Law of Geographical Indications: Judicial Trends

8.1 Introductory Outline

Some products are unique because they can be produced only in a certain geographical region, for example Champagne is a naturally sparkling wine produced in the Champagne district by a process of double fermentation from the grapes grown in the Champagne district of France only or Darjeeling tea is a premium quality tea produced in the hilly regions of the district of Darjeeling in the State of West Bengal, India. These products become reputed because there is a link between their quality characteristics and the geographical attributes of the region where these products are being produced. Such products are not only agricultural commodities like tea, rice, wine, spices, fruits etc., but also encompass handicraft items such as sarees or shawls or some metal with traditional paintings on them; or it could be even food stuff like Hyderabad Haleem or Prosciutto di Parma. Property rights are often sought for such goods based on the fact that they are produced in a geographical region which has unique geo-climatic characteristics and involves traditional skills. The replication of these goods is impossible elsewhere as these traits render a unique value to the product. There is no justification for the goods emanating from another region to use the same geographical term for them. It will ipso facto be a misrepresentation and therefore, a special right makes more sense than an action which requires proof of misrepresentation. An appropriate law seeking to protect geographical indications would therefore endeavour to cohere the asymmetry of information between the producer and the consumers thereby allowing them to invest to a maximum for improving the quality and, thus, the reputation of the good.

GIs are one aspect of intellectual property that may afford protection to traditional knowledge without conferring absolute power to any single person. It has potential to provide a sustainable means of competitiveness even for remote regions of developing countries. In developing markets little attention is paid to strengthening intellectual property rights systems. Many developing countries like India have failed to take the advantage of the form of protection available to GIs that has led to allegations of “biopiracy” by developing countries toward firms who use genetic material from traditional varieties. The controversy over the granting of patenting rights to three strains of Basmati rice to RiceTecInc, by the US Patent and Trademark Office
provides a good example. This fact is of importance to be mentioned because India’s legislature moved very slowly to extend GI protection to its agricultural products such as Basmati.

**8.2 Role of Judiciary in Protecting Geographical Indications**

Judiciary is one of the most important pillars of the Indian democracy. It acts as a guardian of the interests of the citizens. The judiciary in India is separate and independent of the executive to ensure impartiality in administration of justice. The range of judicial review recognized in the higher judiciary in India is the widest and most extensive known to any democratic set up in the world. Judiciary is not confined to interpretation of laws only but also in evolving new principles and doctrines in dealing with new situations. The decision of judiciary sets precedence and therefore it is important that the judiciary be acquainted with the laws and its implications.

The dynamic nature of the intellectual property system further complicates its analysis. It exists within society, and shifts in response to social, political, and economic circumstances. Thus, when society values change, so may the motives and attitudes of creators, invention, and users of intellectual properties. In general the judiciary plays two distinct and important roles in relation to IP as follows:

(i) Interpretation of the various IP Statutes.

(ii) Adjudication of IP litigation or disputes.

The judiciary interprets IP statutes while adjudicating upon IP disputes. It is through this process of pronouncement and interpretation of the laws involved therein that the judiciary leaves its shadow on the development of trade and commerce and consequently the nation’s progress. One of the best examples highlighting the importance of interpretation of IP statutes is the case of *Diamond v. Chakraborty* decided in 1980 by the *US Supreme Court*. In this case patent was granted on a micro-organism, a living being. The decision was first of its kind to grant patent on living beings as there were several unsuccessful attempts earlier to patent life and decisions of law courts rejecting claims on life in different parts of the world.
There are four important stages in the life cycle of any intellectual property. Firstly, there is creation of the intellectual property, secondly protection of the intellectual property, thirdly utilising the intellectual property and lastly enforcement of the intellectual property. The judiciary has an important role to play in each of the four stages in the IP life cycle. The fourth stage is the most important stage in the lifeline of an intellectual property as it prevents others from unauthorized utilisation and exploitation of protected intellectual property for the duration of the protection.

The law lords has always played a proactive role in the protection of Intellectual Property Rights and has invented and extended general principles to cover such cases. The glaring example is Novartis case. Swiss drug firm Novartis lost its legal case against the Indian Government, who it had accused of ‘unconstitutional’ patent law practices. The Novartis challenged the constitutionality of Section 3(d) of the Patent Act as amended by 2005 Patent Amendment on the ground that it was not TRIPS complaint and also some terms in the section are vague and can lead to arbitrary decisions from the patent office. The High Court of Chennai rejected all the plea of Novartis and held that “when domestic law is challenged on the grounds of it being in violation of an international treaty, domestic courts have no jurisdiction”. The ruling sets an important precedent that will cheer the flourishing generics market in the country. In Novartis AG v. Union of India & Others the Supreme Court of India addressed the question regarding the grant of patent to a product which comes by an invention that has a feature that involves technical advance over the existing knowledge and that makes the invention “not obvious” to a person skilled in the art. This case deals with the sensitive issue of patenting a product which is outside the ambit of the definition of “invention” as provided in Section 3(d) of the Patents (Amendment) Act, 2005. In coming to the conclusion of the case the Supreme Court made a note that an error of judgment will put life-saving drugs beyond the reach of the multitude of ailing humanity not only in this country but in many developing and under-developed countries, dependent on generic drugs from India. The judgment of this case thus proved to strike a balance between the need to promote research and development in science and technology and to keep private monopoly at the minimum.

The Judiciary has played a significant role in past, particularly in the absence of any enforced legislation, to protect geographical indications also. It has applied the
common law principle of passingoff as suited in cases of geographical indications. Thus the courts have been giving effect to Articles 22 and 23 of the TRIPS Agreement even before it came into existence. It was the Supreme Court which compelled the government to take serious action regarding the biopiracy of basmati rice. Supreme Court has entertained petitions in cases of infringement of GIs that misleads the consumer as to the place of origin or constitutes unfair competition. The courts have granted injunction restraining the defendants from advertising and offering for sale or distribution in any country goods (including wines and spirits) where they indulge in colourable imitation and unfair trading to reap harvest by exploiting the goodwill of any goods or products which is essentially attributable to specific geographical area and is used in relation to particular goods originating from any country, region or locality, as the case may be. Inspite of the fact the courts in India are playing a significant role in protecting IP rights there is urgent need of specialized judiciary, which can deal with intellectual property rights issues with care keeping the national interest in mind and ensure effectiveness of enforcement system. Rights holders are to be encouraged to participate in enforcement actions. The fairness of the procedures reflected in our laws and recognition of equal rights even to aliens by virtue of Article 14 as their fundamental rights should generate sufficient confidence in our legal system to encourage the entrepreneurs to be sure of the protection of their intellectual property rights which are recognized by the municipal laws.

There is a lot of pressure on the judiciary not only because of the lack of judicial precedents, but also because of the urgency that is shown by the parties in seeking relief. Corporations, individuals and the like come to the court seeking immediate remedy, while the court does have to look not only into the validity of the claim but also into the aspects like jurisdiction, international registrations of IP, market reports, etc. Intellectual property has grown multifariously in every part of the commercial world. Thus, the judiciary is required to have more knowledge and awareness about the intellectual property system. The present judiciary has an important role to play in interpreting the laws and in case of any conflict there is a need to strike a judicious balance between the interest of the nation and the demands of global justice.

8.3 Protection of Geographical Indication in Medicinal Plant: A Case Study

A critical analysis of the cases is briefly referred to as under:
(i) Neem

The neem tree, which translates as the ‘free tree’, is indigenous to the Indian subcontinent, where it has been used in agriculture, medicine and cosmetics for centuries. It has been referred to as the ‘curer of all ailments’ and the ‘blessed tree’ by the people of India as the leaves and the bark have been used to treat illnesses such as leprosy, ulcers, diabetes and skin disorder. The neem tree has many versatile traits that can be traced back to the Upavanavinod, an ancient Sanskrit treatise dealing with agriculture. The neem’s many virtues are to a large degree attributable to its chemical constituents. From its roots to its spreading crown, the tree contains a number of potent compounds, notably a chemical found in its seeds named azadirachtin. It is this astringency that makes it useful in so many fields.

The United States and India were involved in a biopiracy dispute over the rights to the neem tree. W.R. Grace, an agricultural chemical company based in Florida, developed a technology to extract the active ingredient in the neem tree seed in a stable solution and patented the stabilization process and the stabilized form of the ingredient with the United States Patent and Trademark Office (USPTO). W.R. Grace then obtained a European patent in 1994 jointly with the United States Department of Agriculture (USDA) on the manufacturing process of the neem tree seed oil as a fungicide. While the neem tree has been used in India for over 2000 years for various purposes such as pesticides, spermicides and toothbrushes, W.R. Grace had been suing Indian companies for producing the emulsion because they had a patent on the process. The dispute was over the rights of companies to conduct research and development by using patents against the interest of the people who live at the source of the tree. These patents meant that India, despite its ownership of the neem tree and having used the medicinal plant for centuries, had no legal rights to develop the plant for medicinal or curative purposes. It was considered to be both the intellectual as well as the biological piracy. Neem is a part of many Indians’ daily life and its access was free and unrestricted. The patent obtained on neem by the firm Grace disrupted access to this essential resource, with significant consequences in terms of price inflation.

