JOURNAL OF THE INDIAN LAW INSTITUTE

VOLUME 67 APRIL-JUNE 2025 NUMBER 2

GEOGRAPHICAL INDICATION: A CONFUSION IN THE THIRD WORLD COUNTRIES AND HAZARDS IN IPR

N.L.Mitra[*]
Sudipta De Sarkar[**]
Pinaki Ghosh[***]

Abstract

The Geographical Indication Act, 1999 after it had been notified suddenly became active a decade later with a bang on the motivation after GI was provisionally conferred on Kolkata(r) *Rasogolla*. Since then, different states came forward to apply for several hundred claims. While reviewing the same especially to take future challenges, this paper contains three boney contentions, *viz.*, (i) contesting the *verifiable historical link* on the argument of reputation, as one of the two fundamental basis of GI being challenged on the basis of *economic reason of agglomeration* for initial localization of industries and followed by the theory of industrial dynamics; (ii) weaker logical basis of bringing industrial property rights agreed by the union under Paris Convention and Lisbon Agreement as related to Intellectual property established in TRIPS there having opposite objects for rights under right-jurisprudence, to be created for protection; and (iii) questioning the legislative objectives of IPR laws in general and GI Act in particular in comparison with European Union's approach. Indian laws are more on preventive and prohibitory provisions including penal measures instead of the creation of a facilitation and empowerment process. This approach was a colonial approach and not in the interest of the nation. Naturally a lot of possibilities are excluded including creating facility for traditional technology in foodstuff and using forest resources to develop the area inhabited by indigenous people, called scheduled tribes, which may require to develop a national policy on excise duty replacing the present one framed on the policy adopted by the colonial master.

I Introduction

IN THE last few years applications for registration of geographical indications (GI) in various fields, especially in articles belonging to indigenous culinary products in general and traditional sweets in particular; textiles fabric; clothing both of silk and cotton handicrafts; fabrics; artifacts; cultural items *etc.* have tremendously increased in India. It is understandable that India is hard-pressed in its slow progress in IPR protection. So, the proactive steps of the Government of Indian encouraging people

* Emeritus Professor, KIIT Law School, Bhubaneswar.

** Dean of Students' Affairs and Associate Professor, KIIT Law School, Bhubaneswar.

*** MHRD Chair Professor of Intellectual Property, NUJS, Kolkata.

to be aware of Intellectual Property Right (IPR) and its protection is well-taken. Government of India has taken many schemes to popularise and implement the 'Make in India.' It is also understandable that in the competitive world 'low hanging fruits' are required to be collected to show a respectable figure. In a country like India having rich traditional knowledge and indigenous culture spread across all walks of life provides a low list of commercial and trading articles as hanging fruit if GI is made available for IPR protection instead of claiming for a *sui generis* IP protection law for natural resources of flora and fauna; 'traditional knowledge' and 'indigenous culture'. A special campaign followed especially after GI was granted to *Kolkata(r) Rasogolla*[1] having strongly contested by Odisha. The contest was: which place was the first to develop the product, was it in Kolkata or in the State of Odisha, which place had the locational reputation! The bitterness was taken to workers so much so that a GI had to be given to *Orissa Rasogolla,* too! Why was it granted? What is the geography and history of the product? If there is a trademark on *K.C.Das (er) Rasogolla,*[2] how would GI of *Kolkata(r) Rasogolla or Bangla(r) Rasogolla* work better? Why was the manufacture of *Rasogolla* was not considered as the "common heritage of mankind" 'a prior art'? There are several issues that our GI Law has to cover within the system, which US and EU are contesting bilaterally over the IPR on GI for a longer period of time. Now that India has GI and Trade Mark both the form of IPR there would be intra-country quibbling between two IPRs.

Win-win strategy on trade diplomacy

Whereas European countries put their pressure on the claim of protection of wine and spirits, the US was keen on passing through the draft of TRIPS in Marrakesh. Inclusion of GI and reference to Paris Convention in the final draft of TRIPS was apparently a gain of European countries in the deal, yet it was a superb advantage earned by US diplomacy and negotiation to procure consents on TRIPS of the member nations to pass TRIPS in Marrakesh in which it was not on the regular agenda. EU countries were keen on protecting their traditional products as a community right in any case and by any means creating a *sui generis* right. The US wanted IPR as the right-discourse in so far as individual right is concerned to be adopted in Marrakesh at any cost of negotiation. Through this agreement, there must be a message to the development of science and technology. Inclusion of three articles in TRIPS was the easiest pass through after a stiff negotiation. GI stood, however distinctly as a separate type of right, an odd character in the seven IP rights in TRIPS. This was a win-win situation between both the negotiating parties despite the visible midline crack between the EU and US blocks on GI.GI is classically not an IPR but only a marketing right of an industrial product against unfair trade practice. One may legitimately question in a market economy how and when can a competition be unfair? Unfair for whom?

---

1 GI No 533 (as *Banglar Rosogolla*).

2 Trade Mark, 1834254 with user date from June 4, 64.

II Geographical indication in historical perspective

Locational indicator is a very old and common practice, such as, the print 'made in China' on a jacket, 'made in India' on a bed linen or toiletry or 'made in Germany' on a bicycle– these types of identification of goods by way of place of origin or manufacturing is very common in international trade from the earliest times. That means, GI as the indicator of the source of produce or manufactured goods has been a very old usage from early days in trade and mercantilism. Historically speaking, linking the place of origin to a product has been one of the oldest trading practices. With organized international trade developing in Europe from the 6th Century AD geographical source of goods was a very common indicator, either in locational name or by way of using as an exclusive mark. As a matter of fact, the use of name of the place with a product was commonly used in Egyptian civilization, but not unknown in India. *'Dhakka(i) Muslin'* famous for the soft silk textile hand-knitted cloth with high-skilled weavers of Dacca, was found being wrapped in mommies about three thousand years ago. The efficiency of the artisans of Dacca was recognized in those days. *Alexandria white wine* was traced in jars in Tutankhamun's tomb, dating 3rd century AD in ancient Egypt. So, historically name of the place of origin of a product like *Indian spices* was used to indicate that a product would be available at the place.

Such a practice has gradually become an implied warranty for a quality, some speciality, or some special character of the product, such as *'Hilsa of Bangladesh'* Use of the name of a country or a place or a mark denoting a place has been a practice in the trading of goods much earlier than the idea requiring protection of such indication was evolved. This knowledge made a significant contribution to the market for a product coming from different locations. Italian *Tangerine* or Kashmiri *apple*, or *French wine* had higher demands in the market than oranges or apples or wines, as the case may be, coming from different other places in the market. The relation between place and product was gradually developed *as indicators of a product and product-quality*.

Industrial property to intellectual property: A journey from Paris to TRIPS

Paris Convention, 1883, which was revisited in 1967 has been entered into by nations for the purpose of establishment of union; the Scope of industrial property[3] left many issues open. It did not use the word geographical identification as a ground for protecting industrial property. It only included in its list of objects for claiming industrial property an object under the head of 'indication of source' or 'appellation of origin' for protecting industrial property and kept for national legislation to provide for protection of industrial property.[4] 'Industrial property' has not been defined but *ejusdem generis* it would mean in the context of the Convention an essential right of

3 Two titles used in French version to art. I of the Convention

4 Art. 1(2).

production and of marketing the product. In view of this generic right all associated rights have been included, inter alia including (i) equal national treatment to persons of all nations in the union and domiciled non-national by way of commercial presence; (ii) right to priority; (iii) right of creation of all objects for industrial properties; and (iv) protection against unfair competition. However, Paris has 29 Articles in the Convention, 1967, of which number of articles concerning industrial property rights in specificity are as follows: 8 Articles relate to patents; 12 refer to marks, service marks and trademarks; 3 refer to utility model; and 3 Articles refer to industrial design. There is no article specifically on the identification of the source and appellation of origin. However, some provisions specified in case of marks may be applied *mutatis mutandis* in case of indication of source and appellation of origin. The list of who can have industrial property rights has been exhaustive in the Convention, including 'industry and commerce proper' but also agriculture, extract industry, all manufactured and natural products like wine, grain, tobacco leaf, fruits, cattle, minerals, mineral water, beer, flower, and flour.[5]

The Convention contains more of protection mechanism for 'marketing rights' and less for 'production rights' except on 'marks.' Paris Convention first provided 'indication of source' or 'appellation of origin' as the industrial property that *is to be protected by repression of all forms of unfair trade practice.*

The Lisbon Agreement, 1958, provided for some of the silent areas of the Paris Convention 1883, but many other confusions and silences of Paris remained still unmasked in 1967. Lisbon for the first time provided for some newer substantive rights and also its procedure for application. As for example first time the concept of 'geographical Indications (GI)' has been mentioned and International Registration of rights for GI and Appellation of Origin (AO) rights was prescribed to implement the rights. The term 'Indication of Source' used in Paris is avoided. Instead, Lisbon included offering seamless operation of protective mechanism through-out the world and one-time registration without any requirement for further re-registration as some of such characters in Lisbon. The treaty was, however, specifically focussed on GI and AO rights and presently ratified by only 43 contracting parties with one registration and one fee. There has been no renewal provision necessary and the protection was offered without any time limitation unlike other IPRs having a limited time for application of the right. Such a provision could match with the 'property right' in Western jurisprudence. Lisbon has been presently revised by the Geneva Act, 2015.

