper 10, p.3.

Three elements are identifiable in the above definition:¹⁴

1. The appellation must be a direct geographical name (not symbols or other kinds of expression) of either the country, the region or the locality.
2. The appellation must serve as a designation of the geographical origin for the product, which means that the product and geographical name must be the same, such as Porto or Bordeaux;
3. The ‘quality and characteristics’ exhibited by the product must be essentially /exclusively attributable to the designated area of geographical origin.

Relative to the Madrid Agreement, these conditions for qualifying appellations are higher, thus narrowing the range of feasible indications. Examples of protected appellations under the Lisbon Agreement include ‘Bordeaux’ for wine, ‘Noix de Grenoble’ for nuts, ‘Tequila’ for spirit drinks and ‘Jaffa’ for oranges.

Geographical indication (GIs)

A geographical origin is a sign used on goods that have a specific geographical origin and possess qualities or a reputation that are due to the place of origin. Whether a sign functions as a geographical indication is a matter of national law and consumer perception. Geographical indications may be used for a wide variety of agricultural products, such as, ‘Tuscany’ for olive oil produced in a specific area of Italy,¹⁵ or ‘Roquefort’ cheese produced in France.^{16,17}

The term GIs was intended to include both the concepts of “indication of source” and “appellation of origin” and also symbols, “...because geographical indications are not only constituted by names such as the name of a town, a region, or a country (‘direct geographical indications’), but may also consist of symbols.”¹⁸

Part II, Section 3 of the TRIPS Agreement, gives the most recent definition. Article 22.1 defines geographical indications as:

¹⁴ Rangnekar, op.cit. n. 11, p.23

¹⁵ Protected in Italy by Law No. 169 of February 5, 1992

¹⁶ Protected in the European Union under Regulation (EC) No. 2081/92 and in the United States under US Certification Registration Mark No. 571.798

¹⁷ WIPO. “Geographical Indications”, available at http://www.wipo.org/about-ip/en/geographical_ind.html

¹⁸ WIPO, “Intellectual Property Reading Material”, WIPO publication No. 476(E), 1998, p.116

“...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.”

Three important elements of GIs:¹⁹

1. The indication must necessarily identify a good. The indication can be a word/phrase or an iconic symbol or emblem. Thus, pictorial symbols that evoke a location, such as the Eiffel Tower for French goods, the Pyramids for Egyptian goods, or the Statue of Liberty for American goods are allowed. There is also no requirement for the indication to be a direct geographical name. For this reason India wants to protect an indication like ‘Basmati’.
2. The good must necessarily possess a “given quality”, “reputation” or “other characteristics” that are “essentially attributable” to the designated geographical origin.²⁰ Notably, *ceterius paribus*, each one of these qualifiers is on its own an adequate condition to grant protection. Thus it would be permissible to apply GIs to goods that enjoy reputations stemming from local innovativeness such as craft goods rather than physical characteristics emanating from climate or soil quality.²¹
3. It is necessary for the designated geographical area to be identified in some manner through the indication-good link. This requires a level of homogeneity –across goods and manufacturing units- in the distinguishing features such as quality of the good to be achieved across the designated geographical area. Such quality or reputation needs to be tied to the geographical origin that may be uniquely identified in order to exclude others from its use. Further, as the goods must originate in the territory, region or locality, issuing of licenses for the use of GIs would be out of the question.

Considering the relationship between the terms indication of source, appellation of origin and geographical indications, the table below describes the basic differences between the terms and how they build on one another.

¹⁹ Rangnekar, op.cit. n. 11, p.24-25

²⁰ The TRIPS Agreement does not define or provide clarity on the concepts of “given quality”, “reputation” and “other characteristic” essentially attributable to the geographical origin. There has also been no decision from the WTO dispute settlement mechanism on the scope of protection of GIs.

²¹ See Maskus, Keith E. (2003), “Observations on the Development Potential of Geographical Indications.” Paper prepared for the U.N. Millennium Project Task Force on Trade. March 2003. Very preliminary draft version.

Table 1 –Relationship between indication of source, appellation of origin and GIs²²

Type of protection	Description
Indication of source	<ul style="list-style-type: none"> • Is the broadest concept. • Does not require that the product have a certain quality nor a reputation or characteristic linked to its geographical origin. • Includes both GIs and appellation of origin.
Appellation of origin	<ul style="list-style-type: none"> • Is the narrowest concept. • The expression identifying the appellation of origin should necessarily correspond to the name of a country, region or locality. • This name permits the designation of a product whose quality and characteristics are given <u>exclusively</u> or <u>essentially</u> by its geographical origin, including natural and human factors, such as “<i>Porto</i>”, “<i>Tequila</i>”, “<i>Jerez</i>” or the like. • Thus goods that owe a reputation but not a specific quality to their origin are not covered by appellation of origin, but will be covered by GIs.
Geographical indications	<ul style="list-style-type: none"> • Is found in between indication of source and appellation of origin –narrower than indication of source but broader than appellation of origin. • Can be the name of a geographical place or a symbol –thus, a South African flag can be used when associated with qualified wines produced in South Africa. • Is an expression that identifies the product as originating in a territory, region or locality, where a given quality, <u>or</u> reputation <u>or</u> other characteristic is essentially attributable to its geographical origin. Thus, there are three independent criteria for the protection of a given product by means of GIs. This makes the scope GI protection broader than appellation of origin, and includes the possibility of protecting local innovativeness such as handicrafts. • All appellations of origin are also GIs, but not all GIs are, at the same time, appellations of origin.

1.2.1 Scope of protection of GIs

Section 3 of Part II of the TRIPS Agreement sets out the provisions for the protection of GIs. It contains three Articles; Article 22 provides a definition for GIs and outlines the minimum level of protection for GIs for all goods other than wines and spirits, Article 23 outlines the additional protection for wines and spirits, and Article 24 outlines the exceptions to the obligations as set out in Article 22 and Article 23 and sets up provisions for further negotiations.

²² Table drawn up by author, see also Escudero, op.cit. n. 13, p.6-7, 27

TRIPS prescribes two levels of protection for GIs:²³

A general level of protection

Article 22 provides the basic scope for the protection of all GIs. Members are obliged to provide the “legal means for interested parties”²⁴ to protect GIs. Members must thus ensure that legal mechanisms are available to prevent:

- The misleading (Article 22.2 (a)) and deceptive (Article 22. 4) use of the terms;
- The use of indications in a way that constitutes an act of unfair competition (Article 22.2 (b));²⁵ and
- With regards to trademarks, the refusal or invalidation of trademarks that contain or consist of indications, in ways that mislead the public (Article 22.3).

Thus, the use of a GI that does not mislead the public as to its true origin, according to Article 22, should not be considered as an infringement of the TRIPS Agreement. Ultimately, the false or deceptive use of iconic symbols (Eiffel Tower, Statue of Liberty etc.) or the use of language, script or phrase to infer/evoke geographical origin and association would be prohibited as prescribed by Article 22.

A higher level of protection

TRIPS prescribes a higher form of geographical protection for wines and spirits. For these products, there is no requirement to demonstrate that the use of a geographical indication is misleading. The additional protection for wines and spirits encompasses three main elements:

1. Article 23.1 provides the legal means to prevent the use of GIs identifying wines and spirits that do not originate in the place indicated by the GI, even where the true origin of the good is indicated or the GI is used in translation or accompanied by the expressions such as ‘*kind*’, ‘*type*’, ‘*style*’, ‘*imitation*’ or the like.

²³ See also Escudero, op.cit. n. 3, p.26-30; and Rangnekar, op.cit. n. 11, p. 30-33.

²⁴ The TRIPS Agreement does not specify the legal means to protect GIs. It is left to the Members to decide what those measures should be.

²⁵ The use of a GI will constitute an act of unfair competition as per the meaning laid out in Article 10*bis* of the Paris Convention, which lists a number of acts that shall be prohibited, as they are contrary to fair competition.

2. Article 23.2, makes provision for the invalidation or refusal of trademarks that ‘contain or consist of’ GIs identifying wines and spirits. The scope of protection is higher than that of 22.3, as it does not require proof of consumers being misled and only requires establishing the false origin of the goods bearing the (infringing) trademark.
3. Article 24.1 calls for Members to continue negotiations aimed at increasing protection for individual GIs for wines and spirits.²⁶

There is however a distinction to be made, in that, the protection given to GIs for wines is not the same as that granted for spirits. Both receive a higher level of protection as mentioned above. The differences concern Article 23.3 which has to do with homonymous indications, and which applies only to wines, and Article 23.4, concerning a multilateral register, which was originally aimed at wines and has since been extended to spirits.

In practical terms, Article 23 protection afforded to wines and spirits implies that wine cannot be described as ‘Bordeaux style wine, made in Australia’ or ‘imitation Champagne wine, product of Australia’. Thus the protection afforded goes beyond normal prevention of misleading of deceptive labelling, and may approach a form of exclusive rights that denies use of the term by other traders even when it would not mislead the consumer.²⁷

1.2.2 Exceptions

In understanding the scope of protection, important limitations exist:

- i. Article 24.4 permits the “continued and similar use” of particular GIs for wines and spirits by any of a Member’s “nationals or domiciliaries who have used a GI in a continuous manner with regard to the same or related goods or services” in the territory of that Member either for at least ten years preceding 15 April 1994 or in good faith preceding that date.
 - This exception does not require proof of ‘good faith’ where the name has been used for at least ten years and neither does the indication have to be considered generic. If GI extension is achieved, one would expect such an exception to apply to all GIs.²⁸

²⁶ Some countries are of the opinion that this obligation, under Article 24.1 of the Agreement applies to all GIs and not only to those related to wines and spirits.

²⁷ Commonwealth of Australia. “What does TRIPS say about the protection of geographical indications?” Available at http://www.dfat.gov.au/ip/geo_ind_trips.html

²⁸ Rangnekar, op.cit. n.11, p.34

- ii. Article 24.5 grants a waiver on the restriction of trademarks, where the trademark was registered, applied for, or acquired by use in good faith before the TRIPS phase-in periods expired or before the GI is protected in its country of origin even if the trademark is identical with, or similar to, a GI.
 - This exception applies to all GIs, not only wines and spirits, and is contingent on the ‘good faith’ of the trademark holder in question and the time when the trademark was acquired.
- iii. Article 24.6 implies that terms that are generic within a territory need not be awarded GI protection. It is thus up to each country to determine which geographical indications are protected within their own jurisdictions, and TRIPS acknowledges that what is recognised as a geographical indication in one jurisdiction may be seen as a descriptive term elsewhere. For example, ‘champagne’ is protected as a GI in Europe on the basis of its reference to the particular wine-producing region of France called Champagne, whereas it is viewed as descriptive term in some other markets such as the US.²⁹
- iv. Article 24.7 establishes a time limit of 5 years and a contingency of ‘bad faith’ with respect to exercising the right to invalidate or refuse registration of trademarks that consist of or contain an indication. To exercise their right with respect to an indication against a trademark, the GI-holder(s) must initiate their action within five years.³⁰
- v. Article 24.8 recognises the right of a person to use his/her name or the name of their predecessor in business, in the course of trade, with the exception that the name is not used in a manner to mislead the public.
- vi. Article 24.9 places no obligation on Members to protect GIs that are not recognised in their country of origin or have fallen into disuse there. This exception is aimed at those indications that are destined only for export markets.³¹

²⁹ Commonwealth of Australia, *op.cit.* n. 27 –“Who decides what is protected?”

³⁰ See Rangnekar, *op.cit.* n. 11, p. 35. Rangnekar also makes reference to Gervais, Daniel, “The TRIPS Agreement: Drafting history and analysis”, Sweet and Maxwell, London, 1998, p.137 who indicates that the five year period is calculated from the time that the adverse use of the protected indication had become generally known or five years after the date of registration of the trademark if it predates the other test.

³¹ *Ibid.*

1.3 Trademarks -defined

Trademarks are a form of intellectual property rights, used by sellers to distinguish and identify the origin of their products. Trademarks work to provide exclusive rights to the owner of the trademark to use it on the product it was intended for and often on related products. Service marks receive the same legal protection as trademarks but are meant to distinguish services rather than products.

According to the International Trademark Association a trademark is:³²

‘...any word (Poison), name (Giorgio Armani), symbol or device (the Pillsbury Doughboy), slogan (Got Milk?), package design (Coca-Cola bottle) or combination of these that serves to identify and distinguishes a specific product from others in the market place or in trade. Even a sound (NBC chimes), colour combination, smell or hologram can be a trademark under some circumstances. The term trademark is often used interchangeably to identify a trademark or service mark.’

On a multilateral level, WIPO defines a trademark as a distinctive sign, which identifies certain goods or services as those produced by a specific person or enterprise.³³ The WTO, under the TRIPS Agreement, Article 15.1, defines a trademark as:

“Any sign, or combination of signs, capable of distinguishing the goods or services of one undertaking from those of another undertaking, shall be capable of constituting a trademark.”

1.3.1 Trademark laws

Building on the definition of trademarks, it is important to further examine how trademarks apply in practice, by looking at the trademark laws of various countries.

