

The New Japanese Act on Geographical Indications An Intangible Cultural Heritage Perspective

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- I. Introduction
- II. Geographical Indications and Intangible Cultural Heritage
 - 1. Geographical Indications and Intangible Cultural Heritage: Two Worlds Apart or in Mutual Support?
 - 2. Unraveling Inconsistencies or Facing Reality? The Japanese GI Act
- III. The Process towards a Registered Geographical Indication in Japan
 - 1. The Association of Producers, the Application Form and Opinions of Third Parties
 - 2. Grounds for Refusing an Application
 - 3. Amending a Registered Geographical Indication
 - 4. Canceling a Registered Geographical Indication
- IV. Safeguarding Intangible Cultural Heritage in the Framework of the GI Act, Problematic Issues Highlighted
 - 1. A GI Act Geared towards Economic Goals
 - 2. Association of Producers and Communities
 - 3. Authenticity of the Production Process and Intangible Cultural Heritage
 - 4. Revealing the Essential Characteristics of a Product
- V. Conclusion

I. INTRODUCTION

Since the adoption of the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage (ICH Convention) by UNESCO,¹ there has been an increased interest in finding appropriate methods for safeguarding this form of heritage. Whereas the ICH

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1 See Convention for the Safeguarding of the Intangible Cultural Heritage, 17 October 2003, U.N. Doc. MISC/2003/CLT/CH/14.

Convention explicitly recognizes that it does not interfere with the intellectual property right regime, the Operational Directives state that the ICH Convention does not exclude the application of intellectual property rights to safeguard intangible cultural heritage. In specific, the Operational Directives urge the State Parties to adopt the appropriate legal mechanism to duly protect the rights of the communities, groups and individuals that create, bear and transmit their intangible cultural heritage.² One form of intellectual property right that may be suitable, so informs Dev Gangjee, is a geographical indication.³ The formal recognition under intangible cultural heritage laws may be supplemented with a registration as a geographical indication to provide better marketing tools for the intangible cultural heritage and, if necessary, “protection in the international markets.”⁴

This paper investigates to what extent the recently adopted Act for the Protection of the Names of Designated Agricultural, Forestry and Fishery Products and Foodstuffs,⁵ which is generally referred to as “the” law on geographical indications (GI; the act is hereinafter called GI Act),⁶ is able to contribute to a better safeguarding of intangible cultural heritage. The extension of the scope of protection towards “non-edible agricultural, fishery or forestry products and products manufactured or processed using agricultural, forestry and fishery products,”⁷ and thus creating a potential overlap between the regime on intangible cultural heritage and geographical indications, justifies this question. Communities, groups and in some cases individuals, holders of intangible cultural heritage, deserve guidance about the possible hidden dangers of applying for a geographical indication in relation to products based upon intangible cultural heritage.

This article is structured as follows. Section II will introduce the debate on geographical indications and intangible cultural heritage with the purpose of indicating that there exist two opposing views on the usability of the former in relation to the latter. By then introducing the scope of the new Japanese GI Act, the Section will purport that a part of

2 Operational Directives for the Implementation of the Convention for the Safeguarding of the Intangible Heritage, Chapter IV1.2. paragraph 104, <http://www.unesco.org/culture/ich/en/directives>.

3 See D.S. GANGJEE, Geographical Indications and Cultural Rights: The Intangible Cultural Heritage Connection?, in: Geiger (ed.), *Research Handbook on Human Rights and Intellectual Property* (Cheltenham 2015) 555–556.

4 *Id.*, 556.

5 *Tokutei nōrin suisan-butsumō no meishō no hogo ni kansuru hōritsu*, Law No. 84/20014, http://www.maff.go.jp/j/shokusan/gi_act/outline/pdf/doc4.pdf.

6 See, e.g., MAFF, Geographical Indication (GI) Protection System in Japan, http://www.maff.go.jp/e/japan_food/gi_act/pdf/gi_pamph.pdf; J. KIMURA, Dawn of Geographical Indications in Japan: Strategic Marketing Management of GI Candidates (Paper prepared for the 145th EAAE Seminar “Intellectual Property Rights for Geographical Indications: What is at Stake in TTIP?”, 14–15 April, Parma, Italy), [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).

7 Art. 2 GI Act.

the debate has become obsolete. The reality shows that geographical indications can extend towards intangible cultural heritage. In order to further analyze the perils and promises of the extension of the GI Act towards intangible cultural heritage in Section IV, Section III will describe in detail the conceptualization of the new Japanese GI Act. In conclusion, Section V will hold that the GI Act extends to intangible cultural heritage but that holders of intangible cultural heritage should be careful when they seek the registration of products incorporating their intangible cultural heritage as a geographical indication.

II. GEOGRAPHICAL INDICATIONS AND INTANGIBLE CULTURAL HERITAGE

1. *Geographical Indications and Intangible Cultural Heritage: Two Worlds Apart or in Mutual Support?*

The academic debate on the use of geographical indications in relation to intangible cultural heritage is divided.⁸ On the one hand, scholars have defended the vision that

8 The debate is mainly conducted within the framework of traditional knowledge or traditional cultural expressions. This article starts from the presumption that what has been said for traditional knowledge or traditional cultural expressions can be transferred to intangible cultural heritage as well. This is based on the parallels between the definitions that are or are being elaborated at the international level. Intangible cultural heritage is defined in the 2003 ICH Convention. The ICH Convention has a very broad definition of intangible cultural heritage. According to Art. 2 (1) ICH Convention, intangible cultural heritage means “the practices, representations, expressions, knowledge, skills – as well as instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage.” It is further stated that “[t]his intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity.” An exemplary list of intangible cultural heritage is added in Art. 2 (2) ICH Convention. Intangible cultural heritage is manifested in (a) oral traditions and expressions, including language as a vehicle of the intangible cultural heritage; (b) performing arts; (c) social practices, rituals and festive events; (d) knowledge and practices concerning nature and the universe; (e) traditional craftsmanship. Unlike with intangible cultural heritage, there is yet no internationally adopted definition of traditional knowledge or traditional cultural expressions. The closest to an internationally adopted definition, is the draft definition elaborated by the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore. This committee is elaborating an international legal instrument in which traditional knowledge (TK) and traditional cultural expressions (TCE) will be defined. Traditional knowledge is determined in the Terms of Use and Art. 1 of The Protection of Traditional Knowledge: Draft Articles, 2 June 2014, WIPO/GRTKF/IC/28/5, http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=276361 (hereinafter Draft TK). Art. 1 Draft TK says that “[t]he subject matter of [protection]/[this instrument] is traditional knowledge: a. that is created, and [maintained] in a collective context, by indigenous [peoples] and local communities [or nations] [,whether it is widely spread or not]; b. that is [directly] [linked]/[distinctively associated] with the cultural [and]/[or] social identity and cultural heritage of indigenous [peoples] and local com-

geographical indications and intangible cultural heritage are two worlds apart.⁹ On the other hand, scholars have opined that geographical indications could have a positive contribution to intangible cultural heritage.¹⁰ These two visions have probably emerged

munities [or nations]; c. that is transmitted from generation to generation, whether consecutively or not; d. which may subsist in codified, oral or other forms; and [or] which may be dynamic and evolving.” Traditional knowledge covers “know-how, skills, innovations, practices, teachings and learnings of [indigenous [peoples] and [local communities]]/or a state or states.” Traditional cultural expressions are determined in the Terms of Use and Art. 1 of The Protection of Traditional Cultural Expressions: Draft Articles, 2 June 2014, WIPO/GRTKF/IC/28/6, http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=276220 (hereinafter Draft TCE). Art. 1 Draft TCE says that “[t]he subject matter of [protection]/[this instrument] is traditional cultural expressions: a. that are [created]/[generated], expressed and maintained, in a collective context, by indigenous [peoples] and local communities [or nations] [whether they are widely spread or not]; [and]/[or] b. that are [the unique product of] [directly] [linked with]/[distinctively associated with] the cultural [and]/[or] social identity and cultural heritage of indigenous [peoples] and local communities [or nations]; [and]/[or] c. that are transmitted from generation to generation, whether consecutively or not; [and]/[or] d. [that have been used for a term as has been determined by each [Member State]/[Contracting Party] [but not less than 50 years]]; [and]/[or] e. [that are the result of [creative intellectual activity]/[creative activity of the intellect]]; [and]/[or] which are/may be dynamic and evolving.] Traditional cultural expressions cover “any form of [artistic and literary], [creative and other spiritual] expression, tangible or intangible, or a combination thereof, such as actions, materials, music and sound, verbal and written [and their adaptations], regardless of the form in which it is embodied, expressed or illustrated [which may subsist in written/codified, oral or other forms].”