TRIPS finally provided for the *protection of trade related intellectual properties.* Parties who are common to both the multilateral Agreements, Paris and TRIPs shall be bound by both unless any party contracts out any or provisions of either of the treaties. So, protection of industrial property under the Paris Convention has not

5 Art. 1(3).

been replaced. In fact, TRIPS in Article 22(2b) specifically included the provision of Articles 10*bis* of Paris by stipulating that members (of TRIPS) shall provide the legal means for interested parties to prevent any use which constitutes an act of unfair competition.[6] TRIPS However well-defined the area of geographical indications specifying "where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin." TRIPS, therefore, has strictly entertains 'the essential attributes of the place of origin' as required for a GI claim.[7] TRIPS also provides for additional protection for GI on Wines and Spirits.[8]

The 'right contentions' in both these treaties are quite different. Though it was industrial property that would attract protection, but in the Paris Convention a natural property was also taken into the concept of industrial property.[9] The problem in the common perception is that the Paris Convention, 1967 laid down the foundation of *industrial property protection* by restricting the competition in the trade. TRIPS emphasized the intellectual property in so far it is concerned with trade related and ensured the quality of the goods to be traded in the future ensuring further innovation and research. TRIPS included seven grounds of intellectual property instead of five in the Paris Convention for industrial property. One odd in the list was GI especially designed for the extraction industry for making wine, in which differential quality was easily observed in the product due to fruits grown in the area used for wine. So, geographical location, classically mentioned as *terroir*[10] became an indicator signifying specialty, quality, taste, and other conditions specifically adding to the product on account of natural contribution.[11] The question is: when could the contribution to the product be attributable to geographical origin. Dev Gangjee of Oxford observes that it is based on a verifiable link between the product and its place of origin.[12]

---

6 An act of competition contrary to to honest practices in industrial and commercial matters constitutes an act of unfair competition.

7 Art. 22(1) of TRIPS.

8 Art. 23(1) of TRIPS.

9 Art. 1(3) defines industrial property thus: "Industrial property shall be understood in the broadest sense and shall apply not only to industry and commerce proper, but likewise to agriculture and extractive industries and to all manufactured or natural products, for example, wines, grains, tobacco leaf, fruit, cattle, minerals, mineral waters, beer, flowers, and flour."

10 From Geography to History: Geographical Indications and the Reputational Link [Dev Gangjee published in online as ch. 2 in Geographical Indications at the Crossroads of International and National Trade (Ed. Irene Calboli)], *available at*: https://doi.org/10.1017/9781316711002.003(last visited on May 20, 2025).

11 *Ibid.*For much of its history, the notion of a distinctive link between regional products and their places of origin has been articulated in the language of terroir. This polysemous term acts as a cipher for the influence of geographical origin on the end product's quality. As one leading scholar of the concept describes it: Historically, terroir refers to an area or terrain, usually rather small, whose soil and micro-climate impart distinctive qualities to food products at 36 to 60.

12 See Dev Gangjee, *Rellocating The Law of Geographical Indications* 2 (2012).

The Marrakesh round in 1995 finally included the 'geographical indication'(GI) in the list of IP. TRIPS did not replace Paris and in supplement to protection of industrial property under the Paris Convention and promised to negotiate in further rounds on the manner in which GI, *i.e.,* 'a place to add up in the speciality or quality in the product," could be effectively protected. This was the final attempt to bring the two contesting parties closer. The US representing the new world, has a strong view on IPR to calibrate industrial requirement to carry through inventive and innovative research, technology development, technology transfer, and product variance, keeping an eye on the *overall consumers' interest* in a competitive market economy. It is thought that the US has effective protection of geographical indication with trademark laws. On the other hand, the EU, taking the lead for the old world, has a special interest in *protecting the trading interest,* confining technology and getting traders' interest by widening the ambit of unfair competition for wine and spirits. One encourages scientific research and innovation (that is, use of intellectual ability to top-up value of a product through IPR and the other protects the trading interest of industrial property by protecting traders' interest from a geographical area against unfair competition from outside.

Terroir *versus* industrial agglomeration

This contrast between industrial property and intellectual property and the respective claimants of the right, brings out the first conceptual contrasts. It is between the terroir principle, indicating the place of appellation that on account of place there is a qualitative variation of the product. The other principles on which GI base is to be built are the principle of agglomeration explaining that on account of early location of industries there can develop certain internal and external economies, which account for further localization of industries. One of the internal economies that pulls the industrial location is the efficiency and specialty of the workers (labours) that they acquire over a period of time. The principle of terroir claims the contribution of the geographical location of the product, this being a geographical reason of GI. The other is the principle of agglomeration that provides the historical connectivity to justify claims of GI. The following two case studies would explain the complexity in the controversy over GI in the broader perspective of the jurisprudential arguments and foundational contradiction between the geographical location and the historical localization of industry as two essential logics on which Gangjee[13] established his verifiable link foundation of GI as an IP.

The first case-study

Basmati, the Problem Indicator for Future

The case is complex in the sense that the matter was related to grant of patent rights but the argument was imported against from the point of geographical indication.

13 Dev Gangjee, Professor of Intellectual Property Rights in Oxford University.

Basmati is not a name of place, the meaning of this Hindi word *Basmati* is 'aromatic.' The problem arose when on September 2, 1997 the USPTO granted patent on *Basmati* to RiceTec. It was clear from the title sheet of the patent right that what RiceTec patented was not the genome of basmati rice for a genetically mutated variety of paddy. The application was made on a hybrid of 29 varieties of Basmati rice grains belonging to the traditional crop of Pakistan and India produced in a definite identified valley for centuries and globally in demand in the name of *Basmati*. It was simply a hybrid of basmati obtained from *cross-breeding* with an US long rice variety. Initially on the uncontested claim, USPTO observed that *Basmati* 867 was sufficiently novel to grant it a patent in the name of *Basmati.*[14] Post-grant procedure the claim was contested on the main argument against was that there was no novelty and inventiveness, at best, was not proved. At the first step of hybrid of Basmati (aromatic stain) from India and Pakistan with American long variety, the seed was patented about a decade earlier as *Texmati,* which US used to market widely in European countries for previous several years with an observation note, *Texmati, like Indian Basmati*. There was no contest from any side. Post approval of patent with *basmati*, India filed its rejoinder submitting the opposition for cancelling patent on *basmati* and adduced many documentary evidences and facts. The battle was for three years, after which the company dropped 15 of its claims from 20 original claims, including three most important claims in no 15-17 conferring the patent the Rice Tech that would have given exclusive right to control the production and import of Basmati rice in the US market. It could also force the farmers to pay royalties to plant rice and not allow to have the right to reproduction. These claims were dropped on clear evidence of geographical indication and it right of priority. And the name *basmati* was completely omitted from the Patent claim. Obviously, India saved its basmati rice from the brink of biopiracy. But the problem remains deep in the development of science and technology. There were two legal lessons that a country may have from the third-world perspective. *Firstly*, in a preparatory stage of integrating global economy intellectual property protection plays a very strategic role and nations, especially developing nations, must have to be very much aware of the developed countries' aggressive research agenda to manoeuvre IPR consistently and in continuity to avoid any incident of bio-piracy. Secondly, there could be a prohibitive cost to rectify the delay due to ignorance.

The most agonizing problem arising out of *the Basmati* case

That is not perhaps the most agonizing issue. The most agonizing issue would lie in the advancement of science and technology and its impact on public interest. As for example, the *Basmati* case arose from developing a hybrid. The main argument that saved the situation has been that it was the hybrid not an invention and there has been no novelty. There was no genomic mutation by way of gene transfer or

14 Patent No # 5,663,484 under "Basmati Rice Lines and Grains"

modification to develop a new seed. The technic of hybrid has been a very old method for reforming seed. So, granting patent right was most inappropriate. Now, in case of the research being genomic, developing a genomic mutation and developing a seed that produces aromatic character like Basmati, can that seed be given a patent of the name of Basmati? The genome study and research may involve gene-transfer (TM) and genetic modification (GM). If that is allowed to claim IPR there would be a quantum jump in the research and development of seeds on the basis of lab redesigns.

The claim of patent rights on genomic research on crop-seeds and innovate new genomic mutative package in a seed to be protected by Patent right would create a global imbalance in agricultural and natural products. It may not be an immediate problem for the farming sector because it would be the right of the nations to take a position on the life-patenting system except in case of patent rights on an innovating microorganism.[15] It will also encourage biopiracy deceiving the traditional knowledge of the countries having rich heritage like China and India. This problem looms large on all GI marked products, natural and agricultural. The genomic study and invention of genetic code of a GI product and designing seed with GM or genetic technology advancement giving rise to claim for patent right, limited proprietary rights though. Can GI guard against such advancement of science and technology? It may be noted that the Government of India calibrates and permits GM Crops on a selective few agricultural products like cotton, tomato, brinjal *etc.* but not extended to cereal crops (Basmati included). But US has a very aggressive research agenda especially in Botany, Bio-technology and Bio-chemistry.

