

A Critique of the Indian Law and Approach towards Protection of Geographical Indications with Specific Reference to Genericide

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The TRIPS Agreement prescribes minimum standard of protection for geographical indications (GIs) and additional protection for wines and spirits. The lack of uniform international protection, along with inability to reach global consensus to remedy this, has placed many GIs under the threat of becoming generic. Especially, the ones produced by backward, rural communities in developing countries like India, have been vulnerable to exploitation by large commercial enterprises through patenting. The Indian statute along with its rules has adapted a strong scheme of GI protection, mostly on the lines of the European Regulations. However, certain features of the Act merit serious consideration, the most important being the broad criteria given to determine genericide. The requirement to consider the situation outside the country of origin to determine such genericide, is avoidable and potentially harmful.

Keywords: Geographical indications, genericide, TRIPS Agreement

The issue of bringing in intellectual property rights (IPR) into the framework of a trade agreement itself was wrought in controversy, and nowhere was the alleged incompatibility between both starker, than in the rights over Geographical Indications (GIs).¹ The international framework for protection of GIs is provided in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).² Since its very inception, concerns have been expressed with regard to its fairness.³ This paper not only highlights these concerns with regard to GIs, but also analyses provisions of the Geographical Indications of Goods (Registration & Protection) Act, 1999. In order to be TRIPS compliant within the stipulated time, certain requirements in our domestic Act have been inadvertently included, which might have adverse consequences in the long run. These provisions – such as the way we define genericide – need a reassessment since this will largely define the way geographical indications are protected in times to come.

TRIPS and the Debate on Expansion of GI Protection

A comparison between Article 22(2) and Article 23 of TRIPS clearly reveals that it provides for two different levels of protection for GIs. The former merely stipulates the general standards of protection

that must be available for all GIs against unfair and misleading business practices. It was deemed sufficient to protect a GI under the existing legal principles i.e., undue use of it had to mislead the public as to the geographical origin of the product or constitute an act of unfair competition. In sharp contrast to this, Article 23(1) of TRIPS ensures that GIs associated with wines and spirits are accorded a higher level of protection, in cases where they are used to identify the same products, i.e., wines and spirits. The protection under Article 23 is mandatory irrespective of whether the consumers are misled or whether use of such indications constitutes an act of unfair competition. Hence the protection under Article 23 is relatively higher.

The reasons for such discrimination, as well as the later developments in the field of GI protection should be seen in the context of the debate between the 'New World' and 'Old World' countries. Ever since attempts were made to include GIs into the TRIPS framework there has been stiff resistance from certain countries⁴, that do not have a strong historical or cultural background. But the importance of GI protection for traditional agricultural communities in several countries can hardly be overstated. The European Union has always been at the forefront of the demand for strong GI protection. The rationale for such protection was best given by Pascal Lamy, the then European Trade Commissioner:

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‘they reinforce the economic fabric in farming communities through the presence of additional industries; they are a wealth multiplier, a collective right that belongs to communities; it guarantees that the use of a name will remain attached to a region and to the community that saw its birth; they encourage a more balanced distribution of added value between producers and distributors, and between countries of the North and the South, on the other; they stimulate quality and consequently strengthen competitiveness; and they contribute to the identity of the heritage of countries and regions.’⁵

Unsuccessful attempts have been made by some states to increase protection granted to wines and spirits to other food and agricultural products.⁶ Countries that have argued against such expansion make several points of which two are of significance. Firstly, they claim that by expanding the scope of protection, several names which have become generic⁷ will be claimed as being valid GIs. Such an argument is obviously hypothetical and assumes that many products with geographically-indicative names have already become generic.⁸ It is a case of extreme pessimism to assume that there will be no consensus with regard to which GIs are valid and which are not.

The delay in granting protection might actually expose several GIs to the peril of turning. The TRIPS Agreement provides situations in which a member country is relieved of its obligation to protect GIs, and any dispute with regard to the same should be sorted out through mutual agreement or through the dispute-settlement system. The possibility of disputes arising under a particular legal framework cannot be a valid ground to do away with it.

