

Protecting Geographical Indication (GI) under the TRIPS Agreement: Scope of Developing Countries and Least Developed Countries (LDC)s to Protect their Products against Biopiracy

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DOI: 10.55662/SALRJ.2024.903

Abstract

Geographical Indication determines the place of origin of a particular good with the essentials as to the quality and cultural indication. Bio piracy of traditional knowledge often conflicts with the geographical protection mechanism. The developing and the least developing countries are the most afflicted where relevant legal processes can ease this journey of protecting the rights of individuals. The Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement, 1995 plays an indispensable role in signifying the GI protection. It assisted in framing the national mechanisms of countries to make a suitable format that can be followed outright. Due to several challenges, the agreement tried to make the process comprehensible yet questioned in respective fields. The practice of bio piracy in several countries is a matter of concern as it directly affects the right of geographical indication. A respectable number of cases are made where the lack of knowledge concerning intellectual property rights is visible whereas the members of developing and the least developing countries are high in number. The dual or mutual protection process given by the multilateral agreement should cover the indigenous rights of the communities, their domain of knowledge and their traditional apprehension followed by the goods or products or knowledge of a certain origin. The paper indulges into the concern and diversion of TRIPS Agreement while protecting the Geographical Indication

in places of origin preventing the malpractice of bio piracy and concludes with the processing of mitigating the challenges.

Keywords: Geographical Indication, Bio piracy, developing countries, least developing countries, TRIPS Agreement.

1. Introduction

The past decades have tried to drive into the concept of protecting the right of intellectual property. The TRIPS Agreement under the periphery of WTO has emerged as a protective tool in this regard. Geographical Indication is a major intellectual property issue misused due to geographical names in the national and international market. The public law approach alongside the private law must work together to prevent infringing this one. The proper and methodical registration process is required to protect the legitimate holders of GI.

Geographical indication refers to some entity or existence that specific territory owns to be known by that product and profited as well. It is one of the themes of intellectual property rights for the territory where the product has been identified. There are numbers of domestic and international legislations concerning this point, where the TRIPS agreement is one of them that covers Intellectual Property covers the areas of patents, designs, trademarks, copyrights, trade secrets and Geographical Indications (GI) where Geographical Indications is the newest addition which pinpointed the territory of a member country, or a region or locality where a inclined quality, reputation or other characteristics of a good is essentially determinable to its geographical origin. Therefore, it is a unique form of Intellectual Property Rights provided and properly accessible to the community of producers who have brought in the long-established knowledge from generations and produce products of exclusive essential qualities for long serving their territory (Nayak 2010). The TRIPS agreement and its provisions give some concepts by which the region or territory can claim its protection under their procedure and that is secured by World Trade Organization (WTO). Here the developing countries and the other least developing countries are periodically may downfall in a victim causing to some non-fulfillment of requirements under the international obligations, along these lines their protection for geographical identification cannot be materialized.

Thus, the cultural identity, quality and reputation of the goods relates to the geographical indication tool where specific focus should be given and applied on the infringements with other emerging issues in the least developing countries. Within the ambit of such infringements, bio piracy is one of them where the developing and the least developing countries suffer most. The proper and strong cooperation of domestic and international legislations and multilateral agreements has a lot to do. The Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement 1995 has placed it in such a position that it can prevent bio piracy by upholding the geographical indication protection mechanism.

2. What are Geographical Indications (GI)?

The word geographical indication (GI), a pointer or indicator applied on products that objectify a distinct geographical origin and acquire qualities or a reputation, are due to that origin (Geographical Indication, 2020). Geographical Indication helps to provide legal protection of the traditional knowledge of goods of a territory alongside taking legal action against unauthorized users of that goods. Ensuring economic and monopoly rights is another way for Geographical Indication. In short it is an indication whichever we can verify the origin of a good or knowledge which is a component of the intellectual property regime and providing legal means to preserve such right of the good.

The initiation of Geographical Indication started with France following the application of origin concept. This concept refers to the quality and reputation of a particular good. Here they focused on the wines and cheeses in their region. Following the given trend, the other European countries identified the origin name as the geographical indication. Agricultural products were a part of this concept based on the climate and soil of an area determining the key features of a product. Here the materials and labour associated with the making are also significant traits. The Idaho potatoes and Bordeaux Wines are a few examples in this regard. The classification of Geographical Indication indicates the appellation of origin and indication of source (Bikram 2014).

3. Literature Review

Intellectual property protection has become a significant part in the era of legal framework. Prior to the international legal mechanisms, it followed few processes to preserve the rights of the individuals. Currently after enacting a suitable number of legislations, preservation has gained a new dimension.