The second case

The second case relates to *"Tangail Shari"* in the another extreme: Recently, Bangladesh filed an objection on the grant of GI to *Tangail Shari*[16] and has threatened to take the matter to WIPO. The authority in India granted GI to the Association of Handloom workers of East Burdwan and Nadia districts of West Bengal. This is an ideal case study for GI not given to the product for any reason of geography or history. The commonly used name of this handloom design and weaving of the *Shari* traditionally belonged to handcrafted artisans, a specialized class of weavers of 20 villages of Tangail subdivision, presently a district in Bangladesh, for the last more than four hundred years. The weaving community with the surname title 'Basak' used to be the pride of the area now belonging to Bangladesh. During riots in 1946 and 1971, most of the 'Basak' community of Tangail sub-division from erstwhile East Pakistan migrated to India and settled in East Burdwan and Nadia districts where they started weaving their traditional handloom *Shari (women's dress)* commonly marketed with the brand name (though not registered) of *Tangail*. The handicraft of weaving (known in

15 *Diamond Chakraborty* case.

16 Tangail Shari of Bengal, GI No. 702.

the craft, as the *'tana-bana'*) and special art crafted in the *Shari* has been the speciality of the weaving. However, a few families remaining in the place of origin, Tangail (now a District in Bangladesh), continued their household weaving and trading the same cloth in the same name. This shows that if history has to be the basis of claiming GI, it belonged to Bangladesh and if geography would be the reason, GI belonged to Tangail of Bangladesh. India did neither have geography nor history to claim the GI on the product. It also shows that the quality of the product is due to the localization of the industry creating some internal and external economy of the industrial location conceptually known as agglomeration of industrial locational advantages. In this case special skill development and zero-cost industrial skill learning has been the reason for the importance of the locational advantage. So, when the trained work-force left the place and migrated to another place they would produce the same quality product, if not better in the new location. In such a case granting of a claim for geographical indication may not be justified if the place of origin does not have any essential attribute for the product. Had it been registered as a trademark, the intellectual property could have been protected. *Tangail* here may be argued as denoting a special pattern of weaving and the quality of the cloth and not the geographical location. Human migration and emigration in history took with them many technologies to newer places continuing with the name of origin. So, where a place did not add value to the product, the locational name could be represented as a process of manufacture and could be taken as a process patent. The name of the location may be taken as the brand building the product and as a brand value. How can GI take the pressure of a Patent (process), or a Brand or a Mark?

GI, a contentious and contrasting debate

Role of economic 'Principle of Agglomeration (EPA)' in Localization of Industries to 'historical reputation'

Understanding the principle of localization of industries before deciding on 'historical reputation' between product and place. Localization of industry of a product has been a very significant tendency of early industrialization. Once an industrial unit for a product was initially established at any place due to the availability of raw material or easy access to market or cheap labour or any other overall cost advantage, the industrial location then used to create some important internal and some external economies to attract further similar industrial units including auxiliary industries concentrating at the same location. Some of such internal economies were: easy access of raw material; availability of efficient workers; quick communication and distribution services; easy banking services for supply of working capital, growth of auxiliary and by-product services *etc.* Similarly, some external economies are also created due to construction of roads and rails; easy availability of advertising and other marketing facilities; easy availability of transport and container services; development of technical education and skill development institutions suitable for

the industry; urban facilities; *etc.* Each of these economies (agglomerative factors) have functional co-efficiencies (relative strength) to pull further growth of the industry at the same location. There may be some negative factors (de-agglomerated) also over the time that go against the localization. These would be, less availability of land for industrial location and high land aggregation cost; efficient workers demanding higher wages that cannot be sustained, that is, rising labour cost; market intermediaries may demand higher commission, that is, rising marketing cost and above all cost of production going north. But such negative economics of scale would take time and start much later than the localization of industry due to very strong agglomerative forces operating in the initial period for localization of industries. However, such a pull of attraction to a place for an industry may ultimately be argued as the historical reputation built up to relate a product with a place to justify GI on the grounds of historical reputation, like Sheffield for Cutlery- crockeries, Coventry for Foundry products or Manchester for textiles or Kolhapur(i) Chappal. There could be a very serious consequence to follow if such agglomerative locomotive factors of any product lead to GI on the logic of historical reputation. For geographical reasons one gets *Italian tangerine*; *Darjeeling tea; Manbhum lac* so on and so forth. But because of the developed world's claim for GI developing countries are prevented from industrial development and they have to bear the cost of maintaining GI cost in perpetuity, it would be a gross fault in the global economy and economic development.

Localization of industries due to agglomerative forces would apparently look like a type of industry preferred to be located at a place due to place-advantage. Like Jute industry in Bengal or weaving industry in Bombay in the early 20th Century. This place-attraction is *ad hoc,* and immediate. At the initial stages of industrialization linking Kolkata must have built up reputation or branding for jute products. Similarly cotton textiles of Bombay also enjoyed the brand-value or favourable trans shipment cost. The confusion is that if manufacturing goods indicated with GI on the application of 'agglomeration-driven localization (agglomo-location) of industries to have historical reputation, it would restrict competition in a relevant market and also would stand in the way of industrial development in the developing countries. It would also prevent transfer of technology. Besides that, industrialization also goes with industrial locational dynamics. Today Mumbai does not have cotton textile weaving industries at all. The location has been shifted to Nagpur. Bengal Jute has been shifted to Bangladesh.

GI not only blunts prior art logic of patent right; GI also does not have any time limitation. So, GI provides for exclusive right to production and marketing of a product (wine, alcohol, or whiskey or champaign) without having any time limit. The GI pleads for absolute monopoly right of production and distribution of the GI product. GI validates anti-competitive practice. An industrial location known for an industrial product like Sheffield for cutlery-crockery and recommending for GI to the product enjoying mechanism of market protection would ultimately kill market economy.

Conceptual Contradiction in the Market Economy in Between TRIPS and Paris

The objective criterion of TRIPS is quite different from that of the Paris Convention. TRIPS has a specific provision for controlling all anti-competitive practices[17] but Paris only talks about saving the traders by declaring competition among the number of producers of the same product with the provision of unfair competition.[18] TRIPS has one field of GI to set standards concerning availability, scope and use of intellectual property rights. Paris Convention laid down the *protection regime for industrial property* keeping the term widely open without limiting or restricting of 'manufacturing' goods. This provides for apprehension that the GI protection can be misused in the name of industrial property which may ultimately cause herm to industries. TRIPS Agreement in 1995 referring to the Paris Convention kept the 'open plea' for GI still relevant for further negotiation. Keeping the functioning of the two parallel global treaties TRIPS[19] and Paris Convention[20] there are several confusions especially among the small, newly liberated and developing nations. Some of such confusions are:

(i) Why the convention used two terms with *alternate note* like 'indication of sources' or 'appellation of origin', do these two terms denote and connote the same thing;

(ii) Does 'all manufactured and natural produce' come under the protection of industrial property for restricting the market to suit interest of the manufacturing industries with right to restrict supply;

(iii) Could one now insist thet the industrial property of Paris would deontically be the same as the intellectual property and mutually inclusive;

(iv) why did the Convention excluded 'copyright' from industrial property only to take up in a separate Bern Convention though copyright dealing with several industries including printing, publication, communication, cinematograph and performing arts?

---

17 Art. 8 Principles 1. Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement. 2. Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which *unreasonably restrain trade or adversely affect the international transfer of technology*.

18 Art. 1(2) The protection of industrial property has as its object patents, utility models, industrial designs, trademarks , service marks, trade names, indications of source or appellations of origin (j), and the repression of unfair competition.

19 164 nations are parties to the TRIPS Agreement, all are WTO members; Paris Conventions is applicable to 179 countries but only 42 nations are party to Lisbon Agreement and member of the Lisbon System. However 72 countries take the advantage of one registration of GI on one fee and not having any renewal fee.

20 Art.3(2) of TRIPS.

The differences in issues and objects between these two agreements in the quest of the above questions may trigger differential approaches.[21]

New-world and old-world controversy

The most distinguishing features of these two objectives-approaches, one led by the old-world in Paris Convention and the other of the new-world led by US in TRIPS, are significantly contrasting. The new-world put emphasis on the calibration of terms of IPR as an individual right and specifically assuring that IPR shall not be anti-competitive[22] but IPRs would increase quality of competition in the long run through innovation of technology and product. Even if there is periodical restriction on the market, IPR provides for 'compulsory license' to negate the rigors of IPR providing exclusive right to produce for a limited period to be calibrated with national interest. Old-World on the other hand, is arguing for declaration of competition unfair if protection is provided for with industrial property right (IPR). The new-world argued for strengthening and qualitatively developing the market economy and the old-world campaigned for restricting the market because Europe believed that they have products of traditional industry, which requires saving from market economy by way of imposing restriction on liberal industrial policy and democratic market system. The new world puts emphasis on research, invention and innovation providing incentives allocating time-bound IPR and calibrate the same with the qualitative development of market economy. Old-world intends to protect products with IPR without any time limit and restricting the market economy with the tag 'unfair competition'. The new-world emphasizes through IPR incentives to go for product discovery and development and thus widen the market and competition with quality and technological development. The old-world widens the field of monopoly and in a way, restricts science and technology and prevents technology transfer. New-world argues for new knowledge and the old-world argues for protecting old production practice not to face challenge of new technology and there would be no provision of technology transfer.

