3. Geographical Indications

The term Geographical Indication (GI) of goods has been defined as an indication which defines such goods as agricultural goods, natural goods or manufactured goods as originating, or manufactured in the territory of a country, or a region or a locality in that territory, where a given quality, reputation or other characteristics of such goods is essentially attributable to its geographical origin and in case where such goods are manufactured goods one of the activities of either the production or of processing or preparation of goods concerned takes place in such territory, region or locality as the case may be.\(^1\)

The above provision is based on Article 22 of the TRIPs Agreement. However, some expressions have been added in the above definition that is not in Article 22.\(^2\) These expressions have not only unnecessarily constricted the scope but have brought this definition in conflict with the other provisions of the enactment that defines the term goods. A plain reading of the above provision reveals that the term GI is confined to agricultural goods, natural goods or manufactured goods. This would not include handicrafts because these are neither agricultural goods nor natural goods or manufactured goods. They are hand-made goods. Though, one may argue that the term “manufactured goods” would include handicrafts, it is not correct exposition. The dictionary meaning of the word “manufactured goods” is goods manufactured on large scale with the help of machinery. The fundamental argument of craftsmen in Kashmir is that their crafts are imitated in other parts of the country which are machine made and are passed on as Kashmiri brand. They demand protection of their crafts because they are hand made. The language used in Article 22 is flexible

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\(^1\) The Geographical Indications of Goods (Registration and Protection) Act, 1999, Section 2 (e).

\(^2\) For instance, agricultural goods, natural goods or manufactured goods.
enough to include handicrafts. The ideal option was to adopt the language of Article 22 which would encompass handicrafts as well.3

Notably, while Article 22 requires “a given quality, reputation or other characteristic” of the good to be essentially attributable to its geographical origin, the GI Act, in the case of manufactured goods, includes the additional requirement that one of the activities of either the production, processing, or preparation of the good concerned must also take place in the place of its geographical origin. This requirement is more stringent than that under Article 22. This can be explained by taking “Darjeeling tea” as an example. “Darjeeling tea” involves manufacture. The green tea leaves plucked from the tea bushes go through the range of rigorous processing stages before turning into the final product (called ‘made-tea’), which is ultimately sold in the market. Now, even if the tea leaves are plucked from Darjeeling, the GI Act will not allow the final product to be designated as “Darjeeling tea”, unless the processing also takes place within the Darjeeling region, as demarcated for the purpose of this GI. The TRIPs definition will, however, allow the final product to be designated as “Darjeeling tea”, even if the processing takes place outside the demarcated region of Darjeeling, if it can be established that “a given quality” (e.g. flavour, etc.), “reputation” or “other characteristics” of the tea is essentially attributable to the demarcated region associated with the GI ‘Darjeeling’.4

Besides, an explanation has been appended to Section 2(e) that has added to the worries of craftsmen. The explanation provides that the name of a country, region or locality cannot be registered as a GI.5 This principle has been

3 TRIPs Agreement, Art. 22. It says 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 characteristics of the good is essentially attributable to its geographical origin.
5 Explanation: For the purpose of this clause, any name which is not the name of a country, region or locality of that country shall also be considered as the geographical indication if it related to a
borrowed from the trademark jurisprudence which operates with a different scheme of things. A trademark based on the name of a country, locality or region cannot be registered under the Trade Marks Act as no individual will be allowed to trade on any geographical name of the country or region. As against this, the GI Act allows to reap the benefits of GI which may include the geographical names as well.

The handicrafts of Kashmir cannot be identified by a layman unless they carry a Kashmiri tag. A Pashmina shawl or a carpet which is worth lakhs of rupees cannot be identified unless it is branded as Kashmiri Pashmina shawl or Kashmiri carpet. This explanation serves no purpose and has been incorporated without any apparent rationale. It is neither required under TRIPs nor is there any indirect reference made to such provision under TRIPs. Articles 22 and 23 of TRIPs do not prohibit registration of geographical names. Article 22 simply defines GI and enjoins the member states to provide legal means for interested parties to prevent the use of any means in the designation or presentation of a good that indicates or suggests that the goods in question originate in a manner which misleads the public as to the geographical origin of the goods. Thus, the explanation attached to the above provision has been appended without serving any worthwhile purpose.

