

Institutionalizing Geographical Indications in Southern Countries: Lessons Learned from Basmati and Rooibos

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Summary. — Geographical Indications (GIs) are increasingly conceived as a development tool. However there are insufficient empirical and conceptual grounds to fine tune their institutionalization. This paper investigates the need for and the role of State intervention in GIs using comparative analysis of the trajectories of Basmati rice and Rooibos tea, emblematic products respectively from India and South Africa. The social relevance of GIs depends on the State's conception and examination of the link to the origin embodied in the GI. Institutionalization should consider GI as a hybrid between a public quality standard and a specific IPR to protect a heritage-based reputation.

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1. INTRODUCTION

A geographical indication¹ (GI) identifies a good as originating in a place, where a given quality, reputation, or other characteristic of the good is essentially attributable to its geographical origin. As pointed out by Raustiala and Munzer (2007), GIs stand at the crossroads between three major issues, intellectual property (IP), trade, and agricultural policy. Since GIs were first institutionalized in southern Europe in the wine and cheese industries as appellations of origin, they have been widely internationalized as intellectual property rights through the Trade related Aspects of Intellectual Property Agreement (TRIPs Agreement) of the World Trade Organization (WTO) (Gervais, 2003). In a context both of increased globalization and liberalization of agricultural products and of growing consumer demand for quality worldwide, marketing place-based names offers increasing opportunities for differentiation of products (Barham, 2003). However, globalization has gone together with increased risks of misappropriation of geographical names (Das, 2006a, 2006b; Vittori, 2010). Efficient GI protection is seen as a way to foster international trade for the benefit of the producers (Barham & Sylvander, 2011; Crespi & Marette, 2003; Rangnekar, 2004). Benefits derive both from the right to commercially use the name and to fight counterfeiting in trade. While the European Union (EU) initially drove the promotion of GIs in the international arena, establishing them as a new pillar of its agricultural policy strategy in 2003, it also largely argued for their potential in the global South (Josling, 2006a, 2006b; Raustiala & Munzer, 2007). And recently, developing countries and rural communities have shown increased interest in harnessing GI potential as a tool for development (Bowen & Zapata, 2009; Bramley & Biénabe, 2012; Evans & Blakeney, 2006). In this regard, Mancini (2013) refers to “branding from below” as a way for farmers in marginalized areas to remain competitive in a globalized economy. More generally, Bowen (2010) stresses their potential to support local autonomy of rural communities, and talks about “development from within”. Beyond their economic potential, for some people, GIs convey the cultural identity of a place. The reputation attached to GI products is connected with the skills of their producers or processors as well as with the history, customs,

and culture of local communities; and GIs are seen as instruments to prevent outsiders appropriating product names that are part of the local heritage (Addor & Grazioli, 2002; Bérard & Marchenay, 2008; Gangjee, 2012; Hermitte, 2001; Kamperman Sanders, 2010).

In the TRIPs agreement, GIs are included in a special section separate from trademarks. However no detailed legal means are specified for their protection. Hence, some countries and authors consider that collective or certification trademarks provide sufficient protection to geographical names, whereas others consider that the nature of GI as rights with specific collective underpinnings as well as their role in pursuing public policy objectives justify specific forms of institutionalization, i.e., through *sui generis* legal frameworks (Audier, 1999). Public intervention in these systems is generally more significant compared to trade marks (Hughes, 2006; Marie-Vivien, 2010). As a general feature, contrary to trademark regimes, *sui generis* systems provide for substantial examination by states of the product's link to its origin, embodied in the GI specification (Bramley, Marie-Vivien, & Biénabe, 2013). Yet, differences in comprehending the nature of GIs and their multifaceted features in various contexts have led to increasing diversity of GI national regulations worldwide (Audier, 2008), which has been identified as problematic, particularly for international trade (Blakeney, 2001).

Despite increasing diversity, especially in southern countries, the law, and to a lesser extent the economics literature, has been almost exclusively focused on the opposition between *sui generis* and trademark regimes. It deals extensively with the conflict between the United States (US) trademark system and the European Union (EU) *sui generis* system (Gangjee, 2007; Hughes, 2006; Josling, 2006a, 2006b; Le Goffic, 2009; Lorvellec, 1997) and/or with extending the higher level of protection conferred to wines and spirits to all product categories.

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No possible solution has been advanced so far toward international harmonization (Addor & Grazioli, 2002; Das, 2008; Evans & Blakeney, 2006). Another strand of the economics literature explores the efficiency and welfare implications of GIs as quality signals in the market from a theoretical perspective (Winfrey & McCluskey, 2005; Desquilbet & Monier-Dilhac, 2014; Mérel & Sexton, 2012). Menapace and Moschini (2012) theoretically demonstrate the higher market efficiency of the EU system compared to certification marks due to their higher level of information disclosure, which is ascribed to substantial examination by the state. This literature only addresses the reputation attached to a GI in its ability to signal intrinsic quality and from a theoretical perspective. It does not account for broader meanings of GI reputation (i.e., as a collective cultural creation) that transcends market considerations.

Overall, the literature does not provide sufficient empirical and conceptual grounds to understand GI institutional dynamics and their diversity and to move toward more appropriate GI institutionalization to harness its potential as a tool for development. We argue that more interdisciplinary analysis based on empirical studies is needed to deepen our understanding of the public nature of GIs, and therefore of the need for state intervention. This is critical in a context where most GI institutional frameworks are not yet stabilized and where international protection mechanisms are still under construction.

