



Are Geographical Indications Better Suited to Protect Indigenous Knowledge? A Developing Country Perspective

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POLICY BRIEF-2

Many countries¹ uphold the view that the existing legal framework, particularly the intellectual property system could be used for improved protection to indigenous knowledge (IK) and that under certain circumstances; geographical indications (GIs) could be a particularly important way of protecting products based on IK.² This policy brief seeks to enquire into the unique attributes of this intellectual property tool, which could perhaps make it more suited to protecting indigenous knowledge, especially from the perspective of a developing country like India. It also looks into the possibilities of using GIs to contribute to the socio-economic development of the community. With these objectives, it first examines the concept and definition of GI, the provisions of international agreements like the TRIPS which deal with GIs and the relationship between GIs and IK. It then analyses the provisions of the Indian legislation on GIs and how these could be employed to protect IK. The policy brief is substantiated by a case study conducted by Gene Campaign on potential GIs of a state in India-Assam, which has many indigenous products meriting protection.

What is a Geographical Indication? Concept and definition

Geographical regions the world over have their own claims to fame. History speaks of Christopher Columbus sailing from Europe to

chart out a new route to India, lured by the wealth of its spices. English breeders imported Arabian horses to sire Derby winners while China silk, Dhaka muslin, Venetian glass all have been much sought after treasures since a long time. Each reputation has been carefully built up and meticulously maintained by the masters of that region, combining the best of Nature and Man, traditionally handed over from one generation to the next for centuries. The specific linkage existing between the goods and place of production has ultimately resulted in the growth of geographical indications (GIs).

A Geographical Indication may be defined as an indication that is used to identify agricultural, natural or manufactured goods originating from a definite geographical territory, having a special quality or reputation or other characteristics. The primary function of a GI is to inform the consumer of a product about the place of its production or manufacture and thereby assure him about its specific quality, reputation or other characteristics which are essentially due to its geographical origin. In a nutshell, GIs have the following three characteristics:

- GIs are indications which identify a good.
- GIs are indications pointing to the geographical origin of the goods, though they need not necessarily be geographical names like appellations of origins³. Thus, 'Basmati' for rice is a GI, though it is not a geographical name. GIs also embrace

1 TRIPS Secretariat, 2002, "The Protection of Traditional Knowledge and Folklore: Summary of Issues Raised and Points Made", IP/C/W/370

2 Submission of European Communities and their Member States at the TRIPS Council, 2001, "Review of the Provisions of Article 27.3 (b) of the TRIPS Agreement", IP/C/W/254.

3 The concept of 'Appellation of Origin' is closely related to GI. An Appellation of Origin, according to the Lisbon Agreement, means the geographical name of a country, region or locality, which serves to designate a product originating therein and the quality and characteristics which are due exclusively or essentially to the geographical environment.

appellations like 'Bordeaux' for wine, 'Noix de Grenoble' for nuts, 'Tequila' for spirit drinks and 'Jaffa' for oranges, with each of them being a geographical name.

- 'Reputation', 'quality' and 'other characteristics' are each in their own right a sufficient condition for a GI.

Basmati Rice, Kanchipuram Silk, Darjeeling Tea, Alphonso Mango, Nagpur Orange, Kolhapuri Chappal and Bikaneri Bhujia. are some Indian examples of GIs.

Provisions under the TRIPS Agreement

The TRIPS Agreement is said to be the first multi-lateral agreement dealing with geographical indications⁴. Part II Section 3 of the TRIPS Agreement deals with GI. Some of the important provisions are as follows:

(i) Minimum standards of protection

Article 22 of TRIPS provides the basic framework for the member countries to provide for the protection of all GIs, where the obligation is for members to provide the 'legal means for interested parties' to secure protection of their GIs. Under Article 22, the scope of protection is composed of three components:

- Protection against the use of indications that mislead the public or are deceptive.
- Protection against the use of indications in a manner that are acts of unfair competition.
- Refusal or invalidation of trademarks that contain or consist of indications, where it may mislead the public.

Article 22.2.a prohibits the use of indications (words, phrases, images or symbols) that will mislead/ deceive the public about the good's geographical origin. Thus, for example, the use of an iconic symbol like the Taj Mahal to impute that the good has association with India or the use of a script or language to wrongly indicate the geographical origin of a good is prohibited.