3.1. Definition of Goods

Notably, while the TRIPs definition (as per Article 22) refers to “goods” as a whole, Section 2 (1)(f) of the GI Act specifies that:

“goods” means any agricultural, natural or manufactured goods or any goods of handicraft or of industry and includes food stuff.”

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6 In Imperial Tobacco Co. v. Registrar Trade Marks, AIR 1977 Cal. 413, it was held that the geographical terms are words in common use, designate a locality, a country or a section of country which cannot be monopolised as trademarks.

Some experts are of the view that the aforesaid categories of goods basically cover the entire gamut of “goods” and argue that the Indian definition does not really deviate from the scope of coverage of ‘goods’ under Article 22 of TRIPs.\(^8\)

It is, however, submitted that the GI Act has completely ignored the definition of goods as provided in the Sale of Goods Act, 1930. The definition of goods in the GI Act cannot be used interchangeably with the definition of GI nor would it provide content to the definition of GI. There are a good number of judicial decisions suggesting that when in relation to the same subject-matter, different words are used in the same statute, there is a presumption that they are not used in the same sense.\(^9\)

This definition of goods is not in harmony with the definition of GI which is unnecessarily narrow in scope. Hand-made goods are not covered in the definition of GI.

### 3.2. Registered Proprietor

Registered proprietor in relation to a GI means any association of persons or producer or any organisation for the time being entered in the register as the registered proprietor of the GI. The term “producer” in relation to handicrafts means any person who trades or deals in such production, exploitation, making or manufacturing, as the case may be, of the goods.\(^10\) This definition does not distinguish between a real producer, retailer or dealer. As a result of this

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\(^8\) See supra note 4.

\(^9\) Member, Board of Revenue v. Arthur Paul Benthal, AIR 1956 SC 35, at 38. In this case the apex court opined that ‘when two words of different import are used in a statute in two consecutive provisions, it would be difficult to maintain that they are used in the same sense; CIT v. East West Import & Export (P) Ltd., Jaipur, AIR 1989 SC 836, at 838; B. R. Enterprises v. State of UP, AIR 1999 SC 1867, at 1902; Shri Ishal Alloy Steel Ltd. v. Jayaswalas Neco Ltd., JT 2001 (3) SC 114, at 119 where in the court said that the words ‘a bank’ and ‘the bank’ in section 138 of the Negotiable Instruments Act, 1881 do not have the same meaning; in Kailash Nath Agarwal v. Pardeshiya Industry and Inv Corp of UP, 2003, AIR SCW 1358, the words ‘proceeding’ and ‘suit’ used in the same section was construed differently; in DLF, Qutab Enclave Complex Educational Charitable Trust v. State of Haryana, AIR 2003 SCW, 1046, at 1057, the expression ‘at his own cost’ and ‘at its cost’, used in one section was given different meaning.

\(^10\) GI Act, 1999, Section 2(n) and Section 2(k).
discrepancy the benefits of the GI Act may not percolate down to the real producer.

The rural Kashmiri and inhabitants of economically backward pockets in urban areas are generally associated with different crafts. It is their labour and skill which is being reaped by the traders. They toil hard but receive less. It is their haplessness which is being exploited by the moneyed people who have access to global market. The artisans have kept these handicrafts tagged with GI alive. They should have been at the centre stage of any legal protection. The GI Act has accorded protection to the traders of these handicrafts which will prove to be a license for exploitation of grass root workers who give breath and blood to these crafts.

