

GEOGRAPHICAL INDICATIONS AND TEXTILE SECTOR

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I. INTRODUCTION

Textile industry by their very nature is labour intensive and doesn't require high end technological inputs. This gave many developing countries cost advantage in the textile sector. This scenario led to lobbying by developed countries for protections which resulted in four successive Multi Fibre Agreement (MFA) between 1974-94 and many quantitative restriction in trade of textiles.

Under Uruguay round negotiations, textile and clothing were made subject of discussion. Integration of market was sought and it was agreed that in a ten-year period (1995 – 2004) integration will come about and it will take place in four stages – 16% of this category under MFA restriction were to be integrated in 1995, another 17% in 1998, followed by another 18% in 2002. At the end of 2004, the remaining 49% were to be integrated.

With the complete dismantling of MFA, a new era has descended in textile sector. This article tries to explore the benefits accrued after dismantling of MFA in conjunction with Geographical Indications of Goods (Registration and Protection) Act, 1999 (hereinafter referred as 'Act').

Indian textile industry in conjunction with protection provided under the Act can rule the roost in world textile market. The Act can give protection to traditional products like *Pashmina*, *Chanderi*, *Sambhalpur*, *Kancheevaram*, *Lucknavi Chicken*, *Jaipuri Bandhej* etc. India can make use of provisions under Article 24 of TRIPs agreement for negotiating higher protection for textile products.

II. GEOGRAPHICAL INDICATIONS

A. What are Geographical Indications?

Geographical Indications (GIs) as the name suggests are indicative of geographical origin of the product. Theoretically, it is the geographical region

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upon which this intellectual property rights (IPRs) are conferred but as it will appear in this discourse later, that it is for all practical purposes enjoyed by the inhabitants of that region. Marks indicating the geographical origin of goods are the earliest types of trademarks and were established to differentiate goods that possessed some unique quality reflecting environmental factors, or processing methods, or manufacturing skills. These marks have strong geographical motifs that include the depiction of local animals (panda beer), landmarks (Mt. Fuji sake), buildings (Pisa silk), heraldic signs (fleur de lys butter) or well-known personalities (Mozart chocolate).

B. Defining Geographical Indications

The inclusion of GIs within the TRIPs Agreement is a result of the EC's¹ negotiating success. This also draws attention to previous frustrated attempts at securing an international treaty on indications of geographical origin (IGOs) and the insufficiency of closely related IPRs, viz. 'indications of source' and 'appellations of origin'.

(i) Indication of Source

The term 'indications of source' is used in the Paris Convention² and the Madrid Agreement³. The Conventions does not defines 'indication of source' but broadly three elements comprise the notion: (a) there is a clear link between the indication and geographical origin (e.g. 'made in ...') rather than any other criterion of origin (e.g. 'made by ...'); (b) unlike other IGOs, there is no requirement for distinguishing qualities or attributes of the good; (c) the protected indication can be constituted by words or phrases that directly indicate geographical origin or phrases, symbols or iconic emblems associated with the area of geographical origin.

¹ The European Communities are a sub-entity of the EU. As opposed to the EU, the European Communities have comprehensive legal personality. The "European Communities" are made up of two Communities: the European Community (EC) and the European Atomic Energy Community (EURATOM) as founded by the Treaties of Rome of 1957.

² Articles 1(2) and 10 bis, Paris Convention for the Protection of Industrial Property, 1883. The Paris Convention for the Protection of Industrial Property was adopted in 1883 and has been revised at Brussels in (1900), The Hague (1925), London (1934), Lisbon (1958) and Stockholm (1967). The Convention was amended in 1979.

³ The Madrid Agreement for the Repression of False or Deceptive Indications of Source of Goods was adopted in 1891 and revised at Washington (1911), The Hague (1925), London (1934), Lisbon (1958) and Stockholm (1967).

(ii) Appellation of Origin

The term ‘appellations of origin’ is found in the Paris Convention [article 1(2)] and defined in the Lisbon Agreement⁴. Following three elements comprise the notion: (a) appellations must be direct geographical names; (b) the appellation must serve as a designation of geographical origin of the product; (c) quality and characteristics revealed by the product must be essentially attributable to the designated area of geographical origin.

