

When Geographical Indications Meet Intangible Cultural Heritage: The New Japanese Act on Geographical Indications

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1 INTRODUCTION

‘Some scholars have begun to acknowledge the symmetries between formal recognition as GI [geographical indications] and as ICH [intangible cultural heritage],’¹ Dev Gangjee reports in his paper *Geographical Indications and Cultural Rights: The Intangible Cultural Heritage Connection?*² Gangjee then tells us that ‘Brazilian researchers have identified the strategic potential for GI protection for the clay pots of Goiabeiras, from the Brazilian state of Espírito Santo’.³ Subsequently, not only did Brazil formally recognize these pots under their intangible cultural heritage (ICH) laws, but also registered it as a geographical indication (GI). The idea behind this double recognition was to boost the marketing of this ICH and, if necessary, provide ‘protection in the international markets’.⁴

The Brazilian example shows that GIs are not necessarily restricted to agricultural products. The extension of the scope of GIs beyond strictly agricultural products is the subject of intensive research.⁵ In fact, several

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¹ Dev S. Gangjee, *Geographical Indications and Cultural Rights: The Intangible Cultural Heritage Connection?*, in RESEARCH HANDBOOK ON HUMAN RIGHTS AND INTELLECTUAL PROPERTY 544, 555–556 (Christophe Geiger ed., 2015) [hereinafter Gangjee, *GIs and Cultural Rights*].

² *Id.* at 556. ³ *Id.* ⁴ *Id.*

⁵ See, e.g., Michael Blakeney, *Geographical Indications, Traditional Knowledge, Expressions of Culture and the Protection of Cultural Products in Africa*, in EXTENDING THE PROTECTION OF GEOGRAPHICAL INDICATIONS: CASE STUDIES OF AGRICULTURAL PRODUCTS IN AFRICA 120

countries, such as Japan, have already taken the step to adopt legislation with a broad protective scope for GIs.⁶ The Japanese Parliament – the Diet – has amended what is regarded as ‘the’ Geographical Indications Act (GI Act) of Japan,⁷ the *Tokutei Norin Suisan Butsu to no Meisho no Hogo ni Kansuru Horitsu* (Act for the Protection of the Names of Designated Agricultural, Forestry and Fishery Products and Foodstuffs) (GI Act),⁸ to include derivatives of agricultural products⁹ (e.g., Japanese lacquer, an organic substance made from the sap of the urushi tree).

The extended scope of protection for ‘non-edible agricultural, fishery or forestry products and products manufactured or processed using agricultural, forestry and fishery products’¹⁰ opens the discussion of applying the GI Act to ICH, as Brazil already has. Because this is already a reality, the idea cannot simply be dismissed with arguments that GIs are not suitable for protecting ICH. It does not matter that the reasoning behind such arguments is valuable; there has to be some guidance for communities – the holders of ICH – about the possible hidden dangers of applying for a GI in relation to products based on ICH.

This chapter is structured as follows. Section 2 will introduce that the debate on GIs and ICH has mainly two opposing views on the role GIs can play for ICH. By unveiling the scope of the new Japanese GI Act, the section

(Michael Blakeney, Thierry Coulet, Getachew Mengistie, & Marcelin Tonye Mahop eds., 2012); Michael Blakeney, *Protection of Traditional Knowledge by Geographical Indications*, 3 INT’L J. INTELL. PROP. MGMT 357 (2009); INSIGHT CONSULTING, REDD AND ORIGIN, STUDY ON GEOGRAPHICAL INDICATIONS PROTECTIONS FOR NON-AGRICULTURAL PRODUCTS IN THE INTERNAL MARKET: FINAL REPORT (2013) available at http://ec.europa.eu/internal_market/indrop/docs/geo-indications/130322_geo-indications-non-agri-study_en.pdf.

⁶ In several countries, protection for GIs extends beyond agricultural products. Among these countries are Brazil, Chile, China, Colombia, Russia, and Switzerland. See, e.g., INSIGHT CONSULTING, REDD & ORIGIN, *supra* note 5, at 19–20.

⁷ See, e.g., MINISTRY OF AGRICULTURE, FORESTRY AND FISHERIES, *Geographical Indication (GI) Protection System in Japan*, MAFF, www.maff.go.jp/e/japan_food/gi_act/pdf/gi_pamph.pdf (last visited March 10, 2016); Junko Kimura, *Dawn of Geographical Indications in Japan: Strategic Marketing Management of GI Candidates* (2015), available at [http://ageconsearch.umn.edu/bitstream/200232/2/J.%20Kimura%20\(2015\)%20Dawn%20of%20Geographical%20Indications%20in%20Japan%20Strategic%20Marketing%20Management%20of%20GI%20Products%20Candidates.pdf](http://ageconsearch.umn.edu/bitstream/200232/2/J.%20Kimura%20(2015)%20Dawn%20of%20Geographical%20Indications%20in%20Japan%20Strategic%20Marketing%20Management%20of%20GI%20Products%20Candidates.pdf) (last visited 15 September 2015).

⁸ *Tokutei Norin Suisan Butsu to no Meisho no Hogo ni Kansuru Horitsu* [Act for the Protection of the Names of Designated Agricultural, Forestry and Fishery Products and Foodstuffs], 25 June 2014, available at www.maff.go.jp/j/shokusan/gi_act/outline/pdf/doc4.pdf [hereinafter GI Act]. See Juichi Hayashi, *Japan to Implement GI System on June 1, 2015*, GAIN Report Number JA5008 (2015), available at http://gain.fas.usda.gov/Recent%20GAIN%20Publications/Japan%20to%20Implement%20GI%20system%20on%20June%201%202015_Tokyo_Japan_3-10-2015.pdf.

⁹ GI Act, *supra* note 8, art. 2. ¹⁰ *Id.*

will show that part of the debate has become obsolete because, in reality, GIs could sometimes overlap with ICH. Section 3 will describe in detail the conceptualization of the new Japanese GI Act. This will pave the way for further analysis in Section 4 of the perils and promises that the extension of the GI Act has on ICH. In conclusion, Section 5 will hold that although the GI Act extends to ICH, holders of ICH should still be careful when they seek to register products that incorporate their ICH as part of the GI.

2 GEOGRAPHICAL INDICATIONS AND INTANGIBLE CULTURAL HERITAGE: THE JAPANESE GEOGRAPHICAL INDICATIONS ACT

Without denying the existence of sophisticated studies,¹¹ the academic debate on the use of GIs in relation to ICH is divided.¹² On the one hand, scholars have defended the vision that GIs and ICH are two worlds apart.¹³ On the other hand, scholars have opined that GIs could have a positive contribution to ICH.¹⁴ These two visions probably emerged from the fact that GIs and ICH

¹¹ See, e.g., Justin Hughes, *Coffee and Chocolate – Can We Help Developing Country Farmers through Geographical Indications?* (Washington, DC: International Intellectual Property Institute, 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1684370.

¹² The debate is mainly conducted within the framework of traditional knowledge (TK) or traditional cultural expressions (TCE). The current chapter adopts the proposition that what has been said for TK and TCE can be transferred to intangible cultural heritage (ICH) as well. This is based on the parallels between the definitions that have been adopted or are being elaborated at the international level. See respectively Convention for the Safeguarding of the Intangible Cultural Heritage, U.N. Doc. MISC/2003/CLT/CH/14 (17 October 2003) [hereinafter ICH Convention]; The Protection of Traditional Knowledge: Draft Articles, WIPO Document No. WIPO/GRTKF/IC/28/5, June 2, 2014 www.wipo.int/meetings/en/doc_details.jsp?doc_id=276361; The Protection of Traditional cultural expressions: WIPO Document No. WIPO/GRTKF/IC/28/6, June 2, 2014 www.wipo.int/meetings/en/doc_details.jsp?doc_id=276220.

