

Protection of Geographical Indication and Legal Framework in India

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Abstract

Geographical Indications is generally understood as a sign used on goods that have a specific geographical origin and possess qualities or a reputation that is due to that place of origin. The aim of this Paper is to justify the rationale underlying in granting the protection of Geographical Indication. This Paper also analyses the protection of Traditional Knowledge through the mechanism of Geographical indication. The only existing category of Intellectual Property Rights that may be directly applied to the protection of Traditional Knowledge is that of Geographical Indication. To understand how this was made possible, after analyzing the present national and International Legal Framework, this paper analyses the issues and concerns through different case studies. A limited case study of certain GIs, especially from India, is mentioned to find out the potential of GIs to bring socio-economic change and protection of traditional knowledge. The Paper concludes with the socio-economic issues and how the

present legal framework in India is silent on the mechanism and provisions to fight against the infringement

Keywords: Geographical Indication, Traditional Knowledge, TRIPS Agreement

Introduction -

The term 'Geographical Indications' (GIs) entered the terminology of international Intellectual Property (IP) law by way of its inclusion in the Agreement on the Trade-Related Aspects of Intellectual Property Rights (TRIPS) of the World Trade Organisation (WTO). Prior to that no concrete steps had been taken to give protection to GIs in the Globe. GI refers to any indication that identifies a good as originating from a particular place, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin. India has in its possession a number of existing or potential GIs. Some of them like, 'Darjeeling' (tea), 'Basmati' (rice), 'Alphonso' (mango), etc. are already

renowned the world over. It is well known fact that the role of the IPR has assumed a great importance in recent years in national level as well as in international level. With the great advent of technology and the changing dimensions of science has led the countries to ensure better protection to the known Intellectual property rights and to cover the new areas. Intellectual property rights stimulate the economics growth of the country. Our country is rich in genetic resources and traditional knowledge, which is of great value to us and to the world at large and as India has integrated with the global economy, the importance of Intellectual property has come to the fore. In the globalization era the protection of Intellectual property rights has become the essential. Knowledge has become today economically exploitable and is treated as commodity. The knowledge driven economy has increased the importance of the Intellectual property rights. The new dimension of the knowledge driven society is that knowledge lies at the heart of a growth of a different magnitude than has been case historically. In knowledge driven economy the importance of proprietary knowledge has increased. The dynamics of the economy are coming to rest on investment in physical capital and more and more on learning or investment in knowledge creation.

Rationale for protection of Geographical Indication

Geographical indications of origin (GI), their definition, and rationale for protection have historically been the subject of heated debates in the international community.¹ Countries have long quarreled about the extent of protection of “their” GI, that is, the names they used to identify products grown or manufactured on their soil. Fierce defenders of GI protection, European countries have traditionally advocated that GI should not be used by unrelated parties because GI identify the unique qualities, characteristics, and reputation of the products to which they are affixed; thus, should others use GI improperly, consumers would be confused as to the origin of the products.² To this claim, the United States and other “new world” countries have generally responded by pointing out that many GI are generic terms on their soil, such as “champagne” or “Chablis,” and, thus, consumers could not be confused as to the origin of the products identified by these terms.³ Accordingly, they have traditionally defended the right of their

¹ Michael Blakeney, (2001) Proposals for the International Regulation of Geographical Indications, 4 J. WORLD INTELL. PROP. 629;

² Blakeney, supra note 1, at 629–30.

³ Leigh Ann Lindquist, (1999) champagne or Champagne? An Examination of U.S. Failure to Comply with the Geographical Provisions of the TRIPS Agreement, 27 GA. J. INT'L & COMP. L. 309, 309–10

nationals to use foreign generic GI in their countries as they see fit.

Recently, the proper standard of protection to be afforded to geographical indications (GIs) has become the focus of a fiery debate in the International community. All intellectual property rights are protected in furtherance of public interest. In case of patent it is granted to the inventor to encourage them. In case of copyright exclusive rights are granted to the Authors, performers. Trademarks and Geographical Indications are protected mainly to prevent unfair competition in the market and to protect the consumers from misinformation. In case of Trademark the main rationale for granting trademark is to protect the accumulated goodwill of goods or services from misappropriation as free riding on this reputation and to prevent unfair competition. The rationale for and the legal protection of geographical indication are essential for similar reason.