III. THE TRIPs AGREEMENT AND GEOGRAPHICAL INDICATIONS

The TRIPs Agreement is said to be the first multilateral agreement dealing with the term ‘geographical indications’⁵. The TRIPs Agreement discusses the law related to geographical indications in a separate section. Section 3 of Part II of the TRIPs Agreement makes provisions for the protection of GIs. Like any other section of the TRIPs Agreement, it begins with a subject matter definition which also set out the conditions for protection (Article 22.1)⁶. To qualify for protection, an indication must (i) identify the good and its area of geographical origin, (ii) possess a given quality, reputation or other characteristics, which (iii) is essentially attributable to its area of geographical origin.⁷

Articles 22.2-22.4 establish the basic obligation for the protection of all GIs. Members must provide the “legal means for interested parties” to secure protection of their GIs. As the legal means are not specified, Members are free to determine the appropriate implementation mechanism⁸.

⁴ Article 2, Lisbon Agreement for the Protection of Appellations of Origin and their International Registration, 1958.

⁵ Daniel Gervais, *THE TRIPs AGREEMENT – DRAFTING HISTORY AND ANALYSIS*, (Second edition, Sweet and Maxwell).

⁶ The text of Article 22.1 reads as follows: “Geographical indications are, for the purpose 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”.

⁷ It should be noted, however, that WIPO has opted to use the term ‘geographical indication’ in its widest possible meaning to describe names and symbols regardless of whether they indicate that the qualities of a given product are due to its geographical origin (such as appellations of origin), or they merely indicate the place of origin of a product (such as indications of source).

⁸ All Andean countries have regional legislation regarding collective trademarks and certification trademarks. This was not notified expressly to the WTO but it is clearly regulated in Articles 180 to 189 of the Andean Decision 486. See <http://www.comunidadandina.org/ingles/treaties/dec/D486e.htm>.

Article 23 contains additional obligations for providing the 'legal means' for the protection of indications of wines and spirits. The additional protection offered to wines and spirits begins with Article 23.1 which borrows language from Article 3 of the Lisbon Agreement. Article 23.1 prohibits the use of GIs for wines and spirits "even where the true origin of the good is indicated or the geographical indication is used in translation or accompanied by expressions such as 'kind', 'type', 'style', 'imitation' or the like". Paralleling the provisions in Article 22, provisions exist for invalidation or refusal of trademarks that 'contain or consist' of GIs identifying wines or spirits (Article 23.2). The next provision in Article 23 relates specifically to homonymous indications where there is an obligation to "determine the practical conditions under which the homonymous indications in question will be differentiated from each other", while ensuring equitable treatment of producers and that consumers are not misled (Article 23.3). Finally, Article 23.4 obliges Members to enter into negotiations "concerning the establishment of a multilateral system of notification and registration" of GIs for wines to "facilitate" their protection.

It has also been noticed that the built-in agenda for further negotiations and review in this Section was the only possible outcome to overcome the deep conflicts that existed on GIs⁹. The first provision for further negotiations relates to a multilateral register for GIs of wines (Article 23.4)¹⁰.

Article 24 discusses exceptions and sets forth commitments to a process of further international negotiations regarding protection of GIs. Article 24.1 makes explicit provisions for further negotiations aimed at "increasing the protection of individual geographical indications under Article 23" and cautions Members from using the exceptions listed in Articles 24.4-24.8 as either an excuse to avoid negotiations or conclude bilateral or multilateral agreements. A series of exceptions are included in Article 24 that aim at balancing interests of GI-holders with those of the wider public and other users of indications. Article 24.3 is not an exception, but a standstill clause that seeks to preserve TRIPs-plus standards of protection that may have existed in some Member countries at the time the WTO Agreement came

⁹ <http://www.ictsd.org/ipronline>.

¹⁰ Para 17, *Doha Ministerial Declaration*, WTO document WT/MIN(01)/DEC/W/1: "With a view to completing the work started in the Council for Trade-Related Aspects of Intellectual Property Rights (Council for TRIPS) on the implementation of Article 23.4, we agree to negotiate the establishment of a multilateral system of notification and registration of geographical indications for wines and spirits by the Fifth Session of the Ministerial Conference. [...]"