With passage of time, the concept of intellectual property rights has emerged and consequently it has become a precious commodity. Patent, trademark, copy right, geographical indication are a few parts of it which need major attention with appropriate protection mechanism. GI protection is visible at the national level with legislative actions and at the international level it depends on agreements and treaties. One of the major ones is the TRIPS Agreement. But prior to this agreement, few methods were followed in protecting GI such as sui generis schemes, legal and administrative actions, collective or certification marks. Protection to collective mark as GI is maintained in Japan, United Kingdom; protection as to certification mark in GI are followed in Canada, United Kingdom, United States etc. About the sui generis method as to GI is maintained in India, Malaysia, Türkiye, United States etc (Nomani et al 2016). United States' produce 'Jasmati' rice is often mislead with the jasmine rice in Thailand or with basmati rice under Indian subcontinent. This hybrid one is developed from Italian Bertone rice. Genetically it has no connection with jasmine rice yet completely misleading for the consumers where Thailand falls under their first bio piracy issue. This rice is not only considered as staple food of Thailand, rather it has a suitable number of export value (Ngokkuen et al 2012). Often, other intellectual property rights fall into the same perception. For example, the trademark and GI protection are not identical. Trademark gives a right to the owner that it can prevent other using it, on the other hand GI has to do with a place or origin and their goods. GI allows the producers the right that their product cannot be produced and sold and named by other entities or unauthorized parties. Darjeeling tea, if not made in the gardens of Darjeeling that might be a way which can deceive the consumers (Hyder 2016)

In India, we can see a respectable number of cases where the traditional knowledge related geographical indication was connected. Neem, Basmati rice, Turmeric are the prominent cases here. Before TRIPS, the methods were followed differently, and after it comes with a meaningful change in the era of Geographical Indication. To strengthen this part, the

preservation of traditional practice and culture is needed; bio piracy should be avoided; the protection of GI products alongside a proper price benefit with marketing is essential here (Nomani et al. 2016).

Thailand follows the sui generis method by which they enforce their specified legislation on GI Protection (2003) that refers to adding value on products, preserving traditional knowledge, distribution of GI income in the rural areas along with maintaining the standard of the product. Before the said Act, they hardly had domestic legal provisions on GI protection. Intellectual Property rights have been developed well and placed properly in the center stage, there a higher level of protection for trademark law is visible whereas being a member of the International legal mechanisms GI protection must have more stronger effect (Ngokkuen et al. 2012). Therefore, the protection of GI regarding bio piracy should be taken care of with necessary legal and administrative measures mostly in the least developing countries.

4. Geographical Identification Protection under TRIPS Agreement

To get the protection from the World Trade Organization (WTO) the states use to be member or signatory of the TRIPS Agreement, it encompasses some provisions for the protection, identification, and remedies for geographical identification issue.

It provides the member states could take legal means if their geographical identification imitated or used or claimed by some other territory, even for unfair competition further. Another important facet is if any trademark consisting of some information ascribing to that GI good then the member state can apply for its invalidation of that trademark to prevent misleading the public about that product concerning the protection mechanism under the Agreement. Another important provision they grant for wine and spirit and their geographical identification regarding taking legal means; invalidating trademarks accommodating such GI; homonymous products to be differentiated and the negotiation under the TRIPS council. Besides, there are provisions for exceptions that the member states must be accessible for negotiations; no member shall assert to prevent any GI containing some common names or language; any person's personal name, business or predecessors; the protection shall not be taken if that GI existed in the country prior to the date of entry into

force of the WTO Agreement. Along with the national treatment under this agreement to protect the national based issues and the most favored national treatment issue for whom those already established a proper forum of those products ("TRIPS Agreement 1995) this agreement permits the legal support towards the member states with respect to their protection.

TRIPS Agreement under their several provisions as to articles 22 to 24 established that the GI refers to an indication of a good on a particular territory or place which gives upon a specified quality and other relevant characteristics. Alongside it offered certain obligations towards protecting the GI rights (TRIPS Agreement, 1995). Additionally other provisions give upon a definition with a scope of minimum standards, other protection mechanisms with few exceptions as well. The general level protection indicates the legal means preventing unfair competition and the higher-level protection is confined to Wine and Spirits to prevent misleading scenarios, but these levels are frequently creating hazards as to the question of equal attention through equal protection. (Bikram 2016).