- 9 See, e.g., T. BROUDE, *From Chianti to Kimchi: Geographical Indications, Intangible Cultural Heritage, and Their Unsettled Relationship with Cultural Diversity*, Hebrew University of Jerusalem Legal Studies Research Paper Series No. 15-34 (2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2687634; T. BROUDE, *A Diet Too Far? Intangible Cultural Heritage, Cultural Diversity, and Culinary Practices*, Hebrew University of Jerusalem Legal Studies Research Paper Series No. 15-6 (2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2439181 (hereinafter Broude (2013)); S. FRANKEL, *The Mismatch of Geographical Indications and Innovative Traditional Knowledge*, Victoria University of Wellington Legal Research Papers No. 35 (2011), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1953033; T. KONO, *Geographical Indication and Intangible Cultural Heritage*, in: Ubertazzi/Muñiz Espada (eds.), *Le indicazioni di qualità degli alimenti: diritto internazionale ed europeo* (Milan 2009) 289; T. BROUDE, *Taking “Trade and Culture” Seriously: Geographical Indications and Cultural Protection in WTO Law*, *University of Pennsylvania Journal of International Law* 26 (2005) 623 (hereinafter Broude (2005)).
- 10 See, e.g., GANGJEE, *supra* note 3, 544; I. CALBOLI, *Of Markets, Culture, and Terroir: The Unique Economic and Culture-Related Benefits of Geographical Indications of Origin* (2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2329566; D. MARIE-VIVIEN, *The Protection of Geographical Indications for Handicrafts: How to Apply the Concepts of Natural and Human Factors to All Products*, in: WIPO J. 4 (2013) 191; D. GERVAIS, *Traditional Innovation and the Ongoing Debate on the Protection of Geographical Indications*, in: Drahos/Frankel (eds.), *Indigenous Peoples’ Innovation: Intellectual Property Pathways to Development* (Canberra 2012) 132–143 (admitting that the support is limited non-secret traditional knowledge); C. BRAMLEY, *A Review of the Socio-Economic Impact of Geographical Indications: Considerations for the Developing World*, paper presented at the WIPO

from the fact that geographical indications and intangible cultural heritage have “their focus on old creativity and community ownership, rather than new knowledge and individual ownership.”¹¹

Among the advocates for separating geographical indications and intangible cultural heritage, there exists an argument that many of the common features are only “apparently” common. Susy Frankel, in her article *The Mismatch of Geographical Indications and Innovative Traditional Knowledge*, opines that the commonality is only superficial.¹² Without addressing all (un)common features, Frankel relates the “appearance of similarity between GI and traditional knowledge”¹³ to indefinite protection, the collective ownership and the relationship to land. First, indefinite protection offered by a geographical indication is only superficial because the protection is limited to the name of the product and does not extend to the intangible cultural heritage underlying the product. Second, collective ownership in the framework of geographical indications is characterized by an individual “entitlement to the collective,”¹⁴ while such a claim for an entitlement is not present among intangible cultural heritage holders. Toshiyuki Kono further identifies that the entitlements of individuals within the collective allow for the exclusion of others to use the protected geographical indication, and thus create a monopoly, while the idea of exclusion is exogenous to the intangible cultural heritage parlance.¹⁵ Third, the relationship towards land differs in the sense that geographical indication seeks to protect a name because of the land, while intangible cultural heritage seeks the protection of the relationship between the knowledge and the land. It may well be that, as Kono has pointed out, intangible cultural heritage is not necessarily linked to a specific region or area.¹⁶

Kono has analyzed to what extent the generally accepted minimum definition of a geographical indication¹⁷ overlaps with the one of intangible cultural heritage.¹⁸ The comparison leads to the conclusion that one concept, authenticity, distinguishes geographical indications from intangible cultural heritage.¹⁹ Through the concept of authen-

Worldwide Symposium on Geographical Indications, 22–24 June 2011), http://www.wipo.int/edocs/mdocs/geoind/en/wipo_geo_lim_11/wipo_geo_lim_11_9.pdf.

11 M. A. ECHOLS, Geographical Indications for Foods, TRIPS and the Doha Development Agenda, in: *Journal of African Law* 47 (2003) 199.

12 See FRANKEL, *supra* note 9.

13 *Id.*, 5.

14 *Id.*, 8.

15 See KONO, *supra* note 9, 298.

16 See *id.*, 298.

17 The internationally accepted minimal standard for GIs is formulated in Art. 22 (1) TRIPS, and reads as: “[g]eographical indications are, for the purposes of this Agreement, 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 geographical origin.”

18 See KONO, *supra* note 9, 295–299. A definition of ICH is given *supra* note 8.

19 See *id.*, 298.

ticity, geographical indications protect the quality of a product.²⁰ The production process that is “inseparably linked to geography”²¹ has to be described in the application and will be used as a controlling standard. Conforming to this standard, thus keeping the authenticity of the production process, is supposed to give the quality of the product. Authenticity is thus tantamount to originality. This excludes any form of evolution. Geographical indications are thus explained as stabilizing a “historically validated production method.”²² This runs counter the characteristic of the living nature of intangible cultural heritage.

Tomer Broude has formulated another argument showing that geographical indications and intangible cultural heritage do not relate well.²³ According to Broude, a geographical indication does not fulfill the functions that are attributed to it. A geographical indication is not able to immunize the producers from the market forces, due to which a shift to non-traditional production techniques is, sooner or later, likely to occur.²⁴ Just like markets will change the production techniques, markets will change the consumption patterns of consumers and a geographical indication will not be able to preserve an existing culture of consumption patterns.²⁵ In relation to the protection of a cultural identity, the creation of systems, like geographical indication protection, show that producers have a tendency to proclaim that whatever they have been doing is a reflection of tradition, binding them together in a community. This in turn, makes the producers eligible for protection. As communities are being created based upon invented traditions, a soaring number of geographical indications reduced their distinguishing affecting any other purpose that may be served by the geographical indication.²⁶

Despite the argument that geographical indications do not fit within the framework of safeguarding intangible cultural heritage, there are arguments that have attributed a positive role to geographical indications in relation to intangible cultural heritage. Some scholars focus on the common features between geographical indications and intangible cultural heritage to make an argument that the former can be used in relation to safeguarding the other. Daphne Zografos Johnsson, for example, lists and shortly explains the common features. In her opinion, the common features are:

(a) the communal element: while GIs identify a good that is produced by a number of different producers, traditional cultural expressions (TCEs) are usually produced within the community; (b) the element of tradition: while GIs are often based on traditional

20 See CALBOLI, *supra* note 10, 11.

21 KONO, *supra* note 9, 298.

22 GANGJEE, *supra* note 3, 557.

23 See BROUDE (2005), *supra* note 9.

24 See *id.*, 651–656 and 663–669.

25 See *id.*, 665–660 and 669–674.

26 See *id.*, 660–662 and 674–678. See also R.L. BRULOTTE/M.A. DI GIOVINE (eds.), *Edible Identities: Food as Cultural Heritage* (Famham 2014) (in which various chapters describe the (re)invention of traditions).

formulae and processes, TCEs are produced according to traditional methods; (c) the element of time: the know-how attached to both GIs and TCEs is transmitted from one generation to the other; (d) the geographical link: while GIs are granted for products which have a relationship with the land, local resources or the environment, TCEs are generally linked to a specific place where a certain product is made, or to traditional methods or conditions used in a specific place for making a product, often using raw material from sustainable resources. In addition, while the value of a GI is linked to its origin, the value of TCEs is linked to the knowledge that a particular community from a particular region has produced it.²⁷

These common features are not always explicitly mentioned in the argument that geographical indications can support intangible cultural heritage. Irene Calboli, starting with the observation that geographical indications “often embody a cultural component,”²⁸ argues that a designation as a geographical indication could serve as a way to keep this local and traditional knowledge (TK) alive. Put differently, “GI-denominated products could [...] serve to promote the continuation of traditional manufacturing techniques, which could otherwise succumb to the competition of mass productions techniques.”²⁹ Elizabeth Ferreira da Silva and Patricia Pereira Peralta describe the process behind this reasoning as follows:

“[Geographical indications] intend to identify products of a local community, and therefore can help increase economic value of the products. In the collective sense, they serve to identify an original producer, offering distinctiveness to products compared to those of others competitors in the market. In this case, the quality of the products offered is intrinsically linked to the reputation of the agent [...]”³⁰

Due to the process of identification and differentiation, it becomes thus economically viable to keep making and selling local products even with methods that would otherwise lead to losses.³¹ The presumption is thus that attributing a geographical indication to a

27 D. ZOGRAFOS JOHNSON, *The Branding of Traditional Cultural Expressions: To Whose Benefit?*, in: Drahos/Frankel (eds.), *supra* note 10, 157–158.

28 See CALBOLI, *supra* note 10, 14 (the cultural component often relates “to local and traditional knowledge of the region where the products are made”). See also L. BÉRARD/PH. MARCHENAY, *Tradition, Regulation and Intellectual Property: Local Agricultural Products and Foodstuffs in France*, in: Brush/Stabinsky (eds.), *Valuing Local Knowledge: Indigenous People and Intellectual Property Rights* (Washington 1996) 242.

29 CALBOLI, *supra* note 10, 14–15.

30 E. FERREIRA DA SILVA/P. PEREIRA PERALTA, *Collective Marks and Geographical Indications – Comparative Strategy of Differentiation and Appropriation of Intangible Heritage*, in: *Journal of Intellectual Property Rights* 16 (2011) 247.