into force (1 January 1995). Article 24.4 is an exception related to GIs for wines and spirits that permits the “continued and similar use” of GIs for wines and spirits by those who have used that indication in a “*continuous* manner with regard to the *same or related* goods or services” in that territory for at least 10 years preceding 15 April 1994 or in good faith preceding that date. Article 24.5 is an exception relating to all GIs and aims to negotiate the relationship between trademarks and GIs, i.e. Articles 22.3 and 23.2. The exception states that a trademark acquired or registered in good faith either (a) before the date of application of the provisions of Section 3 or (b) before the GI in question has been protected in its country of origin should not prejudice the eligibility for or validity of registration of the trademark or the ‘right to use’ the trademark. Furthermore, Article 24.7 establishes a time limit (5 years) and a contingency (‘bad faith’) with respect to exercising the right to invalidate or refuse registration of trademarks that consist of or contain an indication. Article 24.6 is an exception that concerns generic GIs across all goods and includes a specific application of this principle for ‘products of the vine’ (thus, including those spirits made from vine). The first part of Article 24.6 allows exceptions from obligations in Section 3 where a term is customary in common language as a common name for certain goods and services (e.g. ‘china’ for porcelain). The second part of Article 24.6 exempts Members from protecting indications that are identical with the ‘customary name’ of a grape variety in the territory at the date of entry into force of the WTO Agreement (e.g. Cabernet Sauvignon). Article 24.8 recognises the right of a person to use his/her name or the name of their predecessor in business in the course of trade. This right is circumscribed by requiring the name not to “mislead the public”. Article 24.9 is framed as a ‘dependency’ exception that exempts Members from protecting indications that are either not protected in their country of origin or those that cease to be protected in their country of origin or are in disuse¹¹.

IV. PROTECTION OF GEOGRAPHICAL INDICATIONS

Not only there are deep terminological differences in the area of geographical indications but there are also significant divergences with regard to the modes of and the purpose of protection. The TRIPs Agreement has left broad room for manoeuvre to determine how geographical indications are to be protected at the national level¹².

¹¹ Dwijen Rangnekar, PROTECTING GI: WHAT DEVELOPING COUNTRIES NEED TO DO – LESSON FROM THE EU EXPERIENCE.

¹² It is to be noted that the EC has recently concluded several bilateral agreements referring to the protection of GIs, in particular the agreements with South Africa, Mexico, Australia and Chile.

Knowledge about the different forms of protection available in different countries is useful as an input for the design and implementation of national laws, particularly for those countries that are adopting new rules on the matter¹³. Most importantly, such knowledge is crucial for the international enforcement of rights based on geographical indications. For example, the approaches for the defence and enforcement of a geographical indication from Trinidad and Tobago will considerably differ in Europe as compared to the United States. While in the former, geographical indications receive under certain conditions special protection, in the latter protection is conferred in a variety of ways, including unfair competition, federal (such as trademark law) and state statutes and regulations. In particular, the US Trademark Act of 1946, as amended, provides for the protection of geographical indications as certification marks. Various alternatives have been developed in national and international law for the protection of geographical indications¹⁴ these are inter alia:

- (i) “absolute” protection against use by any non-authorized party of the indication whether the public may be misled or not, as established, for instance, by the French law of May 6, 1919 (which recognized “appellations of origin” and laid down the conditions for their protection), the EC Council Regulation No. 2081/92, the Lisbon Agreement, and Article 23 of the TRIPs Agreement (only for wines and spirits). This special title or *sui generis* protection is based on a public or administrative act (WIPO, 1998, p. 118-119);
- (ii) protection against the use of an indication which is deceptive or misleads the public, as provided for by the Madrid Agreement and by Article 21.2 (a) and 21.3 of the TRIPs Agreement in the framework of trademark law;
- (iii) protection against acts of unfair competition committed with the use of geographical indications, as provided under Article 10 bis of the Paris Convention;

¹³ The explanatory note appended to India’s Geographical Indications of Goods (Registration and Protection) Act, 1999 is worth noting: For the purposes of this clause, any name which is not the name of a country, region or locality of that country shall also be considered as the geographical indication if it relates to a specific geographical area and is used upon or in relation to particular goods originating from that country, region or locality, as the case may be.

¹⁴ See the WTO Secretariat’s review of IGOs for an overview of different mechanisms for implementing this obligation (IP/C/W/253). WIPO’s symposiums on GIs also provide useful material on GI legislation in various countries.

- (iv) protection against acts of “passing-off”, as provided for in common-law countries,
- (v) protection against the ‘false’ use of an indication, when it does not indicate the true origin of the product. This protection established, for instance, under Article 10(1) of the Paris Convention, does not extend to indications which may mislead the public but are not false (for example, where certain geographical areas in different countries have the same name but only one of those areas is known for particular products);
- (vi) “passing-off” is misrepresenting one’s business goods or services as another’s, to the latter’s injury. This approach has been followed, for instance, in United Kingdom;
- (vii) protection as collective or certification mark, which may be registered by the government or by a private entity.

