

'Vanity GIs': India's Legislation on Geographical Indications and the Missing Regulatory Framework

Yogesh Pai* and Tania Singla**

1 INTRODUCTION

A walk through the narrow winding lanes of Bari Bazaar in India's holy city of Varanasi (popularly known as Benaras or Kashi) is captivating for several reasons. Located in one of the oldest continually inhabited cities in the world, Bari Bazaar is a popular hub for producers and sellers of Banarasi silk sarees and brocades. The region represents an epitome of syncretism in India's diverse cultural setting. As the river Ganges silently flows through the city, Varanasi today has emerged as a confluence of products protected by geographical indications (GIs) with five GI registrations assigned to this region alone.¹

But there is also a crisis of survival. Today, one of the most important challenges facing Banarasi saree producers is that cheaper synthetic imitations are produced in the textile city of Surat, which is located in the Western Indian state of Gujarat. It has also been reported that traders frequently import Chinese silk cloth and sell them in the Indian markets as Banarasi sarees.² This illegal trade negatively impacts Banarasi producers, since Surat-made synthetic sarees

* Assistant Professor of Law and Co-Director, Centre for Innovation, Intellectual Property and Competition, National Law University, Delhi, India.

** LL.B., National Law University, Delhi; Ms Singla previously worked as a student fellow with the Centre for Innovation, IP and Competition (CIIPC) at National Law University, Delhi. This chapter continues our ongoing research in this area and adapts and updates an article previously published as *Post-Registration Quality Control for Geographical Indications in India: the Way Forward*, 7 INDIAN J. INTELL. PROP. L. 103 (2014–2015).

¹ Binay Singh, *Varanasi Emerges As a Hub of GI Products*, TIMES OF INDIA (17 April 17, 2015 6:31 PM), <http://timesofindia.indiatimes.com/city/varanasi/Varanasi-emerges-as-a-hub-of-GI-products/articleshow/46959699.cms>.

² Shefalee Vasudev, *Ground Report | The Banaras Bind*, LIVE MINT (23 November 2013 12:04 AM), www.livemint.com/Leisure/5h1lmyORjhtn9ProZ4wiXL/Ground-Report-The-Banaras-bind.html [hereinafter Shefalee Vasudev, *The Banaras Bind*].

and Chinese-made sarees are regularly passed off as Banarasi products in different markets across India.³ Not only are the motifs and patterns of Banarasi sarees ripped-off, and their best weavers poached by producers in Surat; much more problematically, these 'Surat-made Banarasi-style sarees' are produced at a fraction of the cost (due to the use of synthetic materials and polyester) in comparison to an 'authentic' silk Banarasi saree.⁴ It is quite intriguing that Banarasi saree producers have, so far, not contemplated legal action against producers, or traders, of Surat-made or Chinese-made Banarasi-style sarees for infringing on their registered GI. Instead, several Banarasi weavers are also seeking access to cheaper raw materials for their sarees on the basis of and assumption that, by reducing their production costs, they could better fend off the competition by producing cheaper replicas of their sarees. Moreover, these producers seek to reduce costs to compete against the other legitimate producers of GI-denominated Banarasi sarees.

However, this situation begs several questions: Why are (several) Banarasi saree producers choosing to compete in a race to the bottom rather than turning to the legal enforcement of their GI and encashing the premium value of their products protected by the GI? Moreover, what implications will this strategy of lowering the quality of the authentic Banarasi sarees have on those producers who may continue to use silk fibres and not choose to compete by diluting the brand? In other words, what are the obligations of GI producers in India and does the Indian GIs system protect GI producers against those members of the GI producers' community who decide to turn to a lesser quality relying on the historical reputation of the GI products, that is, those who become 'free-riders from within'?

Overall, the existence of a GI registration on a product is meant to enable producers within a collective group to capture a premium for their products by (also) preventing members of the group from arbitrarily changing the product quality. In this respect, a GI registration also aims at preventing members of the collective group from deciding to lower the quality of the products to compete with other GI producers, or producers of similar products outside the GI-denominated market, especially when consumers are agnostic or unaware about those distinctions. Hence, the case of Banarasi sarees reveals that (at least a considerable number of) GI holders are often not concerned about the

³ Rajiv Dikshit, *Narendra Modi's Dilemma: Surat vs Banarasi Saris*, TIMES OF INDIA (27 March 2014 1:20 AM), <http://timesofindia.indiatimes.com/news/Narendra-Modis-dilemma-Surat-vs-Banarasi-saris/articleshow/32742485.cms>.

⁴ *Id.*; see also *Banarasi Sarees in Surat*, EXPORTERSINDIA.NET, www.exportersindia.net/surat/banarasi-sarees.html (last visited 7 March 2016) (providing a list of exporters of Banarasi sarees in Surat).

loss of combined reputation of their GIs resulting from compromise on the distinctive quality. Unfortunately, such instances are not unique to Banarasi sarees in India.⁵ This sense of lack of agency among GI holders highlights the collective action problem that goes deep into the ambiguity surrounding what makes a particular GI unique and the lack of adequate quality control on the ground amongst many GI producers in India. Interestingly, some may argue that changing the composition of raw materials by a few entrepreneurial members of a GI club could be seen as innovation. Yet, when that innovation includes turning to cheaper materials and to synthetic fabrics for sarees historically woven with silk, it should more likely be regarded as a compromise of GI-product quality and a (self)dilution of the GI's distinctiveness.⁶

Essentially, this debate comes down to the quality and characteristics that GI-denominated products are supposed to possess and that GIs are supposed to purport to consumers. Presently, however, almost all of the GI awareness campaigns in India seem to be focused only on the registration component of GIs.⁷ Even though the branding and promotion of GI products has started receiving some attention both on the domestic and international fronts,⁸ the Indian government and the surrounding legal and policy discourse on Indian GIs have, at least until now, completely ignored the introduction of quality-control and maintenance measures for goods produced under the GI tag. In many ways, it could be said that the Indian GIs regime promotes a system of 'Vanity GIs' where the registration of GIs is seen as an end in itself and a measure for brand promotion, with little attention being paid to the deep linkages between the registration of GIs and the quality control that should follow the registration. Instead, quality control – and in turn the function of GIs as guarantors of and symbols assuring product quality – is central to the success of the Indian GIs regime, and this chapter seeks to fortify this claim by identifying how the consumer perception of quality has a sharp influence on the economics of GIs.

Accordingly, this chapter focuses on the post-registration quality-control regulatory measures for GIs in India. First, this chapter identifies the problem

⁵ Recently, studies conducted on Assam's Muga silk have also faced similar issues. Kiran George, *When the Tezpur University Came to GI Tagged Muga Silk of Assam's Rescue*, SPICYIP (28 April 2015), <http://spicyip.com/2015/04/when-the-tezpur-university-came-to-gi-tagged-muga-silk-of-assams-rescue.html>.

⁶ Amit Basole, *Authenticity, Innovation and the Geographical Indication in an Artisanal Industry: The Case of the Banarasi Sari* (Department of Economics, University of Massachusetts, Working Paper No. 2014-09), http://repec.umb.edu/RePEc/files/2014_09.pdf.

⁷ Vrunda Kulkarni & Viren Konde, *Pre- and Post- Geographical Indications Measures for Handicrafts in India*, 16 J. INT'L PROP. RTS. 463, 467 (2011).

⁸ Winson Thomas, *Economic Competitiveness through Geographic Indications*, 2 INT'L J. MKTG., FIN. SERVS. & MGMT. RES. 182, 183 (2013).

involving the interface between GIs as collective intellectual property (IP) rights and their linkages with quality and product/process standards. Second, it briefly discusses the experiences of two comparative jurisdictions – the United States (US) and the European Union (EU) – regarding the linkages between the GIs framework and the corresponding regulatory framework for quality control. Third, the chapter explores the missing regulatory framework in India and discusses the limitations of Indian GI law in this regard. A few short case studies are presented to highlight the various combinations of statutory and self-voluntary mechanisms associated with different GI products in India. The objective is to show how different mechanisms for quality control have led to either preservation or dilution of the collective reputation of GI. This chapter concludes by elaborating on the reasons for failure of the Indian GIs regime on issues of quality control and suggests that decentralized mechanisms for different GIs, which are nevertheless governed by a uniform statutory framework, are the way forward to restore the credibility of many GIs and promote a successful system of GI protection in India.