The purpose of this paper is to empirically investigate the need and role for state intervention in southern countries and to propose an original conception of the public nature of GIs which goes beyond the often sterile debate concerning trademarks *versus sui generis*. We hope to refine the understanding of the need for and potential associated with GI institutionalization from a development perspective. To this end, our paper builds upon an interdisciplinary approach combining law and economics to conduct a comparative analysis of GI protection in two prominent emerging countries, which feature emblematic cases of the trademark *versus sui generis* divide, respectively, India and South Africa (SA). We contrast the positions of these two countries not only at national but also at product levels by drawing lessons from the trajectory of two emblematic products, Basmati² rice and Rooibos tea. The interest in comparing these two products derives from their sharing of key GI-related features. Basmati and Rooibos are *de facto* GIs, well known internationally and of national significance from the perspective of local development, heritage and trade. Not being geographical names, they only implicitly refer to a geographical origin, an interesting peculiarity for scrutinizing the institutionalization of the link to the origin. Furthermore, both products suffered from a well-known case of name usurpation in the US almost two decades ago, which triggered huge reactions in their countries of origin. Despite this, until very recently, neither was protected as GIs (i.e., *de jure* GIs).

To conduct our empirical analysis, we combined the study of legal texts, gray literature and secondary data regarding geographical indications in India, SA, Europe, US and on Basmati and Rooibos with interviews with key stakeholders in India and SA. Furthermore, one of the authors was directly involved in developing the GI for Rooibos as part of a five-year action research project to explore the relevance of GIs in SA and Namibia. This project involved frequent visits to the field over this period and direct involvement with the key actors engaged in the GI process, which continued after the project ended.

We first present the issues for Basmati and Rooibos regarding trade and name usurpation. We then contrast the national

GI frameworks in SA and India. In the third section, we focus on the challenge involved in defining the link to the origin and qualifying Basmati and Rooibos as GIs. We then examine how the Indian and SA State interacted with other actors in establishing the two GIs. Drawing on the comparison between the two cases allows us to discuss different facets of GI institutionalization and to propose a conceptual way to better understand state intervention in GI regulation. We argue that what makes GI a peculiar and valuable instrument socially is the capacity to embody the link to the origin on which the product reputation is established and to account for public considerations both from quality and intellectual property perspectives. More fully recognizing this worldwide would help devise further appropriate national institutional frameworks and tailor state intervention in development stakes.

2. BASMATI AND ROOIBOS: TRADE AND USURPATION

(a) *The European Union: trade and GI*

Trade in Basmati (from India and Pakistan) and in Rooibos is mainly international, and the European Union (EU) is a major market (Giraud, 2008; Jena & Grote, 2012; Rangnekar & Kumar, 2010). Although sales of Rooibos were only worth around 600 million SA Rands³ and 14,500 tons in 2013 (Vink, Bergh, & Novak, 2014), they account for 10% of the global herbal tea market and Rooibos is one of SA's most famous exports. Its production provides unique livelihood opportunities for rural communities in an economically marginalized area (Nel, Binns, & Bek, 2007). Overall, 350–550 farmers produce this very labor intensive crop, and the farms or in processing plants employ more than 5,000 people, making the Rooibos sector one of the biggest rural employers (Raynolds & Ngcwangu, 2010). India exported 37,57,271 MT of Basmati in 2013–14 (Apeda, 9th January 2015) for a total value of US\$ 4,866,302,390 with a constant increase over the last decade. In 2011, the five main importers of Basmati from India, i.e., Saudi Arabia, United Arab Emirates, Iran, Kuwait, and the UK, accounted for 85% of total Basmati exports (Jena & Grote, 2012). With sales opportunities still expanding and given the strong regime of protection in place in the EU, getting GI recognition in this region has been the main international target for both product industries.

Since the amendment in the EU Regulation (Handler, 2006; Marie-Vivien & Thevenod-Mottet, 2007), registering a foreign GI in the EU only requires its protection in its country of origin and compliance with the criteria set up for European GIs, i.e., no longer a GI system in the country of origin similar to the EU one. However, the Rooibos industry GI modeled its strategy on the EU framework and decided to apply for protection of Rooibos in the EU as a Protected Denomination of Origin (PDO). With regard to Basmati, the EU also influenced the Indian strategy through trade agreements with India and Pakistan welcoming a GI application for Basmati in the EU (Marie-Vivien, 2008).

(b) *The fight against usurpation in the US: an initial determining factor toward name protection*

In 1997, Rice Tec, a Texas-based company, applied to register “Texmati” and “Kasmati” as trademarks in the United Kingdom to designate these varieties cultivated in the US resulting from the crossbreeding of Basmati cultivated in India and semi-dwarf rice cultivated in Texas. “Kasmati” was used

together with a graphic reproduction of the Taj Mahal accompanied by the phrase “Indian style Basmati Rice”. During the same period, the Rooibos industry also became the subject of a well-known misappropriation case in the US after a SA company, which had registered a trademark on the name Rooibos in the US, assigned the rights to the trademark to a US company, Burke-Watkins. Burke-Watkins decided to claim its rights over the exclusive use of the name Rooibos and demanded royalties from SA companies for the use of the name Rooibos.