The W.R. Grace patents provoked fervent public howl in India and led to India’s long journey to reclaim the neem tree. In 1995, a coalition of 200 non-governmental
organisations from 35 countries was established to protest Grace’s patent. The coalition fighting the neem patent - whose motto was ‘Free the Free Tree’ - was coordinated by the Green party in the European parliament. It included the Indian Research Foundation for Science, Technology and Ecology, an influential environmental group, and the International Federation of Organic Agriculture Movements (IFOAM), a pressure group for organic farming. The controversy over who has the rights to the Neem tree raised many questions. One of the important concerns of the coalition was that biological resources are common heritage and should not be patented. There was an increased awareness in India that the commodification of neem will lead to its expropriation by multinational corporations, like W.R. Grace. India claimed that the US Companies were actually stealing and pirating the indigenous practices and knowledge of its people that they have been using for years.

The Convention on Biological Diversity (CBD) that took place in 1992 at the United Nations Conference on Environment and Development provided that States are responsible for conserving their biological diversity and for using their biological resources in a sustainable manner, noting further that ex-situ measures, preferably in the country of origin, also have an important role to play. Indian laws at that time did not allow patents on agricultural and pharmaceutical products because they believed that the rights of poor farmers in developing countries will be harmed. India was not against sharing its information about the neem tree’s virtues, but it was against countries and corporations that intend to stop India’s use of neem. It was asserted by the Indian Government, who was one of the parties to the dispute, that the patent in question lacked two basic statutory requirements for the grant of a European patent namely “novelty” and the “inventive step”. Further they said that neem is a bio-asset that is protected under Article15 of the CBD which states:”

Recognizing the sovereign rights of States over their natural resources, the authority to determine access to genetic resources rests with the national governments and is subject to national legislation.

But W.R. Grace that was another party to the dispute believed that the result of research and development in foreign countries can lead to a greater public good because of the new discoveries of medicines and other innovations
India was eventually successful in its legal challenge of the U.S. acquisition of its neem tree ingredient before the EPO when it revoked the patent in 2000 as it was successfully argued that there was prior public use and the claims were therefore not novel. Thus, after six years of persistent campaigning by India, the Opposition Division of the EPO completely revoked the patent granted to the USDA and W.R. Grace. However, the American company appealed against the patent revocation. But EPO also rejected W.R. Grace’s subsequent appeal. Finally, on March 8th, 2005 in Munich, Germany the Technical Board of Appeals of the EPO due to a long and intense Indian civil society mobilisation revoked this illegitimate patent in its entirety.

*Implications of the Case*

The Neem case shows how fuss in ways of life can be caused by acts of biopiracy. This case was unique because for the first time a patent on developing country traditional knowledge was collectively opposed thus sending out a strong message on the need for global recognition and protection of cultural patrimony. There are three main issues surrounding the patenting of local products used for medicinal or agricultural purposes by the United States:

(i) First, the farmers will no longer be able to use these products without paying royalties to the company that has a patent on it.

(ii) Secondly, consumers will be deprived of cheap medicines and agricultural products.

(iii) Last, local communities should receive a share of the profits because the companies learned the value of the species from local knowledge.

Incidents such as the Neem tree piracy reflect the dangers of failure to protect cultural products. In India there is a lack of knowledge of the legal process that surrounds intellectual property rights. Due to absence of adequate legal protection for cultural products in India, it was felt that cases like this can arise again. Integrated approach at the international level was the need to protect such acts of biopiracy. Moreover, developing nations such as India have had to adapt to fast-paced intellectual property harmonization. Neem case reveals that there is a need to ensure that at the very least right holders are compensated for what has been deemed
intellectual property by all TRIPS signatories. This case remains a testimony highlighting the dangers of biopiracy, which provokes upheaval in ways of life and traditional uses.

(ii) Turmeric (1995)

In 1995, two non-resident Indians at the University of Mississippi Medical Centre in Jackson were granted US patent no. 5,401,504 on “use of turmeric in wound healing”. The inventors claimed to have found that the use of turmeric at the site of an injury by topical application and/ or oral intake of turmeric would promote healing of wounds. The Mississippi Medical Centre filed for six claims of novelty. The Indian Council of Scientific and Industrial Research (CSIR) requested the USPTO to re-examine the patent on 28 October 1996. CSIR challenged the patent on the grounds of prior art, i.e., existing public domain knowledge. CSIR argued that turmeric has been used for thousands of years for healing wounds and rashes and therefore its medicinal use was not novel. Their claim was supported by documentary evidence of traditional knowledge, including an ancient Sanskrit text and a paper published in 1953 in the Journal of the Indian Medical Association. CSIR could locate 32 references (some of them being more than one hundred years old and in Sanskrit, Urdu and Hindi), which showed that this finding was well known in India prior to filing of this patent. A combination of scientific evidence and legal skill was used to contest the case. The first office action in the re-examination was issued by USPTO on 28 March 1997, which rejected all the six claims based on the references submitted by CSIR as being by ‘anticipated references’ and therefore considered invalid under 35 USC 102 and 103. Despite arguments by the patentees, the USPTO upheld the CSIR objections and revoked the patent, stating that the claims made in the patent were obvious and anticipated, and agreed that the use of turmeric for healing wounds was an old art.

Turmeric patent case is the first successful case in the area of intellectual property violation in India. The legal costs incurred by India in this case have been calculated by the Indian Government to be about at US $10,000. This case is often cited as an example of biopiracy by developed nations on the traditional knowledge and biodiversity of developing nations.

Implications of the Case
The turmeric case is a landmark case as this was the first time that a patent based on traditional knowledge of a developing country was challenged successfully and USPTO revoked the patent. This case created awareness of the need to document knowledge, which is in public domain, so that patent office’s could verify prior art for claimed inventions before granting a patent. In response to concerns of biopiracy raised by research into turmeric, the Government of India has been translating and publishing ancient manuscripts containing old remedies in electronic form and in 2001 the Traditional Knowledge Digital Library was set up as a repository of 1200 formulations of various systems of Indian medicine, such as Ayurveda, Unani and Siddha. Not only this but also the creation of Traditional knowledge Resource Classification and finally inclusion of Indian traditional medicinal knowledge in the International Patent Classification System was done. The texts are being recorded from Sanskrit, Urdu, Persian, Arabic and Tamil in digitized format, which are available in five international languages made available to patent offices in English, German, French, Japanese and Spanish. The aim is to protect India's heritage from being exploited by foreign companies. Hundreds of yoga poses are also kept in the collection. The library has also signed agreements with leading international patent office’s such as European Patent Office (EPO), United Kingdom Trademark & Patent Office (UKPTO) and the United States Patent and Trademark Office to protect traditional knowledge from biopiracy as it allows patent examiners at International Patent Offices to access TKDL databases for patent search and examination purposes.

8.4 Controversy on Protection of Basmati Rice

Basmati rice is a long-grained aromatic rice variety cultivated in areas of Northern India and Pakistan. Farmers in these regions have selected and maintained Basmati rice varieties that are recognised worldwide for their fragrant aroma, long and slender grain and distinctive taste. Basmati rice requires deep fertile soil, a cool climate and a short photoperiod for its cultivation. As such it is difficult to grow Basmati rice for commercial purposes in other areas. Prized for its exquisite aroma and taste, it commands a premium price in both domestic and international market. India has been exporting Basmati rice to several countries of the world including the US, Europe and Middle East countries for several decades and over a period of time, it has acquired a unique position in the world market. Basmati exports surged 45 per cent to touch a record 3.21 million tonnes in 2011-
12 on robust demand from the traditional markets in West Asia. In the previous year, exports stood at 2.18 million tonnes (mt). In value terms, exports were up 46 per cent at Rs 15,450 crore against Rs 10,578 crore in 2010-11. In dollar terms, the export growth was 29 per cent at $3.22 billion against $2.49 billion last year, said Mr A. K. Gupta, Advisor, Agriculture and Processed Foods Exports Development Authority (APEDA). Nonetheless, long before TRIPS, a Texas rice development company, RiceTec Inc. began producing and exporting a Basmati-type rice called “Texmati” in 1985.

Having acquired the Basmati patent rights, RiceTec was able not only to sell its aromatic rice under the brand name Basmati within the US, but was also legally permitted to label it as such for exports. RiceTec’s Basmati patent has become widely known as a classic case of “biopiracy”. The controversy was initiated by a 1997 grant of a United States patent to Rice Tec, Inc., on a variety of basmati rice lines and grains. The Texas Company’s attempt to patent a type of basmati rice not only provoked large demonstrations in India but also became a touchstone for anti-globalization protest.

Dr. M.S Swaminathan, in a personal message to Prince Hans Adam wrote:

Marketing rice varieties developed by crossing semi-dwarf varieties with Basmati rice from India/Pakistan, as American Basmati is unethical. This is designed to kill even the limited opportunities which poor developing countries have for farm exports.

