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GI Protection to Sweets and Popular Recipes

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ABSTRACT

The growing trend of GI tags around the world has ignited a debate on the utility of such kind of IP protection. Geographical indication protection is provided to a product to establish that the product is linked to a particular location only. The protection granted to products based on the region of their produce may vary from country to country. Some countries have a high standard exclusive protection while others may have a flexible framework. This research focuses on the GI protection that is provided to the sweets and other popular recipes. The protection granted to a sweet or a recipe poses some underlying questions as to the viability of such protection and till what extent it can be enforced. A popular recipe need not be associated with a particular area, granted the proper method and ingredients, such a recipe could easily be imitated in any region. So the point of preponderance here is what will be the status of such recipes made outside the region which has been granted GI. This paper assesses the role of international instruments in protecting the tag of origin of a product. It discusses the Paris Convention on Industrial Property (1883) along with the Lisbon Agreement on the Protection of Appellations of Origin and their International Registration (1958). This project aims to bring out the drawbacks that the grant of GI tags to popular recipes using the current legal regime. In conclusion, the objective of this study is to suggest better alternatives to grant of GI protection granted to common recipes by analyzing the other indication of origin methods applied in Europe and China.

I. INTRODUCTION

The idea of granting geographical indication protection to a product is to essentially link the origin of such a product to a geographical area. It signifies that the product is a result of the qualities and reputation owing to its origin.² Thus there exists a clear link between the nature of the product and its place of origin, which is the dominant feature of such product and distinguishes it from products of similar nature originating in any other area. This type of protection provides recognition to the area which is the origin of such distinguished product.

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² 'Geographical Indications: FAQ's', (WIPO.int) https://www.wipo.int/geo_indications/en/ accessed 30.02.2022

GI is different from trademark as trademarks do not provide for quality assurance or requirements for registrations. GI is a community right whereas trademark belongs only to a particular person.

The trend of GI protection has engulfed the areas all around the globe. This has also raised question over its utility. The GI tags are generally provided to the special product that arises due to the natural conditions or any other natural factor specific to the area, such as Bikaner Bhujia which requires high temperatures present in Bikaner region of Rajasthan, but it is not always the case. Other important GI tags in India include tirupathi laddoo, basmati rice, Darjeeling tea, kohlapuri chappals, Nagpur oranges, and so on. There are various geographical indications protections provided in international realm as well, including Moroccan Argan oil, china's Pixian Douban, and many more. But what is to be kept in purview is that the protection of GI varies in form in each jurisdiction, which shall be discussed in further research.

The major requirement for grant of GI tag to a product is the rational link between the specific quality and the characteristics of the area with the characteristics of the product. As stated by WIPO:

*"It is important for the justification of the elements of the definition to be made in the most objective manner possible with a view to giving the link a precise and specific form, since this constitutes the basis for the protection of a [GI]. The grant of an exclusive right to a denomination is made only insofar as this right is justified by objective elements and forms of proof. These elements and proof help to make the subject matter for which protection is sought and the reason for such protection understandable, while using, for example, specifications containing these elements in methodological and concrete terms"*³

Thus, it is pertinent that the state claiming a GI tag shows the linkage between the product and the area, otherwise any other state will easily be able to produce the same product and eroding any distinctiveness which forms the basis for geographical indication. Proper filing and full knowledge of GI before applying for a GI could reduce the number of applications for GI's⁴. Thus, it is important to understand what is protected by GI protection in IPR.

Article 22(1) of the TRIPS agreement defines geographical indication in such a manner to link the quality or reputation of product to its origin. GI's also protect the goods that originate from

³ 'Geographical Indications' WIPO at 32, WIPO Doc. SCT/10/4 (23 March 2003).

⁴ Sanjeeb Mukherjee, 'MP Basmati rice to 'kadaknath' chicken: How tough it is to get a GI tag', Business standard (25.april.2015) https://www.business-standard.com/article/economy-policy/basmati-rice-of-mp-to-kadaknath-chicken-how-tough-it-is-to-get-gi-tag-118042500273_1.html accessed 12.02.2022

a specific origin due to the special know-how and traditional practices forming part of only that region. Thus, it only protects the goods or products whose quality is highly attributable to the geographical origin. It is due to this reason that GI protection often transverses with the protection of trademarks because both provide source identification protection, guarantee quality and protect business interests.⁵

The legal framework of GI in India is susceptible to criticism due to the fact that GI protection came into a later stage than other IP's and the TRIPS agreement only provides for minimum basic standards of protection, thus, the member nations were left to develop their own kinds of protection whether under the already existent trademark regime or a suo motu protection.