Usurpations were fought differently in the two countries. The Indian State and its agency, the Agricultural and Processed Food Products Export Development Authority (APEDA), took the leadership in the Basmati case. The Indian government successfully challenged the trademarks Kasmati and Texmati. Rice Tec, though initially arguing that Basmati merely designates aromatic rice and is therefore not a GI designating rice cultivated on the Indian sub-continent, withdrew both applications after the government gathered a great volume of evidence such as declarations of culinary experts from the UK to prove that Basmati actually means long-grained aromatic rice from the Indian subcontinent (Lightbourne, 2003; Marie-Vivien, 2008; Rangnekar & Kumar, 2010). Concurrently, the Indian NGOs filed a complaint with the US Federal Trade Commission, which replied that Basmati was generic name, causing a major shock in India. The Basmati case in the 1990s was a rare case in which, including in India and Pakistan, the different protagonists, i.e., researchers advocating for evolved varieties, farmers defending traditional seed, anti-globalization NGOs, exporters, and the government all joined ranks to defend Basmati as if they were defending the Indian flag against a foreign invasion and neo-colonialism (Vidal, 2005). In its defense of national heritage, the Indian State took over most costs and legal procedures. Since then, APEDA continuously fights misuses, including from Indian exporters, with 351 cases filed in India and 211 cases filed abroad in 2013 to protect the denomination Basmati.⁴ Conversely, in the Rooibos case, the industry, no longer able to market its products as Rooibos in the US, conducted the defense of Rooibos with a certain amount of public support at provincial level. It instituted legal action to cancel the trademark. It was joined by a number of US coffee houses which were also prevented from trading Rooibos under its name. Like in the Basmati case, the dispute ended after years of expensive litigation when the US company, faced with mounting legal costs and several additional law-suites pending, agreed to surrender its rights to the trademark. The experience also served as an important lesson for SA. It raised awareness of the weaknesses of the trademark system at least at industrial level. Indeed, although the trademark on the name Rooibos was fought successfully, the very costly process did not allow the industry to claw back its rights to the name. It only prevented others from having exclusive rights on it. This gave impetus to the setting up of the SA Rooibos Council (SARC) as a body to represent the industry and to instigate collective action (Troskie & Biénabe, 2013). It was also a key driver in the subsequent Rooibos GI initiative. However, it did not lead to the introduction of a *sui generis* GI framework and did not substantially change the government’s position on GIs.

3. GI REGIMES IN INDIA AND SA: THE TRADEMARK VERSUS SUI GENERIS DIVIDE

While India was already compliant with the TRIPs agreement’s loose obligations by protecting GIs under the consumer

protection act; through passing-off actions in courts, and through certification trademarks (Das, 2006a, 2006b),⁵ India passed a *sui generis* GI law in 1999⁶ to protect designations of products which are “unique”, reflecting the strong political will of a country with a long history and which had to defend Basmati and Darjeeling abroad. India did not want to only protect foreign GIs on its territory, as had occurred through passing-off action, but to protect its own GIs abroad, and decided to align its system with that of the Old World, in particular with the EU system.⁷ M. Maran, then Minister of Trade and Industry, declared that “India’s rich heritage of products originating from specific regions were nurtured by knowledge and tradition built up by communities over the years”. These indications were seen as “vectors of national, regional and local cultural identities”⁸ In India, GIs are also used to preserve traditional products which do not face any risk of infringement but need to be inventoried as they form part of the cultural heritage (Marie-Vivien, 2010). Finally GIs are considered to protect disadvantaged producers against the shining India (Bramley, Marie-Vivien, et al., 2013).

Political interest in protecting heritage, particularly traditional knowledge, also exists in SA, which is rich in agrofood products with a strong cultural identity rooted in local regions and resources (Biénabe, Bramley, Kirsten, & Troskie, 2011). However, until very recently, private initiatives for protecting GIs have suffered from the lack of consistent public support and appropriate legal framework (Bramley, Marie-Vivien, et al., 2013). The government attitude toward GIs changed only very recently (discussed below). GIs have been defined *per se* at the end of 2013 under the Intellectual Property Laws Amendment.⁹ For GIs, this amendment, which was meant to better account for traditional knowledge protection, consisted in reforming the Trade Marks Act 1994 of 1993 and in defining GIs “in as far as they relate to indigenous cultural expressions or knowledge”.¹⁰ GI registration is still through certification and collective marks. No mechanism for ensuring substantial examination of the link between the quality or reputation of a product and its origin was included. Importantly, this Amendment was introduced long after the Rooibos GI initiative and this is not the route currently envisaged by the Department of Agriculture, Forestry and Fisheries (DAFF), which has the mandate to ensure GI protection for non-wine and spirits products in SA.¹¹ Their aim is to establish GI protection of agricultural products under the Agricultural Product Standards Act, 1990¹² (APS Act), which will require this Act to be amended.

In India, GIs can still be protected as certification marks (Das, 2006a, 2006b).¹³ However, the lack of government oversight over the criteria for registering the name was a major reason for India to establish a *sui generis* system administered by a public authority (Balganesh, 2003). The Indian State therefore helps define the nature of the link to the origin at two levels: the general definition of the GI Act and the substantive examination of the validity of the link to the origin for each GI product. The examined GI application contains the statement of case, comprising a description of the product, its methods of production and the geographical area, and the history, which serves to prove the link to the origin, the “uniqueness” of the product. Natural factors often help establish product specificity but are not a requirement (Marie-Vivien, 2013). The number of GIs registered in India has witnessed a massive upswing with 396 applications as of April 1, 2013, of which 193 are registered¹⁴ while in SA, there have been only two applications to protect GIs as certification marks, one regarding Rooibos and the other Karoo lamb, a well-known product domestically (Bramley, Biénabe, & Kirsten, 2013).