On September 2, 1997, RiceTec did obtain a patent titled “Basmati rice lines and grains” on the basis of 20 claims made by the company in its patent application to the USPTO. RiceTec was granted a patent for allegedly novel basmati lines and grains which were created from the crossing of the basmati germplasm (of Pakistani origin) taken from an ex situ gene bank in the US with American long grained variety of rice. RiceTec claimed that the new varieties have the same or better aroma, grain length and other characteristics than the original basmati variety grown in India and Pakistan and can be grown successfully in specified geographical areas in North America.

Claims 1-14 of the patent pertained to the general characteristics of rice grown in North America, South America, Central America and the Caribbean. Claims 15 to 17 were for rice grains without any limit to GI. Claims 18 to 20 pertained to the specific methods used by RiceTec to develop the rice lines. Of the 20 specific claims made by
RiceTec, claims 15 to 17 seemed especially harmful to the Indian export market since they pertained to particular characteristics of Indian Basmati grain. In these claims RiceTec included a claim to 90% of the rice’s germplasm as well as traditional varieties like Bas 370, Taraori, and Basmati Karnal cultivated in India. In short, RiceTec’s claims of patentable property on its rice lines were in fact typical characteristics of Basmati rice. This had serious ramifications for India.

This came to the notice of the Government of India in February 1998, and an Inter-Ministerial Committee was set up under the Secretary, Department of Industrial Development, to examine this issue. The United Kingdom’s Ministry of Agriculture Fisheries and Food (MAFF) performed a DNA analysis of basmati rice in 1999 which concludes that RiceTec’s two “basmati” style products, Kasmati and Texmati, have a genetic profile with “much more similarity” to US long grain varieties than South Asian Basmati samples. The report concludes “analysis of both Kasmati and Texmati in this study have shown that these varieties can both be easily distinguished at the genetic level from Indian or Pakistani based varieties.”

In April 2000, officials of the Indian Agricultural and Processed Food Products Export Development Authority (APEDA), a body established for development of agricultural commodities and furthering their exports, filed a petition with the USPTO to re-examine the Basmati patent, specifically claims 15-17. At the same time when the Indian Government requested the USPTO to re-examine RiceTec’s patent, the Research Foundation for Science, Technology and Ecology (RFSTE), a US-based non-governmental organization, filed a petition with the Federal Trade Commission (FTC) to control the use of the word “Basmati” in domestic marketing, arguing that Basmati was not a generic term and the use of such would deceive consumers into believing that the rice they were buying was from South Asia. RFSTE’s petition was rejected by the FTC on two grounds.

(i) Firstly, the FTC felt the damage to consumers was overstated.

(ii) Secondly, the FTC said that there were no agricultural regulations to govern the use of the term “Basmati” for rice originating from a particular region.

According to the FTC, Basmati rice is “included as an example of ‘aromatic rough rice,’ and is not limited to rice grown in any particular country”. It ruled that the
labelling of “American grown” basmati rice was not misleading and deemed basmati a generic term. It took APEDA over two years to gather the data to challenge the claim due to the intricacies of RiceTec’s claims. Soon after APEDA’s challenge, RiceTec gave up the right to claim 4 along with claims 15 to 17. USPTO further found that the 16 remainder claims were also questionable. Subsequently, RiceTec was issued notice by USPTO on March 27, 2001 that its patent was in jeopardy. RiceTec then withdrew the remainder claims except claims 8, 9, 11, 12 and 13 which pertained to new cross-bred lines developed by RiceTec that are not similar to any of the varieties grown in India. Thus, as against the Indian attack on 3 claims, RiceTec withdrew 15 claims.

Implications of the Case

There are numerous legal and technical concerns with respect to RiceTec’s patent and use of the name basmati by it, but ultimately the main issue is morality. Farmers in India have selected and bred aromatic rice over generations. It is unethical and unacceptable to be usurped by a foreign company. Basmati rice is an important source of income for Indian rice farmers and the international geographical indication regime forced them to compete unfairly against more developed countries such as the United States whose agricultural products are often highly subsidized. It is a must that the farmers in India should enjoy the full economic benefits of the goodwill that has developed in their product. According to Dr Vandana Shiva, who heads a Delhi-based research foundation which monitors issues involving patents and biopiracy, the theft involved in the basmati patent is threefold:

(i) a theft of the collective intellectual and biodiversity heritage of Indian farmers,

(ii) a theft from Indian traders and exporters whose markets are being stolen by RiceTec, and finally,

(iii) a deception of consumers since RiceTec is using the stolen name Basmati for rice which are derived from Indian rice but not grown in India, and hence are not of the same quality.

Use of the term “basmati” for rice that does not possess its inherent qualities and that is not subjected to the same production process does blemish the reputation of the original good. Moreover, if RiceTec or any other company sells rice similar to
basmati and labels or advertises this as ‘American made basmati type rice’ or ‘basmati style rice’, with a clear indication that the product originates from the US, there is no deception of the public even while the reputation and goodwill attached to the name basmati is diluted as the TRIPS Agreement accords absolute protection against the use of geographical indications with the words kind, type, style, imitation or the like only to wines and spirits and to no other commodity. Also TRIPS does allow WTO Members to deny protection to geographical indications that are not protected in the country of origin. At that time there was a widespread belief in India that unless there is a domestic sui generis legislation to protect geographical indications, these marks cannot be protected in other countries but it was not widely recognised that India already permitted the protection of such marks through certification marks as well as under the common law tort of passing off, provided it can be proved that the consumer would be deceived. The case of basmati rice is also the quintessential case reflecting the consequences of failure to implement a globally accepted substantive law with respect to the protection of geographical indications.

“The case of basmati rice reveals that at that time under the international geographical indication regime important obligatory TRIPS mandates were not being met, as the law was far from uniform, thereby preventing equal market access. Further, a recuperated TRIPS Agreement that extends Article23 to cover traditional goods, not just wines and spirits, would also have prevented RiceTec from marketing its Kasmati brand rice as “traditional Basmati style” or the Texmati brand as “American Basmati”. Though India was successful in winning the legal battle against RiceTec in the US, it still faced legal battles in about 47 countries for 300 instances of infringement. At least 76 of such cases have been settled in favour of India. India could have avoided the legal battle and strengthened Basmati’s position in the global market if it had registered Basmati as a GI earlier. It eventually did so, but by then it was too late. India’s lack of adequate domestic protection under intellectual property law was largely responsible for both the neem and the basmati incident.

Recent Trends

In 2016, the Chennai-based GI registry granted the coveted tag of geographical indication (GI) recognition for basmati rice to the commerce ministry’s wing Agricultural and Processed Foods Export Development Authority (APEDA)
GI protection in India would lead to similar recognition in other countries, including the European Union (EU) and the US, which implies that India’s competitors would be barred from using the ‘basmati’ tag. In the absence of GI for basmati rice, many private companies had been trying to register their products under the title, which commands a premium in the global market.

Basmati rice from the Indo-Gangetic plain, which includes the Punjab province of Pakistan, has a special aroma attributable to it. India commands an 85% share in global basmati trade at present. Following the GI notification, farmers in 77 districts of seven states-Punjab, Haryana, western Uttar Pradesh, Uttarakhand, Delhi and Jammu and Kashmir would now get the benefit.

In 2008, APEDA had applied to the GI registry asking for exclusive (commercial) use of the ‘basmati’ tag for grain varieties grown within the boundaries of the Indo-Gangetic plain. Subsequently, India and Pakistan had initiated steps to register basmati under GI as ‘joint heritage’ for protecting its premium market abroad. But that bid did not fructify due to opposition within Pakistan. However, in February, 2016, the Intellectual Property Appellate Board bench has also dismissed a plea by the Basmati Growers Association (BGA), Pakistan, which was joined as a party in the case.”

8.5 Protecting Geographical Indications

India was rattled out by these cases of bio-piracies and was facing a difficult situation to tackle. As a result of which various policy changes were made and more demand grew for stronger protection of cultural patrimony in India. Adoption of TRIPS by India also brought about a sea change in Indian IPR framework. Despite India succeeded in challenging the neem tree and basmati rice patents, some commentators thought that India’s victories were limited. These cases had two significant lessons for India. Firstly, it helped to draw the attention of whole nation about the importance of not only geographical indications but also traditional knowledge and also their vulnerability to the biopirates. Secondly, it exposed a peephole in the Indian legal system, which had no mechanism to deal with the issues like this.
Countries like India worry that, short of an integrated approach, such case-by-case challenges would be too costly and ultimately ineffective to stop developed countries from continuing to commit biopiracy. But getting them revoked is equivalent to winning small battles at high cost with little impact on the war being waged over the entire system of ‘bio-colonization’. The real solution will come only out of an integrated strategic approach to protect the bio-assets of developing countries through globally accepted formal and informal protection regimes. In reaction to the neem tree and basmati rice patents, India has strengthened its legal regime to conform to international laws on intellectual property, and its local communities have become more aware of and taken actions to protect their sovereign rights over traditional biological resources. Extending the Article23 protection to all geographical indications could have prevented developed countries such as the United States from exploiting the traditions and resources belonging to developing countries like India. It would be an opportunity to achieve a better balance between the divergent interests in the area of intellectual property rights of developed and developing countries.