2 THE RELEVANCE OF QUALITY FOR GEOGRAPHICAL INDICATIONS

GIs do not serve merely as indications of their origin. In their simplest form, GIs also signify a connection between ‘a product’s reputation, quality or characteristic and its geographical origin’.⁹ In the marketplace, consumers often find it difficult to assess product quality without searches or experience and normally possess limited information about the valuable attributes of the product.¹⁰ The producers, however, possess full information about the product’s attributes and quality relative to other goods in the market.¹¹ This results in the ‘natural chaos’ of asymmetrical information. Such information asymmetry can negatively impact the market, or the purchasing choice of consumers, when it is exploited by certain producers who may be inclined to lower the quality of the goods supplied precisely because consumers lack complete information, as is often the case.¹² In such a scenario, GIs can help restore the symmetry in information by offering consumers additional information on the products’ quality and reputation so that they are not adversely placed against producers. In his model on reputation, Shapiro suggested that reputation

⁹ Cerkia Bramley, *A Review of the Socio-Economic Impact of Geographical Indications: Considerations for the Developing World*, WIPO Worldwide Symposium on Geographical Indications 1 (2011).

¹⁰ *Id.* at 2. ¹¹ *Id.* ¹² *Id.*

operates as a signalling device, which transmits information about a certain quality to the consumers, thereby reducing the consumer's search costs.¹³ The operation of GIs is quite similar and therefore GIs could have a direct impact on consumer welfare by leading consumers towards goods of a higher quality.¹⁴

One of the prime motives behind obtaining a GI registration is in fact to create a distinct reputation for the product bearing the GI label so that consumers will eventually move from the point of brand awareness, in this case GI-awareness, about the product to brand preference, in this case GI preference, where they are willing to pay a higher price ('premium') for the GI-denominated product and, at the same time, refuse to accept other alternatives.¹⁵ In this regard, surveys conducted by the United Nations Conference on Trade and Development (UNCTAD) among EU consumers provide good insights. These surveys show that for GI-registered agricultural products consumers are willing to pay a premium of up to 10 to 15 per cent, whereas for non-agricultural products the premium could range anywhere between 5 and 10 per cent.¹⁶ In particular, most consumers expect GI products to be of a higher quality than non-GI products.¹⁷ The findings of certain empirical studies show that in case of foodstuffs. Even though labelling of GIs does not operate as the most important quality attribute,¹⁸ GIs are frequently associated with higher quality control and consumers highly value food safety inspection. Thus, GIs remain an important indicator of quality in the marketplace.¹⁹ Consumer

¹³ Carl Shapiro, *Premiums to High Quality Products as Returns to Reputation*, 98 THE Q. J. ECON., 659, 670–72 (1983).

¹⁴ Thierry Coulet, *Assessing the Economic Impact of GI Protection*, in EXTENDING THE PROTECTION OF GEOGRAPHICAL INDICATIONS: CASE STUDIES OF AGRICULTURAL PRODUCTS IN AFRICA 101, 103 (Michael Blakeney et al. eds., 2013); Luisa Menapace & Gian Carlo Moschini, *Quality Certification by Geographical Indications, Trademarks and Firm Reputation*, 39 EUR. REV. AGRIC. ECON. 539, 539–49 (2012).

¹⁵ Amarjit Singh, *The Role of Collective Marks, Certification Marks and Geographical Indications*, WORLD INTELLECTUAL PROPERTY ORGANIZATION (2007), www.wipo.int/meetings/en/doc_details.jsp?doc_id=81475.

¹⁶ Shashikant B. Bagade & Deven B. Metha, *Geographical Indications in India: Hitherto and Challenges*, 5 RES. J. PHARM., BIOLOGICAL & CHEM. SCIS. (2014), [www.rjpbcs.com/pdf/2014_5%282%29\[146\].pdf](http://www.rjpbcs.com/pdf/2014_5%282%29[146].pdf).

¹⁷ Ramona Teuber, Sven Anders & Corinne Langinier, *The Economics of Geographical Indications: Welfare Implications* (Structure and Performance of Agriculture and Agri-products industry Network, Working Paper No. 2011–16), http://ageconsearch.umn.edu/bitstream/103262/2/Lit-Overview_GI_Paper_04_2011.pdf.

¹⁸ Wim Verbeke, *Food Quality Policies and Consumer Interests in the EU*, in CONSUMER ATTITUDES TO FOOD QUALITY PRODUCTS: EMPHASIS ON SOUTHERN EUROPE 13, 17 (Marija Klopčič, Abele Kuipers & Jean-Francois Hocquette eds., 2013).

¹⁹ *Id.*

perception regarding GI labels thus has important economic implications as it directly influences consumer preferences for the product.²⁰ For example, Louriero and McCluskey have concluded that Spanish consumers are more inclined to pay a premium for fresh meat products labelled with a protected geographical indication (PGI) label – Galician Veal, which is regulated by the European Union – because the consumer perception associates the certification directly with food safety in addition to quality.²¹

But it would be incorrect to claim that the association of reputation with quality is unique to GIs. Trademarks also operate as useful information tools for consumers by allowing them to equate the quality of a good with a distinct brand and business, thereby reducing consumer confusion and their search costs.²² Consequently, trademark protection offers a natural incentive for every business to produce and maintain a ‘consistent quality over time and across consumers’.²³ This encourages the firm to invest in quality (as expected by the customers) and brand value, lest it lose customer loyalty and of course sales.²⁴

Despite these similar tendencies, unfortunately, the incentive to maintain quality does not arise in the case of GIs in the same way it does in the case of trademarks. GIs are collective public or ‘club’ goods and, as such, are more prone to the classic ‘free-rider’ problem compared to other distinctive signs like trademarks.²⁵ In particular, the link between the GI as a collective mark and its owners (i.e. association of producers) is not as direct as in the case of trademark owners protecting their marks. Moreover, not only do GIs identify the quality and the characteristics of the GI-denominated products, but they also embody the *collective* reputation that consumers place on the association or group of producers in a

²⁰ John M. Crespi & Stéphan Marette, *Some Economic Implications of Public Labeling*, FARM FOUNDATION (2003), www.farmfoundation.org/projects/03-65CrespiMarettepaper.htm.

²¹ Maria L. Loureiro & Jill J. McCluskey, *Assessing Consumer Response to Protected Geographical Identification Labeling*, 16 AGRIBUSINESS 309, 314 (2000).

²² Gian Carlo Moschini, Luisa Menapace, & Daniel Pick, *Geographical Indications and the Competitive Provision of Quality in Agricultural Markets*, 90 AM. J. AGRIC. ECON. 794, 794 (2008).

²³ William M. Landes & Richard A. Posner, *The Economics of Trademark Law*, 78 TRADEMARK REP. 267 (1988).

²⁴ World Intellectual Property Organization, *The Economics of Trademarks in Brands And Reputation in the Global Marketplace*, in 2013 WORLD INTELLECTUAL PROPERTY REPORT 81, No. 944E/2013, www.wipo.int/edocs/pubdocs/en/intproperty/944/wipo_pub_944_2013.pdf.

²⁵ Lina Monten, *Geographical Indications of Origin: Should They Be Protected and Why? An Analysis of the Issue from the U.S. and EU Perspectives*, 22 SANTA CLARA HIGH TECH. L. J. 315, 315 (2005).

certain region (who participate in the production of the GI product) and which is carried forward through tradition over time.²⁶ Therefore, while conducting a realistic assessment of GIs one must take into account and tackle the possibility of free-riding from within, i.e. by insiders.²⁷ These insiders are individual producers that operate within the collective group of GI producers, are legally entitled to produce GI-denominated products (as a registered proprietor or authorized user), but have succumbed to producing goods of inferior quality in a bid for higher profit margins. In order to prevent this unwelcome phenomenon, the regulation structure that is at the basis of GI protection needs to provide for specific procedures, which must account not only for the verification of the geographical origin and manufacturing source of the products but also for specific quality certification to ensure that the GI-denominated products ascribe to the registered GI specifications.

3 HOW CAN GEOGRAPHICAL INDICATIONS BE REGULATED? THE EUROPEAN AND AMERICAN EXPERIENCE

Presently, there are two dominant models of formal regulatory mechanisms for quality control and maintenance for GI-denominated products operating in different socio-economic and political contexts across the world: (a) the European-style *sui generis* quality scheme; and (b) the American-style quality scheme based on certification marks, which is not specifically a *sui generis* system for GIs but nonetheless includes relevant provisions with respect to quality control.

