

## **Whats in a Champagne that aint in a Basmati**

### **A question of origin: What's in Champagne that ain't in Basmati?**

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Sipping a hot cup of the finest Darjeeling tea or enjoying an exotic champagne may not have been possible without the aid of geographical indications. For years now, products originating from one particular region or another have gained reputations for their unique quality and characteristics. Their special attributes may be due to the specific geographical conditions of their place of origin, such as the soil and temperature, and/or human factors, like the method of preparation. Such reputations, gained over a number of years, have in the modern era translated into geographical indications over which many battles have been fought. The increase in trade between countries, the reputation gained by certain goods originating from specific geographical areas, and the international demand for these goods have sparked off a new interest in geographical indicators among trading nations. With trade in such goods proving to be lucrative, countries from which they originate have understandably become more protective of them and more conscious of the need to guard against the misuse of these special geographical indications. This increased awareness in geographical markers has not prevented their illegitimate use by counterfeiters. For example, though only 10,000 million tonnes of tea are grown in Darjeeling, about 40,000 million tonnes are sold in the market!<sup>[1]</sup> The Uruguay round of trade talks, which eventually led to the setting up of the World Trade Organisation (see box), appeared to be the perfect platform to raise the issue of such misrepresentation as a trade-related issue and to initiate measures to safeguard the reputation of goods identified with particular geographical regions. After years of deliberation, protection was extended to geographical indications under the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS). However, the TRIPS agreement created two layers of protection: one for spirits and wines, and another for the entire range of other tradeable goods. With the largest number of reputed wines and spirits originating from various parts of Europe, the European Union was naturally keen to provide strong protection for these products. But, in all fairness, other goods ought to have received the same treatment. This article

attempts to highlight the differential treatment meted out to goods other than spirits and wines; in the process it deals with the controversy over Basmati rice and argues for the need for non-discriminatory protection for all tradeable goods. Geographical indications, appellation of origin and indicators of source

A geographical indication (GI) is a sign used on goods that originate in a specific geographical area and possess qualities or a reputation that are due to characteristics peculiar to that particular place. The TRIPS agreement defines it as an "indication which identifies a good as originating in the territory of a country, or a region, or a locality in that territory, where a given quality, reputation or other characteristics of the good is essentially attributable to its geographical origin."<sup>[2]</sup> An appellation of origin is a special kind of GI used on products that have a specific quality that is exclusively or essentially due to the geographical environment from which the products emerge. This is defined in the TRIPS agreement as "the geographical name of a country, region or locality, which serves to designate a product originating therein, the quality and characteristics of which are due exclusively to the geographical environment, including natural and human factors." The only difference between a GI and an appellation of origin is that GI includes reputation, which is not necessary in the case of appellation of origin. Appellations of origin may be used to protect products of a special region – eg Cuban cigars, Kolhapuri slippers, Kashmiri shawls, Florida oranges, Champagne, etc. Under the TRIPS agreement, the definition of GI includes appellation of origin.

Indications of source can be defined as expressions or signs used to indicate that a product originates from a country, a region or a specific place, without any particular reputation or quality being attributed to it. For example, Made in China may be indicated on a watch originating or manufactured in China. Indications of source differ from GI as they do not imply that the product originating from a region has any quality or reputation attached to it. GI and trademarks

It is important to note that, although GI seems to be similar to trademark as it serves to indicate goods of a certain quality, it differs from trademark in a number of ways. Trademark indicates a monopoly over a particular mark exercised by the producer of a good in order to distinguish his/her goods from similar goods manufactured by others. It has no reference to the geographical location in which the good is manufactured. GI is usually descriptive of the origin of the product. To qualify as a trademark it should not be descriptive or deceptive. For example,

Darjeeling tea would not qualify as a trademark as the term indicates where the product originated but is not distinctive enough to distinguish it from other teas that come from the same place.