The registered proprietor of a GI in India has to be an “association of persons or producers”. Such a requirement often entails creation of a new “association”, thereby triggering the collective action problem upfront. In fact, as products using GIs pre-exist their registration and protection, the process of registration raises substantive issues concerning the reorganisation and governance of the supply chains. There are a number of specific tasks to be completed while reorganising the supply chains. These may include demarcating the geographical territory pertaining to the GI, defining the GI product, specifying its distinguishing characteristics, establishing the good-place link, agreeing on codes of practice to be followed while producing the product, developing mechanisms for quality control and methods of governance along the supply chain, among others. The registration process of a GI is, therefore, likely to involve some re-organisation of the product’s existing supply chain, leading to modifications in well-established commercial relations and distribution channels.\footnote{Dwijen Rangnekar, *The Socio-Economics of Geographical Indications: A Review of Empirical Evidence from Europe*, UNCTAD-ICTSD PROJECT ON IPRS AND SUSTAINABLE DEVELOPMENT, 3 ICTSD 1, 19-34 (2004).} This often results in new economic opportunities for some new
players at the cost of some pre-existing ones, thereby creating room for conflicts.

3.3. Authorised User

Any person claiming to be the producer of goods in respect of which a GI has been registered may apply in writing in a prescribed manner to the Registrar for registering him as an authorised user of such GI. Subsequent addition of authorised users can take place with a No Objection Certificate (N.O.C.) of the proprietor of the GI, which has strong monopolistic implications.

Only authorised users of a GI have a legitimate claim to the production of the product. Even a member of the geographical area does not automatically own the GI unless his name is listed on the list of authorised users. In fact it will not be a big surprise if the names of several poor and illiterate crafts-person are not listed. This would imply that legally such persons would be forced to stop production since only authorised users of the GI have a legitimate claim to the production of the product. Thus, the Act is anomalous in so far as it puts the very people at the risk of suffering from it, the protection of the skill of whom is its actual claim.

The GI Act does not make provision for inheriting the status of authorised user of the GI. This is anomalous mainly because the production of most GI products often runs in the family (especially in case of handicrafts) and is learnt, inherited and carried forward by subsequent generations. Strange, that while the family remains most crucial in passing on the very skill in question, the Act does not allow GI users to pass down the legal status to practice the skill within the family.

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12 GI Act, 1999, Section 17 (1).
3.4. Application Procedure

The application procedure is horribly expensive. While the registration fee itself is rupees five thousand,\(^{14}\) the drafting of the application which includes putting together documentation on the historical and commercial significance of the product is time consuming and therefore, expensive. Putting together, the application alone costs 150 hours of specialist staff (lawyers, social scientists, etc.) and 1000 hours of support staff.

From the date of filing the application for the GI, it may take as many as 2-3 years before the GI status is granted. Further there is only a single office for registration of GIs (in Chennai). All this amounts to considerable operational inconveniences.

3.5. Issue of Migration of Craftsmen

The Act is silent on the issue of migration. What if a skilled worker, also an authorised user, leaves for a distant town? Does he still holds the right to produce the “products”? Also, if a person migrates to that geographical area and after a few months learns the skill, can he register himself as an authorised user? For instance, a weaver of a Kani shawl may move from Kanihama to another part of India. He may continue to use his skill, design base and process in a new location, yet he is no longer a weaver of “Kani” shawl. Thus, reliance on the physical location alone for the protection of the use of a name may cause unnecessary hardship. A community is not necessarily a physical location, but a shared resource of custom and tradition, in which the expression of self remains possible.\(^{15}\)

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\(^{14}\) GI Act, 1999. See Schedule I.

It has been argued that the use of GI may operate unfairly when a person from outside moves into a defined geographical area.\(^\text{16}\) Traditions in manufacture and staff skills can be shifted from one geographical area to another given the increasing mobility of human resources in all parts of the world.\(^\text{17}\) Whenever people go to other places, they bring along some product (such as sweets, textiles, handicrafts, artefacts, etc.) that has specific reputation due to its association with its place of origin.\(^\text{18}\) Due to geographical limitation of GIs protection, it is argued that related cultural practices and traditional methods of production may not be protected in the case of manufacture of a product by people migrating from one place to another.\(^\text{19}\)

### 3.6. Quality Control

Quality and GI are inseparable. Quality, reputation and characteristics are three criteria to be specified before the registration of a GI. While the GI Act ensures benchmarking of reputation and characteristics, there is no provision for quality control before and after registration. Quality control and enforcement calls for effective regulatory mechanism.

