

# GI - Trans Border Dilemma: The Road Ahead

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## The Background

A geographical indication (GI) is a sign utilized on merchandise that have a particular geographical beginning and have characteristics or qualities that are basically inferable from that spot of beginning. Thus GI is a classification of IPRs with aggregate proprietorship. The uncommon attributes or quality might be because of regular elements (crude material, soil, territorial environment, temperature, dampness and so forth) or the strategy for assembling or planning of the item (like conventional creation strategies) or other human variables (like centralization of comparable business in a similar area). Aranmula Kannadi<sup>i</sup>, Kancheepuram Silk Saree, Pochampally Ikat, Darjeeling Tea and Balaramapuram Handloom are exemplary models. Varanasi, it should be referenced here, has arisen as a congregation of items protected by GIs with five GI enrollments arising from this region alone<sup>ii</sup>, the most significant of which is of course Banarasi silk sarees. Notwithstanding, Surat made engineered sarees and Chinese made sarees are routinely made look like Banarasi items in various business sectors across India, a lot to the embarrassment of the Banarasi saree makers.

In the 'natural chaos' of deviated data, GIs can help reestablish the evenness thereof by offering customers extra data on the item's quality with the goal that they are not unfavorably positioned against the producers<sup>iii</sup>. In his model, Shapiro opined that regulation operates as a signaling gadget<sup>iv</sup>. The activity of GIs is very comparable. Indeed, reviews led by UNCTAD among EU customers show that for GI-enrolled agrarian items, buyers will pay a premium of upto 10 to 15% while for non-farming items, the premium could go between 5 to 10 percent<sup>v</sup>.

## Appellations of origin and indications of source

Preceding the signing of the TRIPS Agreement, items having a connection to their place of beginning were referred to by various phrasings like appellations of origin and indications of source. The former, for example, has been characterized in the Lisbon Agreement (Article 2(1)) to mean:

*“the geographical denomination of a country, region or locality which serves to designate a product originating therein, the quality or characteristics of which are due exclusively or essentially to the geographical environment, including natural and human factors”.*

Thus an appellation of origin is a special category of GIs<sup>vi</sup>. Instances are Champagne and Tequila. The fundamental distinction between the two phrasings is in the level of connect with the spot of beginning. Champagne refers to a unique sort of shimmering wine from a designated area of France. Tequila's starting point is Mexico. There are government guidelines set up which oversee explicit subtleties before it very well may be named as Tequila<sup>vii</sup>.

As regards indication of source, WIPO defines it as

*“an indication referring to a country (or to a place in that country) as being the country or place of origin of a product”.*

In contrast to GI, the consumer cannot infer from an indication of source the presence of any exceptional quality for the item basically owing to its place of beginning.

### **GI Protection under TRIPS**

Article 22 of the TRIPS Agreement provides a definition of GIs. Article 22.2 provides that WTO members “shall provide the legal means for interested parties to prevent

- a. The use of any means in the designation or presentation of a good that indicates or suggests that the good in question originates in a geographical area other than the true place of origin in a manner which misleads the public as to the geographical origin of the good.
- b. any use which constitutes an act of unfair competition...”.

The utilization of a GI which does not misguide the general society regarding its spot of beginning is not a violation of the TRIPS Agreement. This is one of the vital contrasts between the TRIPS clauses pertaining to all products and the uncommon cover given to wines and spirits. Indeed, Art. 23 and 24 give more extensive insurance to GIs for wines and spirits. Unique notice should be made here of the TRIPS prerequisite of Art. 24.9 which expresses that

*“there shall be no obligation under this Agreement to protect GIs which are not or cease to be protected in their country of origin or which have fallen into disuse in that country”.*

It merits referencing here that the TRIPS-commanded GI system experiences some innate restrictions including the all-inclusive insurance for just chosen GIs and troubles of acquiring protection in foreign jurisdictions<sup>viii</sup>.

## The Indian Scenario

In India, GI protection is done through a sui generis framework operationalized through the Geographical Indications of Goods (Registration and Protection) Act of 1999 (which came into effect on the fifteenth of September 2003) and the Geographical Indications of Goods (Registration and Protection) Rules of 2002. The Intellectual Property Office in Chennai is accountable for GI Registry in India.