4. BASMATI AND ROOIBOS AS GIS: DEFINING THE LINK BETWEEN A PRODUCT AND ITS ORIGIN

In this section, we examine how the conception of GI institutionalization at product level evolved in the Basmati and Rooibos cases.

(a) *Basmati: from a simple public quality standard to a GI strategy*

As became clear when the two main contents of the GI specification, i.e., the plant varieties and the geographical area, were defined, registering Basmati as a GI raised a dilemma between a heritage-based approach rooted in recognition of the local and cultural creation of the reputation and a modernity-based one rooted in a Basmati quality standard and on current production practices.

(i) *Defining Basmati as a public quality standard: a variety-based definition*

The quality, production, and trade of Basmati seeds and rice have long been regulated through public standards issued by the Ministry of Agriculture and the Ministry of Commerce. These standards used to identify the varieties authorized to be called Basmati. More recently, standards have also been set up as part of EU/India/Pakistan trade agreements.¹⁵ Questions arose after intensive plant breeding programs led to Basmati being authorized to be used according to the “Seed Act” of 1966¹⁶ not only to designate traditional varieties but also evolved varieties obtained directly from the breeding of a traditional variety. In 2003, the traditional varieties, which actually fetch a higher price on international markets, were distinguished from the evolved varieties in the Export Act¹⁷; and concurrently, the EU adapted its policy of exemption of duty on Basmati from India and Pakistan established in 1996 to apply it only to the traditional varieties.¹⁸ However, Pakistan and India violently objected to this restriction and succeeded in adding two evolved varieties to the EU policy of exemption of duty.¹⁹ In 2008, the Ministry of Agriculture issued a new standard through an “Office Memorandum”, which qualifies all varieties as Basmati as long as the genealogy includes a variety of Basmati (traditional or evolved). This Office Memorandum was the basis for defining the varieties included in the GI application filed in 2008.

(ii) *Defining Basmati as a GI: two approaches*

The Export Act and the Office Memorandum, only refer to a vague concept “Indo-Gangetic” plains. The application for a GI made it essential to better define the geographical area, which revealed contrasting positions on the link between the product and its origin. The initial area applied for was intended to delimitate the traditional production area.²⁰ But stakeholders of the State of Madhya Pradesh filed six oppositions against it to obtain inclusion of their State. Opponents supported their claims with 23 documents showing that a recognized variety of Basmati has been cultivated in Madhya Pradesh since the early 20th century; that the quality of soil found in Madhya Pradesh is similar to that of the delimited area; that the temperature in Madhya Pradesh is adequate for Basmati cultivation; and that farmers have been benefitting from the support and certification of seed agencies for decades. These opponents also argued that there is no universal consensus on which areas are traditional. The GI applicant replied that meeting the required biophysical quality characteristics was not sufficient to qualify for the GI and that reputation was an essential criterion for GIs that was lacking for

Basmati from Madhya Pradesh. However, the GI Registry conformed to the opponents’ arguments and stated that the delimited area should include all areas currently under production.

Issues behind including evolved varieties and new regions, whose history is recent compared to areas considered as traditional, are firstly, the risk of dilution of the reputation, and secondly, the lack of recognition of the cultural heritage in creating the reputation attached to the GI. Reputation, built over years with *savoir-faire* passed down through generations of producers belonging to the local community, constitutes a common heritage for this community, and GI protects a name which became reputed thanks to this local creation (Hermitte, 2001). This conception of the reputation is hereafter referred to as heritage-based reputation. These underlying issues are critical when considering the link between the product and its origin: can Basmati be a quality standard composed merely of a list of eligible varieties and of the current cultivated area? Or should the reputation criteria of the GI definition be considered more fully to account for the cultural heritage of the community from which the GI originates?

(b) *Rooibos GI definition: from an IP to a quality standard perspective*

Historically, the use in trade of the name Rooibos was not subject to the same dynamics of public regulation as Basmati.²¹ This question arose with the local industry-driven GI initiative, whose objectives progressively evolved from merely obtaining Rooibos name reservation through IPR protection to collectively defining and managing Rooibos quality to sustain its reputation (Bramley, Biénabe, & Kirsten, 2009; Troskie & Biénabe, 2013). Hence, although also combining IPR and quality standards considerations, the Rooibos GI trajectory is the opposite of the Basmati one. The goal of protecting Rooibos in the EU dramatically influenced this trajectory. By providing a strong framework for establishing GIs, it acted as a catalyst for the development of a comprehensive GI strategy. In drafting the EU PDO application, the authors aimed at finding a balance between not excluding local actors and avoiding locks-in in practices and, on the other hand, ensuring a sufficient origin-based quality standard for EU recognition and maintenance of Rooibos reputation.

(i) *Defining Rooibos as a GI: an inclusive IPR-based approach*

The first difference between Basmati and Rooibos is that delimitation of the geographical area in SA did not raise critical questions. A decision was made early to include the whole region with Rooibos potential in the GI despite local recognition of a much narrower traditional area and concerns over quality with expanding Rooibos cultivation. At first glance, this inclusive option contrasts with the initial Basmati application. It reflects a local consensus that all Rooibos of acceptable quality produced in SA should have the right to use the name Rooibos, justified by the fact that the collective international reputation of Rooibos is attached to SA as a whole, as the only Rooibos production area in the world. Considering this as sufficient grounds for linking Rooibos to its origin leaves sufficient room for manoeuvre for different individual origin-based differentiation strategies. It is also likely linked to Rooibos being a very “young” crop compared to Basmati. The same inclusive approach was used to decide on varieties.