The reason for providing intellectual property rights to geographical indications has usually been broadly classified as follows:

(i) The custodians of geographically indicated products should receive some price benefits as marketing of such products leads to commercial gain;

(ii) The protection of GI products contributes to the wider objective of conserving the environment, biodiversity and sustainable agricultural practices;

(iii) Preservation of traditional practices and culture;

(iv) Avoiding “biopiracy”; and

(v) Promotion of its use and its importance to development

Geographical Indications are not exclusively commercial or legal instruments, they are multi-functional. They exist in a broader context as an integral form of rural development that can powerfully advance commercial and economic interests while fostering local values such as environmental stewardship, culture and tradition. They can provide the structure to affirm and protect the unique intellectual or socio-cultural property embodied in indigenous knowledge or traditional and artisanal skills that are
valued forms of expression for a particular community. GIs facilitate progress that is multifunctional in character and are not focused on a single product. An EC evaluation noted that GI development amplified:

(i) Regional cooperation between municipalities, authorities, commercial and social partners;

(ii) The positive identity of the regions, especially referring to culture, landscape conservation and marketing;

(iii) Improvements in the general infrastructure and rural services;

(iv) Profiling of the region as an attractive business location;

(v) Improvements in environmental quality and linked utilization of resources.

India has taken various steps to strengthen the protection given to IP as is evident from the amendments in the legislative enactments to give effect to the International Conventions and Treaties to which India is a signatory. The recent changes in IPR laws reflect India’s compliance with the obligation under the TRIPS Agreement. For example, the Copyright Act, 1957 has been amended to include computer program as literary work as required by Article 10 of the TRIPS Agreement. The Trade and Merchandise Marks Act, 1958 has been replaced with the Trade Marks Act, 1999 which includes protection of well-known marks, certification marks and collective marks. It now provides for registration of trademark for services as well. This is in compliance with Article 16 of the TRIPS Agreement. Other recent legislations include the Geographical Indications of Goods (Registration and Protection) Act, 1999, the Designs Act, 2000 and the Protection of Plant Varieties and Farmers’ Rights Act, 2001.

8.6 Forms of Protection to Geographical Indications

With the advent of the era of knowledge and information technology, today, intellectual capital has gained enormous importance. Of the many factors that might affect the intellectual property system, technological change is likely to have the greatest impact. Consequently, intellectual property and rights attached thereto has become a precious commodity and thus need appropriate protection. The options to protect GIs are diverse and can be confusing as their application and interpretation
varies in different jurisdictions. Multiple forms of protection may also apply in the same country, such as trademarks and a *sui generis* system, both. Protection of an indication can be done on the national level, through legislation or jurisprudence, or at the international level through bilateral agreements, multilateral treaties, or other agreements. Prior to *TRIPS Agreement*, the system followed by the countries in general for the protection geographical indications is as follows:

(i) Protection by means of trademark laws in the form of collective marks or certification marks;

(ii) Laws against unfair competition e.g., passing off, to be enforced by the interested parties;

(iii) *Sui generis* protection schemes;

(iv) Administrative or legal means.

Collective marks or certification marks provide a means for the protection of geographical indications independent of statutory or judicial measures. While the definition may vary from one country to the other, collective marks are usually defined as signs which distinguish the geographical origin, material, mode of manufacture, quality or other common characteristics of goods or services of different enterprises using the collective mark. Collective trademarks are owned by an association that sets the requirements for the use of same. Quality and origin specifications can be included and it is the association that registers and is also responsible for maintaining the voluntary standards assumed by it. The owner may be either an association of which those enterprises are members or any other entity, including a public institution or a cooperative. Once a geographical indication has been registered as a collective mark, the association that owns it has the right to prohibit its use by persons who are not members of the association. Collective marks do not directly indicate quality (but may indirectly if the association has a reputation for being associated with quality products). The question whether a geographical indication is registrable as a collective mark depends entirely on a given national law. Countries which offer protection to geographical indications through collective marks are Japan and United Kingdom (UK), e.g., geographical indication tomato seed, tomato plant and tomatoes registered in the UK through collective mark scheme is
‘Scotland’s Tomatoes’. Collective marks are not an effective form of protection for geographical indications as they need not to certify the goods to be of a certain quality, characteristics or origin.

Certification marks are usually given for compliance with defined standards, but are not confined to any membership. They may be used by anyone who can certify that the products involved meet certain established standards. The owner of the certification mark, who may be a private or public entity, must ensure that the goods or services for which the certification mark is used possess the certified quality. In order to carry out this certification role in a neutral and impartial manner, the owner of the certification mark has to file, together with the application for the registration of the certification mark, detailed regulations which prescribe, *inter alia*, the characteristics certified by the mark, the authorized users and details concerning the certification and control. As a basic rule, the owner of the certification mark does not have the right to use the mark. However, every producer who complies with standards of production as defined by the owner of the certification mark has the right to use that mark. An important requirement for certification marks is that the entity which applies for registration is considered “competent to certify” the products concerned. In many countries, the main difference between collective marks and certification marks is that the former may only be used by a specific group of enterprises, e.g., members of an association, while certification marks may be used by anybody who complies with the standards defined by the owner of the certification mark. In general, the protection of a geographical indication through registration as certification mark is equivalent to that conferred by registration as a collective mark. Countries which offer protection to geographical indications through certification marks are UK, USA, Canada, Australia etc. These countries address GIs as a subset of trademarks. Famous certification marks include WOOLMARK which certifies that the goods on which it is used are made of 100% wool. Some other examples of certification trademarks are STILTON cheese, IRISH linen, Wisconsin Real Cheese, 100% Kona Coffee by US, PARMA for ham, DARJEELING for tea, WASHINGTON for apples, and the (Florida) SUNSHINE TREE for citrus.

The use of a certain geographical indication for goods or services which do not originate from the respective area may be misleading and thus may deceive consumers. Such a use of goods or services may constitute a misappropriation of the
goodwill of the person who is truly entitled to use the geographical indication. An action for unfair competition—which, depending on the national law, is either based on statutory provisions, as interpreted by court decisions or on common law—can be instituted in order to prevent competitors from resorting, in the course of trade, to such misleading practices.

The third means of protection to geographical indications is by way of *sui generis* legislation. The *sui generis* system consists in the adoption of specific laws, establishing an administrative procedures which oblige applicants to define the parameters of their product (mainly the demarcation of the area of production and definition of the product specifications) in order to qualify for protection and obtain registration. The system implies public control and provides a wide scope of protection which impedes use of the geographical indication, even if the public is not mislead as to the real origin of the product. This approach is similar to the protection given by unfair competition regulations, in the sense that litigation against the free rider can be initiated, but it goes further because it defines the geographical indication and the burden of proof of damage and existing reputation on the affected party is lessened. A certification mark differs from *sui generis* GI protection in that:

(a) It is not required to meet any pre-defined public or private standard;

(b) It need not necessarily be confined to a specified geographic area; and

(c) The owner defines its own rules of participation that, for example, may or may not include quality parameters.

Countries which follow *sui generis* approach for protection of geographical indications include India, Malaysia, Turkey, EU, Singapore, US etc. Adoption of Appellations d’ origine Controllee by France for wines is an early example of following up of *sui generis* system for protection of GIs. Other examples include the *Scotch Whisky Act 1988* for protection of Scotch Whisky, The *Harris Tweed Act 1993* for the protection of tweed made in some parts of Scotland etc.

Administrative protection schemes are part of product approval procedures, including review of labelling and, in some cases, rules related to geographical indications. Certain types of goods, such as wines, spirits or medicinal plants, require administrative approval before marketing, for reasons of taxation and hygiene. Label
approval regulates GIs directly, although it does not involve registration. Thus they do not enable the holders of the collective goodwill attached to a GI to take individual action to protect that GI. Instead they provide for an administrative mechanism to prevent misleading use of GIs on products. It also includes punitive actions of consumer protection, or other authorities responsible for controls. Criminal sanctions usually apply in cases of non-compliance. An example of administrative protection of geographical indications is labelling requirements of the Bureau of Alcohol, Tobacco and Firearms (ATF) for wines and spirits in US. Other countries which offer protection to its geographical indications through this scheme are France, Spain, Italy etc.

