

Sophie Davis

A Taste of Local Culture

**Should New Zealand Introduce a *Sui Generis* Regime for the Protection
of Geographical Indications beyond Wine and Spirits?**

Submitted for the LLB (Honours) Degree

Faculty of Law

Victoria University of Wellington

2015

Abstract

Geographical Indications (GIs) are designations that identify products as originating in a specific geographical region, that have characteristics essentially linked to their territorial origin. While accepted by many countries as an important tool for differentiating products and identifying quality standards, there is an international division over the best way to protect GIs. The EU supports a sui generis regime with higher levels of protection, while the United States argues that trade mark law is sufficient. Despite being a strong agricultural food exporter, New Zealand has done little to market the geographical origin of its goods. Currently, New Zealand protects GIs through misrepresentation laws and certification marks. This paper questions whether New Zealand should introduce a sui generis system. It argues that while there are some domestic benefits from enhanced protection, these must be counterbalanced with the costs and potential detrimental rigidities of a sui generis system. The key benefits for New Zealand would be the international trade advantages, namely gaining protection in export markets with GI systems, facilitating a free-trade agreement with the EU, and putting New Zealand in a strong position if a multilateral GI register is established. New Zealand is at risk of undermining future developments if the proposed Trans-Pacific Partnership Agreement proceeds as it has the potential to preclude any GI deals by granting trade marks enhanced status. This paper submits that New Zealand should remain open to the potential benefits of granting GIs greater protection, rather than missing out on future international developments.

Keywords

Geographical Indications; Geographical Indications (Wine and Spirits) Act 2006; TRIPS Agreement; New Zealand Agricultural Exports; *Sui Generis* Registration.

Word count

The text of this paper (excluding title page, abstract, table of contents, footnotes, and bibliography) comprises approximately 14,967 words.

Contents

I	INTRODUCTION	4
II	OVERVIEW OF GEOGRAPHICAL INDICATIONS	6
	A Definition	6
	B Trade Benefits of GIs	7
III	NEW ZEALAND'S AGRICULTURAL ENVIRONMENT	9
IV	PROTECTION OF GEOGRAPHICAL INDICATIONS	12
	A International Developments	12
	B National Protection of GIs	15
	1 TRIPS Minimum Standards.....	15
	2 Modes of Implementation.....	17
	3 Key Distinctions between Certification Marks and GIs	19
	4 Rationale for Approaches	21
	C International Debate over GI Extension.....	22
V	NEW ZEALAND'S REGULATION OF GEOGRAPHICAL INDICATIONS.....	24
	A Legislative Protection	24
	B Protection for GIs beyond Wine and Spirits	26
VI	DOMESTIC BENEFITS OF A SUI GENERIS REGIME	29
	A Protection from Misuse.....	29
	B Niche Marketing Tool.....	33
	C Rural Development	34
	D Protection from Genericisation	36
VII	DRAWBACKS OF ENHANCED PROTECTION	37
	A Costs.....	37
	B Restraints on Production and Innovation	38
	C Distorting Competition and Development	39
VIII	INTERNATIONAL CONSIDERATIONS.....	40
	A Protection from Misuse.....	40
	B Bilateral Trade-Offs	41
	C New Zealand and Conflicting GI Agendas	43
IX	CONCLUSION.....	44
X	BIBLIOGRAPHY	47

I Introduction

Geographically differentiated products such as Darjeeling tea, Roquefort cheese, Champagne, Scotch whisky and Colombian coffee are internationally sought after because of their reputation as traditional, high quality goods. They are all examples of the intellectual property right known as a geographical indication (GI). A GI is a designation recognising and identifying products from originating in a specific geographical region that has characteristics essentially linked to its territorial origin. Consumers are increasingly concerned about the geographical origin of products and care about the specific characteristics they present. GIs are an important method for communicating intangible attributes such as market differentiation, reputation and quality standards. A popular GI takes on value just like any familiar brand, so protection from unauthorised use is important to avoid diminishing a GI's established reputation.

While the concept of identifying geographically differentiated goods has been around for centuries, particularly in Europe, GIs have grown in prominence since their inclusion in the 1994 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).¹ The TRIPS Agreement obligates WTO Members to establish the necessary legal means to prevent the misleading use of a GI but it does not specify the protection methods to be implemented. There is now a wide variety of national legal frameworks for protecting GIs and an international debate has emerged about the extent of protection that should be provided. While countries such as the United States govern GIs by rules of trade mark law, the European Union has established a *sui generis* regime (meaning specific legislation) for GIs which offer a greater level of protection. The EU's approach is gaining traction, with other developed and developing countries offering *sui generis* protection for GIs. The TRIPS Agreement does require Members to provide a higher standard for protecting the GIs of wine and spirits which is irrespective of whether the true origin of the good is indicated.

In March 2015 the Government announced that it will be enacting legislation to establish a registration regime for wine and spirit GIs. The system will allow parties to register the name and boundaries of a GI, so that only wine produced with grapes mainly harvested in the relevant region can use the name. The register is primarily being established for trade-related reasons, namely supporting New Zealand's interest in securing a free-trade agreement (FTA) with the EU and for gaining protection of New Zealand GIs in exporting markets. Beyond wine and spirits, New Zealand fulfils its TRIPS obligations

¹ Agreement on Trade-Related Aspects of Intellectual Property Rights 1869 UNTS 299 (opened for signature 15 April 1994, entered into force 1 January 1995).

through general laws of misrepresentation and trade mark law, in particular the use of certification marks.² The Government has not shown any sign of increasing the protection of GIs for goods beyond wine and spirits and there is limited academic literature on the relevance of GIs in New Zealand.

New Zealand is an exporting nation that prides itself on producing high quality agricultural products. However, many exporters have done little to promote the credence attributes that derive from New Zealand's unique environment and culture to international consumers. Proponents of *sui generis* GI regimes argue that there are many tangible benefits that enhanced protection can provide. The crux of this paper is to assess whether these arguments would be applicable to New Zealand, or whether the current approach is sufficient. It will be argued that there is the potential for a *sui generis* system to grant New Zealand producers domestic benefits above what can be provided by certification marks. These involve enhanced protection from other producers free-riding, the setting of common production standards, clearer GI marketing, the potential for rural development through increased investment in GI regions and protection from GIs becoming generic. These benefits must be counterbalanced by the potential drawbacks of a *sui generis* system which is costly, can be bureaucratic and may place constraints on innovation and competition if standards are too stringent.

There is a strong argument to say that the benefits are unlikely to significantly outweigh the drawbacks to an extent that increased regulation is justified. Instead, the main benefits that could come from a *sui generis* regime is the international trade advantages it could provide. With an international trend towards GI systems, similar domestic legislation could help New Zealand gain protection and prominence in key export markets. It could also assist New Zealand to secure an FTA with the EU and allow New Zealand to gain protection if the movement for a multilateral GI register does gain traction. There is the risk that New Zealand may be undermining these potential future developments through its Trans-Pacific Partnership negotiations which has the potential to preclude any GI deal by granting enhanced status to trade marks. This paper submits that New Zealand should remain open to the potential benefits of granting GIs greater protection, rather than missing out on future international developments.

² Fair Trading Act 1986; Trade Marks Act 2002.

II Overview of Geographical Indications

A Definition

While the term “geographical indication” is not widely known, the basic concept underlying GIs is familiar to any shopper who has purchased Roquefort over “blue” cheese or Darjeeling over “black” tea.³ The TRIPS Agreement defines GIs as:⁴

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

The quality-origin nexus is largely derived from the French term *terroir*, a concept which is “based on the idea that special geographical microclimates yield food products with a unique flavour profile that cannot be replicated anywhere else.”⁵ The connection between the place of origin and the quality of the product is generally understood to be based on natural features such as climate, soil and geography. The World Intellectual Property Organisation (WIPO) maintains that GIs can also highlight qualities due to human factors that are found at the place of origin, such as traditional knowledge, manufacturing skills and local traditions.⁶

The definition of GIs and the interrelated concept of *terroir* is a widely debated topic. It may be questioned whether it is the natural conditions that determine product quality, or instead the human skills and established quality standards that could be transferred to another region.⁷ A determination of this is not always going to be straightforward and varies depending on the product. However, with GIs, it is the perceived quality by consumers that is the major feature. Even if there is “no detectable quality-origin link from an expert’s point of view, consumers can still perceive the product as a higher-quality product owing to its geographical origin.”⁸

³ Maria Paola, Nathalie Frigant and Violeta Jalba *Geographical Indications: An Introduction* (WIPO, Geneva, Product No. 9529E) at 8.

⁴ TRIPS, above n 1, art 21.1.

⁵ Roland Herrmann and Ramona Teuber “Geographically Differentiated Products” in Jayson L. Lusk, Jutta Roosen and Jason F. Shogren (eds) *The Oxford Handbook of Food Consumption and Policy* (Oxford University Press, Oxford, 2011) at 813.

⁶ Kal Raustiala and Stephen R. Munzer “Global Struggle over Geographic Indications” (2007) 18 EJIL 337 at 343.

⁷ Herrmann and Teuber, above n 5, at 815.

⁸ At 815.

While GIs do not explicitly protect products or production methods, they confer to all producers from a given geographical area the exclusive right to use a distinctive sign to identify their products, thus essentially conferring monopoly rights to their users.⁹ Governments have long used different legal mechanisms to protect GIs from misappropriation by non-original producers. These were historically afforded through consumer protection laws. In many countries, GIs are now recognised as a form of intellectual property – either as part of the trade mark system or through *sui generis* regimes.¹⁰ There are currently more than 10,000 protected GIs in the world with an estimated trade value of more than US\$ 50 billion.¹¹

B Trade Benefits of GIs

The concept of identifying the geographical origin to promote certain qualities of food and wine has a long history. For example, in ancient times Thracian wine from Greece yielded a premium price.¹² There is a growing body of literature that indicates that GIs have clear and positive attributes that can make them valuable assets to a country.¹³ One of the main economic rationales for protecting GIs is the benefits they provide by reducing the asymmetry of information between producer and consumer. Consumers are generally less informed about the quality of a product than producers, giving rise to asymmetric information on product quality. In an unregulated market, high and low qualities are often indistinguishable for consumers and may sell at the same price.¹⁴ GIs are primarily used for products that are known as “search goods” or “experience goods”. Commodities, such as wheat and sugar, do not generally command GI protection because they can be produced fairly homogeneously in many locations. Products with known quality variations carry significant search costs for consumers.¹⁵ GIs signal important characteristics about products that may not be evident by simple inspection, for example

⁹ Erik W. Ibele “Nature and Functions of Geographical Indications in Law” (2009) 10 ECJILTP 36 at 38; Felix Addor and Alexandra Grazioli “Geographical Indications beyond Wine and Spirits” (2002) 5 JWIP 865 at 867.

¹⁰ Carsten Fink and Keith Maskus “The Debate on Geographical Indications in the WTO” in Richard Newfarmer (ed) *Trade, Doha and Development: A Window into the Issue* (World Bank, Washington, 2006) at 201.

¹¹ Daniele Giovannucci and others *Guide to Geographical Indications: Linking Products and Their Origins* (International Trade Centre, Geneva, 2009) at xvii.

¹² Marsha A Echols *Geographical Indications for Food Products: International Legal and Regulatory Perspectives* (Kluwer Law International, the Netherlands, 2008) at 7.

¹³ Giovannucci and others, above n 11, at 19.

¹⁴ Herrmann and Teuber, above n 5, at 816.

¹⁵ Fink and Maskus, above n 10, at 202.

the quality of wine or the production process of specialty cheese. A GI confirms not only a link between a product and a specific geographic region, but generally with unique production methods, characteristics or qualities that consumers have come to know exist there.¹⁶

From a business perspective, conveying these characteristics allows producers to distinguish their products and escape from the commodity trap of undifferentiated products trading primarily on the basis of price.¹⁷ Geographically differentiated products can create economic value if the origin is valued by customers. Research suggests that consumers use information on product origin as an extrinsic quality cue. First, if the consumer connects a special image with the production region, this image can be used to form a quality evaluation of the product. Second, the origin label can be used during repeat purchases to re-identify a product. If the customer was satisfied, they are likely to buy the same product or at least another product from the same region.¹⁸ Consumer demand may also be influenced by emotional associations evoked by the product origin as well as social and personal norms.¹⁹

By consolidating and protecting reputations, GIs can be used as a mechanism for creating niche markets that attract higher prices. There are a number of recent studies that claim to confirm and quantify the price premia associated with certain marketed GI products. Italian Toscano oil receives a 20% premium over commodity oil. Milk supplied to produce French Comté cheese sells at a 10% premium.²⁰ The market value for Bresse poultry in France is quadruple that of commodity poultry meat.²¹ Finally, Napa Valley wines have prices 61% higher than wines with a California designation.²² A GI will not automatically make a product successful; there needs to be a business and infrastructure behind these products to help them become well-known.²³ The most successful GI

¹⁶ Giovannucci and others, above n 11, at 7.

¹⁷ At 8.

¹⁸ Herrmann and Teuber, above n 5, at 824.

¹⁹ At 825.

²⁰ Bruce A. Babcock and Roxanne Clemens “Geographical Indications and Property Rights: Protecting Value-Added Agricultural Products” (Briefing Paper, Iowa State University, 2004) at 12.

²¹ At 12.

²² Ibele, above n 9, at 37.