(ii) *Defining the GI as an origin-based collective quality standard*

When developing its PDO application, local industry recognized it as an opportunity to establish a common quality

standard and to reclaim the capacity to manage quality in the chain, thereby facing the challenges with which they had been increasingly confronted (Bramley *et al.*, 2009). Indeed, quality concerns significantly arose since the wave of liberalization in the 1990s and the subsequent sustained increase of exports (Rampedi & Olivier, 2008; Troskie & Biénabe, 2013). This standard was also seen as a way to tackle any quality concerns that could arise because of the inclusive approach, in particular in terms of species and production areas. Hence, to protect the collective reputation of Rooibos and to further distinguish it from other herbal tea industries, agreement was reached to use the PDO specification to implement a common quality standard. In line with the industry's inclusive strategy, the specification was designed to establish a minimum quality standard but decisions were made to include Rooibos production and processing requirements in the specification based on their role in the link between Rooibos quality and its origin. This is evident in the choice to restrict the use of irrigation, as the plant traditionally grows under a low rainfall regime which favors its concentration in different polyphenols.

5. CONTRASTED INTERVENTION OF THE STATE IN INDIA AND SA

(a) *The state at the heart of the GI for Basmati in India*

The Basmati GI trajectory reflects the significance of Indian State intervention at product level. Since the *Affair against Rice Tec*, the Indian government has been very active in defending Basmati. In 2003, the Ministry of Commerce asked APEDA to apply for a Basmati GI.²² However, as APEDA's original mandate was limited to export activities, it first had to modify its status to include activities within India. In the meantime, an NGO, "The Heritage", applied a GI for Basmati. However, its application filed in 2004 was rejected after several examinations by the GI registry.²³ Being only formed by people from Karnal District in Haryana State whereas Basmati is produced in at least six Indian States, the NGO was considered to not properly represent the interests of the producers. Concerns over the financial capacity of the applicant were also mentioned. Then APEDA applied for the GI in 2008. Opposition was filed by nine opponents. They argued that APEDA did also not fill the criterion of producer representativeness. However, in an Order issued on December 31, 2013, the GI registry rejected this argument on the grounds that APEDA is a non-trading body that falls under the category of the "authority established by the law", one of the categories of applicant defined in the GI Act.²⁴

As is apparent from the above, in the Basmati case – like in most cases in India – the State plays all the roles. GI protection in India is very much a State-driven process, and the State or its agencies generally apply for GI registration (Marie-Vivien, 2010), and, at the same time, are legally responsible for implementing the GI policy as an external judge. Furthermore, both the GI registry and APEDA are under the authority of the Ministry of Commerce, which conducts a proactive policy in favor of GI registration. This raises concerns regarding risks of collision between different state administrative bodies. Difference in the treatment of APEDA and of the other GI applicant, the NGO, with regard to their capacity to represent the producers supports this concern. Conversely, although APEDA was considered as the legitimate applicant, the GI registry decided in favor of its opponents in defining the geographical area, which reflects the multifaceted and complex role of the State in India.

(b) *Rooibos GI in SA: from an industry-driven initiative to a public standard*

(i) *An industry confronted with the lack of a public framework*

Despite serious threats of misappropriation and public awareness triggered in the early 2000s, the development of a GI would likely not have happened without the initiative of a group of researchers, who, in 2006, contacted the Rooibos industry in connection with conducting an action-research project on GIs; and together with SARC, they engaged in a GI initiative conducted by a specific task team, which soon became industry driven.²⁵ However, the lack of an appropriate public framework proved to be a significant obstacle to the development of a GI. Indeed, even if GI protection targets foreign registration, it must first be obtained domestically (Kireeva & O'Connor, 2010). In the absence of a domestic public procedure for establishing a link to the origin, the GI task team built on EU regulation 510/2006 requirements²⁶ to frame its application both domestically and internationally. The decision to apply for Rooibos registration domestically as a certification mark with the PDO specification serving as the rules of use was also part of the industry strategy to lobby for a more appropriate domestic framework. In addition to registering a certification trademark being a complex time-consuming process, which can take several years, Rooibos domestic perception as an ordinary and non-distinctive product largely differs from its internationally recognized specificity as originating from a particular SA territory (Dean, 2013). Although not constituting a legal impediment for registering a GI as a certification mark, it complicated the process. Another difficulty was to reach a consensus on registering a logo, a common practice for a certification mark but not for a GI. Indeed, Rooibos companies already have their own established logos on the market. Therefore creating a new logo was judged to be negative as it could add to consumer confusion on a market already quite saturated with differentiation strategies. However, SA public authorities paid little heed to this issue until recently.

The lack of local knowledge and public capacities for accompanying GI initiatives resulted in a laborious process. Substantial external support provided for or channeled through the researchers was required to release a draft specification that was informally passed to EU officials for comment at the end of 2010. Networking with European officials and experts proved to be a critical step (Troskie & Biénabe, 2013). The lack of bodies, be they public or private, with the capacity to control and certify Rooibos quality and origin in SA also made it difficult to complete the process.