Interestingly the old-world, however, do not yet aggressively argue for the protection of traditional knowledge with GI. Europe would argue for the protection of any manufacturing products sold in the imperial market to attain reputation because of cost efficiency due to agglomeration of industries in the nineteenth and 20th Century, such as, Sheffield for cutlery and crockery; Lancashire for Textiles, Coventry for Foundry products *etc.* Thus, there are vital philosophic differences. But the dichotomy is that Paris Convention has larger number of countries as member than that of

21 Paris Convention.

22 US arguments on TRIPS and EU arguments in Paris Convention.

TRIPS.[23] TRIPS created its own uncertainties and road blocks by tagging Paris Convention with it.

GI of Europe and mark of the United States: Two contrasting arguments

(i)US argues that US has a strong existing law for the protection of GI under its existing Trade Mark legal regime and hence it refuses to agree to any *sui generis* law on GI enforcement to be needed in the country.

(ii) EU emphasizes that it has in between the European nations had a strong protection of GI on wines and spirits and as such EU strongly advocates that the protection of EU products of wines and spirits, must get global protection with a *sui generis law* for GI and global registration.

Special Character of GI as a community right: GI protects community right, whereas intellectual property right is protected as individual right. Antiquity of the product of nature and of extraction industry and its locational reputation has been the logic for the especial marketing right. The speciality of the product quality is the reputation like Darjeeling tea or Scotch whisky. This characterization by GI is a time-tested claim and cannot be restricted by clock. Such a claim tested in historical perspective is for example, just opposite to the argument for patent based on *novelty*. If *Banarasi silk* can be cloned in US it cannot be obviously called, *'Banarasi silk'*. American wine may compete with French wine. American wine cannot be called as French wine even if warranty of American wine matches with that of French wine. GI claim comprises (i) branding in the name of the location of the product; (ii) global registration (Lisbon laid down the demand for one time registration with onetime fees); (iii) enforcing the protection without any restriction of time (monopoly right to use the brand for all time to come) and (iv) globally recognized the right of the registered names entitled to use the branding in local name. GI is more a marketing right than an intellectual property right.

The US argued that the country considers that with 'mark' it can effectively and competently protect the intellectual property claimed by a person on a product and as such, it does not require GI cover. Some authors in U.K. argue that Europe possesses a rich history and heritage. So, it wants to protect its heritage products. In the same logic, since Afro-Asia possesses very many old heritages, shall the EU support to Afro- Asia's claim of a superior property right by way of GI or any other *sui generis* form of protection of IPR? At least a decade of consuming *Texmati (US Basmati)* in the backyard of EU countries, EU did not raise any objection to use of the patent!

US protects the right with 'mark 'as the registered user's right. GI only protects community rights of those who constitute the community through any registered

23 Paris Convention has 183 countries submitting ratification by only 167 countries ratified TRIPS.

document. But one cannot compel all producers of a location to register within a community in the organisation form of an Association or Society. If a producer of the same location does not join the Association but produces the same product in the same location cannot brand his product with the locational identity only because producers belonging to the registered body of the community are using GI. If an individual entity like also to register a 'merk' of location it cannot be done as GI does not allow such GI PLUS right registration. So, US pleads that it does not require a *sui generis* law to protect GI right.US has recognition of trademark or service mark by simply registration with prior use right in commerce. The US also registers a collective trademark, collective service mark or collective membership mark. The proof is easier in procedure such as (i) ownership of prior registration; (ii) five years of substantially exclusive and continuous use in commerce; or (iii) other evidence of a mark in distinctive use in commerce. For a collective trademark or service mark, a complete application for registration *shall inter alia* include; (a) a list of the particular goods or services intending to pursue the mark; (b) nature of the membership organization by the type, purpose or area of activity of the members; (c) the scope of the goods or services or nature of membership may not exceed that in the foreign application. So, the US contends that it does not need GI to be a separate branch for IPR registration. Mark provides better protection of individual right to property both by way of individual application or by way of collective right. Community right on the other hand does not provide individual right, which is not to be included in the community interest registration.

Individual right versus community right

Tangible properties that are material properties which can be physically identified, materially used and technologically reshaped to create higher utilities and consequently the creation of higher demands for industrial products. The price of any of such properties depends on the demand and supply of the tangible goods, like land & Buildings; Plant and Machineries; Furniture and Fittings; inventories and receivables *etc.* Intangible properties are on the other hand, physically unidentifiable properties, such as intellectual properties; technology transfer agreements; goodwill; trade secret *etc.* GI is an intangible property. A right to property is created by way of status or by executed contract. Valuation of such intangible properties and creation of security interest for securitization of debt agreements on intangible properties are very critical events in transactions. An independent valuation of assets is required in transactions relating to change of control and management of corporate institutions. For a change of hands of intangible property, it has to fulfil two conditions, namely, (i) intangible property is required to be tangibilized, and (ii) it has to be transferrable. The tangible form of the IPR property is the registration certificate as an instrument creating IPR, which can be transferrable by delivery. GI is no exception. But similarity ends here. A GI is a community right and hence such an asset can only form part of an

asset of a company by way of an explanatory note on contingency. Only in the community institution (which may be a cooperative, society, trust, or a producer company) it can be shown as an intangible property the valuation of which can take place in some contingency, such as, creation of a security interest in case of acquisition of a business loan. An individual member of the community is unable to enjoy the individual right of GI in its tangible and transferrable form. So, there is only a contingent right of the members of the community. There is no *right in rem* or *in personum* of any individual member of the community. Hence, there is no possessory right, right of enjoyment, right of alienation, and all such other rights originating from ownership including right to destroy. Any third party's interference is prevented and prohibited by civil and criminal laws of the country, which impose civil liability and criminal sanctions.

Premium gained in GI

GI demands perennial monopoly through the community right to gain GI premium. In a monopoly condition the producer would stop further production where his Marginal Revenue is equal to Average Cost (MR=AC). Any further production would mean the average cost would be higher than the marginal revenue and hence a notional loss. As such, a monopolist would stop production at a higher level to keep the MR in monopoly condition.

In a competitive market a producer stops further production only when his Marginal revenue is equal to marginal cost, that is, (MR=MC). Further production would be a net loss. In a competitive market the individual firm may still increase the production in the short term to sustain in the market but for a very short term.Thus, GI would provide a GI premium equivalent to the difference between equations 1 and 2 of the above. There being no time limit, such a monopoly right is anti-competitive.

Members maintaining both the rights

The US fulfils its obligation under TRIPS to protect GI , as argued, through its Trademark System including collective and certification marks. So, there is no conflict between GI Rights assigned to community interest and Trademark rights assigned to the holder of the trademark. In Europe there are strong areas of conflict between GI and TM both of the IPR being applicable in Europe. GI ensuring community right where GI is protected and TM protects mark right of the owner of the mark. If there is any common ground where both these rights are available the EU has to remain engaged with its responsibility of interpretation and harmonization. India is now entering into such a conflicting area. If K.C.Das (P) Ltd owns the trademark on *Rasogolla* registered earlier, can it prohibit Kolkata/Bengal manufacturers having the GI, to use the word? Can GI claim priority on account of geographical attribute required for manufacture of *Rasogolla* starting at the inception of idea of manufacturing such a sweet. In the US such an issue never arises as the name of the source is so

generic there cannot be the creation of exclusive rights on the same. As for example, there is no individual right on apple because apple is a generic name. If for any issue a firm wants to protect its own product, such as 'Indiana apple' it can be trademarked. So, there is no possibility of conflict of interest between the community and an individual.

EU rule of prioritizing GI

The EU Court of Justice cancelled the pre-existing trademark registration invalidating its use in conflict with the GI granted protection. In the 2017 case *Toscoro* v. *Toscano* the EU Court of Justice[24] annulled the trademark TOSCORO for olive oil due to its similarity with the TASCANO as the GI mark for the same product. Trademark is a private right and GI offers a public right, a collective right that can be used by all producers in the defined area who comply with the product specification. An individual producer cannot prevent other producers in the region from using the protected right with the use of a trademark. A trademark taken as a private right can coexist only if such a mark does not mislead consumers. GI protection against deceptive use of a mark is paramount. GI is argued to have protection of consumers' trust and safeguard the regional heritage. GI prevents unfair trade practices. So, in the EU, a protected GI has a higher priority and can prevail over an existing trademark if it is likely to mislead consumers. This is a departure from the "fist in time, first in right" principle. In one of the INTA's recent annual meet Luis de Javier, Director of the Legal Department of Miguel Torres SA (www.torres.es) presented the instance of how his company lost the exclusivity of the use of its long time used mark TORRES after the EU ruled in favor of the Portuguese GI 'Torres.' This is a clear example of a later-protected GI harming a famous trademark with valuable goodwill.[25] He explained that as a European he believed in appellations of origin (AOP) but he emphasized that there should be an instrument for producers to compete on the international markets and not be a barrier to trade. He explained that AOP should be used for comparative advantages. He went on to explain that if the EU has a position that makes European companies and producers loose market shares, there is a pressing need to change the EU policy.