²³ Susy Frankel “The Mismatch of Geographical Indications and Innovative Traditional Knowledge” (2011) 1 VUWLRP 1 at 14.

products such as Parma ham and Parmigiano-Reggiano are managed like international brands with advertising and promotion playing a crucial role in their success.²⁴

III New Zealand's Agricultural Environment

Recognising geographically differentiated goods is extremely relevant to New Zealand's agricultural sector. New Zealand is a country that produces and exports a number of high quality agricultural products. There is arguably much to gain from New Zealand's "clean and green" brand.²⁵ New Zealand can take advantage of its fertile soils, temperate climate, ability to produce goods efficiently and safely, and advanced technologies.²⁶ The country's geographical isolation has led to variation and innovation and there are a high number of native flora and fauna that are only found in New Zealand. New Zealand is the largest dairy and sheep meat exporter in the world and is a major global supplier of beef, wool, kiwifruit, apples and seafood. There are 7,500 animal products and 3,800 dairy products exported to 100 countries every month.²⁷

Most New Zealanders are inherently aware of certain regions that produce exceptionally high quality goods. Think Marlborough and Otago wines, Bluff Oysters, Hawkes Bay kiwifruit, Kapiti cheese and West Coast whitebait. As New Zealand is a geographically small and isolated country, a larger product group such as New Zealand lamb is likely to be deemed a GI under the TRIPS definition. Honey is one industry that has internationally produced a number of GIs. With 80% of New Zealand's trees, ferns and flowering plants being native, New Zealand is able to source a number of geographically distinct honeys.²⁸ For example *Kamaha* which is sourced from the Southland and West Coast regions and *Pohutukawa* which is particularly prevalent on the sunny East Coast of the North Island.²⁹ The most well-known and expensive of New Zealand honey is Manuka which is unique to New Zealand and some regions in Australia. Active Manuka honey has scientifically proven health giving properties which have gained international success.³⁰ While Manuka is not the name of a place, given the product's connotation with

²⁴ Herrmann and Teuber, above n 5, at 837.

²⁵ Susy Frankel *Intellectual Property in New Zealand* (2nd ed, LexisNexis NZ, Wellington, 2011) at 658.

²⁶ Kirsty Schmutzsch "Wheying up the Options: How do Geographical Indications used in the European Union Influence New Zealand Specialty Cheese?" (MA Thesis, University of Canterbury, 2012) at 71.

²⁷ "Agribusiness" New Zealand Trade and Enterprise < www.nzte.govt.nz>.

²⁸ "Unique New Zealand" Honey New Zealand <honey.co.nz>.

²⁹ "Native Floral Honeys" Pure New Zealand Honey <purenewzealandhoney.com>.

³⁰ Coriolis *Investment Opportunities in the New Zealand Honey Industry* (Coriolis, May 2012) at 7.

New Zealand, there is a strong argument that it would count as a GI within the TRIPS definition.

There is the risk that New Zealand exporters are not doing enough to harness GIs as a way to market goods internationally. A recent study by Lincoln University argued that New Zealand exporters are failing to communicate the credence attributes of agricultural food products. These are qualities that are believed by a consumer to be present in a product even though they cannot see them, for example animal welfare, fair trade, provenance and environmental stewardship.³¹ In overseas markets, the identification of New Zealand origin is frequently filtered out through the distribution channel. This was particularly the case with dairy and meat products where there is little recognition of New Zealand's credence attributes. The main exception to this was kiwifruit, apples and wine where New Zealand's origin was consistently communicated, and some exporters were achieving a wholesale premium of up to 60% above similar commodity products.³² While this research was not directly on GIs, it highlights how New Zealand's "brand" is not being seen by international consumers.

Another current issue is New Zealand's continued reliance on commodity exports. Between 2002 and 2014, the annualised growth in the value of New Zealand's primary sector was 4.5%.³³ As this was mostly driven by commodity price movements and volume growth, KPMG suggests that "little progress has been made in realising incremental value driven by the attributes of New Zealand products, customer relationships, innovation and branding."³⁴ Increasing exports is a current issue the Government is trying to address. Currently, New Zealand's exports of goods and services represent about 30% of GDP. While this is about the OECD average, it is well below the 40%-50% of GDP for similar-sized OECD countries.³⁵ New Zealand's international competitiveness has been declining and since the mid-2000s, the nation's export performance has suffered. In order to drive progress the Government has committed to a high-level goal to increase the level of exports to 40% of GDP by 2025. It is openly accepted that this is a very ambitious goal and to meet the target New Zealand exports

³¹ Nic Lees and Caroline Saunders *Maximising Export Returns (MER): Communicating New Zealand's Credence Attributes to International Consumers* (Agribusiness and Economics Research Unit, Lincoln University, 2015) at viii.

³² At 12.

³³ KPMG *Agribusiness Agenda 2015 Volume 1 - Growing Value* (KPMG, 2015) at 30.

³⁴ At 30.

³⁵ Export Market Group *Building Export Markets* (Ministry of Business, Innovation and Employment, Business Growth Agenda Report, August 2012) at 9.

will require growth on average of between 5.5% and 7.5% a year from 2016 to 2025.³⁶ Within the agricultural sector, it has been recognised that New Zealand must continue to find ways to add extra value to agricultural exports, for example by additional processing and developing new speciality products.³⁷ An increased focus on developing and promoting GIs could be one tool for producers and exporters to communicate the high quality of New Zealand agricultural products, setting them apart from other products on the market and attracting higher prices.

It is not going to be feasible for all New Zealand exporters to focus on niche, origin differentiated goods. To be successful, it is important that a product is characterised by high specificity to the geographical environment from which it is produced. Generally, goods would have gained a level of popularity already. This does not necessarily mean a product needs to be a result of centuries of tradition, as is normally the case with EU GIs. Some products become “renowned virtually overnight thanks to targeted marketing campaigns”.³⁸ New Zealand does have a tradition of small scale production and entrepreneurs, for whom referring to origin is an important aspect of marketing and a factor of differentiation and added value.³⁹ For example, many New Zealand cheese makers believe that naming cheese for their region helps create an association for the area and enables companies to build brand differentiation. New Zealand cheeses have developed their own identities and cheese makers have strived to create interesting names to reflect the uniqueness of the products and recognise the heritage of their regions.⁴⁰

The main exception to small scale production and niche products is the New Zealand dairy industry as a result of Fonterra’s co-operative structure. Fonterra is a farmer-owned cooperative that was formed in 2001 through a government-sanctioned merger of cooperatives. It is a near-monopoly dairy producer which exports more than 90% of all New Zealand dairy product exports.⁴¹ Fonterra has a number of distinctive brands that are marketed around the world such as Anchor, Kapiti, Fresh ‘n Fruity, Anlene and Anmum. However, the vast majority of New Zealand dairy is used as ingredients in consumer

³⁶ At 11.

³⁷ “Taking New Zealand to the World: Why Exporting Matters” BusinessNZ (November 2007) <www.businessnz.org.nz> at 13.

³⁸ Nuria Ackermann *Adding value to traditional products of regional origin: A guide to creating a quality consortium* (UNIDO, Vienna, 2010) at 30.

³⁹ Schmutsch, above n 26, at 71.

⁴⁰ At 68.

⁴¹ “Fonterra & the New Zealand dairy industry: options going forward” (Coriolis, February 2010) at 3.

products which are sold under global brands offshore. Fonterra is legislatively required to take milk supplied by any New Zealand dairy farmer. It has been argued that this producer-driven approach has meant that increasing volumes and holding market share has largely taken precedence over moving up the value curve.⁴² A bulk exporting approach is largely at odds with niche differentiated markets and communicating the origin of goods. The competing interests between dairy and other exporting producers is likely to be a major issue with any GI developments.

Nevertheless, this paper argues that many New Zealand exporters could benefit from an increased focus on GIs. Currently, origin-labelling is not being effectively used as a means to communicate many New Zealand experience goods. As some producers, such as many cheese makers, have recognised there is potentially a real benefit from creating an association between goods and their geographical origin. While not a means in and of itself, GIs could be one tool for differentiating products and creating higher valued, niche industries. Working on this assumption, the question becomes whether there is a way GIs can be regulated to protect them from misuse and harness optimal results?

IV Protection of Geographical Indications

A International Developments

Laws protecting GIs have existed in a variety of forms in Europe for hundreds of years. For example, in Yugoslavia a Charter of Steven I governed the sale of wine as early as 1222. In the Middle Ages, “guild marks” were a common means to indicate the geographical origin of products. Many of these historic marks remain today, for example Murano glass from the small island near Venice, Italy.⁴³ Aside from guilds there was little formal oversight of product names and their ownership. This was largely because for centuries most foods and beverages were made locally and few foods arrived from outside the community.⁴⁴ The expansion of domestic and foreign trade was one reason for the development of a more structured approach. As the food and wine that had been formally sold in the area of production were made available in other markets, food safety, conditions of fair trade and consumer protection gained importance.⁴⁵ The original rules were designed to create both distinctive marks certifying product quality, for example

⁴² Tony Baldwin “Fonterra – the options for change” *The New Zealand Herald* (online ed, Auckland, 28 August 2015).

⁴³ Bernard O’Connor *The Law of Geographical Indications* (Cameron May, London, 2004) at 21.

⁴⁴ Echols, above n 12, at 33.

⁴⁵ At 33.

wool marks for cloth, and to protect the commercial reputation of these goods by imposing standards on the local products. Such laws were generally protected in accordance with national or local laws, with limited geographical scope.⁴⁶

By the late 19th century, there was a growing realisation that “international cooperation was required to ensure that these geographical indications were protected internationally and that there was reciprocity in the level of protection between states.”⁴⁷ Regional and national regulations had used a variety of terms to denote the origins of goods; namely “indications of source”, “appellations of origin” and “geographical indications”. The first attempt at adopting a common approach to protect IP rights was the 1883 Paris Convention.⁴⁸ The Paris Convention is complemented by the 1891 Madrid Protocol.⁴⁹ While referring to “indications of source”, neither agreement expressly defines the term. Nevertheless, Article 1.1 of the Madrid Agreement holds that:

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

From this definition, it is clear that while indications of source relate to the geographical area from where the product originates, there is no implication that the product needs to have any special quality, characteristic or reputation attributable to its place of origin. This distinguishes it from a GI.⁵⁰

The 1958 Lisbon Agreement is the international reference for a definition of appellations of origin.⁵¹ Article 2.1 of the Agreement states:

In this Agreement, “appellations of origin” means the geographical name of a country, region or locality, which serves to designate a product originating therein, the quality and

⁴⁶ O’Connor, above n 43, at 27.

⁴⁷ At 27.

⁴⁸ Paris Convention for the protection of industrial property of March 20, 1883, as last revised at Stockholm 828 UNTS 305 (opened for signature 14 July 1967, entered into force 26 April 1970).

⁴⁹ Madrid Agreement for the repression of false or deceptive indications of source on goods of April 14 1891, as last revised at Lisbon 828 UNTS 162 (opened for signature 31 November 1958, entered into force 1 June 1970).

⁵⁰ Addor and Grazioli, above n 9, at 867-868.

⁵¹ Lisbon Agreement for the protection of appellations of origin and their international registration 923 UNTS 205 (opened for signature 31 November 1958, entered into force 25 September 1966).

characteristics of which are due exclusively or essentially to the geographical environment, including natural and human factors.

By having the additional quality requirements, this definition goes far beyond indications of source. While similar to GIs, the definition is more stringent. First, mere reputation is not enough for protection; specific qualities or characteristics need to be expressed in the particular product. Second, appellations of origin must be direct geographical names of countries or regions; emblems or symbols evoking a geographical area are not sufficient.⁵² The Lisbon Agreement offers a means of obtaining protection for an appellation of origin originating in one Member State in the territories of all other members.⁵³ It is administered by WIPO, which keeps the International Register of Appellations of Origin. More than 700 appellations are now registered.⁵⁴ There are 28, mainly European, contracting members.⁵⁵ Countries such as the United States, Australia and New Zealand are not signatories to the Agreement.

It has been since the adoption of TRIPS that the term “geographical indication” has come into common use. The TRIPS Agreement was the culmination of a series of attempts to establish common approaches to the protection of IP at the international level.⁵⁶ To date it is the most comprehensive multilateral agreement on IP. Its impact is evident from the explosion of domestic legislation WTO Members introduced thereafter to bring their national statutes into line with TRIPS norms.⁵⁷

Part II, Section 3 of the TRIPS Agreement includes three articles which deal exclusively with the standards for protecting GIs. Despite the relatively short texts of these Articles, they have provided “a wealth of rules and questions concerning geographical indications.”⁵⁸ TRIPS defines a GI as an indication identifying a good as originating in a Member region “where a given quality, reputation or other characteristic of the good is essentially attributable to its geographic origin”.⁵⁹ This is a compromise between the Paris and Lisbon Agreements. It does not cover all indications of source because the

⁵² Addor and Grazioli, above n 9, at 868.

⁵³ Paola, Frigant and Jalba, above n 3, at 37.

⁵⁴ Echols, above n 12, at 53.

⁵⁵ “WIPO-Administered Treaties” WIPO <www.wipo.int>.

⁵⁶ Ibele, above n 9, at 39.

⁵⁷ Michael Blakeney *Trade Related Aspects of Intellectual Property Rights: A Concise Guide to the TRIPS Agreement* (Sweet & Maxwell, London, 1996) at v.

⁵⁸ Echols, above n 12, at 91.

⁵⁹ Article 21.1.

product must have the additional quality, reputation or characteristic that is essentially attributable to the region. It is arguably not as stringent as the Lisbon Agreement's appellations of origin because the TRIPS definition also includes the reputation of the product.