Article 22.2.b prohibits any use of GI that constitutes an act of unfair competition as defined in Article 10bis of the Paris Convention⁵. The language of Article 10bis reveals that in order to prohibit such acts as acts of unfair competition, it has to be established that their use is misleading or will create confusion to the public, and that damages result or there is likelihood of damages resulting from such use of GI.

Under Article 22.3 of TRIPS, registration of geographical indications as trademarks shall be refused or invalidated at the request of an interested party, if their use is likely to mislead the public as to the true place of origin. Most countries including developing countries prohibit the registration of geographical names as trademarks, unless these have acquired secondary meaning.⁶

(ii) Additional protection for wines and spirits

TRIPS provides for two levels of protection for geographical indications. As provided for in Article 22, the first is the basic level or a minimal standard of protection where all geographical indications must be protected against use which would mislead the public or constitute an act of unfair competition. The second is a higher standard of protection specifically for wines and spirits provided for in Article 23 of TRIPS. This article obliges the protection of geographical indications on wines and spirits per se or in absolute terms, without requiring any test of confusion or likelihood of deception to be met. In the special case of wines and spirits, Article 23.1 of TRIPS prohibits the use of translations of geographical indications or attachment of expressions such as 'kind', 'type', 'style', 'imitation' to products not originating from the place indicated, even where the true origin is clearly indicated. Thus, 'Champagne style sparkling wine, Made in the USA' would be prohibited even though this is clearly not deceptive. The ramifications of this additional protection for wines and spirits are discussed in detail later on.

(iii) Exceptions to the obligations

There are several important exceptions to the obligations in Articles 24.3 to 24.9 of the TRIPS Agreement that take away considerably from the benefits to the owners of geographical indications. The most important is the exclusion from

4 Nair, L., R. Kumar, 2005, Geographical Indications: A Search for Identity, New Delhi: LexisNexis, p. 91.

5 According to Article 10bis of the Paris Convention, unfair competition means 'any act of competition contrary to honest practices in industrial or commercial matters', which includes the following:

(1) All acts of such a nature as to create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities, of a competitor;

(2) False allegations in the country of trade of such a nature as to discredit the establishment, the goods, or the industrial and commercial activities, of a competitor;

(3) Indications or allegations the use of which in course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quality of the goods.

6 Watal, J., 2001, Intellectual Property Rights in Developing Countries, New Delhi: Oxford University Press.

protection of a geographical indication that is not or ceases to be protected in the country of origin or has fallen into disuse in that country (Article 24.9). Another exception is a geographical indication that has become generic, that is, identical with the common name of such goods or services or in the case of wines, identical to the customary name of a grape variety found in that Member country (Article 24.6). In addition, particular geographical indications for wines and spirits that have been in continued prior use for at least 10 years preceding April 1994 or in good faith before this date, can continue to be used (Article 24.4).

Further, where a trademark identical or similar to a geographical indication has been applied for or registered or used in good faith before the application of the provisions of TRIPS in the Member Country or before the protection of the geographical indication in the country of origin, the obligations in this section with regard to registration do not apply (Article 24.5). Also, WTO members can limit requests for cancellation of use or registration of a trademark made in good faith to five years after the adverse use of the protected geographical indication has become generally known in that jurisdiction or after the date of registration, whichever is earlier.

The fall out of these exceptions has often been that other countries, particularly those where these indications were not commonly used before the relevant dates given in the TRIPS Agreement, will have to accord the higher level of protection made obligatory under TRIPS. Some developing countries that have just realized the value of their geographical indications may find that they are taking action after it is too late. The case of basmati rice (discussed later) illustrates this predicament.

Geographical Indications, Developing Countries and Indigenous Knowledge

The ability to extend the life of GIs indefinitely and the possibility of collective ownership of such rights suggest that they may be especially suitable for protecting IK. GIs may especially facilitate protection of the collective rights of the rural and indigenous communities in their IK, ensuring that the entire community which has preserved the knowledge and has passed it on with incremental refinement over generations, stand to benefit from the knowledge and that this is not locked up as the private property of one individual. Other advantages of GIs are that the knowledge remains in the public domain, the scope of protection is limited to controlling the class and/ or location of people

who may use the protected indication and the rights can potentially be held in perpetuity as long as the product-place link is maintained. Holders of a GI do not have the right to assign the indication, thus, preventing its transfer to non-locale producers.⁷ The latter provision is important for protection of IK and to ensure that it does not pass on to the hands of those who are not holders of the knowledge.