There is a provision in the GI Act and Rules that calls for furnishing of information on the “particulars of the mechanism to ensure that the standards, quality, integrity and consistency or other special characteristics…which are maintained by the producers, makers or manufacturers of goods …”.\(^\text{20}\) It also requires the applicant to furnish the “particulars, if any, to regulate the use of the GI … in the definite territory, region or locality mentioned in the


\(^{20}\) GI Act, 1999, Section 11 (2). It specifies the documentation requirements for applying for a GI in India. Section 32 (1) of the GI Rules replicates these provisions and, in addition, stipulates a few more documentation requirements.
application”.

However, as indicated by the phrase “if any”, the inspection structure is not a mandatory requirement to be fulfilled while registering GIs in India. As for quality control, often furnishing details about initiatives/plans to set in place quality control mechanisms (rather than already established mechanisms) may be sufficient to have a GI registered, while the mechanism may follow suit. While it is imperative on the part of the GI Registry to implement these provisions stringently, it is also important for the stakeholders of GIs to ensure that appropriate quality control mechanisms are set in place.

3.7. Duration of GI status

The status of GI is valid only for a period of ten years. The application procedure for the GI involves an examination of the geographical region’s cultural and historical past, taking into consideration the various factors, which might have contributed to the uniqueness of the product. Much of this will not have undergone any considerable change after ten years. If this period is set in order to evaluate the existence and vigour in the supply of the product after a period of time, mandating re-application for GI is unnecessary. This ten years clause seems blindly copied from the Trade Marks Act without considering its lack of application for the GI Act.

3.8. Foreign Registration

The GI Act has its validity within the geographical territory of the country. India cannot expect the USA not to register any Indian GI unless the Indian law ensures that no GI registered in any other WTO member country will be registered as such in India. GI registration needs to be honoured on a reciprocal basis among member countries. It is not known whether India has initiated any

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23 GI Act, 1999, Section 18(1) provides that the registration of a GI shall be for a period of ten years but may be renewed from time to time for an indefinite period.
24 Trade Marks Act, 1999, Section 25(1) provides that the registration of the trademark shall be valid for a period of ten years, but may be renewed from time to time in accordance with the provisions of this section.
reciprocal bilateral agreements to honour registered Indian GIs. An essential prerequisite for establishing GI status in foreign countries is obtaining legal protection made available by those countries. However, it may turn out to be a daunting task to acquire legal armour in various target countries as per their respective legal frameworks, more so because there exist significant divergences among countries with regard to the modes and the purposes of protection of GIs. Notably, TRIPs (Article 1.1) leaves it up to the member countries to determine the appropriate method of implementing the provisions of the Agreement within their own legal framework.

In countries that require registration of GIs under a sui generis system such as India, the claimant to the GI are required to codify distinctive facts related to their products, production processes, uniqueness, geographical origin, etc. Specifying these facts in rigorous legal language, as per the requirements of the country concerned, is a technical and costly venture. In Europe, for instance, such one time effort alone could cost US 20,000 dollars.²⁵

3.9. Enforcement within and outside India

Once legal rights over a GI are obtained, they have to be defended and enforced. This entails continuous monitoring of the markets to determine whether counterfeit goods are being passed off. While rampant misuse of many Indian GIs demonstrates the urgent need for effective enforcement, the extent of misuse that has already cropped up makes the task rather difficult. Instances of misuse from within and outside the country are plentiful for Indian handicrafts and Kashmiri crafts are not an exception. For instance, in the case of Kashmiri Pashmina shawls, already a registered GI in India, threats come from power-loom made substitutes such as, Semi-pashmina, Silk-pashmina and various other categories of woollen shawls produced within India as well as

from shawls produced in Nepal\textsuperscript{26} or China that are often passed off as original \textit{Pashmina} in the global market, where there is a huge demand for these high-end shawls.