¹³ See, e.g., Tomer Broude, *A Diet Too Far? Intangible Cultural Heritage, Cultural Diversity, and Culinary Practices*, in *DIVERSITY IN INTELLECTUAL PROPERTY: IDENTITIES, INTERESTS, AND INTERSECTIONS* 472 (Irene Calboli & Srividhya Ragavan eds., 2015); Susy Frankel, *The Mismatch of Geographical Indications and Innovative Traditional Knowledge* 29(3) *PROMETHEUS* 253–267 (2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1953033; Toshiyuki Kono, *Geographical Indication and Intangible Cultural Heritage*, in *LE INDICAZIONI DI QUALITÀ DEGLI ALIMENTI: DIRITTO INTERNAZIONALE ED EUROPEO* 289 (Benedetta Ubetazzi & Esther Muñoz Espada eds., 2009); Tomer Broude, *Taking 'Trade and Culture' Seriously: Geographical Indications and Cultural Protection in WTO Law*, 26 *U. PA. J. INT'L L.* 623 (2005) [hereinafter Broude, *Trade and Culture*].

¹⁴ See, e.g., Gangjee, *GIs and Cultural Rights*, *supra* note 1, at 544; Irene Calboli, *Of Markets, Culture, and Terroir: The Unique Economic and Culture-Related Benefits of Geographical Indications of Origin*, in *RESEARCH HANDBOOK ON INTERNATIONAL INTELLECTUAL PROPERTY* 433 (Daniel Gervais ed., 2014); Delphine Marie-Vivien, *The Protection of Geographical Indications for Handicrafts: How to Apply the Concepts of Natural and Human Factors to All Products*, 4 *WIPO J.* 191 (2013); Daniel Gervais, *Traditional Innovation and the*

have ‘their focus on old creativity and community ownership, rather than new knowledge and individual ownership’.¹⁵

Among these debating scholars, it is not only possible to distinguish two different views – one stating that GIs and ICH are two worlds apart, and one arguing in favour of using GIs to safeguard ICH – but it is also possible to discern the two distinct approaches to support each view. One approach focuses on the definition of GIs and ICH to argument either for or against a supportive role.¹⁶ The other approach places emphasis on whether a GI could, in practice, mean something for ICH in order to conclude in favour, or disfavour, of a supportive role.¹⁷

Reaching different outcomes for a similar question may lead to the conclusion that there is confusion on the substantive matter. But one could attempt to disentangle the different understandings and bring clarity in the confusion: it could be argued that GIs have a different understanding of the collectivity concept.¹⁸ However, that does not mean that the holders of ICH are excluded from using the ICH just because a GI has been attached to a product produced by this heritage. In the same way, ICH may not have a monopoly right,¹⁹ but that does not necessarily mean that GIs are attributing a monopoly right to it. In fact, it is possible that a GI may not permanently preserve ICH, but that would equally deny the very nature of ICH. Theoretical statements made on the indirect support of GIs for ICH risk falling down a slippery slope if they are not supported by empirical evidence.²⁰

However, any attempt to achieve uniformity in the discussion on GIs and ICH may be obsolete. The reality is that legislators have created GI regimes that allow the registration of non-edible products. Japan, be it in a limited way, is one such example. The Japanese Diet passed the GI Act in 2014²¹ and has been operating under the supervision of the Ministry of Agriculture, Forestry and Fishery (MAFF) since 1 June 2015.²²

Ongoing Debate on the Protection of Geographical Indications, in INDIGENOUS PEOPLES’ INNOVATION: INTELLECTUAL PROPERTY PATHWAYS TO DEVELOPMENT 121, 132–143 (Peter Drahos & Susy Frankel eds., 2012) (admitting that the support is limited to non-secret traditional knowledge); Cerkia Bramley, *A Review of the Socio-Economic Impact of Geographical Indications: Considerations for the Developing World* (24 June 2011), available at www.wipo.int/le_docs/mdocs/geoind/en/wipo_geo_lim_11/wipo_geo_lim_11_9.pdf.

¹⁵ Marsha A. Echols, *Geographical Indications for Foods, TRIPS and the Doha Development Agenda*, 47 J. AFR. L. 199 (2003).

¹⁶ See references *supra* note 13 and 14. ¹⁷ *Id.* ¹⁸ See Frankel, *supra* note 13, at 8.

¹⁹ See Kono, *supra* note 13, at 298. ²⁰ See Calboli, *supra* note 14, at 452.

²¹ GI Act, *supra* note 8.

²² The focus of the Abe Cabinet on raising the profile of the agricultural sector as one of the pillars of the Japanese economy has facilitated the promulgation of a GI Act that solely focuses

MAFF being in charge of operating the GI Act (which may be explained by the fact that the agricultural sector wanted an extra layer of protection in place given the ongoing negotiations for the Trans-Pacific Partnership Agreement (TPPA))²³ has an impact on the definition of products eligible for a GI. Only products and foodstuffs that relate to agriculture, forestry, and fishery are within the protective scope of the GI Act.²⁴ However, the legislator did not limit the scope to only edible or drinkable agricultural, forestry, or fishery products and foodstuffs. Instead, it was decided that protection would also extend to non-edible manufactured or processed agricultural, forestry, and fishery products.

Article 2 of the GI Act enables the designation of the following products with a GI:

- (1) Edible agricultural, forestry, and fishery products
- (2) Food and beverages
- (3) Non-edible agricultural, forestry, and fishery products
- (4) Products manufactured or processed using agricultural, forestry, and fishery products.²⁵

on agricultural, forestry, and fishery products and foodstuffs. See Ministry of Agriculture, Forestry and Fisheries, *Abe Cabinet Agricultural Reform*, MAFF, <http://fpcj.jp/wp/wp-content/uploads/2014/07/a89885aa705c72d976dd953518d82140.pdf> (last visited 8 October 2015).

²³ See Nami Togawa, *Report on the New Japanese Law on Protection of Geographical Indications*, INTERNATIONAL ASSOCIATION FOR THE PROTECTION OF INTELLECTUAL PROPERTY (2014) available at <http://aippi.org/wp-content/uploads/committees/220/GR220japan.pdf>. MAFF had been trying to set up a *sui generis* system for the protection of GIs in 2003. However, in a power struggle with the Ministry of Economy, Trade and Industry of Japan (METI), MAFF had to recognize its superior in METI, which developed the regionally based collective trademark system. See Louis Augustin-Jean & Kae Sekine, *From Products of Origin to Geographical Indications in Japan: Perspectives on the Construction of Quality for the Emblematic Productions of Kobe & Matsusaka Beef*, in GEOGRAPHICAL INDICATIONS AND INTERNATIONAL AGRICULTURAL TRADE: THE CHALLENGE FOR ASIA 139, 148 (Louis Augustin-Jean, Hélène Ilbert, & Neantro Saavedra-Rivano eds., 2012); Daisuke Kojo, *Comment: The Importance of the Geographic Origin of Agricultural Products: A Comparison of Japanese and American Approaches*, 14 MO. ENVTL. L. & POL'Y REV. 275, 294 (2007). On the regionally based collective trademarks, see Kenneth Port, *Regionally Based Collective Trademark System in Japan: Geographical Indicators by a Different Name or a Political Misdirection?* 6 CYBARIS, AN INTEL. PROP. L. REV. 2 (2015).