It is also to be noted that there are various lacunas in the GI act and protection in India. The Indian law does not make any distinction between GI, AO, TSG. The protection is only in the form of GI. Thus creating an ambiguous uniform system of protection. Another problem which is highlighted is the distinction made in Part A register and Part B register, where part A register shows the holder of GI and part B register shows the authorized users. But the ambiguity arises when the registered owners of the GI are also authorized users, hence creating a problem of double counting. This research is limited to foods products and hence the focus is generally on the manufactured goods and GI protection, which is highlighted further.

In manufactured food stuffs, the problem comes up when GI tag is provided over a popular recipe which does not require any specific condition but may have acquired distinctiveness in that area. Once such GI tag is granted, the monopoly of the producers in that area arises to use the GI, but the question that arises here is what happens to the producers of that protected food item who are not located in that geographical area? The aim of this research is to analyse the conditions surrounding the protection of GI tag to popular recipes and check the viability of the same in context of the distinctiveness it acquires due to its place of origin.

Why the GI protection?

The infamous controversies that arise due to the tussle for GI protection between different regions are something which can't go unnoticed. This race for GI tag has existed for decades but has recently seen a high rise. The reason for such rise lies in the advantages it offers to the protection holding state. There are various upsides to having a GI tag as have been discussed below.

The most significant benefit of having a GI tag protection is that it offers higher revenues for

⁵ 'Geographical indication protection, IP policy' (*United States patent and trademark office*), <https://www.uspto.gov/ip-policy>

local producers⁶ due to the monopolistic advantage they collectively enjoy. It has been observed that the benefits of GI protection have outweighed the difficulties that arise in securing such protection. One of the basic requirements of recognition of cultural heritage and promotion of regional interests is fulfilled by this protection.⁷ Jean-Claude Chesnais, Programme Manager at AFD, the French Agency for Development, proclaims them to be instruments of development which help in fight against poverty. It puts a country back on the map and advertises its traditions.⁸ For developing countries it can be a method to climb out of the developing stage and give a major boom to their economy simultaneously promoting their cultural diversities.

II. INTERNATIONAL FRAMEWORK GOVERNING GI PROTECTION

The laws relating to GI's have known to be developed in various directions instead of following a single steady path. Different countries internationally have developed their own approaches to protecting products of specific geographical origin which can be seen in the distinguished forms of protection. The international framework thus appears to be rather wide and ambiguous in relation to the international legal frameworks governing other forms of intellectual property protections such as patents, trademarks, copyrights. A uniform system for protecting geographical origin of goods is not formalized. A country may choose to protect GI by the way of a sui generis system specifically developed for the regulation of GI, while some other country may choose to protect it by the way of trademarks and some may even deny the existence of such kind of intellectual property protection. The position of international instruments governing GI can be said to have improved with the coming of TRIPS agreement as an outcome of the Uruguay rounds of GATT negotiations, which resulted in formation of WTO and thus TRIPS as an annexure to the WTO agreement.

The regulation of GI protection internationally is majorly carried out by the various bilateral agreements between the countries or the regional trade agreements in intellectual property, due to the lack of a uniform non-derogatory system for regulating GI, but there are various multilateral agreements which have tried to consolidate the GI regulations. Some of the major agreements are discussed here. The legal framework developed with the coming of the Paris Convention which came in the year 1883, along with Madrid system of 1891, and the Lisbon agreement in 1958 and lastly the TRIPS Agreement in 1994.