3.1 *The Sui Generis Protection and Related Quality Scheme in the European Union*

It is not surprising that the European Union, which was among the demanders of GI protection during the Uruguay Round TRIPS negotiations, has robust mechanisms for issues pertaining to quality control of GI products. The European Union maintains a distinct approach and position on the issue of GI protection when compared with the United States on the other side of the

²⁶ Bramley, *supra* note 9; Menapace & Moschini, *supra* note 14.

²⁷ Daniela Benavente, *The Economics of Geographical Indications: GIs Modeled as Club Assets* (Graduate Institute of International and Development Studies, Working Paper No: 10/2010), http://graduateinstitute.ch/files/live/sites/iheid/files/sites/international_economics/shared/international_economics/publications/working%20papers/2010/HEIDWP10-2010.pdf.

Atlantic. Unlike the United States, European national laws and the European Community's IP law recognize GIs as *sui generis* rights.²⁸ The European Union has passed a number of regulations to govern the grant and operation of GIs, the most significant of which is the Council Regulation 2081/92 'on the protection of geographical indications and designations for agricultural products and foodstuffs' and its subsequent amendments.²⁹ The Regulation was then repealed in 2006 and replaced by Regulation 510/2006. The 2006 Regulation was later amended and replaced in 2012 with Regulation 1151/2012, which is the current community legal instrument that governs the protection of GIs for agricultural products and foodstuffs in the European Union.³⁰ In addition, there is a separate set of Regulations that governs the regulation of GIs for wines and spirits.³¹

Presently, the European Union only grants GI protection for agriculture-related products, even though the European Commission is currently contemplating extending such protection to non-agricultural products.³² The EU Green Paper published in 2014 on this possible extension of GI protection highlights the difficulties that one may encounter in cases of the protection of non-agricultural products, which base their claims on given reputations derived by virtue of long usage rather than more specific product

²⁸ Johann Robert Basedow & Davide Bonvicini, *The EU-US Trade Dispute on Geographical Indications: Two Scorpions in a Bottle?* (Graduate Institute of International and Development Studies, Working Paper), http://graduateinstitute.ch/files/live/sites/iheid/files/sites/mia/users/Imene_Ajala/public/WTO%20Seminar%202009/Basedow_Bonvicini_-_The_EU-US_trade_dispute_on_Geographical_Indications.pdf (last visited 7 March 2016).

²⁹ Council Regulation 2081/92 of 14 July 1992 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs, 1992 O.J. (L 208) 1, as amended by 1997 O.J. (L 83) 3 & 2003 O.J. (L 99) 1 (emphasis added).

³⁰ Regulation 1151/2012 of the European Parliament and of the Council of 21 November 2012 on Quality Schemes for Agricultural Products and Foodstuff, 2012 O.J. (L 343) 1 [hereinafter Regulation (EU) No. 1151/2012]. For an overall survey of the EU protection of GIs, see MICHAEL BLAKENEY, *THE PROTECTION OF GEOGRAPHICAL INDICATIONS: LAW AND PRACTICE* (2014).

³¹ Commission Regulation 479/2008 on the common organization of the market in wine, amending Regulations No. 1493/1999, 1782/2003, 1290/2005, 3/2008 and repealing Regulations (EEC) No. 2392/1986 and 1493/1999, O.J. (L 148) 1; Regulation 110/2008 of the European Parliament and of the Council of 15 January 2008 on the definition, description, presentation, labeling and the protection of geographical indications of spirits drinks and repealing Council Regulation (EEC) No. 1576/1989, 2008 O.J. (L 39) 16.

³² *Making the Most Out of Europe's Traditional Know-How: A Possible Extension of Geographical Indication Protection of the European Union to Non-Agricultural Products*, COM (2014) 469 final (15 July 2014), <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014DC0469&from=EN>.

characteristics.³³ A study commissioned on the same topic and published the previous year specifically notes that a given reputation is 'only quoted in the definition [of GI] and there is no specific criteria established to determine whether or not a product has acquired a specific reputation'.³⁴ Yet, the European Union has been careful not to sideline quality in its drive to expand GI protection and continues to require, in its various Regulations, conformity with the quality schemes for each product and compliance with the specifications.

In this respect, the EU standards go far beyond the protection envisaged for GIs under the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS Agreement). Notably, Article 22 of the TRIPS Agreement envisages a basic level of protection for a GI and does not require a particular standard or quality control to be associated with a GI-denominated product.³⁵ Rather, the provision only contemplates an intrinsically higher-than-generic quality level for which the supply is limited due to the geographical confinement of production. It is not surprising that the European Union has adopted stringent standards because the GI provisions in the TRIPS Agreement arose largely due to the efforts and insistence of the European Union.³⁶

In particular, EU law lays down stringent standards under quality schemes for guaranteeing the quality of all European products.³⁷ These standards are enforced through competent authorities designated by Member States (Competent Authorities) responsible for official controls carried out to verify compliance with the legal requirements relating to the quality schemes.³⁸ Reports of the control activities of these Competent Authorities must be included within the multi-annual and annual national control plans submitted by every Member State to the European Union.³⁹ At the time of registration of a protected designation of origin ('PDO') and a PGI, the

³³ *Id.* at 17. The paper notes:

Requiring the description of product features ensures stable product quality, but does not require a particular level of quality. This can only be achieved by requiring a minimum quality level. However, identifying a meaningful quality benchmark may not work for all products, and setting a particular level of quality requires an element of discretion.

Id.

³⁴ *Study on Geographical Indications Protection for Non-Agricultural Products in the Internal Market*, EUROPEAN COMMISSION (18 February 2013), http://ec.europa.eu/internal_market/indrop/docs/geo-indications/130322_geo-indications-non-agri-study_en.pdf.

³⁵ Agreement on Trade-Related Aspects of Intellectual Property Rights, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) art. 22(1).

³⁶ Monten, *supra* note 25. ³⁷ Regulation (EU) No. 1151/2012, *supra* note 30.

³⁸ *See, e.g., id.* art. 36. ³⁹ *Id.* art. 40.

applicant group is required to identify one or more certification bodies, which will ensure that the product specifications associated with the GI products are met before the goods are placed on the market.⁴⁰ They are required to comply with and, as of 1 May 2010, be accredited in accordance with European standard EN 45011 or ISO/IEC Guide 65.⁴¹ The operation of certification bodies is, in turn, scrutinized by the Competent Authorities.⁴² Thus, a system of checks and balances has been integrated within the GI mechanism of the European Union.

3.2 *The Trademark-Style Protection Adopted in the United States for Geographical Names*

The United States provides a different approach owing to the fact that they lack penchant for GIs. Yet, the regulatory model for quality certification and enforcement is notable. Under the current US law, there is no *sui generis* protection available for products on the basis of their geographical origin.⁴³ The only exception to this is the protection afforded to appellation for wines, which are protected both at the federal and state levels under a system that could be defined as a *sui generis* system.⁴⁴ Hence, the principal method by which geographical indicators can be protected under US law is by means of trademark protection, namely certification marks under the aegis of the Lanham Act, the federal trademark law currently in force in the United States.⁴⁵ Trademarks also form part of US unfair competition law, within which the Lanham Act is the primary statute governing GIs protection of agricultural produce and foodstuffs.⁴⁶ Under the US Lanham Act,

⁴⁰ Regulation (EU) No. 1151/2012, *supra* note 30; Irena Kireeva, *European Legislation on Protection of Geographical Indications: Overview of the EU Member States' Legal Framework for Protection of Geographical Indications*, IPR2 (February 2011), www.ipkey.org/en/resources/ip-information-centre/19-geographical-indications/1947-european-legislation-on-protection-of-geographical-indications-overview-of-the-eu-member-states-legal-framework-for-protection-of-geographical-indications.

⁴¹ Regulation (EU) No. 1151/2012, *supra* note 30, art. 39.2. ⁴² *Id.* art. 38, 39.

⁴³ Bruce A. Babcock & Roxanne Clemens, *Geographical Indications and Property Rights: Protecting Value-Added Agricultural Products*, MATRIC Briefing Paper 04-MBP 7 (May 2004).

⁴⁴ On this point, see Irene Calboli, *Time to Say Local Cheese and Smile at Geographical Indications of Origin? International Trade and Local Development in the United States*, 53 HOUS. L. REV. 373, 394–95 (2015).

⁴⁵ Inessa Shalevich, *Protection of Trademarks and Geographical Indications*, 6 BUFF. INTELL. PROP. L. J. 67, 73 (2008).