There are also some other international convention treaties concerning this such as the Paris Convention where the country of origin has been introduced, Berne Convention, Lisbon Agreement that work for the entire international GI protection, however these have been settled down regarding the intellectual property rights and with the national regime aspects. Although The paper focuses on the TRIPS Agreement, whereas some other conventions talk on the geographical indication issues. The Paris Convention deals with the indication of source. The Madrid Agreement under the Paris Convention follows the indication of origin where it focuses on the prohibition of false and deceptive indication. The Lisbon Agreement discusses the appellations of origin with the registration process (Bikram 2014)

5. Geographical Indication and Economic Stability

Brand recognition is necessary for their marketing their Geographical indications enable date or perception and characteristics of a product that is directly communicating with its origin. So that the consumers may differentiate the products the brand name may promoted. Geographical indications can thus be a key element in developing brands for quality-bound-

to-origin products in this manner. Another important aspect is trade and business where the individual territory or region may have their own products with their own monopoly rights. Even according to the GI protection their traditional knowledge or can be protected too. The recognition and compensation along with licensing and assigning process of business can be derived with the geographical indication. Overall, the origin itself provides the maximum benefits of any product.

6. Biopiracy and Geographical Indication (GI)

Our client asked us to provide a custom solution. One region may have their own traditional knowledge by which they made some products for long. Whenever this knowledge is used by some other territory without the permission of the state from which the concept was deriving that is called bio piracy. There is no proper internationally agreed definition on bio piracy yet, the Rural Advancement Foundation International (RAFI) defined in such way that this is based on a knowledge that is followed by the indigenous communities. Here the term can be explained in another way that the knowledge of the communities is often used or claimed by the developed world taking advantages for commercial benefits. Knowledge is technically possessed by developing countries thus the term can be used suggesting a breach in agreement using the knowledge and without the consent of the communities or individuals (Nomani et al. 2016). Most often the developed countries take the chance of bio piracy from developing or least developed countries and they are hardly aware about the intellectual property rights and legislations. As this manner their traditional knowledge is used by some developed countries without giving a proper recognition or compensation that is a part of bio piracy. The developing or least developed countries are often a victim of these. The Kahahari region and their traditional knowledge for a plant extract and the uses of 'neem' tree for its medical purpose these were eventually used by developed countries without giving them recognition and compensation which is a clear case of biopiracy. Countries follow the knowledge of using natural ingredients and some countries take that knowledge and make their own products. This scenario refers to the fact that bio piracy derives from taking the economic opportunities of few countries as well. The example of neem, turmeric, India followed the traditional knowledge and use it in several places such as cosmetic products,

medication, agriculture etc and India has a bio piracy dispute with United States over the rights of neem. The basmati rice dispute is another of them (Nomani et al. 2016)

Now goods or products are indicated by a Geographical Indication with the components of the traditional artistic heritage developed in each region, known as “traditional cultural expressions”. All these indigenous and traditional identifications, signs and marks can be a part of Geographical Indication and may get protection as Geographical Indications despite their having no direct geographical meaning. If there is a strong intellectual property law and the Geographical Indication protection these traditional knowledge and traditional cultural expressions (in short TK and TCE) can be secured and provide legal means against misleading and deceptive trading practices (Geographical Indication: An Introduction) This step may assist the indigenous communities as they can facilitate the commercial exploitation and economic development, such may work as an improving tool in this regard for the economic sustainability.

7. Developing and the Least Developed Countries (LDC) and Geographical Indication (GI)

Concerning Geographical Indication or the “place of origin” suggests to consumers or buyers with a good having essential quality or characteristic that they may value, even if they use to pay more for such products. GIs as an intellectual property right (IPRs) ensures the protection for accomplishing the current context of internationalization. These countries have food products, handicraft products need the attention and protection, some major actions or measures taken for the of Least Developing Countries planning at preserving and enhancing the commercial and ethical value of their traditional products to maintain biodiversity introducing pro-poor policies. For this sector GI can be an absolute form of Protection of local species, food quality enhancement, environmental protection, collective management and many more aspects.

- *Least Developed Countries (LDC)s*

The least developed countries are already in a situation where they need the absolute training to revive and preserve their economic condition. Only these factors can maintain their

standard of living. The GI protection under the intellectual property rights shall provide them the security that their original products would have a monopoly right and in such manner their condition can be improved. But most of these countries are less aware of intellectual property law and its application as follows they fall into complications regarding this right.