“Geographical indications are understood by consumers to denote the origin and the quality of products. Many of them have acquired valuable reputations which, if not adequately protected, may be misrepresented by dishonest commercial operators. False use of geographical indications by unauthorized parties is

detrimental to consumers and legitimate producers. The former are deceived and led into believing to buy a genuine product with specific qualities and characteristics, while they in fact get a worthless imitation. The latter suffer damage because valuable business is taken away from them and the established reputation for their products is damaged” (WIPO – International Bureau, 2002)⁴. The above quotation highlights the basis for protection of geographical indication

GIs recognizes the geographic and climatic factors and human know-how in the quality of certain products. Much like trademarks, the economic rationale of GI is based on the ‘information asymmetry’ between buyers and sellers in the market and role of reputation, conveyed through distinctive signs, in tackling such asymmetry. Thus GI acts as an essential device that helps the producers to differentiate their products from competing products in the market and enable them to build a reputation and goodwill around their products, which often fetch a premium price. Econometric models employing hedonic pricing techniques also support the willingness to pay more for GI

⁴. Dwijen Rangnekar, Geographical Indications, A Review of Proposals at the TRIPS Council: Extending Article 23 to Products other than Wines and Spirits, School of Public Policy, University College London

products. Though anecdotal, these studies bear testimony to the fact that GIs do have the potential to fetch a significant increase in the value-added through premium pricing. Protected effectively, GIs may yield certain socioeconomic benefits. For instance, GI is often regarded as a potential means for protecting 'traditional knowledge'. While the suitability of GI in performing this role is not free from limitations, it is widely believed that effective protection of a GI-product, by way of preventing loss of value through copying, free riding or usurpation, could go a long way in increasing the inflow of cash income to the community involved in its production. Hence, GI is often cited as a tool that has the potential to contribute to rural development — though indirectly — through a reduction in income poverty. Given its commercial potential, the legal protection of GI assumes enormous significance. Without such protection, competitors not having legitimate right on a GI might ride free on its reputation. Such unfair business practices result in loss of revenue for the genuine right holders of the GI and also misleads the consumers. Moreover, such practices may eventually hamper the goodwill and reputation associated with the GI. In order to rule out its misuse and to tap the potential economic and socio-economic benefits emanating from this IP, it is essential to ensure an

appropriate legal protection for GIs at the national as well as the international level.⁵

Geographical Indications also help producers to differentiate their products from competing products in the market and enable them to build a reputation and goodwill around their products, which often fetches a premium price. Not only from the producer's point of view but from the labour's and buyer's or consumer's part this protection of GIs is proved to be very conducive & healthy to protect their social as well as economic interest. Various studies have quantified the price premium associated with certain GI-products. A consumer survey undertaken in the European Union (EU) in 1999, for instance, found that 40 percent of consumers would pay a 10 percent premium for origin-guaranteed products⁶. Econometric models employing hedonic pricing techniques also support the willingness to pay more for GI products. Though anecdotal, these studies bear testimony to the fact that GIs do have the potential to fetch a significant increase in the value-added through premium pricing⁷.

⁵ Kasturi Das, (2009), 'Socioeconomic Implications of Protecting Geographical Indications in India' Kasturi Das, available at http://wtocentre.iift.ac.in/Papers/GI_Paper_CWS_August%2009_Revised.pdf

⁶ WTO (2004)

⁷ Fink c, and Maskus KE, (2006), Intellectual Property and Development :Lessens from recent Economic Research, Oxford University Press, p.203.

Given such commercial potential, the legal protection of this IP assumes enormous significance. Without such protection, competitors who do not have a legitimate right on a GI might free ride on its reputation. Such unfair business practices result in huge loss of revenue for the genuine right-holders of the GI concerned and also mislead the consumers. Moreover, such practices may eventually hamper the goodwill and reputation associated with the GI concerned.

Geographical Indication and the Protection under TRIPS Agreement

Article 22(1) of the TRIPS Agreement define Geographical indications as "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." Basically, a geographical indication is a notice stating that a given product originates in a geographical area. One of the aims of their use is to promote commerce by informing the customer of the origin of the products. Champagne, Swiss chocolates, Scotch whisky, Cognac, Roquefort cheese, Darjeeling Tea, and Sheffield steel are some best known examples of geographical

indications. It is a separate type of intellectual property. From this definition it can be deduced that GIs are, first of all, signs and indications, necessarily linked to a particular territory. These are mostly geographical names (such as Parma, Manchego, Roquefort, etc.). Traditional and historical non-geographical names can nevertheless be protected if they are linked to a particular place. The most famous example of such a GI is "Feta", which is not a place in Greece but is so closely connected to Greece as to identify a typical Greek product. There are three major conditions for the recognition of a sign as a geographical indication:

- ✓ It must relate to a good (although in some countries services are also included, for example in Azerbaijan, Bahrain, Croatia, Jamaica, Saint Lucia, Singapore and others)
- ✓ These goods must originate from a defined area;
- ✓ The goods must have qualities, reputations or other characteristics which are clearly linked to the geographical origin of goods.