⁴⁶ 15 U.S.C. § 1052(e) (2006); Justin M. Waggoner, *Acquiring a European Taste for Geographical Indications*, 33 BROOK. J. INT'L L. 569, 581 (2008).

Certification Trademarks are used to indicate '(1) regional or national origin; (2) material, mode of manufacture, quality, accuracy or other characteristics of the goods/services; or (3) that the work or labour on the goods/services was performed by a member of a union or other organization'.⁴⁷ In general, geographic indicators would not pass muster as trademarks or collective marks in the United States because they are geographically descriptive. However, an applicant can still register them as certification trademarks without showing any sign of acquired distinctiveness.⁴⁸ Several other kinds of distinctive names, which are otherwise protected under the rubric of *sui generis* GIs in different countries, are protected through several mechanisms, including certification trademarks, trademarks or by way of a common law remedy of passing off.⁴⁹

Even though there is no separate recognition granted to geographical indicators under US law, the US government plays an active role in ensuring that the value of the quality associated with a certified product is not diluted due to 'insiders'. Notably, in most instances, the authority that registers and consequently exercises control over the use of a geographical term as a certification mark is a governmental body or a body operating with governmental authorization.⁵⁰ The US government has separate inspectors for various agricultural types of food and beverages in order to ensure quality maintenance and control post-registration for geographical Certification Trademarks.⁵¹ Consumers and competitors are presumed to have the highest interest in maintaining accuracy and certified standards and therefore can file an opposition or cancellation proceeding against the certification mark or bring an action in the federal court if the prescribed standards are not met.⁵² Overall, even though the United States remains different, at large, from the EU system of protecting GIs, the two systems are not so opposite and, in both systems, quality control represents one of the most important components of the systems in order to safeguard consumers and the long-term quality of the products. The US approach focuses on promoting competition and innovation based on the premise that GIs could be harmful to the economy 'as they are deemed to be untradeable, collective and conserve old-fashioned production methods'.⁵³

⁴⁷ U.S. Patent & Trademark Office, *Geographical Indication Protection in the United States*, www.uspto.gov/sites/default/files/web/offices/dcom/olia/globalip/pdf/gi_system.pdf (last visited 7 March 2016).

⁴⁸ *Id.* ⁴⁹ *Id.* ⁵⁰ *Id.* ⁵¹ *Id.* ⁵² *Id.*

⁵³ Basedow & Bonvicini, *supra* note 28, at 6; *but see* Calboli, *supra* note 44, at 389–99 (noting that the US protects appellations of origin for wines under a *sui generis* system under the Treasury Department Alcohol and Tobacco Tax and Trade Bureau).

4 CASE STUDIES REFLECTING DIFFERENT EXPERIENCES WITH GEOGRAPHICAL INDICATIONS IN INDIA

In India, GI protection is available through a *sui generis* system operationalized through the Geographical Indications of Goods (Registration & Protection) Act of 1999 ('GI Act').⁵⁴ The GI Act was followed by the Geographical Indications of Goods (Registration and Protection) Rules of 2002 ('GI Rules').⁵⁵ The Intellectual Property Office in Chennai is in charge of the GI Registry for India. As of today, the Registry has been able to successfully register around 237 Indian GIs involving agricultural products, handicrafts and manufactured products.⁵⁶

Under the GI Act, the definition of 'geographical indication' adopted states that a GI is

an indication which identifies such goods as *agricultural goods, natural goods or manufactured goods* as originating, or manufactured in the territory of a country, or a region or locality in that territory, where a *given quality, reputation or other characteristic of such goods is essentially attributable to its geographical origin*.⁵⁷

But under the Act, names that do not denote the name of a country or region or locality can still be considered for registration as long as they relate to a specific geographical area and are used in relation to goods originating from that region.⁵⁸ This provides the leeway for extending protection to other famous symbols such as 'Alphonso mangoes'⁵⁹ and 'Basmati Rice'.⁶⁰ It is emphasized that this is not unique to India and the same practice is used in several other

⁵⁴ The Geographical Indications of Goods (Registration & Protection) Act, No. 48 of 1999.

⁵⁵ Biswajit Dhar & Kasturi Das, *Operationalization of GI Protection in India: A Preliminary Exploration* (2007), www2.warwick.ac.uk/fac/soc/csgr/events/conferences/conference2007/papers/das.pdf.

⁵⁶ Geographical Indication Registry, *State Wise Registration Details of G.I. Applications*, <http://ipindia.nic.in/girindia/> (last visited 7 March 2016).

⁵⁷ The Geographical Indications of Goods (Registration & Protection) Act, No. 48 of 1999 ch. 1 § 2(e) (emphasis added).

⁵⁸ *Id.* See Explanation appended to Section 2 (e) in the Indian GI Act.

⁵⁹ Alphonso Mango has not been formally registered as a GI but the application for its registration is currently pending before the GI registry. See Geographical Indications Registry, *Application Details*, <http://ipindiaservices.gov.in/GirPublic/ViewApplicationDetails.aspx?AppNo=139&index=1&pIndex=0&status=0> (last visited 8 March 2016) [hereinafter Alphonso Mango Registration Application].

⁶⁰ Basmati has not been formally registered as a GI, but the application for its registration is currently pending before the GI registry. See Geographical Indications Registry, *Application Details*, <http://ipindiaservices.gov.in/GirPublic/ViewApplicationDetails.aspx?AppNo=14&index=1&pIndex=0&status=0> (last visited 8 March 2016).

countries, including the European Union – Feta is not a region of Greece, for example.

Several scholars have suggested that the collective-action problems that can derive from the misuse of GIs with regard to quality maintenance can be alleviated to a certain extent by the adoption of 'some regulatory process that polices quality and technique among producers within the GI'.⁶¹ However, despite the stakes involved for consumers in this respect, not much attention has been paid to post-registration quality-control measures exclusively for Indian GIs under the current system of GI protection under Indian law. A recent empirical study by an Indian scholar notes the absence of an inspection mechanism on the ground in the GI-denominated regions and calls for 'a stringent quality control mechanism in place to assure the consumer of the authenticity and quality for which she pays a premium price'.⁶² The study notes that among the selected sample of GI producers, only 40 per cent indicated that quality checks were carried out for their GI products before these products were distributed to consumer and after.⁶³

Still, despite the lack of quality control for GI-denominated products in practice, Indian law does provide for some measures guaranteeing quality control in language similar to that of European law. Notably, at the time of the application to register a GI under the GI Act, a combined reading of Section 11(2) of the Act and Form GI-1 suggests that the applicant group should identify an 'Inspection Body', which is responsible for quality control of the products within the GI.⁶⁴ In fact, Rule 32(1)(g) of the Geographical Indications of Goods (Registration and Protection) Rules, 2002 specifically requires 'particulars of the inspection structure, if any, to regulate the use of the geographical indication in respect of the goods for which application is made in the definite territory region or locality mentioned in the application'.⁶⁵ Still, it is important to note that the non-existence of an inspection structure will ultimately not be considered as a

⁶¹ Kal Raustiala & Stephen R. Munzer, *The Global Struggle over Geographical Indications*, 18 *EUR. J. INT'L L.* 337, 360 (2007).

⁶² Dr Ruppel W. Sharma & Shraddha Kulhari, *Marketing of GI Products: Unlocking Their Commercial Potential* (Centre for WTO Studies, Indian Institute of Foreign Trade, August 2015), <http://wtocentre.iift.ac.in/Papers/Marketing%20of%20GI%20Products%20Unlocking%20their%20Commercial%20Potential.pdf>.

⁶³ *Id.* at 92.

⁶⁴ Form GI-1, Application for the Registration of a Geographical Indication in Part A of the Register, GI Act s 11, GI Rules r 23, http://ipindia.nic.in/girindia/Form_GI.pdf (last visited 8 March 2016).

⁶⁵ Geographical Indications of Goods (Registration and Protection) Rules, 2002.

sufficient ground for demonstrating the inadequacy of an application to register a GI for the final granting of the GI under Indian law.⁶⁶

Moreover, in addition to referring to the Inspection Body suggested by the collective group, the law in India could be strengthened by also requiring that an independent neutral agency is also appointed to maintain the quality standards of the GI-denominated products post-registration of the GI.⁶⁷ It should also be noted that the current legislative framework has no teeth as there is no statutory liability imposed on Inspection Bodies under the current GI Act in the event that they fail to conduct periodic verification of compliance with the product specifications of the associated GI.⁶⁸ At present, if members of the collective group entitled to use the GI, or consumers, want to hold a member of the group accountable for not complying with the quality standards of the products, the only course of action available is under Section 27 of the GI Act, which provides the cancellation of registration of the non-complying member from the list of authorized GI producers.⁶⁹ This mechanism is not sufficient, however, and the fact that additional preventive regulatory mechanisms may be needed to ensure the quality control of the GI-denominated products in India is accentuated by reports that popular GI-denominated products are losing their markets to adulterated products that are sold by 'insiders'. Further, the availability of cheaper raw material imports is promoting the sale of inferior-quality products. These products are handed to the unaware consumers who still rely on the name of the GI-registered products and thus are lured into paying premium prices for products that no longer carry the same characteristics of the genuine GI-denominated products.