²⁴ This definition is narrower than the internationally accepted minimal standard for GIs formulated in Article 22(1) of TRIPS. Geographical indications, as defined in TRIPS, can include all kind of products, as long as there is a 'quality, reputation or other characteristic' linked to these products that can be attributed to a specific geographical region. See Calboli, *supra* note 14, at 457–59; Marie-Vivien, *supra* note 14, at 194–95.

²⁵ GI Act, *supra* note 8, art. 2.

In the same Article, we see that alcohol, pharmaceuticals, quasi-pharmaceutical products, cosmetics, and regenerative medicine are excluded from the list of products that could be categorized as agricultural, forestry, and fishery products. Alcoholic drinks, such as *sake*, *shochu*, wine, or spirits, can obtain a GI under the *Act Concerning Liquor Business Associations and Measures for Securing Revenue from Liquor Tax*.²⁶

However, eggs, vegetables, fruits, seafood, milk, or eggs can be categorized under the first section of Article 2 of the GI Act,²⁷ and bread, tofu, olive oil, soft drinks, or prepared food²⁸ under the second section. A Cabinet Order further explains sections 3 and 4 of Article 2 of the GI Act. MAFF categorizes ornamental plants, industrial crops, ornamental fish, and pearls under non-edible agricultural, forestry, and fishery products.²⁹ Products manufactured or processed using agricultural, forestry, and fishery products include feed (limited to things manufactured or processed from agricultural, forestry, or fishery products as raw produce or as ingredients), lacquer, bamboo material, essential oil, charcoal, timber, tatami facing, and raw silk.³⁰

By including manufactured or processed products, the GI Act is embracing know-how, skills, and practices necessary for transforming agricultural, forestry, and fishery products into other products. These know-how, skills, and practices could have developed in response to the external environment and have since been passed down from generation to generation. Thus, they have been recognized as part of the identity of the beholders. Moreover, such know-how, skills, and practices constitute craftsmanship, which is also recognized as a category of ICH internationally³¹ and in

²⁶ See *Concerning Liquor Business Associations and Measures for Securing Revenue from Liquor Tax*, No. 7 of 1953, art. 86.6 (Japan). The powers attributed to the Minister of Finance in this article have been used to create a GI system for liquors, see *Standard for Indication in Relation to Geographical Indications*, (Notification No. 4 of National Tax Agency, Revised Edition Notification No. 9, 2006) 28 December 1994, WIPO Lex No. JP068, available at www.wipo.int/edocs/lexdocs/laws/ja/jp/jp068ja.pdf (for an unofficial translation: www.wipo.int/edocs/lexdocs/laws/en/jp/jp068en.pdf). There are currently six geographical indications recognized for wine (Yamanashi), sake (Hakusan), and *sochu* (Iki, Kuma, Satsuma, and Ryukyu).

²⁷ See MINISTRY OF AGRICULTURE, FORESTRY AND FISHERIES, *Establishment of Japan's Geographical Indication*, (GI) Protection System, MAFF, www.eu-japan.eu/sites/eu-japan.eu/files/SAKA_EN_o.pdf (last visited 8 October 2015) (stipulating that there is no need for a Cabinet Order to further specify the products that are included).

²⁸ See *id.* (stipulating that there is no need for a Cabinet Order to further specify the products that are included).

²⁹ See *Implementation of Act for the Protection of the Names of Designated Agricultural, Forestry and Fishery Products and Foodstuffs*, Law No. 227 of 2015, art. 1 (Japan) available at www.maff.go.jp/j/shokusan/gi_act/outline/pdf/doc7.pdf.

³⁰ See Cabinet Order No. 227, *supra* note 29, art 2.

³¹ See ICH Convention, *supra* note 12, arts. 2(1)–(2). See also JANET BLAKE, COMMENTARY ON THE UNESCO 2003 CONVENTION ON THE SAFEGUARDING OF THE INTANGIBLE CULTURAL HERITAGE 31, 39 (2006).

Japan.³² Holders of such an ICH, whether or not recognized under any of the ICH regimes, should therefore carefully consider the regime that each jurisdiction has for GIs before filing an application. The next section explains how the GI regime is implemented in Japan.

3 THE PROCESS TOWARDS OBTAINING A GEOGRAPHICAL INDICATION IN JAPAN

3.1 Registering a Geographical Indication

In order for agricultural, forestry, and fishery products, and foodstuffs to be eligible for a GI, they first need to be identifiable based on location,³³ quality, or reputation linked to that location.³⁴ If producers or processors of agricultural, forestry, and fishery products think that their products fulfil these criteria, they can form an association of producers.³⁵

An association of producers is in principle composed of members who can be, but are not limited to,³⁶ the direct producers of the agricultural, forestry, and fishery produce. If the association is organized as a legal person, a representative or a manager has to be appointed. The association has multiple tasks: first, it has the responsibility of applying for the GI to MAFF and therefore has to prepare all the necessary documents. Second, once a GI registration has been granted, the association is responsible for the management and control of the production processes described in the product specification (as filed in the application).

Once the association of producers has been formed, it can proceed to file an application with MAFF for a GI.³⁷ The application needs to contain the following information:³⁸

- (1) Name and address of the association of producers and its representative
- (2) Classification of the agricultural, forestry, or fishery product

³² See Law for the Protection of Cultural Property, Law No. 2014 of 1950, art. 2(2) (Revised Edition 2007), available at www.unesco.org/culture/natlaws/media/pdf/japan/japan_lawprotectionculturalproperty_engtof.pdf (hereinafter Law No. 2014) (intangible cultural heritage is referred to in this law as intangible cultural properties and folk-cultural properties. Know-how, techniques, and traditional craftsmanship are categorized under intangible cultural properties). See also CULTURAL PROPERTIES DEPARTMENT (AGENCY FOR CULTURAL AFFAIRS), CULTURAL PROPERTIES FOR FUTURE GENERATIONS – OUTLINE OF THE CULTURAL ADMINISTRATION OF JAPAN (March 2015), www.bunka.go.jp/tokei_hakusho_shuppan/shuppanbutsu/bunkazai_pamphlet/pdf/pamphlet_en_03_ver04.pdf.

³³ See GI Act, *supra* note 8, arts. 2(1), 3. ³⁴ See *id.* at arts. 2(2), 3. ³⁵ See *id.* at art. 2(5).

³⁶ See Hayashi, *supra* note 8, at 4 (mentioning that producers, processors, and local branding associations can form an association of producers).

³⁷ See GI Act, *supra* note 8, art. 7. ³⁸ See *id.* at art. 7(1) 1–8.

- (3) Name of the agricultural, forestry, or fishery product
- (4) Region of the agricultural, forestry, or fishery product
- (5) Distinct characteristic of the agricultural, forestry, or fishery product (shape, taste, etc.)
- (6) Method of production of the agricultural, forestry, or fishery product.