8.7 Conclusion

Different forms of intellectual property rights protection such as trademarks, geographical indications and patents have been around for a long time. But unlike industrialized countries that have a long history of protecting their intellectual property, the legal protection of intellectual property is still relatively new to developing countries. In developing markets, a lot of stress is laid on reducing tariffs with relatively little attention paid to strengthening intellectual property rights systems. No doubt various forms of protection were available to GIs worldwide prior to TRIPS Agreement like CTM or sui generis legislation but the problem is that the certification mark system or even any sui generis legislation requires the definition of the particular product. However, the TRIPS Agreement of the World Trade Organization provides for protection where a given quality or reputation of an item is attributable to its geographic origin

With the advent of TRIPS all developing countries are required to strengthen their IPR system. Yet, many developing countries failed to take much action in this regard or have taken action very slowly. Intellectual property is a very important issue with the food and beverage products like basmati or neem or turmeric because not only are the imitations being sold under the pretence of the real thing, but this also dilutes the quality of these unique products. The US-patent on ‘Basmati Rice Lines and Grains’ granted to Texas based RiceTec Inc. is a flagrant example of wrongful exploitation of a renowned GI from India. For India to be competitive in the international market, it is as important to strengthen its intellectual property system. In the case of India, at
the very least, it could have avoided the time and money spent in the legal battles over basmati or neem or turmeric, around the world had it improved its intellectual property system. Nations should move more quickly to institute policies such as protection of geographical indications in their national laws and also there may be a need to make these indications more specific in future negotiations in order to protect traditional varieties. Piracy is developing in the business society as an evil. Laws are there but the need is for a zealous and vigilant judiciary to handle such issues with not only diligence but also competence, promptness and firmness. Judiciary has to protect and uphold the interests of the people at large in all the spheres especially geographical indications thereby restoring their cultural and economic rights in order to benefit the society at large.

There is a need in India that the interpretation of IPR laws should be uniform across the country along with increased awareness of them as there is a direct link between economic growth and IP Scenario. The Judges of Indian judiciary should prepare themselves according to the changing phenomenon of the IPR world and bring the Indian IPR laws in harmony with the international conventions and treaties. It is appropriate to mention here the words of Justice Sanjay Kishan Kaul of Delhi High Court:

Though there should be laws to protect the hard work and effort of the inventor, we must not forget that the purpose of IP laws is not to create a monopoly or only to benefit a few individuals or corporations, but to benefit the society as a whole by giving them access to new choices, products, inventions and literature etc.
Conclusion, Recommendations & Suggestions

9.1 Introduction

In this work, effort has been made to critically assess the law on GI protection in India. It goes without saying that India has taken some positive efforts for the protection of GIs by passing the legislation which gives legal framework of GI protection.

Effective protection of GIs is essential in today’s knowledge society, where competitiveness relies essentially on creativity and innovation. Protecting geographical indications protects the cultural heritage, traditional methods of production, and natural resources of a geographical region and thus rewards producers for their commitment to quality which in turn encourages liberalized trade in quality products. Due to the increasing demand for quality products all around the world, Indian producers and manufacturers realized the importance of having a distinguishable product to compete in the international market. Although the Indian courts applied the common law principle of passing off action to protect rights of the GI holders as in case of trademarks but need for a legislative framework was obvious if GIs were to be given effective and robust protection. It is in such a scenario that India took steps to enact legislations for protection of Intellectual Property in compliance with the TRIPS Agreement. The legislation namely Geographical Indications (Registration and Protection) of Goods Act, 1999 is one such step. Despite India adopted legislation on GIs that implements at least the minimum standards set out in the TRIPS, serious deficiencies have been noted in terms of the practical implementation of such legislation and the way it is enforced. India needs a stable and safe GI regime, not only in India where this is already ensured to a large extent, but also abroad, where infringement of GIs can cause significant financial losses for GI right holders and legitimate businesses.

9.2 Summary of the Chapters

The first chapter which was introductory in nature effectively highlighted the need for the study to be undertaken. The chapter briefly outlined the importance and relevance of GIs in the context of international trade and globalization. It set out the essential elements of the study that was proposed to be undertaken touching upon
aspects of previous studies. The research questions and hypotheses which formed the basis of the study were detailed in this chapter.

The second chapter looked at GIs in detail. It was crucial to understand the concept of GIs to establish its role in the IP family. The chapter highlighted the essential characteristics of what can be termed as a GI. The understanding of what constitutes a GI product was critical given that it is not only an agricultural commodity that can be seen as a GI but the scope is vast and can range from food items to handicrafts and even medicines. The basic definition of GIs as mentioned in the TRIPS agreement is ‘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’ Having understood the genesis of GIs and its characteristics the second chapter also considered the role of GIs in the Intellectual Property family. IP law is traditionally territorial in nature GIs fit within that aspect most comfortably. A possible conflict given the territoriality principle vis-à-vis GIs is that two different countries can have the same name of a particular geographic location. This can create the possibility of confusion in the minds of consumers. The chapter then proceeded to look into GIs in the context of Industrial Property (1883), the, 1891 Madrid Agreement for the Repression of False or Deceptive Indications the Lisbon Agreement on Appellations of Origin (1958). These agreements were important to consider as they gave rise to what GIs in TRIPS represents today. An issue of the Doha Round of the WTO negotiations was also addressed in this chapter. The chapter studied the legal and economic aspects of GIs. It established the need and importance of GI protection. Protection of GIs has far reaching implications for both producers and consumers alike. While consumers can be assured of a particular quality when they look at products from a specific geographical location, the producers can be assured that a premium on their products is established.

The chapter then considers GIs and Trademarks and highlights the similarities as also the fundamental differences between them. Both GIs and Trademarks serve as source indicators and that is a key similarity between them. Perhaps one of the most important differences is the nature of rights that GIs and Trademarks offer. While trademarks are individual rights and can be owned privately, GIs are seen as public or
collective rights. This essentially means that GIs do not have the same elements as that of other forms of IP, such as transfer, assignment and sale. They are inherently linked to the geographic area and therefore cannot be moved from there.

The third chapter thereafter looked at the Indian perspective on GIs. In line with its TRIPS obligations India enacted The Geographical Indication of Goods (Registration and Protection) Act, 1999. The salient features of the Act were considered and outlined in detail. The Indian law defines indication as ‘any name, geographical or figurative representation or any combination of them conveying or suggesting the geographical origin of goods to which it applies’. The fact that the GI Act in India provides for civil and criminal action in the event of infringement shows that India has kept GIs at par with trademarks and considered them as a valuable asset.

The fourth chapter considered the relationship between traditional knowledge (TK) and GIs. While GIs relate to the product, TK refers to the information and both then link to geographically confined people or a particular region or locality. There is then a close relationship between GIs and TK. This chapter also highlighted a product based on traditional knowledge that can be considered for a GI registration. Considering the close relationship between GIs and TK, efficient policies on identification of TK that could perhaps be protected as GIs becomes imperative.

The fifth chapter finds out that the importance of the medicinal plants sector can be gauged from the fact that herbal medicines serve the healthcare needs of about 80 per cent of the world’s population. According to the World Health Organization (WHO), the goal of ‘Health for All’ cannot be achieved without herbal medicines. While the demand for herbal medicines is growing in developing countries, there are indications that consumers in developed countries are becoming disillusioned with modern healthcare and are seeking alternatives. This has renewed interest by the multinational pharmaceutical industry in bio-Law, Environment and Development Journal prospecting. But the lack of national legislation or effective international agreements on conservation of biodiversity has resulted in ‘slaughter harvesting’ of medicinal plants and massive depletion of biodiversity. This trend does not augur well for sustainable use of medicinal plants resources.

The sixth chapter considers that the methodology for conservation of medicinal plants both In-situ and Ex-situ has to be adopted in combination, besides initiatives
for scientific propagation of Medicinal Plants on required scale. Again, it is very essential that livelihood of forest dependent communities are kept in consideration as they are the major stake holders to share the benefits. It is also very essential to improve the capacity of front line staff to equip them to face the present day challenges in conservation of medicinal plant wealth.

The seventh chapter explored that with the immense increase in the use of traditional medicines worldwide, protection of traditional medicinal knowledge has become an important concern. With the increase in demand for medicinal plants, exploitation of resources by the multinationals and absence of an effective system of protection, the urgent need for regulating access and benefit sharing has arisen. India is a most important resource collection centre for plants and traditional knowledge of system of medicines like Ayurveda, Siddha and Unani. As regards IP protection of traditional knowledge, it’s true that a dilemma prevails about providing patents to products and medicinal formulations, which are developed over hundreds of years.

The chapter thereafter looked Geographical Indication as an instrument of Intellectual Property rights can be the way to protect traditional medicinal knowledge. What we need is a sui generis law combined with certain intellectual property rights. Legislation can be enacted taking into account the various regional differences in the matter, customary laws of various communities etc. Besides, we should give more priority to collective or community rights instead of individual rights. That way it will become more profitable to the communities to commercialize their knowledge. The traditional medicinal knowledge which is not yet in the public domain can be protected as trade secrets. But the most essential thing which is needed is compatibility between the legislations and customary laws.”

The eighth chapter highlighted the role of Judiciary, particularly in the absence of any enforced legislation, to protect geographical indications. It has applied the common law principle of passing off as suited in cases of geographical indications. Thus the courts have been giving effect to Articles 22 and 23 of the TRIPS Agreement even before it came into existence. It was the Supreme Court which compelled the government to take serious action regarding the biopiracy of basmati rice.