⁶⁶ Although section 11(6) of the GI Act states 'Subject to the provisions of this Act, the Registrar may refuse the application of accept it absolutely or subject to such amendments, modification. Conditions or limitations, if any, as he thinks fit.' However, the GI Act does not contain any specific provision that relates to insufficiency in GI application due to non-existence of inspection structures. The Geographical Indications of Goods (Registration & Protection) Act, No. 48 of 1999.

⁶⁷ Office of Controller General of Patents, Designs and Trade marks, *Draft Manual of Geographical Indications Practice and Procedure*, http://ipindia.nic.in/manuals/DraftManual_GI_PracticeProcedure_31March2011.pdf (last visited 8 March 2016).

⁶⁸ There is no legislation at present that governs the qualifications and the nature of responsibilities of Inspection Bodies and the liability that may be imposed on such Bodies for failure to act in accordance with their responsibilities. E.g., in the case of textiles, The Export Promotion and Quality Assurance Division of the Textiles Committee is the First Accredited Inspection Body in India under ISO 17020 (Type 'A' Inspection Body). The ISO 17020 standard specifies general criteria for the competence of impartial bodies performing inspection. However, these Inspection Bodies have not been made liable under the Act to secure given quality in the case of GI products.

⁶⁹ The Geographical Indications of Goods (Registration & Protection) Act, No. 48 of 1999, § 27.

In the following sub-sections, this chapter reviews four case studies of Indian GI-denominated products for which it seems that 'free-riding' by insiders has become the norm. As we elaborate in the remainder of this chapter, this has negatively impacted the market for other producers within the respective collective groups.

4.1 Sarees and Brocades from Banarasi

Since the Mughal era Banarasi sarees have enjoyed a distinguished reputation on account of their fine silk, gold or silver brocade or *zari*, and opulent embroidery.⁷⁰ Even today, they continue to be a popular item among the womenfolk in India. To protect the authenticity of the weaving tradition of the Banarasi sarees, several organizations – Banaras Bunkar Samiti, Human Welfare Association ('HWA'), joint director industries (eastern zone), director of handlooms and textiles Uttar Pradesh Handloom Fabrics Marketing Cooperative Federation, Eastern UP Exporters Association ('EUPEA'), Banarasi Vastra Udyog Sangh, Banaras Hath Kargha Vikas Samiti and Adarsh Silk Bunkar Sahkari Samiti – filed an application for GI registration for 'Banarasi' in 2007. They finally secured the GI in 2009.⁷¹

However, despite the considerable reputation that the industry enjoys in both the domestic and international markets,⁷² and the GI registration, the weavers have been facing stiff competition from cheap silk fabric imports from China and Surat.⁷³ Notably, known for its unique gold-bordered designs and improvisations of medieval artistic patterns on its sarees and brocades, Banarasi sarees have been witness to fast changes and rapid industrialization. Particularly, power looms have scaled-up production and have been responsible for bringing intense competition to suit pockets of the highly segmented Indian consumer market.⁷⁴ Power-loom-based manufacturers are

⁷⁰ *Dream of Weaving: Study & Documentation of Banaras Sarees and Brocades*, TEXTILES COMMITTEE 36, <http://textilescommittee.nic.in/writereaddata/files/banaras.pdf> (last visited 8 March 2016).

⁷¹ Binay Singh, *Banarasi Sarees Get Copyright Cover*, THE TIMES OF INDIA (18 September 2009 4:40 AM), http://articles.economicstimes.indiatimes.com/2009-09-18/news/28410802_1_gi-status-banarasi-silk-gi-registration.

⁷² Statistics suggest that the annual turnover of the industry is Rs. 30,000 million (approximately \$500 million). See Basole, *supra* note 6.

⁷³ *Id.*; see also Shefalee Vasudev, *The Banaras Bind*, *supra* note 2.

⁷⁴ Shefalee Vasudev, *The Powerloom Lobby is out to Destroy India's Handloom Advantage: Ashoke Chatterjee*, LIVE MINT (25 April 2015 1:39 AM), www.livemint.com/Industry/bAQBfuEgCCEFrUGOm7zxJ/The-powerloom-lobby-is-out-to-destroy-Indias-handloom-advan.html.

now seeking parity with producers of handloom in the Banarasi region.⁷⁵ Initially, handloom-based producers of Banarasi sarees hoped not to be affected by this competition as they cater to the higher-income markets – markets in which consumers still appreciate the techniques and materials that go into a handwoven saree. Still, new ideas have emerged in the attempt to popularize handloom Banarasi sarees as ‘green products’ to capture newer markets abroad.⁷⁶

More problematically, studies show that, in order to compete with powerloom-based manufacturers, master weavers and artisans have also started to resort to strategies such as passing off synthetic fibres for silk and powerloom fabric as handloom. This, in turn, has compromised the quality of dyes and designs of the traditional sarees.⁷⁷ To date, the penetration of the markets by these inferior-quality products has reached a point where the ordinary Indian consumer can no longer be sure of the quality of the Banarasi saree she is buying. This uncertainty raises transaction costs for the consumer and unfortunately operates against the collective group of producers that have seen the sales of their artisans’ products greatly reduced.⁷⁸ The tragedy of the situation is such that some Banarasi saree producers are now advocating that the government must support new spinning mills in Banaras that produce Banarasi sarees using synthetic materials, so as to compete with Surat-made Banarasi sarees. As an alternative, these producers are advocating that they should have access to cheaper imported silk yarns, which are still natural fibres.⁷⁹

In theory, five inspection bodies were identified by the applicant group of producers in Banarasi in the GI application that was submitted to the GI Registry. These Inspections Bodies are the Department of Handlooms (Government of Uttar Pradesh), the Development Commissioner (Handlooms), the Weavers’ Service Centre, Master Weavers’ Self-Regulation and the Textiles Committee. The role of the Textiles Committee is arguably the most prominent in this respect, as the Committee is a statutory body whose main objective is ‘to ensure the quality of textiles and textile machinery both for internal consumption and export

⁷⁵ *Id.*

⁷⁶ Prashant Pandey, ‘Green’ plans for Banarasi Sarees to Take It Global, THE INDIAN EXPRESS (16 September 2014 4:20 AM), <http://indianexpress.com/article/cities/lucknow/green-plans-for-banarasi-sarees-to-take-it-global/>.

⁷⁷ Basole, *supra* note 6. ⁷⁸ Shefalee Vasudev, *The Banaras Bind*, *supra* note 2.

⁷⁹ Rajeev Dikshit, *Silk Rivals Kashi, Surat Join Hands to Fight Crisis*, THE TIMES OF INDIA (16 February 2015 10:18 AM), <http://timesofindia.indiatimes.com/city/varanasi/Silk-rivals-Kashi-Surat-join-hands-to-fight-crisis/articleshow/46378029.cms>.

purposes'.⁸⁰ The Export Promotion and Quality Assurance division of the Textiles Committee is an Accredited Inspection body in India under ISO 17020⁸¹ and provides a host of inspection services for importers/traders/exporters/manufacturers for textiles.⁸² The Textiles Committee is also the implementation agency for the Handloom Mark, which certifies that the product being purchased is genuinely handwoven.⁸³ This presents a picture quite similar to the European model, where the certification bodies for agricultural produce are accredited in accordance with European standard EN 45011 or ISO/IEC Guide 65.⁸⁴

However, until the present day, the Textiles Committee has focused its attention in the sphere of GIs almost entirely on the facilitation of the registration of GIs for unique textile products in India.⁸⁵ Besides facilitating the procedures related to GI registration, the Textile Committee does not oversee special quality or process certification schemes that are supposed to be in place for GI-denominated products, including those products which are listed as requiring an Inspection Body in the product specification, to ascertain whether the products are actually being produced in accordance with the registered specifications. Instead, at present, the Banarasi saree operates with a multitude of certification marks such as the Silk Mark and the Handloom Mark.⁸⁶ The Silk Mark Organization of India (SMOI), the registered owner of the SILK Mark, recently introduced a high-security nano-particle-embedded fusion label as a mark of purity for Banarasi silk to enable customers to verify the authenticity of the source of silk.⁸⁷ Beyond these external agencies, quality

⁸⁰ *About Us*, TEXTILES COMMITTEE, MINISTRY OF TEXTILES, GOVERNMENT OF INDIA (emphasis added), <http://textilescommittee.nic.in/about-us/about-us> (last visited 8 March 2016).