Indian GI Act determines the products to be either agrarian merchandise or natural merchandise or made merchandise that can qualify as a GI. Further in the Indian Act if a maker applies for a GI for a fabricated good, he/she should ensure that at any rate one of the exercises of creation, handling or planning should occur in the region. Thus the GI Act is more prohibitive than the TRIPS definition. Yet, under the Act, names that do not mean the name of a country or district or territory can in any case be considered for enlistment as long as they identify with a particular topographical region and are utilized vis-à-vis merchandise starting from that locale, giving a breathing space to stretching out insurance to Alphonso mangoes and Basmati rice.

Different phases of issue of GIs have been recommended by the Registry. In the initial step, the makers' association or an aggregate collection of makers (like the Tea Board of India) needs to file an application in the endorsed structure. The subtleties that should be given in the application include: the class of merchandise, the region, specifics of appearance, subtleties of makers, sworn statement of how the candidate professes to address the interest, unique human expertise included, number of makers and structure to control the utilization of GI.

The application will be analyzed by specialists identified by the GI Registry. Whenever accepted, the application will be left open for public examination. In any case, if the application is protested by specialists, a hearing will occur. In the event that no complaints are filed, it is considered as fit to be granted GI certificate. Notwithstanding, if any individual or maker association or NGO protests the legitimacy and genuineness of the GI, a hearing happens and if the result thereof is in the affirmative, certificate is given. It should be specified here that the Indian GI Act (Section 32) explicitly bars litigation in civil courts in such matters.

## The Pakistani and Bangladeshi Scenarios

Pakistan has managed assurance of GIs through trade mark law-to be specific, Trade Mark Ordinance 2001 executed through Trade Mark Rules 2004. The meaning of GI of Pakistan is akin to TRIPS. The Trade Mark Ordinance of Pakistan characterizes products comprehensively to incorporate anything subject to exchange, assembling or business. Notwithstanding, the Pakistanian system is quiet on covering homonymous signs (those which

might be comparative as far as spelling yet refer to products coming from different nations). This is not the position in the Indian Act (Section 10).

In Pakistan, the application for enrollment of GIs is to be submitted to the Registrar of Trademarks alongside the guidelines overseeing utilization, indicating the people approved to utilize the imprint, conditions for utilization of the imprint and any authorizations against abuse. The guidelines are to be endorsed by the Registrar considering consistence with the prerequisites to be filed alongside the application and that they are not against public policy. In the event that every one of the conditions are met, the application would be granted.

Bangladesh, paradoxically, has a sui generis GI enactment - to be specific the Geographical Indications of Goods (Registration and Protection) Act 2013 which gives an enrollment framework to its native items. Nonetheless, GI enrollment is not mandatory. The Bangladeshi GI Act additionally gives equivalent treatment to foreign GIs. The Act recognizes the concept of homonymous GIs. Section 28(d) also provides that “a registered GI shall be infringed by a person if he, not being an authorized user thereof.... uses any other GI to such goods not originating in the place indicated by such other GI or uses other GI to such goods .....even indicating the true origin of such goods or uses of other GI to such goods in translation of the true origin or accompanied by expressions such as kind, style, imitation or the like...”. Section 21 of the Act specifies that registration of trademarks can be opposed if it can be shown that the trade mark contains or consists of a GI.

## Cross Border GIs

Cross Border GI (also called trans-border GI) has been defined as “a GI which originates from an area that covers regions, territory or locality of two or more countries where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin extending over those countries<sup>ix</sup>”. In spite of the fact that most of GIs are a basically situated inside the area of a state, there are various GI items across the world that have started from the region of at least two nations. An oft quoted example is Basmati rice-an item produced from the two countries of India and Pakistan. Irish bourbon and Ouzo also need special mention here. Ouzo comes from both Greece and Cyprus. Obviously, the acknowledgment and authorization of shared GIs across borders should invite more debate because of its monetary attractions in a multilateral trading framework.

## TRIPS and Cross-Border GIs

TRIPS does not unequivocally disallow the concept of cross-border GIs. Yet, it stays quiet with regards to the parameters to determine origin of a GI where at least two nations have contending claims. In such a circumstance, nations may rely upon recorded and topographical proof, target lawful necessities and shared social understandings to prove their cases over GIs across borders<sup>x</sup>. Further, except for a few legislative provisions in the EU to protect cross border GIs which provide for trans-border GI registration for agricultural products, foodstuffs and wines (but not for spirits), international practices in this regard are quite heterogeneous. Classic examples of first EU legislations are Regulation 1151/12 of the European Parliament and of the Council of 21<sup>st</sup> November 2012 on Quality Schemes for Agricultural Products and Foodstuffs as well as Regulation 479/2008 of the European Parliament and of the Council of 29<sup>th</sup> April 2008 on the Common Organization of the Market in Wine. In the EU case several groups within different territories may lodge a joint application within the EU centralized system.