TRIPS, GI and differential treatment The TRIPS agreement makes it mandatory for all governments to provide legal means to interested parties so that they can prevent the use of marks that mislead the public about the geographical origin of the good. According to the agreement, "In respect of geographical indications, Members shall provide the legal means for interested parties to prevent: (a) the use of any means in the designation or presentation of a good that indicates or suggests that the good in question originates in a geographical area other than the true place of origin in a manner which misleads the public as to the geographical origin of the good; (b) any use which constitutes an act of unfair competition." This means that interested parties cannot invoke the law if they are unable to prove that the false representation of the place of origin of certain goods has misled the public. They have the additional burden of proving that such an act has amounted to misleading the public. Article 22(3) makes it clear that member countries must desist from registering trademarks that consist of GI if the concerned product does not originate in the territory indicated, albeit subject to the condition that the use of such an indication in the trademark would mislead the public. Moreover, governments may refuse to register a trademark and/or may invalidate an existing trademark (if their legislation permits or at the request of another government) if it misleads the public about the true origin of a good. Article 23 of the TRIPS agreement states that governments of all member countries must provide the owners of GI the right, under their laws, to prevent the use of a geographical indication to identify wines not originating from the place suggested by the geographical indication. This rule applies even in cases where the public is not being misled, where there is no unfair competition, and where the true origin of the good is indicated, or where the geographical indication is accompanied by expressions such as 'kind', 'type', 'style', 'imitation', and/or other apparent disclaimers. Similar protection is given to geographical indications identifying spirits but, significantly, not to other goods. Thus Article 23 provides additional protection to wines and spirits even though the agreement does not put forward any case for granting special protection to wines and spirits. From the language of the Article it is evident that the general protection provided under Article 22 applies to wines and spirits but, in addition, member countries

must provide specific extra protection for wines and spirits. So, in the case of wines and spirits, nations must ensure the availability of legal means to interested parties to prevent others from using terms or adjectives like 'kind', 'type', 'similar', etc, alongside a reputed GI -- even if the exact place of origin (which is different from the one referred to in the GI) is clearly mentioned. For example, if the label of a wine originating in New Zealand specifies that it is produced there but claims to be a 'type' of Champagne or 'similar' to Champagne, member countries must have mechanisms in place to prevent such claims. This means that, under Article 23, only those wines and spirits produced in the particular geographical region referred to in the GI can use the GI. However, the fact that the Article covers only wines and spirits provides an unfair advantage to producers of this category of goods, which is not available to producers of other goods with distinctive GI. So, if France manages to grow aromatic rice similar to Basmati, Indian and Pakistani growers of Basmati have no remedy, under TRIPS, to prevent the European country from representing the rice grown there as 'Basmati type' rice. At the same time, if an Indian wine is represented as 'Champagne type' wine made in India, the claim can be prevented through the use of Article 23(1). It is true that the indiscriminate use of GI might result in misleading or confusing the consumer but, by the same token, the absence of protection for the GIs of goods other than wines and spirits clearly hurts the interests of the producers of such goods. Moreover, Article 24 of TRIPS provides exceptions to the protection of geographical indications that are particularly relevant in the case of GI for wines and spirits. For example, member countries are not required to protect a GI where it has become a generic term commonly used to describe the product in question. But, says the agreement, in case a government intends to regard a name or term as generic, it should ensure that it does not prejudice prior trademark rights that have been acquired in good faith and under certain circumstances, like long-established use or continued use. In addition, the agreement calls for a negotiation to establish a multilateral system of notification or registration of GI for wine. It is vital to extend similar protection to the GI of other products. So far the producers of such products have been given a raw deal under the TRIPS agreement. For one, in cases involving the illegitimate use of the GI for a competitive good not originating from the region, they have to prove not only that such use is illegitimate but also that it has misled the consumer/public and that such use has resulted in damage. For