⁸¹ The ISO 17020 standard specifies general criteria for the competence of impartial bodies performing inspection. It also specifies an independence criterion of Inspection Bodies.

⁸² *Inspection*, TEXTILES COMMITTEE, MINISTRY OF TEXTILES, GOVERNMENT OF INDIA, <http://textilescommittee.nic.in/services/services-o> (last visited 8 March 2016).

⁸³ *Handloom Mark*, TEXTILES COMMITTEE, MINISTRY OF TEXTILES, GOVERNMENT OF INDIA, <http://textilescommittee.nic.in/about-us/handloom-mark> (last visited 8 March 2016).

⁸⁴ Organic Research Centre, *The European Regulatory Framework and its implementation in Influencing Organic Inspection and Certification Systems in the EU* (Susanne Padel ed., 2010), http://certcost.org/Lib/CERTCOST/Deliverable/D14_D11.pdf.

⁸⁵ *Facilitation of IPR Protection through Geographical Indications*, TEXTILES COMMITTEE, MINISTRY OF TEXTILES, GOVERNMENT OF INDIA, <http://textilescommittee.nic.in/services/g-eographical-indications> (last visited 8 March 2016).

⁸⁶ Krishna Dwivedi & Souvik Bhattacharya, *Restore Glory of the Banarasi Sari*, THE HINDU BUSINESS LINE (21 December 2012), www.thehindubusinessline.com/opinion/restore-glory-of-the-banarasi-sari/article4226412.ece.

⁸⁷ Ajay Kumar, *Banarasi Silk Gets Nano Mark of Purity*, HINDUSTAN TIMES (30 May 2012 10:05 PM), www.hindustantimes.com/india-news/banarasi-silk-gets-nano-mark-of-purity/article1e1863590.aspx.

control internally among the GI producers is especially difficult. Despite being aware of the negative impact of inferior-quality sarees, stakeholders in the industry are unable to take action due to the complex market dynamics involved.⁸⁸ It is also noteworthy that legitimate users of the Banarasi GI for sarees are not in the financial position to bear the cost of protracted litigation against traders involved in non-compliance with the product specification, which in turn diminishes the premium value that a consumer of Banarasi sarees would have ordinarily paid for the Banarasi GI due to inferior alternatives.

4.2 *Pashmina from Kashmir*

One of the most popular and sought-after craft items associated with Kashmir, the Kashmir Pashmina refers to the extremely soft woollen fabric with fibres spun out of the Pashmina goat called 'Capra Hircus'.⁸⁹ The Kashmir Pashmina is known for its 'fineness, warmth, softness, desirable aesthetic value, and timelessness in fashion'.⁹⁰ The application for GI registration of the Kashmir Pashmina was an initiative undertaken by the Craft Development Institute (CDI) to secure protection for local artisans against the mushrooming power looms and fake pashminas flooding the markets in India (and abroad). The CDI only acted as a temporary registered proprietor of the GI since the GI was assigned to TAHAFUZ, an association that comprises a diverse group of Kashmiri artisans, when TAHAFUZ was registered under the Societies Act.⁹¹ Similar to the Banarasi sarees, however, the traditional weavers in Kashmir are under severe strain due to the machine-made Semi Pashmina Shawls and imitations of the Kashmiri name that are being spun in Amritsar, located in the Indian province of Punjab (geographically close to the Indian state of Jammu and Kashmir), and China and that are sold to consumers, who are not aware of the geographical significance of the name Kashmir Pashmina and the traditional qualities associated with the authentic products.⁹²

⁸⁸ The Energy and Resources Institute (TERI), *The Protection of Geographical Indications in India: Issues and Challenges* (March 2013), www.teriin.org/div/briefing_paper_GI.pdf.

⁸⁹ Ishrat Yaqoob, Asif H. Sofi, Sarfaraz A. Wani, FD Sheikh, & Nazir A. Bumla, *Pashmina Shawl – A Traditional Way of Making in Kashmir*, 11 INDIAN J. TRADITIONAL KNOWLEDGE 329, 329 (2012).

⁹⁰ *Id.*

⁹¹ Form GI-1 (Pashmina), http://ipindiaservices.gov.in/GI_DOC/46/46%20-%20Form%20GI-1%20-%2009-12-2005.pdf (last visited 8 March 2016).

⁹² Sanjiv Singh, *Geographical Indication; A Case Study of Kashmir Pashmina (Shawls)*, 1 NEWMAN INT'L J. MULTIDISCIPLINARY STUD. 96, 100 (2014).

Unfortunately, when the application for the GI was filed, the identification of an Inspection Body for the compliance of the products with the specification was suspended until a later time.⁹³ Eventually, the responsibility for ensuring quality control for the Kashmir Pashmina products was handed over to the Pashmina Testing and Quality Certification Centre ('PTQCC') in 2013.⁹⁴ The purpose of this body is to certify the quality of the products. Procedurally, authentic Kashmir Pashmina Shawls will receive the Kashmir Pashmina Mark (GI) by the PTQCC after verification of the weaving technology, the spinning method and the genuineness of the raw materials.⁹⁵ In order to ensure greater authenticity, a micro-chip known as the Secure Fusion Authentic Label ('SFAL') would be attached to the product with a unique number that could be read under infrared light.⁹⁶ To date, the effectiveness of the PTQCC in guaranteeing the quality of the GI-denominated products still needs to be proven, as the system is in a nascent stage. Yet, as a matter of policy, the creation of a more detailed system of control for the stages of production as well as the application of a tracking system for the products is believed to be a step in the right direction in order to guarantee product compliance with the standards required as per the GI specification.

In this respect, it is interesting to note that, unlike several other prominent GIs in India, there is no certification mark associated with the Kashmir Pashmina. This again may be due to the initial lack of organization of the group of producers in setting up a quality control system for their products, as certification marks also require a dedicated certifying authority that guarantees the conformity of the marked products with the standards set for the certification.

4.3 *Tea from Darjeeling*

Whether you are from India or abroad, if you are a tea-drinker, it is almost certain that you would have heard of the famous Darjeeling tea. Darjeeling tea

⁹³ Form GI-1 (Pashmina), *supra* note 91.

⁹⁴ Press Trust of India, *J&K Weaves Plan to Save Pashmina; Power Looms Fake*, THE INDIAN EXPRESS (13 July 2014 11:19 AM), <http://indianexpress.com/article/india/india-others/jk-weaves-plan-to-save-pashmina-power-loom-fake/>.

⁹⁵ Press Trust of India, *GI Mark for Handwoven Pashmina Shawls*, BUSINESS STANDARD (5 August 2013 8:39 PM), www.business-standard.com/article/pti-stories/gi-mark-for-handwoven-pashmina-shawls-113080501152_1.html.

⁹⁶ Masood Hussain, *Now Micro-chip Embedding into the Pashmina Shawls to Assure its Authenticity*, THE ECONOMIC TIMES (6 August 2013 5:53 AM), http://articles.economic-times.indiatimes.com/2013-08-06/news/41132034_1_pashmina-shawl-farooqui-crore.

contributes just over one per cent to the total tea production in India (10.85 million kilograms of Darjeeling tea as compared to 981 million kilograms of total tea production).⁹⁷ But the reputation of Darjeeling tea remains unparalleled due to its distinctive quality and flavour and in turn has made the region a hallmark for tea, underscoring the fact that the incomparable quality of the tea is largely attributable to its geographical origin.⁹⁸ Almost synonymous with Indian tea in foreign markets, Darjeeling tea is cultivated, grown and produced in the Darjeeling district of West Bengal. Interestingly, the tea has been produced in the region by the local population for over one and a half centuries and continues to remain one of the most coveted black teas in the world.⁹⁹

In the sphere of GIs, the Darjeeling tea industry has set a milestone in Indian history. Darjeeling tea was the first GI to be registered in India after the enactment of the GI Act in 1999.¹⁰⁰ Even though the tea industry in India lies in the hands of the private sector, the Ministry of Commerce has exercised statutory control in maintaining the quality of Darjeeling tea since 1933 under various legislations (that culminated in the Tea Act in 1953) and the Tea Board.¹⁰¹ The Tea Board, a statutory authority established in 1953 under the Tea Act, has administered the use of the Darjeeling logo for many years to maintain quality and ensure that the Darjeeling logo is applied only to the tea that has been certified by the Tea Board as conforming to the prescribed characteristics of Darjeeling tea.¹⁰² Certification services are provided to the Tea Board by Intertek Agri Services, a private entity that conducts testing and possesses inspection expertise for agricultural commodities, foods and related products.¹⁰³

To ensure genuineness in the exports of Darjeeling tea, a system of certification for the authenticity of the exported Darjeeling tea by the Board was

⁹⁷ WORLD INTELLECTUAL PROPERTY ORGANIZATION, *Managing the Challenges of the Protection and Enforcement of Intellectual Property Rights*, www.wipo.int/ipadvantage/en/details.jsp?id=2540 (last visited 8 March 2016).