Mention must also be made here of Art 24.1 of the Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore within the Framework of the ARIPO (African Regional Intellectual Property Organization) adopted by the Diplomatic Conference at Swakopmund (Namibia) which read as follows: “Eligible foreign holders of traditional knowledge and expressions of folklore shall enjoy benefits of protection to the same level as holders of traditional knowledge and expressions of folklore who are the nationals of the country of protection”. This Article can no doubt be extended to trans-border GI protection.

The manner in which WOOLMARK is protected can also be a leading light in this regard. The said mark is a certification mark collectively shared by the Wool Boards of Australia, New Zealand, South Africa and Uruguay. These respective Boards have set up a common Secretariat called the International Wool Secretariat which in turn has established a company called IWS Nominee Company Ltd which is responsible for protection of the WOOLMARK name and logo against all acts of infringement. Nevertheless, while drawing lessons from this example, one must not forget the basic and fundamental differences between a private right (certification mark) and the public element (rights of a GI).

The Geneva Act of the Lisbon Agreement on Appellations of Origin and GIs (2015) expands the Lisbon arrangement to GIs. Article 5.4 of the Act sets out the system for joint application in matters of a trans-border geographical territory. However, it is just an unassuming start.

## Cross-Border Protection of GIs and the GI- Trademark Imbroglio

Ensuring cross-border protection of GIs in countries where the same GI is protected as a trademark poses insurmountable difficulties. This is amply born out from the Canadian case of Scotch Whisky Association vs. Glenora Distillers International Ltd. ((2008) 65CPR (4<sup>th</sup>) 441) where the Scotch Whisky Association filed a statement of opposition against the application by Glenora Distillers to register the trade mark GLEN BRETON for single malt whisky in Canada, contending that the word GLEN is of Scottish origin and when used with whisky would connote the Scotch Whisky- a registered GI in Canada. On appeal to the Federal Court, the opposition to the registration succeeded. In the light of the above jurisprudence, resolution of conflicts between trademark protection and GI protection in the cross border market place is crucial<sup>xi</sup>.

### The India-Bangladesh Trans-Border GI Issues:

#### From Jamdani Sarees to Nakshkantha Quilt

Bangladesh feels that a portion of its GI items which are socially and topographically connected with that nation are asserted by India through enlisting them under the Indian sui generis framework. Jamdani sarees, Fazil mangoes and Nakshkantha (weaved quilt) are exemplary models. Jamdani, it should be referenced here, is the first GI item enrolled in Bangladesh. The anxiety of Bangladesh is that because of its sui generis enlistment framework being in a beginning stage and because of the shortfall of a widespread strategy system to guarantee protection of trans-border GI, the interests of that LDC (Least Developed Country) are in effect sabotaged. The methodology recommended as of now (i.e.) separate enrollment in the two nations bringing in two independent GIs-Indian Jamdani and Bangladeshi Jamdani is unwieldy and may make the GI item semi generic thereby leading to loss of GI tag in other countries<sup>xii</sup>. The situation is all the more complicated as the laws of both India and Bangladesh recognize the concept of homonymous GIs.

### The Indo-Pak Issues: Basmati and Beyond

The trans-border GI issues among India and Pakistan generally hover around Basmati whose administrative scene is unexpectedly convoluted by licenses, brand names and brands. India and Pakistan have known about the requirement for joint enrollment of Basmati rice to shield it from unfamiliar aggregates, yet to date there is no agreement in the matter. Basmati, it should be referenced here, is recognized by the grain's tall and thin shape, tightening at the two finishes however not protruding at the midsection and its unforgettable fragrance, which is supposed to be a mind boggling impact of more than 40 mixtures and not just 2-acetyl-pyrroline. The pallor of the grain is additionally a distinctive mark, as also its extension on cooking to

practically twofold its length, with the width continuing as before. The conventional Basmati developing regions in India are in the sub-Himalayas and specific parcels of the Indo-Gangetic plain in Haryana, Punjab, Uttar Pradesh and Uttarkhand and the Union Territory of J&K. As far as territory is concerned, Haryana represents 44% of the Basmati cultivation followed by UP (28%), Punjab (22%), J&K (5%) and Uttarkhand (under 1%). 66% of the produce is traded abroad.

