

Geographical Indications at the Crossroads of Trade, Development, and Culture

Focus on Asia-Pacific

Edited by Irene Calboli
and Ng-Loy Wee Loon



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Edited by

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Editors' Preface

Why a book on geographical indications (GIs) with a focus on the Asia-Pacific region? Our reason is simple enough. For several decades, GIs have not received mainstream attention by national policy-makers in Asia-Pacific. Consider that on the international stage, the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration (Lisbon Agreement)¹ has been of interest, at least so far, only to one country in Asia, namely, North Korea. Of course, this does not mean that there is no legal protection for GIs in this region; after all, GI protection is mandated by the Agreement of Trade-Related Aspects of Intellectual Property (TRIPS).² However, our sense was that GI laws in this region were enacted, at least initially, by the policy-makers primarily as a matter of compliance with international obligations without fully understanding the implications of these laws.³ This state of affairs, we felt, deserved further investigation and attention by academics – especially now that many countries in the region are showing a growing interest for GIs, and GIs have appeared on the agenda in the bilateral or pluri-lateral negotiations for international trade agreements (FTAs) between countries in the region and other countries, in particular the

¹ Lisbon Agreement for the Protection of Appellations of Origin and Their International Registration, October 31, 1958, *as revised*, July 14, 1967, 923 U.N.T.S. 205.

² Agreement on Trade-Related Aspects of Intellectual Property Rights arts. 22–24, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299.

³ This is borne out by observations made by some of the authors in this volume. To cite a few, the chapter authored by Tay Pek San (Chapter 12) reporting on Malaysia's experience with GIs writes that when the country enacted its GI Act 2000, there was "relatively little understanding of the benefits and potential impact" of GI protection. A similar message came from Szu-Yuan Wang (Chapter 15) reporting on Taiwan, when he described the country's struggles to understand this "foreign" transplant when it was amending its laws to protect GIs upon accession to the WTO in 2002. As the readers may observe, several other chapters in the volume express similar considerations and concerns.

European Union (EU). For example, the EU has recently concluded FTAs with South Korea, Singapore, and Vietnam and is also negotiating, or discussing the possibility to negotiate, similar agreements with Malaysia, India, and other countries in Asia-Pacific. And then there were the negotiations for a multilateral agreement of the Pacific that led to the adoption of the Trans-Pacific Partnership (TPP) in 2015 (but whose fate is, at present time, uncertain due to the recent withdrawal of the United States therefrom). GIs were a sticky topic in the TPP, as negotiating parties were almost evenly divided between countries supporting strong protection, and others, such as the United States, Canada, Australia, and New Zealand, which were less enamored of GIs.

Unsurprisingly, the EU's narrative on GIs is that GIs can play an important role in trade, rural development, and the conservation of national cultural heritage – a position that has been enshrined in the EU law on GIs since the adoption of the very first GI Regulation in 1992.⁴ Today, this narrative is gaining consensus in several countries in Asia-Pacific, particularly those that are rich in agricultural products and traditional handicrafts. However, this narrative needs further testing and exploration, as enthusiasm for GIs could not necessarily harvest the results that several countries in the region may hope for. To this end, we convened a meeting of a group of scholars and other experts in March 2015 at the Faculty of Law of the National University of Singapore (NUS) to discuss the changing landscape of GI protection in this region and, to a certain extent, worldwide. We believed that a comprehensive analysis of these questions would assist policy-makers and trade negotiators in this region to formulate appropriate responses during FTA negotiations, in the adoption of national laws on GI protection and, beyond that and regardless of FTA negotiations, to review how the potential in their country's GIs may be actualized with best practices, quality-control programs for GI products, and the like. At the meeting, several themes were addressed, and in particular the following questions. What should policy-makers and trade negotiators in Asia-Pacific make of the claims and the rebuffs of benefits from GI protection? Is it true that a GI protection regime will provide higher economic returns to farmers and other holders of traditional knowledge through price premiums and enhance rural development and/or preserve indigenous knowledge and culture? What level of legal protection of GIs, if not that set out in TRIPS, will

⁴ See recital 6 of the Council Regulation (EEC) No. 2028/1992 on the Protection of Geographical Indications and Designations of Origins for Agricultural Products and Foodstuff (stating that GIs have “proved successful with producers, who have secured higher incomes”).

produce these benefits? Where are the success stories? Can these success stories be replicated in other countries, especially the developing countries in the Asia-Pacific region?