31 But see J. HUGHES, *Coffee and Chocolate – Can We Help Developing Country Farmers through Geographical Indications?* (2010) 10, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1684370 claiming that this kind of reasoning is only valid if the geographical indication is part of a marketing strategy. The mere introduction of the geographical indication would not trigger any kind of valorization effect.

product could create and stimulate an economy in which time consuming production processes are affordable, production processes based upon decades and sometimes centuries of collected knowledge could be safeguarded. Without the geographical indication, the producers would probably shift to “pressures of efficiency and maximum exploitation.”³² The negative effect of these pressures could be, in the best case, an overhaul of the production process or selling the production process to a multinational, through which a diverse and local production process will shift to “mass production, mass distribution and uniformity of products across various countries.”³³

Behind the aforementioned reasoning is the recognition that geographical indications do not directly protect intangible cultural heritage.³⁴ Geographical indications alone do not prevent the appropriation of intangible cultural heritage that it has embedded.³⁵ A system of geographical indications is about “valorizing the products which draw on traditional knowledge in its production.”³⁶ The process of valorization will reward the producers that utilize the intangible cultural heritage. This reward will “encourage the continued use and preservation of the associated traditional knowledge.”³⁷ Geographical indications, by enabling “people to translate their longstanding, collective and patrimonial knowledge into livelihood and income,”³⁸ are thus not about protecting the traditional knowledge but only about its continued existence.

Justin Hughes tempers the expectations of the argument that geographical indications can have a positive effect on intangible cultural heritage.³⁹ Geographical indications center on connections to place and not on traditional customs.⁴⁰ Nonetheless, intangible cultural heritage could be preserved through the help of geographical indications if the “product’s unique qualities *depend* on local, traditional knowledge.”⁴¹ Hughes further clarifies this statement by saying that

“if the claimed nexus between place and product qualities *absolutely depends* on some TK, then successful GI-based marketing of the product will preserve the TK – simply be-

32 CALBOLI, *supra* note 10, 15.

33 *Id.*

34 See BRAMLEY, *supra* note 10, 7. See also B. HAZUCHA, Intellectual Property and Cultural Diversity: Two Views on the Relationship between Market and Culture, in: Kono/Van Uytzel (eds.), *The UNESCO Convention on the Diversity of Cultural Expressions: A Tale of Fragmentation in International Law* (Antwerp 2012) 328.

35 See BRAMLEY, *supra* note 10, 7.

36 *Id.*

37 *Id.*

38 BÉRARD/MARCHENAY, *supra* note 28, 240.

39 See HUGHES, *supra* note 31, 70–80; See also T. VOON, Geographical Indications, Culture and the WTO, in: Ubertazzi/Muñiz Espada (eds.), *supra* note 9, 307 (indicating that it may not be easy for a consumer to ascertain whether the geographical indication is reflecting cultural attributes the consumer is expecting. In other words, she indicates that consumers are not always aware of what a geographical indication stands for).

40 See HUGHES, *supra* note 31, 72.

41 *Id.*, 76.

cause the TK is needed to make the product. In other words, the geography is *always* a necessary condition for the GI [sic] product, but the local customs are only *sometimes* a necessary condition.”⁴²

These conclusions are based upon the observation that “the history of successful GIs is replete with examples of the local traditional knowledge being substantially modified or *abandoned* in order to ensure the GI product’s continued success.”⁴³ In order to prevent the latter from happening, Hughes suggests strengthening the connection between geographical indications and intangible cultural heritage by incorporating the intangible cultural heritage elements in the product specifications of the geographical indication⁴⁴ and, at the same time, impose “production conditions, requirements or specifications.”⁴⁵

Giving a complete picture of the extent of the debate is outside the scope of this article, but some problems related to using geographical indications to support intangible cultural heritage need to be highlighted. One problem is the overexploitation of geographical indications. The collateral damage of such an overexploitation may be on the use of intangible cultural heritage as such⁴⁶ or on the society as a whole in the form of, for example, environmental problems⁴⁷. Another problem that is identified is that a geographical indications legislative framework may force previously undisclosed intangible cultural heritage to open up.⁴⁸

2. *Unraveling Inconsistencies or Facing Reality? The Japanese GI Act*

Among the scholars debating about the geographical indications in relation to intangible cultural heritage, it is not only possible to distinguish two different views: one stating that geographical indications and intangible cultural heritage do not fit together and one arguing in favor of using geographical indication to safeguard intangible cultural heritage. It is also possible to discern the same two approaches to support each view. One approach focuses on the definition of geographical indications and intangible cultural heritage to argument either in favor or in disfavor of a supportive role. The other approach emphasizes whether a geographical indication can in practice mean something for intangible cultural heritage to conclude either in favor or disfavor of a supportive role.

42 *Id.*

43 *Id.*, 76–77.

44 See *id.*, 79.

45 *Id.*, 79 (Hughes notes that the quality control can be done by governmental, para-statal, or private institutions, as long as it operates transparently and is relatively inclusive and non-corrupt. See *id.*, 80).

46 See *id.*, 10.

47 See CALBOLI, *supra* note 10, 16.

48 N.S. GOPALAKRISHNAN/P.S. NAIR/A.K. BABU, Exploring the Relationship Between Geographical Indications and Traditional Knowledge: An Analysis of the Legal Tools for the Protection of Geographical Indications in Asia, International Centre For Trade and Sustainable Development Working Paper (2007), <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.163.564&rep=rep1&type=pdf>.

Reaching different outcomes for a similar question may lead to the conclusion that there is confusion on the substantive matter. One could attempt to disentangle the different understandings and bring clarity in the confusion. It could be argued that the geographical indications have a different understanding of the collectivity concept, but that does not mean that the holders of intangible cultural heritage are excluded from using the intangible cultural heritage just because a geographical indication has been attached to a product produced by this heritage. Equally, intangible cultural heritage parlance may not know the monopoly right, but that does not mean that geographical indications are attributing a monopoly right to the intangible cultural heritage. It is well possible to say that a geographical indication is not able to preserve intangible cultural heritage as something carved in stone, but that would equally deny the very nature of intangible cultural heritage. Making theoretical statements on the indirect support of geographical indications to intangible cultural heritage is entering a slippery slope if it is not supported by empirical evidence.

Any attempt, however, to create a single line in the discussion on geographical indications and intangible cultural heritage may be obsolete after having seen the reality. The reality is that legislators have created geographical indication regimes that allow for non-edible products. Japan, be it in a limited way, is one such example. The Diet passed the GI Act in 2014.⁴⁹ This Act operates under the supervision of the Ministry of Agriculture, Forestry and Fishery (MAFF) since 1 June 2015.⁵⁰

That MAFF is 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 with regard to the ongoing negotiations for the Trans-Pacific Partnership Agreement,⁵¹ has its impact on

49 GI Act, *supra* note 5.

50 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 on agricultural, forestry and fishery products and foodstuffs. See MAFF, Abe Cabinet Agricultural Reform (2014), <http://fpcj.jp/wp/wp-content/uploads/2014/07/a89885aa705c72d976dd953518d82140.pdf>.

51 See N. TOGAWA, Report on the New Japanese Law on Protection of Geographical Indications, International Association for the Protection of Intellectual Property (2014), <https://www.aippi.org/download/commitees/220/GR220japan.pdf>. One should note that the Ministry of Agriculture, Fisheries, and Forestry had been contemplating the establishment of a *sui generis* system for the protection of geographical indications in 2003. However, in a power struggle with the Ministry of Economy, Trade and Industry of Japan, MAFF had to recognize METI as its superior. See L. AUGUSTIN-JEAN/K. SEKINE, From Products of Origin to Geographical Indications in Japan: Perspectives on the Construction of Quality for the Emblematic Productions of Kobe and Matsusaka Beef, in: Augustin-Jean/Ilbert/Saavedra-Rivano (eds.), *Geographical Indications and International Agricultural Trade: The Challenge for Asia* (Hampshire 2012) 148; D. KOJO, Comment: The Importance of the Geographic Origin of Agricultural Products: A Comparison of Japanese and American Approaches, in: *Mo. Envtl. L. & Pol'y Rev.* 14 (2007) 294. METI designed the positive protection system within the Trademark Act, allowing for the registration of regional names together with a common name of a good or service. This system, generally referred to as regionally based

the definition of products eligible for a geographical indication. Only products and foodstuffs that relate to agriculture, forestry and fishery are within the protective scope of the GI Act.⁵² However, the legislator did not limit the scope to edible or drinkable agricultural, forestry or fishery products and foodstuffs. The decision was made to extend the protective scope to non-edible and manufactured or processed agricultural, forestry and fishery products. Art. 2 GI Act enables designating the following products with a geographical indication:

- 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.⁵³

In the same article, we can read that alcohol, pharmaceuticals, quasi-pharmaceutical products, cosmetics and regenerative medicine are explicitly excluded from the list of products that could be understood as agricultural, forestry and fishery products. Alcoholic drinks, such as *sake*, *shōchū*, wine, or spirits, can obtain a geographical indication based upon the Act Concerning Liquor Business Associations and Measures for Securing Revenue from Liquor Tax.⁵⁴

collective trademarks, went into effect in 2006. By the end of 2013, 551 regional collective trademarks had registered with the Japan Patent Office, while another 400 were pending for review. For a description of the latter, see K. PORT, Regionally Based Collective Trademark System in Japan: Geographical Indicators by a Different Name or a Political Misdirection?, in: *Cybaris. An Intellectual Property Law Review* 6-2 (2015); D. GANGJEE, Protecting Geographical Indications as Collective Trademarks: The Prospects and Pitfalls, *IIP Bulletin* (2006) 115–118. For a summary of all regionally based collective trademarks, see Japan Patent Office, Regional Brands in Japan: Regional Collective Trademarks (2014), https://www.jpo.go.jp/cgi/link.cgi?url=/sesaku_e/trademark_system.htm.