The second criticism that is of greater merit, is that GI protection through FTAs and other agreements between countries might create consumer confusion in the market, because companies might be obliged to change the names under which they currently market their products. This might be true to an extent, especially considering the number of products to which such changes need to be made. However, this criticism is valid only for a short-term.⁹ The example of the boom in the Australian wine industry:

‘After signing a bilateral agreement with the European Union in 1994, Australians stopped

using the names of French regions like Burgundy or Chablis to describe their wines. Far from creating decrease in production and competition feared by opponents of stronger GI protection, signing of this agreement represented making of the Australian wine industry. By relying on their own regional names like Coonawarra and Barossa, and stressing grape varieties like Chardonnay and Shiraz, the Australians have built the world's most dynamic wine industry.’⁹

Though the debate on the issue of expanding substantive GI protection has never really taken off, under pressure from some of the developing countries and the EU, the TRIPS Agreement had to incorporate an in-built mechanism of negotiations (in Article 23.4 of the Agreement) on the establishment of a multilateral system of notification and registration. There have been proposals and counter-proposals¹⁰ under these negotiations in the Doha round. While a discussion of these proposals is beyond the scope of this paper, it suffices to know that the ‘New World’ countries advocated a ‘minimalist’¹¹ approach to the multilateral registry which essentially provided for a voluntary system of registration by member states, where as the EU-led group proposed a comprehensive system which would include a list of geographical indications to be registered, a procedure for opposing listed geographical indications, legal implications of the register, and the way future alterations to the multilateral register will proceed.¹²

Although negotiations at the Fourth and Fifth WTO Ministerial Conferences focused on the registry for wines and spirits, there was a lack of substantive discussion, as the focus turned more towards questions concerning a deadline for negotiations, and whether ministers should provide guidance on substantive matters.¹³ Member countries did not come any closer to consensus in discussions on the topic of registry, and positions were largely unchanged.¹¹ There was tacit acceptance that the implementation of international protection of GIs will not occur any time in the near future¹¹ and since then nothing has changed.

The Indian Law—Case of late Realization

Under TRIPS is the minimum level of protection. Member states are free to extend the protection under Article 23 (given to wines and spirits) to other products also under their national laws.¹⁴ Expectedly,

countries like the US¹⁵ did not adopt any separate system, but preferred to use trademark laws for GI protection as well¹⁶, whereas the 'Old-World' adopted strong *suigeneris* laws for GI protection.¹⁷ Of these the EU model¹⁸ is the most advanced and closest to the Indian law.

Under the Geographical Indications of Goods (Registration & Protection) Act, 1999, (GI Act), the Indian government is at liberty to add any product under the Article 23 type protection.¹⁹ The Indian government was never proactive in pursuing the issue of GI protection under TRIPS until it was faced with public outrage due to the '*Basmati* controversy'.²⁰ India has not demonstrated any unique need, compared with developed countries such as the EU members, for extending the heightened level of protection of Article 23 to all geographical indications.²¹ The issue of *Basmati* rice being patented by the American company, Ricetec Ltd, has brought to light utter laxity on the part of the Indian administration in realizing the importance of GI protection. India's lack of adequate domestic protection under intellectual property law was largely responsible for both *Basmati* incident.²¹ Greater international protection also would not have made a difference:

'*Basmati* rice would...be outside the protection mandated by the geographical indications provisions of TRIPS, because (it) was not afforded any kind of geographical indication protection within India. Under the Article 24.9 exception to national treatment, WTO members are not obligated to provide protection for geographical indications not recognized in their own country of origin. Therefore, India would have had very weak cases for protecting the...*Basmati* rice as TRIPS geographical indications, and even under the Article 23 absolute protection standard, success would have been unlikely'.²¹

However, once the Act came there has been greater awareness and Indian GIs are much safer. But it is submitted that the Act is not flawless and the provision with regard to generic names are critiqued during the course of the paper.

The Genericide Exception: Why the Indian Act needs Change?

Generic Names under TRIPS and the Indian Act

Among the series of exceptions, Article 24.9 of TRIPS relieves members from any obligation to protect a GI which:

- Is not protected in its country of origin, or,
- Ceases to be protected in that country, or,
- Has fallen into disuse in that country.

TRIPS does not explicitly mention generic names.²² Article 24.9 merely states that members have no obligation to protect a GI which has, ceased to be protected/fallen into disuse in the country of origin.