Arguments for and against

Development of mark and geographical place of origin from the early inter-country trade practice: Two essential conditions of need for protection of geographical indication are(i) quality, reputation, and other characteristics of a product, and(ii) the same is essentially attributable to its place of origin. The place of origin has been a very important fact for identification in international trade from the very beginning, as has been already

24 InfoCuria Case -Law; Judgment of the General Court (Seventh Chamber), ECLI.EU;T:2017:54, in Case T-510/15 dated Feb. 2, 2017; curia.europa.eu/juris/document.jsf?docid=187382&doclang=en

25 European Court Reports 2008 II-03817 ECLI identifier: ECLI:EC:EU:T:2008:602; Case T-287/06Dnb.com/business-directory/company-profiles.miguel_torres_sa.23919967d

been suggested. Use of locational name with the product was started either by the name of the nation or region or location prescribed on the packages of goods or by putting a mark especially where the place of origin was wanted to be kept secret or not disclosed for keeping business secrecy. For such practice a 'mark' was developed much before trademark law came into practice in the 18th Century, for protection of the 'mark'. The 'mark' is used to specify identity, place of origin, producer, and source of production. The distinctive feature of 'mark' is that here each party could use a distinct mark to protect its identity and ensure the condition of quality, specialty, and marketability.

Civil law used to confer the right of exclusivity and identity and the criminal law prohibits any violation of the right from all directions. Any special quality or specialty of a product attributable to the place of origin could also be protected by mark. 'Brook Bond Red Level Darjeeling tea' is protected under trademark right ensuring the consumer buying Brook Bond Red Level Darjeeling tea so that a person cannot use other variety of tea, say of Assam tea by way of blending or replacing in the packet with the trademark. Thus, the company is also bound by the warranty through the trademark. Correspondingly the brand is distinguished from 'Tetley Darjeeling tea' which ensures Darjeeling tea and at the same time builds up the brand of 'Tetley Dip-Dip' instant green tea. Therefore, the US argument is that Trademark offers better protection of intellectual property based on warranties expressed through trademark including geographical indication. Protection provides conferment of right by way of registration including exclusive right to use and also prohibition by which criminal law prevents others to use the same by prescribing penal damages as well as other forms of punishment.

Doha's menu

Doha had three issues in its agenda of negotiation: (i) creating a multilateral register for GI for wines and spirits;

(ii) GI extension to other products the higher protection now given to wines and spirits, and

(iii) 'disclosure 'requirements for use of generic materials and traditional knowledge used in inventions by way of broadening the inter-relation between TRIPS and Biological Diversity (CBD) by way of amending the TRIPS Agreement.

Although the above three issues are not officially linked up, a majority group of nations advocated taking the three issues in parallel, 'take them all or leave them'. Wines and spirits are given a higher or enhanced level of protection (article 23), subject to a number of exceptions (article 24), they have to be protected even if misused but not causing the public to be misled. The EU's arguments on superior protection mechanism on wine and spirits have two inherent contradictions with the

fundamental basis of WTO. The 'closure' rule to be followed by all member-nations following GI to wines and spirits and other products would severely blow to market economy by (i) standing in the way of technology transfer thereby preventing industrial growth, and (ii) validating absolute restriction both by tariff and non-tariff barriers to establish absolute anti-competitive trade practice. Unlimited unfair trade practice is in itself an anti-competitive trade practice and work against free trade.

Discussion went on till the fifth ministerial conference on the Doha declaration without having any material breakthrough in national stands. In fact, there are a lot of uncertainties and doubts about the EU's proposal of international registration and notification of GI. There are several non-clarities in the EU proposal of International Registration and notification. In several INTA conferences such non-clarities and misgivings have been discussed, both substantive and also procedural. Some are discussed below.

III International trade mark association

International Trademark Association (INTA) in its recent annual meeting devoted much of its time in evaluating the performance of TM in comparison with GI especially with the EU prioritizing GI over established TM. The following issues are flagged by INTA

Common misunderstanding

There are several common misunderstandings about the proposal of international registration and notification, such as, the International Register would perhaps replace national Register; international protection would replace the national protection; with the international protection GI would interfere or over-ride the protection under trademark; there would be a separate enforcing authority and additional enforcement procedure; registration may affect past use of names *etc.* Antonio Berenguer, the EU Commission Directorate General for Trade gave in an INTA annual meeting an overview of the problems that EU producers who benefit from GI protection in Europe encounter in the world to protect their names. He explained that GI protection outside Europe is often too low, in particular for products other than wines and spirits and that enforcing effectively GI protection is often too costly and too difficult. Mr. Berenguer explained how all of the above prevented producers from benefiting from GI protection from expanding internationally, especially when they are small producers (mostly SMEs in a country like India) with lesser resources. In the light of the current obstacles to GI international protection, the EU believes that there are two solutions, which are the establishment of a GI register, on the one hand, and on the other hand the extension of the scope of the TRIPS additional protection to products other than wines and spirits. In that case GI has to establish some further advantage in comparison with the advantages of 'mark'.

Berenguer, finally explained the common misunderstandings concerning the EU proposal thus:

i. The WTO system would not replace the national systems of protection; it would only create a presumption of validity, which is rebuttable. This would therefore provide GI holders with a first line of defense against usurpations.

ii. The Register would not alter the relationship between a trademark and a GI. This would continue to be controlled by the existing TRIPS Agreement and domestic rules.

iii. The WTO system would not replace national registration. The register provides for a "defensive" protection. An "offensive" protection, if available, by the WTO member authorities would continue to be dependent on national registration or other systems of protection.

iv. The Register would not require additional enforcement procedures. It would use whichever system of enforcement of the WTO member states is already available. The Register only reverses the burden of proof in national courts.

v. The Register would not affect past use of names which would continue to be controlled by the TRIPS applicable rules (notably article 24).[26]

Trademark versus GI

The above fact has already shown the extent of apprehension on the direct conflict between GI and Trademark. In several INTA meetings the conflict has been anticipated and examples of such conflict harming the IPR in general have been discussed**.** The principle of "First in Time, First in Right" depicted in TRIPS Article 16(1) read together with the saving clause of TRIPS Article 24(5), has been accepted in several international agreements and meetings of international professional institutions, like INTA. This principle is endorsed by other international bodies, which support the concept of *treating trademarks and GIs equally*, with conflicts between them being resolved by means of the *principle of priority*. EU's standpoint on GI can be confused as providing 'protection' with reverse interest to prevent industrial growth and 'preventing' unfair trade practice by way of putting unlimited restriction on market competition. Philosophically, the US stands on IPR in the TRIPS debate for creating rights under right-jurisprudence to incentivize research, innovation, technological growth and industrial development keeping in view the competitive market economy with freedom of trade that significantly strengthens balances of right-obligation jurisprudence. At the same time Article 3(2) provides for the practices of national treatment in IPR are not to be applied in a manner which would constitute a disguised restriction of trade. Article 7 of TRIPS clarified the objectives of TRIPS as (i) protection and enforcement

26 INTA *Annual Report.*

of IPR to contribute promotion of technological innovation; (ii) transfer of technology to the mutual advantage of producers and users of technology; (iii) conducive to social and economic welfare; and (4) to a balance rights and obligations. In Section 8 of TRIPS (Article 40) provides for control of anti-competitive practices by issue of contractual licenses.

INTA has questions on the TRIPS Agreement and on whether or not these GI provisions have been understood in the spirit of the TRIPS Agreement. INTA believes that it is important to look at the legitimate concerns of developing countries and finally establish an ultimate balance between trademark and GI protection. He supported the idea of a register; however, he explained that it is important to remember that a register function is based on "the first in time first in right" principle in accordance with traditional rules that have their roots in Roman law, that is, the concept of priority.

A representative of a law firm explained that currently there is no international consensus as to what terms might be eligible for protection as a geographical indication. Some Members suggest that country names would not be eligible for protection, while others suggest that only place names would be eligible. He explained that the private sector should be concerned about extension because it could lead to loss of trademarks, loss of generic terms, burden of renaming, rebranding, relabeling, loss of common terms and company names, changes to shipment routes, as well as potential loss of markets domestically and abroad. There are a good number of examples of how extension of GI protection might affect generic terms that are widely used such as Pilsner for beer, Sardine for fish, Lipizzaner for horses. Finally, the EC's proposed exception to GI protection for mineral waters, such as Evian, highlights a conflict that exists between absolute GI protection and trademark rights.

Extension of article 23 GI protection to other products

Berenguer, The EU Director-General makes his position quite clear in his exclusive trading right of the producers with an argument that indigenous technique in small industrial enterprises in wine and spirits need such right to be protected. The advantages for developing countries of such extension are:

- Higher protection for wines and spirits mostly benefits the developed world and this needs to be rectified.
- Increased income coming from GI protection promote agricultural and industrial development.
- GIs are fair because anyone can use them and they cannot be removed from the territory by any corporation.
- GI promote trade and help developing countries' products make inroads in foreign markets.