52 This definition is narrower than the internationally accepted minimal standard for geographical indications formulated in Art. 22 (1) TRIPs. For the definition, see *supra* note 8. Geographical indications, as defined in TRIPs, can include all kinds 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 10, 5; MARIE-VIVIEN, *supra* note 10, 194–195.

53 Art. 2 GI Act.

54 The Act Concerning Liquor Business Associations and Measures for Securing Revenue from Liquor Tax (Law No. 7/1953) gives, in Art. 86-6, the Minister of Finance broad powers to issue standards relating to how liquors will be displayed to consumers. The law mentions the process of making liquor and quality, but then leaves an opening by including the vague denominator of “other related items.” That this vague denominator can include geographical indications has become apparent in the notification of the National Tax Agency. See Standard for Indication in Relation to Geographical Indications, Notification No. 4 of National Tax Agency of 28 December 1994 (lastly amended by Notification No. 9 (2006)), <http://www.wipo.int/edocs/lexdocs/laws/ja/jp/jp068ja.pdf> (for an unofficial translation: <http://www.wipo.int/edocs/lexdocs/laws/en/jp/jp068en.pdf>). There are currently 6 geographical indications recognized for wine (Yamanashi), *sake* (Hakusan) and *shōchū* (Iki, Kuma, Satsuma, and Ryūkyū). For detailed information on the Notifications granting the geographical

Eggs, vegetables, fruits, seafood, and milk on the one hand,⁵⁵ and bread, tofu, olive oil, soft drinks, or prepared food on the other hand⁵⁶ can be categorized under the first and second section of Art. 2 GI Act respectively. A Cabinet Order further explains section 3 and 4 of Art. 2 GI Act. Under non-edible agricultural, forestry and fishery products, MAFF categorizes ornamental plants, industrial crops, ornamental fish, and pearl.⁵⁷ Products manufactured or processed using agricultural, forestry and fishery products include feed (limited to things manufactured or fabricated from agricultural, forestry or fishery products as raw produce or ingredient), lacquer, bamboo material, essential oil, charcoal, timber, tatami facing, and raw silk.⁵⁸

By including manufactured or processed products, the GI Act embraces know-how, skills and practices necessary for transforming agricultural, forestry and fishery products into other products. This know-how, skills and practices can, but not necessarily, have grown in response to the outside environment and transferred from generation to generation, due to which they have been recognized as part of the identity of the beholders. Such know-how, skills and practices constitute craftsmanship, which is also recognized as a category of intangible cultural heritage internationally⁵⁹ and in Japan⁶⁰. Holders of such intangible cultural heritage, whether or not recognized under any of the intangible cultural heritage regimes, should therefore carefully consider the regime of geographical indications before filing an application. How this regime looks like in Japan is explained in the following section.

indication by the National Tax Agency, see <https://www.nta.go.jp/shiraberu/senmonjoho/sake/hyoji/chiri/gaiyo/04.htm>.

- 55 See MAFF, Establishment of Japan's Geographical Indication (GI) Protection System, slide 2.2 (2014), http://www.eu-japan.eu/sites/eu-japan.eu/files/SAKA_EN_0.pdf (stipulating that there is no need for a cabinet order to further specify the products that are included).
- 56 See *id.* (stipulating that there is no need for a cabinet order to further specify the products that are included).
- 57 See Art. 1 Cabinet Order No. 227 on the Implementation of the Act for the Protection of the Names of Designated Agricultural, Forestry and Fishery Products and Foodstuffs, http://www.maff.go.jp/j/shokusan/gi_act/outline/pdf/doc7.pdf.
- 58 See Art. 2 Cabinet Order No. 227.
- 59 See Art. 2 (1) and (2) ICH Convention. See also J. BLAKE, Commentary on the UNESCO 2003 Convention on the Safeguarding of the Intangible Cultural Heritage (Leicester 2006) 31 and 39.
- 60 See Art. 2 (2) Law for the Protection of Cultural Property, Law No. 214/1950, last amended 30 March 2007, http://www.unesco.org/culture/natlaws/media/pdf/japan/japanlawprotectionculturalproperty_engtof.pdf (Intangible cultural heritage is referred to in this law as intangible cultural properties and folk-cultural properties. Know-how, techniques, 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 2 (2015), http://www.bunka.go.jp/tokei_hakusho_shuppan/shuppanbutsu/bunkazai_pamphlet/pdf/pamphlet_en_03_ver04.pdf.

III. THE PROCESS TOWARDS A REGISTERED GEOGRAPHICAL INDICATION IN JAPAN

1. The Association of Producers, the Application Form and Opinions of Third Parties

In order for agricultural, forestry and fishery products and foodstuffs to be eligible for geographical indication registration, these products need to be identifiable based upon location⁶¹ and quality or reputation linked to that location⁶². If producers or processors of agricultural, forestry and fishery products are of the opinion that these products fulfill the criterion of location based identity that is linked with quality or reputation, they can group into an association of producers.⁶³

An association of producers is in principle composed of members, who can be, but not necessarily,⁶⁴ the direct producers of the agricultural, forestry and fishery produce. If the association of producers is organized as a legal person, a representative or a manager has to be appointed. The task of the association is multiple. First, the association is responsible for applying for the geographical indication to MAFF and thus has to prepare all the necessary documents. Second, once a geographical indication has been granted, the association is responsible for the management and control of the production processes that have been described in the application.

When an association of producers has been formed, an application with MAFF can be filed to obtain a geographical indication.⁶⁵ The application needs to contain the following information:⁶⁶

- 1) the name and address of the association of producers and its representative;
- 2) the classification of the agricultural, forestry or fishery product;
- 3) the name of the agricultural, forestry or fishery product;
- 4) the region of the agricultural, forestry or fishery product;
- 5) the distinct characteristic of the agricultural, forestry or fishery product (shape, taste, etc.);
- 6) the method of production of the agricultural, forestry or fishery product.

This list of requirements can be enlarged by MAFF to include other necessary information.⁶⁷ Together with the application form, the association of producers needs to

61 See Art. 3 and 2 (1) GI Act.

62 See Art. 3 and 2 (2) GI Act.

63 See Art. 2 (5) GI Act.

64 See J. HAYASHI, Japan to Implement GI System on June 1, 2015, GAIN Report Number JA5008 (2015) 4, http://gain.fas.usda.gov/Recent%20GAIN%20Publications/Japan%20to%20Implement%20GI%20system%20on%20June%201_2015_Tokyo_Japan_3-10-2015.pdf (mentioning that producers, processors, and local branding associations can form an association of producers).

65 See Art. 7 GI Act.

66 See Art. 7 (1) 1–8 GI Act.

67 See Art. 7 (1) 9 GI Act.

submit a detailed product specification and guidelines for quality control.⁶⁸ These guidelines should specify how the group would manage the production process. Since the process of specifying the product is supposed to be made within the organization, the community of local producers or processors asking for the recognition of their products as geographical indication, will be consulted.

Once MAFF receives an application, the application will be announced on a special website.⁶⁹ During a period of three months, any person can formulate an opinion regarding the application and submit it to MAFF.⁷⁰ The opinions are forwarded to the applying association.⁷¹

When the period of three months is over, MAFF has to consult with experts (persons with specialized knowledge and experience) in order to see whether the application should be rejected according to one of the categories for the rejection of an application.⁷² The experts will also be given the opinions expressed during the public notice period of three months.⁷³ If the experts deem it necessary, they can also consult the stakeholders directly.⁷⁴ The experts have a duty of confidentiality regarding the information they have obtained in the process of formulating their opinion. Further, they should refrain from using this information fraudulently.⁷⁵ If the screening process with experts does not reveal any reason for which a registration should be rejected, MAFF will proceed to register the geographical indication,⁷⁶ inform the applicant of its successful registration⁷⁷ and notify the public through a posting on a designated MAFF website.⁷⁸

2. *Grounds for Refusing an Application*

During the registration process, the general public and experts can formulate comments and opinions on the application for a geographical indication. The comments and opinions should enable MAFF to decide whether or not there are reasons to refuse a geographical indication. There are several reasons why an application for registration can be denied. The main reasons can be divided into the following categories: the applicant,⁷⁹ the quality control guidelines,⁸⁰ nature of the product,⁸¹ and the name of the product⁸².

68 See Art. 7 (2) GI Act.

69 See Art. 8 GI Act.

70 See Art. 9 (1) GI Act.

71 See Art. 9 (2) GI Act.

72 See Art. 11 GI Act.

73 See Art. 11 (2) GI Act.

74 See Art. 11 (3) GI Act.

75 See Art. 11 (4) GI Act.

76 See Art. 12 (1) GI Act.

77 See Art. 12 (3) GI Act.

78 See *id.* The website where the information is uploaded is: http://www.maff.go.jp/j/shokusan/gi_act/notice/index.html.