The EC in its law on Community trademarks³⁴ sets out in Article 4 the rules pertaining to the signs of which a Community trademark may consist. Article 9 sets out the rights conferred by a Community trademark, and clearly the proprietor of a Community trademark has exclusive rights to it, meaning that the proprietor shall be entitled to prevent all third parties from using the following, in the course of trade, without having his consent:

³² International Trademark Association. “Trademark basics”, available at www.inta.org/basics/tmfaqsd.shtml

³³ WIPO. “Trademarks”, available at www.wipo.org/about-ip/en/trademarks.html

³⁴ Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark.

- Any sign which is identical with the Community trademark;
- Any sign which because of its identity with or similarity to the Community trade mark, causes or there exists a likelihood of confusion;
- Any sign, which may be identical with or similar to the Community trademark, even if the goods and services are not the same, and where the use of the sign takes unfair advantage of, or is detrimental to the distinctive character or the reputation of the Community trademark.

The South African law on trademarks,³⁵ in Part I, defines trademarks by putting emphasis on the purpose of distinguishing the goods or services in relation to which the mark is used or proposed to be used from the same kind of goods or services connected in the course of trade with any other person. Part III deals with registrable trademarks, setting out the rules that qualify and disqualify a trademark from being registered. Those trademarks that cannot be registered are identical if not similar to the above conditions as set out by the EU.

India's trademark law³⁶ has in recent years been modified, and as a result, the definition of trademarks has been broadened so that the proprietor of the trademark has exclusive rights to it, not only on physical goods or commodities, but under the new Act, trademark registration would be extended to services as well.

The definition of infringement has been broadened to include action against the unauthorized use of a confusingly similar mark, not only in respect of the goods and services covered by the registration, as is presently the case, but also in respect of goods and services not covered in the registration which are so similar that a likelihood of deception or confusion exists. An action for infringement is also available against the unauthorized use of a mark in relation to dissimilar goods, if such mark is similar to a registered mark that is well known in India and the interest of the registrant is likely to be affected adversely.³⁷

The term of registration for a trademark will be increased from seven to ten years, and renewable for additional 10-year periods, according to the new Act.

³⁵ Trade Marks Act 194 of 1993. Assented to 22 December 1993. Date of commencement 1 May 1995.

³⁶ Trade & Merchandise Marks Act, 1958 (old law). New statute: Trade Mark Act, 1999.

³⁷ Ladas & Parry –Intellectual Property Law. “India –New Trademark Law.” Available at <http://www.ladas.com/BULLETTINS/2002/0202Bulletin/IndiaNewTrademarkLaw.html>

These examples of trademark laws in different countries show how trademarks are applied in practice on a national level. As the definition suggests, most laws focus on the distinguishing nature of trademarks and ensure exclusive rights to the trademark holder. Although the EC, South Africa and India may be worlds apart from each other in terms of protecting intellectual property rights, their laws on trademarks seem to converge on many points.

1.4 Comparison between GIs and trademarks

GIs and trademarks are types of intellectual property rights, which can both be used by consumers to distinguish products of their preferences. Despite this however, an analysis of the definitions of the concepts show that clear differences between GIs and trademarks exist. Some of the main differences are analysed in the table below.

Table 2 -Main differences between trademarks and GIs

Trademarks	Geographic Indications
Trademarks are expressions such as “ <i>Coca Cola</i> ”, “ <i>Peugeot</i> ”, “ <i>Marlboro</i> ”, and “ <i>Citibank</i> ”. All of them distinguish products or services and/or their producer, manufacturer or provider.	GIs are expressions such as “ <i>Cognac</i> ”, “ <i>Pilsen</i> ”, “ <i>Tequila</i> ”, and “ <i>Champagne</i> ”. All of them distinguish the geographical origin of a given product. ³⁸
A trademark provides protection to the owner of the mark by ensuring the exclusive right to use it to identify goods or services, or to authorise another to use it in return for payment.	The protection of GIs is however enjoyed by all traders from a particular geographical location. ³⁹
Trademarks personalise and identify products and services from a specific manufacturer, producer or service provider, in order to differentiate such goods or services.	GIs do not identify a single producer or manufacturer, but rather a place of origin. ⁴⁰
The development of trademarks is linked to human creativity. Such creativity is capable of creating an original and novel sign or expression, which permits a certain product or service to be distinguished from similar products or services. As such, trademarks put an emphasis on the producer of a product	GIs are linked to topography, human work, climate or other factors, independently from human creativity. GIs underlie the geographic origin of the product and some derived characteristics. ⁴¹
There is a single person –legal or natural – entitled to use the trademark.	All producers belonging to the region or locality where the geographical indication comes from are entitled to use it. ⁴²

³⁸ Escudero, op.cit. n. 13, p. 1

³⁹ WIPO. “What does a trademark do?” Available at http://www.wipo.org/about-ip/en/about_trademarks.html

⁴⁰ Escudero, op.cit. n. 13, p. 1

⁴¹ Ibid.

⁴² Ibid.,p.36

<p>Since a trademark is used to distinguish the products of a specific trader from those of its competitors, it is not likely to be descriptive and it cannot be generic.</p>	<p>GIs are by definition generic descriptions because a geographic name denotes the geographical origin of the product it identifies. In many countries a GI will normally not be registered as a trademark for a product, because a GI is considered to be insufficiently distinctive.⁴³ The EU law on Community trademarks does not allow GIs to be registered as trademarks under Article 7 –Absolute grounds for refusal.⁴⁴</p>
<p>Individual production of goods is linked more to the notion of trademarks.</p>	<p>Collective production of products originating from the same geographical zone, and having the same quality, reputation or characteristic attributable to its geographical origin, are linked to the notion of geographical indication.⁴⁵</p>
<p>Trademarks are easier to protect internationally than GIs but requires active participation by the owner or holder of the trademark. Usually, trademarks are protected by registering with the competent domestic authority.</p>	<p>GIs are generally monitored and protected by producer associations from the relevant regions. International protection of GIs is more difficult as no single mechanism exists to protect GIs and it could be done by means of law, jurisprudence or administrative acts. State involvement is far greater in the case of GIs than trademarks.⁴⁶</p>
<p>Trademarks are freely transferable from one owner to another.</p>	<p>GIs are not freely transferable from one owner to another, as a user must have the appropriate association with the geographical region and must comply with the production practices of that region.⁴⁷</p>

⁴³ Addor, Felix and Grazioli Alexandra. (2002), “Geographical Indications beyond Wines and Spirits. A Roadmap for Better Protection for Geographical Indications in the WTO TRIPS Agreement,” *The Journal of World Intellectual Property*, November 2002, Vol.5, No. 6, p.870-871

⁴⁴ Council Regulation (EC) No 40/94, op.cit. n.34

⁴⁵ Escudero, op. cit. n. 13, p.36

⁴⁶ Ibid.

⁴⁷ Blakeney, op. cit. n. 8, p. 632

Section 2 –Economic theories and GIs

The fundamental reason for protecting the many instruments of IPRs, such as patents, trademarks and copyrights within the TRIPS Agreement, is due to a mix reflecting the public good properties of knowledge/information and the harm resulting from ‘free riding’ on reputation.⁴⁸

GIs and trademarks are both categories of IPRs covered by the TRIPS Agreement. Despite the differences between GIs and trademarks, shown in table 2 above, both are instruments that can be used by consumers and producers alike to identify the origin of products. Furthermore, both GIs and trademarks can acquire a high reputation and commercial value and for these reasons may be exposed to misappropriation, counterfeiting or misuse.⁴⁹ Since GIs share many features with trademarks, clearly a close relationship between the two exists, and it will thus be useful to consider the rationale for protecting trademarks.

This section will examine current economic literature that can be applied to GIs. Theories that will be analysed include the economic literature pertaining to trademarks i.e. the economic reasoning for protecting trademarks. In addition to this, two other theories will be analysed, these being, information theory and Shapiro’s model on reputation, which have been identified in a study conducted by the OECD, as important theories that have to do with aspects of economic theory relating to the use of distinctive or quality signs such as GIs.⁵⁰

2.1 Economic literature on trademark theory

The economic reasoning behind the registration of trademarks is largely based on George Akerlof’s ideas of the effects of asymmetrical information between producers and consumers. Akerlof relates quality and uncertainty. Asymmetry in information develops when sellers have more knowledge or relevant information about the quality of a good than the buyers. In such ‘lemon’ markets, buyers use some market statistic to judge the quality of the prospective purchases. There is an incentive for sellers to market poor quality merchandise, since the returns for the good quality accrue mainly to the entire group whose statistic is affected, rather than to the individual seller. As a result there tends to be a reduction in the average quality of goods and in the size of the market. It can also be seen that good quality products may be driven out of the

⁴⁸ See Rangnekar, op.cit. n. 11, p.18

⁴⁹ See Escudero, op. cit. n. 13, p.1

⁵⁰ OECD. (2000). “Appellations of Origin and Geographical Indications in OECD Member Countries: Economic and Legal Implications,” *Working Party on Agricultural Policies and Markets of the Committee for Agriculture, Joint Working Party of the Committee for Agriculture and the Trade Committee*. December 2000. p. 7, COM/AGR/APM/TD/WP(2000)15/FINAL.

market for lemons, because poor quality products sell at the same price as the good quality products since it is impossible for the buyer to tell the difference between the good and the bad products; only the seller knows.⁵¹ To avoid these effects, sellers must be able to effectively and actively send out reliable signals of quality.

This theory applies to trademarks in that in the first instance, an asymmetry of information exists as the producers hold all the information regarding a product's quality, whilst the consumers have no indication of quality other than price and thus the search costs for finding the desired level of quality will be high.⁵² Trademarks offer the legal means to signal to consumers the identity of producers and the level of quality linked to a specific product, whilst excluding others from being able to use such a signal to sell their products.

In the absence of any legal means allowing a producer to exclude others from using a distinctive sign, symbol or signal to indicate a specific level of quality, consumers will not be able to ascertain the true quality of products resulting in a reduction of the purchase of higher-quality goods as higher-quality goods are driven out by the lower-quality goods. Furthermore, firms' incentives to invest in quality will then be reduced.⁵³ Ultimately, as Akerlof suggests, if the search costs for finding the desired level of quality for the consumers are high, and if the consumers are risk averse in the presence of uncertain information, they would consume less, resulting in a reduction in the size of the market.⁵⁴

The solution that trademarks offer to the above problem lies in what they achieve. WIPO suggests that a trademark provides protection to the owner of the mark by ensuring the exclusive right to use it to identify goods or services, or to authorise another to use it in return for payment.⁵⁵ Trademarks thus allow firms to link their reputations of quality to particular symbols and expressions and exclude others from using these symbols and expressions.

⁵¹ Akerlof, George A. (1970), "The Market for Lemons: Qualitative Uncertainty and the Market Mechanism," *Quarterly Journal of Economics*, Volume 84, Issue 3: 488-500

⁵² Some consumers may choose price as an indicator of quality but in the case of information asymmetry, price would be a poor indicator of quality as low quality products sell at the same price as the high quality products.

⁵³ See Maskus, op. cit. n. 21, p.6.

⁵⁴ Ibid.

⁵⁵ WIPO, op. cit. n. 39.

2.1.1 Benefits of trademarks⁵⁶

Firstly, it can be seen that because trademarks reduce consumer search costs, this requires the producer of the trademarked good to maintain a consistent quality over time and across consumers. Therefore, trademark protection encourages expenditures on quality. If consumers are pleased with the purchase of a particular brand or they are pleased with the purchase of another brand, which is produced by the same producer, the consumer would find it less costly to search by identifying the relevant trademark and purchasing the corresponding brand. Such a strategy will only work if it is cheaper to search for the right trademark than the desired attributes of the good, as well as if past experience is a good predictor of the likely outcome of current consumption choices i.e. the brand must exhibit consistent quality. This in turn encourages firms to ensure consistent quality.

It follows that if firms want to capitalise on repeat purchases linked to their trademarks, they must have the ability to maintain a consistent level of quality. Firms thus have an incentive to develop a trademark only if they are able to maintain consistent quality, highlighting the self-enforcing feature of trademarks. In fact, producing inconsistent quality will be tantamount to a product without a trademark. Very simply, consumers search costs will increase as they realise they cannot rely on the trademark to relate future purchases to past consumption experiences. As such, they will be unwilling to pay more for the branded good than for the unbranded good. The result being that the firms will not earn sufficient return on their trademark promotional expenditures to justify making them. At the other end of the spectrum, firms with a valuable trademark will be reluctant to lower quality due to the potential capital loss on their investments.

Consumers benefit from trademarks because they lower search costs, which should presuppose legal protection of trademarks. The value of a trademark is the saving in search costs made possible by the information or reputation that the trademark conveys or embodies about the brand, or the producer of the brand. Creating such a reputation requires expenditures on product quality, service, advertising and so on. Once a firm has created a reputation, it will obtain greater profits because repeat purchases and word-of-mouth references will generate higher sales and because consumers will be willing to pay higher prices for lower search costs and greater assurance of consistent quality.

⁵⁶ This section is taken mainly from the work of: Landes, William M. and Posner, Richard. (1987), "Trademark law: An Economic Perspective," *Journal of Law and Economics* 30: 265-309

Naturally, if trademarks are not protected, the incentive to carry the cost of duplicating another firm's trademark will be quite high, and more so the stronger the trademark. The free-riding competitor will, at a low cost, capture some profits associated with a strong trademark because some consumers will assume, at least in the short run, that the free rider's and the original trademark holder's brand are identical. With no legal protection for trademarks, free riding will eventually destroy the information capital embodied in a trademark, and eliminate the incentive to develop a valuable trademark in the first place.