⁶ 'Experts discuss the benefits of geographical indications and the support needed to make them work', International trade centre (*INTRACEN.org* 10.july.2013) <https://www.intracen.org/layouts/2coltemplate.aspx?pageid=47244640256&id=75185>

⁷ Ibid

⁸ Ibid

The Paris convention on intellectual property, 1883 is very wide in coverage but it does not specifically define geographical indication. This agreement in its article 9⁹ refers to seizure of goods giving rise to unfair competition and Article 10¹⁰ provides for protection of indications of source and direct or indirect use of such indication to reflect false indication of origin¹¹. Moving to the Madrid agreement concerning the international registration of marks deals only with trademarks, but a separate agreement which also came into force in 1891 talks about the false and deceptive indications of origin. Another agreement which concerns the GI is the Lisbon agreement for protection of appellations of origin and their international registration which came into effect in 1966 sought to unify the single registration procedure for granting protection to appellations of origin in jurisdictions other than the country of origin. This agreement defined the scope of protection for appellations of origin and article 2.1 of the agreement defines appellations of origin. The agreement has a total membership of 36 members with no major powers as its members, thereby reducing the scope of such protection provided by this system significantly.

Lastly, the TRIPS agreement which has all major countries as members due to its mandatory nature for WTO members. This agreement is the basic legal framework which aligns the GI protection among nations. Part II Section 3 of the agreement deals with the GI protection. Article 22 provides the definition of Geographical indication, article 23 talks about special protection to wines and spirits and Article 24 provides for various exceptions to GI protection. It is a single most regulatory framework which sets minimum standards of protection for countries to provide GI. The Lisbon agreement also provides for GI and AO protections in different products through WIPO.

With the different legal frameworks, the various forms of protection in protecting the origin of goods come into light. The various forms of protection can be broadly classified into GI tag protection, indication of source and appellations of origin. These kinds of protections also differ in the standard of protections, the minimum requirements for having protection and the nature of protection provided by them.

⁹ Article 9 of the Paris Convention for the Protection of Industrial Property, last revised at the Stockholm Revision Conference held Mar. 20, 1883

21 U.S.T. 1583; 828 U.N.T.S. 305

¹⁰ Article 10, Paris Convention for the Protection of Industrial Property, as last revised at the Stockholm Revision Conference, Mar. 20, 1883

21 U.S.T. 1583; 828 U.N.T.S. 305

¹¹ Daniele Giovannucci, Tim Josling, William Kerr, Bernard O'Connor, May T. Yeung *GUIDE TO GEOGRAPHICAL INDICATIONS: Linking products and their origins* (first published by the International Trade centre 2009) 19.

III. GI PROTECTION TO SWEETS AND POPULAR RECIPES

The grant of GI tag to popular food items has been a keen practice since the coming of such a protection. Various popular sweets and other recipes have been protected under the framework of GI, indications of source or appellations of origin linking the monopolistic advantage to the particular location. The legal recognition of such specific protection can be traced to article 23 of the TRIPS agreement which provides for “additional” protection to wines and spirits with a view of preventing unfair competition. The questions that arise here is why the need to protect popular recipes arises? And what kind of protection is absolutely necessary to save the essence of such food item? And does the grant of GI tag provide for effective and adequate protection as envisaged in the TRIPS?

The protection provided to locally manufactured food items, sweets or popular delicacies is a prohibition on unauthorized producers from using the popular variety name. It grants special status to those regional manufacturers over the protected GI item. Popular delicacies are popular because of the name that is linked to the region of production.¹² It also helps to prevent food adulteration¹³ because of the regulated nature of manufacturers. To completely understand the need for providing recognition to such food recipes, it is important to compare the forms of regulations practiced by various jurisdictions below mentioned.

A. GI Protection in China

The people's republic of China has been known to protect its geographically originating products even before the advent of GI through TRIPS. With the coming of the TRIPs agreement which provides for countries to regulate GI with the framework of their choice, China employs a dual system of protection to its products. It uses its trademark laws as well as the specific GI protection system in the form of special labels to geographically originating products to protect geographical indications¹⁴. Article 10 of the trademark law in China, provides legal recognition to Geographical indications as being registered trademarks, which do not have any other meanings.¹⁵ Thus, such GI's can be registered a certification marks or collective marks as per the law. The decisions as to the registration of GI as trademark lies with the state intellectual property office, because China only recognizes registered trademarks.¹⁶ On the other hand, China provides for special label system which envisages the protection of origin by the way of

¹²P.S Vasudeva, 'Sweets, silk & GI tag' *The Tribune* (August.19.2016)< <https://www.tribuneindia.com/news/archive/comment/sweets-silk-gi-tag-277749>> accessed 15.03.2022

¹³ Ibid

¹⁴ Lanye Zhu, 'An Analysis of China's System of Protecting Geographical Indications' (2006) 1 AsJCL [ii]

¹⁵ Art. 10, Trademark Law of the People's Republic of China, 1982 as amended in 2001.