- GI can provide some protection to products which incorporate traditional knowledge.
- GI can even promote tourism and other geographically related activities.[27]

A careful review of the above argument would show that GI is not the protection of IPR. It protects the producers marketing right by forming an association of society, or trust or any other body. It seems to be a *high degree of cartelization among market forces* through GI under the cover of IPR. It has to be noted that some European countries resorted to this form of cartelization of early industrial civilization and resort to anti-competitive practices through the back door.

Finally, Hans Bender, the President of INTA advised caution when considering the extension of protection to other products with GI. He called for attention to the EU system and the consequences it had on generic terms in Europe. Bender expressed his concerns regarding the availability of generic terms in commerce and the bad faith claims of GI status to products that do not have any real GI qualities. He referred again to the *feta* battle in Europe and reminded that 10 EU member states notified *feta* as a generic term. Bender stated that recent testing has proven that the *Greek feta cheese*, which is a protected denomination in Greece, very often is produced not only from sheep's or goat's milk but very often partly or completely from cow's milk and even in many cases contains vegetable fats. In the light of this case, Bender expressed his fear of the EC's tendency to restrict the use of generic terms. Bender feared that in an extended system, such a tendency would become more uncontrollable. He finally noted that many questions remain unanswered such as the way to avoid misleading consumers, the responsibility of enforcement of rights and ways to resolve conflicts.[28]

Indian GI, how far compliant to TRIPS

TRIPS compliance would require compliance with the following two conditions: that the goods do (i) originate in the territory of a member or a region or locality; and is (ii) a given quality, reputation or other characteristics of the good *essentially attributable to its geographical origin*.[29] The product has to be originated in a territory (terroir principle of geographical indicator). Origination identifies itself to nature and provides a distinguished Character to the goods. Though Article 22 of TRIPS incidentally refers to Article 10*bis* of the Paris Convention,[30] but it would be wrong to interpret all provisions of TRIPS in consonance with Paris Convention. Article 22(1) of TRIPS

27 INTA *Annual Reports*.

28 INTA Annual Proceedings.

29 *Supra* note 27.

30 Art. 22 (2)(b) any use which constitutes as an act of unfair competition within the meaning of Art. 10 *bis* of the Paris Convention.

is very specific regarding definition and characteristics of GI. Paris Convention used industrial property very broadly in so far as the objects of protection of industrial property.[31] TRIPS only tries to specifically protect the intellectual property with the object of (i) protecting and enforcing of intellectual property rights to contribute to the promotion of technological innovation; (ii) transferring and disseminating technology to the mutual advantage of producers and users of technology knowledge; (iii) the manner of using the technology knowledge to be conducive to social and economic welfare; and (iv) balancing the rights and obligations.

Indian law on GI:

Definition of GI in India[32] is somewhat [TRIPS *plus*]. Indian law by and large, follows the definition given in TRIPS.

Definition as in TRIPS	Definition in GIA (India)
Article 22 (1)(i)Goods in originating in (ii)territory of a member-country, region or locality, where (iii) a given quality, reputation or characteristics (iv) essentially attributable to its geographical origin	Sec 2(c) GI is that (i)Indication that identifies goods as (ii)agricultural, natural or manufactured (iii) originating or manufactured (iv)in the territory of a country of a region or locality where (v) a given quality, reputation or other characteristics of such goods (vi) essentially attributable to its geographical origin (vii) in case of goods manufactured, one of the activities to take place either in production or of processing to take place in the territory, region or locality (viii) goods include food stuff.
No suggested list provided	No indicative list provided

If reputation is essentially attributable to the place of origin (first in industrial use/ production, first in reputation and so first in right) but not absolutely the product may be applied for registration of GI having the locational name suffixed or prefixed. In industrialization, localization of an industry is a vitally important consideration.

31 Art. 1 (3) to be read with Article 1(2) of Paris Convention.

32 S. 2(1)(e) of the Geographical Indication of goods (Registration and protection) Act 1999.

There are several factors on which the project cost is dependent. A place which can provide facility for producing and distributing at the cheapest cost would attract an industry to be located and in the course of time, the product could be known by the place of the origin. But such localization of industry is a dynamic process and the cost of production and distribution changes from time to time due to many agglomerative and de-agglomerative factors of external and internal economy including change of technology. But the first in origin may remain static with a GI even after industry moves to other places. This is not where a place is having an essential attribute to any quality, reputation of the product *per se* .As for example, *Titagarh Paper*, *Dunlop Tire*, *Dalmia Cement, Ludhiana Blanket, Kashmiri Sawal, Manipuri Basket; Meghalaya Bamboo; Kerala Backwater resort,* - all of these may be applicants for GI. In some cases, place does not have *a priori* connection with the product, such as, *Titagarh Paper, Dalmia Cement* etc.

In many cases a place becomes prominent and famous because of the product or a place has been renamed in the name of the product. *Long stipple Dehradun Rice* may be a right claim for GI on the proof that the micro-climatic condition and the local soil condition retaining moisture for a longer time are the technical reason for the impact of nature on the product. Or *Bangla Nalen Gur(rer) Sandesh* may claim for GI registration with justification of a proof that '*Nalen Gurr (soft aromatic liquid-sweet available from Palm Tree during winter session)* is produced only in Bengal from the droplet of extracts from Palm Tree in the winter season. The *Sandesh* – a special type of sweet famous in Bengal prepared with the *Nalen Gurr* is a delicacy for centuries.

One also has to remember that industrial goods used to enjoy monopoly market by way of a natural outcome of industrialization in the early period. But such localization of industrial rights is highly inconsistent with the term 'geographical indications' as a separate IPR distinct from industrial rights. The Lisbon Agreement and Geneva Act differed from Paris in the sense that both being pre-TRIPS first laid down the foundational requirement under TRIPS namely (a) originating in a geographical area and (b) quality of goods exclusively or essentially is due to the geographical environment.[33]

33 Art. 2 (1) of LISBON Agreement stipulates on Subject matter as follows: The Act applies in respect of (i) any denomination protected in the Contracting Party of Origin consisting of or containing the name of a geographical area, or another denomination known as referring to such area, which serves to designate a good as originating in the geographical area, where the quality or characteristics of the good are due exclusively or essentially to the geographical environment, including natural and human factors , and which has given the good its reputation as well as (ii) any indication protected in the Contracting Party of Origin consisting of or containing the name of a geographical area, or another indication known as referring to such area, which identifies a good as originating in that geographical area, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin. (2) [Possible Geographical Areas origin] A geographical area of origin as described in paragraph (1) may consist of the entire territory of the Contracting Party of Origin or a region, locality or place in the Contracting Party of Origin. This does not exclude the application of this Act in respect of a geographical area of origin, as described in paragraph (1), consisting of a trans-border geographical area, or a part thereof.

TRIPS did not use the adjective "exclusively." It would mean the impact of geographical environment on the product being essential but not exhaustive. The two conditions indicate that the product must have a natural environmental impact on the product in determining its quality, character and specialty based on climatic and soil conditions of the environment, weather and/ or soil content and conditions. If it is exclusive the quality of the product is exclusively the attribute of the locational identity. If it is essential the quality is an essential but not exclusive attribute. There could be some other attribute mixed with the essential attribute creating the condition of the quality of the product. Therefore, the fundamental principle underlying TRIPS in designing the GI has been keeping the quality naturally included in the product coming from the forest and forestry, agriculture, and other cultural products like horticulture, sericulture, but excluding pisciculture, animal husbandry, *etc.* because of IPR on life depending on national policy. It excludes secondary and tertiary industrial products. It has been argued earlier that in industrial culture; the localization of industries creates many internal and external economies garnering a force of agglomeration in favor of a place. Such as, Jamshedpur Steel (trade marked as TATA STEEL) cannot be a GI. In the auction suppose Indian Steel fetches a higher price than the Chinese Steel,that would not be treated as GI at any sense to warrant a quality. But say if local available *anthracite coal* is used to extract an iron ingot that would produce a special quality of the steel manufactured in Eastern India, is the reason for the better quality of steel produced compared to steel produced with bituminous coal produced in other places, Eastern Indian Steel could claim a GI.

India has already created a confusion by granting GI to sweets and some industrial products based simply *on the argument of reputation*. The country has otherwise also an enormous opportunity of granting GI to many of its products specifically complying with (a) origin in a location (b) locational environment (climatic condition, soil quality, and rainfall, wind conditions etc.) determining the quality and character of the product. As for example, there are variety of mangos produced in the country. Say for example, *Malda Fazli*; *UP Daseri; Pune Alfanso; Andhra Baiganpalli; Bengal Himsagar; Bhagalpur Langra*; *South Indian Mallika* so on and so forth. The quality and character of each class of mangoes are different based on the climatic conditions of the place of origin. Fruits, for that matter, any natural or cultural crop, food-products, seeds etc. to have GI must have (i) standardization of seeds, (ii) procedure of soil preparation; (iii) micro-climatic stipulations and impact on the produce; (iv) use of standardized manure, fertilizer, pesticide, and other materials. Similarly scientific procedure of cultivation to prevent insects and bacteria, and proper classification, branding, proper packaging, and delivery chain must also be standardized and prescribed. For the export market there are certifications of quality required in case of each food, food articles, processed food, fruits, seeds and other products. There have to be examination and certification procedures. Similarly, tea grown in an Assam Garden has a different

character than tea produced in a Darjeeling Garden. Based upon places of origin Basmati varieties are differentiated. Some other examples may be *Muzaffarpur Lichi*; Kashi *Guava*; *etc.* A similar type of Lichi produced in other places cannot use the geographical indicator, as *Muzaffarpur Lichi* once the GI is registered with GI mark.