There are a number of key points to note about the TRIPS definition. It extends to non-food goods instead of only covering food and agricultural products. GIs can therefore apply to products such as textiles and carpet designs that are linked to a locality, for example Indonesian batiks and Ghanaian kente cloth.⁶⁰ Under the TRIPS definition a GI does not have to be an actual geographical place name. As long as the indicating term identifies goods as originating in the territory, region or locality of a Member, it will qualify as a GI.⁶¹ This means that traditional names that connote but do not directly state the name of a place, such as Basmati for rice from India or Feta for crumbly cheese from Greece, can qualify as GIs. As the definition used the word "indication" rather than "name" or "designation", it extends coverage to iconic symbols that can represent a geographical location, for example the Matterhorn or the Taj Mahal.⁶²

B National Protection of GIs

1 TRIPS Minimum Standards

Article 22 sets the minimum standard of protection that must be provided by WTO Members for protecting GIs. The full text of Article 22.2 reads:

In respect of geographical indications, Members shall provide the legal means for interested parties to prevent:

- (a) The use of any means in the designation or presentation of a good that indicates or suggests that the good in question originates in a geographical area other than the true place of origin in a manner which misleads the public as to the geographical origin of the good;
- (b) any use which constitutes an act of unfair competition within the meaning of Article 10*bis* of the Paris Convention (1967).

Article 22 imports the prohibition of "an act of unfair competition" from the Paris Convention which defines unfair competition as "[a]ny act of competition contrary to

⁶⁰ Echols, above n 12, at 63.

⁶¹ Ibele, above n 9, at 40.

⁶² At 40.

honest practices in industrial or commercial matters”.⁶³ The examples given include both “confusing and misleading the public, as well as negatively affecting a business’s reputation and goodwill.”⁶⁴

Article 23 of TRIPS applies to wine and spirits and offers a wider scope of protection. WTO Members must provide the means to prevent the use of GIs for wine and spirits irrespective of whether the true origin of the goods are indicated. The extra level of regulation protects the product independently of whether there is a risk of misleading the public, for example producers would be prohibited from using a designation such as “sparkling wine in the style of Champagne, produced in Chile”. In comparison, Article 22 does not protect a designation such as “Roquefort cheese, produced in Norway”.⁶⁵ There is no rationale for this two-tiered system, though wine and spirits constitute the vast majority of GIs in some countries.⁶⁶ Instead, it is mainly historical with wine producers and traders being the first to realise the economic advantages of GIs and fought to obtain protection during negotiations for the TRIPS Agreement.⁶⁷

Article 24 contains a number of important exceptions which are designed to:

- (a) recognise the use of a GI in good faith, or for more than ten years preceding the TRIPS Agreement;
- (b) legitimise rights acquired through trade marks;
- (c) recognise the existence of generic names or the use of a grape variety with a geographical significance; and
- (d) allow a person to use that person’s name or the name of their predecessor in business, except where the term is used in such a manner as to mislead the public.

The trade mark provisions essentially provide that a country does not have to invalidate any trade mark containing a GI if rights in that trade mark were developed prior to either TRIPS coming into force in that country, or the protection of the GI in its country of origin.⁶⁸ The genericity exception allows the use of geographical names outside of the denominated region that have become associated with a broader category of products. For

⁶³ Article 10*bis*(2).

⁶⁴ Blakeney, above n 57, at 73.

⁶⁵ Addor and Grazioli, above n 9, at 879.

⁶⁶ Raustiala and Munzer, above n 6, at 343.

⁶⁷ Addor and Grazioli, above n 9, at 875.

⁶⁸ Justin Hughes “Champagne, Feta and Bourbon: The Spirited Debated About Geographical Indications” (2006) 58 *Hastings L.J.* 299 at 319.

example, while “cheddar” cheese was originally produced in the United Kingdom, it is now used to refer to cheese produced in many countries.⁶⁹

2 Modes of Implementation

Article 22 of the TRIPS Agreement leaves each WTO Member with the flexibility to decide how to apply and enforce its GI commitments. There are two main ways that countries have implemented the TRIPS standards: either through a system of specific protection for GIs (*sui generis* regime) or through a system of trade marks. Of the 167 countries that actively protect GIs as a form of IP, 111 nations use *sui generis* regimes and 56 prefer to use existing trade mark systems.⁷⁰

Sui generis regimes protect GIs through a system that applies specifically and exclusively to them. Such systems establish a specific right over GIs that is separate from a trade mark or any other IP right.⁷¹ Europe has long been the main proponent for protecting GIs through a *sui generis* regime. In 1992 (pre-TRIPS) the EU created unique systems to bring together the many different rules for appellations and protected origins.⁷² These were updated in March 2006.⁷³ There are two forms of agricultural registration for GIs in the EU. The first is a Protected Designation of Origin (PDO). For this designation, a product must be produced and processed in the particular geographical area. If a product obtains a PDO, there is the implication that the product exhibits qualities or characteristics that are essentially due to that region.⁷⁴ Examples of PDOs include Parmigiano-Regianno, Roquefort and Fontina. The second type of registration is a Protected Geographical Indication (PGI). This type of registration allows greater flexibility as the product only needs to be produced or processed in the geographical

⁶⁹ David R Downes and Sarah A. Laird “Innovative Mechanisms for Sharing Benefits of Biodiversity and Related Knowledge: Case Studies on Geographical Indications and Trademarks” (paper prepared to the UNCTAD Biotrade Initiative, 1999) at 10.

⁷⁰ Giovannucci and others, above n 11, at xviii.

⁷¹ Paola, Frigant and Jalba, above n 3, at 28.

⁷² Council Regulation (EEC) 2081/92 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs [1992] OJ L 208; Council Regulation (EEC) 2082/92 on certificates of specific character for agricultural products and foodstuffs [1992] OJ L 208.

⁷³ Regulation 510/2006 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs [2006] OJ L 93/12.

⁷⁴ Giovannucci and others, above n 11, at 60.

region. A PGI can be based more on reputation, and it is linked less concretely to the qualities of a geographic region.⁷⁵

Neither of these GI protections can be sold or delocalised. They are accessible to any producer within the specified region of origin that meets the particular PDO or PGI certification criteria.⁷⁶ Registration confers producers with an Article 23 level of protection. The holder of a PDO or PGI enjoys protection against any direct or indirect commercial use of the registered name. In addition, there is protection against any imitation or evocation of the name, even if the true origin of the product is indicated or the protected name is accompanied with an expression such as “style” or “type”.⁷⁷ When a name is considered generic, the use of that term is not considered to breach these restrictions. Once a name is protected, it may not become generic.⁷⁸ The EU has developed an extensive list of protected GIs for foods and beverages which in 2014 encompassed 1433 food products in the DOOR database and 2885 wines in the E-BACCHUS database, as well as a series of distinctive logos and labels to differentiate these products.⁷⁹

There is an international trend towards countries establishing *sui generis* GI systems. For instance, in 2005 China introduced GI regulation. Since then, over 600 Chinese GI products have been identified and some of them have already been registered at national level.⁸⁰ Since 2000, 13 countries in Asia, such as Mongolia, Thailand and Vietnam have established protection systems. Additionally, over 12 countries from Latin America have adopted systems, including Colombia, Venezuela, Cuba and Costa Rica.⁸¹

The United States is at the forefront of a trade mark approach to protecting GIs, along with countries such as Canada, Australia, New Zealand and South Africa. The United States did not enact any specific legislation for GIs to comply with the TRIPS Agreement, except for one provision for wine and spirits. Instead, it took the position that TRIPS-level protection already existed for GIs under the Trademark Lanham Act of

⁷⁵ At 60.

⁷⁶ At 61.

⁷⁷ Regulation 510/2006, art 13(1).

⁷⁸ Article 13(2).

⁷⁹ Marcis Garcia “Squaring the Circle?: Approaches to Intellectual Property Rights and the TTIP” (paper presented to UACES 44th Annual Conference, Cork, September 2014) at 2.

⁸⁰ Ester Olivias Cáceres “Perspectives for Geographical Indications” (paper presented to International Symposium on Geographical Indications, Beijing, June 2007) at 5.

⁸¹ At 5.

1946.⁸² The United States Patent and Trademark Office (USPTO) observe that GIs are a subsection of trade marks because they serve the same essential function. They are both source identifiers, guarantees of quality and valuable business interests.⁸³ It is estimated that the United States has nearly 1,000 registered marks that specifically cover geographical origin and could be termed GIs. Most are for wine and spirits, and a number of them are registrations of foreign origin.⁸⁴

GIs are generally protected through a sub-category of trade marks known as certification marks. Certification marks act like a seal of approval as they guarantee that a product meets certain standards.⁸⁵ A certification mark has a single owner, but this owner can licence others to use the mark to “certify regional or other origin, material, mode of manufacture, quality, accuracy, or other characteristics” so long as the licensee meets the standards associated with the mark.⁸⁶ The mark can be owned by a single umbrella organisation (often a government affiliated body) who must make the mark available to all producers that meet the organisation’s standards. A high-profile example is the Idaho Potato Commission (IPC) who has registered the certification marks “Idaho Potatoes” and “grown in Idaho”. The IPC does not use the marks itself, but instead licences potato growers, packers and processors to use the certification marks on their potatoes and potato products to certify that these products are from Idaho and meet the IPC’s quality standards.⁸⁷

3 Key Distinctions between Certification Marks and GIs

Certification marks and registered GIs are complementary as they both serve as a shorthand message to consumers about the quality of a marked product, yet there are a number of fundamental differences that render them as distinct approaches.⁸⁸ A GI is a collective right that can be used by any producer established in the geographical area designated by the GI who abide by any relevant specifications. GIs cannot be sold or delocalised. A consortium or similar type of organisation, comprised of producers and

⁸² Emily Nation “Geographical Indications: The International Debate over Intellectual Property Rights for Local Producers” (2001) 82 U.Colo.L.Rev. 959 at 970.

⁸³ Giovannucci and others, above n 11, at 65.

⁸⁴ At 64.

⁸⁵ Nation, above n 82, at 972.

⁸⁶ At 972.

⁸⁷ At 974.

⁸⁸ Daniele Giovannucci, Elizabeth Barham and Richard Pirog “Defining and Marketing “Local” Foods: Geographical Indications for US Products” (2010) 13 JWIP 94 at 104.

processors, normally set standards to control quality and integrity and promote the GI product. An example of such an organisation is the Consorzio Tutela Formaggio Asiago in Italy which controls the quality of Asiago cheese. The regulatory board represents Asiago cheesemakers and workshops and there are 55 companies within the PDO-specified geographical region that are certified to produce Asiago cheese.⁸⁹ In comparison, there is one registered owner for a certification mark and the property and administration of the mark belongs to the right owner to the exclusion of all non-registered persons.⁹⁰

While the objective of a GI is to identify and protect the origin of a product and the associated qualities and reputation, a certification mark can certify a range of attributes such as quality, origin and production method of third parties.⁹¹ There is not the same special connection between the quality of the product and its geographical origin. A certification mark is not required to meet any pre-defined public standards and the owner defines its own rules of participation that may or may not include a quality parameter.⁹² A “first in time, first in right” rule applies with certification marks, so that whoever gets the mark has the protection to the exclusion of all others. Such registration does not prevent the designation from becoming a generic term. In comparison, GI registration is based on principles related to a legitimate interest to use and registration prevents the designation from becoming generic.⁹³ In the EU, registration of a trade mark that conflicts with a pre-existing GI will be refused and invalidated, however the prior existence of a trade mark is not a barrier to the registration of a conflicting GI, unless certain restrictive criteria are met.⁹⁴ With GIs, the name is protected against imitation or evocation, even where the true origin of the third parties’ product is identified. With certification marks, exclusivity cannot generally be obtained for geographical designation and third parties may continue to use the name with expressions such as “like” and “style”.⁹⁵

⁸⁹ Babcock and Clemens, above n 20, at 5.

⁹⁰ Addor and Grazioli, above n 9, at 873.

⁹¹ Ackermann, above n 38, at 15.

⁹² Giovannucci and others, above n 11, at 55.

⁹³ Ackermann, above n 38, at 16.

⁹⁴ Billy A. Melo Araujo “The EU’s Deep Trade Agenda: Stumbling Block or Stepping Stone Towards Multilateral Liberalisation?” in Christoph Herrmann, Markus Krajewski and Jörg Philipp Terhechte (eds) *European Yearbook of International Economic Law 2014* (Springer-Verlag, Berlin, 2013) at 281.

⁹⁵ Ackermann, above n 38, at 16.

4 *Rationale for Approaches*

The contrasting approaches to GI protection in national legislation is largely reflective of the wide diversity of “histories, consumers and agri-food sectors across countries.”⁹⁶ William van Caenegem observes that:⁹⁷

The absence of the broad-based consensus that underpins other areas of IP law results from the mixed status of GI registration: it is both an instrument of agricultural policy, and a form of intellectual property. Whereas the economic and policy basis for legal protection for reputation is widely accepted, the agricultural policy impact of various GI registration systems is the root cause of much of the current disagreement.