Our harvest was bountiful. We heard from those who warned of overstatements of the benefits that stronger GI protection can produce⁵ and who unveiled the hidden costs of romanticizing the GI debate,⁶ while others were optimistic, sometimes cautiously,⁷ sometimes more openly.⁸ We learned of real-life success stories⁹ and of failures¹⁰ in various countries – and success stories and failures occurring within the same country.¹¹ Even more importantly, we learned about the various factors that contributed to the success or failure in the case studies presented. As expected, we saw national politics, and even geopolitics, at play when there are fights over GIs between the central government and the local government in a country,¹² or between neighboring countries.¹³ Our playfield also went beyond Asia-Pacific, and scholars discussed recent development in international law, above all the recent controversial adoption of the Geneva Act of the Lisbon Agreement in

⁵ See, e.g., Justin Hughes (Chapter 3) focusing on the promised economic benefits; and Tomer Broude (Chapter 19) focusing on the preservation of intangible cultural heritage and promotion of cultural diversity.

⁶ See, Rosemary J. Coombe & S. Ali Malik (Chapter 4) highlighting the socioeconomic marginalization of the Nepali-speaking women workers in the *Darjeeling* tea plantations in India even as this GI gains renown around the world, allowing others to reap the economic benefits.

⁷ See, e.g., Irene Calboli (Chapter 1) supporting the positive aspects of GI protection as long as producers disclose the actual origin of all products' raw materials; Peter Drahos (Chapter 11) highlighting the possible positive aspects of GI protection in Australia in the wine sector; Steven Van Uytsel (Chapter 21) in the context of preservation of intangible cultural heritage in Japan.

⁸ See Dev Gangjee (Chapter 2), highlighting how the current definition of GIs reflects not only a geographical but also an historical linkage between products and places; Barbara Pick, Delphine Marie-Vivien, and Dong Bui Kim (Chapter 13) supporting the importance of GIs in Vietnam.

⁹ See Peter Drahos (Chapter 11) on the case study of the *Granite Belt* GI for wine in Australia.

¹⁰ See Yogesh Pai and Tania Singla (Chapter 14) on the case study of the *Banarasi* GI for silk sarees in India.

¹¹ See Barbara Pick, Delphine Marie-Vivien, and Dong Bui Kim (Chapter 13) on the case studies of the *Hà Long* GI for fried calamari (success story) and the *Lạng Sơn* GI for star anise (not so successful) in Vietnam.

¹² See Christoph Antons (Chapter 20) on Indonesia where the central government and local government can fight for control over GIs linked to national cultural heritage and traditions.

¹³ See Tay Pek San (Chapter 12) on the dispute between Malaysia and Indonesia over ownership of the term *batik*, a textile art involving the practice of dyeing cloth through wax-resistant methods; Muhua Zahur (Chapter 18) on the resentment in Bangladesh when location-based products of Bangladesh such as *Jamdani* fabric were registered in India by Indian parties; and Szu-Yuan Wang (Chapter 15) on the registration of certain Taiwanese tea production districts as trademarks in China.

May 2015.¹⁴ In addition, we were given an assessment of how Asian GIs would fare in Europe,¹⁵ and how GIs are protected in the United States.¹⁶ We were alerted to interesting features in national GI protection systems in this part of the world.¹⁷ We understood better what reputation-based GIs really mean and their implications for nonagricultural products and even services.¹⁸ We were given insight into the potency of the Investor State Disputes Settlement (ISDS) provisions, if incorporated into FTAs, in how they can be triggered by GI owners.¹⁹ We saw the challenges facing policy-makers in navigating conflicting provisions on GIs in EU-dominated FTAs and the TPP,²⁰ even as we were surprised by an alternative (not so anti-GI) approach taken by the United States that seems to be known by just a few, but could become very relevant in the global GI debate going forward.²¹ Last, but not least, we were given important insights on the potential, and again controversial, role of GIs beyond trade and development and from a culture-related perspective.