(ii) *The creation of an ad hoc public standard and the negotiation of a GI protocol with the EU*

As the result of both internal and external pressure, there have been dramatic changes in SA State intervention in the last few years. In 2013, a French company, *Compagnie de Trucy*, intended to register a wide range of expressions comprising the name Rooibos, including "South African Rooibos" and "Rooibos tea", as individual trademarks in France.²⁷ While the industry tackled the issue by formulating observations on these registrations to the French Intellectual Property office, local media (e.g., the Sunday Times) and IP specialists raised the alert concerning this new threat of misappropriation. They put forward the actions undertaken by the industry for protecting Rooibos as a GI and stressed the lack of an appropriate legal framework as well as of the lack of government support in the preceding decade to protect what they highlighted as part of the SA national heritage (Smith,

2013).²⁸ As a result, and as the SA government was under pressure to define its position in terms of the Economic Partnership Agreements (EPAs) negotiated between the EU and African, Caribbean and Pacific (ACP) countries (Bramley, Biénabe, *et al.*, 2013)²⁹ including on a GI Protocol, intense discussions took place between the Department of Trade and Industry and the DAFF, the Rooibos industry, and EU representatives, with the aim of providing both domestic and EU protection for Rooibos. Forced to take rapid action, the government opted domestically for *ad hoc* measures, and in July 2013, the DTI published a notice under the Merchandise Marks Act regulating the use in trade of the word Rooibos, thereby providing protection for the name Rooibos.³⁰ While reproducing the formulation of the specification of the SARC, this notice formally constitutes a public quality standard enacted by the government. However, the notice is meant to provide interim domestic protection pending protection by DAFF under the APS Act. Furthermore, as part of the EPA, the GI Protocol makes provision for the bilateral recognition of GIs, and Rooibos was included in the SA list of GIs for agricultural and food products, which only comprise three names (i.e., Rooibos, Honeybush, and Karoo Lamb), while the EU requested protection for 105 GIs (among which Feta).³¹

6. A CONCEPTUAL PROPOSAL FOR FRAMING STATE INTERVENTION IN GIS

The first lesson to be learned from the Rooibos and Basmati trajectories is the intense institutional processes to which they gave rise both at home and internationally in moving from *de facto* GIs to *de jure* GIs. This reflects learning processes by the different stakeholders, and in particular by the state, in institutionalizing GIs at different levels (from a domestic product to an international product).

(a) *Institutionalizing GI as a hybrid between an IPR and a public quality standard*

What stands out in the comparative analysis of the Basmati and Rooibos trajectories are the different combinations of IPR and quality dimensions at the different stages in the development of the GI. In what follows, we further explore the implications of these two dimensions with a view to better understanding the public nature of GIs, and hence the role for public intervention.

(i) *GI institutionalization as a public quality standard*

Public quality considerations led many states to regulate the use of GIs according to quality claims, thereby conferring characteristics of public quality standards to GIs (Barjolle & Sylvander, 2002; Josling, 2006a, 2006b). *Sui generis* GIs systems intend to provide information on a product's origin and quality/reputation through a public standard which is transparent and usually broadly understood by consumers (Evans, 2010). This can be a key driver behind private actors' engagement in establishing GIs, as featured in the Rooibos case where awareness of the European GI framework potential for implementing a collective quality strategy significantly increased the industry's interest in GI protection. Suh and MacPherson (2007) also showed that South Korean local producers of "Boseong" green tea consider the public quality guarantee provided by GI to be its most important feature.

Historically, like in the Basmati case, it is not unusual for GI products to be initially regulated as public quality standards

with no explicit consideration for their origin. In Europe, a key consideration in finally recognizing Feta as a GI and not as a generic name was that the Greek government had passed several regulations to define the quality conditions for a cheese to be called Feta.³² Similarly Grana Padano was considered to be a GI based on an Italian legislation from 1938 regulating the use of the word Grana in the trade of cheeses.³³ Hence, the public quality standard facet of GI is an important basis for GI institutionalization.

(ii) *GI institutionalization as an IPR*

Compared to public quality standards, the recognition of GIs as IPRs allows more balanced relationships between the stakeholders involved in GI production and the state in defining GI specifications. Indeed, as is the case for any IPR, it is applied by the stakeholders who claim rights on it and is then subject to examination by the state. The negotiation of the specification between GI producers and the state is at the heart of the European system, each GI requiring a case-by-case analysis (Bienaymé, 1995; Bérard & Marchenay, 2007). Furthermore, the institutionalization of GIs as IPRs, which are private rights, confers exclusive rights over the use of names. To avoid unnecessary exclusion and preserve the nature of GIs as an IPR available to anyone entitled to use the name, *sui generis* systems generally require that the applicant be representative of the producers (Bramley, Marie-Vivien, *et al.*, 2013). This is the case in India and in the EU. However, the current situation in India is peculiar in that the interventionist State most often acts directly as the applicant with the stated objectives of preserving national heritage and supporting underprivileged farmers and artisans. Although state ownership helps to cover the cost of GI enforcement thereby reducing economic sources of exclusion, it can nonetheless raise other exclusion concerns. As apparent in the Basmati case, the State is then both the judge and the judged. Although this case also confirms that state bodies can still act with some autonomy, it makes the system particularly sensitive to collision. Another institutional difference between an IPR and a mere public quality standard concerns the possibility of opposition. Like for any IPR, the GI registration procedure includes the possibility for any interested third party to oppose the content of the technical specification in a much simpler procedure than that required to cancel a public standard. The Basmati case illustrates how this opposition procedure allowed the legitimacy of the applicant and the geographical area to be questioned, with significant practical implications.