This list of requirements can be expanded by MAFF to include other necessary information.³⁹ The producer association must also submit detailed product specifications and quality-control guidelines together with the application form.⁴⁰ These guidelines should specify how the group will manage the production process. Since the specification of the product is supposed to be done within the specified community, the local producers or processors who want the recognition of their products as GIs will be consulted.

Once the GI application is submitted, MAFF will publish the application on a dedicated website.⁴¹ Subsequently, for a period of three months thereafter, any person may submit an opinion regarding the application to MAFF.⁴² The opinions are then forwarded to the applying association.⁴³

After the three months, MAFF must consult experts (persons with specialized knowledge and experience) to see whether the application should be rejected under one of the categories listed in the GI Act.⁴⁴ The experts will also be given the opinions expressed during the three-month public notice period.⁴⁵ If the experts deem it necessary, they can also directly consult the stakeholders.⁴⁶ In the process of formulating their opinion, the experts have a duty of confidentiality regarding the information they have obtained. Furthermore, they should not use this information fraudulently.⁴⁷ If the experts' screening process does not reveal any reason to reject the application, MAFF will proceed to register the GI,⁴⁸ inform the applicant of its successful registration,⁴⁹ and notify the public by posting it on a designated MAFF website.⁵⁰

3.2 Refusal of an Application for a Geographical Indication

There are several reasons why a GI application may be denied. The main reasons can be divided into the following categories: the nature or behaviour of

³⁹ See *id.* at art. 7(1) 9. ⁴⁰ See *id.* at art. 7(2). ⁴¹ See *id.* at art. 8.

⁴² See *id.* at art. 9(1). ⁴³ See GI Act, *supra* note 8, art. 9(2). ⁴⁴ See *id.* at art. 11.

⁴⁵ See *id.* at art. 11(2). ⁴⁶ See *id.* at art. 11(3). ⁴⁷ See *id.* at art. 11(4).

⁴⁸ See *id.* at art. 12(1). ⁴⁹ See GI Act, *supra* note 8, art. 12(3). ⁵⁰ See *id.*

the applicant,⁵¹ the quality-control guidelines,⁵² the nature of the product,⁵³ and the name of the product.⁵⁴

A prospective applicant may have to wait two years before applying again if his organization's (association of producers) GI had previously been cancelled for any of the following reasons:⁵⁵

- (1) the association of producers no longer meet the requirements of being an association of producers;
- (2) the association of producers has disobeyed an order of MAFF; or
- (3) the association of producers has submitted an application by unlawful means.

Next, quality-control guidelines are an important part of the application. They should stipulate how the organization plans to ensure that the association's members comply with the methods of production described in the application.⁵⁶ Registration may be refused if the guidelines are insufficient to fairly ensure compliance with the stipulated methods of production.⁵⁷ Equally, if the organization does not prove to have enough financial or technical ability to maintain quality control, MAFF will refuse the application.⁵⁸

MAFF will also refuse a GI application if the products do not meet the definition of the designated agricultural, forestry, and fishery products, and foodstuffs.⁵⁹ This has two aspects. Items that fall outside the definition of agricultural, forestry, and fishery products, and foodstuffs in Article 2(1) may be refused application.⁶⁰ Another basis for refusal is the lack of a geographic link, specific quality, reputation, or other characteristic that is attributable to the location in question.⁶¹

Finally, the MAFF may refuse an application if the name of the product is a generic term,⁶² or if it is identical or similar to a registered trademark.⁶³ However, it is possible that the owner of a registered trademark, or an authorized user, could have applied for GI recognition.⁶⁴ In such a case, the name will be protected under both the trademark law and the GI Act.

3.3 Amendments to a Geographical Indication Registration

In Japan, the terms of registration of a GI are not necessarily permanently fixed. Even though it is compulsory to submit a description of the production

⁵¹ See *id.* at art. 13(1). ⁵² See *id.* at art. 13(2). ⁵³ See *id.* at art. 13(3).

⁵⁴ See *id.* at art. 13(4). ⁵⁵ See GI Act, *supra* note 8, arts. 13(1), 22. ⁵⁶ See *id.* at art. 13(2).

⁵⁷ See *id.* ⁵⁸ See *id.* ⁵⁹ See *id.* at art. 13(3). ⁶⁰ See *id.* at art. 2(1).

⁶¹ See GI Act, *supra* note 8, art. 2(2). ⁶² See *id.* at art. 13(4)(a). ⁶³ See *id.* at art. 13(4)(b).

⁶⁴ See *id.*

process and to implement quality-control guidelines to ensure compliance, the GI Act gives the association of producers the opportunity to revise their registration.⁶⁵ The process of amending a GI's registration is, just like the registration process itself, a time-consuming one under the supervision of MAFF. The amendments may be related to either the eligibility of the association of producers⁶⁶ or the application documents.⁶⁷

The association of producers in charge of checking for compliance with the quality-control guidelines can apply to add another association of producers.⁶⁸ This application requires the name and address of the added association of producers and its representative.⁶⁹

Amendments to application documents have to be supported by all the associations of producers that have applied for the registration of a GI.⁷⁰ In other words, all associations of producers need to submit a joint application for an amendment. The request for an amendment can relate to the name, the region, the characteristic of the product, the production process, or if MAFF requires extra information.⁷¹ The application for an amendment needs to mention the registration number and a description of the part that requires amendment.⁷²

The procedure for these amendments is *mutatis mutandis* the same as that for registration. This means that there is a publication of the amendments, an opposition period, and consultation with experts.⁷³ The duration for each of these steps is the same as in the original registration.⁷⁴ Once the amendments are approved, MAFF will publish it on its website.⁷⁵

3.4 Cancellation of a Geographical Indication Registration

Besides the cases in which a registration as a GI loses its effects, which is when an association of producers has been dissolved or the quality-control guidelines have been abolished, MAFF may also, *ex officio*, cancel a registration.⁷⁶ A cancellation can be done for reasons pertaining to the association of producers,⁷⁷ the information in the application for registration,⁷⁸ or the product name.⁷⁹

First, an association of producers is meant to be an organization that groups producers, processors, or brand organizations.⁸⁰ Moreover, the organization is required to accept members on fair conditions comparable with that

⁶⁵ See *id.* at arts. 15–19. ⁶⁶ See *id.* at art. 15. ⁶⁷ See GI Act, *supra* note 8, art. 16

⁶⁸ See *id.* at art. 15(1). ⁶⁹ See *id.* at art. 15(2). ⁷⁰ See *id.* at art. 16(2).

⁷¹ See *id.* at art. 16(3). ⁷² See *id.* ⁷³ See GI Act, *supra* note 8, arts. 15(2), 16(3).

⁷⁴ See *id.* ⁷⁵ See *id.* at art. 17(3). ⁷⁶ See *id.* at art. 22. ⁷⁷ See *id.* at arts. 22(1)–(3).

