

## Concept Note

### **National Seminar on Geographical Indications**

#### Background

Over the recent past, Geographical Indications (GI) have emerged as a significant form of Intellectual Property Rights (IPR) issue in the Indian context. The term GI refers to any indication that identifies a good as originating from a particular place, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin. 'Darjeeling' (tea), 'Champagne' (wine), 'Bordeaux' (cheese) are examples of some such GIs that are famous the world over. Much like trademarks, the economic rationale of GI is based on the 'information asymmetry' between buyers and sellers in the market and the role of reputation, conveyed through distinctive signs, in tackling such asymmetry. GI helps a community of producers to differentiate their products from competing products in the market and build goodwill around their products, often fetching a premium price. From consumers' point of view, GIs act as a signaling device, which helps them identify genuine quality-products and also protect them against counterfeits.

#### National and International Laws

In view of their commercial potential, adequate legal protection of GIs becomes necessary to prevent their misappropriation. Although India has had in its possession a considerable number of products that could qualify for legal protection as geographical designators, the initiatives to exploit this potential began only recently when the country established a sui generis system of GI protection with the enactment of 'The Geographical Indications of Goods (Registration & Protection) Act, 1999' (GI Act 1999), coupled with the 'Geographical Indications of Goods (Registration and Protection) Rules, 2002 (GI Rules 2002). The Act, which became operational with effect from 15 September 2003, was drafted as a part of the exercise in the country to set in place national IPR laws as much in compliance with India's obligations under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) of the World Trade Organization (WTO) so as to take advantage of the 'minimum' standards of GI protection (alongside other IPRs) that the TRIPS sets out for the WTO Members to comply with in their respective national legislations. However, as far as the scope of protection of GIs under TRIPS is concerned, there is a problem of hierarchy based on an arbitrary categorization of goods. This is because, although TRIPS contains a single, identical definition for all GIs, irrespective of product categories, it mandates a two-level system of protection – (i) the basic protection applicable to all GIs in general (under Article 22); and (ii) an additional protection applicable

only to the GIs denominating wines and spirits (under Article 23). Importantly, the absence of Article 23 type cover for the other GIs leaves considerable room for their misuse.<sup>i</sup>

### Misuse of geographical names

The illegitimate practice of using geographical names even without a discernible link, not only damages the reputation of the original GI, but also deprives the genuine rightholders of the full benefit of the investments they put into developing their goods and creating the good will and reputation in the market. Besides, the consumers are also likely to be misled into thinking that they are purchasing is an authentic good with certain well-specified quality and characteristics whereas what they are actually buying are a mere imitation. Aware of the inadequacy of the protection granted under Article 22, India, along with a host of other like-minded countries (e.g. the European Union, Bulgaria, China, Pakistan, Sri Lanka, Switzerland, Thailand, among others) has been pressing for an 'extension' of the ambit of Article 23 (henceforth 'extension') to cover all categories of goods. However, countries like the United States, Australia, New Zealand, Argentina, Chile, among others, are strongly opposed to 'extension'. As a result of the wide divergence of views among WTO Members on the issue, not much headway could be achieved in the negotiations so far under the ongoing Doha Round of trade talks.

### Status of GIs in India

Back home, more than hundred Indian products have been registered as GIs – a vast majority of them belonging to handlooms, handicrafts or other artisanal products, followed by agricultural goods, among other categories. While domestic registration is the necessary first step, there are several practical challenges confronting the stakeholders in the country when it comes to the realization of the potential benefits ingrained in the GI status of a product. Apart from effective enforcement of the rights in the relevant markets (domestic and export), success of a GI is contingent, in a large measure, upon appropriate marketing and promotion of the product – tasks that are not only resource-intensive but also challenging to execute for many stakeholders from a developing country like India. Sustained efforts backed by appropriate planning and adequate investments over the medium to long term are some of the essential prerequisites for achieving success on these fronts.

### Traditional Knowledge and GIs – scope for symbiosis

As for protection of Traditional Knowledge (TK), GI is often regarded as a suitable instrument for this purpose. Indeed, GI has certain peculiar features, which in contrast to other IPRs, are considered to be relatively more amenable to the customary practices of the indigenous communities:

- (i) GI is a collective right;
- (ii) knowledge remains in the public domain;
- (iii) rights are (potentially) held in perpetuity (though registration might be necessary in some countries, like in India);
- (iv) the scope of protection is relatively circumscribed in the sense that the rightholders do not have the right to assign; and they are required to remain within the demarcated geographical territory in order to be able to enjoy their GI rights.