If it can be claimed that the silk fiber of a particular quality locally produced is used for hand weaving a silk cloth or Shari of identified quality and character, like, Assam Silk, Murshidabad Silk, Bengal Silk, Banarasi Silk, Mysore Silk, Madras Silk like *Kanjibharam, etc.* these products may claim GI. Any handloom product which is based only on account of efficiency and long experience and manufacturing technique can hardly claim a GI simply because the name of the place of manufacture is used with the product due to localization of the product. The quality of the product is dependent on account of local workers being especially efficient and experienced to manufacture the product and there being no special contribution of the place. In such a case migration of workers would change the name of the place and geographical location. Workers' efficiency of place or specialty or consumers choice can be argued but cannot clinch the claim of GI rights. India has a plenty of such local variations in handicraft and localized character of various products. Only two samples are discussed below from tribal districts of eastern India.

Pleading for Indian wine from *mahua*

The geographical origin of natural flora and fauna has a distinctive influence on the product and hence could create different GI products. As for example, the forest belt of West Bengal, Jharkhand, Chhattisgarh, and Madhya Pradesh have a common natural seasonal flower, known as *mahua.* Indigenous (*Adivasis*) people inhabited in these areas get intoxicated by consuming the extracts of this flower. The industrial policy of the imperial British Raj was evident from its treating to destroy the handloom textiles in India to benefit the Manchester textile industry. It was the early British Raj that introduced the industrial licensing system to prevent Indian industrial capital from benefiting the British industries. The British Raj perhaps anticipated that wine/whisky produced from *mahua* could be a stiff competitor of wine/whisky from England and Europe. So, making any extraction from such a flower has not only been criminalized but was also subjected to punitive excise duty. A colonial excise policy anti to India's industrial interest was formulated. It is unfortunate is that after independence, India continued with the same colonial policy of excise duty to suppress the industrial interest of the country. India could have developed an aggressive industrial policy especially in the tribal districts to produce Indian wine from *mahua* and created a superior global brand as well as develop the life and living of the tribal communities in these districts. Instead of producing any Indian brand of wine and spirit, India continued to prohibit the extraction industry with colonial criminal law and punitive excise duty. The Indian extraction industry by now could have created many

employment opportunities, globally acceptable GI, and spin of many times of the revenue collected through punitive excise out of this *'mahua'* flower-extracts.

Manbhum Lac a fit case for GI

India being in the hotbed of tropical forest, with a wide form of biodiversity, there are various natural products, which may rightfully require protection through GI. One is the *Manbhum lac* (a dark red transparent resin produced on the twigs of trees) located in the forest of Purulia and the nearby districts of Chhattisgarh and Jharkhand inhabited by indigenous people. Development of such production by use of GI may enhance the foreign market of the product and have an economic development and impact on the life and living of the tribal people.

The unique characteristics of Purulia (Manbhum) Lac are that it distinguishes itself from that of other countries of East Asia because it is traditionally hand-made and the processing is simple in order to keep this insect resin as natural as possible. Historically *Manbhum lac* has the reputation of being the best quality lac in India as the area provides the perfect agro-climatic zone for *lac* cultivation. It is a natural organic resin produced by insects; thus, the resource is renewable.

Owing to its unique and various properties, the use of *lac* can be found extensively in different industries, including paint, electronics, automobile, cosmetic, adhesive, leather, wood finishing, among others. Previously, almost about half of the whole output was used in the gramophone industry. Thereafter, *lac* has found its application both in decorative and lacquers of various kinds and insulating varnishes. Generally, it is used as a first coating on wood to fill the pores, if any, and to seal knots as well, in order to exude resin and disfigure or spoil finished paint work.

Forest provides a wide range of ecosystem services to humankind. These include contributions to the overall socio-economic aspect of a community, for example, employment and processing of forest-derived products. *Lac,* a natural resin of insect origin is cultivated in the non-forest areas in the forest fringes of the district. *Lac*, as a product. provides both economic and social benefits to people of Purulia.

How does 'Lac of Purulia' qualify as a geographical indication

Lac of Purulia, is a natural good which has been produced in Purulia for centuries and has achieved the position of standard quality for its production being dependent on the natural resources. The commonly consumed host plants are Palash. Ber, Kusum, which are the varieties of plant found in Purulia District in abundance. This *Lac Resin* precisely comes from the two strains of lac insects, which are *Rangeeni* and *Kusumi*. The quality of the resin has an inter-relation and direct link with the kind of trees, as mentioned above found in this geographical area. Therefore, the product is linked with the geographical location of Purulia in order to produce well known reputable Lac of Purulia. Hence, the product is eligible for GI registration under section 2(l) (e) ofthe Gl Act 1999.

Grandma technology in the hegemony between the old and the new world

Another argument against claiming of GI on extracted wines and spirits by use of traditional technology and technique in European countries and preventing modern technology from developing a similar product is that it contradicts the developed world's contention against the claim for protection of traditional knowledge. If it is argued that traditional knowledge will be documented can be saved from the consumptive claim of patent right (as for example, *hot turmeric-sodium (common salt) paste* to use against pains on physical injury and ligament twist for immediate relief) by way of exception on the argument of common heritage of mankind, why then French wine or Scotch Whiskey cannot be the common heritage of mankind? If claim of premium price can be upheld on any centuries-old knowledge and product, why that cannot also be extended to any product of the traditional knowledge? *That raises the question of grand IPR policy*, national and international. Is IPR a philosophy of the western world, which is by nature against the traditional knowledge and skilful technology of Afro-Asian people? Can a new form of IPR be designed to suit indigenous technology and traditional skill-driven products or can GI can equally be applicable in all such cases of traditional knowledge and indigenous cultural products?

Afro-Asian countries have the problem of protecting their indigenous and traditional knowledge, a treasury of thousands of years through oral communication and public memory. There are scant written documents about such vast resources. But the so-called new and the old world in the Euro-American continents do not have any interest in discussion about protecting this knowledge as the common heritage of humankind. Hungry wolf of the commercial world paunce upon such knowledge as the fruit of their empirical research and take IPR on the same. The seven objects of IPR does not cover any of this knowledge to protect such traditional knowledge. Basmati, turmeric-lime mixture, tamarin extract, are eye openers. Now Afro-Asian countries are aware of documenting such huge knowledge over a very wide area of indigenous medicine, food and drinks, drug-formulations, medicinal herbs, indigenous form of art and culture and many other things. Huge research and funding would be required. So, Afro-Asian countries now take item-wise GI protection as the savor for all of these products linked to places as indicators. European Union has a protection policy *of dadima technology* in the name of rural traditional knowledge on foodstuff under Title III Article 51 of EU Regulation.

Developing countries under target-pressure for global reporting on record of IPR registration may follow the EU Regulation and strengthen the EU argument on intellectual property protection. So, such traditional knowledge, especially on food and beverage, is the low hanging crop for GI as IPR protection. IPR numbers are thus made-up for the record with more and more GI registrations. But this brings a plethora of litigation and new compromises of creating further GI. Meanwhile big

multinational companies are now engaged in research on agricultural crops through genetic engineering, gene modification and gene transfer and finding new seeds through genetic modification and transgenetic seeds and compelling farmers to buy such high-yield varieties of seeds, exploiting the soil quality of the third world countries. In the absence of regulating and preventing biopiracy, GI is a very poor substitute. Protection of biodiversity and Farmers' and Breeders' rights shall have to be brought under IPR management. Developed countries before issuing a patent on seeds, have to notify to all member countries of filing objections on the grounds of generic factors used; gene-modification by way of bio-piracy; breach of the Biodiversity Convention and violation of farmers's and breeders' rights. GI may also have to face similar opportunities of filing objections on similar lines.

IV GI and common benefit sharing

The most important distinction between 'mark' and 'geographical indication' is that the former provides individual rights and the latter is concerned with 'community rights'. Community interest may be either in the form of joint tenancy or tenancy in common. In joint tenancy individual rights like right of ownership, succession, possession and use, transfer – all these are available, though right of physical partition *inter se* the joint owners, is not permissible. In tenancy- in common, the property can be used but cannot be alienated. Section 11 of the GI Act provides that an application for GI can be made by an association of persons or producers or organization or authority established by or under any law representing the producers of the concerned goods.[34]It is advisable that producers of the goods to apply for GI, should form a producers cooperative registered under the Cooperative Act of the country, region or locality having essentially impacted on the product. It can also be a producer company registered under section 8 of the Companies Act as a non-profit organization (NPO). Producer-members of the Cooperative/Company shall be using the mark of the registered GI who can only use the geographical indicator with their product, by way of right of tenancy in common. Other can neither use the mark nor use the name of the GI with the product. Suppose, all the producers of *Mecha Sandesh* of Saltorah (geographical name of the place of location) of Bankura constituted a producers' cooperative and apply for the GI of *Saltorah Mecha Sandesh,* All members shall have the right to use the mark of the GI as well as the GI number at all conspicuous places in advertisement, packing boxes, and other display materials like sign boards. The cooperative society shall advertise, and create market depth in both

34 S. 11(1) of the Act 48 of 1999: Any association of persons or producers or any organization or authority established by or under any law for the time being in force representing the interest of the producers of the concerned goods, who are desirous of registering a geographical indication in relation to such goods shall apply in writing to the Registrar in such form and in such manner and accompanied by such fees as may be prescribed for the registration of the geographical indication.

domestic and foreign market. The organization shall also carry on product research, product standardization, foreign market research and development for the product, product preservation, export procedure determination and workers training and social welfare. The organization can also have a dispute resolution mechanism, ensure supply of raw materials, and upgrade the technology and represent the producers in the agreement of foreign trade.