79 See Art. 13 (1) GI Act.

80 See Art. 13 (2) GI Act.

The applicant for a geographical indication may not be eligible for filing an application within two years after this organization's geographical indication has been cancelled for any of the following reasons:⁸³

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

Quality control guidelines are an important part of the geographical indication application. The quality control guidelines stipulate how the organization plans to manage the compliance of the association's members with the methods of production described in the application.⁸⁴ If the guidelines are insufficient to fairly ensure compliance with the described methods of production, a geographical indication can be refused.⁸⁵ Equally, if the organization does not prove to have enough financial or technical ability to conduct the quality control, MAFF will refuse the application.⁸⁶

MAFF will also refuse a geographical indication application if the products do not meet the definition of designated agricultural, forestry and fishery products and foodstuffs.⁸⁷ This has two aspects. The refusal of the application can be based upon the fact that the product or foodstuff falls outside the concept definition of Article 2 (1) on agricultural, forestry and fishery products and foodstuffs.⁸⁸ Another basis for refusal is the lack of a geographic link, a specific quality, reputation or other characteristic that is attributable to the location in question.⁸⁹

A last category for which MAFF can refuse the application for a geographical indication is that the name is considered a generic term⁹⁰ or is identical or similar to a registered trademark⁹¹. It is, however, possible that the owner of a registered trademark or an authorized user applied for geographical indication recognition.⁹² In such a case, the name will be both protected under trademark law and the GI Act.

81 See Art. 13 (3) GI Act.

82 See Art. 13 (4) GI Act.

83 See Art. 13 (1) and Art. 22 GI Act.

84 See Art. 13 (2) GI Act.

85 See *id.*

86 See *id.*

87 See Art. 13 (3) GI Act.

88 See Art. 2 (1) GI Act.

89 See Art. 2 (2) GI Act.

90 See Art. 13 (4) (a) GI Act.

91 See Art. 13 (4) (b) GI Act.

92 See *id.*

3. *Amending a Registered Geographical Indication*

The registration of a geographical indication in Japan is not carved in stone. Even though it is compulsory to submit a description of the production process and to make quality control guidelines indicating how the compliance with the production process will be ensured, the GI Act provides the association of producers with the possibility to revise their registration.⁹³ The process of amending a geographical indication'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 eligible association of producers⁹⁴ or application documents⁹⁵.

The association of producers that is in charge of checking the compliance with the quality control guidelines can apply to add another association of producers.⁹⁶ Such an application requires the name and address of the added association of producers and its representative.⁹⁷

Amendments related to application documents have to be supported by all associations of producers that have applied for the registration of a geographical indication.⁹⁸ In other words, all associations of producers need to submit a joint application for amendment. The request for an amendment can relate to the name, the region, or the characteristic of the product, the production process, or the information additionally required by MAFF.⁹⁹ The application for amendment needs to mention the registration number and a description of the part that is open for amendment.¹⁰⁰

The procedure to be followed for these amendments is *mutatis mutandis* the same as for a registration. This means that there is a publication of the amendments, an opposition period, and consultation with experts.¹⁰¹ The duration for each of these steps is also similar to the one stipulated for the original registration.¹⁰² When the amendments are approved, MAFF will make them public at their website.¹⁰³

4. *Canceling a Registered Geographical Indication*

Besides the cases in which a registration as a geographical indication loses its effects, which is when an association of producers has been dissolved or the quality control

93 See Art. 15–19 GI Act.

94 See Art. 15 GI Act.

95 See Art. 16 GI Act.

96 See Art. 15 (1) GI Act.

97 See Art. 15 (2) GI Act.

98 See Art. 16 (2) GI Act.

99 See Art. 16 (3) GI Act.

100 See *id.*

101 See Art. 15 (2) and 16 (3) GI Act.

102 See *id.*

103 See Art. 17 (3) GI Act.

guidelines have been abolished, MAFF may, *ex officio*, cancel a registration.¹⁰⁴ A cancellation can be done for reasons pertaining to the association of producers,¹⁰⁵ the information in the application for registration¹⁰⁶ or the product name¹⁰⁷.

An association of producers is supposed to be an organization grouping producers, processors or brand organizations.¹⁰⁸ Further, the organization is required to accept members on fair conditions compared with those applied to current members.¹⁰⁹ 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.¹¹⁰ Because of this, MAFF can cancel the registered geographical indication.¹¹¹

An association of producers has several obligations. Members of an association of producers have the right to use the geographical indication for the registered products. The flipside of the coin is the obligation not to use the geographical indication for products that are similar to the registered product.¹¹² The use of a designated symbol for a geographical indication is allowed, but the use of a similar symbol is forbidden.¹¹³ Any other forbidden use which is not described in the two previous examples is caught by a general obligation to refrain from any unlawful use of the geographical indication.¹¹⁴ If a violation of any of these obligations occurs, MAFF is entitled to cancel the registration of the geographical indication.¹¹⁵

Quality control is an essential element of the geographical indication's registration. Therefore, the association of producers has the obligation to fulfill this control in the best conditions. This requires quality control guidelines that ensure the compliance with the method of production, sufficient financial capacity to implement the guidelines and technical ability.¹¹⁶ If any of these are not present, the "authenticity" of the product may be affected, giving MAFF the right to cancel the registration.¹¹⁷

MAFF can also cancel a registration if it turns out that the description regarding the origin and the characteristics of the product in the application form do not fit with reali-

104 See Art. 22 GI Act.

105 See Art. 22 (1)–(3) GI Act.

106 See Art. 22 (4) GI Act.

107 See Art. 22 (5) GI Act.

108 See Art. 2 (4) GI Act.

109 See *id.*

110 See *id.*

111 See Art. 22 (1) GI Act.

112 See Art. 3 (2) GI Act.

113 See Art. 4 GI Act.

114 See Art. 5 GI Act.

115 See Art. 22 (2) GI Act.

116 See Art. 13 (2) GI Act.

117 See Art. 22 (3) GI Act.

ty.¹¹⁸ MAFF has a similar right if the product does not originate anymore from a specific region or the quality, reputation or other characteristic essentially attributable to its geographical origin ceases to exist.¹¹⁹ A registration will also be cancelled if the registered name of a designated product has become a generic term.¹²⁰

IV. SAFEGUARDING INTANGIBLE CULTURAL HERITAGE IN THE FRAMEWORK OF THE GI ACT, PROBLEMATIC ISSUES HIGHLIGHTED

1. *A GI Act Geared towards Economic Goals*

The GI Act has been adopted against the backdrop of economic decline and a progressing liberalization. Since his rise to power in 2012, Prime Minister Abe made it clear that the economic revival of Japan, often indicated as Abenomics, was his main aim.¹²¹ Revitalization of the agricultural sector fitted within such an economic view.¹²² That geographical indications may contribute to such a revitalization has been expressed by MAFF in two different ways.¹²³ First, geographical indication will trigger product differentiation based upon brand naming, which, together with quality assurance, will lead to higher price setting. So rural villages will reap the financial benefits and revitalize.¹²⁴ Second, stressing the truly Japanese origin of local produce will increase the interest of foreign consumers, spurring the export of agricultural, forestry and fishery products and foodstuffs of Japan.¹²⁵

MAFF refers to two other aims of the GI Act. Consumer protection is seen as an offspring of the above-mentioned economic aims of the GI Act. Through the quality control, MAFF argues that only products that abide by the pre-determined quality standards reach the market. The certainty about the quality is beneficial to consumers.¹²⁶ Assisting

118 See Art. 22 (4) and 2 (2) GI Act.

119 See *id.*

120 See Art. 22 (5) GI Act.

121 See N. YOSHINO/F. TAGHIZADEH HESARY, Three Arrows of “Abenomics” and the Structural Reform of Japan: Inflation Targeting Policy of the Central Bank, Fiscal Consolidation, and Growth Strategy, Asian Development Bank Institute, Working Paper 492 (2014) 3, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2475730.

122 See MAFF, Abe Cabinet Agricultural Reform (2014), <http://fpcj.jp/wp/wp-content/uploads/2014/07/a89885aa705c72d976dd953518d82140.pdf>.

123 See *id.*, 5.

124 See MAFF, Establishment of Japan’s Geographical Indication (GI) Protection System (2014) 16, http://www.eu-japan.eu/sites/eu-japan.eu/files/SAKA_EN_0.pdf, MAFF, Geographical Indication (GI) Protection System in Japan, 3, http://www.maff.go.jp/e/japan_food/gi_act/pdf/gi_pamph.pdf.

125 See *id.*

126 See *id.*

the inheritance of traditional food culture, whatever it may be according to MAFF,¹²⁷ is another aim of the GI Act. It is without doubt that the latter is the closest reference to intangible cultural heritage made by MAFF.

This article does not need to assess whether the GI Act will be able to attain the goals identified by MAFF. Also, this article should not address the question of whether the GI Act has underlying unstated goals and whether these could be realized. For the purposes of this article, it suffices to point out that the economic goals are most prominent in MAFF's discourse. It will therefore be likely that MAFF will gear the operation of the GI Act towards attaining the economic goals without necessarily paying attention to other aims, such as safeguarding intangible cultural heritage. Furthermore, MAFF is not a ministry dealing with culture and has thus no expertise in this respect. The lack of expertise, however, could be compensated by relying on experts not only versed in geographical indications but also in intangible cultural heritage issues.¹²⁸

Despite the lack of interest in or expertise on intangible cultural heritage in MAFF, the broad scope of the GI Act, combined with the necessity to describe the production process, means that intangible cultural heritage can be part of a geographical indication registration. When holders of intangible cultural heritage register for a geographical indication, they should take into consideration some problems in relation to the association of producers, the authenticity of the production process and the openness regarding the essential characteristics of a product.

2. *Association of Producers and Communities*

A geographical indication regime is an attractive legal instrument for intangible cultural heritage holders because it is "based upon collective traditions and a collective decision-making process."¹²⁹ The GI Act stipulates that the collective decision-making has to occur within the context of an association of producers.¹³⁰ The GI Act leaves it up to the association whether it takes the form of a legal person or not. If the association takes the form of a legal person, the association needs to appoint a representative. Bringing this to the context of intangible cultural heritage, one could argue that the holders of intangible cultural heritage, as a community, could take the place of the association and apply for the geographical indication.

