

# The Law and Economics of Geographical Indications: Introduction to Special Issue of The *Journal of World Intellectual Property*

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Geographical indications (GIs) are a remarkable instrument of intellectual property protection when compared with other intellectual property rights (IPRs), namely patents, copyrights and trademarks. While of recent origin, having only been introduced into the pantheon of IPRs by the Trade-Related Aspects of Intellectual Property Rights Agreement (TRIPS), they have a remarkably long history. Much of that history is constituted by a complex mix of customary law and social conventions, informal practices and oral traditions and various regulatory systems. These different traditions have contributed to the contested negotiations on GIs in the Uruguay Round, which continues to be characterized by a lack of intra-Quad consensus. Consequently, unlike other obligations at TRIPS, GIs do not come with particular prescriptions concerning the architecture of law, but require only “legal means” for acquiring protection. Another remarkable feature of GIs is the emergence of World Trade Organization (WTO) member countries from the Global South as a *demandeur* for stronger protection. Rare it is to see this constituency demanding stronger intellectual property. The demand for stronger rights can be traced to various opportunities for endogenous rural development, protecting the rights of indigenous communities and niche marketing of culturally emblematic products. Thus, on the one hand, absent prescriptions on legal architecture in TRIPS heralds potential disharmony for the project of global regulation of IPRs. While, on the other hand, the negotiation on GIs are embedded in a wider policy framework concerning development and thus configured by much anticipation and hope (in the Global South).

There has been a growth in the scholarship on indications of geographical origin. From within law, scholars and practitioners have examined the GI provisions in TRIPS and enriched our understanding of the emerging contours of GIs. Here, we are informed of the different “legal means” for protecting indications of geographical origin, such as laws concerning business practices, *sui generis* systems and trademark law. The introduction of GIs as an IPR itself has brought into sharper focus a long outstanding complication: the relationship between trademarks and GIs. This, as litigation and rhetoric equally reveal, is partly on account of differences in legal tradition and contrasting instrumental economic logic. The various different ways in which “origin” is deployed in commerce and trade has itself engendered an economics of quality.

There remain a series of outstanding issues with respect to GIs. In particular, the twin negotiating issues of GI-extension and the multilateral register. Not only is this a reminder of how WTO negotiations are structured and intertwined, but it is indicative of movements in the locus of power in global trade negotiations. Focussing only on TRIPS, post-Uruguay Round negotiations are witness to a changing constellation of Global South members, which sees them able to stall negotiations (e.g. Cancun), achieve outcomes (e.g. Doha Declaration on Public Health) and also set agendas (e.g. GIs in the Doha Round). On GIs, this attention can be traced to the Seattle Ministerial where a number of Global South members placed GI-extension on the negotiating table.

The growing interest of a coalition of Global South members in GIs opens up a different canvas of concerns. It is also a reminder to be attentive to how the debate on IPRs is not any more exclusive to either TRIPS or the WTO—or even the World Intellectual Property Organization. To

illustrate, at the Food and Agriculture Organization, there is much interest in GIs as a possible policy intervention to remedy certain inequities in global commodity markets (Anonymous, 2009). The United Nations Development Programme has also taken note of the rural development potential of GIs through a series of case studies (Wagle, 2007). Even the World Bank draws attention to the potential of GIs for handicrafts (Liebl and Roy, 2004). Reflected in these various policy interests on GIs is a growing awareness of the economics of signs and the proliferation of socially generated appellations that are suggestive of different moral economies of concerns related to the conditions of production in distant locations (e.g. fair trade, organic, no sweat shops, etc.). A striking example of how these interests in GIs overlap can be found in the United Nations Conference on Trade and Development (UNCTAD) India Programme, with the government of India as partner, and funded by the UK government's Department for International Development (Anonymous, n.d.). Focussing on artisans, farmers and agrarian communities, the Programme has undertaken a road show on GIs that popularized the notion of GIs and subsequently facilitated the registration of a number of GIs.

The aim of this collection is to respond—to some extent—to these issues. In particular, as the first special issue of an academic journal on GIs, it seeks to lay down a marker on the emerging scholarship on GIs. In recognition of the wide spectrum of interests that seek to speak to GIs, the special issue brings together contributions from social scientists, lawyers and practitioners. The range of articles is aimed at the different tasks of stocktaking, reviewing the literature, focussing on problematic and unresolved aspects of GIs, reporting case studies and building a reflective and nuanced appreciation of GIs.