The chapter then considered Piracy is developing in the business society as an evil. Laws are there but the need is for a zealous and vigilant judiciary to handle such
issues with not only diligence but also competence, promptness and firmness. Judiciary has to protect and uphold the interests of the people at large in all the spheres especially geographical indications thereby restoring their cultural and economic rights in order to benefit the society at large.

9.3 Deficiencies and Weaknesses in the Existing Legal Framework on Geographical Indications

As with most GI systems, the administration of the Indian GI system under the Geographical Indications of Goods (Registration and Protection) Act, 1999 presents some weakness/challenges which are as follows:

(i) While the definition of GIs in the GI Act indicates that goods imply agricultural goods, natural goods or manufactured goods, Section 2(1) (f) of the GI Act defines “goods” to mean any goods of handicraft or of industry and food stuff as well. Such discrepancy could have been avoided by the lawmakers of India.

(ii) Though many GIs are registered in India, there is no registration of authorized users in all cases. Definition of ‘producer’ under the Act includes persons who trade in or deal in production, exploitation, making or manufacturing of GI goods. This definition gives an upper hand to traders and middlemen, thus actual producers get marginalized. They may register GIs which may have potential for commercial exploitation and by limiting the geographical area and identifying producers in whom they have interest and who may not be real producers, misuse the law.

(iii) No rural producer is bothered to challenge infringement of GI nor is he interested in getting himself registered as an authorized user.

(iv) Sometimes, the majority of producers are not actively involved in the application and are unaware that a GI has been registered, leaving the local government the task of informing them of their rights and opportunities after the fact.

(v) Moreover, producers that are members of the group owning the registered GI do not automatically have the right to use the GI but they must be registered as an
‘Authorized User’, which entails a registration procedure, payment of applicable fees, and approval from the registered proprietor of the GI.

(vi) Lack of awareness, capacity or resources may preclude legitimate producers of the GI product from registering.

(vii) There are no provisions within the Act to ensure that the traits as required under the Act for the initial registration like quality, reputation and characteristics, are maintained post-registration.

(viii) Section 9 (f) prohibits the registration of GIs that are determined to be generic. This exception of genericide, which is broader than required, is a serious blow to the producers in a country like India where many traditional agricultural products derive their peculiar qualities and characteristics from the particular geographical region where they are grown.

(ix) The artisans like weavers, goldsmiths and other craftsmen may not be affluent or literate in English language, so the publication must be in the local language. The main object of the Act is to protect those persons who are directly engaged in exploiting, creating or making or manufacturing the goods. They have the hands-on experience of the GI products. When these creators or makers complain that the application has been made behind their back, the registration should not be allowed to remain.

(x) The advertisement in Section 13 of the Act, in the Trade Journal is of no use and will not serve the same purpose as a public notice akin to the Section 4 of the Land Acquisition Act 1894 notice.

“TRIPS Agreement leaves it exclusively in the discretion of the country of origin to decide whether a particular geographical name has become generic or not. India ought to have kept the scope of genericide as narrow as possible, i.e., it should have allowed its courts to determine which term is generic and which is not, based only on the situation in India (the country of origin) and not based on the status in the areas of consumption. As an overall assessment, there is a genuine and sincere desire on the part of delegations to move forward and resolve the remaining differences in the Act.”
This study further reveals that following are the apparent deficiencies in the existing legal framework for protecting GIs effectively:

(i) Lack of Detailed and Flexible Regulations

(a) The regulations framed under the Act are ambiguous in terms of content and methodologies. The procedure prescribed under the Act for the completion of documentation, the description of product, and the evaluation of the content, etc., are not clear.

(b) Defining the exact geographical boundaries of a product is often a big challenge, particularly in the context of non-agricultural products. For example, Moradabad Metal Craft is made not just in the city but in the rural areas of the same district as well as in some neighbouring districts. Since the officials of the GI registry have taken a lead role in providing the process of registration, they try to include the entire state for registration of GI which may not be appropriate. That is why the application of GI Act provisions into real life overlaps and is hardly implemented.

(c) The roles of organizations and individuals are not clarified, especially the roles and functions of national organizations in applying for GI registration.

(d) Limitations are faced by the examiners for registering a product as a GI in the form of unavailability of relevant information for cross verification due to poor documentation and lack of understanding of the law and its interpretation on the part of applicant.

(ii) Protects the Name or Indication Only: An important dimension of GI is that it does not protect knowledge or technology as such. It only protects the name or indication. This essentially means that the famous Lucknow Zardozi can be produced anywhere in the world but it cannot be named ‘Lucknow Zardozi’

(iii) Negligible Infringement Reported: The improvements in the law for the protection of GIs in India recently introduced have not been able to bring down the scale of infringements. No rural producer seems to be bothered to challenge infringement of GI nor is he interested in getting himself involved in the infringement action. The situation is due to the fact that access to the judicial system remains
difficult in practice, because of burdensome and costly litigation and notarization requirements, the lack of an effective preliminary injunction system, and the inadequacy of the damages awarded. The lack of uniform methodology for enforcement also hinders these efforts. Moreover, the willingness of authorities to take effective action is at times affected by insufficient training of the staff involved. Authorities also tend to interpret laws and regulations in a narrow way which can create loopholes for infringers. The registration of a GI under the GI Act can make sense only if the infringement actions are taken against the violators of the GI laws. However, there seems to be not many takers for initiating infringement actions.

(iv) Post Registration no Quality Control: There are no provisions within the Act to ensure that the traits as required under the Act for the initial registration of a GI like quality, reputation and characteristics, are maintained post-registration once the status of a GI is granted to a product. Existing sui generis legal framework do not often provide for compulsory controls of the compliance of the products with the GI specifications.

(v) Lack of Awareness: Serious lack of awareness among the producers and stakeholders about what a GI is a challenge faced which could impair successful protection of a GI. Lack of awareness precludes legitimate producers of the GI product from registering their products. They are not familiar with the legal instruments available for the protection of their products. For most of them, the protection of their intellectual property rights appears to be a relatively new priority. The primary reason for this is the complete lack of awareness with respect to potential benefits arising from the registration of GIs and thus limited use of GI laws.

(vi)Lack of Institutional Capacity: The framework for protection of GIs should be strong and stable to ensure that the link between the product and its origin is shielded, and at the same time it should be flexible enough to allow innovations that do not threaten the territorial identity of the product. Large scale of counterfeit products is still on sale in markets, and authorities entrusted with the duties to enforce the provisions of the Act, hardly use such powers. Lack of local institutional capacity is a major challenge faced by the producers who wish to protect their products through GI registration. Government or groups who wish to pursue a product for GI designation
should keep in mind that the distribution and the magnitude of costs and benefits from a GI will depend upon the nature of the institutions established for its protection.

(vii) Only One Geographical Indication Registry: As per the GI Act, in order to register a GI, an application is to be addressed to Registrar of Geographical Indications, Geographical Indication Registry, in Chennai. This in a way makes it difficult for people from other parts of the country to come up for the registration of GIs. This issue points out the need to open more centers in India for GI registration so that access to registration is facilitated and also popularized.

Due to these imperfections, a robust legal rights regime of GIs has not been developed. In fact, these limitations are inevitable because of internal deficiencies in the GI Act itself and also factors like the lack of participation on the part of the community and other civil organizations. India needs not only to protect GIs, but also adopt the policies necessary to develop its GI products globally.

9.4 Depletion of Traditional Knowledge in Medicinal Plants in Kashmir

There was a time when people in Kashmir would resort to traditional way of treatment for common and dreadful disease and this culture was very prevalent in the Kashmir since immemorial. There have been competent herbal healers that were known as Hakeems. But now this culture seems to be fading from the sphere of Kashmir. Jammu and Kashmir is very rich in medicinal plants but there is a need to explore them for the benefit of the society.

The question arises as to why we need to preserve traditional knowledge of our state. The answer to this is that before the dawn of English medicinal culture, Kashmiri masses would resort to herbal medicinal products or herbs for the treatment of diseases like diarrhoea, jaundice, gout etc. Now the culture of this herbal healing system is fading. Secondly if an elderly citizen is having the knowledge of say 10 herbs and their usage. His son would have knowledge of 5 herbs. This way process will go on and the scale of herbal knowledge will decrease with the advancement of generations. The time will come when people would have no knowledge of these herbs. If a sophisticated machine is imported from America or any other foreign country it will cost too much to purchase. If the same is provided at low cost to the people it will make our state self-sufficient besides providing security and patent to
the idea, innovation or herbal practice of an innovator. An initiative can be taken to launch a medicinal product in the market for which selection of practices will be taken from local herbal healers whereby the validity of those herbal practices will be evaluated by reputed chemists and scientists. The herbal practice provided by an innovator/herbal healer or a farmer etc is included in the National Register of Grassroots Innovations and Traditional knowledge. With the consent of innovator or herbal healer it can be shared with the third party. With the prior permission of the innovator it may be disseminated for the benefit of the society. Property Rights of the innovator/Herbal Healer is ensured before initiating such process like improvement and design etc. However, if the herbal practice or traditional knowledge innovation provided by an innovator is well known in public domain, then the restrictions on its diffusion or application will not apply. The grassroots innovations developed by farmers, slum dwellers should be unaided, unsupervised without any aid from any external agencies.