In the context of indigenous communities, Rosemary Coombe, Sarah Ives and Daniel Huizenga have identified that the process of assuming the role of the association of pro-

127 Tomer Broude indicates that this may be explained in two different ways. First, it may relate to a traditional technique of preparing agricultural products into food, see BROUDE (2005), *supra* note 9, 651. Second, it could be interpreted as maintaining a culture of consuming local produce, see *id.*, 656.

128 See Art. 11 GI Act.

129 See SH. SINGHAL, Geographical Indication and Traditional Knowledge, in: Journal of Intellectual Property Law & Practice 3 (2008) 733.

130 See *supra* Section III.1.

ducers by the community will most likely not be problematic.¹³¹ These communities have usually already been “subjectified”¹³² in their interaction with norms of other discourses, as there could be a human rights one or an environmental one.¹³³ This experience will facilitate the communities’ recognition of the “economic and political opportunities that GI protections afford.”¹³⁴

Intangible cultural heritage in Japan is not necessarily linked to indigenous communities seeking protection.¹³⁵ Nonetheless, when there has been a designation as important intangible cultural property, the population group holding the intangible cultural heritage will be subjectified in the framework of the Law for the Protection of Cultural Property.¹³⁶ When intangible cultural heritage, among which traditional craftsmanship, is denominated as important intangible cultural property, the holder of the intangible cultural heritage is designated as person responsible for the safeguarding. The holder can either be an individual or a group.¹³⁷

Even though the population group has been subjectified into a community for intangible cultural heritage purposes, this community may not necessarily be sufficiently homogenous to identify a geographical indication registration as mutually beneficial.¹³⁸ Coombe, Ives and Huizinga reflect on the minoritarian bias,¹³⁹ in which a small group of producers, often the wealthy ones, steers the direction in relation to the geographical indication.¹⁴⁰ A small group may thus be able to construct the collective organization to suit their demands. Their demands may have an impact on the description of the geographical indication application in several ways. The formulation of the production process can be steered towards the practices of the smaller group. The participation criteria

131 See R.J. COOMBE/S. IVES/D. HUIZENGA, *Geographical Indications: The Promise, Perils and Politics of Protecting Place-Based Products*, in: David/Halbert (eds.), *The Sage Handbook of Intellectual Property* (Los Angeles et al. 2015) 215.

132 See R.J. COOMBE, *Cultural Agencies, The Legal Construction of Community Subjects and Their Properties*, in: Biagioli/Jaszi/Woodmansee (eds.), *Making and Unmaking Intellectual Property: Creative Production in Legal and Cultural Perspective* (Chicago 2011) 83.

133 See COOMBE/IVES/HUIZENGA, *supra* note 131, 215.

134 *Id.*

135 See, e.g., N. AKAGAWA, *Heritage Conservation in Japan’s Cultural Diplomacy: Heritage, National Identity and National Interest* (London 2015) 134 (stating the communities have a lesser role to play in the Japanese intangible cultural heritage regime).

136 See Art. 71–77 Law for the Protection of Cultural Property.

137 See CULTURAL PROPERTIES DEPARTMENT, *supra* note 60, 2.

138 See COOMBE/IVES/HUIZENGA, *supra* note 131, 214.

139 Neil Kommesar has pointed out that the more agencies participate and the more complex the issue at stake, the less there is an “enhanced possibility of minoritarian bias and the prospect of ‘rent-seeking.’” The ideas or interest of the majority risk to be underrepresented. See N. KOMESAR, *Law’s Limits: The Rule of Law and the Supply and Demand of Rights* (Cambridge 2001) 153.

140 See COOMBE/IVES/HUIZENGA, *supra* note 131, 214; See also SINGHAL, *supra* note 129, 737 (expanding on the problem of disagreements between small groups, even families).

in the collective organization can also be determined at the moment of the application, possibly creating a burden for future entry.

The risk of a minoritarian bias may be problematic in the light of the often heard critique that a geographical indication creates a monopoly right.¹⁴¹ One could argue that the creation of a monopoly right would even further strengthen the grip of this small group on the intangible cultural heritage. It should be noted, however, that this consequence is indirect. The monopoly right created by a geographical indication is one of mainly delineating who can have an individual “entitlement to the collective.”¹⁴² 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.”¹⁴³ The monopoly right does therefore not deprive anyone from using techniques or knowledge that are underlying the geographical indication. Intangible cultural heritage holders, when disagreeing to join the collective association to apply for a geographical indication, will still be able to produce their products but are limited in their marketing. Their marketing may not resemble the geographical indication, something the GI Act confirms in Article 3 (2).

When, unlike in the above described example, the intangible cultural heritage is not yet designated, a collective association still needs to be formed. The risk associated with this situation is the artificial creation of a community¹⁴⁴ or an industry or the state driving the formation process.¹⁴⁵ 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. Government interference has led, in the case of ceramics, to “promoting economies of scale and forms of industrialized manufacture that [...] seriously damaged the social relations of production which historically sustained egalitarian communities of producers.”¹⁴⁶ Industry elites working together with the government in the denomination process of tequila caused the “introduction of highly industrialized standards and volumes of production which marginalized smaller producers.”¹⁴⁷

It is difficult to exclude that any of the above described problems will occur in Japan. However, the fact is that the formation of associations has a long history in Japan.¹⁴⁸

141 For a discussion on geographical indications, monopoly rights and intangible cultural heritage, see KONO, *supra* note 9, 298.

142 FRANKEL, *supra* note 9, 8.

143 *Id.* See also SINGHAL, *supra* note 129, 733 (even though there is a creation of a monopoly right, this right “simply limits the class of people who can use a certain symbol”).

144 See BROUDE (2005), *supra* note 9, 674.

145 See COOMBE/IVES/HUIZENGA, *supra* note 131, 217–218; See also D. VITROLLES, When Geographical Indication Conflict with Food Heritage Protection, in: *Anthropology of Food* 8 (2011) §§ 28–31.

146 COOMBE/IVES/HUIZENGA, *supra* note 131, 217.

147 *Id.*, 218.

148 See SH. GARON, From Meiji to Heisei: The State and Civil Society in Japan, in: Schwartz/Pharr (eds.), *The State of Civil Society in Japan* (Cambridge 2003) 49. To name a few, the Japan Lacquer Association (*Nihon Shikkō-kai*) was established in 1891. The Greater Japan

Many of the holders of intangible cultural heritage are most likely, in one way or another, linked to associations that date back to the late 19th or early 20th century (often changing names in the pre-war period)¹⁴⁹ and were often formed under state guidance to, for example, improve information flows and quality control.¹⁵⁰ A unifying or industrializing effect on the production process, if there has been one at all, may have happened at the time these associations were incepted. This does not take away that the above-described minoritarian biases can be fully excluded in the associations that have been operating for decades, especially if the local associations are under the control of a nation-wide association.

It could be argued that the likelihood of the minoritarian bias or the industrial elite's influence will be minor in an environment providing for a wide participatory role for producers whose product is under consideration for a geographical indication application.¹⁵¹ The GI Act has only two broad guarantees for such a participatory role. First, the GI Act requires the formation of an association of producers in order to apply for a geographical indication.¹⁵² The formation of an association may 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 towards a geographical indication application.¹⁵³ This complaint may formulate the concerns of the loss of diversity of intangible cultural heritage. Not having the safeguarding of intangible cultural heritage as its main aim, neither MAFF nor its experts may take the complaint seriously. At the end, loss of diversity is not a reason to refuse a geographical indication. Nevertheless, it could cause internal discussion among the producers.¹⁵⁴

In order to somehow prevent the above described problems from occurring, producers could turn to the flexibility offered in the substantive law provisions.¹⁵⁵ The GI Act requires a product specification, holding the description of the production process. There is no sign in the law that such a production process should be homogenous among the

Ceramic Industry Association (*Dai Nippon Yōgyō Kyōkai*) was set up in 1892. See D. SATŌ, *Modern Japanese Art and the Meiji State: The Politics of Beauty* (Engl. transl. by Hiroshi Nara, Los Angeles 2011; original publication: Tōkyō 1999) 119.

149 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, http://shofu.pref.ishikawa.jp/shofu/wajima_e/h_nenpyou.html.

150 See COOMBE/IVES/HUIZENGA, *supra* note 131, 218.

151 See *id.*, 214–215.

152 See *supra* Section III.1.

153 See *id.*

154 See *supra* Section III.3.

155 See D. RANGNEKAR, *Geographical Indications and Localisation: A Case Study of Feni*, Centre for the Study of Globalisation and Regionalisation Report (2009) 20–32, http://www2.warwick.ac.uk/fac/soc/pais/research/researchcentres/csgr/research/projects/2007/protecting_feni/proj_pbl/esrc_report_english.pdf.

members of the association of producers.¹⁵⁶ The application guidelines offer some further insights. First of all, the guidelines indicate that, as long as one is dealing with the relevant characteristics for a geographical indication registration, plural criteria can be included.¹⁵⁷ 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 constitute the production process.¹⁵⁸ The application form indicates that this list of examples is neither exhaustive nor compulsory.¹⁵⁹ However, neither the guidelines nor the application form indicate whether the plurality points to more than one element or that one element could have different varieties. In case of the latter, the applicant could explicitly stipulate the differences in the production process.¹⁶⁰ A more indirect approach would be to not mention the differences directly, but to stipulate the “normally” followed production process.¹⁶¹ Whether the former or the latter approach is followed, both approaches enable a broader participation of holders of intangible cultural heritage in the geographical indication registration. Second, more than one association of producers can be registered as eligible for using the geographical indication.¹⁶² The guidelines stipulate that, even though one single application form can be submitted, the product specification needs to be submitted by each respective association.¹⁶³ It is explicitly acknowledged in the guidelines that the respective product specifications can differ among each other.¹⁶⁴ Since the product specification has also a section on the production process, the difference could be located at that point as well. The flip side of the coin is that, with this interpretation, the application form should allow for flexibility as well.