If there is one remarkable aspect concerning GIs, it is the manner in which they are increasingly being adopted as a potential intervention to protect the intellectual property of groups and communities that are otherwise neglected by IPRs. In this respect, Kamperman Sanders attends to traditional cultural expressions where there is an acute concern about misappropriation and a threat to the survival of holders of such cultural expressions. Recognizing the potential of local control that GIs may enable, he explores the possibilities of GIs for protecting cultural expressions in a globalized world of cultural flows. While noting possibilities, Kamperman Sanders also emphasizes the need for a tort of misappropriation, among others, as a way to seek reconciliation between “western” and “non-western” notions of property. Another area where GIs appear to have gained significant currency and attention is with respect to alternative food networks. Standing in opposition to a global agri-food regime with its flexible mode of production that is predicated on de-territorializing food, alternative food networks are embedded in locality. Looking at local foods in the United States, Giovannucci, Barham and Pirog make us attentive to the multiple notions of “local”, “authentic” and “origin”. However, they also note that its growing popularity is equally troubled by a lack of consensus and coherence in the attributes that come to constitute “local”. Critical of a trademark approach to protection, they argue for a more serious reflection on *sui generis* systems of GIs as a way to build a workable regulatory system for protecting local foods in the United States. Provocative as this may be, the contribution will be an important reminder of the possible divergences between local articulations on IPRs and the negotiating positions adopted in multilateral forums.

As was noted in the opening paragraphs, GIs are the contemporary culmination of a long history of conventions, customs and regulations. Marie-Vivien brings some of that history into her contribution when she reflects back on the origins of the system in France and the European Union. Adopting a comparative analysis between this history and contemporary practices in India, there are notable contrasts and enduring features. For instance, even while state and parastatal organizations were supportive in enabling producer groups get protection; there was an element of

“disengagement” in France and the European Union. In contrast, the Indian state has been actively supportive in a manner that also sees parastatal bodies being party to the application. Yet, in these different ways, there has been recognition of the collective action problems faced by producer groups in securing their (collective) rights in a GI. Resonant with some of these concerns is the contribution by Das, where the focus is on the challenges for GI protection in India. Das begins by explicating the collective action dilemmas for producers of a GI, and then notes the necessity of state intervention in securing protection. Moving towards a programmatic concern with GIs, she maps out a series of challenges, such as the enforcement of the rights domestically or internationally, the task of building a brand and marketing the product and the distribution of economic returns across the supply chain. Drawing out empirical evidence from some GIs, such as “Pochampally Ikat” and “Chanderi Fabrics”, Das demonstrates the successes of a GI that is conceived as part of a broader set of policy interventions concerning rural livelihoods.

In as much as interest in the use of GIs cuts across a wide policy landscape—and the range of multilateral bodies that have conferred on GIs is itself testimony—the scholarship on GIs is itself transdisciplinary as reflected in the next set of articles. Focussing on a potential GI from India and Pakistan—Basmati—Rangnekar and Kumar present a sketch of a range of issues that go beyond the received conceptualization of collective action. For one, they draw attention to the potential threat that patents might have for the subject matter of a GI through a review of the RiceTec patent dispute by raising the link to genericity. A key contribution of their work is on the socio-economics of the case for protecting Basmati. It is here that they note that, while TRIPS attends to homonymous indications, it has failed to recognize the reality of transborder GIs of which Basmati is a clear example. Thus, they map out a possible institutional solution for transborder GIs. Studying Tequila, the oldest GI outside of Europe, Bowen undertakes a study of the power that certain actors might have in shaping the specifications of a GI. It is a compelling narrative in demystifying the received wisdom that constructs Tequila as a “successful” GI in the Global South. Analyzing the changing specifications for Tequila, such as the permitted proportion of industrial sugars or the requirements concerning bottling, Bowen demonstrates the role of large distillers and foreign bottlers. Many of the normative concerns about GIs, such as localization and rural development, tend to be undermined by the story of Tequila. A different set of contrasts emerge through a nuanced study of the French system of *Appellations d’Origine Contrôlée* by Teil. “Quality”, as she reminds us, is a highly slippery concept that under a regulatory system remains judged, disputed, debated and disregarded, but remains persistently enduring. The changing locus of “quality” and its continuous displacement are reflective of the diversity of opinion makers and the range of interests that come to influence notions of quality. The allegory of “city of Troy”, Teil suggests is a useful metaphor to capture the multilayered aspects of the qualifications of the wine market.

The final set of articles in the collection focuses on the negotiations of GIs. With respect to negotiations on GIs, I have earlier noted the intra-Quad lack of consensus and the growing constellation of *demandeurs* from the Global South. As a result of the former, TRIPS only scripts an obligation for the “legal means” to protect GIs. The article by Kireeva and O’Connor provides a most useful and comprehensive survey of the status of GIs and implementing legislation across WTO member countries. They confirm the general suspicion that the implementation of GIs has occurred in a diverse and uncoordinated manner and that the resulting disharmony stands in contrast to the objective of TRIPS. Representative of the growing interest in GIs is Organization for an International Geographical Indications Network (OriGIN), and its Secretary General, Massimo Vittori, makes a strong argument for pragmatic negotiations. Of significance to the policy debate and the negotiations, he points out a series of issues that confront producer groups,

notably the lack of harmony in legal architecture and the concomitant uncertainties and costs in enforcing protection outside the country of origin.

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