



# Proving Provenance? Geographical Indications Certification and its Ambiguities

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**Summary.** — With their historic links to a specific region, GIs are increasingly valued for their endogenous development potential. But precisely what does legal recognition as a GI guarantee? Drawing on the EU's registration system as a model, this paper investigates the certification of provenance and authenticity by public authorities. Recent empirical findings reveal that considerable flexibility exists within the certification process, which permits the loosening of linkages to a region and dilutes the certification guarantee. The present over-reliance on the system's ability to certify could be usefully remedied if greater attention is paid to the individual product specification design.

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## 1. INTRODUCTION

For foodstuffs and agricultural products, provenance matters like never before. While an individual's food consumption choices are a private matter, in the aggregate these choices have considerable social consequences, impacting on economic development, ecological sustainability, global transport systems, and the relationship between urban and rural areas (Morgan, Marsden, & Murdoch, 2006). Geographical Indications (GI) protection systems are legal regimes which facilitate the signaling of this provenance in marketplaces. According to the World Intellectual Property Organization (WIPO), the “basic concept underlying GIs is simple, and familiar to any shopper who chooses Roquefort over ‘blue’ cheese or Darjeeling over ‘black’ tea... [these are] well-known examples of names associated throughout the world with products of a certain nature and quality, known for their geographical origin and for having characteristics linked to that origin” (WIPO, 2012, p. 8). Registration-based GI certification systems verify the content of these interdependent provenance and quality signals, as a prerequisite to formal legal recognition and protection. Yet what precisely does it mean for a regional speciality product to be legally certified as a GI? What formal guarantees and reassurances are provided by public authorities? And how effective is certification? Motivated by scholarship which has investigated the effectiveness of Fairtrade certification (Beuchelt & Zeller, 2011; Ruben & Fort, 2012; Steering Committee, 2012), this paper critically assesses the extent to which a product's link to a defined geographical region (provenance), associated quality attributes and adherence to traditional methods of production (authenticity) are verified by this public, as opposed to private, authentication process.

A close study of GI registration systems is rewarding for primarily two reasons. First, certification verifies the existence of a particular type of link with the region of origin. According to Article 22.1 of TRIPS, GIs are “*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*” (emphasis added). Certification ensures that only those products which satisfy such a formal

legal definition ought to be recognized and protected. This reinforces the credibility of GIs as market signals and mitigates the effects of market failure arising out of imperfect information (Crespi & Marette, 2003). Additionally, drawing on place-based theorizing emphasizing the notion of embeddedness,<sup>1</sup> the verification of this close connection to a region is considered crucial for achieving endogenous development goals (Augustin-Jean, 2012; FAO, 2008; Réviron, Thevenod-Mottet, & El Benni, 2009). As Bowen (2010b, p. 210) explains: “Because GIs root production in particular places and protect the unique environmental and cultural resources that have developed over time in these places, scholars and development practitioners have framed them as a means of localizing production within the framework of globalization”. Optimistic appraisals suggest that “GIs may be as close to a comprehensive, equitable and market-oriented rural development package as we have seen” (Giovannucci, Josling, Kerr, O'Connor & Yeung, 2009, p. 5). Registration-based certification mechanisms require this localizing link to be explicitly articulated, which then forms the axis for territorial development strategies. A suitable “link with the geographical origin will constitute the essential point on which an application for registration of a product as a geographical indication will be based” (WIPO, 2003, p. 9). Therefore investigating the extent to which GI registration systems certify this close connection to place is worthwhile.<sup>2</sup>

The second reason relates to comparatively greater ‘public’ or state involvement in GI protection, which sets it apart as an unusual category of intellectual property (IP). While the preamble to TRIPS confirms that “intellectual property rights are private rights”, by contrast GIs are characterized by their high degree of state or quasi-public involvement (Biénabe, Jordaan, & Bramley, 2013; Marie-Vivien, 2010; OECD, 2000, p. 10). As we will see below, manifestations of this state involvement are evident in the formal examination and certifi-

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cation process conducted by public authorities, within the context of *sui generis* GI registration systems.<sup>3</sup> In pursuing this line of enquiry, the analysis presented here draws primarily on the European Union's (EU) GI registration system as a model, since it is the most institutionally well-developed regime and an exemplar of prescriptive, *sui generis* protection in international debates (Gangjee, 2012a, pp. 201–202). If certification by public authorities is proving to be successful anywhere, it should be here. The analysis is supplemented by insights from emerging GI regimes from the global South, which suggests that the findings in this paper are more broadly relevant.