Any sign, even geographical, may not be considered as a geographical indication if it does not fulfill these three conditions.

Geographical Indication and Traditional Knowledge

Protected effectively, GIs may yield certain socioeconomic benefits. For instance, GI is often regarded as a potential means for protecting 'traditional knowledge'. The important linkage between geographical indications and developing countries interest, corresponds to the protection of Traditional Knowledge. Probably the only existing category of intellectual property rights that may be directly applied to the protection of Traditional Knowledge is that of geographical indication. In the light of the growing importance attached to traditional knowledge (TK) and related concerns about preserving cultural and biological diversity, protection of TK has assumed enormous significance in the recent past. There is no universally accepted definition of TK. Even the World Intellectual Property Organization (WIPO) uses the term TK in two senses, one narrow and one broad. In its narrow sense, TK refers to the content or substance of knowledge that is the result of intellectual activity and insight in a traditional context, and includes the know-how, skills, innovations, practices and learning that form part of TK systems, and knowledge that is embodied in the traditional lifestyle of a community or people, or is contained in codified knowledge systems passed from

one generation to another. It is not limited to any specific technical field, and may include agricultural, environmental, medicinal knowledge, and knowledge associated with genetic resources. The broader definition of TK used by WIPO is an all-encompassing and working concept, which states that: *'Traditional knowledge' ... refer[s] to tradition-based literary, artistic or scientific works; performances; inventions; scientific discoveries; designs; marks, names and symbols; undisclosed information; and all other tradition-based innovations and creations resulting from intellectual activity in the industrial, scientific, literary or artistic fields. "Tradition based" refers to knowledge systems, creations, innovations and cultural expressions which have generally been transmitted from generation to generation; are generally regarded as pertaining to a particular people or its territory; and, are constantly evolving in response to a changing environment. Categories of traditional knowledge could include: agricultural knowledge; scientific knowledge; technical knowledge; ecological knowledge; medicinal knowledge, including related medicines and remedies; biodiversity-related knowledge; "traditional cultural expressions" ("expressions of folklore") in the form of music, dance, song, handicrafts, designs, stories and artwork; elements of languages, such as names,*

geographical indications and symbols; and, movable cultural properties. Excluded from this description of traditional knowledge would be items not resulting from intellectual activity in the industrial, scientific, literary or artistic fields, such as human remains, languages in general and other similar elements of “heritage in the broad sense”⁸.

It is widely believed that effective protection of a GI-product, by way of preventing loss of value through copying, free riding or usurpation, could go a long way in increasing the inflow of cash income to the community involved in its production. Hence, GI is often cited as a tool that has the potential to contribute to rural development — though indirectly — through a reduction in income poverty.⁹

Legal Framework in India

Prior to the enactment of ‘The Geographical Indications of Goods (Registration and Protection) Act, 1999’ (GI Act), there was no separate legislation dealing specifically

⁸ WIPO (2002 b), Response To The Questionnaire On The Protection Of Traditional Knowledge By The Republic Of Ghana , http://www.wipo.int/export/sites/www/tk/en/igc/pdf/ghana_tk-tce.pdf

⁹ Kasturi Das, (2007), Protection of Geographical Indication:An overview of select issues with particular reference to India, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1587372

with GIs. However, there were three different ways in which the then-existing legal systems of the country could have been utilised for preventing the misuse of GIs:

Under the Consumer Protection Acts¹⁰

Through Passing-Off Actions in Courts¹¹

Through Certification Marks¹²

The GI Act was formulated as part of the exercise in the country to set in place National Intellectual Property Laws in compliance with India’s obligations under the TRIPS Agreement. Under the purview of this Act, which came into force with effect from 15 September 2003, the Central Government has established the ‘Geographical Indications Registry’ with all-India jurisdiction at Chennai, where the right

¹⁰ The principal legislations in the field of consumer protection are the following: (a) The Consumer Protection Act of 1986, and (b) Sections 36-A to 36-E of the Monopolies and Restrictive Trade Practices (MRTP) Act, 1969. The aforesaid sections in the latter Act pertain to unfair trade practices and were inserted into the MRTP Act by an Amendment Act in 1984, with effect from 1 August 1984.