A similar provision is present in Section 9²³ of the Indian GI Act. This section prohibits the registration of GIs that are determined to be generic. In a country like India where many of the traditional agricultural products derive their peculiar qualities and characteristics from the particular geographical region where they are grown²⁴, the above exception of genericide, which is broader than required, may prove to be a serious blow to producers. Tea has been cultivated in the district of Darjeeling since 1835 due to its unique and complex combination of agro-climatic conditions.²⁵ Such tea has a distinctive and naturally occurring quality and flavour. Darjeeling tea has since long acquired an international reputation and is a clearly identifiable GI.²⁵ Complaints were coming from time to time from all over the world that tea sold as 'Darjeeling' did not always originate from the Darjeeling plantation district of India and hence the consumers were being deprived of the special quality and flavour that they expect from Darjeeling tea as a product of GIs.²⁶ Though, as long as one is able to prove that a certain use is misleading in a certain jurisdiction, Article 22 can be enforced, it needs little mention that things would be easier if the protection is of the same level as in Article 23.

Running Out of Time

Reaching consensus on which products will enjoy absolute GI protection may take a long time in view of the stiff opposition of the most influential members of the WTO. Given the death of the debate on any substantial or procedural additions to international protection, likelihood is that relatively few important GIs will obtain absolute level of protection so vigorously demanded by the EU and India. More importantly, the value of any additional protection, if at all achieved, will not be known till the completion of the negotiations on the multilateral system of registration.²⁷ The allowance of use through patents or trademarks however, puts the GIs at the risk of becoming generic names over time.²⁸ Interested parties in developing countries have to ensure that

valuable GIs do not become generic or semi-generic in their export markets. The fact that many have already become so has been the argument of the 'New-World'.²⁹ Such marks have to be protected against unfair competition by filing cases in courts and opposing or canceling registration in trademark offices or other WTO members, if necessary.²⁷ The problem, however, is that the GI Act has come into effect only recently in India and awareness regarding this kind of intellectual property is quite low in our country. Not all the legitimate owners of these GIs seem to be pro-active enough in ensuring a legal safeguard for their respective GIs, even though many of these products have already developed a reputation in the international market.

Revisiting the *Basmati* Controversy

Because GIs are a relatively new species of intellectual property, most producers in developing countries are yet to realize their critical importance and potential value. Many of the traditional agricultural products of these countries which have gained world wide reputation for their taste and quality run the risk of becoming generic names. *Basmati* rice is a case in point. *Basmati* is long-grain aromatic rice originating in the sub-Himalayan region of the Indian sub-continent. Due to its popularity in the west, scientists have attempted to develop several different varieties of aromatic rice naming them as *Basmati*, although many of these aromatic rice varieties do not contain any parental line of the traditional *Basmati*. The Government of India has filed actions in as many as 35 countries of the world and has already won many so far. In September 1997, a US company, M/s Ricetec, managed to get a patent for a new plant variety that is a cross between American long-grain rice and *Basmati* rice. To popularize this new version of *Basmati* rice, Ricetec used the trademarks 'Texmati' and 'Kasmati'. These trademarks have been in use in the US for over two decades now.³⁰

The likely impact of this will be that if the American version is able to establish itself in the international market through advertising, etc, Indian and Pakistani exports of *Basmati* rice will take a serious hit. To prevent this, India disputed the patent claim, while at the same time, alleging that *Basmati* is a GI.³¹ The dispute was largely settled when the USPTO eventually granted a narrower patent to RiceTec only a few variants of *Basmati*. India was satisfied with the settlement as its exports were no longer affected¹³ and

this stand taken by India reflects the typical shortsightedness shown by our governments again and again. By being satisfied with unaffected exports, the government has failed to note the larger advantages of GIs for farming and other communities in the long run. It must however be emphasized that India has successfully resisted patenting of these *Basmati* variants in UK and Greece.³²

Despite this settlement there is no guarantee that the *Basmati* can be saved from becoming generic.³³ There are several hurdles in the way before India can manage to get protection for *Basmati* rice. eg: (1) Large number of varieties named *Basmati* or having other similar names have generated enormous confusion regarding authenticity of different varieties, without knowing which variety is authentic and which is not, it is not possible to grant GI protection.²⁷ (2) *Basmati* rice is now grown in many parts of the world and is no longer confined to the northern regions of India and Pakistan. Notwithstanding the obvious difference in taste and flavour, it has become virtually impossible to demarcate (with any reasonable accuracy) the geographical regions/areas in which rice of this variety can be given the exclusive name of '*Basmati*'. No producer would want to give up on this right. Hence, without proper demarcation, GI protection cannot be awarded.²⁷ (3) Most significantly, Ricetec has taken the argument that the term '*Basmati*' has been used for decades in a generic way describing this variety from other sources such as American *Basmati*, Uruguyan *Basmati* and Thai *Basmati*. In other words, even if the term did fit the TRIPS definition at one point of time, it has fallen into the public domain and has become generic through lack of efforts to protect the name internationally.²⁷ Even if India takes this matter to court; the likelihood is that Ricetec will escape liability. This is because Ricetec labels its product as '*American style Basmati rice*', a practice prohibited under Article 23 (1) of TRIPS only for GIs relating to wines and spirits.