The EU’s strong position on protecting GIs is largely a strategy to reduce taxpayer subsidies given to farmers. With the inception of the European Community in the 1950s, the Common Agricultural Policy (CAP) was intended to be a support structure for farmers and a means for ensuring self-sufficiency. Agricultural subsidies were tied to production, and as rapid production increased this converted Western Europe into a net exporter. As farm efficiencies improved, subsidies rose dramatically.⁹⁸ Between 1981 and 1991, the cost of EU agricultural subsidies trebled. The crippling cost and unequal distribution of these subsidies (in 2003 France’s share was twice as much as Germany) has led to immense internal fiscal pressure to decrease this system of subsidisation.⁹⁹ One of the ways Europe is trying to wean its farmers from subsidies is to “create greater incentives for farmers to invest in higher-quality, value added food products by bestowing greater property rights over the names of regional products”, thus creating a more diversified, profit-orientated agriculture.¹⁰⁰ There is evidence that this is having the intended effect. The Italian food industry in Tuscany and Emilia-Romagna is “booming with new investments in value-added food items protected by GIs” and there has been an extraordinary growth in the availability of non-commodity meats, poultry and produce in France and Britain.¹⁰¹

In contrast, the United States is much more comfortable and familiar with protecting GIs through a private system of rights. The trade mark regime is firmly grounded in American “legal and economic theory that is orientated primarily towards individual and exclusive

⁹⁶ Giovannucci and others, above n 11, at 49.

⁹⁷ At 171.

⁹⁸ Hughes, above n 68, at 343.

⁹⁹ At 344.

¹⁰⁰ Babcock and Clemens, above n 20, at 16.

¹⁰¹ At 16.

ownership of assets including brands, business names, and other identifiers.”¹⁰² As a trade mark approach requires private management, mark owners do not have to wait for the government to address unauthorised use or take legal action against infringement.¹⁰³ Further, no additional commitment of resources by governments or taxpayers is necessary to create a new GI protection system.¹⁰⁴

C International Debate over GI Extension

Since the signing of the TRIPS Agreement, an international debate has emerged within the Doha Development Agenda over whether there should be further protection of GIs. The EU is advocating for the modification of TRIPS to provide increased GI protection. On the other side of the debate stand certain “new world” countries who have commonly adopted European geographical terms, in some cases as generic product descriptors. These countries, led by the United States and including Australia, New Zealand and Canada oppose any extension of TRIPS.¹⁰⁵

The first EU proposal is that the Article 23 level of protection should be extended to other products. The EU, with the support of countries such as Egypt and India, argue that the consumer-confusion test allows producers from other regions to easily usurp a GI and free-ride on its reputation without any possibility for legitimate producers to stop such action so long as the true origin is labelled.¹⁰⁶ The exceptions under Article 24 would still apply. The EU’s second proposal is the creation of a multilateral system for the modification and registration of GIs. Opposing countries are concerned that increased GI protection is overly protectionist and will disadvantage them in developing export trade into certain third country markets, as well as impose onerous compliance obligations.¹⁰⁷ They argue that the current levels are adequate and enhanced protection would be a burden and disrupt existing legitimate marketing practices.¹⁰⁸ These strongly opposed views has led to a stalemate and the Doha Development Round has broken down.

¹⁰² Giovannucci, Barham and Pirog, above n 88, at 104.

¹⁰³ Giovannucci and others, above n 11, at 65.

¹⁰⁴ “Office of Policy and International Affairs - Geographical Indications (GI) Protection” (2013) USPTO <www.uspto.gov>.

¹⁰⁵ William van Caenegem “Registered GIs: Intellectual Property, Agricultural Policy and International Trade” (2004) 26 E.I.P.R 170 at 173.

¹⁰⁶ Addor and Grazioli, above n 9, at 884.

¹⁰⁷ Van Caenegem, above n 105, at 173.

¹⁰⁸ Echols, above n 12, at 287.

It is not necessarily the end of the road for a multilateral GI register. In May 2015, parties to the Lisbon Agreement which protects “appellations of origin” controversially agreed to extend the Agreement’s scope to cover GIs. This was despite a proposal from non-member countries, including the United States, Australia, Canada and New Zealand, warning that the lack of full and equal participation was a deviation from existing practice.¹⁰⁹ The revision was aimed at enhancing the attractiveness of the Lisbon system to new members and permitting inter-governmental organisations, such as the EU, to accede to the system.¹¹⁰ This is a step towards establishing an international GI registration system that will apply across all contracting parties, and ensures that GIs at the international level remains a live issue.

The final and most controversial EU proposal is for the “clawback” of generic and semi-generic names. In the context of GIs, a good is said to have become a generic term when it is no longer associated with a product characteristically linked to a geographical origin, but rather it is used as the common name to designate the product.¹¹¹ A prime example of a GI that has become a generic is *Camembert* for cheese. This name can be used on any camembert-type cheese made anywhere in the world. In contrast, *Camembert de Normandie* is a French appellation of origin for cheese only produced in Normandy.¹¹² The EU proposes that the names of 41 well-known European GIs of “significant economic and trade value” be recognised as superior to prior trade marks that are based on the GI name. The list includes wine, spirits and foods such as Roquefort, Feta, Parmigiano-Reggiano, Prosciutto di Parma and Mortadella Bologna.¹¹³ A statement by Australia – a producer of feta – is illustrative of the strong opposition to this proposal. Australia argued that the clawback would remove the generic exception in Article 24, despite many of the products on the list being widely considered generic in world markets, and are often produced in much larger quantities by other WTO Members. This would cause costly disruption of international trade by granting a small handful of European producers’ monopoly rights.¹¹⁴

¹⁰⁹ “Revised WIPO Lisbon Agreement to Cover Geographical Indications” (2015) 19(19) Bridges 4 at 4.

¹¹⁰ At 5.

¹¹¹ Paola, Frigant and Jalba, above n 3, at 24.

¹¹² At 24.

¹¹³ Echols, above n 12, at 291.

¹¹⁴ At 292.

V New Zealand's Regulation of Geographical Indications

A Legislative Protection

Following the signing of the TRIPS Agreement, the New Zealand Government introduced the Geographical Indications Act 1994. This Act offered protection for all goods and allowed the registration of foreign GIs. The 1994 Act was enacted on the premise that broad multilateral and bilateral GI agreements would be concluded. In particular New Zealand was influenced by the fact that it was in the process of negotiating a bilateral wine agreement with the EU. The 1994 Act was never brought into force. Such legislation did not remain consistent with New Zealand's negotiating stance in light of developments within the WTO as part of the Doha Development Round. New Zealand opposed the EU's proposal for a compulsory multilateral register and for an extension of Article 23 protection to goods other than wine and spirits. Additionally, as drafted, the 1994 Act did not permit New Zealand to fully exercise the exceptions under the TRIPS Agreement that would allow for the examination and refusal, in defined circumstances, of registration of foreign GIs.¹¹⁵

The Government decided to repeal the 1994 Act and replaced it with the Geographical Indications (Wine and Spirits) Registration Act 2006, which just applies to the protection of wine and spirits. The Act was created to address a substantial risk to the wine industry in 2004 that New Zealand wine exports would be blocked from the EU market because the EU considered they were not using "officially recognised" GIs on their labels. This ban would have had a "catastrophic impact" on the New Zealand wine industry – at that time, the EU was the largest export market for New Zealand wine with exports returning around \$140 million in earnings.¹¹⁶ The Select Committee Report held that protecting GIs would "allow them to be used as marketing tools to establish and develop a geographical brand, while preventing the erosion of the brand by other producers using the indication on goods that were not produced in the specified region."¹¹⁷ In December 2007, Cabinet decided to delay the implementation of the Act. This was largely due to discussions with the EU over a wine agreement stalling after the European Commission failed to obtain a

¹¹⁵ Ministry of Economic Development "Submission to the Foreign Affairs, Defence and Trade Select Committee on the Geographical Indications (Wine and Spirits) Registration Bill" at 3.

¹¹⁶ Tim Groser and Paul Goldsmith *Geographical Indications (Wine and Spirits) Registration Act 2006 Cabinet Paper and Regulatory Impact Statement* (Submitted to the Cabinet Economic Growth and Infrastructure Committee, December 2014) at [12]-[13].

¹¹⁷ Geographical Indications (Wine and Spirits) Registration Bill (278-2) (select committee report) at 2.

negotiating mandate from its Member States in 2008.¹¹⁸ Issues of market access were dealt with in the interim by the Government developing an *Overseas Market Access Requirement* (OMAR) that sets out 24 New Zealand wine GIs that may be used in the EU.¹¹⁹

In March 2015, Ministers Tim Groser and Paul Goldsmith announced that Parliament will amend the 2006 Act with the intention of bringing it into effect in 2016.¹²⁰ The Act will create a registration system that operates similarly to the current trade mark system. Compliance with TRIPS does not require a GI register, but following consultation with the New Zealand wine and spirit industry, it was established that this approach was preferred.¹²¹ A register and registrar of GIs will be created, under which interested parties can apply to register the name and boundaries of a GI, and any conditions relating to its use. The Act imports the TRIPS definition of a GI, so that the indication must identify the wine or spirit as originating from a territory or region “where a given quality, or reputation, or other characteristic, of the wine or spirit is essentially attributable to its geographical origin.”¹²² Once a New Zealand GI has been registered for wine, it will be usable by any person only if at least 85% of the wine is produced from grapes harvested in the relevant region, and it obeys any conditions attached to the GI.¹²³ A person who contravenes this requirement will be deemed to have breached the Fair Trading Act 1986, which prohibits misleading or deceptive conduct in trade.¹²⁴ The provisions of the Fair Trading Act would then be available to remedy the misuse of the GI.¹²⁵ As amendments will be passed, the legal framework may change slightly, but the basic structure of the Act is unlikely to alter significantly. The amendments are more directed towards updating the Act and ensuring the registration process runs smoothly.¹²⁶

There were a number of reasons for implementing the Act after nine years. First, implementation will support New Zealand’s interest in securing FTA negotiations with

¹¹⁸ Groser and Goldsmith, above n 116, at [19].

¹¹⁹ At [20].

¹²⁰ Tim Groser and Paul Goldsmith “Wine and Spirit geographical registration coming” (press release, 31 March 2015).

¹²¹ Ministry of Economic Development, above n 115, at 4.

¹²² Geographical Indications (Wine and Spirits) Registration Act 2006, s 6(1).

¹²³ Section 21(a).

¹²⁴ Fair Trading Act 1986, s 9.

¹²⁵ Groser and Goldsmith, above n 116, at [7].

¹²⁶ Sue Irwin Ironside “Encouraging Origins – Geographical Indications may finally become registerable in New Zealand” (13 April 2015) Baldwins Law Limited <www.baldwins.com>.

the EU. New Zealand is one of only six WTO members who do not have or are not negotiating some form of preferential access to the EU market, and securing a FTA is a priority for the government. The EU has remained highly interested in when the register will be implemented.¹²⁷ Second, many of New Zealand's key export markets for wine provide some form of *sui generis* system, for example China and the EU. Being able to demonstrate that a New Zealand GI is officially recognised in New Zealand can assist an applicant to gain *sui generis* protection for its GIs in other countries. Both China and the EU have this requirement as a prerequisite for gaining protection.¹²⁸ The OMAR list approach is not considered a satisfactory substitute for having the relevant domestic legislation in place.¹²⁹ *Sui generis* protection in exports markets should provide more cost effective protection for New Zealand GIs. Relying on general consumer laws to protect unregistered GIs in foreign jurisdictions is "complex, difficult and comes with a degree of uncertainty."¹³⁰ Finally, a 2011 PricewaterhouseCoopers report showed that future industry growth would involve Asian markets where misuse of label information was recognised as a major problem in the alcoholic beverages sector.¹³¹ The Act's implementation was "warmly welcomed" by New Zealand Winegrowers with CEO Philip Gregan describing it as a "big step forward for the New Zealand wine industry".¹³²

B Protection for GIs beyond Wine and Spirits

Beyond wine and spirits, New Zealand upholds its TRIPS obligations through three legal mechanisms: the tort of passing off, the Fair Trading Act 1986 and trade mark law. These legal protections aim to prevent producers from misleading customers about a product's geographical origin, which is sufficient for fulfilling the minimum standards under Article 22 of the TRIPS Agreement.

The action of passing off is brought to redress, or protect against, unfair competition between traders. It is particularly concerned with misrepresentations made by one trader,

¹²⁷ Groser and Goldsmith, above n 116, at [32].

¹²⁸ At [39].

¹²⁹ At [41].

¹³⁰ At [42].

¹³¹ At [22].

¹³² New Zealand Winegrowers "A big step forward for the New Zealand wine industry" (press release, 31 March 2015).

which damage the goodwill of another. To succeed, the plaintiff must satisfy a three-pronged common law test that has been cited in the New Zealand courts:¹³³

- (a) there is goodwill or reputation attached to the goods or services;
- (b) there has been a misrepresentation to the public by the defendant; and
- (c) the plaintiff has suffered damage as a result of the defendant's misrepresentation.

The tort was established by the English courts during the early part of the 19th century, when the imitation of a competitor's mark was becoming increasingly common practice. From its beginnings, the action prevented the misuse of geographical terms. In *Dunnachie v Young and Sons* (1883) the defendants were prevented from marking their fire bricks "Young Glenboig" and advertising them as "made from Glenboig clay" because the bricks were made from a seam of clay about two miles away.¹³⁴

Passing off has been used in New Zealand by French wine interests to prevent winemakers from labelling their sparkling wine "Champagne".¹³⁵ In ruling that passing off had occurred to the detriment of the French producers, the Court of Appeal held that the French plaintiff had established the requisite goodwill and reputation in the New Zealand marketplace. Justice Gault found that it was "not the name that indicates the characteristics but the name in conjunction with experience or repute [and] for suppliers the attracting force in the name constitutes a part of the goodwill of their business."¹³⁶ Essentially, the court rejected that the word "Champagne" could be viewed as a generic term for describing sparkling white wines, wherever they are produced.¹³⁷

Mislabelling goods as coming from a particular place would be a breach of the Fair Trading Act. The Act holds that "no person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive".¹³⁸ This can arguably protect GIs from misrepresentation because if a product does not originate from the geographical area indicated, or does not possess the characteristics for which a GI is known, it could be in breach of the Act.¹³⁹ Unlike passing off, the Fair Trading Act does not require the

¹³³ *Anheuser-Busch v Budweiser Budvar* [2001] 3 NZLR 666.