- *Developing Countries:*

The emerging and developing countries have engaged themselves in international negotiations concerning Geographical Indications with intergovernmental negotiations. At this concern they face several challenges as of the reciprocity of international recognition of their own produce of origin through the TRIPS Agreement. An example of South that their long grain scented basmati rice, produced in Himalayan Piedmont and Gangetic plains of India and Pakistan. So here already a matter with the place is present. Later, the protection mechanism of TRIPS Agreement, the rice producers of India and Pakistan faced the trademark deposited for the American type basmati rice that is produced in United States are responsible as there is a matter of unfair competition is prevailing there to mislead the consumers (Sautier et al. 2011) Many geographical names in developing countries have been usurped outside the region or country which is needed for both economic and cultural motivations.

8. Scope of the Developing Countries and Least Developed Countries (LDC) against Biopiracy

The relevant international obligations require applying intellectual property law to protect the GI of the developing and least developed countries. In this respect what are the available scope for these regions are elaborated below-

- *Strong Intellectual Property Law*

A strong and effective Intellectual Property law must be initiated to protect their products and traditional knowledge from bio piracy. Their domestic law should have a clear implication concerning this matter. Not only law implication, but its regular monitoring is also needed.

- *International Obligations*

The international convention treaties regarding intellectual property law should be applicable in each state to get a remedy in case of GI protection with other states. The international registration process should be more adapted. Here the TRIPS Agreement, Berne Convention, Lisbon Agreement can be referred.

- *Transparency*

The formal and informal institutions concerning intellectual property law and GI should have a proper transparent procedure whether in domestic or international institutions. To validate the transparency, the legislations those are pertinent to Geographical Indication, the enforcement mechanisms, and informal institutions (local customs or practice, social norms) are significant part here for the developing and least developing countries to maintain the geographical indication as a development mechanism for their further improvement.

- *Biopiracy and remedy*

Biopiracy is one of the issues between the developed and developing or least developed countries where the products or knowledge is used without mentioning the origin. Thus, these countries are most affected by this, so a strong IP law is needed to initiate for bio piracy. To take legal actions against the territory that is misleading the GI and to case file as well.

- *Products variation*

Not only agricultural or food products, but the traditional knowledge expressions should also be supervised by geographical indication to ensure recognition and popularity.

- *Financial support and capacity-building:*

The protection will not a less costly work, so it needs financial support along with capacity building factors, the establishment of the marketing and surveillance mechanisms. The local producers should be given a chance to work independently and within their self-organizing pattern. This should be set as a priority.

- *Local and external markets factors*

the GI products should not be confined into the international market or out of border aspect, it needs the attention and cooperation of the external domestic markets as well, the local consumers should be allowed to Be Tasting the products based on their actual origin where a respectable number of quality and standards should be well maintained.

- *Sui generis System and use of collective or certification marks*

The sui generis system, along with the applicability of the collective or certification marks, should be incorporated to register for the GI, and the focus must be on business practice.

Another scope we can incorporate that is the Council of WTO has given some guidelines due to this particular of geographical indication, here some scope can be altered for the developing and least developed countries but still there is a question a reliability of this guidelines.

9. Challenges of Developing and the Least Developed Countries (LDC) in implementing GI

The implementation of GIs in developing countries and LDCs is ore suffering as to weak institutional structures. Some of the LDCs commercialize origin products without having the GI recognition some LDCs have already made GI registrations, for example Ziama-Macenta robusta coffee registered as GI in Guinea; Kampot pepper GI registered in Cambodia and as PGI in the European Union (UNCTAD 2015). The two stages protections provided by TRIPS Agreement, where the higher levels are preserved for wines and spirits and general protections are available for all, here the developing and least developing countries hardy have the opportunities with wine and spirits (Bikram 2014) As follows they face challenges due to precarious institutions and not having a proper national GI regulatory frameworks etc. it has a larger range of diverse and complex factors and cultural context such as transparency, considering the ethnic groups and many more. Only by allowing all these proper GI processes can be initiated and overcome the challenges as well.

10. Bangladesh Perspective

The paper reflects on the developing and the least developed countries in that place Bangladesh is a developing country falls under this theme. We have already taken the protection of GI under the Jamdani saree, moshlin and Hilsha fish. Along with some of the more products are trying to be a part of this sector including Fazli mango, Langra mango, Kataribhog rice, Kalijira rice and honey from the Sundarbans. We have an Act called the Geographical Indicative Products (Registration and Protection) Act 2013. Under the act, if there is any claim or complaint for certified GI products, the complaint must be given within two months. Otherwise, the decision will be granted. Bangladesh, after introducing the GI Act in 2013, it came with multiple opportunities that the products of Bangladesh will get a proper GI tag. As GI is associated with the culture, climate, reputation of a specified territory now the goods or products of Bangladesh will get adequate placement. The Act has opened with a GI Unit where any person can come and apply for the registering the GI goods. Though the Act has been questioned on the factor of "Appellation of Origin" as the goods and place should be strongly connected and which is another format of GI. The application of this term in the legislation must have benefitted the GI goods in Bangladesh (Hyder 2016)