The enforcement of GIs associated with such traditional arts and craft products would be an extremely challenging venture even in India, let alone in other countries. In the first place, handicrafts are sold from a variety of formal and informal outlets in India making it a Herculean task to keep vigilance on imitations. Moreover, there are so many varieties of blended and machine-made products available in the market that regulating this trade is far from easy.

The enforcement of GIs in foreign jurisdictions is an even greater challenge for stakeholders from a developing country like India. Monitoring the foreign markets require hiring the services of a watch dog agency, which is a very expensive proposition, as is fighting legal battles overseas, particularly in developed countries, which generally entails hiring legal services from those countries at exorbitant rates (at least as per developing country standards).\textsuperscript{27}

\textsuperscript{26} Perhaps due to wide publicity by the Nepal shawl industry, a misconception has now become widespread that Pashmina is originally a product of Nepal and not of Kashmir. Even a google search reveals that there exist a number of web portals associated with the sales of Pashmina that refer to it as originating from Nepal. For instance, Blair Rhodes, CEO of the Pashmina Store in United States which is an online retailer that sells Grade A Pashmina delivered direct from Nepal to Humble, Texas, USA. In fact, this so-called “Pashmina” industry in Nepal is a major foreign currency earner for the country. There are over a hundred “Pashmina” producing units in Nepal, out of which 95% are in Kathmandu valley alone. Over 90% of Pashmina manufactured in Nepal is exported and only 10% is consumed locally. Nepal “Pashmina” is exported to around 40 countries, mainly in Europe, America and Asia. As per media reports, of late, Nepal “Pashmina” has earned a bad name in the international market. Even, polyester and woolen mixed materials are being exported in the name of Pashmina recently. Nepali “Pashmina” entrepreneurs say that it is also due to the breakneck competition in the international market. Pashmina from Nepal is even exported in India. Nepal Pashmina Industries Association (NIPA) exports large proportion of Pashmina which has improved a lot after International Trade Centre (ITC) Support Programme is implemented. In addition, the Government is helping with the process of registering the “Chyangra Pashmina” Trade Mark in Russia, United Arab Emirates, China, India, South Africa, Thailand, Brazil and Taiwan. \textit{See, e.g., Pashmina Export of India Encouraging}, THE HIMALAYAN TIMES April 20, 2013.

\textsuperscript{27} \textit{Supra} note 22, at 161.
3.10. Prohibition of Registration of certain Geographical Indications

Section 9 of the GI Act deals with the prohibition of registration of certain Geographical Indications. This section is based on Article 24.9 of the TRIPs. Article 24.9 states three situations under which the member countries are said to have no obligation to protect a GI. The first is the case where the indication is not protected in its country of origin. Now, a GI may not be protected in the country of origin not only because it has become a generic name but also for other reasons, for instance, the absence of a statute on GIs. The first criterion included in section 9(f) of the GI Act, however, restricts itself only to those cases where the concerned GI is not protected in its country of origin, solely due to the fact that it is a generic name. Thus, the provision in the GI Act is narrower than its counterpart in TRIPs.

3.11. Protection of Traditional Knowledge (TK)

India has introduced and modified its IPR laws to take care of traditional knowledge largely biodiversity and medicinal knowledge. Crafts have not been given much consideration.

The different crafts in Kashmir are carried on professional lines by the inhabitants of particular area(s) generation after generation. These are based on skill, knowledge and experience. Some of these crafts are based on what in local language is known as taleem. This taleem is based on traditional knowledge and is copied script which can be prepared by a trained professional and read by trained persons only. It consists of precise instructions that are to

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28 TRIPs Agreement, Art. 24.9 provides that there shall be no obligation under this agreement to protect Geographical Indications which are not or cease to be protected in their country of origin, or which have fallen into disuse in that country.