⁷⁸ See *id.* at art. 22(4). ⁷⁹ See GI Act, *supra* note 8, art. 22(5). ⁸⁰ See *id.* at art. 2(4).

applicable to current members.⁸¹ Thus, no legitimate candidate should be refused participation. A violation of any of these conditions means that an 'association of producers' is not in compliance with the definition of an association of producers.⁸² Because of this, MAFF could cancel the registered GI.⁸³

Second, an association of producers has several obligations. Members of an association of producers have the right to use the GI for the registered products. But the flipside of the coin is the obligation not to use the GI for products that are similar to the registered product.⁸⁴ The use of designated symbol for a GI is allowed, but the use of a similar symbol is forbidden.⁸⁵ Any other use not described in the previous two examples is caught by a general obligation to refrain from any unlawful use of the GI.⁸⁶ If any of these obligations are violated, MAFF is entitled to cancel the registration.⁸⁷

Quality control is an essential element for obtaining a GI registration and maintaining the registration. Therefore, the association of producers are obligated to implement the best guidelines to ensure that the quality of GI products is upheld up to the expectations of the consumers and as indicated in the product specification. This requires guidelines that ensure compliance with the method of production, that there is sufficient financial capacity to implement the guidelines, and competent technical ability to carry out the required measures.⁸⁸ If any of these are not present, MAFF has the right to cancel the registration because the 'authenticity' of the product may be compromised.⁸⁹

Lastly, MAFF can also cancel a GI registration if the description in the application regarding the origin and characteristics of the product are inaccurate or false.⁹⁰ MAFF has a similar right if the product no longer originates from a specific region, or if the quality, reputation, or other characteristics essentially attributable to its geographical origin cease to exist.⁹¹ The registration will also be cancelled if the registered name of a designated product has become a generic term.⁹²

4 THE GEOGRAPHICAL INDICATIONS ACT AND INTANGIBLE CULTURAL HERITAGE

4.1 *Positioning Intangible Cultural Heritage within the Geographical Indications Act*

Since he came to power in 2012, Prime Minister Abe has emphasized achieving economic growth – by a system often referred to as

⁸¹ See *id.* ⁸² See *id.* ⁸³ See *id.* at art. 22(1). ⁸⁴ See *id.* at art. 3(2).

⁸⁵ See GI Act, *supra* note 8, art. 4. ⁸⁶ See *id.* at art. 5. ⁸⁷ See *id.* at art. 22(2).

⁸⁸ See *id.* at art. 13(2). ⁸⁹ See *id.* at art. 22(3).

⁹⁰ See GI Act, *supra* note 8, arts 2(2), 22(4). ⁹¹ See *id.* ⁹² See *id.* at art. 22(5).

'Abenomics'.⁹³ Since the revitalization of the agricultural sector fits within this economic strategy,⁹⁴ a system of GIs for agricultural, forestry, and fishery products was implemented to facilitate this revitalization.⁹⁵

In particular, MAFF has supported that GIs can contribute to this revitalization in two different ways. First, GIs will enable product differentiation based upon the GI name and the branding can be associated with the GI name. This, together with quality assurance that is embodied in GI-denominated products, should lead to higher prices for GI products. In turn, rural villages will reap the benefits of these higher prices, and thus these villages will be economically revitalized.⁹⁶ Second, by highlighting the truly Japanese origin of local produce, GIs will make the products more attractive for foreign consumers and the interest of these consumers for Japanese products will increase, therefore spurring the export of Japanese agricultural, forestry, and fishery products, and foodstuffs.⁹⁷

In this context, however, consumer protection only enters the picture as an indirect consequence of the quality-control requirement that GI producers have to fulfil as part of the GI specification. Due to quality control, only products that abide with the predetermined quality standards reach the market. Still, the requirement that GI producers have to guarantee a certain product quality and exert quality control is, according to MAFF, beneficial to consumers.⁹⁸

Moreover, ICH is not mentioned by MAFF as one of the goals of the GI Act, except for the assistance to inheriting traditional food culture.⁹⁹ Likewise, MAFF does not indicate the importance and the implication for GIs of traditional food, and traditional food culture. Hence, traditional food culture could be relevant in two aspects in the context of GI protection. On the one hand, traditional food culture may relate to

⁹³ See Naoyuki Yoshino & Farhad Taghizadeh Hesary, *Three Arrows of 'Abenomics' and the Structural Reform of Japan: Inflation Targeting Policy of the Central Bank, Fiscal Consolidation, and Growth Strategy 3* (Asian Development Bank Institute, Working Paper No. 492, 2014), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2475730.

⁹⁴ See Ministry of Agriculture, Forestry, and Fisheries, *Abe Cabinet Agricultural Reform*, MAFF <http://fpcj.jp/wp/wp-content/uploads/2014/07/a89885aa705e72d976dd953518d82140.pdf> (last visited 9 March 2016).

⁹⁵ See *id.* at 5.

⁹⁶ See Ministry of Agriculture, Forestry, and Fisheries, *Establishment of Japan's Geographical Indication (GI) Protection System*, MAFF www.eu-japan.eu/sites/eu-japan.eu/files/SAKA_EN_o.pdf (last visited 9 March 2016); Ministry of Agriculture, Forestry, and Fisheries, *Geographical Indication (GI) Protection System in Japan*, MAFF www.maff.go.jp/e/japan_food/gi_act/pdf/gi_pamph.pdf (last visited 9 March 2016).

⁹⁷ See *id.* ⁹⁸ See *id.* ⁹⁹ See *id.*

traditional techniques of preparing agricultural products into food,¹⁰⁰ which could be relevant as part of the GI specification and in turn the quality control to which GI products should be subjected as part of the GI Act. On the other hand, traditional food culture could contribute to the success of GI products as it incentivizes maintaining a culture of consuming local produce.¹⁰¹

Because of its limited scope, this chapter does not need to assess whether the GI Act will be able to attain the goals identified by MAFF. Also, this chapter cannot address the question of whether the GI Act has underlying unstated goals and whether they could be realized. For the purposes of this chapter, it suffices to point out that economic goals are the most prominent in MAFF's discourse. Therefore, it is likely that MAFF will gear the operation of the GI Act towards attaining the economic goals without necessarily paying attention to other stakes, such as safeguarding ICH. Furthermore, MAFF is not a ministry that deals with culture and thus has no expertise in this respect. But this lack of expertise could be compensated for by relying on experts who are well versed not only in GIs but also in ICH issues.¹⁰²

Notwithstanding MAFF's lack of interest or expertise in safeguarding ICH, the broad scope of the GI Act, combined with the necessity to describe the production process, means that ICH can be part of a GI. But when holders of ICH register for a GI, they should consider the problems relating to the association of producers, the authenticity of the production process, and the product specification.

4.2 Association of Producers and Communities

A GI regime is an attractive legal instrument for ICH holders because it is 'based upon collective traditions and a collective decision-making process'.¹⁰³ The GI Act stipulates that the collective decision-making must occur within the context of an association of producers.¹⁰⁴ The GI Act leaves open the question of whether or not the association takes the form of a legal person. If the association takes the form of a legal person, it needs to appoint a representative. In the context of ICH, one could argue that the holders of ICH, as a community, could be considered an association, and thus they may be eligible to apply for a GI.

¹⁰⁰ See Broude, *Trade and Culture*, *supra* note 13, at 651. ¹⁰¹ See *id.* at 656.

¹⁰² See GI Act, *supra* note 8, art.11.

¹⁰³ See Shivani Singhal, *Geographical Indication and Traditional Knowledge*, 3 J. INTELL. PROP. L. & PRAC. 732, 733 (2008).

¹⁰⁴ See *supra* Section 3.1.