¹¹ In its simplest form, the principle of passing-off states that “No-one is entitled to pass-off his goods as those of another”. The principal purpose of an action against passing off is therefore, to protect the name, reputation and goodwill of traders or producers against any unfair attempt to free ride on them. Though, India, like many other common law countries, does not have a statute specifically dealing with unfair competition, most of such acts of unfair competition can be prevented by way of action against passing-off.

¹² Here ‘Certification trade mark’ means a mark capable of distinguishing the goods or services in connection with which it is used in the course of trade which are certified by the proprietor of the mark in respect of origin, material, mode of manufacture of the goods or performance of services, quality, accuracy or other characteristics from goods or services not so certified and registrable as such. ‘Certification trade marks’ can be registered under the Trade Marks Act of India.

holders can register their GIs. Once a GI gets registered, any person claiming to be the producer of the registered GI can file an application for registration as an authorized user. The GI Act is being administered by the Controller General of Patents, Designs and Trade Marks, who is the 'Registrar of Geographical Indications'

An effective protection for GIs was of considerable importance for a country like India, which was richly endowed with natural and agricultural products and which already had in its possession renowned geographical names such as 'Darjeeling'(tea), 'Alphonso' (mango), 'Basmati' (rice), etc., there was no separate legislation on GIs until the enactment of 'The Geographical Indications of Goods (Registration and Protection) Act, 1999' (henceforth the GI Act). The tea from Kenya, Sri Lanka, have often been passed off around the world as 'Darjeeling tea', which originally denotes the fine aromatic produce of the high-altitude areas of North-Bengal, from where it derives the name. Corporations in France and the US have been producing rice based on 'Basmati' varieties in those countries, and registering trademarks that refer to 'Basmati', thereby seeking to gain from this renowned geographical name. The US-patent on 'Basmati Rice Lines and Grains' granted to

Texas based Rice Tec Inc, which triggered a lot of controversy in the recent past, is a glaring example of wrongful exploitation of a renowned GI from India. So on and so forth, It is in such a scenario, that the GI Act was enacted formulated as part of the exercise in the country to set in place national intellectual property laws in compliance with India's obligations under the TRIPS Agreement. Under this Act, which has come into force with effect from 15th September 2003, the Central Government has established the 'Geographical Indications Registry' with all India jurisdictions at Chennai, where the right holders can register their respective GIs. After a GI is registered any person claiming to be the producer of the good designated by the registered GI can file an application for registration as an authorized user. The GI Act is to be administered by the Controller General of Patents, Designs and Trade Marks- who is the Registrar of Geographical Indications.

It is often argued that proper protection of GIs could lead to socio economic changes for the producers of goods that also involve Traditional Knowledge. With the major Asian Countries putting in place laws to protect GIs, it is interesting to find out the nature of the Geographical Indication that exist and the potential to bring in socio economic changes to the producers of the

goods. A limited case study of certain GIs, especially from India, is mentioned to find out the potential of traditional Knowledge.

Case Studies

Aranmula is a rural place in Pathanamthitta District of the State of Kerala in India. This is rural area and the place is known for a peculiar type of metal mirror called 'Aranmula Kannadi'. The high quality of the mirror, which is made of metal, makes it different from ordinary mirror and is in great demand as a gift. Only a few Traditional families are engaged in production of this metal mirror. Their Ancestors belong to the category of Viswakarma bronze smith, who was brought to Kerala from Tirunelveli approximately 500 years ago. Aranmula Kannadi is marketed nationally and internationally. Due to the exorbitant price of the product, only the elite class could afford it. There are many duplicates of Aranmula Kannadi in the market. It is very difficult to trace out the duplicates and the Manufacturers could identify it only when it comes to them to be polished in their hands. The fact that the duplicates did not affect their market share seems to be the reason for not initiating any legal action to prevent this. It is worth noting that even in the application for protection of GI they did not disclose the secret of molding and casting. The unique nature of this product is that it involves

extraordinary skill and craftsmanship in the combination of casting and molding. It is evident from the case study that the direct manufacturing and selling of the mirror enables them to reap the maximum benefit from the GI. The Traditional Knowledge used for making the mirror was not disclosed. The case of 'Aranmula Kannadi' makes it clear that traditional knowledge used in the products of GIs should be protected effectively only if the knowledge is not disclosed to the public by the Producers and the GIs acquire unique reputation.¹³

Another example is the patenting of the Indian Turmeric. The turmeric is a plant that has been used in India for centuries not just as spice in curry preparations but more importantly as an anti-septic agent for its wound-healing properties. When the US Patent and Trademark Office granted a patent in 1995 on turmeric, this caused a furor in India and elsewhere. The Council of Scientific and Industrial Research from India asked the US Patent Office for reexamination and revocation of the Patent, a procedure not only involving time but also money and effort. For instance, the Indian Council showed ancient scriptures to prove to the US patent office that the wound-