Table 3 –Advantages conferred by trademark protection

Producer Benefits	Producers can signal quality of their product and establish a reputation.
	Ensure exclusivity of signal, by having the legal means to exclude others from using their signal.
	Incentive to sustain quality levels, so as to prevent capital losses on their investment.
	Incentive to seek out profit-maximising market segments –the result being extensive product and quality differentiation with effective signalling. ⁵⁷
	Producers can build reputation by ensuring consistent quality and a reliable a trademark.
	Obtain greater profits as consumers trust the brand and are willing to pay more for lower search costs and greater assurance of quality.
	Trademark protection dissuades free riders, thus particularly in the high-quality goods market, where there is a high price premium, the gains to firms from trademark protection are especially high.
	Trademarks offer inducements for new firms with distinctive products to enter new markets –an important process for market deepening and growth. ⁵⁸
	Trademark protection establishes incentives for orderly distribution, important for securing economies of scale. ⁵⁹
	Trademarks provide the foundation for inter-brand competition among firms in similar but differentiated products. ⁶⁰
Consumer Benefit	Quick association of signal and quality
	Lowers search costs, as they need not search a product's attributes but rather search for the right trademark
	Trademarks provide assurances of a consistent level of quality
	Consumers can retaliate against inconsistent quality or if quality does not meet expectations by cutting back on future purchases of a particular trademark or brand ⁶¹
	Consumer choice increases as they face a larger variety of product and quality differentiation.
	Consumers rely on trademark protection to ensure that they are purchasing the original product.

⁵⁷ Maskus, op. cit. n. 21, p.7.

⁵⁸ Ibid.

⁵⁹ Ibid.

⁶⁰ Ibid.

⁶¹ Akerlof, op.cit. n. 51, p. 499-500

2.2 Information Theory

Information theory shows that market failures stem from an asymmetry of information between producers and consumers. Producers hold all the information about the product including its properties and quality, and consumers do not always have easy access to this information. Nelson⁶² explains that consumers not only lack information about prices of goods, but that information about quality variation of products is poorer simply because such information is difficult to obtain. He identifies two types of goods; these being search goods and experience goods, which are defined in terms of how consumers obtain information about the goods. Search goods allow the consumer to determine the quality of the product before buying it. An alternative to searching is for the consumer to use experience, that is, determining the quality of the brands by purchasing brands and then using them. Therefore experience goods imply that consumers can only determine the quality of a good after buying it.

Darby and Karni added another type of good to the above classification, this being credence goods. With credence goods, quality cannot be fully determined even after the good has been purchased and used. Thus, even if consumers are able to observe the utility derived from the good, *ex post* consumption, they would still be unable to judge whether the quality received was as the one expected *ex ante*.⁶³ Typically many foods are sold under the label of 'low-fat', but even after purchasing and consuming such foods, consumers can never be certain of these claims.

Asymmetrical information thus creates problems for both consumers and producers alike. Producers are placed in a position of strength since they hold all the information about their respective products, including the true quality, and thus may be tempted to behave unfairly. It thus happens that in markets where goods are not homogenous, and quality differences are only known to producers, the goods end up selling at the same price. In such a case, there is no incentive for producers to supply high-quality items, which are more costly to produce, and thus the consumer can expect to receive lower quality. As such, the bad cars drive out the good because they sell at the same price as the good cars and also because it is impossible for the buyer to tell the difference between a good car and a bad car, as only the seller knows. As a result there is a reduction in the average quality of goods and also in the size of the market.⁶⁴

⁶² Nelson Philip. (1970), "Information and Consumer Behaviour," *The Journal of Political Economy*, 30: 311-329, p. 311-312.

⁶³ Darby, Michael R and Karni, Edi. (1973), "Free Competition and the Optimal amount of Fraud," *Journal of Law and Economics*, 16: 67-88

⁶⁴ See Akerlof, op. cit. 52, p. 488-490

Consumers are thus in a weaker position, since they do not have the information they need to optimise their choices

2.3 Shapiro's model on reputation⁶⁵

Working from the premise that a firm, which has a good reputation, owns a valuable asset, Shapiro explores the implications of firm-specific reputations in a perfectly competitive environment, with imperfect consumer information. When product attributes are difficult to observe prior to purchase, consumers may plausibly use the quality of products produced by the firm in the past as an indicator of present or future quality. Thus, a firm's decision to produce high-quality items is a dynamic one: the benefits accrue in the future via the effect of building up a reputation. In this sense, reputation formation is a type of signalling activity: the quality of items produced in previous periods serves as a signal of the quality of those produced during the current period.

When consumers rely on producers' reputations, a producer who decides to enter the high-quality segment of the market is compelled to invest in his reputation by producing quality goods. During the investment period the producer must sell his product below marginal cost until his reputation is established. The necessity of investment in reputation implies that in equilibrium, high-quality goods must be sold at premium prices.⁶⁶ The premium can be viewed either as returns on initial investment in reputation or as an incentive payment to induce quality maintenance. Simply, premium prices for high-quality goods ensure that producers will not benefit from a fly-by-night strategy of quality reduction, since positive profits can be earned via the faithful strategy of quality maintenance.

Shapiro also challenges some informal notions relating to reputations:

- Firstly, a good reputation need not confer market power on its owner.
- Secondly, reputations need not imply a barrier to entry –“Reputation constitutes a cost of entry, but not necessarily a barrier to entry.”

Finally Shapiro also looks at the welfare analysis of information remedies and minimum quality standards. Increases in minimum quality reduce the equilibrium price of high-quality products,

⁶⁵ Extracted from an article by Shapiro, Carl. (1983), “Premiums for High Quality Products as Returns to Reputations,” *The Quarterly Journal of Economics*, 98: 659-680.

⁶⁶ Premium price is the differential between marginal production cost and price.

and therefore increase consumer surplus for those using high quality products.⁶⁷ The existence of a premium price causes welfare losses relative to the full information outcome, which in fact reflects the information costs associated with establishing reputation. These information costs are as real as production costs, and thus premium prices should not be viewed as a market failure but rather as a cost due to imperfect information.⁶⁸ There are thus welfare gains from improving consumers' abilities to evaluate product quality and communicating this information; these must be balanced against the costs of such a program. Assuming that it is costly to improve consumer information, it is not optimal to provide perfect information.⁶⁹ The process of consumer learning and information is thus essential to Shapiro's theory: the sooner the consumer perceives a product's true quality, the smaller the differential between its marginal cost and the premium price.⁷⁰

2.4 Implications

The above theories show the importance of improving consumer information about product quality, not only from the consumer's perspective who is placed in a weakened position due to the asymmetry of information, but also from the producer's perspective in whose interest it lies to inform the consumers about his product quality so as to build a reputation.

The three theories that have been examined as potential theories that can be applied to the reasoning for protecting GIs are largely related to one another. In fact, both information theory and Shapiro's model on reputation support the main economic reasoning for protecting trademarks. The extent to which the above theories apply to GIs will be discussed in the section below, when examining the need to protect GIs as a means of overcoming the market failure of information asymmetry.

⁶⁷ Shapiro, op. cit. n. 65, p. 661.

⁶⁸ Ibid., p. 674

⁶⁹ Ibid., p. 678

⁷⁰ OECD, op. cit. n.50, Annex 1, p. 33.

Section 3 - Welfare implications of protecting GIs

The purpose of this study is to assess the welfare implications of protecting GIs, and for this, it will be helpful to look at research conducted by the OECD on the economic and legal implications of GIs, in which a question was presented relating to the welfare implications of protecting GIs:⁷¹

Is the well being that producers and consumers gain, in terms of overcoming the market failure stemming from asymmetrical information, sufficient to offset the losses from restricted competition?

This section deals with this normative question by breaking it up into a number of pertinent sub-questions, each dealing with an important component of protecting GIs, these being:

- When looking at GIs, is there a market failure?
 - What is the source of information asymmetry?
- Can GIs be used as a tool to overcome the market failure?
- What are the welfare implications of protecting GIs as a means to overcome the market failure?
 - What are the benefits to producers and consumers when overcoming this failure?
 - What are the costs to producers and consumers from protecting GIs?
 - What are the potential losses from restricted competition?
- Do the welfare gains outweigh the losses in justifying increased protection?
- What are the alternatives to overcoming this market failure?

3.1 When looking at GIs –is there a market failure?

Before determining whether to protect GIs and what the welfare implications are of such a decision, it is important to take a step back and to first assess, whether in the case of GIs, there is a market failure and what is the source of such a failure.

⁷¹ OECD, op.cit. n. 50, p. 21.

The economic theory supporting the registration of trademarks as well as information theory both highlight the fact that information is distributed asymmetrically between producers and consumers. It has been mentioned above that both GIs and trademarks share a common problem of information asymmetry. The extent to which such a market failure can be attributed to GIs can be analysed by examining the source of information asymmetry.

3.1.1. What is the source of the asymmetry of information?

To answer this question it will be relevant to examine the application of information theory, to GIs, which links asymmetry of information between producers and consumers to market failure. Using the definition of GIs as set out by TRIPS, it becomes clear that an asymmetry of information exists when the following situation arises:

1. A good is produced in a specific geographic region, where a given quality, reputation or other characteristic of that good is attributable to that region. As an example we can use the alcoholic drink tequila produced in a specific region of Mexico called Tequila, which has a good reputation for producing high-quality tequila.
2. The good is produced by many producers, but only a few of them produce in that region, so although there may be a worldwide production of tequila, only a few brands of tequila are produced in the region of Tequila, Mexico;
3. An asymmetry of information arises when the producers are aware of the above information, placing them a strong position, whilst the consumers are not aware of the good's quality, reputation or characteristic linked to the region, or which producers are producing in this region and which producers are excluded from this region, and are therefore in a weaker position. Due to this information asymmetry, consumers must rely on the producers of tequila to inform them of which regions are known to produce high-quality tequila, and which brands of tequila are then produced in that region.

It is apparent from the above scenario that if producers from a specific geographic region are not able to signal that their products have a distinct quality, reputation or other characteristic attributable to that region, consumers will not be able to tell the difference between the goods produced in such a region and those that are produced outside of the region. It thus follows that the producers are in a position of strength since they hold all the information and this may serve

as an incentive for some producers to behave unfairly. Producers outside of a particularly well-known geographic region may be tempted to pass off their products as having been produced from that region or as having the same or similar qualities or characteristics as those from that region. In this case there will be no incentive for the producers from that region to supply high-quality goods, which may be more costly to produce, and so the poor-quality goods will drive out the higher-quality goods, because they will sell at the same price. The result will be a reduction in the average quality of goods and also size of the market.

3.2 Can GIs be used as a tool to overcome the market failure?

Once it has been established that in the case of GIs, a market failure in the form of information asymmetry exists, the next step is to question the need to protect GIs as a means of overcoming such a market failure. Thus the question arises; if a market failure of information asymmetry exists, can the protection of GIs be used to overcome such a problem?

Since there is no official or traditional economic theory that applies solely to GIs, in order to grasp the economic rationale for protecting GIs, the need to examine and apply the theory supporting the registration of trademarks as well as Shapiro's theory of reputation to GIs, becomes relevant.

These theories it would seem are applicable to the rationale for protecting GIs, since they highlight both the problem of information asymmetry, which has been shown above to apply to GIs, and the need for improving consumer information about product quality, not only because consumers are placed in a weakened position, but also because producers would be better off by informing consumers about their product quality so as to establish and build a reputation.

Improving consumer information can come from a number of sources. Firms take responsibility for their own products and providing information to potential consumers via advertising, labelling, certificates of guarantee, and investment in trademark reputation etc. In addition to private sector efforts to improve consumer information, local and/or central governments in many countries have consumer information policies by introducing labelling schemes which supply information about ingredients, production methods, packaging, storage, product origin etc.⁷² GIs are but one of many tools that can be used to provide information about product quality. The rationale however for the protection of GIs as a tool to overcome the market failure of information asymmetry, can be determined by analysing the extent to which trademark theory and Shapiro's model on reputation applies to GIs.

⁷² OECD, op.cit. n. 50, p. 8.

3.2.1 Application of Trademark theory to GIs

Section two above covered the analysis of the economic rationale for protecting trademarks, and bearing in mind that both trademarks and GIs are used to identify the origin of a product, it is pertinent to examine to what extent the rationale for protecting trademarks can be applied to GIs. Is there a case for protecting GIs, based on the economic reasoning for protecting trademarks?

First it can be noted that since GIs and trademarks guarantee the origin of products, the former in terms of region and the latter in terms of a specific producer, they thereby both ensure that consumers search costs are reduced.

Secondly, whilst trademarks do not directly guarantee the quality of a product⁷³, GIs are required, by definition, to be associated with a specific level of quality or reputation that is inherent in the location or region. This would imply that the information content in terms of quality is similar but in the case of GIs more direct.⁷⁴ The French region of Champagne is known to produce superb champagne mainly due to the good reputation of the region itself.