In the context of indigenous communities, Rosemary Coombe, Sarah Ives, and Daniel Huizenga have identified that it will most likely not be difficult for the communities to assume the role of an association of producers.¹⁰⁵ These communities would usually have already been ‘subjectified’¹⁰⁶ to this role in their interaction with norms of other discourses, maybe human rights or environmental issues.¹⁰⁷ These experiences would help them recognize the ‘economic and political opportunities that GI protections afford’.¹⁰⁸

However, ICH in Japan is not necessarily linked to indigenous communities seeking protection.¹⁰⁹ Nonetheless, Japan has a relatively old law dealing with ICH. The Law for the Protection of Cultural Property was adopted in 1950.¹¹⁰ Under this law, ICH, including traditional craftsmanship, can be designated as important intangible cultural property. Where there has been a designation of important intangible cultural property under this law, the population group¹¹¹ holding the ICH will have identified itself as a community,¹¹² which then can subsume the role of an association of producers.

Even though the population group is considered a community for the purposes of ICH, this community may not necessarily be sufficiently homogeneous to agree that a GI registration is mutually beneficial for all.¹¹³ Coombe, Ives, and Huizenga reflect on the minoritarian bias,¹¹⁴ in which a small group

¹⁰⁵ See Rosemary J. Coombe, Sarah Ives, & Daniel Huizenga, *Geographical Indications: The Promise, Perils and Politics of Protecting Place-Based Products*, in THE SAGE HANDBOOK OF INTELLECTUAL PROPERTY 207, 215 (Matthew David & Debora Halbert eds., 2015).

¹⁰⁶ See Rosemary J. Coombe, *Cultural Agencies, The Legal Construction of Community Subjects and Their Properties*, in MAKING AND UNMAKING INTELLECTUAL PROPERTY: CREATIVE PRODUCTION IN LEGAL AND CULTURAL PERSPECTIVE 79, 83 (Mario Biagioli, Peter Jaszsi & Martha Woodmansee eds., 2011).

¹⁰⁷ See Coombe, Ives, & Huizenga, *supra* note 105, at 215. ¹⁰⁸ *Id.*

¹⁰⁹ See, e.g., NATSUKO AKAGAWA, HERITAGE CONSERVATION IN JAPAN’S CULTURAL DIPLOMACY: HERITAGE, NATIONAL IDENTITY AND NATIONAL INTEREST 134 (2015) (stating that communities have a lesser role to play in the Japanese intangible cultural heritage regime).

¹¹⁰ See Law No. 2014, *supra* note 32.

¹¹¹ See CULTURAL PROPERTIES DEPARTMENT, *supra* note 32, at 2. (Note that under the Law for the Protection of Cultural Property the application process for important cultural property does not necessarily have to be done by a group. It can also be done by an individual.).

¹¹² See Law for the Protection of Cultural Property, *supra* note 110, arts. 71–77.

¹¹³ See Coombe, Ives, & Huizenga, *supra* note 105, at 214.

¹¹⁴ Neil Komesar has pointed out that the more agencies participate and the more complex the issue at stake, there is an ‘enhanced possibility of minoritarian bias and the prospect of “rent-seeking”’. The ideas or interest of the majority risk being underrepresented. See NEIL KOMESAR, LAW’S LIMITS: THE RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS 153 (2001).

of producers, often the wealthy ones, steer the rest towards the registration for a GI.¹¹⁵ Thus, this small group may be able to construct the collective organization to suit their demands. Their demands may impact the description of the GI in several ways. For example, the production process could favour the practices of this group. Moreover, the criteria for participation in the collective organization may also be determined during application, possibly creating a burden for future entry.

The risk of a minoritarian bias may be problematic in light of the often-heard critique that a GI creates a monopoly right.¹¹⁶ Accordingly, one could argue that the creation of a monopoly right would further strengthen the grip this small group has on the ICH. However, it should be noted that a monopoly right is an indirect consequence of a GI. The ‘monopoly right’ created by a GI is one that mainly delineates who may have an individual ‘entitlement to the collective’.¹¹⁷ In other words, the regime is set up to determine the ‘group of qualified individuals who can use the GI for their independent business purposes’.¹¹⁸ Therefore, the ‘monopoly right’ does not deprive anyone from using techniques or knowledge that underlie the GI. ICH holders who refuse to join the collective association in applying for a GI will still be able to produce their products, but will be limited in their marketing efforts. Their marketing must not resemble the GI’s marketing, something the GI Act confirms in Article 3(2).

Even if the ICH is not yet designated, a collective association must still be formed. However, the risk associated with this situation is the artificial creation of a community¹¹⁹ or an industry, or by the state driving the formation of the association.¹²⁰ It has been described by Coombe, Ives, and Huizinga that this may have an industrialization effect. They describe this effect in relation to Chucucanas ceramics and Mexican tequila. In the case of ceramics, government interference led to ‘promoting economies of scale and forms of industrialized manufacture that [...] seriously damaged the social relations of production which historically sustained egalitarian communities of

¹¹⁵ See Coombe, Ives, & Huizinga, *supra* note 105, at 214; See also Singhal, *supra* note 103, at 737 (expanding on the problem of disagreements between small groups, even families).

¹¹⁶ For a discussion on geographical indications, monopoly rights, and intangible cultural heritage, see Kono, *supra* note 13, at 298.

¹¹⁷ Frankel, *supra* note 13, at 8.

¹¹⁸ *Id.*; see also Singhal, *supra* note 103, at 733 (noting that, even though there is a creation of a monopoly right, this right ‘simply limits the class of people who can use a certain symbol’).

¹¹⁹ See Broude, *Trade and Culture*, *supra* note 13, at 674.

¹²⁰ See Coombe, Ives, & Huizinga, *supra* note 105, at 217–218; see also Delphine Vitrolles, *When Geographical Indication Conflict with Food Heritage Protection*, 8 ANTHROPOLOGY OF FOOD §§ 28–31 (2011).

producers'.¹²¹ Industry elites working together with the government to nominate tequila as ICH resulted in the 'introduction of highly industrialized standards and volumes of production which marginalized smaller producers'.¹²²

It is difficult to be sure that these problems will not occur in Japan. However, the fact that associations have a long history in Japan¹²³ means that many holders of ICH are most likely linked to associations that date back to the late nineteenth or early twentieth centuries (often changing names in the post-war period)¹²⁴ and that were often formed under state guidance to, for example, improve the flow of information and quality control.¹²⁵ A unifying or industrializing effect on the production process – if any – might have happened at the time these associations were formed. But this does not take us away from the fact that the above-described minoritarian biases can be removed in associations that have been operating for decades, especially if the local associations are under the control of a nationwide association.

Moreover, it could be argued that the likelihood of a minoritarian bias or the effect of the industrial elite's influence will be minor in an environment that allows producers with a pending GI application to participate widely.¹²⁶ The GI Act has only two broad guarantees for having such a participatory role. First, the GI Act requires the formation of an association of producers in order to apply for a GI.¹²⁷ The formation of an association might lead to communication between the various stakeholders, but will not necessarily exclude a minoritarian bias or an industrial elite's influence. Second, the GI Act provides the possibility of filing complaints against a GI application.¹²⁸ These complaints may express concern over the loss of diversity of ICH. However, MAFF and its experts may not take complaints seriously because the safeguarding of ICH is not its main aim. But ultimately, the loss of diversity

¹²¹ Coombe, Ives, & Huizenga, *supra* note 105, at 217. ¹²² *Id.* at 218.