(b) *The assessment of the link to the origin at the heart of the public nature of GIs*

Despite major differences between the Indian and SA legal frameworks, we observed similar difficulties in institutionally recognizing these already *de facto* well-known GIs as *de jure* GIs. As shown in this article, the major question is the institutional capacity to comprehend the link between a product and its geographical origin. Indeed, the definition of a link to the origin is the basis for establishing the quality criteria attached to the GI and for granting exclusive rights of use over the name. If this link cannot be demonstrated, the name can be considered as generic and hence no longer reserved to designate the product from a specific area. Conversely, the risks of granting exclusive rights to a name for products not linked to the origin lie in creating non-legitimate "monopolies" (Hughes, 2006; Thiedig & Sylvander, 2000; Torre, 2002).

The Rooibos case confirms that the lack of consistent criteria to link the product to its origin, which is a general feature

of trademark regimes and even of certification marks (Evans, 2013), can seriously hamper GI dynamics.³⁴ Conversely, the existence of a *sui generis* framework does not suffice *per se* for regulating GIs in their link to the origin. As became apparent in the Basmati case, a mere concept of quality was retained to the detriment of the concept of a GI based on heritage-based reputation as defined above. Historically, appellations of origin, the first institutional form used to protect GIs, were only granted to well-known geographical names, and reputation was a mandatory criterion (see Lisbon Agreement on the international registration of appellations of origin, 1958). Not accounting for reputation as a criterion *per se* for granting GI as an IPR means disregarding the heritage of local communities and their intellectual creation in building the reputation over time. It challenges the GI concept as a specific IPR that differs from trademarks and the justification for granting exclusive rights over geographical names. Importantly, from a development standpoint, the risk involved in not recognizing the local intellectual creation needed to build a reputation is delocalization and dilution of the name's reputation to the detriment of the community that established the geographical name to identify its product. Contrary to those who consider reputation to be a too vague criterion compared to quality criteria (Audier, 1999), we argue that heritage-based reputation should *per se* constitute an essential criterion for the decision to grant a GI and that this effectively defines GIs as a specific IPR. This criterion should be explicitly included in GI specifications and publically examined on a case-by-case basis together with quality criteria.

(c) *Trade, public intervention and international harmonization of GIs*

Enhancing trade is at the core of the GI's potential as a tool for development. In the current weak international context, a main challenge is the lack of harmonization between national frameworks. The Rooibos and Basmati cases with their common trading stakes but contrasted positioning with regard to the EU GI framework provide interesting insights. We argue that, beyond historical differences in bilateral trade relations with Europe, differences in public frames have been determining factors in such divergent Rooibos and Basmati GI trajectories in the EU. As the Indian *sui generis* Act is quite similar to the EU one, domestic registration is generally sufficient to apply for a GI in the EU. Conversely, the lack of a dedicated national framework led the Rooibos task team to translate the EU regulation into a product specification to ensure sufficient compliance to achieve protection as a PDO. A major political implication is that, prior to government *ad hoc* measures, set-

ting up SA GIs for recognition by the EU involved relying on external rules and conditions imposed by the EU, which were difficult to comply with in the absence of EU official public guidelines regarding the expected content of an application (Troskie & Biénabe, 2013). This situation would not have occurred had SA defined its own institutional framework and set its conditions for establishing GIs, which would have allowed it to better tailor them to the local context. Such tailoring is emphasized by Bowen (2010) as a condition for ensuring "development from within".

Regarding international protection, recent trends confirm the specific role of the state in this IPR. Indeed, multilaterally, the revision of the Lisbon Agreement system for the international registration of appellation of origin (1958, World Intellectual Property Organization), in which the state's role is decisive in representing the producers, is attracting an increasing number of countries. And an irresistible rise in bilateral free trade agreements in which states are responsible for including lists of particular GIs is underway, for example, the one negotiated between the EU and SA, (Covarrubia, 2011). This process, which does not apply to other IPRs or to other quality standards, confirms the very specific public nature of GIs.

The discussion above confirms both the importance of systems being adapted to their national contexts and of sufficient harmonization between institutional frameworks across countries for the purpose of trade. We have discussed that what makes GI a peculiar and valuable instrument socially is its capacity to embody the link to the origin on which the product reputation is built and to account for public considerations from both a quality and intellectual property perspective, while GIs retain private considerations in the sense that they are used by private stakeholders. Public considerations attached to institutionalizing GIs as a specific IPR are in recognizing heritage-based reputation and avoiding non-legitimate exclusion. We therefore propose to build further GI institutionalization on conceiving this instrument as a hybrid between a public quality standard and a specific IPR protecting heritage-based reputation. This comprehensive way of approaching GIs, which goes further than the systems currently in place worldwide, provides a new window of opportunity to harmonize GI protection internationally. It also leaves each country room to tailor its framework to its own context and needs, in particular with regard to development stakes. The challenge is how to define substantial examination of the link to the origin grounded both on quality- and heritage-based reputation criteria and to foster the negotiation between the state and local stakeholders over both.

NOTES

1. While GIs can legally be any kind of indication, usually the object of the GI is a name, and often a geographical name. Hereafter, we consequently sometimes refer to the geographical name.

2. Even if the geographical area of Basmati is shared by both Pakistan and India, in this paper, the authors only consider the Indian scenario, first because up to now, the Indian Basmati GI strategy has been to register two legal titles, one in each country, and second because Basmati is an illustration of the Indian *sui generis* system, whereas Basmati is protected as a trademark in Pakistan.

3. In January 2015, 1 USD = 11.5 SA Rand (ZAR) approximately.

4. <http://spicyipindia.blogspot.com/2013/03/auditing-worldwide-litigation-involving.html> consulted 15 April 2013.