Even though the substantive law seems to enable flexibility and thus a broader participation, the remaining question will be how the controlling institutions, being the experts and MAFF, will judge the acceptability of the inclusion of differences in the production process or of a vague formulation of the production process. The main criteria against

156 See Art. 6 and 7 GI Act.

157 See MAFF, *Chiriteki hyōji hogo seido. Shinsei-sha gaidorain* [The System for the Protection of Geographical Indications – Guidelines for Applicants] (October 2015) 38, http://www.maff.go.jp/j/shokusan/gi_act/process/pdf/doc11.pdf.

158 See *id.*, 89.

159 See *id.*

160 See, e.g., RANGNEKAR, *supra* note 155, 31 (indicating that a revision of the application for Feni could include both apples and coconut as raw material for the product carrying the geographical indication).

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

162 See Art. 6 GI Act. See also MAFF, *Chiriteki hyōji tōroku no shinsei hōhō ni tsuite* [About the Way how to Apply for Geographical Indications] (October 2015) 6, http://www.maff.go.jp/j/shokusan/gi_act/process/pdf/doc11.pdf.

163 See MAFF, *supra* note 157, 56.

164 See *id.*

which this judgment will occur is most likely going to be quality control assessment. Vague formulations will make such assessments difficult and leave the producers much leeway. A detailed formulation will enable the quality assessment, but will require a more sophisticated and financially more expensive quality control mechanism.

The GI Act may be able to accommodate diversity and thus a broader participation of different holders of intangible cultural heritage, which is why a reflection is needed on whether the unifying force of a minoritarian bias or industrial elite should be automatically considered as problematic. Intangible cultural heritage is a living heritage, prone to change in response to the outside environment.¹⁶⁵ It could thus be questioned whether the application for a geographical indication necessarily should mean the fixation of a diversity of intangible cultural heritage. This issue links to authenticity, a concept often heard within a geographical indication context.

3. *Authenticity of the Production Process and Intangible Cultural Heritage*

Geographical indications are often linked to the concept of authenticity. This link stems from the fact that the production process has to be monitored according to what has been described in the application for a geographical indication. In other words, a product discontinues being authentic if a different production process has been deployed than the one put forward in the application. Not complying with the production process, which most likely is “inseparably linked to geography”¹⁶⁶ could eventually affect the quality that the geographical indication is supposed to represent. This interpretation excludes any form of evolution. Geographical indications are thus explained as stabilizing a “historically validated production process,”¹⁶⁷ and this runs counter the characteristic of the living nature of intangible cultural heritage.¹⁶⁸

After pointing out that other scholars have already indicated that the timeliness of the production process should not be overstated too strongly,¹⁶⁹ Dev Gangjee provides a way out of the authenticity issue. As long as the understanding of authenticity refers to a state of antiquity, the concepts of geographical indication and intangible cultural heritage will not be reconcilable with each other. Shifting the understanding of authenticity to the designation of a “strong link with a specific community,”¹⁷⁰ goods will be authentic if they are produced by what the community considers the appropriate way of pro-

165 S. VAN UYTSEL, *Philosophies behind the Intangible Cultural Heritage Convention: Equality in Heritage Protection, Community Recognition and Cultural Diversity* (2012) 9–10, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2001835.

166 KONO, *supra* note 9, 298.

167 GANGJEE, *supra* note 3, n. 60–63.

168 See KONO, *supra* note 9, 298.

169 GANGJEE, *supra* note 3, 557. See also BROUDE (2005), *supra* note 9, 623.

170 FR. COMINELLI, *Governing Cultural Commons: The Case of Traditional Craftsmanship in France* (2011) 8, <http://dlc.dlib.indiana.edu/dlc/bitstream/handle/10535/7212/726.pdf?sequence=1&isAllowed=y>; also quoted in GANGJEE, *supra* note 3, 558.

ducing. This allows for a specific community to actively (re-)interpret the intergenerational transmissions.

Gangjee's vision on the interpretation of authenticity is not foreign to the recent intangible cultural heritage 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 of value for intangible cultural heritage.¹⁷¹ More in specific, authenticity could guarantee the connection between intangible cultural heritage and the cultural identity of the creators and bearers. Authenticity would be the concept preventing intangible cultural heritage being used for purposes that the community does not ascribe to. Intangible cultural heritage would be authentic if "such heritage is constantly tailored to the cultural identity of the communities, groups, and/or persons concerned."¹⁷²

Suggesting that authenticity should be devoid of the meaning of originality still requires the GI Act and its enforcement structure to be suited for such an interpretation. As has been indicated above, the GI Act provides the possibility for amending the geographical indication registration. One part that could be amended is the description of the production process, giving the impression that, in theory at least, a community could file an application for amending the registration whenever it deems desirable. If MAFF accepts some flexibility in the formulation of the production process, the change in the production process could be inscribed next to the originally inscribed production process.

In the absence of flexibility and presuming that a process of change will be most likely gradual, initiated by some members of the community, two scenarios could develop. The more vocal members of the community change their production process, forcing the others to follow. When the less outspoken or the minority of the community members change the intangible cultural heritage, the more outspoken or the majority members may keep that group in line through the quality control to be exercised by the association of producers. Whatever the case may be, a strict application of the GI Act could trigger standardization of intangible cultural heritage or stifle its development.

Changes of the intangible cultural heritage mentioned in a geographical indication registration can only be inscribed with the consent of the association of producers, thus requiring agreement among its members. Individual members cannot apply for a change of the registration. There is no role for MAFF to play if there is any disagreement between the members. The best way MAFF could accommodate for the soft lines of intangible cultural heritage is to set aside an overly legalistic application of the GI Act and allow flexibility in the application documents.

171 See F. LENZERINI, *Intangible Cultural Heritage: The Living Culture of Peoples*, in: EJIL 22 (2011) 101.

172 *Id.*, 113–114.

4. *Revealing the Essential Characteristics of a Product*

Registering a product for a geographical indication generally requires drawing up a product specification. In principle, the product specification could concentrate on the “product’s unique connection to its particular place of origin.”¹⁷³ In the end, the connection to a place is “definitional to a GI.”¹⁷⁴ This means that the legitimacy of a geographical indication can be sustained if “weather and topology”¹⁷⁵ make out the “claimed nexus between place and product qualities.”¹⁷⁶ The GI Act, as has been explained above, required a description of the production process.¹⁷⁷ The production process, especially when we talk about products made from agricultural, fishery or forestry products, may well be based upon knowledge that the community has gathered in order to make valuable products with what they had at hand locally.¹⁷⁸ Through years of passing down this knowledge and transforming it into an identifier for that community, intangible cultural heritage has been formed.¹⁷⁹ It is thus likely that this intangible cultural heritage also characterizes the unique qualities of the product.

The process of describing intangible cultural heritage is also to be found in the intangible cultural heritage discourse. The ICH Convention, for example, imposes an obligation on its member states to create one or more inventories.¹⁸⁰ There is one difference between the ICH Convention and the GI Act. The ICH Convention is quite flexible as to what these inventories mean.¹⁸¹ It can be a listing of intangible cultural heritage identified in the member state’s sovereign territory. Within the listing, separate categories can be introduced depending upon their local, regional or national importance. Another categorization of the listing could depend on the need for extra safeguarding measures. The inventory can also be a detailed description of what the intangible cultural heritage 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.¹⁸²

In the previous sections, speculation has been made about the flexibility of the GI Act to accommodate diversity and change. The guidelines are much more direct about the inclusion of elements that could be considered as trade secrets or know-how of the

173 HUGHES, *supra* note 31, 72.

174 *Id.*

175 *Id.*, 76.

176 *Id.*

177 See Art. 6 and 7 GI Act.

178 See GOPALAKRISHNAN/NAIR/BABU, *supra* note 48, 35.

179 See VAN UYTSEL, *supra* note 165, 8–9.

180 See Art. 12 ICH Convention. See S. VAN UYTSEL/T. KONO, Intangible Cultural Heritage Identified: Inventories as an Essential Part of the Safeguarding Process, in: Kono (ed.), Intangible Cultural Heritage and Intellectual Property: Communities, Cultural Diversity and Sustainable Development (Antwerp 2009) 113.

181 See S. VAN UYTSEL, Inventory Making and Fairy Tales: Safeguarding of Intangible Cultural Heritage in Historical Perspective, in: Kono (ed.), *supra* note 180, 43.