The Indo-Pak joint endeavors versus Basmati date back to 2005 when the Indian Minister for Commerce and Industry kept in touch with his partner in Pakistan proposing systems to hold consultations. In 2006, deliberations between delegate exchange bodies from both the nations occurred. In the November 2008 deliberation in Islamabad, the two nations consented to consider 2009 as Year of Basmati as a way to underscore endeavors towards joint protection. In any case, there have been differentiating developments too-specifically endeavors by the nations to secure separate rights. For instance, in India in 2004, a NGO put forth an application at the GI Registry and in Pakistan an application was recorded in December 2005 by the Basmati Growers Association. APEDA (which has now been given the authority to enlist Basmati as a GI) recorded objections in Pakistan's Sindh High Court.

Suggestions have been galore- from forming a company with participation from Indian and Pakistani entities to a Joint Commission of India and Pakistan on Basmati<sup>xiii</sup>. Notice should likewise be made here of the essential contrasts between the Indian and the Pakistani structures. In India, any association or authority set up by any law which addresses the interest of the makers of the concerned merchandise can apply for GI enlistment. Conversely, Pakistan follows the brand course and thus private elements can secure rights in Basmati in that nation prompting a tussle between various delegate bodies. What is required is going past these two systems and ensuring that the fruits reach the agriculturists who toil in the field. Add to these the intricacies of producing the technical ingredients of the GI or as Vidal terms making a "Basmatisthan"<sup>xiv</sup> and the complexities of an exercise that involves negotiating multitude of interests, nay drawing out shared understandings on attributes, specifications and geography of cultivation amidst the politics of a trans-border reality will unfold.

## Conclusion

Cross-border GI requires harmony between domestic strategy contemplations and a non-prejudicial methodology as to foreign right holders. It likewise needs updation of the relevant enactments and a more uniform, reliable and adaptable implementation framework. We have a long way to go towards such a system which must be accomplished through common perspective between adjoining nations, deliberations and agreements to empower GIs across borders. We

need to cross the vacuum in trans-border GI matters via reciprocal, plurilateral or territorial plans, which may include joint commissions through political drives conjoined by the will to execute. Till that D-day arrives, cross-border GI related debates will continue to be paper tigers.

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<sup>i</sup>A peculiar type of metal (combination of tin and copper) mirror. The high quality of the mirror makes it different from ordinary mirrors.

<sup>ii</sup>Binay, Singh (2015), 'Varanasi Emerges as a Hub of GI Products', Times of India, April 17<sup>th</sup>.

<sup>iii</sup> Yogesh, Pai & Tania Singla, 'Vanity GIs: India's Legislation on Geographical Indications and the Missing Regulatory Framework', <https://www.cambridge.org/core>

<sup>iv</sup>Carl, Shapiro (1983), 'Premiums to High Quality Products as Returns to Reputation', 98 The QJ Econ.

<sup>v</sup>Shashikant, B. Bagde & Deven B. Mehta (2014), 'Geographical Indications in India: Hitherto and Challenges', 5 RES J PHARM, BIOLOGICAL & CHEM SCIS, [www.rjpbcs.com/pdf/2014-5%282%29/146.pdf](http://www.rjpbcs.com/pdf/2014-5%282%29/146.pdf)

<sup>vi</sup><http://www.fao.org/fileadmin/templates/est/COMM-MARKETS-MONITORING/Tea/Documents/Wipo-FAO-IGGtea-GI-AO-mg-10-05-13.pdf>

<sup>vii</sup>[http://www.wipo.int/wipo\\_magazine/en/2008/06/article\\_0009.html](http://www.wipo.int/wipo_magazine/en/2008/06/article_0009.html)

<sup>viii</sup>Islam, Mohammad Towhidul & Ansari, Masrur, Cross-Border GI protection: Challenges and Ramifications for Bangladesh (2017), WIPO-WTO Colloquium Papers.

<sup>ix</sup>Ibid.

<sup>x</sup>Ibid.

<sup>xi</sup>Ibid.

<sup>xii</sup>Dwijen, Rangnekar & Sanjay Kumar (2010), 'Another Look at Basmati: Genericity and the Problems of a Transborder GI, The Journal of World Intellectual Property, Vol3(2).

<sup>xiii</sup>Ibid.

<sup>xiv</sup>Vidal, D.(2005) 'In Search of 'Basmatisthan': Agro Nationalism and Globalization', in J. Assayag & C.J. Fuller (eds.), Globalizing India: Perspectives from Below, Anthem, London.