Thirdly, GIs like trademarks, are also capable of achieving a high reputation and commercial value and are thus more likely to be exposed to misappropriation, counterfeiting or misuse. Furthermore, since both trademarks and GIs do not protect the underlying technology or knowledge, anyone is free to reverse engineer a product marketed solely under GI protection.⁷⁵

Some have described GIs as trademarks for goods associated with a certain region and thus it appears that, on the face of things, the rationale for protecting trademarks applies, by and large to GIs. Certainly many of the advantages of trademark protection can be applied to protecting GIs, especially since they both share the core problem of information asymmetry. Thus the need to protect GIs can theoretically be ascribed to the economic theory for protecting trademarks. There are however important differences between the two concepts, such as trademarks apply to individual firms whilst GIs can be used by a group of producers in a region designated by the GI. Such differences will have an effect on the extent to which trademark theory applies to GIs as well as on the welfare implications of protecting the two. The application of Shapiro's model on

⁷³ A trademark does not necessarily guarantee good quality. What it does guarantee is consistency. It guarantees the public that the goods purchased today will be the same as the goods bearing the same trademark that were purchased yesterday. See Diamond, *op. cit.* n. 6, p.15.

⁷⁴ Maskus, *op. cit.* n. 21, p.7.

⁷⁵ *Ibid.*

reputation to GIs, below, will determine the extent to which both trademark theory as well as Shapiro's model on reputation applies to GIs and under which circumstances they do not apply.

3.2.2 Application of Shapiro's model on reputation to GIs

Shapiro's model on reputation applies to GIs in the sense that reputation formation as mentioned above, is a type of signalling activity: the quality of items produced in previous periods serves as a signal of quality of those produced during the current period. It thus goes to say that producers who are able to produce a good that has a specific quality, reputation or characteristic attributable to a particular geographic region where it is produced, would want to signal such an association to the geographic region so as to build reputation.

Some important differences between GIs and the above model on reputation arise when looking beyond the link with reputation and quality. Shapiro's model on reputation explores the implications of firm-specific reputations, whereas GIs point to a specific area or region, and within this area, many firms have the right to use the GI. Trademarks are similar to the model on reputation in this regard, as a trademark is associated with a firm regardless of location, and as such trademarks are firm-specific.

Following on this, one of the elements of this reputation theory that can be disputed when applied to GIs refers to the fact that premium prices are justified as an incentive payment to induce quality maintenance. Whilst this would apply to firms trying to build a trademark and reputation over the long run, it is more complicated with regards to GIs, which apply to a specific area, within which many producers operate and are entitled to use the GI. GIs ensure that the reputation of a region accrues to all the producers in that area, but even amongst those producers there will be varying degrees of quality. As such the product of specific firms in a region can be differentiated via quality, associated with both the geographic origin and individual reputation of the firm, which will be reflected by premium prices. As such, GIs are hardly sufficient to encourage competition in quality among member firms; rather the firms might be expected to migrate toward some average or least-cost quality. Therefore, GIs may not carry with them automatic pressures among firms to sustain quality.⁷⁶

Individual firms have an incentive to maintain quality and build reputation, as positive profits can be earned via the faithful strategy of quality maintenance.⁷⁷ In this case, such positive profits

⁷⁶ See Maskus, *op. cit.* n. 21, p. 8.

⁷⁷ See Shapiro, *op. cit.* n. 65, p. 660.

accrue to the firm alone. With GIs however, all the producers in a specific region must agree to maintain quality so that they can all benefit from the reputation associated with that region. In addition to benefiting from being associated with a GI, a producer operating in that region will also want to maintain quality to build his own reputation, as is indicated by Shapiro's theory. However, this may not always be the case, as Maskus points out, firms taking advantage of a GI also have incentives to cheat on its reputation individually, with a joint 'prisoner's dilemma' outcome of eroded quality over time. The evident solution to this free riding is a coordinated strategy within producer coalitions that provide implicit or explicit punishments to defectors. Such associations themselves may be exclusionary.⁷⁸

A further problem now arises. Although each producer is interested in maintaining quality for his own purpose of reputation building, it is also in the interest of each producer to ensure that other producers in that region maintain quality so as to preserve the reputation associated with the region as a whole. Such a dual interest often leads to some kind of cooperative behaviour between producers in a specific region. Although such cooperative behaviour can be above board, there is a danger of cartel-like behaviour ensuing. Some regions protected by GIs are quite small in size allowing for limited number of producers to benefit. In such instances, not only is it easier to coordinate efforts in order to build the reputation of the region, but also it is easier for those producers to coordinate efforts in what may result in anti-competitive behaviour.

Taking Parmesan cheese as an example, the Consorzio del Parmigiano-Reggiano has 563 member dairies collecting milk from approximately 7000 milk producers and is one of the oldest safeguarding bodies.⁷⁹ This Consortium of Parmesan cheese producers in Italy is also largely responsible for coordinating efforts between the different dairies and milk producers. It has Articles of Association in which its purpose and tasks are set out. Part of the Consortium's purpose includes safeguarding the designation of origin of "Parmigiano-Reggiano" cheese. There are a number of production standards, marking regulations and feeding regulations that must be followed. Thus the need for a producer association in this case will help to coordinate efforts and ensure that the regulations are followed so as to help guarantee a consistent level of quality among the different producers. However, as was mentioned in the theory above, whilst producer associations help to sort out coordination difficulties, their efforts may also result in anti-competitive practices as can be seen in the 1996 decision of the Italian Competition Council.⁸⁰

⁷⁸ See Maskus, *op. cit.* n. 21, p. 8, with reference to footnote 18.

⁷⁹ Parmigiano Reggiano –official website. Available at <http://www2.parmigiano-reggiano.it>

⁸⁰ The summary of the decision by the Italian Competition Council is taken from the OECD, *op.cit.* n. 50, p. 18

Country, Date, Decision	Italy, Competition Council Decision No. 4352 of 24 October 1996 (Bollettino No. 43, 11 November 1996)
Sector/Product	Parmigiano Reggiano and Grana Padano cheese.
Complainants	Firms belonging to the Grana Padano Consortium reported it for anti-competitive practices. The Industry Minister referred the matter to the Competition Council, asking it to examine the measures introduced by both consortia.
Contested practices	Approval of an output plan placing limits on total annual supply. Arrangement for allocating production among member firms. Market allocation agreement between the two consortia.
Content of Decision	The practices were found analogous to agreements which restrict market competition (contrary to Article 2/1 of Italian Law 287/90 on competition and market supervision).

A further element of Shapiro's model on reputation that can be challenged when applying it to GIs refers to the notion by Shapiro that reputations need not imply a barrier to entry. In the context of GIs that are exclusive to an area and not to an individual firm, however, there are two effects. Firstly, since GIs designate a region, determining the borders of that region will have effects on those producers that are situated on the border of the region. The criteria used to select which producers will or will not have rights to use the GI will for many producers be equivalent to a barrier to entry.

Secondly, for those producers outside of the GI protected region, depending on the type of protection afforded to GIs, more than a barrier to entry can be created, in fact complete elimination of direct competition⁸¹, in terms of the name of the product, is possible. Whilst trademarks are firm-specific and belong to individual producers, GIs are produced by many producers both within a GI designated region and outside of such a region. Since several GIs have been produced globally for a number of years, this has resulted in many of them becoming generic terms in third markets.⁸² As an example, in the US the word 'champagne' is regarded as a generic term, which means any light-coloured wine with bubbles.⁸³ The current protection granted to GIs in TRIPS, Article 22 and Article 23, are both subject to the exceptions listed in Article 24. Article 24.6 makes specific reference to GIs that have become common language i.e. generic, and states that in such a case, protection of the GI need not be granted.⁸⁴ If however, such an exception were to be scrapped, as in the case of the EU proposal (to be discussed below)

⁸¹ Direct competition in this context refers to competition in terms of names i.e. preventing other producers from using the name champagne. Although champagne producers will still face competition from the sparkling wines sector and more indirect competition from other alcoholic beverages, creating a greater separation in terms of the names of products will affect the substitutability of the product and the cross-price elasticity of demand.

⁸² Those WTO Members that are opposed to extending GI protection to products other than wines and spirits insist that many of the names of products claiming GI protection have in fact been used for generations in their own markets and have thus become generic terms.

⁸³ United States Patent and Trademark Office –International IP –Geographic Indications. Available at <http://www.uspto.gov/web/offices/dcom/olia/globalip/geographicalindication.htm> Accessed 22/09/2003.

⁸⁴ See section 1.2.1 and 1.2.2 above, regarding the scope of protection of GIs.

the consequences would be such that direct competition from producers outside the GI designated region would be eliminated. The EU would like for a selected group of products including champagne, that only those producers in the region of Champagne, France be entitled to call their products champagne.⁸⁵ Producers of champagne/sparkling wines outside of France would not have the right to name their products champagne, even though in their own areas, champagne may be regarded as a generic term. They must thus resort to finding and using other names to sell their products. Such GI protection eliminates direct competition in the champagne market albeit not the sparkling wine market.

3.2.3 Theoretical implications for GIs

From the above analysis of the extent to which the rationalisation for protecting trademarks can be applied to the need to protect GIs, the results are ambiguous in many respects. Certainly, the fact that they both face a potential market failure of information asymmetry, places them in a similar category. Both trademarks and GIs can identify the origin of a product and as Shapiro's model on reputation points out, it is in the interest of many producers to be able to signal the quality of their products.

The major difference between the two concepts, being that trademarks are firm-specific, whilst GIs can be used by a number of producers in a region designated by the GI, implies that latter are prone to collective action, which is not covered by trademark theory or Shapiro's model on reputation. Although such collective behaviour does not necessarily imply anti-competitive practices, the need to be vigilant does become apparent. If the decision to protect GIs is taken, such collective behaviour of GIs will have welfare implications, and the extent of these implications will be discussed below.

3.3 What are the welfare implications of protecting GIs as a means to overcome the market failure?

There are a number of differing interests that can be served by GIs, but these interests mainly lie in the level of protection afforded to GIs. Thus, an analysis of the welfare implications of GIs must take into account the scope of GI protection, because each level of protection will have different welfare implications for all the interest groups. The potential benefits and losses will be analysed in terms of their effects on three groups, these being, producers, consumers and the public, and also in terms of three possible levels of protection.

⁸⁵ Buck Tobias. (2003), "EU draws up menu of foods to fight for", *Financial Times*, July 25, 2003

As was noted above, the TRIPS Agreement prescribes two levels of protection for GIs, these being, a general level of protection as per Article 22 and a higher level of protection for wines and spirits as per Article 23. It is particularly pertinent to examine the welfare implications of Article 22 and Article 23 separately, and not as single protection afforded to GIs by the TRIPS Agreement, for a number of reasons. Firstly, Article 22 and Article 23 prescribe different levels of protection, which will have different welfare implications. Secondly, a large part of the GI debate today has to do with the fact that some countries want to negotiate extending a higher level of protection, such as that given to wines and spirits under Article 23 of TRIPS, to a wide range of other products, including agricultural products, processed foods and handicrafts. For these reasons, a separate welfare analysis of the two levels is necessary.

The EU has always been the most active in seeking the inclusion of GIs within TRIPS.⁸⁶ In the recent debate concerning the extension of the scope of application of Article 23 to products other than wines and spirits, the EU is one of the leading *demandeurs* for such an extension, and even calling for negotiating the protection of specific names of specific agricultural products as part of the agriculture negotiations.⁸⁷ Thus, in addition to the two levels of protection prescribed by TRIPS, the EU's proposal will also be analysed. The EU's international policy on GIs has the following three objectives in the context of the Doha Development Agenda:⁸⁸

- A multilateral register for geographical indications.
- The extension of additional GI protection –additional protection for products other than wines and spirits, such as cheeses, rice and teas, where protection will ensure that such products cannot be copied by producers in other countries by simply indicating “made in USA” or “style of Roquefort”.
- Ensuring market access for EU GI products –for a selected group of GIs, remove prior trademarks and, where necessary, grant protection for EU GIs that were previously used or have become generic.

3.3.1 What are the benefits to producers and consumers when overcoming this market failure?

The proponents of GI protection and indeed the extension of GI protection to products other than wines and spirits highlight the following problems and arguments as part of the rationale for ensuring that GIs are protected.

⁸⁶ See Rangnekar, *op.cit.* n. 13, p. 17 and Maskus, *op. cit.* n. 21, p1.

⁸⁷ See WTO “Geographic Indications”, *op.cit.* n. 4.