Section 2 commences by describing the various ways in which there is state involvement in GI protection. The registration-based certification process is the defining framework for state involvement, enabling a catalog of wider interventions by public authorities. It then considers the justifications – as identified by the Court of Justice of the European Union (CJEU) and the European Commission (EC) – for having such a certification system. These justifications relate to the *official guarantee* of provenance, quality, and authenticity that benefits consumers. Section 3 then outlines the formal stages of the registration process and the details required by the product specification. Stated briefly, registration is designed to verify information relating to provenance, quality, and potentially authenticity, which facilitates the signaling function of GIs. Section 4 then considers the operation of this regime in practice, drawing on recent empirically grounded reviews of the European GI system. The gaps and flexibilities identified during the certification process expose the limitations of attempts to guarantee origin, quality, and authenticity by public authorities. For instance, there are formally recognized exceptions to the requirement that raw materials must be sourced from within the region of origin. If the *raison d'être* of GI protection is to guarantee geographical origin, to what extent can such exceptions be reconciled? Formal registration has inherent blind spots, which dilutes the nature of the certification guarantee. Therefore *as opposed to relying on this systemic guarantee*, Section 5 concludes by drawing attention to the recent interest in the *design of individual product specifications* and which is framed by insights from collective action theory. The participants involved in such drafting initiatives extend well beyond public authorities, to include NGOs/civil society organizations, networks of academic researchers, and international organizations. This exposes the hybridity of influences that exist between state or market paradigms. The paper therefore concludes by identifying product specification design as a more promising site for interventions that would enable GIs to deliver on their developmental potential.

## 2. GI CERTIFICATION – THE UNDERLYING ASSUMPTIONS

### (a) *Mapping state involvement*

As a legal regime which regulates the use and misuse of commercially valuable geographical brands in the marketplace, GI protection is often compared with trademark law (Gangjee, 2012a, pp. 291–294). Both regimes are considered by some to be functionally equivalent mechanisms to enhance informational efficiency. By granting exclusive rights to control the use of signs, these legal regimes facilitate uncluttered origin signaling in the marketplace (Teuber, 2011a). While Articles 22–24 of TRIPS establish minimum international standards of pro-

tection for GIs, the agreement does not specify the methods of implementation and various national approaches coexist (O'Connor & Co., 2007). For instance, the US largely incorporates GI protection within trademark law, which establishes a system of private rights and proprietary interests in signs (Evans, 2013; USPTO). Therefore while these are not mutually exclusive categories, a division has emerged between those countries prioritizing trademark law and those adopting *sui generis* registration systems.<sup>4</sup> The very act of establishing a separate system to accommodate regional products indicates that GI regimes are expected to do different kinds of legal work. Three inter-related features account for this: (1) As TRIPS acknowledges, a GI identifies a product for which a causally demonstrable link to a specific region exists; (2) this in turn suggests a collective – as opposed to individual – interest in the use of the sign by all legitimate producers within the region, since the product's reputation and associated know-how is generated by collective effort; (3) this collective interest provides the basis for greater state involvement, since both legal entitlements and legal obligations need to be defined, allocated, and co-ordinated.<sup>5</sup>

However GIs regimes go further than trademark law. Whereas the latter is primarily concerned with preserving the coherence of the sign in the marketplace (for e.g., prohibiting third party uses likely to confuse consumers about commercial origin), for *sui generis* GI systems defining methods of production and facilitating supply chain co-ordination are additional important outcomes. As Bowen (2010b, p. 233) notes: “The [*appellation d'origine contrôlée*] system tries to ensure that French GI schemes, as a whole, protect the link to *terroir* and maintain the use of ‘local, loyal, and constant’ production practices”. The thickness of this regulatory intervention can be traced to the historic significance of certain agricultural products for national economies, as illustrated by viticultural over-production and its effect on the livelihoods of grape-growers in 19th and 20th century France (Warner, 1960). It is also attributable to the symbolic status of many regional products (e.g., Champagne) that operate as national champions contributing to collective identity formation projects (Gangjee, 2012b; Guy, 2007). State oversight is therefore associated with these public goods aspects.

Besides establishing a distinct legislative framework for GIs, public authorities are operationally involved with GI protection at a number of levels. At the initial stages, public sector research institutions or Ministries of Agriculture have taken the initiative in identifying products with GI potential, conducting surveys and compiling inventories of likely targets (for e.g., Bérard & Marchenay, 2008, pp. 49–50; FAO, 2012; Soam, 2005). Governmental authorities also promote the availability of a distinct registration procedure for regional products and the enhanced protection that flows from it, through road shows and workshops targeted at producers or their representatives (Rangnekar, 2009, p. 9). They may facilitate the application process, providing technical guidance on product specification drafting, assisting with bureaucratic formalities and providing financial subsidies to offset the costs of registration (Hartman, 2012, pp. 184–190). In the EU, a review of the GI system notes that there is “a high level of guidance and interaction” in eight member states, where “help is provided to applicants in completing the application in order to give them the best chance of success” (London Economics, 2008, p. 69). Unlike other forms of IP such as patents or trademarks, where applicants pay a fee, in most EU Members the costs of the registration procedure for GIs are borne by public authorities (European Commission,

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