Traditional knowledge (TK) related to the use of natural resources including medicinal plants has been recognized as one of the important assets inherited through generations by the local communities. Such knowledge is generally passed down to the next generation verbally, in the form of odes and poems. In the process of rapid modernization and advancement of medical sciences, partially documented or undocumented knowledge on ethno medicine began to deplete drastically. Although several ethno botanists and anthropologists have made attempts at documenting such knowledge in various parts of the world, several remote localities and indigenous communities have remained unnoticed. Traditional knowledge has now regained importance due to the discovery of new drugs and formulations from phytoresources. As a result, there has been a spurt in herbal industries. The pharmaceutical sector has to meet the ever-growing, excessive demand and this in turn has led to wild harvest of these resources, which may lead to rapid depletion of resource base. Contrary to the growing demand of medicinal plants all over the globe, TK on ethno medicine is declining rapidly, especially in the developing countries. The Himalayan region, well known for diversity and richness in medicinal plants, also harbours a large number of ethnic communities, each with distinct culture and TK system. Rapid pace of development and socio-economic transformations have led to erosion of natural resources and TK in the western Himalayan region.
Nowadays, rural life is changing into fast life of modern cities. This change is affecting the young generation and overall increasing willingness to use allopathic medicines over ethno medicines for its faster effect. Though the respondents shared that the process of collection of medicinal plants is time consuming and tedious, it was observed that villagers were more interested in selling these medicinal plants instead of using them for self cure. But, this trade is more or less in the informal sector and so difficult to document. Changes in agricultural practice were evident from the fact that locals preferred cash crops like soybean, rajma, potato and tomato over medicinal plants. Local needs and micro-socio-economic–environmental conditions of knowledge holders and of medicinal plants should be considered to formulate policies to conserve both traditional knowledge and the plants.

9.5 Traditional Knowledge, Medicinal Plant and Intellectual Property

As the legal instruments available to invoke Intellectual Property Rights (IPR) are inadequate to protect the vast intellectual resources available in the country with the indigenous people, we need to be agile and alert in watching the IPR infringement by others and claiming the benefit sharing in proportion to the commercialization of our potentials as well as intellectual resources of Medicinal Plants. The IPR system and the misappropriation of potentials without prior knowledge and consent of the indigenous tribal community are bound to evoke feelings of anger, frustration, of being cheated and helplessness of knowing nothing about IPR and piracy. Even now, for indigenous tribal community, life is a common property that cannot be owned, commercialized and monopolized by an individual or a group and majority of Indians are unaware of IPR intricacies of how the system operates. We are now in the process of learning the new world order of IPR and have to tight our nuts and bolts to develop efficient safeguarding strategies by developing capacity building of the people through networking with various groups who own the intellectual resources in their interest in particular and nation as a whole.

During the course of research, various problems were identified with and several legal obstacles have been observed and also the relevance of this industry was well understood and thus the researcher come up with certain recommendations and suggestions which are as follows:
(i) It is important to try to capture the salient features of the medicinal plants trade in India, particularly in J&K state and the related aspects of conservation and use in order to explore possibilities of private sector intervention, which can address the twin objective of sustainability of the resource as well as a better stake for the collectors/ growers.

(ii) “Transit permit (issued by the Forest Department) should be made mandatory for transportation of commercial quantities of the fruits so that it ensures a fair share for the primary collectors/growers. This will act as automatic regulation on when the fruit was harvested. The Forest Department personnel, should be already oriented about the importance of proper time/method of harvesting, accordingly they should refuse to issue transit permits before the right time.

(iii) The legal and administrative structure pertaining to medicinal plants can play an important role in sustainable management through proper check while granting licenses, etc.

(iv) The State level intervention should be more active and policies on Medicinal Plants should be important criteria in their policy framework.

(v) India should be developing viable policies that effectively promote bio-prospecting and sustainable development while protecting the rights and the cultures of local communities.

(vi) Establishment or designation of scientific authorities to conduct non-detrimental studies for listed species, and management authorities to issue permits and certificates is important.

(vii) Legal instruments should be implemented to address biological diversity conservation and the sustainable use of its components comprehensively.

9.6 Protecting Medicinal Plant as Geographical Indications

India was rattled out by the cases of bio-piracies and was facing a difficult situation to tackle. As a result of which various policy changes were made and more demand grew for stronger protection of cultural patrimony in India. Adoption of TRIPS by India also brought about a sea change in Indian IPR framework. Despite India succeeded in challenging the neem tree and basmati rice patents, some commentators
thought that India’s victories were limited. These cases had two significant lessons for India. Firstly, it helped to draw the attention of whole nation about the importance of not only geographical indications but also traditional knowledge and also their vulnerability to the bio pirates. Secondly, it exposed a peephole in the Indian legal system, which had no mechanism to deal with the issues like this.

Countries like India worry that, short of an integrated approach, such case-by-case challenges would be too costly and ultimately ineffective to stop developed countries from continuing to commit biopiracy. But getting them revoked is equivalent to winning small battles at high cost with little impact on the war being waged over the entire system of ‘bio-colonization’. The real solution will come only out of an integrated strategic approach to protect the bio-assets of developing countries through globally accepted formal and informal protection regimes. In reaction to the neem tree and basmati rice patents, India has strengthened its legal regime to conform to international laws on intellectual property, and its local communities have become more aware of and taken actions to protect their sovereign rights over traditional biological resources in general and medicinal plants in particular. Extending the Article 23 protection to all geographical indications could have prevented developed countries such as the United States from exploiting the traditions and resources belonging to developing countries like India. It would be an opportunity to achieve a better balance between the divergent interests in the area of intellectual property rights of developed and developing countries.

The reason for providing intellectual property rights to geographical indications has usually been broadly classified as follows:

(i) The custodians of geographically indicated products should receive some price benefits as marketing of such products leads to commercial gain;

(ii) The protection of GI products contributes to the wider objective of conserving the environment, biodiversity and sustainable agricultural practices;

(iii) Preservation of traditional practices and culture;

(iv) Avoiding “biopiracy”; and

(v) Promotion of its use and its importance to development.

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Geographical Indications are not exclusively commercial or legal instruments, they are multi-functional. They exist in a broader context as an integral form of rural development that can powerfully advance commercial and economic interests while fostering local values such as environmental stewardship, culture and tradition. They can provide the structure to affirm and protect the unique intellectual or socio-cultural property embodied in indigenous knowledge or traditional and artisanal skills that are valued forms of expression for a particular community. GIs facilitate progress that is multifunctional in character and are not focused on a single product. An EC evaluation noted that GI development amplified:

(a) Regional cooperation between municipalities, authorities, commercial and social partners;

(b) The positive identity of the regions, especially referring to culture, landscape conservation and marketing;

(c) Improvements in the general infrastructure and rural services;

(d) Profiling of the region as an attractive business location;

(e) Improvements in environmental quality and linked utilization of resources.

India has taken various steps to strengthen the protection given to IP as is evident from the amendments in the legislative enactments to give effect to the International Conventions and Treaties to which India is a signatory. The recent changes in IPR laws reflect India’s compliance with the obligation under the TRIPS Agreement. For example, the Copyright Act, 1957 has been amended to include computer program as literary work as required by Article 10 of the TRIPS Agreement. The Trade and Merchandise Marks Act, 1958 has been replaced with the Trade Marks Act, 1999 which includes protection of well-known marks, certification marks and collective marks. It now provides for registration of trademark for services as well. This is in compliance with Article 16 of the TRIPS Agreement. Other recent legislations include the Geographical Indications of Goods (Registration and Protection) Act, 1999, the Designs Act, 2000 and the Protection of Plant Varieties and Farmers’ Rights Act, 2001.
9.7 Suggestions and Recommendations for Protection of Medicinal Plants in Geographical Indications Law

In the light of above discussion it is humbly submitted if the following recommendations are considered and given effect to, there is likelihood of the state of law getting better objective oriented.

(i) Efficient Protection

(a) There is a need to approach the issue of protection of GIs holistically and evenly.

(b) Building of an appropriate capacity for implementing the GI legislation.

(c) Discussions of the researcher with officials indicated that there are limitations faced by the examiners in the form of non-availability of relevant information/data for cross verification due to poor documentation and lack of understanding of the law and its interpretation. Therefore, there is a need to simplify the definitions and procedures provided under the Act, for building confidence and trust amongst the right holders in GI protection.

(ii) Emphasis Should be Placed on Flexibility in Geographical Indication Registration Strategies

(a) Need to wean the rights holders in the registration system to secure protection of their rights.

(b) Rules must facilitate registration without compromising on essential conditions for registration. To facilitate registration it is necessary that there must be flexibility in the rules without there being any compromise in observing the essential conditions lay down by law for registration of GIs. The authorities must not be too technical as to seep away the enthusiasm of the applicants to seek registration of their products and hence protection under the GI Act. This will give them confidence in the system and ultimately bring credibility and transparency to the system.
(c) Clear and transparent registration, modification and cancellation procedures providing legal guarantees to stakeholders.