¹³⁴ O'Connor, above n 43, at 213.

¹³⁵ *Wineworths Group Ltd v Comite Interprofessional du Vin de Champagne* [1992] 2 NZLR 327 (CA).

¹³⁶ At 337.

¹³⁷ Philip B Gurney "Protecting goodwill in New Zealand wine labels – how will "geographical indications" bolster existing IP rights (if at all)?" (2008) 5 NZIPJ 484 at 489.

¹³⁸ Section 9.

¹³⁹ Gurney, above n 137, at 488.

plaintiff to establish a distinctive reputation, but rather establish that consumers have been misled as to the product's origin.¹⁴⁰

GIs can also be protected as an individual trade mark if they meet the criteria under the Trade Marks Act 2002 (TMA). As in the United States, certification marks are the closest New Zealand has to EU-style registered GIs. In New Zealand, a certification mark is a “sign certifying that the goods or services in respect of which it is used are of a particular origin, material, mode of manufacture, quality, accuracy, performance, or other characteristic.”¹⁴¹ The owner of the certification mark has the same rights as those attached to a standard trade mark, such as the exclusive right to use, and allow persons to use, the mark. These monopoly protections are obtained by the registration of the mark.¹⁴² The owner of the mark has to be an independent body that can impartially assess applicants to determine whether they meet the standards required to be allowed to use the mark. This independence means that the owner cannot trade in the good or service, and they are usually government departments, incorporated societies, councils or industry associations.¹⁴³ The standards required for use of the mark are not arbitrary. A copy of the regulations determining who can use the mark and how it must be used are to be provided to and approved by the Intellectual Property Office of New Zealand (IPONZ) as part of the registration process. This allows for members of the public to look up the regulations and find out what standards the mark certifies the product as having met.¹⁴⁴

Well known certification marks include BusinessNZ's “Buy New Zealand Made” and Enviromark. Certification marks in New Zealand for certifying geographical origin are rare. Bluff Oysters and Waiheke Wine appear to be the only New Zealand based certification marks that would be deemed GIs. A search of the IPONZ database reveals that there are a number of foreign GIs registered as certification marks in New Zealand. For example, the Stilton Cheesemakers' Association from Britain has been granted a certification mark in New Zealand, along with many non-EU countries including the United States, Australia, Canada and South Africa.¹⁴⁵ Other foreign certification marks include Darjeeling tea and Café de Colombia.

¹⁴⁰ Frankel, above n 25, at 665.

¹⁴¹ Trade Marks Act 2002, s 5(1).

¹⁴² Section 10.

¹⁴³ Virginia Nichols “Certification marks – for non-traders only” *Law Talk* (New Zealand, 8 May 2015) at 30.

¹⁴⁴ At 30.

¹⁴⁵ “Stilton Facts” Stilton Cheese <www.stiltoncheese.co.uk>.

Collective marks are signs used in relation to goods or services produced in the course of trade by members of an association to distinguish them from goods produced by non-members. This differs from a standard trade mark whose function is to distinguish the goods of a single party.¹⁴⁶ Any member of the collective association has the right to use the mark in respect of those goods.¹⁴⁷ An example of a New Zealand collective mark applying to a GI is the mark belonging to the Gimblett Gravels Winegrowers Association from the Hawke's Bay. The Association has an authenticity rule that wines using the logo must source 95% of their content from the defined Gimblett Gravels district.¹⁴⁸

VI Domestic Benefits of a Sui Generis Regime

While certification (and collective) marks are essentially the most direct way for GIs to be protected in New Zealand, there appears to be little knowledge and use of them in this manner. The introduction of the wine and spirit GI register is being heralded as a big step forward for New Zealand producers, yet there is little indication that the Government will be extending protection to goods beyond wine and spirits. This is despite producers of other goods, such as cheeses, fruits and vegetables, having demonstrated their interest in having relevant GIs protected.¹⁴⁹ Working on the basis that New Zealand would benefit from an increased focus and promotion of GI products, this section considers whether a *sui generis* regime could introduce any domestic trade benefits that are not currently provided for through current regulation.

A Protection from Misuse

A key reason for having GI regulation is to ensure the validity of a product's quality by protecting it from misuse. This is reflected in Article 22 of TRIPS which prevents producers from using a GI in a way that misleads the public or constitutes an act of unfair competition. When a GI has built up its reputation, non-authentic use by other producers has the potential to undermine the goodwill that has developed with the product. A GI will only attract higher prices if there are adequate protection mechanisms to assure customers of the legitimacy of the product they are purchasing. It can be argued that New Zealand GIs are sufficiently protected from domestic misuse through the current laws of misrepresentation. Producers can bring claims under the Fair Trading Act or through an action in passing off if other producers are mislabelling their products with a GI. So long

¹⁴⁶ "Collective Marks" IPONZ (16 November 2009) <www.iponz.govt.nz>.

¹⁴⁷ Section 10(2)(a).

¹⁴⁸ Gurney, above n 137, at 487.

¹⁴⁹ Ironside, above n 126.

as consumers are not being misled, there is no additional harm that a GI system would address.

There are some limits to the scope of protection from misrepresentation laws. The major hurdle for a plaintiff alleging a case of passing off will be demonstrating that a particular product has acquired the requisite goodwill or reputation in the minds of the potential customers. While this may be fine for well-established brands, such as Champagne, it can provide a significant difficulty for lesser known producers.¹⁵⁰ The tort also requires a real and tangible risk of damage, which must be more than a mere possibility. It can be difficult for GI owners to show that damage has been suffered, especially as it generally means a loss of sales.¹⁵¹ Overseas case law has indicated that the dilution of a product's reputation is generally not enough to satisfy the requirement for damage. This has resulted in the tort offering little protection to GIs, even in instances where third parties attempt to free ride off the goodwill and reputation associated with them.¹⁵² While the Fair Trading Act does not require the same damage to goodwill or reputation as passing off, liability under the Act also requires a deliberation of whether conduct is misleading or deceptive. Litigation is often time-consuming, complicated and costly, with a fairly low chance for legitimate producers to enforce protection of GIs other than wine or spirits.¹⁵³

One argument in support of a *sui generis* system is that it grants greater protection to GI producers. As a form of intellectual property, registering GIs gives statutorily defined proprietary protection for a GI's reputation. This is done by allowing *a priori* determination of legal entitlement. Registration "obviates the need, within certain parameters, to prove ownership when a dispute arises, as well as the need to prove reputation and deception of consumers".¹⁵⁴ Unlike with indirect protection through passing off and the Fair Trading Act, producers do not have to prove misleading behaviour after the fact; lengthy actions by which time a GI's reputation may already be damaged. It can be argued that direct protection of New Zealand GIs is provided for through the certification mark regime. These too grant producers an exclusive right to use a mark and there is no need to prove ownership or reputation once granted use of the mark.

¹⁵⁰ Gurney, above n 137, at 488.

¹⁵¹ Stephen Stern and Katerina Makris "Should Australia implement a full GI System?" (2009) 76 IPF 39 at 42.

¹⁵² At 42.

¹⁵³ Addor and Grazioli, above n 9, at 881-882.

¹⁵⁴ Van Caenegem, above n 105, at 174.

Are GI systems therefore superfluous? Proponents for *sui generis* regimes argue that GI registration prevents the potential free-riding that can occur under an Article 22 level of protection, which allows the use of correctives such as “American type basmati rice”. Misrepresentation laws and certification marks do not prevent other producers evoking a GI with phrases such as “style” or “like”. Many proponents argue that these goods cannot carry the same qualities or characteristics as the original goods since they do not come from the specified region. In addition, it is argued that these correctives can contribute to a good becoming generic.¹⁵⁵ Another issue from the lower level of protection is when while the origin is true, there may be no guarantee of the associated quality of the good which is a fundamental aspect of GIs. For example, the “Washington Apple” logo that is used in the United States only signals origin and does not reflect specific quality or production standards.¹⁵⁶ With GI systems, a consortium or similar type of organisation comprised of producers and processors normally set standards to control product quality and integrity.¹⁵⁷ These public standards aim to ensure that consumers can be certain that they are buying a product that originates from the labelled region which contains certain qualities and characteristics. This protection benefits producers as well because as far as quality information for consumers raises demand for high-quality goods, prices will increase and producer welfare will improve.¹⁵⁸

Certification marks in New Zealand also require standards that are approved by IPONZ upon registration which can arguably convey the same quality information. The main distinction with certification marks is that the regulations are ultimately the private decision of the certifiers. There can be a range of standards, and there may still be no requirement for a link between the origin and quality. Further, with a GI system a producer cannot opt out of it and continue to use the geographical name to indicate the origin of the goods concerned.¹⁵⁹ As the ownership of a GI rests with the collective group, there is not the same risk as with a certification mark that the ownership will be sold or delocalised, therefore undermining any investment into standards or product

¹⁵⁵ Lina Monten “Geographical Indications of Origin: Should They Be Protected and Why? An Analysis of the Issue from the U.S and EU Perspectives” 22 (2005) Santa Clara Computer & High Tech.L.J 315 at 335.

¹⁵⁶ Jason A. Winfree and Jill J. McCluskey “Collective Reputation and Quality” (2005) 87 Amer. J. Agr. Econ 206 at 212.

¹⁵⁷ Babcock and Clemens, above n 20, at 4.

¹⁵⁸ Herrmann and Teuber, above n 5, at 816.

¹⁵⁹ William Van Caenegem, Jen A. Cleary and Peter Drahos “Pride and Profit: Geographical Indications as Regional Development Tools in Australia” (2014) 16 JESP 1 at 12.

reputation. The public law element of a registered GI has an element of collective compulsion that does not exist for an ordinary certification mark.¹⁶⁰

Manuka honey can provide a practical example of an experience good that could benefit from stricter legal protection. Coriolis, an Australasian consulting firm specialising in the agri-food industry, undertook a study of the New Zealand honey industry for the Ministry of Economic Development. It submitted that the New Zealand honey industry has an ongoing problem with fake, mislabelled and counterfeit Manuka honey, particularly the labelling of non-active honey as active.¹⁶¹ As part of the study, Coriolis compared the legal rules surrounding Scotch whisky with New Zealand Manuka honey. Scotch whisky is specifically protected for in UK law and as a PDO in the EU. Scotch whisky has specific product formulation and production requirements. There are no requirements for Manuka and it is left to competing private sector certifiers to set standards.¹⁶² This has resulted in there being no common definition of certification for “active” Manuka honey and it is being marketed to consumers under a range of confusing and often dubious systems such as UMF 10+, MGO 250, MGS 16+ or OMA 16+.¹⁶³ There is also a range of labelling and advertising requirements for Scotch whisky, whereas there are no specific Manuka requirements. A registered GI for Manuka could consolidate these standards by having a consortium of honey experts set certain boundaries around what is deemed Manuka honey. Producers would then have a common mark around which to market their individual goods, distinguishing their products from non-legitimate versions.

Finally, if a group intend to use a certification mark, there must be a separate legal entity that is willing to take on the responsibility of exercising control over the mark, or they risk losing it. This effectively means policing misuse of the mark and then paying for all enforcement and protection efforts to prevent it. While this may be less bureaucratic than a public body, this would incur a considerable cost and for small groups that have modest resources, it may be difficult to achieve any actual protection.¹⁶⁴ There may also be difficulty in finding the appropriate bodies who are prepared for the responsibility of owning and controlling the certification mark.

¹⁶⁰ At 12.

¹⁶¹ Coriolis, above n 30, at 49.

¹⁶² At 50.

¹⁶³ At 48.

¹⁶⁴ Giovannucci, Barham and Pirog, above n 88, at 105.

To conclude, while misrepresentation laws are a key protection against illegitimate use, they do not confer the exclusive proprietary right that GI registration does. This can make them difficult to police and enforce GI rights. It can be argued that private certification marks go most of the way in conferring additional protection by pre-determining legal entitlement to the mark and setting quality standards. The main protective benefits that a *sui generis* regime would provide for New Zealand producers is the easier prevention against free-riding, the establishment of a common approach for individual GI standards, and the control of the GI by a public body.

B Niche Marketing Tool

GIs are viewed as a marketing tool that can add economic value to agricultural products by conveying a unique cultural identity using the region of origin and acknowledging the value of specific human skills and natural resources in the production process. In Europe, the protection of GIs has been seen as a means for changing the EU's CAP to one with a focus on quality rather than quantity. EU policy holds that consumers' quest for specific, high-quality products "generates a demand for agricultural products or foodstuffs with an identifiable geographical origin."¹⁶⁵ It is believed that:¹⁶⁶

Registration promotes diversification in industrial production: in the absence of legal protection for reputed signs, producers of non-testable foods would not supply diversified and distinct products at higher cost, because of the inability to capture higher returns. Competitors would imitate the sign and attach it to goods of lesser quality produced at lower cost, so the incentive to produce differentiated goods in the first place would be reduced.