⁸⁸ EU –Online. (2003), Intellectual Property, “Why do Geographical Indications matter to us?”, MEMO/03/160, 30 July 2003. Available at http://europa.eu.int/comm/trade/miti/intell/argu_en.htm

3.3.1.1 Producer interests

- GIs eliminate the risk of confusion, which will affect both producers and consumers. Producer interests are affected when a risk of confusion arises between products originating in a specific region and having a special quality due to that origin, on the one hand, and products using the same denomination but not having the qualities derived from that specific region, on the other hand.⁸⁹ It is important for those producers who are availing themselves of the GI, to build on the reputation of the GI, and therefore, when there is a risk of confusion between products linked to a GI designated region and those that are not, the reputation of the GI can be negatively affected, especially where quality differences exist.
- Linked to the above idea of a possible confusion arising between those products originating from a particular region and associated with a GI, and those that are not, a potential free rider problem may arise. The information asymmetry that exists between producers and consumers causes confusion as to which products are genuinely associated with a GI and those that are not. If producers in a region are not able to signal to the consumers that their goods have a certain quality, reputation or other characteristic attributable to its geographic origin, as well as exclude others from using such a GI, producers outside of that region have the opportunity to free ride on the reputation of that GI. Thus GI protection eliminates potential free rider abuses.
- GIs allow for product identification, and thus producers stand to benefit from distinctive characteristics and traditions, and differentiation of their products in the global market.
- By labelling products as unique, GIs provide added value to the products, which then enable the producers to sell their products at premium prices. The EC claims that Italian “Toscano” oil is sold at a premium of 20% and French cheeses at a premium of 2 euro since they have been registered as GIs.⁹⁰
- Producers who are affiliated with a GI, but are not able to use the name or benefit from the reputation or quality linked to the GI due to lack of protection of GIs in other countries or due to prior trademark registration of the name suffer losses in revenue and market access.

⁸⁹ WTO. (2002), TRIPS Council, Communication from Bulgaria, Cuba, Cyprus.... “The extension of the additional protection for geographical indications to products other than wines and spirits.” IP/C/W/353, 24 June 2002.

⁹⁰ See EU –Online op. cit. n. 88.

According to the EU, Italian producers of Parma ham have to call their “Parma Ham”, “N. 1 ham” in Canada and cannot sell their ham in Mexico. They claim to be losing an estimated 3.5 million euros per year in these two countries⁹¹. The EU proposal, which is requesting the removal of prior trademarks for a selected group of products, would thus ensure that GIs such as Parma ham would regain such losses⁹².

- For those producers who will be benefiting from GI protection it will mean enhanced access to third country markets.⁹³ A higher level of protection such as that afforded to wines and spirits, as well as that of the EU proposal, would mean an assured increase of market access especially for those producers of products that would qualify for such higher protection.
- GIs act as an incentive to foster development of local rural communities and encourage a quality agricultural and industrial policy.⁹⁴ Indeed, allowing for sufficient protection of GIs, will also serve as an incentive for all producers to search for local influence over their products and other ways of marketing their products. As Maskus points out, GIs may be expected to have some pro-competitive and pro-development features. GIs can serve as an incentive for producers in regions to organise their innovation and production methods to achieve distinctiveness in flavour, colour, design, or some other characteristics. This can in turn be used as a basis for national and global marketing that can increase rents per unit of product.⁹⁵

3.3.1.2 Consumer interests

- GIs aid consumers with the potential risk of confusion they face in choosing between goods originating from a particular region and benefiting from a certain quality, reputation or characteristic due to that region, and products using the same name but not originating from that region. Therefore in eliminating such confusion, GIs ensure consumer protection.
- GIs will ensure that consumers gain from lower search costs, greater choice and a deeper continuum of quality.⁹⁶ The market failure of information asymmetry can be bridged by GIs,

⁹¹ Ibid.

⁹² Parma ham is on a preliminary list of selected items that the EU will ask for higher protection, as per its proposal, see Buck, op.cit. n. 85.

⁹³ See WTO, IP/C/W/353, op.cit. n. 89, p. 2.

⁹⁴ Ibid., p. 2.

⁹⁵ Maskus, op. cit. n. 21, p. 8.

⁹⁶ Ibid., p. 8.

because consumers are better informed about the origin of the product and the quality, reputation or any characteristic of the product linked to the GI.

- The EC claims that EU consumers highly appreciate GIs. A consumer survey indicated that 40% of consumers are ready to pay a 10% premium price for originally guaranteed products. Following on this, a market survey revealed that 79% of EU consumers believe that “Feta” evokes an origin rather than a type of product.⁹⁷ With the support of such numbers, the EU is pushing for higher protection of GIs and arguing that it is not only in the consumers’ interests but also it is what the consumers want.

3.3.1.3 Public interest⁹⁸

- The public benefits from repression of unfair commercial practices, and availability of remedies against misleading or deceptive commercial conduct.
- Promotion of legitimate competition and a wide range of choice in available products, which can be described according to accepted practice.

3.3.1.4 Implications of benefits

From an economic perspective, the major benefit of protecting GIs has to do with the ability of GIs to overcome the problem of information asymmetry, which will ensure that producers within a region designated by a GI are able to rely on the GI, whilst eliminating the risk of confusion with other products and consequently, eliminating free rider abuses. Consumers likewise, will benefit from lower search costs. These economic advantages, as well as the benefits to public interest mentioned above, can be conferred with the current levels of GI protection as set out by TRIPS. A higher level of protection such as the one afforded to wines and spirits or the proposal of the EU would also ensure a greater increase in market access and revenues for those products that qualify for such protection.

3.3.2 What are the costs to producers and consumers for protecting GIs?

At the other end of the spectrum, a number of countries are opposing certain aspects of GI protection. It is interesting to note that many countries are not opposed to the idea of GI protection *per se*, but rather to the level of protection afforded by GIs. It is mainly with the

⁹⁷ EU-Online, op.cit. n.88. This entire claim can be found on the web page allocated to this footnote.

⁹⁸ WTO. (2000), TRIPS Council, Communication from Australia. “Geographical Indications Article 24.2 Review of the application of Part II, Section 3: Some background issues.” October 2000, IP/C/W/211, p.3.

higher level of protection such as that afforded by Article 23 of TRIPS, and the possible extension of protection to products other than wines and spirits as well as with the EU proposal, where the controversy, and main points of opposition lie. The potential losses due to GI protection will thus be discussed in the light of the differing levels of protection.

3.3.2.1 Producer interests

Those countries advocating a higher level of protection for GIs claim that if the status quo in terms of GI protection is maintained, producers availing themselves of current GI protection are losing out, because producers producing the ‘same’⁹⁹ product outside a specific GI region will not be prevented from free-riding on the reputation of the GI and GIs run the risk of becoming generic terms.¹⁰⁰ Opposing this, some countries are of the view that the protection afforded by Article 22 is sufficient to protect GI-owners’ interests, and that a higher level of protection would give the owner of a GI a monopoly over language that has long been used to describe the style of a product.¹⁰¹ For these countries, many of the products for which a higher level of protection is being sought, have already become generic terms in their own markets. In such a case where the terms have become generic, depending on the level of protection granted to GIs, such protection can have negative welfare implications for a number of producers.

- If higher protection comes in the form of extending protection of all GIs to a uniform level as per the one afforded to the protection of wines and spirits -Article 23, some producers producing the ‘same’ product outside a specific GI region will be negatively affected. Assuming firstly, that the exceptions to GI protection as per Article 24, were also to apply to the additional products, then the negative effects will fall on those existing and new producers of such GI protected products who are producing outside of the GI designated region and who do not qualify for the exemptions. For such existing producers, they will have to face the cost of re-naming, re-labelling and re-branding their products.¹⁰² In addition to this, new producers of such GI protected products will have to find new names for products which consumers have already come to learn as another name and these producers

⁹⁹ The word ‘same’ product is placed in inverted commas for the reason that there is contention as to whether a product produced in a GI designated region is exactly the same as a product that is produced outside the GI protected region, but that still uses the name of the GI. For example, producers outside a GI protected region would then be all those parmesan cheese producers producing outside of the GI protected region in Italy where parmesan cheese has its origin, but still calling their product Parmesan cheese.

¹⁰⁰ WTO. (2001), TRIPS Council, Communication from Bangladesh, Bulgaria, Cuba... “Extension of the protection of geographical indications for wines and spirits to geographical indications for other products.” October 2001, IP/C/W/308/Rev.1, p.4.

¹⁰¹ The New Zealand Ministry of Foreign Affairs and Trade. WTO Negotiations –Negotiations on Intellectual Property Issues, available at www.mfat.govt.nz/foreign/tnd/wtonegotiations/tripsintellpropnegs.html

¹⁰² Such costs will depend on the length of time that the producers have used the GI and the number of markets which they service as well as the extent to which the name of their product is established in these markets.

will also be excluded from using any form of labelling that will distinguish them from the protected region, in such ways as Parma ham, made in the USA or Parma-style ham, Parma-like ham etc. Some countries claim that by allowing GIs to be accompanied by expressions such as “style” and “kind”, GIs run the risk of becoming generic terms. However, many of the products for which a higher level of protection is being sought have already become generic terms. Even so, this does not mean that internationally recognised GIs cannot command a premium price on world markets. In fact, countries opposing an extension of GI protection claim that free and fair imitation of a product enhances the intrinsic value and premium of the genuine GI.¹⁰³

- This may also have a particular effect on developing countries, as they encourage new business ventures and small medium enterprises to open up. If such initiatives are pursued in many of the GI protected markets with the possibility of gaining higher protection, market access opportunities will be closed off to some of these emerging industries.
- If higher protection comes in the form of the EU proposal, it would imply that all producers producing the ‘same’ product outside a specific GI region would be negatively affected by such a higher level of protection. For a selected group of products, the EU calls first for the removal of prior trademarks and secondly for the protection of GIs that have become generic. This will mean that, unlike the scenario above, the exceptions listed in Article 24, particularly, 24.4, 24.5 and 24.6 would not apply to any producer that is producing the ‘same’ product outside a GI protected region.¹⁰⁴ Such protection of GIs will imply that all those producers falling outside a GI protected region will not be able to name or continue naming their products as per the GI, even if they hold a trademark over that name or if the term is regarded as a generic one in their market. Such producers face a number of costs, first of having to find a new name for their product; second, there would be costs associated with having to re-label their products, and thirdly, they would have to incur the costs of marketing and branding these ‘new’ names. These costs can be exorbitant for some firms that have

¹⁰³ See WTO. (2001), TRIPS Council, Communication from Argentina, Australia, Canada.... “Extension of protection of geographical indications for all products: potential costs and implications.” June 2001, IP/C/W/289, p. 6.

¹⁰⁴ Article 24.5 allows for trademarks to exist even if they are identical or similar to the GI; Article 24.6 allows for terms that are generic to be excluded from protection and countries may determine for themselves which terms are generic. It is the opinion of the author that Article 24.4 which permits the continued and similar use of a GI, is also one of the exceptions that will fall away as per the EU proposal since it would be logical that if they ask for the removal of prior trademarks and the protection of GIs even where they are generic, that it is implied that exceptions of Article 24.4 should also fall away.

already built a successful global brand around the products in question. According to Grocery Manufacturers of America, such costs can prove to be staggering. The cost of a brand roll-out depends very much on the product and the market. A national launch of a new cereal brand can run as high as \$ 160 million, spent over a period of 18 months to two years. A new mustard roll-out, which has a more limited audience than a cereal, can run from \$ 5 million to as much as \$30 million.¹⁰⁵ These costs however will be even far greater for those companies with global brands. For instance, Kraft Foods produces a range of yellow mustards, which include Dijon mustard and Country Dijon, as well as a range of cheeses, of which one brand is Kraft 100% Parmesan cheese. If a higher level of protection, as per the EU proposal, were to be granted to either Dijon mustard or Parmesan cheese, Kraft would lose its trademark over these names and the costs to Kraft to re-name, re-label and re-brand, both nationally and internationally will be exorbitant¹⁰⁶. Other producers, not only in the US, but also around the world will also face the same types of costs. For some of the smaller manufacturers, who are not global players, or even big national players, the costs may even be too high for them resulting in them exiting the market.

- The major difference between a higher level of protection such as that granted to wines and spirits and a higher level of protection as proposed by the EU, lies in whether the exceptions of Article 24 will apply. The EU proposal requesting that for a selected group of products, prior trademarks be removed and protection granted even if the terms have become generic in other markets will mean that certain exceptions such as Article 24.4, 24.5 and 24.6 would not apply. This has major implications on the welfare effects of protecting GIs, especially for producers. Therefore, depending on the size of the region being protected and the number of producers within that region that are availing themselves of the GI and the number of producers producing the ‘same’ product outside of the protected region, the loss to the latter, could be greater than the gain to those producers within the region. In such a case, overall producer welfare will suffer losses, certainly in the short term, until such time as the new brands have regained strength.¹⁰⁷

¹⁰⁵ Thorn, Sarah. (2003), “GMA Testimony on Geographic Indications”, Grocery Manufacturers of America, Inc. July 22, 2003, available at www.gmabrands.com/news/doc/Testimony.cfm?DocID=1183 -The figures are based on national averages in the US market and the costs would vary depending on both product and size of market.

¹⁰⁶ According to a preliminary list of selected items, which the EU plans to ask for higher GI protection, Parmigiano Reggiano –Parmesan cheese is one of them. See Buck, op.cit. n. 85.

¹⁰⁷ Without knowing the value added to those producers that gain from increased protection, and the losses incurred by another group of producers, one cannot say with accuracy that there will be an overall welfare loss. Thus, no empirical study that the author is aware of has been done to show this and as such opens a door for recommended and much needed research.

One of the benefits of increased protection for GIs mentioned above has to do with increased market access to third markets and increased revenues for GI protected products. What can be questioned in this regard is the number of producers that will be gaining from such increased protection. This will have implications on the distribution of wealth and once again will depend not only on the type of protection afforded to GIs but also on the size of the region which will determine the number of producers that will receive protection.