V. ECONOMIC ASPECTS OF GEOGRAPHICAL INDICATIONS

The inclusion of geographical indications, itself a new category of intellectual property rights, within the ambit of the TRIPs Agreement is well-appreciated as signifying the negotiating success of the European Union. While the TRIPs Agreement heralds a significant upgrading of the standards of protection for indications of geographical origin (IGOs) there remains the problem of a hierarchy in the levels of protection based on an arbitrary categorisation of goods. Interestingly, unlike any other IP-instrument in the TRIPs Agreement, demandeurs for stronger protection include many developing countries. The interest of developing countries is based on a presumption of strong commercial potential as IGO-goods tend to be from the rural, agricultural and handicraft sectors of the economy. In this respect, growth of niche markets segments like ‘fair trade’, ‘organic’, and ‘authentic’ and consumer interest in the source of products is supportive. However, it is the nature of multilateral trade negotiations at WTO that concessions in other areas will have to be made by demandeurs to secure their desired gains in the area of GIs. Balancing gains and concessions require an analysis of different policy outcomes. A first step in that direction, at least for demandeurs, is to understand the evidence and impact of GIs¹⁵

IGOs are the oldest category of trademarks, suggesting a shared heritage and a degree of commonality in the economic rationale for their protection.

¹⁵ Geographical Indications: A Review of the Proposals at the TRIPs Council, June, 2002.

In the case of trademarks, economists draw attention to the informational asymmetries between the buyers and sellers of a good¹⁶. Despite the shared heritage and rationale for protection, there are differences between trademarks and IGOs. Trademarks belong to an enterprise and are not limited by any territorial link. In contrast, 'geography is at the heart' of IGOs and, in contrast, not limited to any particular enterprise, but enjoyed by all enterprises within the demarcated geographical area that meet the stipulated requirements for use of the indication. By virtue of not being 'owned' by a single firm, IGOs are more appropriately characterized as collective monopoly rights.

So much for the impact at macro-level, it is in the very nature of GI as an intellectual property to provide for redistributive justice. Unlike other IPRs, GI is a community right. So promotion of GI will help in fulfilling the obligations of state under Directive Principles of State Policy of our Constitution.

Negotiation under GIs are likely to be more fruitful than those under other obligations of TRIPs Agreement, because world vis-à-vis GI is not divided into North and South but division is between European Economic powers on one hand and US and its allies like Australia, Latin American Countries and New Zealand on the other. Where former is vying for extension of GI protection and later fighting against its extension. European countries have got their interest secured by incorporation of Article 23 of TRIPs Agreement. Now it is the turn of developing superpowers like India and China to unite and make use of Article 24 to get higher level protection for GIs in textile sector. As a public policy instrument, GIs have potentially positive implications towards the protection of indigenous knowledge and as a means for generating livelihood and income.

VI. EFFECT OF DISMANTLING OF MFA

For more than three decades the textile and clothing sector has been the subject of special attention in the World Trade Organisation (WTO) and its trade in goods oriented predecessor, the General Agreement on Tariffs and Trade (GATT). This is partly because the textile and clothing sector – one of the most widely distributed industries in the world and a key provider of employment – has long been recognized as an essential factor for economic and social development and one where market interventions were deemed to be necessary. But since labour costs are important differentiating

¹⁶ This asymmetry exists because sellers have much better information with regard to the unobservable features of a product than the buyer.

components of this sector's competitiveness, a number of industrialized countries (who might otherwise have been unable to compete) sought to shield this sector from foreign competitions. This led to quantitative restrictions being introduced especially by Europe and the United States, on top of already high tariff-based restrictions.

Although quantitative restriction had been in place even before then, 1974 saw the inception of the Multifibre Agreement (MFA) which was a formalisation of quota restrictions in textile and clothing which had been in effect since 1962. While the MFA was not specifically time-bound, it signaled the beginning of a long-term shift in the dynamics in the global textile and clothing sector. It was renewed in 1977 and again in 1981, 1986 and 1991. The MFA also signified a major departure from GATT principles, and could thus be classified as derogation from GATT rules. However, as per Agreement on Textile and Clothing, the textile quotas were phased out and textile sector fully integrated into WTO from 1st January 2005. The liberalized trading regime would result in increased international trade in textiles thus providing greater export opportunities; and at the same time expose the domestic industry to import penetration in the domestic market. The industry will have to improve its efficiency and productivity to meet the emerging global competitions.

Together with selected agricultural products, textiles and apparel are subject to the most protective policies. Ministry of Textiles is responsible for policy formulation, regulation, development and export promotion in respect of textiles, including cotton, wool, silk, jute and other fibers¹⁷ and handicrafts. The Ministry has taken a number of policy initiatives for the sector and more particularly since introduction of the economic reforms in mid-1991. The Uruguay Round was not only for continuation of these initiatives but for hastening their pace of implementation, since all the existing barriers to global trade in textiles were to be phased out by December 2004. The Ministry is taking various policy initiatives¹⁸.