(d) An extensive protection of registered GI names in all the States

(iii) Policy for Awareness and Advocacy Programmes Must be put in Place

A strong need for awareness building towards all types of stakeholders is required as there is a general lack of understanding of the importance of GI protection. Promotion campaigns of the GI Act should be implemented in order to promote it among all the relevant stakeholders. The main objective of the awareness is to prepare the producers and stakeholders particularly the manufacturing associations, exporter and trade associations, civil society organizations, institutions & centers’ of excellence and grass root level stakeholders associated with the production, marketing and overall development of the products on the emerging issues relating to Geographical indication, so that they can prepare themselves for protecting their products under the Act. Education and awareness among the public will also assist in effective implementation of the GI policies and legislation. Moreover, post-registration, there is need for promotion and continuous awareness building particularly among the consumers.

(iv) Role of Producers

It is worth mentioning the value of geographical indications in terms of economy and culture. Due to the fact that genuine products with protected geographical indication are closely connected to their place of production and are influenced by specific local factors, they create value for local communities and properly inform the consumers about the origin of the product. They support rural development and promote new job opportunities in production, processing and other related services, and in the same time strengthen consumer loyalty. Producers in India who wish to avail themselves of the opportunities that owing rights to a GI can provide, need to agree on the quality standards and/or reputation attributes that will impart value to products identified with the GI and then they must collectively stick to them and support them. The researcher considers that there are good arguments to establish a system that would provide:

(a) A key role should be given to groups of producers when it comes to making the application for registration of a GI.
(b) Involvement of the State functionaries, NGOs and other groups working in the sphere of GI holders and producers at individual and collective level.

(v) Supporting the Representation of Small-Scale Farmers via Collective Representation

Though many GIs are registered in India, there is no registration of authorized users in all cases. Definition of ‘producer’ under the Act includes persons who trade in or deal in production, exploitation, making or manufacturing of GI goods. This definition gives an upper hand to traders and middlemen, thus actual producers get marginalized. They may register GIs which may have potential for commercial exploitation and by limiting the geographical area and identifying producers in whom they have interest and who may not be real producers, misuse the law. When the legal system enables representative groups to apply it is a means to encourage small scale and less favoured stakeholders to get involved in the process. The GI specifications are a strategic tool that can be adapted to each situation and which may include provisions in favour of communities who could otherwise be at a disadvantage. The GI collective organisation will be also responsible for the follow-up and internal controls and GI safeguarding. GI regulation should give particular attention to indigenous languages in decrees, regulations and registries when the traditional knowledge of indigenous peoples is involved. There should be respect and recognition of horizontal governance over biological resources and knowledge in order to empower small farmers in projects that support vertical integration. GIs do not have negative impacts on biodiversity or traditional cultures, but positively support these wider territorial aspects which give rise to origin-based products. This could be achieved by encouraging producers to seek protection for a variety of products, rather than a single product, and by linking these tools to territorial development plans which provide the broader and longer term vision which shape their objectives.

(vi) Implementation of the Provisions of the Act

There is a need to strategize IP protection of GIs to create a better future and in order to achieve the same, it is important to have the broadest possible protection. Strategy for the protection of GIs can include:

(a) Conducting seminars and workshops to various stakeholders;
(b) Publishing the Policy in the Government Gazette;

(c) Employing advocacy of the Policy at national, regional and international levels.

There should be proper deterrent remedies including stringent fines. Public authorities may need to do more than provide legal remedies for deception. They may need to define quality standards and take steps to protect the reputation inherent in the GI from devaluation.

(vii) Infringement Action to be undertaken

The registration of a GI under the GI Act could make sense only if the infringement of the same is proceeded against. Geographical indications are a useful intellectual property right for developing countries because of their potential to add value and promote rural socio-economic development. However, as a consequence of such high commercial value of geographical names, they are exposed to misuse and counterfeiting. The abuse of geographical indications limits access to certain markets and undermines consumer loyalty. In the absence of effective measures against misuse of geographical indications and other important geographical names, the risk of infringement of such intellectual property rights increased significantly. However, there seems to be not many takers for initiating infringement actions in India. The survey conducted showed that only few respondents were party to an infringement action. Many of the respondents answered that they knew about the infringement of their GIs, but were not initiating any action.

The main challenge is to obtain best commercial benefit by relying on the GI registration granted in India. This would include undertaking investigations to ascertain the infringement of the GI and undertaking appropriate infringement action. If producers are able to advertise their products that the GIs concerned are registered and any infringement of the right related to such GI may attract legal actions, then the chances of such infringement can be reduced.

(viii) Establishment of Enforcement Agents for the GI Policy and Supporting Legislation
Despite the positive developments for protection of GIs, significant progress on priority issues is still needed, especially insofar as GI enforcement in India is concerned. It still appears that the implementation of GI enforcement mechanisms needs further strengthening. Concerns are there with respect to the length and uncertainty of the outcome of court proceedings, as well as insufficient trained officials in the field of GIs. Strong engagement from the authorities to enforce GI and to improve the implementation of procedures will remain very important not only for right-holders but also for creating a climate favourable to innovation. Moreover, insofar as GI enforcement is concerned, the complexity of the system and the lack of efficient cooperation between enforcement bodies and stakeholders are two important issues. Enforcement of standards must be strict. Otherwise the value of the GI will be eroded.

(ix) Role of Government

In any protection system for geographical indications the involvement of governments is important in relation to their recognition and control over the use and enforcement. Producers often face significant constraints in applying for GIs registration. Government should provide greater financial and technical support and capacity building, especially for small-scale producers and indigenous people for applying for, promoting and enforcing quality and origin standards. Government should recognise that producers are the primary stakeholders, even if they are less powerful than other actors (e.g. exporters), and producer organisations should be given support so that they can participate on a level playing field in multi-stakeholder processes. This support should include finance, capacity building and government policies that enable small producers to defend their rights. Further, government should support the creation or adaptation of national and regional, legal and institutional frameworks to prevent the false or misleading use of geographical indications, conflicts with trademarks or abusive generification processes. Quality is the main criteria for extending domestic and international protection to geographical indications. National governments of producer countries can have an important role in establishing quality standards. A balance is to be drawn between these practices, in order to gain broader acceptability of a GI in the domestic as well as world markets.
Apart from legislative changes in relevant GI laws, the Government’s initiatives should include upgradation and modernisation of the administrative framework covering Geographical Indications. The stabilization of the Indian GI system is linked to the formation of a broad network of actors and organizations, each taking on specific roles, and requiring permanent and dynamic governance at all levels. The distribution of competencies requires huge efforts to ensure that governance does not develop parallel conceptual models within different organizations. The main components of modernization include:

(a) Strengthening of infrastructure support;
(b) Comprehensive computerisation;
(c) Automation and re-engineering of work procedures;
(d) Human resource development through additional manpower; and
(e) Suitable training at all levels and liquidation of backlog.

(x) Millennium Development Goals

GIs have a role to play in reducing vulnerability to poverty, which refers to the first of the Millennium Development Goals (MDGs). GIs can significantly contribute to promote human development by helping countries like India to meet the targets set under the MDGs.

This study clearly shows that there is much room for improvement of the protection and enforcement of GI rights, although efforts and improvements from national authorities are also evident. The mission of government and other institutions should be to deal with the issues of economic development, propagation and the protection of GIs which is an important part of intellectual property. It is the strong recommendation of the researcher that India should review relevant legislation on the above suggested lines in order to protect its GIs. If the above recommendations are implemented, growth and development will be spurred on in numerous areas and sectors in India, including agriculture, handicrafts, foodstuffs and manufactured products.
GI protection has the potential to improve the condition of farmers and rural producers, who often do not see the benefits of Intellectual Property protection in the present globalized world. What is at stake here is more than just market economics and increased profits, as such products often reflect the heritage, tradition and culture of a place. It is hoped that this practical contribution will encourage policy makers and Indian producers to actively seek protection of the names of their products.

With the immense increase in the use of traditional medicines worldwide, protection of traditional medicinal knowledge has become an important concern. With the increase in demand for medicinal plants, exploitation of resources by the multinationals and absence of an effective system of protection, the urgent need for regulating access and benefit sharing has arisen. India is a most important resource collection centre for plants and traditional knowledge of system of medicines like Ayurveda, Siddha and Unani. As regards IP protection of traditional knowledge, it’s true that a dilemma prevails about providing patents to products and medicinal formulations, which are developed over hundreds of years.

Geographical Indication as an instrument of Intellectual Property rights can be the way to protect traditional medicinal knowledge. What we need is a sui generis law combined with certain intellectual property rights. Legislation can be enacted taking into account the various regional differences in the matter, customary laws of various communities etc. Besides, we should give more priority to collective or community rights instead of individual rights. That way it will become more profitable to the communities to commercialize their knowledge. The traditional medicinal knowledge which is not yet in the public domain can be protected as trade secrets.