However, the aptness of GI for protection of TK is not free from limitations. The foremost problem emanates from the fact that while GI can protect products from misappropriation of their reputation based on their geographical origin, they cannot protect the knowledge embedded in their production processes, which often form part of the TK of the communities involved therein. Notwithstanding such caveats, it may still be asserted that to the extent that products draw on distinctive traditional methods of production that have been preserved and nurtured over time by communities specific to a region, GIs can be used as a legal tool to develop, market and protect a brand. GI as a tool for protection of TK-based products assumes particular significance for India in view of the fact that a vast majority of Indian GIs belong to TK-based artisanal products. Unfortunately, in face of competition from cheaper imitations or other competing products that are increasingly wedging their way into the fast-changing markets in the era of globalization, most of these traditional artisanal products and the people involved therein are struggling hard to stay in business.

### *Impact on the creators of the Intellectual Property*

The worst affected in the whole process are the actual producers or artisans at the bottom-most stratum of the supply chain. Poor working conditions, low wage and insecurity often force these artisans to explore alternative means of livelihood leaving behind their ancestral business. What is more alarming is a general lack of interest among the new generations of these communities to continue with their ancestral professions. The reasons are not difficult to find when one looks at the distressful conditions of these communities. If this kind of situation is allowed to continue, much of the rich artistic heritage of India and the associated TK might become extinct in no time.

Legal protection as GIs, when coupled with effective enforcement, may go a long way in helping the genuine right holders of these products in combating free-riding and counterfeiting. Hence, GIs do have the potential to contribute towards the socio-economic wellbeing of the actual producers/artisans, provided of course they receive a fair share of the benefit pie. However, there is no guarantee that the benefits that may accrue from the GI status would be shared equitably among various tiers in the supply chain of the product

concerned. Because, it is generally observed that different tiers in a supply chain and the actors involved therewith are differentially endowed with economic and bargaining power and that actual producers and artisans, generally belonging to the bottom-most stratum, are usually the most vulnerable ones with very little bargaining strength. Hence, one cannot rule out the possibility of more powerful actors in the supply chain appropriating a disproportionate share of the benefits, in the process nullifying to a large extent, the development potential of GIs. In view of such adverse possibilities that may arise, there is a strong case for appropriate strategic intervention on the part of public or quasi-public institutions in this respect. When registration and exploitation of GIs are conceived as components of a multi-pronged strategic intervention, this collective IPR does have a significant potential in contributing towards the socio-economic wellbeing of the actual producers and artisans.

### *Need for and hopes from the National Seminar*

Against this backdrop, the National Seminar on GIs is being organized by the Centre for WTO Studies with the aim of bringing together representatives from governments, academics, industry, civil society, as well as other stakeholders on the same platform to deliberate on a range of issues pertaining to GIs. The specific objectives of the event are as follows:

- *To initiate an academic debate on all aspects of GIs including the desirable Indian negotiating position in the Doha Round regarding the relevant TRIPS provisions*
- *To generate awareness about the key issues pertaining to GIs;*
- *To analyze the opportunities and challenges confronting GIs in the country;*
- *To understand from the stakeholders the ground realities of the pre- and post-registration scenarios on GIs;*
- *To brainstorm on the ways forward on GIs in India.*

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<sup>i</sup> Provisions on Geographical Indications in the TRIPS Agreement

## SECTION 3: GEOGRAPHICAL INDICATIONS

### *Article 22*

#### *Protection of Geographical Indications*

1. Geographical indications are, for the purposes of this Agreement, indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.
2. In respect of geographical indications, Members shall provide the legal means for interested parties to prevent:

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- (a) the use of any means in the designation or presentation of a good that indicates or suggests that the good in question originates in a geographical area other than the true place of origin in a manner which misleads the public as to the geographical origin of the good;
    - (b) any use which constitutes an act of unfair competition within the meaning of Article 10*bis* of the Paris Convention (1967).
  3. A Member shall, *ex officio* if its legislation so permits or at the request of an interested party, refuse or invalidate the registration of a trademark which contains or consists of a geographical indication with respect to goods not originating in the territory indicated, if use of the indication in the trademark for such goods in that Member is of such a nature as to mislead the public as to the true place of origin.
  4. The protection under paragraphs 1, 2 and 3 shall be applicable against a geographical indication which, although literally true as to the territory, region or locality in which the goods originate, falsely represents to the public that the goods originate in another territory.