- Higher protection as that according to Article 23 will mean that a number of producers who do not qualify for the exceptions in Article 24 will lose out, but since many producers who fall under the exceptions of Article 24 will be able to continue production and there will be an assured increase in protection for those producers in the GI designated region, the effects are rather ambiguous and depend very much on the product in question and the markets that will be affected.¹⁰⁸ Thus, for different products the effects will also be different.
- However, the EU proposal for increased GI protection implies an elimination of direct competition, in terms of the name of the product, which will have immediate and stronger welfare implications. One of the products for which the EU is requesting additional protection is champagne. There are about 100 Champagne Houses (84 according to some sources) and about 15 000 wine growers.¹⁰⁹ The Union of Champagne Houses indicates that about two-thirds of sales turnover (exceeding 100 million euros) is achieved by the large Houses (4 groups consisting of 17 Houses), another group of about 55 Houses reach a sales turnover of between 10 and 100 million euros, and finally about 5% of sales turnover is achieved by about 30 of the smaller Houses. Thus increased GI protection for champagne will result in increased revenues for a small number of producers (about 100 Champagne Houses), but also within that group, all producers will not gain evenly and a few will benefit more than the majority as seen by the two-thirds of sales turnover achieved by only the large Houses (4 groups consisting of 17 Houses).

Another example is that of Parma ham, which the EU has also placed on its preliminary list of selected items that it would like to ask for higher protection, and which has 189

¹⁰⁸ Once again empirical research is needed to determine the number of producers that will be gaining as opposed to the number of producers that will have to incur losses, and this will depend on the type of product in question and the affected markets. Thus a case-by-case analysis would be required.

¹⁰⁹ Champagne Wines –official website, available at <http://www.champagne.fr>; also a link to the Union of Champagne Houses, available at <http://www.unc.fr> -see page on ‘Organisations and Economy’.

producers.¹¹⁰ The EU's proposal will thus ensure that the 189 producers of Parma ham from the region of Parma will benefit.

- Clearly, increased GI protection has implications on the distribution of wealth. It will depend very much on the type of protection afforded to GIs, the size of the region being protected, the product in question and the number of producers that will be benefiting from such increased protection, as well as the number of producers in other markets that will have to incur costs due to such protection.

The major difference between trademarks and GIs being that trademarks are firm-specific whereas GIs are associated with specific regions within which many firms operate and are able to avail themselves of the GI has a number of implications on the welfare of producers.

1. The proponents for GI protection and the extension of protection to higher levels have pointed to the fact that other producers producing the 'same' product outside the GI designated region can potentially undermine a GI's reputation by producing lower quality products, if there is insufficient protection. The advantage thus of increased GI protection is that it assures consumers of a higher quality product ensured by those producers enjoying protection for the GI. However, an assured higher level of quality by all producers within a GI designated region cannot be regarded as a given. Although the product of specific firms bears the name of a GI region with a particular reputation, the product can still be differentiated by quality. As such, some champagnes produced in Champagne, France are known to be of a better quality than others and the premium prices asked for such champagnes reflect both the geographical origin and their individual reputations. In this context, Maskus explains that GIs are hardly sufficient to encourage competition among member firms in quality; rather the firms might be expected to migrate toward some average or least-cost quality. As such, GIs may not carry with them automatic pressures among firms to sustain quality.¹¹¹
2. A further problem associated with the fact that GIs are exclusive to an area, relates to the number of producers who qualify to fall within the designated GI region and determining who these producers will be. Since there is no necessary restriction on the entry of firms into the area, it can happen that popular regions become congested in a "commons" overuse of

¹¹⁰ Prosciutto di Parma, see website for details <http://www.prosciuttodiparma.it> -Economic Data

¹¹¹ See Maskus, op.cit. n. 21, p. 8.

the joint property right.¹¹² Many regions wanting GI protection will have a number of producers firmly within its borders and yet other producers will lie on its margins.

Determining whether the 'marginal' firms are allowed to use the GI can be both costly and litigious.¹¹³ The welfare implications can prove to be negative for those producers lying on the border of a GI designated region, having to incur costs to ensure that they too have rights to use the GI. The criteria that are thus used to determine which producers are included in the protected region can then act as a barrier to entry for many of those firms. Furthermore, if a decision were to go against any such producers, the loss to them would be great, as they would have to continue producing the same product but with the added costs of re-naming, re-labelling and re-branding.

3. Linked to the above problem of a region's borders, it is also difficult to determine how broad a region can be that a GI should cover. The proponents for GI protection claim that the definition of GIs is flexible enough to protect geographical names of localities, regions or countries or any name that evokes a geographical origin.¹¹⁴ The borders, however, of some regions are easier to define than others, with consequences on ensuring quality. Whereas champagne is produced in the properly designated French region of Champagne, Basmati rice does not represent a region as such but is a name that evokes a geographical origin as claimed by India. In the latter case, India would have to register a broad territory or possibly even the country as a GI for Basmati in order to economise on registration and marketing costs. However, a broader territory will mean that coordination efforts will be more difficult and as such there will be greater incentives to cheat on quality.¹¹⁵

3.3.2.2 Consumer interests

Consumer interests are likely to be negatively affected by higher levels of protection for GIs, such as a type of Article 23 protection and especially by the level of protection proposed by the EU, which will require that many firms re-name, re-label and re-brand their products. For consumers this can imply confusion.¹¹⁶ Where consumers may habitually buy their cold meats from a particular company, the re-naming of certain cold meats without being able for example

¹¹² Dr Garrett Hardin used the analogy of overgrazing a commons to explain the relationship of population to the availability of food. He argued that the world was like a commons whereupon only so many animals could graze before eventually destroying it. The *tragedy of the commons* was that people acted in their short-term, rational interests by continually producing more livestock, which eventually used up the commons, dooming both them and society. See Maskus, op.cit. n. 21, p. 8.

¹¹³ Ibid.

¹¹⁴ See WTO, IP/C/W/353, op. cit. n. 89, p. 3.

¹¹⁵ Maskus, op.cit. n. 21, p. 8.

¹¹⁶ See WTO, IP/C/W/289, op. cit n. 103, p. 2.

to use Parma-style ham, or Parma-like ham etc, will cause confusion leaving consumers wondering whether the new named ham is a new type of ham or the same ham as they were previously purchasing but with a new name. Whereas GIs have the potential of reducing search costs by eliminating the asymmetry of information, in such a case, the search costs for consumers would increase, at least in the short run, till such time as they are able to familiarise themselves with the new names and brands.

Furthermore, the EU is calling for higher protection of GIs by claiming it is what EU consumers want.¹¹⁷ However this, together with other aspects of the EU claim below can be disputed.

EU consumers highly appreciate GIs. A consumer survey indicated that 40% of consumers are ready to pay a 10% premium price for originally guaranteed products. Following on this, a market survey revealed that 79% of EU consumers believe that “Feta” evokes an origin rather than a type of product.

- Firstly, the above survey may be indicative of what EU consumers want, but since GI protected products are sold worldwide, the opinion of those consumers can be very different. Consumers’ perceptions of a product’s origin, and the importance this has in their assessment of the product, are not identical across all consumers. For some, origin is one of the most important attributes of the product. But others attach greater importance to other attributes such as safety and nutritional value.¹¹⁸
- Secondly, although EU consumers showed a willingness to pay premium prices for original products, once again, other consumers all over the world may think differently. The EU has a higher GDP per capita than many of the other countries and their consumers’ income elasticity of demand and marginal propensity to consume will differ depending on the product characteristics in question, to for example, consumers in poorer countries whose income elasticity of demand would be more sensitive relative to whether the product is a luxury item or staple item. For those consumers across the globe, who are prepared to pay premium prices for original products, they can purchase the GI protected product at any time and also do so under an Article 22 type of protection. For those consumers however who are price conscious, they will be faced with a limited choice depending on the level of protection.

¹¹⁷ This section of the text is present on the EU-Online website, op. cit. n. 88, but is omitted from MEMO/03/160

¹¹⁸ See OECD, op. cit. n. 50, p. 14.

- Protection afforded to GIs by Article 22, will give consumers the choice of paying a higher price for the GI protected products and a range of other prices for the imitation or like products.
 - Higher protection for GIs as that afforded to wines and spirits will mean that consumers can pay higher prices for the original products, and a possible range of different prices for those products that fall under the exceptions (Article 24), but no more choices for other products that would potentially fall in the category of imitation, style, like etc.
 - Finally, the EU's proposal will only benefit those consumers who have enough money and are prepared to pay premium prices for the original products. Consumers wanting to pay less will not be able to choose among other directly competitive products, in terms of the name of the product.
- Thirdly, the EU claims that 79% of EU consumers believe that Feta evokes an origin rather than a type of product and it is thus unacceptable to allow non-Greek cheese to be labelled as such. It is interesting to note that although there is such strong consumer support for Feta as originating from Greece, the European Court of Justice (ECJ) annulled a decision by the EU Commission to protect the name 'Feta' as a Protected Designation of Origin (PDO). When the Commission decided to register Feta as a PDO, Denmark, Germany and France contested the decision, as the cheese has been produced (also from cows' milk) and legally marketed under the name 'Feta' since 1963 in Denmark, 1981 in the Netherlands and 1984 in Germany. According to the ECJ, the Commission in determining whether a name has become generic, should in particular, have taken account of the existence of products legally on the market.¹¹⁹
 - Thus, the EU's proposal regarding GI protection, which asks to remove prior trademarks and to grant protection to EU GIs that were previously used or that have become generic, is rather presumptuous, since their own ECJ ruled that "Feta" had become a generic term and could not be protected as a PDO. In deciding whether it should have been protected as a PDO, the Commission overlooked other relevant factors, and in particular they should have taken account of the existence of products legally on the market. This would be equivalent to trademarks which have existed for

¹¹⁹ ECJ, Cases C-289/96, C-293/96 and C-299/96. *Denmark, Germany and France v Commission, supported by Greece* Press Release No 17/99 'Registration of the name "Feta" as a Protected Designation of Origin is annulled' Available at <http://curia.eu.int/en/actu/communiques/cp99/cp9917en.htm>. Information was taken from press release which does not bind the Court of Justice.

a number of years and which are legally marketed. Yet, the EU is asking for prior trademarks to be removed for certain products that they want to protect via GIs.

3.3.2.3 Public interest

- Some countries are of the opinion that the fundamental objectives of GI protection are set out in Article 22.2: not misleading the public and ensuring fair competition between producers in the market place. A higher level of protection will operate to confer exclusive rights over a particular term to one group of producers effectively depriving others of the right to use that term. This will create an imbalance as the grant of exclusive rights over a particular term confers a more restrictive protection than is necessary to achieve the fundamental objectives of GI protection.¹²⁰
- Since GIs are exclusive to an area within which a number of producers operate and are entitled to use the GI, ensuring quality levels among the producers requires coordination efforts. If such coordination efforts lead to anti-competitive practices, the interests of the public would not have been served by GI protection, particularly in the area of ensuring fair competition, where the end result would actually be restricted competition.
- Protecting GIs fragments the market and with higher levels of protection, the market becomes more fragmented. This in turn pushes power to the producers and creates inefficiencies in distribution with resulting increases in distribution costs. It also eliminates the possibility of a homogenous liquid market, which implies taking advantage of economies of scale, with the result being increased search costs for the consumer since they now require networks to trade.¹²¹
- The EU claims to have registered some 4800 GIs.¹²² Questions arise as to whether the registration of such a high number of GIs is in the public interest. If countries like China or the US, which are much larger than the EU were to also start registering all possibilities of products as GIs, where would it all end? In a multilateral trade setting such as that provided by the WTO, where the aims are to liberalise trade, how can the protection of 4800 GIs in the EU alone be beneficial to such liberalisation aims? If it has been agreed that trade

¹²⁰ WTO, IP/C/W/289, op.cit. n. 103, p. 3.

¹²¹ Rauch J. (1996), "Networks Versus Markets in International Trade" NBER Working Paper 5617, June 1996, available at <http://papers.nber.org/papers/w5617.pdf>

¹²² MEMO/03/160, op.cit. n. 88, p. 2.

liberalisation is in the public interest then the level of protection of GIs must not serve as an obstacle to such liberalisation efforts.

3.3.3 What are the potential losses from restricted competition?

Related to the objective of ensuring fair competition, GI protection and indeed higher levels of GI protection can result in the anticompetitive practices. Where GIs work to solve one market failure, that of information asymmetry, they give rise to another, this being coordination difficulties. Since a number of producers operate in a GI designated region, ensuring quality among all producers is both necessary on the one hand as all produces benefit from the reputation of the region but also difficult on the other hand. Whilst producer associations may be needed to manage this difficulty, they may also behave in a manner that is exclusive and monopolistic, reducing the net gains, and their diffusion, to small firms and potential entrants. In the light of possible anti-competitive practices resulting from the behaviour of producer associations or dominant firms operating in GI designated regions, competition authorities will have their work cut out for them.¹²³

3.3.3.1 Coordination problems and the threat of anticompetitive practices

Whilst producers and processors may very often be independent firms, they are linked in that they make a PDO product whose main characteristics are set out in specifications.¹²⁴ There is thus a need to coordinate efforts, and the main reason for this, is the need at the end of the processing stage, to arrive at a product with specific characteristics. This entails monitoring all along the chain.¹²⁵ Such coordination efforts run the risk of resulting in anti-competitive practices.