The European Communities and their Member States have pointed out that it may also be useful to examine the possible role of GIs in achieving the goals of the Convention on Biological Diversity (CBD)⁸. The CBD recognizes the existence of geographically defined areas that are regulated to achieve conservation objectives. Products originating from such areas may perhaps also be identified as geographical indications, if producers decided to link their collective production standards and related IK to conservation goals⁹. Thus, GIs, apart from protecting IK, may also be seen as a means to achieve TRIPS- CBD reconciliation.

The importance of GIs as tools for protection of IK of communities has been emphasized. However, the inequities existing in the hierarchical protection of GIs as provided for in TRIPS seriously undermine the interests of developing and least developed countries. The higher protection conferred to wines and spirits by TRIPS does not refer to the unique characteristics of wines and spirits, but was rather a compromise reached in negotiations. The major beneficiaries of this protection are developed countries alone while developing and least developed countries, which do not have wines and spirits to protect, but are endowed with vast and rich bio- resources and IK are at a disadvantage. Many developing countries including India, Pakistan, Kenya, Mauritius and Sri Lanka are attempting in the TRIPS Council, to broaden the scope of protection of geographical indications now confined to wines and spirits to other sectors of importance to them. Owing to pressure from developing countries, the Doha Ministerial Conference had suggested to consider extra protection that WTO members apply to wines and spirits, to other traditional high quality products that are just as deserving of recognition such as Indian saris, Oriental carpets, specialty teas such as Darjeeling tea, Jasmine rice (Thailand), art paper (China), porcelain from Limoges (France) etc., by the Fifth Ministerial Conference, held in Cancun in September 2003. However, the deadline could not be met.

Developing countries are faced with two options: to protect all geographical indications at a uniformly higher level; or to

7 Commission on Intellectual Property Rights, 2004, Integrating IPRs and Development Policy.

8 Submission of European Communities and their Member States at the TRIPS Council, 2001, "Review of the Provisions of Article 27.3 (b) of the TRIPS Agreement", IP/C/W/254

9 *ibid.*

accept two different levels of protection, with the higher level for wines and spirits. In either case, it is pointed out by the Final Report of the Commission on IPRs that it would be practical to base such absolute protection on a registration system specifying the geographical indications to be protected. Developing countries should insist on a common list of geographical indications for wines and spirits that all WTO members will accept as otherwise they could be forced to accept a longer list than other more powerful members.¹⁰ In this connection, negotiations have been taking place in the TRIPS Council for establishment of a multilateral register for wines and spirits. The purpose of the register has not been clearly defined. Some wish to use it as a full international register that would oblige all member countries to provide protection to geographical indications meeting the requirements for registration. Others want it as a voluntary system of registration and source of information.

In considering positions to take on the discussions on both the multilateral register and the possible extension of the scope of protection, it is important for developing countries to consider carefully the potential costs and benefits.¹¹ The main economic benefit of geographical indications would be to act as a quality mark which will play a part in enhancing export markets and revenues. But increased protection, particularly applied internationally, may adversely affect local enterprises which currently exploit geographical indications that may become protected by another party. It has also been suggested that geographical indications may be of particular interest to a number of developing countries who might have, or might be able to achieve, a comparative advantage in agricultural products and processed foods and beverages. For these countries, seeking and enforcing protection for geographical indications abroad may have economic gains. However, the economic consequences of seeking and enforcing protection for geographical indications might be prohibitively high. In addition, prior to seeking protection abroad, it is necessary to develop and protect the geographical indication in the country of origin. Resources may need to be deployed to ensure that the required quality, reputation or other characteristics of the product covered by the geographical indication are developed and maintained. Effort will also be needed to ensure that the geographical indication does not become an accepted generic term, freely useable by all (as in the basmati case).