The above illustration clearly shows how countries like the USA can, by taking advantage of the discriminatory treatment under Articles 22 and 23 of TRIPS and by stalling the negotiation process envisaged under Article 23.4, indefinitely postpone GI protection to traditional agricultural products of the developing world. Ultimately, even if a system of multilateral registration is created, GI protection can

be opposed by saying that the terms used to describe the product have become generic by virtue of their usage in different parts of the world for a long period of time.

Expanding the Geographical Boundaries - The Overlooked Threat?

An examination of the GI Act reveals another very significant detail. India may have, without knowing it, made it more difficult for its producers to get GI protection for its agricultural products. Section 9 of the Act, which prohibits registration of GIs which are determined to be generic names or indications of goods, says that an indication becomes generic when it goes back to the public domain and is not or has ceased to be protected in their country of origin, or which has fallen into disuse in that country.

It should be noted that TRIPS leaves it exclusively in the discretion of the country of origin to decide whether a particular geographical name has become generic or not. Thus, it is the governments/courts of WTO members that will decide whether or not a particular GI has become generic or needs to be protected. Article 24.9 requires taking into consideration only the situation in the country of origin. It must also be emphasized that the Lisbon Agreement, the predecessor to the TRIPS in dealing with GIs, was equally narrow in its conception of genericide.³⁴

However, it is sometimes argued that evaluation of a generic name should be based not only on the criterion of the country of origin, but also on the status of the term in international trade.²⁸ Indian lawmakers have adopted a similar approach. The explanation to Section 9 of the Act states that:

‘In determining whether the name has become generic, account shall be taken of all factors including the existing situation in the region or place in which the name originates and the area of consumption of the goods.’

This requirement of judging whether a name is generic or not, based on its status in the area of consumption of the goods has been added to the GI Act by the Indian legislature. There is no such requirement mandated by TRIPS nor is India under any obligation to consider areas other than itself (the place of origin) in determining whether a name has become generic or not. It may well be that we have walked into a trap where we find that all our

traditional agricultural products and food stuffs, which have gained considerable reputation in the international market, have become generic names. This is because when we consider areas other than the place of origin, we are likely to find that the producers in these areas have also started producing them on a large scale and selling them to consumers using the original geographical name/indication –a practice which is not prohibited by TRIPS so long as the consumers are not misled. This has already happened in the case of *Basmati* rice, where Ricetec has claimed that the term ‘*Basmati*’ has fallen into the public domain and is a generic name in North America. Consumers, in turn, may not understand the significance of Ricetec selling them rice named ‘*Basmati*’ and may well consider the term to be a common or generic name.

It is submitted that India ought to have kept the scope of genericide as narrow as possible, i.e., it should have allowed its courts to determine which term is generic and which is not, based only on the situation in India (the country of origin) and not based on the status in the areas of consumption. The more areas and situations we consider, the more likely that the term is generic, especially considering the drive with which industries in the ‘New World’ are attempting to exploit GIs.

The EU, a strong supporter of GI protection, recognizes that once a name becomes generic, there can be no protection.³⁵ However, it must be pointed out that the relevant EU Regulation lays down that the standard for determining whether a term is generic includes taking account of the ‘existing situation’ in the member state in which the name originates and in the areas of consumption.³⁶ However, given the fact that TRIPS does not impose any requirement of determination of genericide, India need not have imported such requirements (such as consideration of the status of the term in the area of consumption) in its own law. Though EU has traditionally a very strong system for GI protection, there is no reason why India should blindly adhere to it.

Pointers from The ‘Feta Cheese’ Case

In October 2005, the full court of the European Court of Justice³⁷ ruled that the term ‘*Feta*’ had not become generic, thereby restricting the use of the name ‘*Feta*’ to producers in the designated region of Greece. ‘*Feta*’ was originally registered as a PDO.³⁸ In 1999, Germany and Denmark, supported by France and the UK, successfully applied to the Court for cancellation of registration on the ground that it had

become a generic term for soft, white cheese made from sheep's or cow's milk. In October 2002, the Commission concluded that the name '*Feta*' had not become generic and it declared the legality of registration of '*Feta*' as a designation of origin for Greek cheese.