The OECD has analysed a number of cases where competition authorities have intervened in PDO chains in OECD countries. From this they have identified three main types of risks from the standpoint of free competition and market rules.¹²⁶

➤ The risk of Monopolistic cartels

Competition authorities in the EU investigated several cases where it was found that groups had taken measures to control supply. Of the five cases analysed, four have to do with placing limits

¹²³ See Maskus, op. cit. n. 21, p. 9.

¹²⁴ PDO is a Protected Designation of Origin and covers the term used to describe foodstuffs which are produced, processed and prepared in a given geographical area using recognised know how.

¹²⁵ OECD, op.cit. n. 50, p.16.

¹²⁶ Ibid., p.16-20 –This section is largely extracted from the work of the OECD.

on supply. Most cases showed the total annual supply programme accompanied by a detailed breakdown of output through quotas allocated to producers. To ensure that producers kept to their quotas, penalty arrangements were in place. Only the case regarding the French red label scheme did the investigation focus on price collusion.

In most of the cases three main lines of defence were put forward. Firstly, they claimed a legal foundation for their power to control production. Secondly, they argued that supply controls were essential for quality control. Finally, they pointed to exceptions, which some competition regulations allow to the general ban on understandings to restrict competition.

All the cases analysed below were found to have contravened the respective competition laws applicable to each case. The table below provides a summary of cases investigated by competition councils in EU countries on PDO products.¹²⁷

Table 4 -Cases investigated by competition authorities in EU countries on PDO products

1	Sector/product Country, Decision, Date Contested practices	Cantal cheese France, Competition Council Decision No. 92-D-30 on 28 April 1992. In 1986 the Interprofessional Committee approved a plan for the 1987 farm year, placing limits on the total supply for the year and proposing a method of allocating output to enterprises.
2	Sector/product Country, Decision, Date Contested practices	Label-scheme poultry sector ¹²⁸ France, Competition Council Decision No. 94-D-41 of 5 July 1994. Structural measures designed to reduce output. Procedures for admitting poultry breeders in as much as they are discriminatory. Price collusion, in particular prices paid by slaughterhouses to breeders. The attempt by slaughterhouses to set a minimum resale price for distributors. Contractual clauses between a quality group and member slaughterhouses, to allocate slaughter markets covered by the label.
3	Sector/product Country, Decision, Date Contested practices	Parmigiano Reggiano and Grana Padano cheese Italy, Competition Council Decision No. 4352 of 24 October 1996. Approval of an output plan placing limits on total annual supply. Arrangement for allocating production among member firms. Market allocation agreement between the two consortia.
4	Sector/product Country, Decision, Date Contested practices	Parma and San Daniele ham Italy, Competition Council Decision No. 3999 of 19 June 1996. Introduction of an output plan placing limits on total annual supply. Arrangement for allocating production among members.
5	Sector/product Country, Decision, Date Contested practices	Gorgonzola cheese Italy, Competition Council Decision No. 6549 of 12 November 1998. Introduction of supply quotas. Approval of an overall output plan, and an arrangement to allocate production.

¹²⁷ The OECD listed only those cases known to them, and this table is summarised from their work.

¹²⁸ In the French red label scheme the label is not a PDO, it is a collective mark held by the French State, and was included in the analysis because the type of structure that it establishes is similar to that for a PDO.

An analysis of the above cases brings an awareness not only of the types of anti-competitive practices typically followed by producer associations but also highlights the need for a change in the mindset of many of these producer groups. Firstly, producer groups need to disassociate the idea that production standards can be maintained by placing limits on supply. If production quotas are not allocated on the grounds of relative efficiency, then resources are being wasted. Where GI protection aides to overcome the market failure of imperfect information on the one hand, it can also help, as in the cases mentioned above, to ensure that inefficient producers are being protected.

Another implication of the above types of anti-competitive practices is that consumer welfare will suffer. Consumers will face higher prices due to the limits placed on volume of supply, which will hike up market prices. Naturally, such a strategy could also be detrimental to producers who will still face competition from other products. However, the protection of GIs and indeed the level of protection granted will have an effect on the type and amount of competition that GI protected products will face. The greater the level of protection for GIs, the more exclusive the GIs become and instead of enhancing quality and innovation, producers relying on the GI may not respond to market signals.

➤ The risk of obstacles to market entry

This risk relates to the basic criteria defining membership of a producer group, which seems to remain unsettled. Of the losses to producers due to GI protection mentioned above, defining the boundaries of a protected region and determining the criteria as to which producers are included and which are not, can be problematic and controversial.

Two criteria for eligibility can be posed: the producer's link to the geographical area defined in the specifications of the PDO product, and the producer's capacity to comply with the standards laid down in the specifications. Given that greater consumer welfare remains the crucial aim, the rules laid down in the specifications should relate to product quality from the standpoint of the consumer, not the producer. The risk that a group may endeavour to restrict entry of new producers, in order to hold down overall supply volumes, is easy to see from the cases that have been analysed. Competition authorities observed practices restricting market access for new producers.

- In the case of the San Daniele Consortium, an output plan was adopted where it was found that a firm wanting to start producing ham using that name could apply to the consortium for a production quota. Such a quota could under no circumstances exceed 3 per cent of the total output of the consortium members.
- Discriminatory measures were also detected in the French red label scheme with regards to the admission of poultry breeders.

➤ The risk of over-administration and over-regulation

The problem of information asymmetry is one of the main reasons for governments and producers wanting to establish special labelling schemes. However, any official arrangements, backed by regulations should place minimum restrictions on competition. In the EU, Council regulation No. 2081/92 reintroduces a crucial element of competition by calling for inspection as a means of ensuring competition in the PDO chain. Having a group of producers making the product on the hand, and an independent certification body responsible for inspection and certification restores an element of competition, which could possibly be eliminated if the two functions were combined.

The danger of excessive bureaucracy surrounding these names can be harmful to producers and consumers, as well as aid in slowing down the registration process. Furthermore, administrative arrangements for products with appellations of origin could also result in providing producers and processors with insufficient stimulus. If they were to somehow equate the success of the product with the right to use the appellation, and the appellation itself gains a reputation of quality, a danger arises that producers may not respond to market signals. In the end, the whole process actually discourages innovation.

3.3.4 International cross- border issues

The protection of GIs within a multilateral framework such as the WTO has implied consequences on cross border issues. Such cross border issues can be divided into two categories, one relating to the use of geographical names and the other to the extension of protection to an entire chain.

It is mainly due to the first issue relating to the use of GIs that rules on GIs were included in the TRIPS Agreement. Many countries are fighting for increased protection of the use of GIs. This

can be done within a multilateral negotiation setting such as the WTO and this is currently what the debate on GIs is focused on. Alternatively, countries seek to protect the use of their GIs by means of national laws. For a number of years, the Consorzio del Parmigiano-Reggiano together with the Ministry of Agriculture in Italy has been fighting for protection of the use of the name “Parmigiano-Reggiano”. In June 2002, the ECJ ruled that the term “Parmesan” is the translation for “Parmigiano-Reggiano” and that the safeguard given to the “Parmigiano-Reggiano” PDO also applies to its translation “Parmesan”, which therefore cannot be considered as a generic denomination.¹²⁹ The cross-border implications of such a ruling is that all the EU States now have an obligation of banning all those cheeses bearing the designation “Parmesan” and which are produced outside the production area of origin of Parmigiano-Reggiano cheese.

Protecting GIs creates obligations for other countries, thus where the protection is aimed at a geographical name that is also a generic term in other markets, the disputes will be many, especially with a higher level of protection, which will ensure greater exclusivity of the term.

The second category of cross borders issues relates to how far down the process the name can be protected. Can a food product of designated origin be sliced and packaged by another company outside the designated origin and still be sold under the name of the original brand? This is the case of *Consorzio di Parma (Parma ham) v. ASDA Stores Ltd*, a British supermarket chain. Parma ham wanted to prevent the supermarket chain from selling Parma ham unless it had been sliced and packaged in Italy. It argued that in order for Parma ham to be named and described as such, it must comply with the Italian law and that slicing and pre-packaging affected the quality of the ham (based on EU regulations). This argument failed at first to be accepted by a British judge, who maintained that although the Italian rules prohibit the sale of Parma ham which has been pre-sliced and packaged in Britain as Parma ham, they do not have effect in Britain. However, the ECJ recently ruled in favour of Parma ham pointing out that the slicing of ham and packaging constitute important operations, which may damage the quality and authenticity and consequently the reputation of the PDO if those requirements are not complied with. The court stated that those operations are prohibited to third parties outside the region of production only if that is expressly laid down in the specification.¹³⁰

A consequence of the above case is that Consorzio di Parma now has greater control over the product: Parma ham. Is this necessarily a good thing? For the Parma ham producers and the

¹²⁹ Parmigiano-Reggiano. (2002), Press release – “Parmigiano-Reggiano wins: Parmesan is not generic in the 15 EU countries”, 25 June 2002. Available at <http://www2.parmigiano-reggiano.it/>

¹³⁰ ECJ, Case C-469/00 and C-108/0, op.cit. n. 1.

butchers in Italy, it certainly is.¹³¹ However the ruling may not prove to be so good on the grounds of common sense and market efficiency arguments. Firstly, the ruling has been criticised for opposing the slicing and packaging of Parma ham outside of Italy, but at the same time allowing the name Parma ham to be used when the meat is sliced on a delicatessen counter in front of shoppers. If the quality of Parma ham is also due to the way that the meat is sliced, then there is inconsistency to the logic, as slicing Parma ham on a delicatessen counter, which is permitted, should also then affect the quality of the ham. Secondly, on the grounds of market efficiency, the ruling does not favour an option of cutting costs and thus reducing the price for consumers. The ASDA supermarket group claims that its packaging procedures meant that it could sell Parma ham 60% cheaper than its rivals.¹³² Thus consumers lose the choice of either buying Parma ham that is sliced at the delicatessen counter or imported Parma ham that is sliced and pre-packaged in the UK at a lower price. They will now have to pay a higher price for sliced and pre-packaged Parma ham coming from Italy.

3.4 Do the welfare gains outweigh the losses in justifying increased protection for geographic indications?

First, it cannot be said with certainty that protection of GIs will always lead to welfare gains or welfare losses. There are certainly gains to be had by protecting GIs, such as overcoming information asymmetry, but at the same time there are costs in the form of coordination problems, amongst others. It becomes clear that GIs present trade-offs. The matrix below provides a summarised version of who will be better off or worse off under different levels of GI protection.

Table 5 –Matrix summarising who gains and loses under different levels of GI protection

Levels of protection	Producer interests	Consumer Interests	Public Interests
No protection afforded to GIs	<ul style="list-style-type: none"> • Producers in a GI region will lose • Producers outside GI region will gain • Free riding producers • Information asymmetry could provide an incentive for producers to behave unfairly 	<ul style="list-style-type: none"> • Asymmetry of information places consumer in a weakened position • Consumers will have variety. • Consumers cannot be assured of quality 	<ul style="list-style-type: none"> • No consumer protection • Possible unfair competition practices • Information asymmetry can result in the bad products driving out the good products

¹³¹ The producers of Parma ham and the butchers or those responsible for slicing the ham may be two separate businesses or one and the same entity.

¹³² BBC News. (2002), "Court supports ASDA over Parma ham", 26 April 2002. Available at http://news.bbc.co.uk/2/hi/uk_news/1950236.stm

TRIPS Article 22 protection	<ul style="list-style-type: none"> • Producers in a GI region will gain • Producers outside GI region can continue to produce with correct labelling and origin indication 	<ul style="list-style-type: none"> • Consumers gain from protection i.e. not being misled. • Consumers gain by being better informed –market failure of information asymmetry is bridged • Consumers gain from lower search costs • Consumers gain by larger variety in terms of both products and prices 	<ul style="list-style-type: none"> • Consumer protection • Unfair competition restricted • Potential for anti-competitive practices among producer associations
TRIPS Article 23 protection	<ul style="list-style-type: none"> • Producers in a GI region benefit from increased protection ensuring high quality; increased market access and increased revenues • Some producers outside GI region will fall under exceptions –they continue with production and remain unaffected • Some producers outside the GI region not falling under the exceptions have to incur costs of re-naming, re-labelling and re-branding their products and are not permitted to use the GI with accompanying terms such as ‘like’, ‘type’ or ‘kind’ etc. • New producers entering the market will have to find new names for their products and cannot use the GI accompanied by terms such as ‘like’, ‘style’ or ‘kind’ etc. • Producers on the borders of a GI protected region may view criteria for acceptance into the region as a barrier to entry 	<ul style="list-style-type: none"> • Consumers gain from protection i.e. not being misled. • Consumers gain by being better informed –market failure of information asymmetry is bridged • Consumers gain from lower search costs • Consumers may face confusion as some producers will be forced to re-name their products thus increasing search costs in those cases 	<ul style="list-style-type: none"> • Consumer protection • Unfair competition restricted • Potential for anti-competitive practices among producer associations

EU Proposal	<ul style="list-style-type: none"> ○ Producers in GI region qualifying for EU proposal will gain from ultimate protection ensuring exclusive use of the name, increased market access, and increased revenues 	<ul style="list-style-type: none"> ○ Consumers gain by being assured of the origin of products 	<ul style="list-style-type: none"> ○ Consumer protection
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This matrix shows that a number of trade-offs will be faced depending on the level of protection granted to GIs. Under certain circumstances there are clear winners whilst others might be losing and under other circumstances, the overall welfare effects are more ambiguous.¹³³

Under the first scenario where no protection is granted to GIs, the overall welfare would probably be in favour of net losses. With no GI protection, the initial market failure of imperfect information still prevails, including the consequent problems of producers free riding on the reputation of the GI. With no consumer protection and the potential for unfair competition practices, consumers are in a weak position and cannot be assured of the quality of the products they purchase.