India's Geographical Indications of Goods (Registration and Protection) Act, 1999

The need to protect Indian's famous products through geographical indications was acutely realized following the basmati case. In 1997, the US Patent Office granted a patent

on Basmati rice to an American company called Rice Tec Inc. Basmati is a slender, aromatic, long grain variety of rice from the Punjab provinces of India and Pakistan. It is a major export crop for both countries and represents the livelihood of thousands of farmers. In the absence of domestic legislation then to protect GIs, India had no option but to resort to the expensive procedure of challenging the patent in the US.

In view of these circumstances, it was considered necessary to have a comprehensive legislation for registration and for providing adequate protection for geographical indications. For, unless a geographical indication is protected in the country of its origin, there is no obligation under the TRIPS Agreement for other countries to extend reciprocal protection. Also, India being a party to the TRIPS Agreement is required to protect geographical indications and hence in order to fulfill that obligation, the Geographical Indications of Goods (Registration and Protection) Act, 1999 was enacted. The main benefits which follow from registration under the Act are, it confers legal protection to geographical indications in India, it prevents unauthorized use of a registered geographical indication by others, it boosts exports of Indian geographical indications by providing legal protection, it promotes economic prosperity of producers and it enables seeking legal protection in other WTO member countries.

From the perspective of protection of IK, one of the best features of the Indian Act is the comprehensive definition given of GI, whereby agricultural, natural and manufactured goods all come under the ambit of GI. This is especially important in the Indian context considering the wide variety of goods that is deserving of protection ranging from agricultural products like Basmati, Darjeeling tea to manufactured goods such as Agra ka petha, Kolhapure chappals, Chanderi silk etc.

Section 11 of the Act provides that any association of persons, producers, organization or authority established by or under the law can apply for registration of a GI. This section facilitates protection of the collective rights of the rural and indigenous communities in their IK.

Another positive feature of the Act is that by registering an item which is the product of IK as GI, it can be continued to be protected indefinitely by renewing the registration when it expires after a period of ten years. This is unlike the protection offered by a patent; after patent lapses, the subject matter of protection comes into the public domain.

The Indian Act also deserves applause for the fact that it has

10 Watal, J., op.cit.

11 Commission on Intellectual Property Rights, 2004, op.cit.

tried to extend the additional protection reserved for wines and spirits mandated by TRIPS to include goods of national interest on case to case basis. Section 22.2 of the Act provides the Central Government with the authority to give additional protection to certain goods or classes of goods. As seen earlier, India is also exerting pressure in the TRIPS Council in this regard so that high quality products of importance to India based on the IK perfected over centuries can be protected.

Section 25 of the Act, by prohibiting the registration of a GI as a trademark, tries to prevent appropriation of a public property in the nature of a geographical indication by an individual as a trademark, leading to confusion in the market. This provision is conducive to the protection of IK, which may be regarded as a public property or the heritage of a community and ensures that it is not locked up as the private property of one individual.

Again, as per section 24, a GI cannot be assigned or transmitted. The Act recognizes that a GI is a public property belonging to the producers of the concerned goods; as such it cannot be the subject matter of assignment, transmission, licensing, pledge, mortgage or any contract for transferring the ownership or possession. This feature is essential for protection of IK and to ensure that it does not pass on to the hands of those who are not holders of the knowledge.

Measures to Protect GIs in India

GIs, both at national and international level are primarily faced with two kinds of risk, one arising from their generic use to indicate a class of products without any regional nexus and the other from their dilutive use as trademarks on similar or dissimilar goods or services. Such enforcement is further compounded by the difficulties arising from the civil law and common law divide internationally among various jurisdictions, the former insisting on formal registration in the country of disputed use and the other insisting on proof of local reputation and goodwill in the country of disputed use.