### *Article 23*

#### *Additional Protection for Geographical Indications for Wines and Spirits*

1. Each Member shall provide the legal means for interested parties to prevent use of a geographical indication identifying wines for wines not originating in the place indicated by the geographical indication in question or identifying spirits for spirits not originating in the place indicated by the geographical indication in question, even where the true origin of the goods is indicated or the geographical indication is used in translation or accompanied by expressions such as "kind", "type", "style", "imitation" or the like.<sup>i</sup>
2. The registration of a trademark for wines which contains or consists of a geographical indication identifying wines or for spirits which contains or consists of a geographical indication identifying spirits shall be refused or invalidated, *ex officio* if a Member's legislation so permits or at the request of an interested party, with respect to such wines or spirits not having this origin.
3. In the case of homonymous geographical indications for wines, protection shall be accorded to each indication, subject to the provisions of paragraph 4 of Article 22. Each Member shall determine the practical conditions under which the homonymous indications in question will be differentiated from each other, taking into account the need to ensure equitable treatment of the producers concerned and that consumers are not misled.
4. In order to facilitate the protection of geographical indications for wines, negotiations shall be undertaken in the Council for TRIPS concerning the establishment of a multilateral system of notification and registration of geographical indications for wines eligible for protection in those Members participating in the system.

### *Article 24*

#### *International Negotiations; Exceptions*

1. Members agree to enter into negotiations aimed at increasing the protection of individual geographical indications under Article 23. The provisions of paragraphs 4 through 8 below shall not be used by a Member to refuse to conduct negotiations or to conclude bilateral or multilateral agreements. In the context of such negotiations, Members shall be willing to consider the continued applicability of these provisions to individual geographical indications whose use was the subject of such negotiations.
2. The Council for TRIPS shall keep under review the application of the provisions of this Section; the first such review shall take place within two years of the entry into force of the WTO Agreement. Any matter affecting the compliance with the obligations under these provisions may be drawn to the attention of the Council, which, at the request of a Member, shall consult with any Member or Members in respect of such matter in respect of which it has

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not been possible to find a satisfactory solution through bilateral or plurilateral consultations between the Members concerned. The Council shall take such action as may be agreed to facilitate the operation and further the objectives of this Section.

3. In implementing this Section, a Member shall not diminish the protection of geographical indications that existed in that Member immediately prior to the date of entry into force of the WTO Agreement.

4. Nothing in this Section shall require a Member to prevent continued and similar use of a particular geographical indication of another Member identifying wines or spirits in connection with goods or services by any of its nationals or domiciliaries who have used that geographical indication in a continuous manner with regard to the same or related goods or services in the territory of that Member either (a) for at least 10 years preceding 15 April 1994 or (b) in good faith preceding that date.

5. Where a trademark has been applied for or registered in good faith, or where rights to a trademark have been acquired through use in good faith either:

(a) before the date of application of these provisions in that Member as defined in Part VI; or

(b) before the geographical indication is protected in its country of origin;

measures adopted to implement this Section shall not prejudice eligibility for or the validity of the registration of a trademark, or the right to use a trademark, on the basis that such a trademark is identical with, or similar to, a geographical indication.

6. Nothing in this Section shall require a Member to apply its provisions in respect of a geographical indication of any other Member with respect to goods or services for which the relevant indication is identical with the term customary in common language as the common name for such goods or services in the territory of that Member. Nothing in this Section shall require a Member to apply its provisions in respect of a geographical indication of any other Member with respect to products of the vine for which the relevant indication is identical with the customary name of a grape variety existing in the territory of that Member as of the date of entry into force of the WTO Agreement.

7. A Member may provide that any request made under this Section in connection with the use or registration of a trademark must be presented within five years after the adverse use of the protected indication has become generally known in that Member or after the date of registration of the trademark in that Member provided that the trademark has been published by that date, if such date is earlier than the date on which the adverse use became generally known in that Member, provided that the geographical indication is not used or registered in bad faith.

8. The provisions of this Section shall in no way prejudice the right of any person to use, in the course of trade, that person's name or the name of that person's predecessor in business, except where such name is used in such a manner as to mislead the public.

9. There shall be no obligation under this Agreement to protect geographical indications which are not or cease to be protected in their country of origin, or which have fallen into disuse in that country.