5. See the Trade and Merchandise Act, 1958, replaced by the Trade Mark Act, 1999.

6. The Geographical Indications of Goods Act, 1999.

7. Shri P.H. Pandiyan (Tirunelveli).

8. The Hindu, Sunday 26 Aug 2001; http://www.patentoffice.nic.in/ipr/photo_gallery/inaug_chennai.htm.

9. Except for the Wine and spirits sector which have been benefiting from a formal indigenous system established under the Wine and Spirits Control Act in 1970 (Act 47 of 1970), refined with the establishment of the Liquor Products Act of 1989 (Act 60 of 1989).
10. ‘Geographical indication’ in as far as it relates to indigenous cultural expressions or knowledge, means an indication which identifies goods or services as originating in the territory of the Republic or in a region or a locality in that territory, and where a particular quality, reputation or other characteristic of the goods or services is attributable to the geographical origin of the goods and services, including natural and human factors” (Intellectual Property Laws Amendment Act, 2013, article 8 (f)).
11. Personal communication with Yvonne Tsiane, Food Safety and quality Assurance Officer – in charge of GI development for vegetable agricultural products at DAFF.
12. Act No. 119 of 1990.
13. Act 47 of 1999. Sect.2.e.
14. See <http://ipindia.nic.in/girindia/>, last consulted April 15, 2013.
15. The European Community (EC) signed an agreement with India and Pakistan in the form of an exchange of letters, implemented under regulation n°1549/2004 of 30 August 2004.
16. Basmati 217, Basmati 370, Type 3, Punjab Basmati 1, Pusa Basmati 1, Kasturi Haryana, HKR 228, Mahi Sugunda, Taraori HB 19, Ranbir, Basmati 386. Voir <http://seednet.gov.in/SeedVariety>, consulted on November 2007.
17. See notification 68 “The Export of Basmati Rice (Quality Control and Inspection) Rules, 2003”, 23 January 2003, Export Act, which states that “*Basmati Rice is grown in the Indo Gangetic plains and has the following characteristics: exceptional length of grain, which increases substantially on cooking; the cooked grain has high integrity and high discreteness and distinctive aroma, taste and mouth feel; it is a traditional variety or is an evolved variety. . .Traditional variety shall mean land races or varieties of rice of uniform shape, size and color traditionally recognized as Basmati and evolved variety shall mean a variety whose one of two parents is a traditional variety*”. The parent selected from a traditional Basmati variety shall be any parent and not a direct parent of the genealogy.
18. Règlement (CE) n°2294/2003, 24 déc. 2003 modifiant le règlement (CE) n°1503/96.
19. UE signed in 2004 an Agreement with India and Pakistan, implemented through regulation (CE) n° 1549/2004 of 30 August 2004 which provides that “With respect to the import regime of husked rice of the varieties Basmati 370, Basmati 386, Type-3 (Dehradun), Taraori Basmati (HBC-19), Basmati 217, Ranbir Basmati, Pusa Basmati and Super Basmati, the EC’s specific bound rate of duty shall be zero”. Same agreement with Pakistan for the following varieties: Kernel (Basmati), Basmati 370, Pusa Basmati, and Super Basmati.
20. Were included the States of Punjab, Haryana, Delhi, Himachal Pradesh, Uttarakhand, and part of Uttar Pradesh and Jammu & Kashmir.
21. Except for general food safety standards to which all traded agricultural products must comply (Rampedi and Olivier, 2008).
22. Letter sent by Ministry of Commerce to APEDA, 31 January 2003.
23. Order 18 May 2010.
24. APEDA is a statutory authority established under an Act in 1985.
25. This project was conducted jointly by the University of Pretoria, the Western Cape Department of Agriculture and the CIRAD during 2005–10. It was funded by DURAS, a joint GFAR – Agropolis International initiative. The SARC appointed representatives of the small and large farmers, processors and marketers as well as NGOs to form, together with two researchers, a task team in charge of developing the GI.
26. Now replaced by Regulation 1151/2012.
27. See for example Liou J., Afrique du Sud: la défense du thé rouge rooibos, une affaire d’Etat. 7 March 2013. http://www.google.com/hostednews/afp/article/ALeqM5iHmxluVpKsRdCO110iulhm_ZzS0A?-docId=CNG.dd780b3bc4e81811f0f267d5844cd16d.521. Consulted 13 July 2014.
28. See for example Owen D., Beating about the Rooibos. 18 Feb. 2013. <http://www.bizcommunity.com/Article/196/364/89393.html>. Consulted 13 July 2014.
29. SA is the EU’s largest trading partner in Africa while SA exports to the EU are growing and diversifying. Furthermore, the EU is SA most important development partner, representing 70% of all external assistance funds perceived in SA (See <http://ec.europa.eu/trade/policy/countries-and-regions/countries/south-africa/>. Consulted 13 November 2014).
30. Act 17 of 1941.
31. As a result, the DTI published a notice under the Merchandise Marks Act proposing the prohibition on the use of the EU list of names. Symmetrically, the European Commission issued an information notice presenting the proposed SA list for protection. The EPA was initiated in July 2014 and is now in the process of being ratified.
32. See decision of the European Court of Justice, C 465/02 and C 466/02.
33. Regio Decreto Legge No 1177, Disposizioni integrative della disciplina della produzione e della vendita dei formaggi (Royal Decree-Law No 1177 of 17 May 1938 introducing provisions to supplement the rules on the production and sale of cheeses, GURI No 179 of 8 August 1938).
34. As an illustration, the US regime only requires including a geographical area of production when applying for GI registration as a certification mark (Menapace & Moschini, 2012).

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