Advocates argue that one way to ensure that the growth in demand for high-quality goods will benefit producers is to give them greater control over the quality of the goods they produce. Only then can producers guard against imitators who would overwhelm an otherwise profitable niche market. Increased GI protection is the type of support needed for producers who want to move away from commodity production.¹⁶⁷

The counter argument is that verifying the quality of certain goods, which can include origin, through private certification marks is just as an effective measure for differentiating products. While certification marks are an important marketing tool, there

¹⁶⁵ Regulation 510/2006.

¹⁶⁶ Van Caengegem, above n 105, at 175.

¹⁶⁷ Babcock and Clemens, above n 20, at 17.

are limits to the value they can add to GIs. A study of United States certification marks for agricultural products that included a linkage with product origin found that they are most often used to promote the sale of unrelated products.¹⁶⁸ As the mark can be widely used, it will have fewer controls and is more a general marketing tool rather than a device signalling high quality.¹⁶⁹ In other cases where the marks successfully identified the origin of a single agricultural product, they did not necessarily command a premium for that product. Under both approaches, many of the products continued to be marketed at commodity prices.¹⁷⁰ It may often be more difficult for consumers to recognise these private marks as specific or objective market signals. As they vary in what they certify, it is not always clear to what extent a geographic term conveys anything more beyond mere identification of the source or geographical origin, rather than any particular connotation of quality.¹⁷¹

Sui generis systems such as the EU's also have a potential marketing advantage in that the EU has a consistent logo for all registered GIs. This is a simple and effective method for communicating the product's authenticity. Even if consumers are not familiar with the particular brand, they may already recognise the logo as indicating a certain set of qualities or characteristics.¹⁷² In comparison, a certification mark is unique to the certification organisation and each new mark will be relatively unknown to the public. However, in the EU, while individual GI products are well-known, the formal certification system is still relatively invisible, despite the passage of two decades since its implementation.¹⁷³ A consistent logo is therefore not going to automatically lead to consumers being prepared to pay for GIs over other goods. There will need to be sustained and consistent promotion of the meaning of the marks.

C Rural Development

One of the fundamental rationales for protecting GIs in Europe is the benefit to rural development due to increased investment in the production and promotion of agricultural products. The preamble to the EU regulation on GIs states that:¹⁷⁴

¹⁶⁸ At 3.

¹⁶⁹ Giovanni and others, above n 11, at 58.

¹⁷⁰ Babcock and Clemens, above n 20, at 3.

¹⁷¹ Giovannucci and others, above n 11, at 58.

¹⁷² At 58.

¹⁷³ Echols, above n 12, at 25.

¹⁷⁴ Regulation 510/2006.

...The promotion of products having certain characteristics can be of considerable benefit to the rural economy, particularly in less favoured or remote areas, by improving the incomes of farmers and by retaining the rural population in these areas.

Given the direct link GIs give between product and origin, they are viewed as the most evident manifestations of locality and are often considered useful instruments through which to preserve local culture and traditions and foster rural development.¹⁷⁵ The initiation for a particular GI regulatory scheme traditionally lies with the local producers, who cooperate within the framework of a representative association to which all interested producers should have access. This is normally supported by a central body or institution that can provide technical expertise, encourage the development of the indication, and defend it nationally and internationally.¹⁷⁶ It is argued that “because both producers and processors belong to the organisations that control and promote GI products, price premiums generally benefit both groups, giving the GIs the potential to revitalise rural areas by improving returns to small and medium-sized enterprises.”¹⁷⁷ In comparison, countries that use a trade mark approach tend to view GIs as a tool to assist the competitiveness of firms and producer groups. There is much less emphasis on rural development or traditional systems.¹⁷⁸

A number of studies have indicated that, under appropriate conditions, GIs can contribute to the development of rural areas.¹⁷⁹ Because GIs tend to generate a premium price, they contribute to local employment creation, which may ultimately help prevent rural exodus. Beyond the direct GI stakeholders, GIs often have spin-off effects, for example through tourism and gastronomy, as well as stimulating investment within the borders of the GI region. The history of the French cheese Comté, which has PDO status, is one example.¹⁸⁰ The product’s value chain employs five times more people than that of generic, industrially-produced Emmentaler cheese in the same area. Integrating Comté cheese within the local environment has also helped promote tourism by means of a public-private partnership resulting in the Comté gastronomic routes.

¹⁷⁵ Cerkia Bramley, Estelle Biénabe and Johann Kirsten “The Economics of Geographical Indications: Towards a Conceptual Framework for Geographical Indications Research in Developing Countries” in *The Economics of Intellectual Property* (WIPO, Geneva, 2009) at 118.

¹⁷⁶ Van Caenegem, Cleary and Drahos, above n 159, at 9.

¹⁷⁷ Babcock and Clemens, above n 20, at 14.

¹⁷⁸ Giovannucci and others, above n 11, at 64.

¹⁷⁹ Paola, Frigant and Jalba, above n 3, at 17.

¹⁸⁰ Ackermann, above n 38, at 21.

New Zealand's rural sector largely drives the country's economy, yet a number of provincial communities are facing a population exodus and economic hardship. A GI system could be one way to promote investment in regional areas by incentivising the production and processing of food goods in the regions, as both parties can benefit from price premiums. It gives control to the producers which can help build strong regional networks. This offers an alternative to producers merely being at the bottom of the commodity value chain. GI investment could also lead to increased regional food tourism in New Zealand. Food tourism is a growing area of demand, yet this has remained a largely untapped market in New Zealand. As food columnist Lauraine Jacobs wrote, New Zealand tourism is focused on "hobbits, thrill-seeking adventurers and stunning scenery...Much of our economy is based on food exports, so why not encourage the world's foodies to visit and enjoy our excellent food here".¹⁸¹ Apart from a few districts with established food networks, such as the Hawke's Bay food and wine trail and the Central Otago wine trail, there are still a number of food producing regions that could benefit from increased investment and international recognition. Rural development is just one element of the picture. There would need to be wider benefits to the overall New Zealand economy to justify a *sui generis* regime in order to avoid benefiting certain sectors of society at the expense of wider public welfare.

D Protection from Genericisation

A final argument in support of a registration system is the protection it can provide against GIs becoming generic terms. Striking examples of once famous GIs that are now considered generic include Arabica coffee, India rubber, chinaware and Colby cheese. The genericisation of goods is an issue that New Zealand has not remained immune from. During the 20th century, New Zealand kiwifruit producers were unable to protect their brand. Today, there are South American and Italian "kiwi" being sold in America and Europe.¹⁸² While this is arguably a brand rather than a geographic identifier, it exemplifies the potential for unique New Zealand goods to become generic and the impact that a lack of direct protection can have on New Zealand's primary sector. Being able to protect and enforce rights over a GI is therefore an important tool for preventing GIs against becoming generic expressions.

¹⁸¹ Lauraine Jacobs "Adventures in food tourism" *New Zealand Listener* (online ed, New Zealand, 2 July 2014).

¹⁸² Frankel, above n 25, at 658.

A key characteristic of a *sui generis* system is that once registered, a GI is given indefinite protection and cannot become generic.¹⁸³ This does not protect goods that are already seen as generic as a GI may be refused protection if the competent authority considers that the sign constitutes a common name for the kind of product to which it applies.¹⁸⁴ As is evidenced by the EU's current attempt to "clawback" certain GIs, any attempts to reclaim generic terms are likely to be strongly resisted, given the vested interests of firms that use terms in their marketing to sell goods such as feta, china, cheddar, kiwi etc.¹⁸⁵ As most New Zealand goods that would be deemed GIs are quite specific place names that have not spread as far internationally as "cheddar" or "camembert", this is not a major issue for New Zealand. Nevertheless, there could be some benefit to establishing a system to prevent the risk of some particularly high profile goods becoming generic, for example "active" Manuka honey.

VII Drawbacks of Enhanced Protection

There are potential drawbacks of GI regulation that must also be considered. These drawbacks largely align with a private interest theory of regulation. Private theories are based on the assumption that regulation emerges from the actions of individuals or groups that are motivated to maximise their self-interest. There is no central aim to promote the public interest, and if it does, it is merely coincidental.¹⁸⁶ One well-known variant of a private interest theory is the public choice theory. This proposes that regulation is more likely to reflect the policy preferences of narrowly focused interest groups and consequently generate a net social loss.¹⁸⁷ Limiting the power of regulators and thus their ability to advance the interests of small groups at the expense of general interests would instead enhance social welfare. Market outcomes, however imperfect, are held to be better than an overstretched regulatory regime.¹⁸⁸

A Costs

A GI register is an expensive undertaking both for the taxpayer and for businesses wanting to adhere to GI standards. Bureaucracies at various levels are necessary to determine whether a GI should be registered and under what conditions. Organisation at

¹⁸³ Cáceres, above n 80, at 4.

¹⁸⁴ Paola, Frigant and Jalba, above n 3, at 34.

¹⁸⁵ Giovannucci and others, above n 11, at 16.

¹⁸⁶ Bronwen Morgan and Karen Yeung *An Introduction to Law and Regulation: Texts and Materials* (Cambridge University Press, Cambridge, 2007) at 43.

¹⁸⁷ At 47.

¹⁸⁸ At 50.

the producer level is also required to bring companies into adherence and help facilitate the setting of standards.¹⁸⁹ A legitimate GI system should ensure consistent product standards and close geographical connection. This involves a determination of specifications and enforcement mechanisms. Even a more simple system, requiring only the geographical location, would require considerable resources.¹⁹⁰

Registering GIs are not their own reward. Investment is required to build their reputation by way of protection, promotion and advertising. This can be a considerable cost in a competitive environment.¹⁹¹ In countries without a formal registration system, regional reputation may not be a common marketing tool. Building goodwill associated with regional traits is expensive and will also take time. If rushed and artificial, a GI is unlikely to be successful. For example, Pico Duarte coffee was a new GI created in the Dominican Republic due to scientific analysis of the soil type and topography in a particular region. The GI was found to be ineffective, with high production costs, small production volumes and insufficient development of its reputation.¹⁹²

B Restraints on Production and Innovation

There is the potential for GI registration systems with strict production standards to impose detrimental rigidities on production and supply, as well as additional costs in terms of inflexibility to compete by innovation.¹⁹³ A public interest theorist would argue that these restraints are evidence of the risks of overregulation. By imposing geographical limits, GI registration can potentially:¹⁹⁴

...restrain the ability of a local industry to respond flexibly to natural variations in production levels. It may also impede flexible responses to market signals, in particular variations in demand in the presence of a relative inability to vary price.

New Zealand agricultural industries are subject to meteorological and other natural hazards, for example droughts, high snow fall and floods. Strong GI registration systems have no effective response for these events and can have negative results if product cannot be imported from outside the designated zone. This negative feature would be

¹⁸⁹ Van Caenegem, above n 105, at 176.

¹⁹⁰ At 176.

¹⁹¹ At 176.

¹⁹² Van Caenegem, Cleary and Drahos, above n 159, at 13.

¹⁹³ Van Caenegem, above n 105, at 175.

¹⁹⁴ William Van Caenegem "Registered Geographical Indications: Between Intellectual Property and Rural Policy – Part I" (2003) 5 JWIP 699 at 715.

most acute if all stages of production, processing and preparation was required to occur within the area, for instance as is required under European PDOs. By contrast, PGIs are much more flexible, with only one stage needing to occur within the designated area. However, the reputation of the good is likely to suffer if the link with locality is more tenuous and the central purpose of the GI registration is essentially undermined.¹⁹⁵

If GI registration requires, in addition to rules of origin, specifications for production standards, this can result in a significant break on innovation. While this may be an advantage where traditional artisan production methods are well-established, when this is not the case, GI registration can be very restrictive.¹⁹⁶ In the EU, in spite of the regulations permitting amendment of specifications after registration, some critics still argue that producers are constrained by the required production processes for GIs.¹⁹⁷ Collective consultation and agreement can be slow, preventing rapid adaptation to changing competitive environments. In “new world” agricultural countries, such as New Zealand, experimentation in crops and practices is still on-going and it would perhaps be counter-productive to place artificial barriers in its path.¹⁹⁸ If New Zealand was to undertake a GI registration system, it would need to have enough flexibility to keep local producers in control of any particular standards and have processes to ensure that these could adapt with developing technology and practices.

C Distorting Competition and Development

Opponents to GI systems similarly argue that highly restrictive GI regimes can distort competition and prevent alternative land use. GIs essentially confer a monopoly on the group of producers that reside in the specified geographic area and engage in the production of the good to which the indicator is applied. Monopolies can provide rents to those who have been endowed the monopoly rights.¹⁹⁹ Opponents argue that strong GI protection distorts competition as it supports inefficient rural production and land-use and prevents efficiencies in agricultural production that can itself deliver variety and lower prices.²⁰⁰ Registration systems tend to benefit established industries in rural areas which adhere to traditional methods and established crop choices which have maintained

¹⁹⁵ At 716.

¹⁹⁶ At 717.

¹⁹⁷ Echols, above n 12, at 27.

¹⁹⁸ Van Caenegem, above n 194, at 718.

¹⁹⁹ William A. Kerr “Enjoying a Good Port with a Clear Conscience: Geographic Indicators, Rent Seeking and Development” (2006) 7 ECJILTP 1 at 6.