¹²³ See Sheldon Garon, *From Meiji to Heisei: The State and Civil Society in Japan*, in *THE STATE OF CIVIL SOCIETY IN JAPAN* 42, 49 (Frank J. Schwartz & Susan J. Pharr eds., 2003). To name a few, the Japan Lacquer Association (Nihon Shikkoukai) was established in 1891. The Greater Japan Ceramic Industry Association (Dai Nippon Yougyou Kyoukai) was set up in 1892. See DOUSHIN SATOU, *MODERN JAPANESE ART AND THE MEIJI STATE: THE POLITICS OF BEAUTY* 119 (Hiroshi Nara trans., 2011) (1999).

¹²⁴ The Wajima Lacquerware Craftsman Association was founded in 1899, but changed its name to Wajima Urushi Ware Commerce and Industry in 1947. See Digital Archives of Ishikawa Japan, *History of Wajima Lacquerware*, WAJIMA LACQUERWARE http://shofu.pref.ishikawa.jp/shofu/wajima_e/h_nenpyou.html (last visited 8 March 2015).

¹²⁵ See Coombe, Ives, & Huizenga, *supra* note 105, at 218. ¹²⁶ See *id.* at 214–215.

¹²⁷ See *supra* Section 3.1 ¹²⁸ See *id.*

is not a reason to refuse the registration of a GI. Nevertheless, it could encourage internal discussion among the producers.¹²⁹

In order to somehow prevent the above-described problems from occurring, producers could turn to the flexibility offered in substantive law provisions.¹³⁰ The GI Act requires a product specification that describes the production process. There is no indication in the law that such a production process should be homogenous among the members of the association of producers.¹³¹ The application guidelines offer some further insight into this.

First of all, the guidelines indicate that, when dealing with the relevant characteristics for an application, plural criteria can be included.¹³² The application form itself refers to several elements, such as the technical basis, special ingredients, special raw materials, delivery basis or standard, feedstuff, or cultivated breed, that could make up the production process.¹³³ The application form indicates that this list of examples is neither exhaustive nor compulsory.¹³⁴ However, neither the guidelines nor the application form indicate whether the plurality points to more than one element or whether that one element could have different varieties. In the latter case, the applicant could explicitly stipulate the differences in the production process.¹³⁵ A more indirect approach would be to not directly mention the differences, but instead stipulate the ‘normally-followed’ production process.¹³⁶ Nevertheless, whether the former or the latter approach is followed, both enable holders of ICH to participate actively in the registration process.

Second, more than one association of producers can be registered to use the GI.¹³⁷ The guidelines stipulate that only one single application form can be submitted, but the product specification needs to be submitted by each

¹²⁹ See *supra* Section 3.2.

¹³⁰ See Dwijen Rangnekar, *Geographical Indications and Localisation: A Case Study of Feni* 20–32 (24 September 2009), available at www2.warwick.ac.uk/fac/soc/pais/research/researchcentres/csgr/research/projects/2007/protecting_feni/proj_pbl/esrc_report_english.pdf.

¹³¹ See GI Act, *supra* note 8, art. 6.

¹³² See MAFF, *Chiritekihyouji Hogo Seido Moushikomisha Gaidorain* [The System for the Protection of Geographical Indications – Guidelines for Applicants] 38 (27 October 2015), available at www.maff.go.jp/j/shokusan/gi_act/process/pdf/doc11.pdf.

¹³³ See *id.* at 89. ¹³⁴ See *id.*

¹³⁵ See, e.g., Rangnekar, *supra* note 130, at 31 (indicating that a revision of the application for Feni could include both apples and coconut as raw materials for the product carrying the GI).

¹³⁶ See, e.g., *id.* at 30 (indicating that the GI Feni has been defined as ‘fallen and ripe apples are “normally” used’, indicating that sometimes different approaches could be followed).

¹³⁷ See GI Act, *supra* note 8, art. 6. See also MAFF, *Chiritekihyouji Touroku no Moushikomi Houhou ni Tsuite* [About the Way how to Apply for Geographical Indications] 6 (27 October 2015), available at www.maff.go.jp/j/shokusan/gi_act/process/pdf/doc11.pdf.

respective association.¹³⁸ It is explicitly acknowledged in the guidelines that the respective product specifications can differ from each other.¹³⁹ Since the product specification also has a section on the production process, the differences could be identified there as well. To accommodate these interpretations of the law, MAFF should use application forms that allow for enough flexibility.

Even though the substantive law seems to enable flexibility and thus a broader participation by different holders of ICH, the remaining question is how the controlling institutions – the experts and MAFF – will judge the acceptability of the inclusion of difference in the production process, or of a vague formulation of the production process. Quality control will most likely be the main criterion by which this decision will be made. Vague formulations will make such quality-control assessments difficult and give the producers much leeway to breach the appropriate standards. A detailed formulation will allow for better quality assessment, but it requires a more sophisticated and expensive quality-control mechanism.

While the GI Act may be able to accommodate diversity, we need to reflect on whether the unifying force of a minoritarian bias or industrial elite should be automatically considered as problematic. ICH is a living heritage, prone to change in response to the outside environment.¹⁴⁰ Thus, it could be questioned whether the application for a GI should necessarily mean the fixation on preserving the diversity of ICH. This issue links to authenticity, a concept often heard within the context of GIs.

4.3 *Authenticity of the Production Process and Intangible Cultural Heritage*

GIs are often linked to the concept of authenticity. This link stems from the fact that the production process must adhere to what has been described in the application for a GI. In other words, a product is no longer authentic if a different production process, other than the one put forward during the application, is deployed. Non-compliance with the production process, which is most likely ‘inseparably linked to geography’,¹⁴¹ could eventually affect the quality of the product that the GI is supposed to represent. This interpretation excludes any form of divergence from the stipulated production process.

¹³⁸ See MAFF, *supra* note 132, at 56. ¹³⁹ See *id.*

¹⁴⁰ Steven Van Uytsel, *Philosophies behind the Intangible Cultural Heritage Convention: Equality in Heritage Protection, Community Recognition and Cultural Diversity* 9–10 (9 February 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2001835.

¹⁴¹ Kono, *supra* note 13, at 298.

Therefore, GIs are described as stabilizing a ‘historically validated production process’,¹⁴² and this runs counter to the characteristic of the living nature of ICH.¹⁴³

After pointing out that other scholars have already indicated that the timeliness of the production process should not be too strongly overstated,¹⁴⁴ Dev Gangjee provides a way out of the authenticity issue. He posits that as long as the understanding of authenticity refers to a state of antiquity, the concepts of GIs and ICH will not be reconcilable with each other. By shifting the understanding of authenticity to the designation of a ‘strong link with a specific community’,¹⁴⁵ goods will be authentic if they are produced by what the community considers the appropriate method of production. This allows for a specific community to actively (re-)interpret the intergenerational transmissions of production processes.

Gangjee’s vision on the interpretation of authenticity is not foreign to the recent ICH debate. In his article *Intangible Cultural Heritage: The Living Culture of Peoples*, Federico Lenzerini argues that authenticity, even though not included in the ICH Convention, could be valuable to ICH.¹⁴⁶ More specifically, authenticity could guarantee the connection between ICH and the cultural identity of the creators and bearers. Authenticity would be the concept preventing ICH from being used for purposes that the community does not ascribe to. ICH would be authentic if ‘such heritage is constantly tailored to the cultural identity of the communities, groups, and or persons concerned’.¹⁴⁷

However, suggesting that authenticity should be devoid of the meaning of originality still requires the GI Act and its enforcement structure to suit such an interpretation. As mentioned above, the GI Act provides the possibility for amending the GI registration. One area that could be amended is the description of the production process to give the impression that, in theory at least, a community could apply to amend the registration whenever it deems desirable. If MAFF accepts some flexibility in the formulation of the production

¹⁴² Gangjee, *supra* note 1, at n. 60–63. ¹⁴³ See Kono, *supra* note 13, at 298.