India's textile products, including handlooms and handicrafts, are exported to more than hundred countries. However, USA, EU Member States, Canada, UAE, Japan, Saudi Arabia, Republic of Korea, Bangladesh, Turkey etc are the major importers of our textile goods. The market size of

¹⁷ Excluding non-cellulose synthetic fibre and filament yarns.

¹⁸ Examples of these policies are: National Textile Policy-2000 (NTxP-2000), New Foreign Trade Policy, Apparel Export Park Scheme, Scheme for Integrated Textile Parks, India Exposition Mart etc.

the textile industry is about US\$ 37 billion. Textiles contribute 16% of india's export earnings. While export of textiles (including handicrafts, jute and coir) formed 24.6% of total exports from India in 2001-2002, this percentage has decreased to 16.24% during the year 2004-05. The main reason in the past has been the discriminatory quota regime governing international trade in textile and clothing. As the availability of quotas was less than their demand, quota restriction had immediate effect of limiting exports. But with the dismantling of quota system countries like India, Pakistan and China can expect gain in their textile exports. Without quotas, global demand especially from large European and US retailers is likely to gravitate. Consumers in general are also likely to be major beneficiaries, as the removal of market impediments should increase the competitiveness of the sector and drive down the price of textiles and finished garments.

Under these circumstances India can receive most significant gains from exports in textile. India's textile industry is versatile and having a large variety with unique characteristics. By giving status protection to Geographical Indication under the Act, the product will be protected from the false use and misrepresentation. It can boost the Indian economy if used properly. Recently, status of Geographical Indication is given to Chanderi Silk, Pochampally Ikat, Kanjeevaram sari but there are lots more textile and handicrafts, which need protection and which have capacity to contribute significantly in the economic development of the country. With the opening of trade under WTO regime, it is felt that handicraft sector may also use IP tools primarily as a marketing strategy and for protection of its important traditional heritage sector.

The new Foreign Trade Policy contains a number of positive features. The features, which are particularly beneficial to the textile industry, are as follows:

- (i) Handicrafts and Handloom sectors, among others, have been identified as Special Focus Initiatives;
- (ii) Duty free import of trimmings and embellishments for Handlooms and Handicrafts sectors increased from 3% to 5% of FOB value of exports;
- (iii) Import of trimmings and embellishments and samples shall be exempt from CVD.

Attention has also been paid to Human Resource Development in the textile sector. Towards this end, particular mention deserves to be made of National Institute of Fashion Technology (NIFT), which is imparting training

to Fashion Designers and Fashion Technologists to cater to the human resource requirements of garment industry¹⁹.

If a state's handicrafts are protected under the GI Act, the people of the state would have exclusive rights for manufacturing such products. It would prevent unauthorized use or copying of the products and would promote economic prosperity of the producers, besides giving greater recognition to the state artisans. The absence of such a right being given can lead to a situation wherein the commercial benefits that should have vested in a country are being "hijacked" by some other country.

The success of getting the Geographical Indication Registration for 'Pochampally Ikat' has motivated the Government of India and, more specifically the Union Textile Ministry to identify all handloom products, which can be registered under the system. The Andhra Pradesh Textiles Development Committee (APTDC) would also be given a commission for carrying out a countrywide survey to locate such goods. A national programme for preparing the textile industry for globalization in the WTO regime has been initiated by the Textile Committee.

Items for which GI registration was applied in 2005 (awaiting registration) include the famous Kanjeevaram Silk rumal (handkerchief) and famous Banarasi Silk Sarees from Uttar Pradesh. Kanjeevaram Silk Sarees, Mysore Silk Sarees, made-ups, ties and yarn have already got their registration.

Now it's high time that Government must take up protection to GIs at war footing. This will need support of civil society organizations also. We must have ready referencer of GIs rather than having piece-meal approach. Since it involves participation of traditional societies also, so it will be prudent in the scheme of things to have nurturant approach. The benefits that will accrue due to protection of GIs will far outweigh the costs involved.

¹⁹ A team of the National Institute of Fashion Technology (NIFT), Kolkata, with assistance from the Development Commissioner, Handloom and Handicrafts, Union Textiles ministry, is in the state of Arunachal Pradesh to identify and patent indigenous Arunachalee handicrafts under the intellectual property rights through geographical indication (GI).