example, if the name 'Darjeeling' is illegitimately used for a tea originating in Kenya in an attempt to pass it off as a tea from the Darjeeling area, then legitimate producers of 'Darjeeling tea' have the burden of not only proving that there has been an instance of unauthorised use but that such use has also misled the consumer and damaged their legitimate business. Similarly, the agreement should forbid the producers of similar goods from other regions to use the expressions 'type' or 'same quality', etc, alongside a well-known GI even if the actual geographical origin is indicated. For example, Rice Tech -- an American company - did succeed in growing aromatic rice similar to Basmati. But they should not be allowed to represent it as 'Basmati type' rice, even if the actual place of origin is mentioned, because it is a well-known fact that Basmati is grown in the Himalayan regions of India and Pakistan, and that this region is particularly conducive for this specific variety of rice. If such use is not prevented, Basmati growers would stand to lose their market for the product in different parts of the world and consumers everywhere could be led to believe that they are actually consuming rice grown in India or Pakistan. In fact, they may never get to taste the rice grown in this particular region. The lack of a multilateral register has hurt GI users of products other than wines and spirits as there is a danger that certain GI could be considered generic and no longer in need of protection. For example, if the United States chooses to declare that Basmati is a generic term used to indicate all aromatic rice, Basmati rice may no longer be given protection as a GI.

**THE BASMATI CONUNDRUM**

The Basmati case, which was initially a battle over patents, soon turned into a struggle over geographical indications. Basmati is an aromatic variety of rice grown in the Himalayan region of India and Pakistan. It is a slender, aromatic rice that grows in this region and is a major export crop for both countries. The soil and the climate of the region are primarily responsible for the special character of the rice grown there. Although there are other varieties of aromatic rice, like the Thai aromatic rice well know as 'Jasmine,' Basmati rice is more renowned and is totally associated with the geographical region from which it originates. Annual Basmati exports are worth about \$300 million and constitute the livelihood of thousands of farmers. The battle for Basmati began in 1997, when the US rice breeding firm, RiceTech Inc. was awarded a patent (US5663484) relating to plants and seeds, seeking a monopoly over various rice lines, including some having characteristics similar to Basmati lines. India requested a re-examination of this patent in 2000 and, in

response to this request, the patentee withdrew a number of claims, including those covering Basmati type lines. Further claims were also withdrawn following concerns raised by the USPTO. The dispute has, however, moved on from the patent issue to the misuse of the name “Basmati.” In some countries the term “Basmati” can be applied only to the long-grain aromatic rice grown in India and Pakistan. RiceTech also applied for the registration of the trademark, ‘Texmati,’ in the UK, claiming that “Basmati” was a generic term. It was successfully opposed and the UK has established a code of practice for marketing rice. Saudi Arabia (the world’s largest importer of Basmati rice) has similar regulations on the labelling of Basmati rice. The code states that “the belief in consumer, trade and scientific circles is that the distinctiveness of authentic Basmati rice can only be obtained from the northern regions of India and Pakistan due to the unique and complex combination of environment, soil, climate, agricultural practices and the genetics of the Basmati varieties.” But in 1998 the US Rice Federation submitted that the term “Basmati” is generic and refers to a type of aromatic rice. In response, to a petition filed by the US and Indian civil society organizations which sought to prevent US-grown rice from being advertised with the word “Basmati”, the US Department of Agriculture and the US Federal Trade Commission rejected it in May 2001. It opined that the label “American-grown Basmati” did not mislead the consumers, and deemed “Basmati” as a generic term. Conclusion The possible threat of GIs being declared as generic has generated responses from developing countries and some countries within the European Union. They are demanding a system of registering the GI as well as extending additional protection against unilateral decisions by member countries to consider or label well-known GIs as generic products. Such proposals have been rejected by some developed countries like the United States, Australia, New Zealand etc, on the pretext that stronger protection for other products would lead to monopoly over such products in addition to increasing the cost of setting up an effective mechanism for enforcement and of implementing new laws. However, in the end, the advantages of extending protection to GI would far outweigh the initial costs as such protection would not only enable GI products to be traded in the international markets without any trade distortions but also allow the public everywhere to enjoy the authentic product. Endnotes: [1]Niranjan Rao, Geographical Indications in the India Context: A Case Study of

Darjeeling Tea, Indian Council for Research on International  
Economic Relations [2]Article 22.1