Today, the presentations and discussion in our meeting have been translated into this volume, which presents itself as the first comprehensive guide on GI protection in Asia-Pacific. The readers will greatly benefit from learning more about the topic from the various contributions, which illustrate the many complexities, and contradictions, that still characterize the GI debate in this region. In their chapters, contributors employ a variety of research methodologies – from doctrinal analysis, to both quantitative and qualitative

¹⁴ World Intellectual Property Organization (WIPO), Geneva Act of the Lisbon Agreement on Appellations of Origin and Geographical Indications and Regulations Under the Geneva Act of the Lisbon Agreement on Appellations of Origin and Geographical Indications, WIPO Document LI/DC/19 (May 20, 2015). See Daniel Gervais (Chapter 5) offering a recount and critique of the diplomatic conference leading to the adoption of the Geneva Act.

¹⁵ See Christopher Heath (Chapter 8) discussing the various GIs from Asia currently protected in the EU.

¹⁶ See Christine Haight Farley (Chapter 9).

¹⁷ See, e.g., Susanna Leong (Chapter 10) on Singapore, where the *sui generis* GI Act, if the 2014 amendments thereto are brought into force, will protect registered and unregistered GIs, with registered GIs enjoying a higher level of protection; Haiyan Zheng (Chapter 16) on China where GIs can be protected not only under trademark law as well as not just one but two *sui generis* regimes which are administered by different governmental agencies; and Naazima Kamardeen (Chapter 17) on Sri Lanka, where all agricultural products, regardless of whether they are wines or spirits, enjoy the enhanced level of protection mandated in art. 23 of the TRIPS Agreement for wines and spirits.

¹⁸ See Dev Gangjee (Chapter 2). ¹⁹ See Anselm Kamperman Sanders (Chapter 7).

²⁰ See Susy Frankel (Chapter 6).

²¹ See Christine Haight Farley (Chapter 9) discussing the General Inter-American Convention for Trade-mark and Commercial Protection, February 20, 1929, 46 Stat. 2907, 124 L.N.T.S. 357 (referred to as both the Inter-American Convention and the Pan American Convention).

empirical studies, to theories related to law and development, law and culture, and gender studies. This richness of methodologies provides the readers with an important variety of perspectives, and ultimately contributes to the conclusion that the appropriate role of GI protection is often defined on a case-by-case basis. This volume develops across four themes: the first group of contributions sets the stage for the discussion, recounting the still-contested framework of GI protection, the promises of GIs, and their potential pitfalls; the second group addresses the growing role of GIs as a trade issue, both at the international and national level, with specific attention to different systems of GI protection; the third group digs deeper into the actual value of GIs in many of the countries in Asia-Pacific, and presents results that are, intentionally, contradictory in part; the fourth and last group tackles GI protection from the lenses of the preservation of culture, a narrative that is gaining traction in many countries, and which is interconnected with the discussions for safeguarding intangible cultural heritage led by the United Nations Organization for Education, Science, and Culture (UNESCO).

Our hope is that this volume, now in print, will be useful to a large variety of stakeholders, including academics, policy-makers, trade negotiators, legal practitioners, and representatives of producer and consumer associations. We also hope that this volume will lead the way for more research in this area in Asia-Pacific, especially more case studies of the practical application of GI protection to local and regional products.

To all who participated in this project, we express our deep appreciation. First of all, we thank the contributors to this volume. It has been our privilege to work with such an outstanding group of scholars and experts. We are also indebted to five additional participants to the March 2015 meeting, who offered important insights to the discussion and the perspectives presented in this volume: Kiyoshi Adachi, Denis Croze, Keri Johnston, Ignacio de Medrano Caballero, and Daren Tang. Several students assisted us in editing and preparing the manuscript for the final stage of publication before delivering it to our publisher, Cambridge University Press (CUP). In this respect, we thank Kyle Carney, Tave Parker Doty, Ellen Flint, Evangeline Lim, Victor Looi Yi En, Caitlin P. Schneider, Cherilyn Wong, and Huiling Xie. We are additionally grateful to John Berger, and the editorial staff of CUP, for their strong support to this project. Very special thanks also go to Professor Andrew Harding and Regana Zara Mydin, respectively the Director and Assistant Manager at the Centre for Asian Legal Studies (CALS) at the Faculty of Law of NUS at the time of our meeting in March 2015. Without the financial and administrative support from CALS, this project would not have been possible. We also thank the Applied Research Centre for Intellectual Assets

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Irene CALBOLI
NG-LOY Wee Loon
Singapore, August 2016

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