The first problem would be if all producers do not come under the same cooperative society, producers outside the cooperative could not use the sign of the GI and the GI with their products. But nevertheless, they would clearly show they belong to the same geographical area and enjoy the same economy as other production units are in the same place. Some of them may register their shop under Trademark Act. Without being members, they may enjoy the market expansion and all the benefits of the market expenditure of the cooperative.

The important benefit for a cooperative organization is that the cooperative may enjoy government grants for specific purpose of infrastructure development, training facilities and foreign market expansion for all these MSMEs. A part of the GST collected may also be allocated to the cooperative Society to go for social welfare of the producers as well as their training, insurance, and infrastructure development, foreign market expansion and standardization of products. Cooperative may also facilitate the loan facilities for the units from Rural and Cooperative Banks under various schemes of NABARD.

EUGI Regulator: a pathfinder for GI in India

The European Union regulates and monitors GI through regulations and occasionally reviews the rules. The current Regulation is Regulation (EU) No 2024/1143.[35] The following are the industries to enjoy GI claim[36] registration: (a) wine; (b) spirit drinks; and (c) agricultural products[37] including foodstuffs.[38] Agriculture products cover

35 Regulation (EU) 2024/1143 amended EU Regulations (EU) No 1308/2013; (EU)2019/787 and EU 2019 /1753 and repealed Regulation (EU) No 1151/2012.

36 Art. 5 of Regulation (EU) 2024/1143.

37 Annex 1 of the Regulation contains the following as the agricultural products; salt; cochineal; essential oil; albuminoidal substances, modified starches, glues; hides and skins; raw fur skins; cork; raw silk and silk waste; wool and animal hair; raw cotton, waste and cotton carded or combed; raw flax; raw hemp.

38 Art. 51 with the objectives of safeguarding traditional method of production under Art. 52 to be issued on registered traditional specialities guaranteed (RTSG). Art. 53 enlisted the eligibility criteria for registration.

agriculture products, including foodstuffs[39] and fisheries and aquaculture products. One of the special features of the EU Regulation is its Title III on the Traditional Specialties Guaranteed (TSG) and Optional Quality Terms which may be a pathfinder for rich Indian rural products to register under GI. The objectives of Title III as provided in Article 52 of EU GI Regulation, is a Scheme for traditional specialties guaranteed (TSG)to safeguard traditional method of production and recipes by helping (a) producers of traditional products in marketing and communicating the value-adding attributes of their traditional recipes and product to consumers and (b) to generate added value by contributing to fair competition in the marketing chain, a fair income for producers and contributing to the achievement of rural development policy objectives. This scheme is a very suitable program for a traditional society as we have in India and which is very rich in several food articles with traditional technology. India has several self-help rural working groups producing various food items with traditional recipes such as (a) various types and products of papads; (b) various types of dried products with dal and products like *naksa badi*; (c) various types of seasonal sweet-articles from various cereals/carnival food festival articles in rural areas called various types of rice-cakes and related product called *pitha-payesam,* which may be brought under GI. Schemes of such products introduced in self-help groups in rural and semi- urban areas to register under the scheme can be brought to enjoy benefit under GI registration. These types of special schemes under foodstuff of traditional product with traditional recipe can also be protected under Indian GI Act which is now not included under the present framework. The nature of the Indian GI Act is more an Act of prevention and prohibition (criminalization) than a code of facilitation for the right conferment for production and commercialization. IPR laws in India are not growth-oriented.

V Conclusion

Indian definition on geographical integration being linguistically too close to the definition provided in TRIPS it would be required for India to develop a policy to

39 Annexure II of the Regulation enlisted Foodstuffs and agricultural products referred to in Article 51 for grant of Traditional Specialities guaranteed: prepared meals, beer, chocolate and derived products, bread, pastry and cakes, confectionaries, biscuits and other baker's wares, beverages made from plant extracts, pasta, salt, aerated water, and cork. In Annexure III there are 31 product classification as referred to in Article 89 that comprises Wines, Spirit drinks, Fresh meat (and offal); meat products (cooked, salted, smoked etc.); Cheeses; Other animal products like eggs, honey, diary products except butter, etc.; Oil and Fats (butter, margarine, oil etc.; Fruits, vegetables and cereals fresh or processed; Fresh fish, molluscs, and crustaceans and products there from; Other products in Annexure I like Spices etc.; Beer; Chocolate and derived products; Bread, pastry, cakes, confectionaries, biscuits and other baker's wares; Beverages made from plant extracts; Pasta; Salt; Natural gums and resins; Mustard paste; Hay; Essential oils; Cork; Cochineal; Flowers and Ornamental plants; Cotton; Wool; Wicker; Scutched flax; Leather; Fur; Feather; Fur; Feather; Aromatised wines; Other alcoholic beverages; Beeswax.

enlist the area in which GI could be claimed. India has not provided any specific list such as one adopted by the EU. As the manufacturing industry is included and reputation is one of the objectives identified for the claim of GI right, it would be likely to encounter several conflicts, both internally and internationally, between GI rights and TM rights on any industrial products. The scope of litigation is wider because localization of industry on the reason of agglomeration would also affect growth and industrial development including preventing facilitation on technology transfer. INTA has already provided the red signal. Instead, India can prepare a policy of identified industries belonging to certain definite industrial fields like beverage; bio-technological traditional extractions; oil; foodstuffs; agricultural products; forest and natural products; traditional food and confectionary items; handicraft with only local materials and indigenous knowledge products etc. GI would have a priority claim inspite of late registration because the intellectual property link between the place and product is a priori to any other right creation.

TRIPS has not replaced the Paris Convention. Hence, creation of intellectual property is required to be rewarded with the right to enjoy a premium with exclusive rights for a limited period with balancing of the right-interest with the national and public interest mechanism. This facilitates industrial growth and technology development with inventions and innovations. In liberal capitalism any possibility of monopoly in the market is an anathema. In industrial property the rights are right to production and marketing without any time limit. These two rights can be ensured with negative trade rights confirming the monopoly. Any competition against the industrial property would be anti-trade and antithetical to trade-related intellectual property. So even in TM or ID or Integrated Circuit that is exhaustion of the right attributed. Hence, the logic of EU for protection of traditional industry and traditional products to be protected from market competition creating negation by call it "unfair" has logic. But with the trade war on the dead body of the WTO by dominating power enforcing the GM Crop to be pushed into a country with GI on its natural crop or an argument of protecting bio-diversity, how can competition be prevented with the "unfair" tag? No industrial property right not compatible with intellectual property right may perhaps exist in a liberal democratic capitalism. So, the challenge is how to interpret Paris in view of TRIPS and not the other way round.

The legislative policy on drafting law in India remains unchanged from the colonial period on the argument of continuity and predictability of law. Unfortunately, whenever economic legislations are attempted, at the end, it is found that there are more preventive, prohibitive and penal provisions than creating facilities for developing economic operations. If one compares GI Act 1999, one would find that are 32 provisions out of 87 containing preventive, prohibitive and penal provisions and only 4 or 5 provisions providing the source of facilitation but none for empowerment. There is no provision to empower producers' group or developing community interest.

Balance provisions are on regulatory power, not the responsibility of a facilitator. Registration is not an empowerment process. It is only the introduction of the regulatory system. In contrast, in EU Regulations, most of the regulations are either creating facilities or specially providing for empowerment process. There are only a few provisions on regulatory functions, not more than 10 out of 97 Articles. Even in regulatory functions also the emphasis is more on obligations than on power. The legislative drafting in India is based on the *a priori* idea of breach, violation, infringement, false information and hence for every right created there would be a barrage of prohibitory and penal provisions. That is why the legislative drafting is complex and difficult to interpret. EU Regulation is in simple language easily understandable. Growth growth-oriented IPR legal regime with enlistment of many disclosure requirements and data generation, the digital technology will aggressively spread requiring data protection and data security almost parallel to the growth of IPR in the country. The EU has a list of 31 industries, agricultural products and food products with traditional specialities guaranteed. It also has the provision for digital data protection and data security. The Government of India could make a GI Policy to enlist a comprehensive list in which GI protection could be encouraged with benefit sharing to registered participants. Correspondingly, we have to build up comprehensive digital data protection ensuring data security. EU regulation also looks into this aspect.[40]

40 See art. 42 (1) of the reg. (EU) 2018/1725.