Denmark and Germany appealed, emphasizing that they had produced '*Feta*' cheese for more than fifty years and that the name had become generic. However, in its recent ruling, the Court upheld the legality of the registration, holding that white cheese soaked in brine and called '*Feta*' must originate from specified areas in Greece. The Court found that the 'interplay between the natural factors and the specific human factors, in particular, the traditional production method, has given '*Feta*' cheese its remarkable international reputation.'³⁹

While the Court acknowledged that the production of *Feta* in some European countries had been relatively large and of substantial duration, it noted that more than 85% of consumption of *Feta* per person and per year in the EU took place in Greece. The Court further noted that the labels used by non-Greek producers on their *Feta* cheese often referred to the cultural traditions and civilization of Greece. Equally, the Court observed that while white cheeses soaked in brine have been produced for a long time, not only in Greece but in various countries in the Balkans and the southeast of the Mediterranean basin, those cheeses are known in those countries under names other than '*Feta*'.³⁹ The Court thus concluded that the name '*Feta*' had not become generic name of the product, and that it continued to evoke a Greek origin. The Court thus upheld the GI protection for *Feta*.

Germany and Denmark's chief contention in the above case was based on the fact that *Feta* cheese was produced and consumed in many parts of the world and not merely in Greece. Hence, the fact that the product was of Greek origin was of little significance. Though the Court overruled this argument, the fact that it looked into statistics to determine how much of the cheese was produced and consumed outside Greece is in itself worrying. Consideration of such extraneous factors does not augur well for the numerous groups of producers who are desirous of getting GI protection for their products.

The decision in the *Feta* cheese case turned more on the factor that the product was still strongly associated with Greek traditions and agricultural

practices rather than on where it was consumed and what people in those consumption areas thought about it. Thus, the true test of genericide ought to be whether the product in question still reminds one of the country of origin and its specific production methods, climatic conditions, etc, and not what its status is in the places of consumption, as against Denmark's claim that the situation outside Greece must be taken into consideration. If the latter were to be the sole test of genericide, then producers in the consumption area would always claim that the product name has become generic due to its widespread production in those areas. This would be to their own advantage as they would be able to make use of the goodwill of the original product.

Conclusion

This paper merely rues about an issue that has been criticized and written about in plenty- the danger of products being disintitiled to registration as GIs, due to the delay in granting protection for products beyond wine and spirits under the TRIPS framework. But, it must be adequately emphasized that the underlying purpose behind the arguments has more to do with highlighting the need for states, especially , India, to ensure that the criteria for a product to become generic be kept as narrow as possible. The situation in the state of consumption to be taken into consideration to determine genericide is clearly TRIPS-plus obligation, the Indian Act militates against the interests of numerous indigenous communities and other producers. Despite the lack of empirical evidence to buttress this claim, it is always better to err on the side of caution.

It is also submitted in the context of the larger debate, that India should realize that a multilateral framework need not be the only way of ensuring protection of its GIs in the international community.⁴⁰ The EU has made it a point to include clauses pertaining to enhanced GI protection in bilateral and regional trade agreements.⁴¹ It has in fact done so with countries like the US itself.⁴² Despite large number of such trade agreements, India is entering into with countries, there is no evidence of it pursuing the issue of GI protection with adequate vigour. There can be no doubt that India enjoys greater bargaining power in the international trading community today than ever before, but one is tempted to conclude that this is not being sufficiently used for the purpose of making bilateral and regional trade partners but to understand the need for enhanced GI protection.

Representatives from various countries in the WIPO 2007 International Symposium on Geographical Indications held in Beijing, voiced their views and there was enough acknowledgment that the basic difference still remained as to the nature of international mechanisms to protect GIs. The Indian representative, Dr Ajay Dua of the Indian Ministry of Commerce and Industry stressed that work was needed to clarify notions such as 'quality' and 'reputation,' as well as inspection mechanisms.⁴³ But, while conflicting views were to be expected in the current stage of the WTO negotiations, WIPO Assistant Director General, Ernesto Rubio, noted that discussion fora such as the WIPO symposia contributed positively to increasing mutual understanding.⁴³ It is this mutual understanding that needs further development.

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