²⁰⁰ Van Caenegem, above n 194, at 712-713.

geographic integrity and have an established reputation.²⁰¹ Alternative land use within a particular area may be displaced by a registration system, which entrenches existing uses that are not necessarily optimal. As such, experimentation with different crops or rural products will be discouraged.²⁰² The number of GIs that could be successful will be limited in number, which consequentially means that only some local producer groups will truly gain the benefits from increased protection. Public choice theorists would argue that regulation is only benefiting a select few, yet resulting in a cost to the wider public.

VIII International Considerations

A Protection from Misuse

GIs are governed by the “territoriality principle” which means that the effects of the right obtained in a particular jurisdiction are limited to that jurisdiction’s territory.²⁰³ In today’s globalised economy where most well-known GI products are exported around the world, protection in markets where the product is being commercialised will likely be paramount. Some jurisdictions make it possible for other countries to gain protection of a GI within their national frameworks. For example, in the United States an application for registration of a certification mark may be filed with the USPTO.²⁰⁴ The EU also gives the opportunity for non-EU states to register geographical names. However, the EU register will only allow the inclusion of foreign GIs if permitted under a bilateral agreement and on the basis of equivalent *sui generis* protection. Bilateral and multilateral agreements are being used as a way to increase the level of protection for countries’ respective GIs on the basis of mutual recognition.

As the main focus for New Zealand GIs is overseas export markets, protection of GIs in foreign countries is an important consideration. There is an on-going risk that the misappropriation of New Zealand goods (or “food fraud”) is having a negative impact on New Zealand exporters by undermining the value of reputable brands and potentially putting consumers at risk. Food fraud occurs when a product is substituted, adulterated, mislabelled or counterfeited. The motive is almost always economic gain, and the longer and more complicated the supply chain, the more opportunity there is for deception to be carried out.²⁰⁵ A recent KPMG Agribusiness Report highlighted how historically New

²⁰¹ Van Caenegam, above n 105, at 175.

²⁰² Van Caenegam, above n 194, at 714.

²⁰³ Paola, Frigant and Jalba, above n 3, at 35.

²⁰⁴ At 37.

²⁰⁵ “The Risk: Food Fraud” Oritain <oritain.co.nz>.

Zealand has not secured geographical protection for native flora and fauna, and is now facing companies growing products offshore or passing off similar products.²⁰⁶ To again use the example of Manuka honey, there are risks that the active honey is being counterfeited by overseas producers, and international competitors are launching imitative active honey.²⁰⁷ As discussed in relation to the wine and spirit register, using general consumer and unfair competition laws to protect and enforce an unregistered GI in an overseas jurisdiction is complex, difficult and inherently uncertain.²⁰⁸ With the growth of *sui generis* regimes in key export markets such as China, South East Asia and the EU, the ability to demonstrate that a New Zealand GI is officially recognised in New Zealand can assist with gaining protection in important export markets.

If protection is gained, defending GIs from counterfeit production in foreign markets is unlikely to be simple. Even if foreign governments are responsible for enforcement, GI right holders will have to expend resources monitoring overseas producers and bringing any violations to the government's attention. Defence may also require a formal legal case, which will likely incur considerable resources.²⁰⁹ GI producers have coordinated their efforts in response to such challenges. In 2003, the Organisation for an International Geographical Indications Network (OriGIIn) was established. Based in Geneva, this NGO promotes advocacy campaigns for extended GI protection, as well as assisting its members to monitor and denounce to relevant enforcement authorities the unlawful use of their GIs and to enforce their rights in third countries' jurisdictions.²¹⁰

B Bilateral Trade-Offs

As the EU is actively negotiating for the protection of GIs through bilateral agreements, establishing a full *sui generis* system could further support New Zealand's interest in securing a FTA with the EU. This was, after all, one of the key reasons for implementing the Wine and Spirits Registration Act. The EU will likely want to protect a number of its GIs in New Zealand. With any GI agreement, individual countries have to assess the value of the bargain offered in terms of the reciprocal protection of some specific geographic terms of their own.²¹¹ The EU has recently been pursuing a number of

²⁰⁶ *Agribusiness Agenda 2015 Volume 1: Growing Value* (KPMG, 2015) at 43.

²⁰⁷ Coriolis, above n 30, at 45.

²⁰⁸ Ministry of Economic Development, above n 115, at [42].

²⁰⁹ Kerr, above n 199, at 9.

²¹⁰ Massimo Vittori "The International Debate on Geographical Indications (GIs): The Point of View of the Global Coalition of GI Producers – oriGIIn" (2010) 13 JWIP 304 at 310.

²¹¹ Van Caenegem, above n 105, at 178.

bilateral trade deals in Asia that contain a chapter of GIs. In 2011 the EU-Korea FTA was concluded with provisions for GI protection. The EU has 60 agricultural products and more than 100 wine and spirits listed to be protected in South Korea, and South Korea has 63 agricultural products and one spirit to be protected in the EU.²¹² The EU has also concluded a FTA with Singapore. Despite Singapore having traditionally been a strong promoter of trade marks as the appropriate means to protect GIs, it agreed to establish a GI register.²¹³ The EU is additionally pursuing FTA negotiations with Malaysia and Vietnam, with both countries having already established GI registers along the lines of the EU system.

It may be determined that it is in New Zealand's best interest to rebrand certain goods in return for enhanced overseas protection. This understandably sounds alarming and may conjure images of New Zealand producers not being able to brand products with widely used names, such as parmesan and mozzarella. This outcome is not likely to be a major concern as most of the GIs the EU have been protecting via FTAs contain a direct reference to a geographical place. The component parts may be used on their own without undermining the GI. For example, while the GI *Mozzarella di Bufala Campana* is protected in South Korea, producers from South Korea (and countries that sell cheese in South Korea) would be free to use the term mozzarella.²¹⁴ The main issue for New Zealand producers will be if the EU demands protection for single word component GIs, such as Feta, as it has in South Korea and Singapore.

The recent Comprehensive Economic and Trade Agreement (CETA) between Canada and the EU exemplifies how the EU has been prepared to allow some breathing room with GI protection. A core part of this trade agreement is the requirement for Canada to protect more than 170 additional GIs for food and agricultural products. There are some exceptions to the strict requirements, for example the names Asiago, Feta, Fontina and Munster can still be used for cheeses if accompanied with expressions such as "style" or "like". They can also be used without such expressions by any person who has made commercial use of them prior to 18 October 2013.²¹⁵ It is yet to be seen how the

²¹² Jayashree Watal "Is TRIPS a Balanced Agreement from the Perspective of Recent Free Trade Agreements?" in Josef Drexel, Henning Grosse Ruse-Khan and Souheir Nadde-Phlix (eds) *EU Bilateral Trade Agreements and Intellectual Property: For Better or Worse?* (Springer Heidelberg, Berlin, 2014) at 50.

²¹³ Bernard O'Connor "The European Union and the United States: Conflicting Agendas on Geographical Indications – What's Happening in Asia?" (2014) 9 G.T. & C.J 66 at 66.

²¹⁴ At 69.

²¹⁵ "What's in a name? Geographical Indications under CETA" Gowlings <www.gowlings.com>.

requirements will be interpreted and implemented into Canadian law. This approach suggests that there may be some negotiating room for New Zealand if it were to enter into a bilateral arrangement with the EU. GIs will always be just one aspect of a wider trade agreement and some concessions from New Zealand on GI protection may grant important benefits in other areas. Any decision to rebrand goods would have to be decided on a product by product basis as part of the negotiation process.

C New Zealand and Conflicting GI Agendas

There is the risk that countries which have negotiated FTAs with the EU are belonging to more than one preferential trade agreement and are in the process making inconsistent commitments. For example, South Korea also has a FTA with the United States, which is founded on trade mark law. The United States argues that American producers can no longer sell many of their generically marketed products in South Korea. This is arguably a nullification or impairment of a benefit for the United States due to market access being denied for some of its products.²¹⁶ Canada also risks similar conflicting agreements because of its existing obligations under the North American Free Trade Agreement (NAFTA). There is a likely overlap between the products for which GI recognition will be given under CETA and those that trade under NAFTA either with trade mark protection or as generic products.²¹⁷

New Zealand is also at risk at setting itself up for irreconcilable commitments. New Zealand, along with Canada, Singapore, Vietnam and Malaysia is part of the Trans-Pacific Partnership (TPP) negotiations for a regional trade agreement between the United States and other Pacific Rim countries. Many of the leaked draft TPP provisions appear to directly target EU GI philosophy by protecting the interests of trade mark owners who may have used geographical terms in their trade marks or as generic terms describing a product.²¹⁸ The TPP also makes GIs a subsidiary doctrine to trade marks. Registration of GIs, if available through a *sui generis* or trade mark regime, is made subject to opposition and/or cancellation where the GI would cause confusion with an existing trade mark, or where the GI is a term customary used as a common name.²¹⁹ The TPP defines a generic GI in a way that would allow one country's generic use of a term to defeat a claim of a GI

²¹⁶ Crina Viju, May T. Yeung and William A. Kerr "Geographical Indications, Conflicted Preferential Agreements, and Market Access" (2013) 16(2) J Intl Econ L 409 at 410-411.

²¹⁷ At 437.

²¹⁸ Kimberlee Weatherall "TPP – Section-by-Section Analysis of Some Provisions People Aren't Talking About" (29 October 2014) Social Science Research Network <www.ssrn.com> at 18.

²¹⁹ At 18.

that is protected in another country. For example, it appears possible that a GI term could be considered generic in Peru because it has become generic in the United States.²²⁰ It also provides that a trade mark or GI may become generic even after registration or recognition.²²¹

That the TPP embodies a version of GI protection preferred by countries like the United States and Australia is not surprising. But, as one commentator wrote, it is striking how aggressive the TPP is in trying to prevent and pre-empt the ability of any TPP country from doing any future deal with the EU regarding GIs.²²² There is the danger that the strict approach within the TPP could prevent New Zealand from gaining any future protection for GIs within the EU and other countries with GI registers. The TPP proposals seek to preclude this sort of deal as the registration of a GI would be subject to potential opposition and cancellation if the GI causes confusion with an existing trade mark or if it is customarily used.²²³ The recent extension of the Lisbon Agreement to include GIs is further evidence of the growing importance of GIs in the international realm. The Lisbon Agreement could allow New Zealand to gain protection of its GIs in a number of other nations, especially if many of its close trading partners also join. It is likely a dangerous move for New Zealand to completely rule out the potential for developing GIs by following a strict trade mark approach.

IX Conclusion

In recent years, geographical indications have developed from being a relatively obscure topic to one of exceeding interest for policy-makers, trade negotiators, lawyers and producers. A growing body of literature has emerged on the trade benefits GIs can have in conveying attributes such as market differentiation, reputation and quality standards. Research shows that consumers are prepared to pay more for higher quality goods. GIs are increasingly being recognised as a tool for securing consumers' loyalty by establishing a link between product attributes and their geographical origin. As an exporting nation, New Zealand continuously needs to consider the best measures for adding value to goods. Investing in intangible assets which highlight New Zealand's environment and high production standards is one way exporters can gain a comparative advantage over other countries. This paper has argued that GIs are not a common

²²⁰ Jimmy Koo "Trans-Pacific Partnership – Intellectual Property Rights Chapter February Draft – Section by Section Analysis" Info Justice <www.infojustice.org> at 10-11.

²²¹ O'Connor, above n 213, at 67.

²²² Weatherall, above n 218, at 18.

²²³ At 18.

marketing tool for New Zealand exporters and that there are real benefits for many smaller producers to invest in GIs as a way to develop niche markets.

While the major markets for GI products, including the EU and the United States, appreciate the validity of GIs, a divergent split has occurred between old and new world countries over the best means to protect GIs. This international debate involves not only whether *sui generis* or trade mark systems are preferable, but also issues such as the EU trying to clawback generic GIs, international registers, and the EU and United States trying to spread their approaches into other countries. New Zealand is caught in the middle of this complex international debate. While following a trade mark approach, in reality there is little direct protection of GIs in New Zealand with limited knowledge and use of certification marks for their protection.

This paper has questioned whether introducing a *sui generis* GI regime would have any potential benefits, or if a certification mark approach is sufficient. At the domestic level, investing in enhanced protection has the potential to grant New Zealand producers some tangible benefits. By granting proprietary rights to the use of GIs, a registration system acts as an incentive for local producers to collectively invest and develop GIs, thereby encouraging small-scale production and cost-sharing. While certification marks can confer ownership and set standards, their private nature make them a limited mechanism for protecting against free-riding and establishing a common standard for each GI. GI registration is also a more effective mechanism for commanding premium prices because of its enhanced protection and clearer ability to convey quality standards. There are counterarguments to increased regulation, with GIs potentially benefiting only certain producer groups, yet requiring considerable establishment and protection costs which are predominantly borne by the public. There are also risks that stringent standards may distort production and competition. However, many of these drawbacks can be ameliorated by establishing a system that is flexible and gives producer groups the ability to adapt to changing technologies and market demands.

While there is at least the potential for a *sui generis* system to give New Zealand some domestic benefits, a strategic reason for establishing a registration system would be for the international trade benefits it could provide. Most countries with *sui generis* regimes require an equivalent system of protection. A similar system could allow New Zealand to gain GI protection in important overseas markets, such as the EU and China. GIs are an important negotiating tool for a trade agreement with the EU and it may be decided that any relabelling of New Zealand products is worth the increased EU market access. There

is a real risk that New Zealand could be precluding any future deal by giving trade marks an enhanced status under the TPP. GIs are becoming increasingly important, as evidenced by more countries establishing *sui generis* regimes and the recent extension of the Lisbon Agreement. There is the danger that “refusing to consider GI regulation now assumes the future will look like the past.”²²⁴ New Zealand does not want to miss out on the potential benefits that come from future GI developments because the Government has not truly considered whether it too could benefit from increased GI protection.