¹⁴⁴ Gangjee, *GIs and Cultural Rights*, *supra* note 1, at 557. See also Broude, *Trade and Culture*, *supra* note 13, at 623.

¹⁴⁵ Francesca Cominelli, *Governing Cultural Commons: The Case of Traditional Craftsmanship in France*, <http://dlc.dlib.indiana.edu/dlc/bitstream/handle/10535/7212/726.pdf?sequence=1&isAllowed=y> (last visited 8 March 2016); see also Gangjee, *GIs and Cultural Rights*, *supra* note 1, at 558.

¹⁴⁶ See Federico Lenzerini, *Intangible Cultural Heritage: The Living Culture of Peoples*, 22 EUR. J. INT. L. 101 (2011).

¹⁴⁷ *Id.* at 113–114.

process, the change in the production process could be printed just next to the original description of the production process.

In the absence of flexibility, and presuming that a process of change will most likely be gradually initiated by some members of the community, two scenarios could develop. The first is that the more vocal members of the community could change their production process, thereby forcing the others to follow suit. Thus, when less outspoken or minority community members change the production process of the ICH, the more outspoken or the majority members may keep that group in line via the quality-control mechanisms enforced by the association of producers. Whatever the case may be, a strict application of the GI Act could either cause the standardization of ICH or stifle its development.

The second scenario could be that changes to the ICH mentioned in a GI registration may only be recorded with the consent of the association of producers. Therefore, individual members cannot apply for a change in the registration because all the members must be in agreement. There is no role for MAFF to play if there is any disagreement between the members. The best way for MAFF to accommodate the blurry boundaries of ICH is to do away with an overly legalistic application of the GI Act and allow flexibility in the application documents.

4.4 *Openness of the Product Specification and Intangible Cultural Heritage*

Generally speaking, the product specification must be drawn up before a product may be registered as a GI. In principle, the product specification should concentrate on the ‘product’s unique connection to its particular place of origin’.¹⁴⁸ Ultimately, the connection to a place is ‘definitional to a GI’.¹⁴⁹ This means that the legitimacy of a GI can be sustained if ‘weather and topology’¹⁵⁰ make out the ‘claimed nexus between place and product qualities’.¹⁵¹ The GI Act also requires a description of the production process.¹⁵² The production process – especially when we talk about products made from agricultural, fishery, or forestry products – may well be based on knowledge that the community has gathered in order to make valuable products with what they had on hand.¹⁵³ ICH is formed through years of

¹⁴⁸ Hughes, *supra* note 11, at 72. ¹⁴⁹ *Id.* ¹⁵⁰ *Id.* at 76. ¹⁵¹ *Id.*

¹⁵² See GI Act, *supra* note 8, arts. 6–7.

¹⁵³ See, e.g., N.S. Gopalakrishnan, Prabha S. Nair & Aravind K. Babu, *Exploring the Relationship between Geographical Indications and Traditional Knowledge: An Analysis of*

passing down this knowledge and then transforming it into an identifier for that community.¹⁵⁴ Thus, it is likely that this ICH also characterizes the unique qualities of the product.

The process of describing ICH is also found in the ICH discourse. The ICH Convention, for example, imposes an obligation on its member states to create one or more inventories of their ICH.¹⁵⁵ But there is one difference between the ICH Convention and the GI Act: the ICH Convention is quite flexible as to what these inventories could mean.¹⁵⁶ For example, it could be a listing of ICH identified in the member state's sovereign territory. Within the listing, separate categories can be made depending on their local, regional, or national importance. Another listing could be categorized depending on its need for extra safeguards. The inventory could also be a detailed description of what the ICH is. In other words, the ICH Convention leaves enough freedom to the member states to create inventories that cater to the specific needs of the communities.¹⁵⁷

In the previous sections, speculation was made about the flexibility of the GI Act to accommodate diversity and change. The registration guidelines are much more direct about the inclusion of elements that could be considered as trade secrets or know-how of the community. The guidelines mention that the applicant should think carefully about including such secrets or know-how in the application documents, as these documents are generally made public.¹⁵⁸ The only limitation that the guidelines put to this flexibility is that the trade secret or the know-how should not be directly related to the product's characteristics.¹⁵⁹ MAFF and its experts have a margin of appreciation as to what aspects of the production process should be revealed. But, as Hughes

the Legal Tools for the Protection of Geographical Indications in Asia (Geneva: International Centre For Trade and Sustainable Development, Working Paper, 2007).

¹⁵⁴ See Steven Van Uytsel, *Philosophies behind the Intangible Cultural Heritage Convention: Equality, in Heritage Protection, Community Recognition and Cultural Diversity* 8–9 (9 February 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2001835.

¹⁵⁵ See ICH Convention, *supra* note 12, art. 12; see also Steven Van Uytsel & Toshiyuki Kono, *Intangible Cultural Heritage Identified: Inventories as an Essential Part of the Safeguarding Process*, in *INTANGIBLE CULTURAL HERITAGE AND INTELLECTUAL PROPERTY: COMMUNITIES, CULTURAL DIVERSITY AND SUSTAINABLE DEVELOPMENT* 113 (Toshiyuki Kono ed., 2009).

¹⁵⁶ See Steven Van Uytsel, *Inventory Making and Fairy Tales: Safeguarding of Intangible Cultural Heritage in Historical Perspective*, in *INTANGIBLE CULTURAL HERITAGE AND INTELLECTUAL PROPERTY: COMMUNITIES, CULTURAL DIVERSITY AND SUSTAINABLE DEVELOPMENT* 143 (Toshiyuki Kono ed., 2009).

¹⁵⁷ See *id.* at 143. ¹⁵⁸ See MAFF, *supra* note 132, at 38.

¹⁵⁹ See *id.*; but see Gopalakrishnan, Nair & Babu, *supra* note 153, at 48–49 (arguing for a strong exception for secrets).

mentions in one of his studies, what is the point of a GI when something essentially relevant to characterize the product is not part of the description made to obtain the registration?¹⁶⁰

5 CONCLUSION

With the adoption of the GI Act, Japan has left the negative protection system for GIs. The GI Act applies not only to edible agricultural, forestry, and fishery products but also to manufactured and processed agricultural, forestry, and fishery products. Therefore, in an application for a GI, the production process must be adequately described, and a control mechanism checking for compliance with the production process must be established. The combination of these two elements means that know-how, skills, and practices will also be protected. Such know-how, skills, and practices can also fulfil the definition of ICH such that GIs and ICH could coexist under the GI Act.

Bringing GIs and intangible heritage together in one legal framework is controversial. However, it is unavoidable and must be dealt with. Through a flexible interpretation of the substantive law relating to the production process; allowing amendments to the original application process; and a choice for applicants to decide what to include in the product specification, the GI Act could potentially accommodate difficult issues such as minoritarian biases, industrial elites, authenticity, or openness of product specification. The only question to be answered in practice is the extent to which MAFF will comply with these suggestions in order to contribute to the safeguarding of ICH.

¹⁶⁰ Hughes, *supra* note 11, at 76–77.