⁹⁸ *Id.* ⁹⁹ *Id.*

¹⁰⁰ Sudhir Ravindran & Arya Mathew, *The Protection of Geographical Indication in India – Case Study on ‘Darjeeling Tea’*, PROPERTY RIGHTS ALLIANCE (2009), www.altacit.com/wp-content/uploads/2015/03/The-Protection-of-Geographical-Indication-in-India-Case-Study-on-Darjeeling-Tea.pdf.

¹⁰¹ S. C. Srivasatava, *Protecting the Geographical Indication for Darjeeling Tea*, in *MANAGING THE CHALLENGES OF WTO PARTICIPATION: 45 CASE STUDIES 231* (Peter Gallagher, Patrick Low & Andrew Stoler eds., 2005).

¹⁰² Brief for Petitioner at 240, *In re Tea Board, India* (2003), http://ipindiaseservices.gov.in//GL_DOC/1/1%20-%20Statement%20of%20Case%20-%2017-10-2003.pdf.

¹⁰³ *List of Inspection Agency Approved by Tea Board*, TEA BOARD OF INDIA (6 May 2005), www.teaboard.gov.in/pdf/policy/List_of_Insp_Ag_under_TDEC_05.pdf.

made mandatory under the Tea Act in 2003.¹⁰⁴ All dealers of Darjeeling tea are bound to enter into a licensing agreement with the Tea Board, which includes the payment of an annual licence fee. Under the agreement, dealers are required to furnish information regarding the production and manufacture of Darjeeling tea and its sale, through auction or otherwise.¹⁰⁵ On the basis of the information supplied, the Tea Board is thus able to track and compute the total volume of Darjeeling tea produced and sold in a particular period.¹⁰⁶ Certificates of origin are issued for export consignments under the Tea (Marketing and Distribution Control) Order of 2000 as read in conjunction with the Tea Act of 1953. These certificates are to be compulsorily cross-checked at all customs checkpoints in India.¹⁰⁷ This detailed series of measures to control the origin and characteristics of the tea ensures that the sale-chain integrity of Darjeeling tea is maintained until the consignments leave the country.¹⁰⁸ Under the authentication process that is supervised by the Tea Board, 171 companies dealing in Darjeeling tea have registered with the Tea Board, seventy-four of which are producer companies and ninety-seven of which are trader/exporter companies.¹⁰⁹

As per the licensing agreement, every licensee is required to submit a sample of the tea sold by him to the Tea Board, to enable the Board to monitor the legitimacy and quality of Darjeeling tea produced by the licensees for exports *and* domestic markets.¹¹⁰ Further, the Board reserves the right to inspect, prior to and after the grant of license, the premises of any licensee where tea is being processed, manufactured, packed or stored, to ensure that the standards laid down by the proprietor are being adhered to and complied with.¹¹¹ The Tea Board has also registered the 'Darjeeling Logo' and the word 'Darjeeling' as certification trademarks. These marks may be used by any of the dealers of Darjeeling tea as long as they have been granted licensee rights by the Tea Board.¹¹²

The initiatives taken by the Tea Board in the field of monitoring and quality assurance, in collaboration with the Darjeeling Planters' Association (which is the only producers' forum in Darjeeling), are the reason why Darjeeling tea continues to enjoy an untarnished reputation not just in India but across the

¹⁰⁴ Tea Marketing (Control) Order, 2003 § 3.

¹⁰⁵ Tea Marketing (Control) Order, 2003; Srivastava, *supra* note 101.

¹⁰⁶ Srivastava, *supra* note 101. ¹⁰⁷ *Id.* at 232. ¹⁰⁸ *Id.*

¹⁰⁹ WIPO, *Managing the Challenges of the Protection and Enforcement of Intellectual Property Rights*, *supra* note 97.

¹¹⁰ *Id.* at 5.2. ¹¹¹ *Id.* at 5.3.

¹¹² The Tea Board of India, *Protection and Administration of Darjeeling in India* 1, www.teaboard.gov.in/pdf/policy/India.doc (last visited 8 March 2016).

globe. However, it has been noted that cheaper tea from Nepal is sourced by Indian blenders (due to open trade and porous borders with Nepal). This tea is very similar, in quality and characteristics, to the Darjeeling tea and unfortunately it can find its way into Indian markets sold as Darjeeling tea by traders that are not associated with the Tea Board.¹¹³ Hence, only 100 per cent Darjeeling tea can be identified with the Darjeeling tea GI and all other tea mixtures have to be identified as blends. In this respect, it should be noted that the transitory norm that was applicable in the European Union, which allowed EU importers to blend 51 per cent Darjeeling tea with 49 per cent of any other tea, and still sell the final products as Darjeeling tea, has finally been repealed in 2016.¹¹⁴ This may give an additional boost to Darjeeling tea exports from India into the European Union.

4.4 *Alphonso Mango and the Related Controversy*

Alphonso mango is a popular export variety mango grown in the coastal districts of Maharashtra, Goa, Karnataka and Gujarat.¹¹⁵ In 2014, the European Union had imposed a temporary ban on the import of Alphonso mangoes and four other vegetables from India, causing a major upheaval in the EU-India bilateral trade ties because of the impact of this decision on the Indian farmers' annual estimates of profits.¹¹⁶ The decision was taken by the EU Standing Committee on Plant Health because 207 consignments of

¹¹³ Shaoli Chakrabarty, *Concern over Darjeeling Clone*, THE TELEGRAPH CALCUTTA, INDIA (13 April 2015), www.telegraphindia.com/1150413/jsp/business/story_14233.jsp#.VqYo3IV97IU.

¹¹⁴ Regulation (EU) No. 1050/2011 of 20 October 2011 entering a name in the register of protected designations of origin and protected geographical indications (Darjeeling (PGI), O.J. (L 276); Mithun Dasgupta, *GI Tag in Place, Darjeeling Tea Growers Gear Up to Push Exports*, THE FINANCIAL EXPRESS (16 January 2016 3:32 AM), www.financialexpress.com/article/markets/commodities/gi-tag-in-place-darjeeling-tea-growers-gear-up-to-push-exports/195696/; combined cases in India: T-624/13, T-625/13, T-626/13, T-627/13, respectively entitled, *The Tea Board v. OHMI – Delta Lingerie (Darjeeling)*, *The Tea Board v. OHMI – Delta Lingerie (Darjeeling collection de lingerie)*, *The Tea Board v. OHMI – Delta Lingerie (Darjeeling collection de lingerie)*, *The Tea Board v. OHMI – Delta Lingerie (Darjeeling)*.

¹¹⁵ G-1 Application Form for Alphonso Mango, http://164.100.176.36/GI_DOC/139/139%20-%20Form%20GI-1%20-%2022-09-2008.pdf (last visited March 8, 2016). This variety accounts for about 60 per cent of India's mango exports.

¹¹⁶ See European Union Press Release, *EU Stops Some Fruit and Vegetable Imports from India, to Protect EU Crops from Pests* (1 May 2014), http://eeas.europa.eu/delegations/india/documents/press_release_eu_stops_some_fruit_and_vegetable_imports_from_india.pdf (last visited 8 March 2016); see also *EU Bans Indian Alphonso Mangoes, 4 Vegetables from May 1*, THE HINDU (28 April 2014), www.thehindu.com/news/international/world/eu-bans-indian-alphonso-mangoes-4-vegetables-from-may-1/article5956482.ece [hereinafter *EU Bans Indian Alphonso Mangoes*].