Geographical Indications have emerged as one of the important features of the IPR regime of India. In India, there has been an effort to increase the list of protected GIs. After the Geographical Indications Act came into force on September 15th 2003, applications for registration as GI has been filed in respect of Darjeeling tea, Kancheepuram silk,

Chanderi silk sarees, Alphonso mangoes, Basmati rice, Kohlapuri sandals, Bikaneri Namkin, apples from Himachal and Kashmir, Petha from Agra, Pedha from Mathura etc.' some of which like Darjeeling tea, Chanderi silk have been notified as GIs.¹²

Apart from this, India has also resorted to other measures to protect valuable GIs. After long litigation in the case of the basmati patent, which resulted in ultimately changing the title of the patent, India has set up a Basmati Development Fund, a watch agency to keep a worldwide watch for new trademark applications of Basmati rice or its deceptive variations. In order to protect a valuable GI, its registration under the Act is not sufficient. Many a geographical indication has died a natural death because those who owned the rights were negligent in stopping any kind of abuse of the geographical indications. Communities that own geographical indications must, therefore, be alert to any misuse or abuse of their geographical indications. Instances of abuse and misuse would include use of the geographical indication in respect of similar or dissimilar goods (eg. 'Champagne' in respect of mineral water or perfumes), use of a geographical indication in lower case ('basmati' in place of 'Basmati'), use of a geographical indication as a qualifier or laudatory term ('Champagne of mineral water'), use of a geographical indication in a generic sense ('Darjeeling type tea') etc.¹³ The digital and internet age abuse of geographical indications would be the use of a geographical indication as a domain name when the owner has nothing to do with a product in the geographical indication or simply squatting on the domain to derive a monetary gain from the true owners or selling identical goods not originating in the correct place as indicated by the geographical indication through the internet using the domain name¹⁴.

Again, apart from getting GIs protected, due care needs to be taken to maintain and ensure the quality of the GI protected goods, both in India and while exporting them abroad. Owners of GIs have a collective responsibility to ensure that the quality or supply chain integrity is maintained at all stages.

Potential GIs of Assam: A Case Study

Gene Campaign, as part of the project "Protection of Indigenous Knowledge of Biodiversity", had looked into the potential of GIs in contributing to the socio-economic development of the North-Eastern state of Assam. This region, despite being one of the richest regions in India in

12 "Intellectual Property Rights of Darjeeling Tea in the Age of Globalization and World Trade", American University-Trade and Environment Database Journal, Number 752, July 2004.

13 Nair, L.R., R. Kumar, 2005, Geographical Indications: A Search for Identity, New Delhi: Lexis Nexis, pp. 199-200.

14 *ibid.*

terms of natural resources, indigenous knowledge and products or commodities with valuable reputations, remains one of the least developed. The problem of misappropriation of the products of Assam could be expected to be compounded further, considering the fact that the North- East region of India has very porous borders. While close proximity to the markets of Bangladesh, Myanmar, China, Bhutan and even the markets of Thailand, Malaysia, Indonesia could be expected to give a fillip to exports from the state, the 'Look East' Policy of the Indian Government, might make its exclusive products increasingly vulnerable to misappropriation in the absence of legal protection.

A few products of Assam have received worldwide attention and fame: Assam silk being one of them. Assam produces three varieties of silk: pat, muga and edi. The terms pat and edi are derived from the Sanskrit words, pattaja and erandaja respectively but there is no Sanskrit equivalent for muga which seems to indicate that muga is an exclusively indigenous product of Assam. The name muga has been given to it on account of its golden yellow colour resembling the colour of the yellow muga pulse. Historical evidence suggests that Assam's silk industry had reached the pinnacle of perfection by the 7th century A.D. Banabhatta, the author of Harshacharita informs us that king Bhaskara Varma of Kamarupa (ancient Assam) presented to Harshavardhana silken towels as "silken and pure as the autumn moon's night...". In the present day, muga silk constitutes the state's most popular export product after Assam tea. The muga silk is one of its own kind, popular for its natural golden colour, glossy texture and durability and is obtained from the multivoltine silkworm (*Antheraea assamensis*). The rearing of muga silkworm, extraction of its silk and weaving of muga silk fabric are age-old practices in Assam, which are entwined with tradition, culture and religion of Assamese society. Realizing the value of muga, the Patent Information Centre of the Assam Science, Technology and Environment Council (ASTEC) has already made an application for registration of muga silk as a GI.