29 GI Act, 1999, Section 9(f) provides that Geographical Indications which are determined to be the generic names or indications of goods and are, therefore, not or ceased to be protected in their country of origin, or which have fallen into disuse in that country shall not be registered as a Geographical Indication.
be strictly followed by the weaver during the weaving process. This coded script is in real form a weaver’s technical language.\textsuperscript{30}

The \textit{taleem} cannot be accorded copyright protection as it is already in public domain and no individual is entitled to claim exclusive copyright protection over it. It cannot be protected under the Design Act, 1911 as it does not satisfy the requirements of originality, novelty and no prior publication. The TK needs protection and it is to be protected under the GI Act itself.\textsuperscript{31} However, there are some writers who deny the suitability of GIs to protect TK on the ground that GI protection is of assistance only where the knowledge is associated with a defined geographical area. Thus, if the knowledge is scattered, as in the case of Ayurvedic system of medicine, a GI cannot be used.\textsuperscript{32} Further, the goods must enjoy a commercial reputation. This is because a GI merely signifies the true source of the goods, and if the source is not important to the consumer, protection by means of a GI is immaterial. It has been suggested that the representatives of interested local communities must first survey the industry and consumer groups regarding the market demands for various indigenous products because a significant market for the product is an essential criterion for the use of a GI.\textsuperscript{33}

A large portion of TK is currently being documented, but GI cannot be used to protect all of it because knowledge underlying a GI remains in the public domain, and hence its misappropriation (qua piracy) is not protected against. As such GIs should be considered as a part of a wider set of policy measures that seek to protect and reward indigenous knowledge. This raises the possibility of complementary, though overlapping, IPRs covering similar subject matter. By way of example, consider handicrafts: the technical content may be protected as a technical idea, while the cultural value as a form of

\begin{thebibliography}{99}
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\bibitem{30} Supra note 7, at 225.
\bibitem{31} Ibid.
\end{thebibliography}
expression and its distinctive characteristics through marks or indications of geographical origin. Keeping in view the inadequacy of GIs for the protection of TK, some countries have devised sui generis systems to protect their indigenous knowledge.

There are, however, the writers who argue that GIs may be better than sui generis system for the protection of that TK which has been in the public domain for so long that it is difficult to assign it to a specific right holder.

As already pointed out that in case of handicrafts, the requisite knowledge is in the public domain and distinctiveness of the product is dependent on human factors, therefore, the product may be manufactured anywhere. However, when produced in a particular area, the product enjoys a unique reputation. In such cases, a GI affords considerable protection because consumers are willing to pay a premium in the market for products manufactured in that region, and using that region’s traditional methods. GI seems to be one of the best ways of protecting such products because they cannot receive patent-like protection, nor do they derive their uniqueness from any natural factor available only in that area.

Various studies have quantified the price premium associated with GI products. A consumer survey undertaken in the European Union (EU) in 1999, for instance, found that 40 percent of consumers would pay a 10 percent premium for origin-guaranteed products. Econometric models employing the hedonic pricing techniques also support the willingness to pay more for GI products. Though anecdotal, these studies bear testimony to the fact that GIs

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34 Supra note 11.
36 Supra note 32, at 734.
38 One Econometric Study found that certain regional designations for “Bordeaux” wines command a large price premium as much as US 15 dollars per bottle in the case of the “Pomerol” designation. (See, e.g., Stuart London and Constance E. Smith, Quality Expectations, Reputation, and Price, 64
do have the potential to fetch a significant increase in value-addition through premium pricing.  

Sou. Eco.J.628-647 (1998). Another such study found that wines with a “Napa Valley” designation were priced 61 percent higher than wines with a “California” designation (See Helene Bombrun and Daniel A. Sumner, What Determines the price of Wine? The Value of Grape Characteristics and Wine Quality Assessments, AIC ISSUES BRIEF no. 18, 1-6 (Jan. 2003). Evidence for price premium is not limited to wines alone. For instance, econometric work on the Spanish market for meat products showed that products bearing the “Galician Veal” label commanded a premium of US 0.21 dollars per kilogram. (See, Maria Luz Loureiro and Jill J. McCluskey, Assessing Consumer Response to Protected Geographical Identification Labelling, 16 Agribusiness 3, 309-320 (2000).