¹⁶ Hu Gang, 'Evaluating the Treatment of Geographical Indications in China' (2020) 285 *Managing Intell Prop* 114.

Regulations for designations of origin, 1999 which defines designations of origin as a product which takes raw materials originating from a particular geographical area and uses traditional techniques thereby essentially determining their quality, special features and reputation to such area, and which is approved according to the regulations to be named after its place of origin.¹⁷

The second system is administered by both the General Administration of Quality Supervision, Inspection and Quarantine (AQSI) and the ministry of Agriculture (MOA), thereby giving three forms of protections. Along with this, china's unfair competition law, Product quality laws and consumer rights law also affords protection to GI.¹⁸ Some scholars have found this triple mechanism of protection to be disadvantageous to the GI protection seekers as it adds to the burden of getting a GI and also leads to ambiguity. It is often argued that these three systems should be integrated to form one substantive system of GI's in Chins, because of China being such an enthusiast of GI protection.¹⁹

B. GI protection in European Union

The EU has had a distinct history of protecting geographical indications owing to the wine producing regions and the trend of protecting viticulture techniques²⁰. The EU provides for three kinds of protections for products of a specific origin namely, the PDO (Protected designations of origin), PGI (protected geographical indications) and TSG (Traditional specialties Guaranteed). With more focus on the foodstuffs and wines, the EU has an integrated system of grant of GI.

Where the PDO and PGI explicitly relate to the origin of products, TSG system is more concerned with the traditional methods of production instead of focusing on the place of origin. An example of TSG is the mozzarella which is a specific guaranteed product registered in EU in 1998, another example of such protection is the Kriek beer which was developed by a special method in Belgian breweries²¹. Thus, the essential requirement of being from a specific origin is dispensed with. EU has its own set of regulations governing the PDO and PGI. The regulation 1151/2012 lays down conditions for grant of both PDO and PGI. The two require to be originating in a specific place, and a quality link between the product and the origin attributable

¹⁷ Art. 2, Regulations for designations of origin, 1999. (China)

¹⁸ Bradley M Bashaw, 'Geographical Indications in China: Why Protect GIS with Both Trademark Law and AOC-Type Legislation' (2008) 17 Pac Rim L & Pol'y J 73.

¹⁹ Haizheng Zhang and Didi Hu and Yanhui Li, 'Protection of Geographical Indications under China's Intellectual Property Legal Framework' (2016) 17 Austl J Asian L 391.

²⁰ Fabio Parasecoli and Aya Tasaki, 'Shared Meals and Food Fights: Geographical Indications, Rural Development, and the Environment' (2011) 2 Environment and Society 109.

²¹ Yves van Couter and Florence d'Ath, 'Protecting the Origin of Foodstuffs in the European Union: Indications of Origin and Trademarks as Intellectual Property Tools' (2016) 11 Eur. Food Feed Law Rev. 6.

to the natural and human factors. The only difference lies in the place of production, where in PDO all the stages of production need to take place in the defined geographical area, in PGI, only one of the stages in the geographical area is sufficient for protection.²²

IV. ISSUES RELATING TO GI PROTECTION OF SWEETS AND POPULAR RECIPES

The basic aim of any GI tag is to grant monopolistic advantage of producers of a specific area where the origin of a product is linked to. Generally, a GI protection is used for goods specifically manufactured in an area which have their qualities attributable to the natural conditions of that particular area or some traditional or cultural knowledge which confers on the product its unique identity.

When it comes to sweets and other popular recipes, which are prepared pan India, the grant of GI tag to any particular area would completely ruin the actual aim of GI protection. Anything which though may have originated in a particular area may not be confined to such area anymore. So what does the protection mean for producers of such products? It would be irrational assuming that the other producers of such a product would stop manufacturing it, even if they could stop using the traditional name of the product based on the origin, they would still not lose their distinctiveness.²³

Drawing a comparison with the other systems of IP protection, only an undisclosed work which has not been in public domain is generally granted an IP protection. So, in cases of sweets and other popular recipes that are already in public domain be granted such a protection, that too depriving a huge population of producers who are not locally present in the area of origin.