182 See *id.*, 140.

community. The guidelines mention that the applicant should carefully think on the inclusion of such secrets or know-how in the application documents, as these documents are in general made publically available.¹⁸³ The only limitation that the guideline puts to this flexibility is that the trade secret or the know-how should not be directly related to the characteristic of the product.¹⁸⁴ The experts advising MAFF and MAFF itself have a margin of appreciation as to what has to be revealed of the production process in the application for the geographical indication registration. But, as Hughes mentions in one of his studies, what is the point of a geographical indication when something essentially relevant to characterize the product is not part of the description made to obtain the geographical indication registration?¹⁸⁵

V. CONCLUSION

With the adoption of the GI Act in 2014, Japan has left the negative protection system for geographical indications. The GI Act, that went into force in June 2015, does not only apply to edible agricultural, forestry and fishery products, but also to manufactured and processed agricultural, forestry and fishery products. When applying for a geographical indication, the production process has to be described and a control mechanism checking the compliance with the production process has to be established. Combining these two elements means that know-how, skills and practices are part of the geographical indication protection. Such know-how, skills and practices can also fulfill the criteria of the definition of intangible cultural heritage. If there is a formal recognition as intangible cultural heritage, it can thus be supplemented with a formal recognition as a geographical indication. Both regimes could thus meet in the GI Act.

Bringing geographical indications and intangible heritage together in one legal framework is controversial. However, it is a reality and it has to be dealt with. Through flexible interpretation of the substantive law requirements, this paper has argued that the GI Act could deal with the main problematic issues that could arise of including intangible cultural heritage in such an act.

The risk that some producers take a leading role in the formation of the association of producers and so influence the product specification to the detriment of diversity can be overcome through a complaint procedure. A complaint procedure can be avoided if the producers realize that the substantive law provisions allow for accommodating diversity of intangible cultural heritage either by inscribing different production processes or by stipulating what the normal production process is. The issue of authenticity can be overcome by re-interpreting that concept to mean that intangible cultural heritage is authen-

183 See MAFF, *supra* note 157, 38.

184 See *id.* Gopalakrishnan, Nair and Babu, however, argue for a strong exception for secrets, see GOPALAKRISHNAN/NAIR/BABU, *supra* note 48, 48–49.

185 HUGHES, *supra* note 31, 76–77.

tic as long as it is recognized and supported by a community. In taking this view, even a geographical indications regime that provides for a procedure to revise the registration, like the GI Act, can accommodate the living nature of intangible cultural heritage. Revealing the content of intangible cultural heritage may be delicate and undesirable, making a registration for a geographical indication difficult. The GI Act, however, has enough flexibility to leave out secrets and know-how that are not directly related to the characteristics of the product.

Despite the great flexibility in the GI Act, it remains to be seen how MAFF will implement the GI Act in relation to products that hold intangible cultural heritage. Since MAFF is not a ministry dealing with culture there is always a risk that economic perspectives will prevail.

SUMMARY

The use of geographical indications for the safeguarding of intangible cultural heritage is controversial. There are as many scholars acknowledging the suitability of extending geographical indications towards intangible cultural heritage, as there are scholars arguing that geographical indications should at all times be separated from the safeguarding process of intangible cultural heritage. No matter how valuable the arguments on both sides may be, the reality is, however, that more and more countries create the possibility to supplement the formal recognition as intangible cultural heritage with the one of a geographical indication. This is also the case in Japan, that recently adopted the Tokutei nōrin suisan-butsu tō no meishō no hogo ni kansuru hōritsu (Act for the Protection of the Names of Designated Agricultural, Forestry and Fishery Products and Foodstuffs) (hereinafter GI Act).

Crucial for using the GI Act towards intangible cultural heritage is not only the extension of the scope of application to products manufactured or processed using agricultural, forestry and fishery products, but also the requirement to describe the production process in the application documents for registering the geographical indication. It is in the description of the production process that intangible cultural heritage, usually in the form of traditional craftsmanship, can find its expression. To further keep the legal framework of geographical indications applicable to intangible cultural heritage, this paper investigates to what extent the bearers of intangible cultural heritage would be able to enjoy the fruits of a formal recognition as geographical indication, to what extent the living nature of the intangible cultural heritage could be guaranteed and to what extent openness in relation to intangible cultural heritage could be problematic.

The argument developed in this paper is that the GI Act has, in principle, enough flexibility in its substantive law provisions to deal with the main problematic issues that could arise of including intangible cultural heritage. The risk that some producers take a leading role in the formation of the association of producers and so influence the product specification in the detriment of diversity can be overcome through a complaint procedure. A complaint

procedure can be avoided if the producers realize that the substantive law provisions allow for accommodating diversity of intangible cultural heritage either by inscribing different production processes or by stipulating what the normal production process is. The issue of authenticity can be overcome by re-interpreting that concept to mean that intangible cultural heritage is authentic as long as it is recognized and supported by a community. In taking this view, even a geographical indications regime that provides for a procedure to revise the registration, like the GI Act, can accommodate the living nature of intangible cultural heritage. Revealing the content of intangible cultural heritage may be delicate and undesirable, making a registration for a geographical indication difficult. The GI Act, however, has enough flexibility to leave out secrets and know-how that are not directly related to the characteristics of the product.

Despite the great flexibility in the GI Act, it remains to be seen how the Ministry of Agriculture, Forestry and Fishery (MAFF) will implement the GI Act in relation to products that hold intangible cultural heritage. Since MAFF is not a ministry dealing with culture there is always a risk that economic perspectives will prevail.

ZUSAMMENFASSUNG

Der Gebrauch geographischer Herkunftsangaben zum Schutz immaterieller Kulturgüter ist umstritten. Es gibt genauso viele Stimmen für eine Ausweitung geographischer Herkunftsangaben auf immaterielle Kulturgüter wie solche für eine strikte Trennung beider Regelungssysteme. Ungeachtet der Überzeugungskraft der Argumente auf beiden Seiten besteht in der Realität in einer zunehmenden Zahl an Ländern die Möglichkeit, die formale Anerkennung eines immateriellen Kulturguts um eine solche als geographische Herkunftsangabe zu ergänzen. Das ist auch in Japan der Fall, wo vor Kurzem der Tokutei nōrin suisan-butsu tō no meishō no hogo ni kansuru hōritsu (Act for the Protection of the Names of Designated Agricultural, Forestry and Fishery Products and Foodstuffs; im Folgenden: GI Act) erlassen wurde.

Entscheidend für die Anwendung des GI Act auf immaterielle Kulturgüter ist nicht nur die Ausdehnung des Anwendungsbereichs auf Produkte, die unter Verwendung von Agrar-, Forst- oder Fischereiprodukten hergestellt oder verarbeitet wurden, sondern auch die Anforderung, den Herstellungsprozess in den Antragsunterlagen für die Registrierung der geographischen Herkunftsangabe zu beschreiben. Im Rahmen der Beschreibung des Herstellungsprozesses können immaterielle Kulturgüter, regelmäßig in der Form traditionellen Handwerks, Berücksichtigung finden. Um die Regelung geographischer Herkunftsangaben für immaterielle Kulturgüter zugänglich zu machen, untersucht dieser Beitrag darauf aufbauend, in welchem Umfang Träger immaterieller Kulturgüter in der Lage wären, von den Vorteilen einer Anerkennung als geographische Herkunftsangabe zu profitieren, bis zu welchem Grad die lebendige Natur eines immateriellen Kulturguts gewährleistet werden kann, und inwieweit die Offenheit gegenüber immateriellen Kulturgütern Probleme aufwirft.

Das Ergebnis der Untersuchung dieses Beitrags ist, dass die Regelungen des GI Act grundsätzlich flexibel genug sind, um auf die zentralen Probleme zu reagieren, welche sich aus der Einbeziehung immaterieller Kulturgüter ergeben. Der Gefahr, dass einige Hersteller bei der Gründung der Vereinigung der Hersteller eine Führungsrolle einnehmen und die Produktbeschreibung zum Nachteil der Vielfältigkeit beeinflussen, kann über ein Beschwerdeverfahren begegnet werden. Ein solches Verfahren wird zudem überflüssig, wenn die Hersteller erkennen, dass die gesetzlichen Regelungen es ermöglichen, die Vielfalt der immateriellen Kulturgüter zu erhalten, indem entweder verschiedene oder ein „normaler“ Produktionsprozess festgeschrieben werden. Das Problem der Authentizität kann gelöst werden, indem das Konzept so verstanden wird, dass immaterielle Kulturgüter solange authentisch sind, wie sie von einer Gemeinschaft als solche anerkannt und gestützt werden. Auf diese Weise kann auch ein Regelwerk zu geographischen Herkunftsangaben wie der GI Act, welches ein Verfahren zur Anpassung der Registrierung bereithält, die lebendige Natur immaterieller Kulturgüter erfassen. Es kann häufig unerwünscht sein, den Inhalt immaterieller Kulturgüter offen zu legen, wodurch eine Registrierung als geographische Herkunftsangabe schwierig wird. Der GI Act bietet jedoch auch hier genügend Flexibilität, um Geheimnisse und Know-how, welche nicht direkt mit den Eigenschaften des Produkts zusammenhängen, geheim zu halten.

Ungeachtet der großen Flexibilität der Regelungen des GI Act bleibt abzuwarten, wie das Ministry of Agriculture, Forestry and Fishery (MAFF) das Gesetz in Bezug auf Produkte, die immaterielle Kulturgüter beinhalten, anwenden wird. Da das MAFF als Ministerium nicht mit Kultur befasst ist, besteht die Gefahr, dass ökonomische Sichtweisen Vorrang haben.

(Die Redaktion)