Earlier in Bangladesh we have an ordinance named Geographical Indications of Goods (registration and protection) Ordinance 2008, identified 66 products as the country's GI products including vegetable products, agricultural, food items, Jamdani and Nakshi katha etc (Siddidue 2017) so as we can see being a developing country Bangladesh have stepped towards the intellectual property rights along with some national and international obligations. The other developing or least developed countries should follow the same path for ensuring protection.

11. Some Case Studies

The Darjeeling tea in India, the Basmati rice in India; Bhutanese red rice; Harennna wild coffee, Wukro honey from Ethopia; Kampot pepper and durian from Cambodia; Ziama-Macenta robusta coffee from Guinea, pink rice and many more items that are clear examples of the geographical indication of various region and territories who have

gained this position with regard to their GI and Intellectual property law so far. The bio piracy with Turmeric is another case study concerning the application of traditional knowledge in the year 1995. Two non-resident Indians got US patent at the University of Mississippi Medical Centre on using the turmeric in wound healing through applying it directly or by oral supplement. That Medicine Centre of US claimed its novelty whereas the use of turmeric was preexisted in India. Thus, the Indian Council of Scientific and Industrial Research (CSIR) tried to prevent it as that medicinal use was not novel and they are using this knowledge for about thousands of years. Documentaries, papers, and other references made in Urdu; Sanskrit made this clear that the use of turmeric is existing prior domain knowledge in India. This is considered one of the landmark cases under the concept of bio piracy and the first successful one (Nomani et al 2016).

The case with neem tree is another example of bio piracy. W R Grace, an agricultural company in Florida used the extracts of neem and made a product and was patented. But before that, Indians were using neem for multiple reasons. Thus, the company claimed that they could not use it. But the use of neem tree was not novel at all. One more case with the famous basmati rice grows in northern part of India and Pakistan. This variety cannot be produced in other places. This the manual pricing and export value of this basmati rice grew higher. In Texas, a company RiceTec made similar rices named 'Texmati and Kasmati' where the question of bio piracy came in. The rice breed made in Texas had few similarities with basmati, yet that claim did not go well. But this has certainly blemished the reputation of the original basmati rice made in Asian sub-continent (Nomani et al 2016). These cases are examples where it showed to what extent the legal knowledge should be admirably adapted by Indians concerning the Intellectual property rights. Otherwise, the traditional knowledge of developing countries is often taken by the developed ones. Another important thing is the developing and least developed countries usually have more traditional knowledge than the others that should be brought under legislation is an important task.

12. Conclusion

Though Bangladesh inherited the intellectual property rights mechanism process from the British regime, yet it took years to finalize a domestic legislation based on geographical indication. Here the TRIPS Agreement plays a vital role in framing the concept of GI,

promoting goods on distinct areas and the eligibility of being protected under any legislative authority (Hyder 2016) The protection of geographical indication refers to an origin from which one or more products can be derived along with some specific qualities and characteristics. This indication may vary to develop to any developing or least developed countries as well, but the thing is from whatever place the products have been originated that should be recognized otherwise some other may take advantage of.

The developing and the least developed countries often fall in victims due to this specific, their intellectual property law is not that much strong enough to protect their products as follows a strong legislation is needed. Legal mechanisms are providing the guidelines that how the legislation should protect and how the unfair practices in GI protection can be eradicated. The continuous practice of bio piracy is another obstacle in preservation of geographical indication in a territory.

Protecting GI while keeping an issue with bio piracy is undoubtedly a tough task. TRIPS Agreement has played a meaningful representation here through providing diverse levels of protection in GI. While the protection mechanism often questioned dealing this term, yet this is the most comprehensive agreement in international level concerning Intellectual property till now. Two level protection issues can be solved following the best interest of all the countries and allowing a liberalized market. Few propositions were given to TRIPS council to negotiate things and eradicate a few modalities which can allow them to work in a better way. (Bikram 2014). Call for awareness by Government, other stakeholders and for the mass people in developing and least developing countries is a needing factor in this regard as their insufficiency of knowledge may lead to another defeatist site of bio piracy. Finally, the dualism aspect and its implementation with geographical indication in these products of the countries should be materialized to shelter them from biopiracy where mutually agreeable explanation is essential.

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