At the other end of the matrix lies the EU proposal, which could also lead to net losses in certain product categories. This will depend firstly on the product in question and also on the number of producers that will benefit from the increased protection as well as the value added due to increased market access and increased revenues, and on the other hand, the number of producers who will have to give up prior trademarks and incur the costs of re-naming, re-labelling and re-branding. Where a GI has become a generic term in third markets, the value to those producers of such a generic term and the costs of having to give it up will be difficult to determine. The EU proposal of ‘absolute’ protection may also ensure that for certain GIs increased revenues due to

¹³³ Without empirical studies showing which producers gain and by how much and likewise, which producers lose and by how much, the results remain ambiguous and can only be speculative.

the increased GI protection will go to a small number of producers. This will have consequences on the distribution of wealth. The losses to consumers may also be greater than the gains, as they would face higher prices for the products with GI protection and will also have greater search costs for other competing products as producers falling outside of GI protection would have to re-name and re-label their products. Furthermore, such exclusivity will mean that more power is conferred to the producers of GI protected products and as such the possibility of anti-competitive practices is greater than usual.

The two other scenarios, general protection under Article 22, and a higher level of protection given to wines and spirits under Article 23, seems to be the converging point. It is then no surprise that the controversy surrounding GI protection today has to do with whether to extend the GI protection granted to certain products, which currently receive protection under Article 22, to the same level of protection as that given to wines and spirits in Article 23. Under the latter level of protection, the welfare gains and losses seem to be more ambiguous. Those producers relying on GI protection feel that the protection granted under Article 22 is insufficient to protect their interests and to prevent others from negatively affecting their reputation and would prefer stronger protection. Whilst those producers who are not covered by GI protection feel that the protection granted under Article 22 is sufficient to meet the objectives of protecting GIs in the first place, this being to not mislead the public and to ensure fair competition between producers in the market place. They also point out that internationally recognised GIs will always be able to command premium prices even if the GIs have become generic terms in other markets, and should thus welcome the competition.

Ultimately, where some producers gain, others will lose. The benefits to consumers of protecting GIs will lead to lower search costs, greater choice and a deeper continuum of quality. Both levels of protection i.e. Article 22 or Article 23 will however secure such benefits. Furthermore, in both cases the problem of information asymmetry will be overcome, whilst at the same time coordination problems will arise.

3.5 Alternative solutions to overcoming the market failure

We have thus far established that there is a market failure of imperfect information, and that the protection of GIs is one possible tool to overcome this market failure. However, there is no certainty that the welfare effects of protecting GIs will always be positive. It has been shown above that under some levels of GI protection, there are groups of producers that will benefit whilst others will have to incur costs due to such protection.

It is thus helpful at this stage to consider the alternatives that are available to overcome this market failure. Since the market failure has to do with imperfect information, an immediate response is to use different types of communication tools to improve the type of information consumers receive on product quality. It has been mentioned that business and government are increasingly relying on tools such as advertising, labelling and marks to inform consumers and influence the range of search information available or making it easier to use and thereby lowering the cost to consumers of acquiring information.

Labelling in and of itself cannot be seen as an alternative to GIs, because it forms part of the existing law protecting GIs. Article 22 is largely about labelling, and thus any arguments in favour of labelling will be countered by exactly those arguments used by some countries to express their dissatisfaction with the protection afforded to GIs by Article 22. Labelling offers the opportunity to those producers outside a GI designated region to produce the ‘same’ product as that of the protected region and to label it as such, so that consumers are not misled as to the true origin of the product, for example, Style of Champagne –made in Australia. However, producers in the GI protected region feel that such labelling provides insufficient protection in that others can still free-ride on the reputation of the GI whilst at the same time diluting its reputation and that it also aides the risk of rendering the GI as a generic term. The latter argument is redundant in those markets where the GI is already considered as a generic term, but even so, consumers would still be willing to pay premium prices for the recognised GI.

A possible alternative to the way GIs are protected can come in the form of marks. Since GIs by definition require that the good to be protected originate in the territory, region or locality indicated in the designation, the implication is that no form of licensing can take place. Thus all enterprises fulfilling the conditions specified in a GI have the ‘right to use’ but do not have the ‘right to authorise use’ to others.¹³⁴ An alternative to this is the option of marks, and more specifically certification marks, which are categorised as private property rights. The US offers protection for GIs through registration as a certification mark, which is a type of trademark. A certification mark is defined as:¹³⁵

¹³⁴ See Rangnekar, *op. cit.* n. 11, p. 37.

¹³⁵ United States Trademark Act of 1946. *Trademark Manual of Examination Procedure (TMEP)* –Section 1306 Certification Marks. Available at http://www.uspto.gov/web/offices/tac/tmep/1300.htm#_Toc2249653 The work below describing the type, use and purpose of certification marks was also extracted from the TMEP.

“any word, name, symbol, device, or any combination, used, or intended to be used, in commerce with the owner’s permission by someone other than its owner, to certify regional or other geographic origin, material, mode of manufacture, quality, accuracy, or other characteristics of someone’s goods or services, or that the work or labour on the goods or services was performed by members of a union or other organization.”

There are three types of certification marks.

1. Marks which certify that goods or services originate in a specific geographic region;
2. Marks which certify that the goods or services meet certain standards in relation to quality, materials, or mode of manufacture; and
3. Marks which certify that the performer of the services or the manufacturer of the goods has met certain standards or belongs to a certain organisation or union.

Two important characteristics differentiate certification marks from trademarks or service marks and these relate to the use of the mark and the purpose of the mark.

First, the owner of a certification mark does not apply the mark to his or her goods or services and, in fact, usually does not attach or apply the mark at all. The owner of the certification mark controls the use of the mark by others on their goods or services, by taking steps to assure that the mark is applied only to goods or services which contain the requisite characteristics or meet the specified requirements which the certifier/owner has established or adopted for the certification. Second, the purpose of the certification mark is not to indicate origin in a single commercial or proprietary source; it does not indicate source in a trademark sense at all. The message conveyed by a certification mark, when it is applied to goods or used in connection with services, is that the goods or services have been examined, tested, inspected, or in some way checked by a person who is not their producer, by methods determined by the certifier/owner.

The protection of GIs under TRIPS means that GI right holders only have the right to use the GI but cannot authorise others to use the indication. Conversely, certification marks give the owner of the mark the right to authorise use. The owner of the mark does not apply the mark as such but possesses the right to authorise others to use the mark on goods or services once they are able to meet the requirements set out by the owner/certifier. The certification can be granted on the basis

of the three types of certification marks mentioned above, which will then feature in the rules of the users. Any operator who complies with the rules has the right to use the mark. The advantage is that the operator is bound only by the rules or requirements as set out by the owner of the mark, and as such is not bound to a specific region only (unless of course the owner of the mark chooses to include in the certification standards of the product, a special link between the characteristics of the product and its geographical origin). It is however possible, under this type of protection that the mark be granted to an operator who falls outside the designated geographical region.

The advantage of a system of certification marks is that it does more than indicate origin. There is assurance on the side of the producers that since the owner of the mark has control over the rules that are set out, there will be greater consistency with regards to quality and that the reputation associated with the mark will not be diluted. Consumers also enjoy the added benefit of knowing that the mark attached to the good or service being purchased indicates that production and inspection are carried out by different parties but still in accordance to the methods determined by the certifier or owner. Furthermore, any operator can qualify for certification to produce the good or carry out the service if they can meet the requirements as laid out by the owner

There are some complications that may create inefficiencies or even other market failures. The first problem that comes to mind is the possibility that the rules governing the use of the mark become in themselves obstacles to market entry. Since it is a private right, the owner is free to select the criteria to feature in the rules for users and thus what prevents the owner of the mark from creating requirements that are particularly discriminating? In the US, a certification mark can be annulled if the owner does not allow those meeting the established criteria to use the certification mark.¹³⁶

Another problem relates to the ownership of the mark. Where the names of certain products have evolved into generic terms in some markets, there may be confusion and disputes concerning the ownership of the mark. There may also be problems surrounding the possibility that a certification mark exists for a product in one market and in other markets, different operators may hold a trademark over the same name.

¹³⁶ See OECD, *op. cit.* n. 50, p. 19.

It is apparent that with a system of certification marks, there are many advantages, including the right of the owner of the mark to authorise use to others, and there are some disadvantages, the main one being that the requirements governing the use of the mark may create obstacles that keep efficient producers out of the market, or aid in making the whole process inefficient.

For this reason, certification marks as an alternative means of protecting GIs, may be beneficial to some and not to others. Whilst some parties will welcome the opportunity for greater control over the production of the good, others may not want to be subject to the requirements set out by the owners of the marks and may view these requirements as too restrictive. For now it seems that certification marks may not provide the flexibility which all the parties affected by GI protection may want and which the current system of GI protection provides. Thus, more research will have to be done in this area to determine if certification marks will prove to be a viable alternative to the current protection afforded to GIs.

4. Conclusion

The purpose of GIs as an instrument of IPRs should be aligned with the objectives of intellectual property protection, which is to create incentives that maximise the difference between the value of the intellectual property that is created and used and the social cost of its creation, including the cost of administering the system. An important aspect is whether the intellectual property system strikes a balance between creating and disseminating intellectual property. Providing incentives for the creation of many new works may encourage resources to be devoted to innovative activity. However, if the new innovations are not widely used, the system may be less beneficial than one with less creativity, but where the materials created are more broadly disseminated.¹³⁷ The TRIPS Agreement builds on this in its objectives stated in Article 7, which requires that the protection afforded to intellectual property rights should be “conducive to social and economic welfare, and to a balance of rights and obligations”.

Protecting GIs must then aim to balance the varying interests that producers, consumers and the public have in GIs.

- Consumers want access to information about product quality;
- Producers want to signal the quality, reputation or other characteristic of the product which is attributable to its geographic origin; and
- The public wants consumer protection and a restriction of unfair competition.

The welfare implications of protecting GIs are not clear-cut. In overcoming the market failure of information asymmetry on the one hand, other problems arise relating to coordination difficulties. Collective action by producers in a GI designated region may result in anti-competitive practices such as monopolistic cartels, obstacles to market entry and the risk of over-regulation. Protecting GIs means facing trade-offs –where one group of producers gain exclusive rights to use a term will imply that another group of producers is deprived of using such a protected term. Especially where the term is a generic one in other markets, the costs of protection may far outweigh the gains as many producers will be forced to re-name, re-label and re-brand their products and search costs for consumers rise as customary terms will no longer be used by some producers. This will depend on the type of protection afforded to GIs and the extent of exclusionary use of certain GIs.

¹³⁷ Besen, Stanley M and Raskind, Leo J. (1991), “An introduction to the Law and Economics of Intellectual Property” *The Journal of Economic Perspectives*, Volume 5, Issue 1 (Winter, 1991), p5-6.

In attempting to balance interests, it is apparent that the welfare implications of protecting GIs depend on the different levels of protection afforded to GIs. The EU proposal, whilst benefiting the producers in a GI designated region, calls for the removal of prior trademarks and in doing so does not create a balance with other IPRs or with other capable and efficient producers of the GI.

A converging point seems to be the protection afforded to GIs by Article 22 and Article 23. Where the GI terms are already generic, protection afforded by Article 22 seems to provide enough flexibility to accommodate the varying interests of producers and consumers alike. Article 23 provides greater protection to producers in a GI designated region and should result in fewer costs where the term protected is not a generic one.

The current system of protecting GIs must also be flexible enough to include a broader range of products, which may in the future be linked to GIs, such as access to genetic resources and traditional knowledge.

Recommendations

Protecting GIs seems to have captured the attention of many countries, with the possibility of gains and losses to be had depending on the level of GI protection afforded. Thus the need for further research is vital. Without much needed empirical research that will confirm the gains and losses of GI protection, the results remain ambiguous and speculative and the determination of the level of GI protection will be at the command of powerful interest groups, instead of clear economic rationale. The possibility for future work includes:

- Empirical studies in terms of a particular product and market to determine the number producers that gain and by how much from GI protection and the opposing number of producers that have to incur costs and the value of such costs.¹³⁸ A longer-term analysis will also shed light on determining whether this distribution across the varying interest groups has changed over time and to what extent.
- Studies examining whether certain product categories will benefit more from GI protection, and with which types of products will GI protection be ineffective?
- Other possible alternatives to differentiating products and the welfare implications associated with these.

¹³⁸ A case-by-case analysis is needed as products and markets differ. A starting point would be to analyse the effects of a bilateral trade agreement where GI protection has been included for some products. The EU-South Africa Free Trade Agreement is one such bilateral agreement where the EU managed to secure GI protection for some of its products.

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