Alphonso mangoes and the other vegetables, which had been imported from India into the European Union, were found to be contaminated by pests such as fruit flies and other quarantine pests.¹¹⁷ The ban was successively lifted by the European Union in January 2015.¹¹⁸ At present, Alphonso mangoes are not formally registered as a GI in India, but an application to register the GI is pending before the GI Registry.¹¹⁹ The news of the ban imposed by the European Union underscored the importance of quality certification for agricultural products. Accordingly, as a soon-to-be-registered GI with immense export potential,¹²⁰ the Alphonso mango certainly deserves our attention in this chapter.

The mandate of inspection and certification for agricultural food products in India has been entrusted to the Agricultural and Processed Food Products Export Development Authority ('APEEDA'), a statutory body established by the Government of India in 1986.¹²¹ APEEDA fixes standards and specifications for agricultural products for the purpose of exports¹²² and also has powers to carry out inspection at storage houses where such products are kept to ensure quality.¹²³ In this respect, state-of-the-art packaging houses have been set up in major production zones to ensure a uniform quality across export consignments in order to maintain the highest quality standards in mangoes.¹²⁴ APEEDA has additionally put in place internationally recognized treatment facilities, like hot water treatment, vapour heat treatment and irradiation facilities at various places along the production belt.¹²⁵ These facilities are supplemented by a unique product identification system, supplemented by the traceability networking and Residue Monitoring Plan, which have been

¹¹⁷ *Mango Ban: India Threatens to Drag EU to WTO*, THE HINDU (1 May 2014), www.thehindu.com/news/mango-ban-india-threatens-to-drag-eu-to-wto/article5970369.ece.

¹¹⁸ See European Commission – Daily News, Plant Health: Experts Endorse the Lift of the Import Ban of Mango Fruits from India (20 January 2015), http://europa.eu/rapid/press-release_MEX-15-3523_en.htm.

¹¹⁹ Alphonso Mango Registration Application, *supra* note 59.

¹²⁰ The United Kingdom alone imports nearly 16 million mangoes every year and the market for the fruit is nearly 6 million pounds annually. See *EU Bans Indian Alphonso Mangoes*, *supra* note 116.

¹²¹ *About APEEDA*, AGRICULTURAL AND PROCESSED FOOD PRODUCTS EXPORT DEVELOPMENT AUTHORITY (APEEDA), http://apeda.gov.in/apedawebsite/about_apeda/About_apeda.htm (last visited 8 March 2016).

¹²² The Agricultural and Processed Food Products Export Development Authority Act 1985, No. 2 of 1986 § 10(2)(c).

¹²³ *Id.* at 10(2)(d).

¹²⁴ *Mango*, APEEDA, http://apeda.gov.in/apedawebsite/SubHead_Products/Mango.htm (last visited 8 March 2016).

¹²⁵ *Id.*

developed for consumer safety wherein APEDA can even issue a product recall in case of exigencies.¹²⁶

Once the Alphonso mango would be registered as a GI, it would be important that, in addition to the requirement already in place under the system supervised by APEDA, all consignments of mangoes be subject to another layer of verification based on the quality control that would be required as part of the GI specification. In particular, the group of producers that has applied for the GI for Alphonso mango, Dr Balakrishna Sawant Konkan Krishi Vidyapeeth ('BSKKV') has stated that the BKSSV and the Department of Horticulture, College of Agriculture, will decide on a Standards and Quality Committee, which will operate as the Inspection Body and maintain high standards in the quality of the mango.¹²⁷ The success of this model of self-regulation can only be assessed once the GI is registered and the Committee begins to operate. However, the long-term success of the GIs and the producers of Alphonso mangoes certainly require a high level of product quality control and traceability of products from the producers to the market.

Moreover, even though quality control for export products has been successfully managed by regulators in certain cases,¹²⁸ the EU ban on Indian mangoes indicates that internal quality control mechanisms to protect a GI product have to be carefully coordinated with the specific requirements of applicable Sanitary and Phytosanitary ('SPS') measures in the country where the exports are destined. However, SPS measures may also be used in a discriminatory manner. For example, the abnormally high number of fruit flies present in the Alphonso mango shipments that arrived in the European Union turned out to be 22, as compared to 102 from Pakistan, 27 from Dominican Republic, 22 from Jamaica, 19 from Ivory Coast, and 16 from Kenya, which contained the same fruit flies.¹²⁹ Accordingly, the European Union may even have violated her obligations under the WTO Agreement on SPS in banning the mangoes from India.¹³⁰ Further, the European Union imposed a blanket ban on Indian mangoes, when it could have approved the mangoes sourced and authenticated by APEDA, thereby imposing a more

¹²⁶ *Id.* ¹²⁷ Form GI-1, *supra* note 64.

¹²⁸ Sharma and Kulhari, *supra* note 63. As an example, the study notes that the Spice Board in India has developed mandatory pre-shipment inspection mechanisms to check for authenticity.

¹²⁹ Chinmay Deshmukh, *Pulp Friction: World Trade Organization Violations in the European Union's Ban of Indian Fruit Exports*, 2 CORNELL INT'L L. J. ONLINE 111 (2014), <http://come.lilj.org/wp-content/uploads/2014/09/C.-Deshmukh-EU-Fruit-Ban.pdf>.

¹³⁰ *Id.* at 113 (noting that it could violate Article 2.3 of the Sanitary and Phytosanitary (SPS) Agreement).

restrictive trade measure.¹³¹ Similarly, a trade ban could not exclude GI-denominated products, despite stronger quality control and inspections, even though such inspections may contribute to avoiding possible bans since these bans negatively impact the collective reputation of the GI producers.

5 CONCLUSION

GIs must be able to create value for their products in order to be valuable to registered producers. The GI regime in India borrows heavily from the regulatory framework of trademarks. Consequently, it is highly trader-centric, focusing primarily on protecting GIs against the misuse of the names by unauthorized users. The GI Act does not account, however, or accounts considerably less for the producer-centric need to maintain the quality and reputation of the GI-denominated products. Perhaps, due to the lack of awareness and lack of enough incentives, producers have not been able to assure themselves of a premium market. Legitimate interests of consumers cannot, and should not, be ignored; providing quality assurance and promoting consumer welfare have been found to be central to the success of any GI regime across the world, especially the European model.

This chapter presented four different case studies highlighting both the successes and pitfalls of post-registration quality control of GIs in India. The case study of Banarasi sarees highlights the need for collective action among the traditional producers who are choosing to compete with the synthetic fabric producers – those who sell sarees made from synthetic fabrics under the GI names – and by producers belonging to the collective group who are entitled to use the Banarasi GI. However, by choosing to compete with subpar products, producers will only dilute the premium value of the GI-denominated products. The case study of Pashmina highlights how voluntary regulatory mechanism with the support of the government has the potential to strengthen quality control and provide assurance to consumers about the origin and characteristics of the products. The use of technology to track the products and certify quality throughout the manufacturing chain may assist producers in monitoring the production of the GI-denominated products. The world-famous Darjeeling tea GI is an interesting case study, where due to the establishment of inspection structures governed by the Tea Board, the supply chains have been foolproof. But this is only on account of historical factors responsible for the establishment of the Tea Board and subsequent strict

¹³¹ *Id.* at 114.

compliance with quality norms by authorized users. And yet, it is only since 2016 that Darjeeling tea producers can take legal action against blended tea sellers in the European Union. Finally, the Alphonso mango case study, after the EU ban, highlights the need to incorporate the SPS standards of importing destinations into inspection structures by authorities in India. Due to the weak link in the GI Act, where inspection structures are not linked with compliance by GI authorized users, it remains to be seen how market dynamics will play out in this sector.

The Indian experience thus highlighted how the different mechanisms of regulation currently associated with some of the most prominent Indian GIs showcase a fragmented framework of quality-control structures across the country. This could perhaps be an advantage as GIs across the country face different issues. Yet, even though a decentralized mechanism with different approaches to the implementation of a system of quality control could be the way forward, it is also crucial that the legislature consider either the inclusion of a chapter on the responsibilities of Inspection Bodies within the GI Act or enact a separate statute altogether for the same purpose. Certainly, Indian policymakers can no longer afford to ignore quality-control debate in the policy discourse surrounding GIs as quality control is a key element to preserve the premium value of GIs as it ensures compliance with quality. To the contrary, the Indian GIs system, with its several registered GIs, will be called out for its vanity!