Another important concern is regarding the scope of such protection; many distinct recipes are native to very small area and may not be local to the whole state where the protection is granted, as the banglar rasogulla, which is native to only specific parts of West Bengal²⁴. In this case, the GI protection may be prone to exploitation, and with the aim of exploiting such protection, the population of such protected area may come up with manufacturing units, which would in turn result in loss of authenticity of the product and increase the number of unfair and mala-fide trade practices.

One more significant issue comes into light with the Doha rounds of negotiations where EU demanded that certain genericization of words, which predominantly arose from Europe be

²² Vvw Duba, 'The Indication of Source, Appellation of Origin, and Geographical Indication' (1995) 7 S Afr Mercantile LJ 176.

²³ Sreyoshi Guha, 'Why I Love My Rasogolla Without its GI Tag' (*Spicy IP* 24. November.2017) <https://spicyip.com/2017/11/why-i-love-my-rasogolla-without-its-gi-tag.html> accessed 16.04.2022

²⁴ Ibid.

returned, where the rounds collapsed in 2006.²⁵ The French system follow the rule of *terrior* which though does not have a specific English translation, means connection to the soil or land. The GI protection to food recipes is just adverse to such rule.

V. ALTERNATIVES

The protection granted to products in India, specifically, deals with providing GI protection under the Geographical Indications of Goods (Registration and Protection) Act, 1999 and the rules made hereunder provide protection to goods either natural, agricultural or manufactured where quality, reputation or characteristic is attributable to the area or when manufactured the process or production or preparation is done in that territory.

- In the context of sweets and other popular recipes, the protection provided by geographical indication under the current legal regime does not appear to be adequate. An alternative method of protection shall be in the form of the trademark protection, which is also prevalent in other jurisdictions in the form of collective marks or certification marks, as discussed in the research above. By the way of trademark, the problem as to misappropriation of protection can be remedied as only a handful of producers which are authentic could get the protection and this would also not contradict the basic requirement in case of GI, which is the attribution to the place of origin.

- Another measure which could go hand in hand with the geographical indication protection to other food stuffs, is as provided by the way of TSG, thus suggesting a more substantive form of standard for protection in the form as to where any one stage of manufacturing should essentially be linked to the area of origin, which guarantees that the quality of product is essentially attributed to that particular area and the product cannot be made anywhere else. But the implementation of such method would mean the stricter compliances for the manufacturers as well as stricter checks.

VI. CONCLUSION

The evolution of geographical indication protection has been monumental, but the GI's have always been a matter of controversy. The GI protection has been practiced in different forms such a indications of origin, appellations of origin, PDO, PDI, TSG and even trademarks. In a country like India, with such diverse yet interlinked cultures and traditions, it is an arduous task to dissimilate the indications of origin. In such a scenario, the even bigger issue is with regards

²⁵ Justin Hughes, 'Champagne, Feta, and Bourbon: The Spirited Debate about Geographical Indications' (2006) 58 Hastings LJ 299.

to traditional recipes, sweets and popular delicacies, which is a challenge for the GI framework.

The tremendous growth in GI applications in India, and their grant may seem economically beneficial but in long term may prove to be the sole reason for generating undesirable monopolistic lobbies and other unfair trade practices.²⁶ A look at the GI granted to “tirupathi laddu” where a religious shrine has been granted GI protection is something unique and may become a matter of dispute and often lead to questions on basic constitutional principles.

Thus a very clear understanding of the scope and parameters of GI protections have to be developed to averse such future ramifications. India has been steadily aiming to raise the standards of GI protection in addition to the TRIPS provisions.²⁷ Thus, Indian system of GI's for popular recipes and sweets needs a turn around, along with adoption of an alternative form of protection.

²⁶ Meghna Banerjee and Susanah Nausahd, 'Grant of Geographical Indication Designation to Tirupati Laddu: Commercialization of Faith' (2010) 3 NUJS L Rev 107

²⁷ Ibid.