Assam tea (*Camellia sinensis* var *assamica*), grown in the lowlands of Assam, is a special kind of black tea renowned the world over for its body, briskness, malty flavor, and strong, bright color. Historically, Assam is the second largest commercial tea production region after China. There exists a 10th century Sanskrit medical text from Assam called Nidana that mentions leaves called shamapatra from which shamapani was made. The tea industry in Assam has a long history going back to the colonial period; Robert Bruce is credited with the discovery of the tea plant in Assam as early as 1823. Today, Assam produces more than half the tea grown in India. On the international market, Assam Tea can be identified by the official logo chosen by the Tea Board of India.

Joha is a scented variety of winter rice that grows only in Assam. Actually, there are about five to six varieties of joha; the most famous being the kunkuni, keteki and tulsi joha. It is claimed that the joha except for its size, can compete with basmati in every other respect. After boiling, the size of the basmati grain is about 12 mm while this is 8 mm; however, some regard its scent as even much better than basmati. The rice, organically grown, has already made a very good impression at several international festivals, particularly among European rice importers at the world-famous BIOFACH in Germany in the year 2005.

Brass and bell metal works in Assam also have a very old history. The manufacture of brass and bell- metal articles in Assam has been traditionally practiced by a particular community known as the Mariyas who were descendants of the prisoners of war during Turbak's invasion of Assam about 1506 A.D. Bell metal utensils are manufactured by casting in moulds, while brass vessels are made out of thin sheets of metal which are beaten out and pieced together. The principal items are the kalah (water pot), sarai (a platter or tray mounted on a base), kahi (dish), bati (bowl), lota (water pot with a long neck) and tal (cymbals). In recent times, artisans have attempted to bring about innovation to the designs with an eye on the market.

Apart from the urgency to protect against misappropriation, GI rights in these products could be expected to contribute to socio- economic development, which has till date eluded the people of this region. The development potential of GIs could be expected to have the following dimensions:

- (i) Economical methods of production: As already seen earlier, many GIs from North- east India relate to products of agriculture or handicrafts; many like Assam silk, Joha rice are products of rural labour. Considering the low- tech and low- cost methods of production followed (usually indigenous methods which have a strong nexus with the premium of the end product); there is an assured higher stream of income for the producers and artisans. This could translate into greater economic benefits for rural artisans and labourers and contribute to their overall development and better quality of life.
- (ii) High value nature of goods labelled as GIs: Goods marketed under GIs are usually high value products for a niche market, consumed by the elite section of the society. Despite the low costs of production, the demand in the market for such high quality products makes it an expensive affair, thereby ultimately benefiting the producer by giving high economic returns for low- cost traditional methods. Thus, such incomes derived from GIs can contribute to the economic and social development of a community; help eradicate

poverty, empower women in such industries where there is a predominance of female workers (as in the case of production of eri or endi silk which is exclusively done by women), develop infrastructure, lead to better health and education for children etc.

- (iii) Empowerment of producers leading to human development: The empowerment aspect of geographical indications stems from the fact that producers of GIs are given a right to exclude all others from using the name. Such exclusion eventually lends an aura of uniqueness to the product concerned, thereby enhancing its premium. The premium attached to these goods enables the producers to commercially and economically take advantage of the product. Again, some GIs of North- East are associated with popular tourist destinations, as in the case of the Assam tea (with tea plantations holidays catering to a mostly foreign clientele, in search of the exotic). This could be expected to provide greater employment opportunities to the people in the area.
- (iv) Ecological and environmental sustainability: In the context of the overlap and interplay of GIs and IK, it can be said that sustenance through continued use of IK in GIs by communities is essential to human development. If a community is lax about protecting its IK and allows it to be misappropriated by others, such IK descends into the public domain, thereby depriving the relevant community of any economic and commercial advantage it could have derived from such knowledge.

The above case study clearly indicates that GIs may be expected to serve as tools for protecting the indigenous knowledge as well as acting as mechanisms for socio-economic development of indigenous communities in developing countries. However, it needs to be pointed out that though GIs are considered free of the many adverse socio-economic results of corporate control and accumulation of IPR rights, it is important to recognize that GIs do not in any way protect the knowledge embodied within the good and/or associated production process. Consequently, neither is protection of GIs a guarantee against the misappropriation of indigenous knowledge nor are other strategies to protect IK precluded by the use of GIs. Anyone can use the technology, without acknowledging the contribution of the original IK holders. Also, GIs cannot be used for protecting IK, not confined to a specific geographical location.



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