¹³ Gopalakrishnan.N, Prabha .S, (2007), Exploring the relationship between Geographical Indication and Traditional Knowledge, www.ipsor

healing properties of turmeric were known for centuries in India and hence was in public domain and thus, there was no novelty involved, an important criterion for patentability. In the end, the US Patent Office revoked the patent, but only because there was written evidence are completely inadequate to handle traditional knowledge which may be passed on from one generation to the next by word of mouth.

Socio-Economic Issues

In India, perhaps only in the case of one good i.e. Darjeeling Tea; the Tea Board has had some success in defending against misappropriation in a few countries because they have the financial capacity to do so. Though the Act defines the cases when a registered GI is said to be infringed, it is silent on the mechanism and provisions to fight against the infringement and this is an area where the government needs to play a larger role. In Indian context you may observe the several instances of socio-economic problem issues time and again i.e., “Banarsee saree” weavers continue to be a distressed lot, idle looms have not begun functioning and unscrupulous practices of selling imitation products in the name of Banarsee Saree have not been curbed. GI could not delivered its proposed benefits. The moot question is – ‘Will GI be helpful in

bringing back those thousands of weavers back into this famous craft who gave up weaving as their livelihoods were destroyed due to almost the same reasons GI protection is supposed to address.¹⁴

Hence, GI should be considered as part of a wider set of policies measures that seek to protect and reward indigenous knowledge. If needed, the technical component of the handicraft could also be protected through other IPRs. There is a dearth of literature from an Indian perspective on potential benefits from GI protection. While many studies have been done in Europe on the issue, hardly any systematic assessment has been undertaken by the relevant agencies in India while identifying the products to be accorded GI status.

Developing Countries like India see GI's as a potential rural development tool. They believe that a GI would add value to local production, moves to strengthen GI provisions for food involves the potential to protect traditional and indigenous knowledge. With GI's, knowledge remains in the public domain. No private entity exercises monopoly control over the knowledge embedded in the protected

¹⁴ Gautam Kumar, Geographical Indications of India Socio Economic and Development Issues, <http://www.craftrevival.org/voiceDetails.asp?Code=245>

product. Yet, precisely because the knowledge covered by a GI is not owned, it can be misappropriated by others.

References:

- [1] Michael Blakeney, (2001) *Proposals for the International Regulation of Geographical Indications*, 4 J. WORLD INTELL. PROP. 629;
- [2] Leigh Ann Lindquist, (1999) *champagne or Champagne? An Examination of U.S. Failure to Comply with the Geographical Provisions of the TRIPS Agreement*, 27 GA. J. INT'L & COMP. L. 309, 309–10
- [3] Dwijen Rangnekar, *Geographical Indications, A Review of Proposals at the TRIPS Council: Extending Article 23 to Products other than Wines and Spirits*, School of Public Policy, University College London
- [4] Kasturi Das, (2009), 'Socioeconomic Implications of Protecting Geographical Indications in India' Kasturi Das, available at http://wtocentre.iift.ac.in/Papers/GI_Paper_CWS_August%2009_Revised.pdf
- [5] Fink c, and Maskus KE, (2006), *Intellectual Property and Development :Lessens from recent Economic Research*, Oxford University Press, p.203
- [6] Gopalakrishanan.N, Prabha .S, (2007), Exploring the relationship between Geographical Indication and Trditional Knowledge, www.ipsor
- [7] Gautam Kumar, *Geographical Indications of India Socio Economic and Development Issues*, <http://www.craftrevival.org/voiceDetails.asp?Code=245>
- [8] Kasturi Das, (2007), *Protection of Geographical Indication:An overview of select issues with particular reference to India*, http://papers.ssrn.com/sol3/papers.cfm?aabstract_id=1587372
- [9] TRIPS.Ten Years later compromise or conflict over Geographical Indication.2005.(online) available at www.trade.ee.europa.eu/docib1/html/130588
- [10] WIPO. 2007. *A Promising Solution for Developing Countries on Appropriate international Legal Framework*, International Symposium on Geographical Indication organized by WIPO. Wipo/geo/07/11
- [11] Rangnekar. D (2004), *the pros and cons of stronger Geographical Indication Protection*. <http://www.iprsonline.org/resources/docs/Rangnekar%20-%20GI%20-%20Blue%204.pdf>