²²⁴ Van Caenegem, Cleary and Drahos, above n 159, at 18.

X Bibliography

A Cases

Anheuser-Busch v Budweiser Budvar [2001] 3 NZLR 666.

Wineworths Group Ltd v Comite Interprofessional du Vin de Champagne [1992] 2 NZLR 327 (CA).

B Legislation

1 New Zealand

Fair Trading Act 1986.

Geographical Indications Act 1994.

Geographical Indications (Wine and Spirits) Registration Act 2006.

Trade Marks Act 2002.

2 European Union

Council Regulation (EEC) 2081/92 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs [1992] OJ L 208.

Council Regulation (EEC) 2082/92 on certificates of specific character for agricultural products and foodstuffs [1992] OJ L 208.

Regulation 510/2006 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs [2006] OJ L 93/12.

C International Treaties

Agreement on Trade-Related Aspects of Intellectual Property Rights 1869 UNTS 299 (opened for signature 15 April 1994, entered into force 1 January 1995).

Lisbon Agreement for the protection of appellations of origin and their international registration 923 UNTS 205 (open for signature 31 November 1958, entered into force 25 September 1966).

Madrid Agreement for the repression of false or deceptive indications of source on goods of April 14 1891, as last revised at Lisbon 828 UNTS 162 (opened for signature 31 November 1958, entered into force 1 June 1970).

Paris Convention for the protection of industrial property of March 20, 1883, as last revised at Stockholm 828 UNTS 305 (opened for signature 14 July 1967, entered into force 26 April 1970).

D WTO Submissions

Work on Issues Relevant to the Protection of Geographical Indications: Extension of the Protection of Geographical Indications for Wines and Spirits to Geographical Indications for Other Products IP/C/W/247/Rev.1 17 May 2001 (Proposal from Bulgaria, Cuba, The Czech Republic, Egypt, Iceland, India, Liechtenstein, Mauritius, Nigeria, Sri Lanka, Switzerland, Turkey and Venezuela).

E Parliamentary and Government Materials

(14 November 2006) 635 NZPD 6449.

Geographical Indications (Wine and Spirits) Registration Bill (278-2) (select committee report).

Export Market Group *Building Export Markets* (Ministry of Business, Innovation and Employment, Business Growth Agenda Report, August 2012).

Tim Groser and Paul Goldsmith *Geographical Indications (Wine and Spirits) Registration Act 2006 Cabinet Paper and Regulatory Impact Statement* (Submitted to the Cabinet Economic Growth and Infrastructure Committee, December 2014).

Ministry of Economic Development “Submission to the Foreign Affairs, Defence and Trade Select Committee on the Geographical Indications (Wine and Spirits) Registration Bill”.

F Press Releases

Tim Groser and Paul Goldsmith “Wine and Spirit geographical registration coming” (press release, 31 March 2015).

New Zealand Winegrowers “A big step forward for the New Zealand wine industry” (press release, 31 March 2015).

G Books and Chapters in Books

Nuria Ackermann *Adding value to traditional products of regional origin: A guide to creating a quality consortium* (UNIDO, Vienna, 2010).

Billy A. Melo Araujo “The EU’s Deep Trade Agenda: Stumbling Block or Stepping Stone Towards Multilateral Liberalisation?” in Christoph Herrmann, Markus Krajewski and Jörg Philipp Terhechte (eds) *European Yearbook of International Economic Law 2014* (Springer-Verlag, Berlin, 2013).

Giovanni Belletti and Andrea Marescotti “Origin Products, Geographical Indications and Rural Development” in Elizabeth Barham and Bertil Sylvander *Labels of Origin for Food: Local Development, Global Recognition* (CABI, Oxfordshire, 2011).

Michael Blakeney *Intellectual Property Rights and Food Security* (CABI, Wallingford, 2009).

Michael Blakeney *Trade Related Aspects of Intellectual Property Rights: A Concise Guide to the TRIPs Agreement* (Sweet & Maxwell, London, 1996).

Cerkia Bramley, Estelle Bienabe and Johann Kirsten “The Economics of Geographical Indications: Towards a Conceptual Framework for Geographical Indication Research in Developing Countries” in *The Economics of Intellectual Property* (WIPO, Geneva, 2009).

Marsha A Echols *Geographical Indications for Food Products: International Legal and Regulatory Perspectives* (Kluwer Law International, the Netherlands, 2008).

Carsten Fink and Keith Maskus “The Debate on Geographical Indications in the WTO” in Richard Newfarmer (ed) *Trade, Doha and Development: A Window into the Issue* (World Bank, Washington, 2006).

Susy Frankel *Intellectual Property in New Zealand* (2nd ed, Lexis Nexis, Wellington, 2011).

Daniele Giovannucci and others *Guide to Geographical Indications: Linking Products and Their Origins* (International Trade Centre, Geneva, 2009).

Roland Herrmann and Ramona Teuber “Geographically Differentiated Products” in Jayson L. Lusk, Jutta Roosen and Jason F. Shogren (eds) *The Oxford Handbook of Food Consumption and Policy* (Oxford University Press, Oxford, 2011).

Herman Cohen Jehoram (ed) *Protection of Geographical Denominations of Goods and Services* (Sijthoff & Noordhoff, Amsterdam, 1980).

Bronwen Morgan and Karen Yeung *An Introduction to Law and Regulation: Texts and Materials* (Cambridge University Press, Cambridge, 2007).

Maria Paola, Nathalie Frigant and Violeta Jalba *Geographical Indications: An Introduction* (WIPO, Geneva, Product No. 9529E).

Bernard O’Connor *The Law of Geographical Indications* (Cameron May, London, 2004).

Dwijen Rangnekar *Geographical Indications: A Review of Proposals at the TRIPS Council: Extending Article 23 to Products other than Wines and Spirits* (ICTSD, Geneva, 2003).

Jayashree Watal “Is TRIPS a Balanced Agreement from the Perspective of Recent Free Trade Agreements?” in Josef Drexel, Henning Grosse Ruse-Khan and Souheir Nadde-Phlix (eds) *EU Bilateral Trade Agreements and Intellectual Property: For Better or Worse?* (Springer Heidelberg, Berlin, 2014).

H *Journal Articles*

Felix Addor and Alexandra Grazioli “Geographical Indications beyond Wine and Spirits” (2002) 5 JWIP 865.

George A. Akerlof “The Market for “Lemons”: Quality Uncertainty and the Market Mechanism” (1970) 84 Q.J.Econ. 488.

Alan Bollard and David G Mayes “Lessons for Europe from New Zealand’s Liberalisation Experience” (1993) 143 N.I.E.R 81.

Susy Frankel “The Mismatch of Geographical Indications and Innovative Traditional Knowledge” (2011) 1 VUWLRP 1.

Daniele Giovannucci, Elizabeth Barham and Richard Pirog “Defining and Marketing “Local” Foods: Geographical Indications for US Products” (2010) 13 J.W.I.P 94.

Philip B Gurney “Protecting goodwill in New Zealand wine labels – how will “geographical indications” bolster existing IP rights (if at all)? (2008) 5 NZIPJ 484.

Justin Hughes “Champagne, Feta and Bourbon: The Spirited Debated About Geographical Indications” (2006) 58 Hastings L.J. 299.

Erik W. Ibele “Nature and Functions of Geographical Indications in Law” (2009) 10 ECJILTP 36.

William A. Kerr “Enjoying a Good Port with a Clear Conscience: Geographic Indicators, Rent Seeking and Development” (2006) 7 ECJILTP 1.

Lina Monten “Geographical Indications of Origin: Should They Be Protected and Why? An Analysis of the Issue from the U.S and EU Perspectives” 22 (2005) Santa Clara Computer & High Tech.LJ 315.

Emily Nation “Geographical Indications: The International Debate over Intellectual Property Rights for Local Producers” (2001) 82 U.Colo.L.Rev. 959.

Bernard O’Connor “The European Union and the United States: Conflicting Agendas on Geographical Indications – What’s Happening in Asia?” (2014) 9 G.T. & C.J 66.

Kal Raustiala and Stephen R. Munzer “Global Struggle over Geographic Indications” (2007) 18 EJIL 337.

Stephen Stern and Katerina Makris “Should Australia implement a full GI System?” (2009) 76 IPF 39.

William Van Caenegem “Registered Geographical Indications: Between Intellectual Property and Rural Policy – Part I” (2003) 5 JWIP 699.

William van Caenegem “Registered GIs: Intellectual Property, Agricultural Policy and International Trade” (2004) 26 E.I.P.R 170.

William Van Caenegem, Jen A. Cleary and Peter Drahos “Pride and Profit: Geographical Indications as Regional Development Tools in Australia” (2014) 16 JESP 1.

Crina Viju, May T. Yeung and William A. Kerr “Geographical Indications, Conflicted Preferential Agreements, and Market Access” (2013) 16(2) *J Intl Econ L* 409.

Massimo Vittori “The International Debate on Geographical Indications (GIs): The Point of View of the Global Coalition of GI Producers – oriGIn” (2010) 13 JWIP 304.

Jason A. Winfree and Jill J. McCluskey “Collective Reputation and Quality” (2005) 87 *Amer. J. Agr. Econ* 206.

I Conference and Research Papers

Bruce A. Babcock and Roxanne Clemens “Geographical Indications and Property Rights: Protecting Value-Added Agricultural Products” (Briefing Paper, Iowa State University, 2004).

Ester Olivias Cáceres “Perspectives for Geographical Indications” (paper presented to International Symposium on Geographical Indications, Beijing, June 2007).

David R Downes and Sarah A. Laird “Innovative Mechanisms for Sharing Benefits of Biodiversity and Related Knowledge: Case Studies on Geographical Indications and Trademarks” (paper prepared to the UNCTAD Biotrade Initiative, 1999).

Marcis Garcia “Squaring the Circle?: Approaches to Intellectual Property Rights and the TTIP” (paper presented to UACES 44th Annual Conference, Cork, September 2014).

Kirsty Schmutzsch “Wheying up the Options: How do Geographical Indications used in the European Union Influence New Zealand Specialty Cheese?” (MA Thesis, University of Canterbury, 2012).

Kimberlee Weatherall “TPP – Section-by-Section Analysis of Some Provisions People Aren’t Talking About” (29 October 2014) Social Science Research Network <www.ssrn.com>.

J Newspaper and Magazine Articles

Tony Baldwin “Fonterra – the options for change” *The New Zealand Herald* (online ed, Auckland, 28 August 2015).

Lauraine Jacobs “Adventures in food tourism” *New Zealand Listener* (online ed, New Zealand, 2 July 2014).

Virginia Nichols “Certification marks – for non-traders only” *Law Talk* (New Zealand, 8 May 2015).

“Revised WIP Lisbon Agreement to Cover Geographical Indications” (2015) 19(19) *Bridges* 4.

K *Research Reports*

“Fonterra & the New Zealand dairy industry: options going forward” (Coriolis, February 2010).

Coriolis *Investment Opportunities in the New Zealand Honey Industry* (Coriolis, May 2012).

KPMG *Agribusiness Agenda 2015 Volume 1 - Growing Value* (KPMG, 2015).

Export Market Group *Building Export Markets* (Ministry of Business, Innovation and Employment, Business Growth Agenda Report, August 2012).

Nic Lees and Caroline Saunders *Maximising Export Returns (MER): Communicating New Zealand’s Credence Attributes to International Consumers* (Agribusiness and Economics Research Unit, Lincoln University, 2015).

L *Internet Resources*

Sue Irwin Ironside “Encouraging Origins – Geographical Indications may finally become registerable in New Zealand” (13 April 2015) Baldwins Law Limited <www.baldwins.com>.

Jimmy Koo “Trans-Pacific Partnership – Intellectual Property Rights Chapter February Draft – Section by Section Analysis” Info Justice <www.infojustice.org>.

Tony Nightingale “Deregulation and environmental regulations, 1984 onwards” Te Ara – the Encyclopedia of New Zealand <www.teara.govt.nz>.

Tony Nightingale “Government and agriculture: Subsidies and changing markets, 1946-1983” Te Ara – the Encyclopedia of New Zealand <www.teara.govt.nz>.

“Agribusiness” New Zealand Trade and Enterprise <www.nzte.govt.nz>.

“Collective Marks” IPONZ (16 November 2009) <www.iponz.govt.nz>.

“Native Floral Honey” Pure New Zealand Honey <purenewzealandhoney.com>.

“Office of Policy and International Affairs - Geographical Indications (GI) Protection” USPTO (2013) <www.uspto.gov>.

“Overview: The TRIPS Agreement” World Trade Organisation <www.wto.org>.

“Stilton Facts” Stilton Cheese <www.stiltoncheese.co.uk>.

“Unique New Zealand” Honey New Zealand <honey.co.nz>.

“Taking New Zealand to the World: Why Exporting Matters” BusinessNZ (November 2007) <www.businessnz.org.nz>.

“The Risk: Food Fraud” Oritain <oritain.co.nz>.

“WIPO-Administered Treaties” WIPO <www.wipo.int>.

“What is a trade mark?” IPONZ <www.iponz.govt.nz>.

“What’s in a name? Geographical Indications under CETA” Gowlings <www.gowlings.com>.