



INTERNATIONAL LAW  
JOURNAL

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**WHITE BLACK  
LEGAL LAW  
JOURNAL  
ISSN: 2581-  
8503**

*Peer - Reviewed & Refereed Journal*

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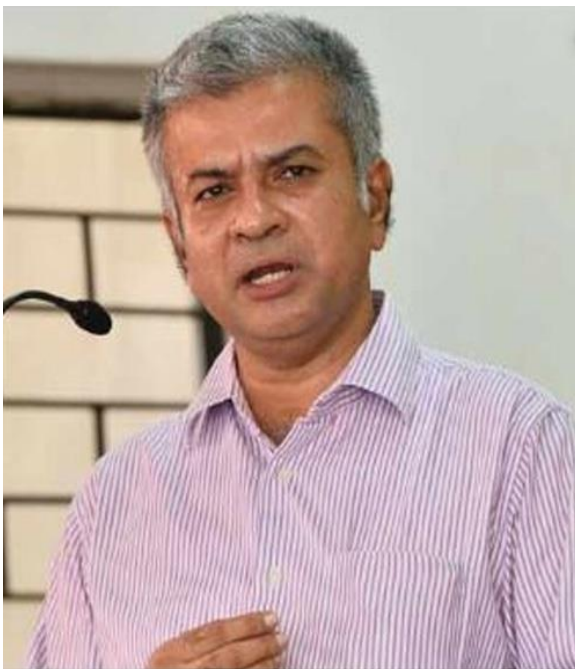
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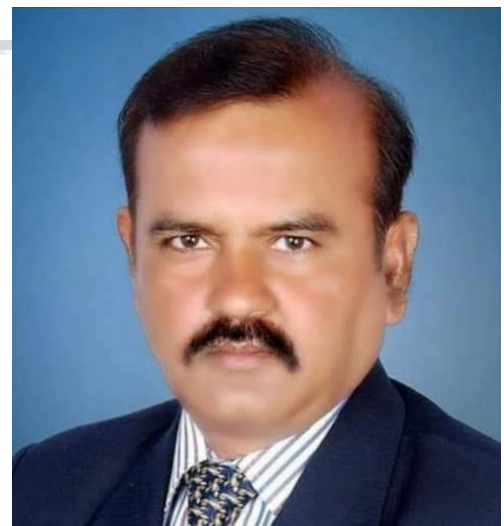
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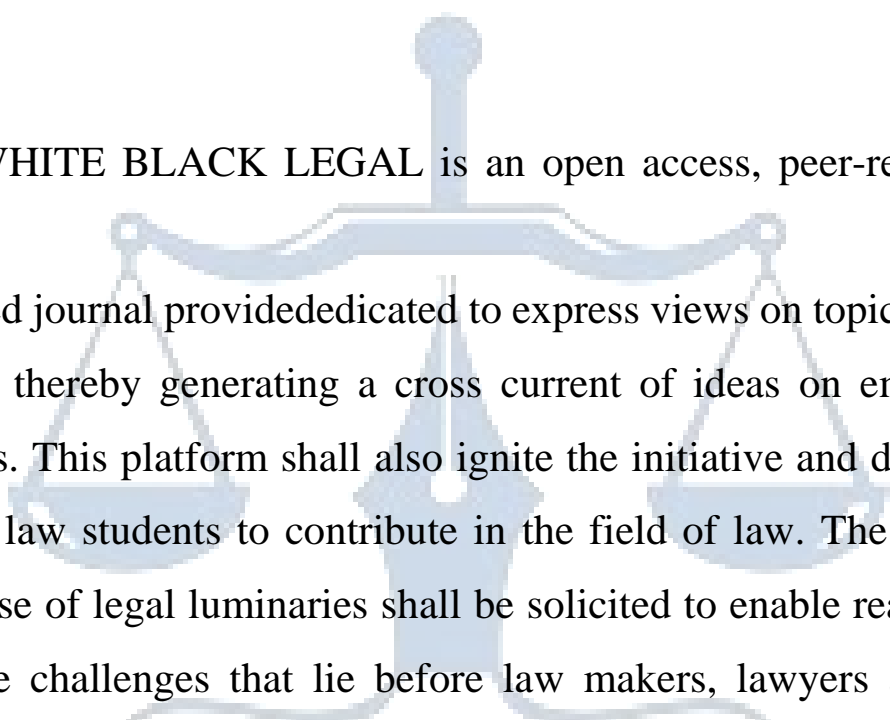


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With this thought, we hereby present to you

# **GIS AND ISSUES ACROSS BORDERS: THE CASE STUDY OF PISCO FROM THE LENS OF IPR**

AUTHORED BY – DR. RAJU NARAYANA SWAMY IAS

## **Geographical Indication: The Concept**

Geographical Indication (GI) is a category of intellectual property rights with collective ownership. It is a sign used on goods that have a specific geographical origin and possess qualities, reputation or characteristics that are essentially attributable to that place of origin. <sup>i</sup> The special characteristics, quality or reputation may be due to natural factors (raw material, soil, regional climate, temperature, moisture etc) or the method of manufacture or preparation of the product (such as traditional production methods) or other human factors (such as concentration of similar businesses in the same region). 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. <sup>ii</sup>

Classic examples in this regard include Kancheepuram Silk Saree, Pochampally Ikat, Darjeeling Tea, Balaramapuram Handloom and Aranmula Kannadi <sup>iii</sup>

## **Different definitions of geographical indication**

Unlike other categories of intellectual property rights such as patents or trademarks where there is a general definition accepted worldwide, in the case of geographical indication there is no unique definition or single terminology. This is because of the diverse ways in which the protection of GI has evolved under national laws. The following are the conventional definitions which can be found in literature:-

### **a) Definition in the TRIPS Agreement**

Article 22(1) of the WTO Agreement of Trade Related Aspects of Intellectual Property Rights concluded as part of the Uruguay Round trade negotiations, defines geographical indications as

“Indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.”

**b) Definition as per European Commission Regulation on the Protection of Geographical Indications, Designations of Origin and Certificates of Specific Character for Agricultural Products and foodstuffs (Council Regulation 2081/92 of 14<sup>th</sup> July 1992)**

For the purposes of this regulation, geographical indication is defined as

“...being the name of a region, a specific place or, in exceptional cases, a country, used to describe an agricultural product or foodstuff:

-originating in that region, specific place or country and

-which possesses a specific quality, reputation or other characteristics attributable to that geographical origin.... the geographical link must occur in at least one of the stages of production and/or processing and/or preparation of which takes place in the defined geographical area.”

**c) Definition as per North America Free Trade Agreement (NAFTA)**

For the purposes of this Agreement, geographical indication means “any indication that identifies a good as originating in the territory of a Party, or a region or locality in that territory, where a particular quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.”

**d) Definition as per the Geographical Indications of goods (Registration and Protection) Act 1999 of India**

Section 2(e) of the Act reads as:

“ 'Geographical indication', in relation to goods, means 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 and in case where such goods are manufactured goods one of the activities of either the production or of processing or preparation of the goods concerned taken place in such territory, region or locality as the case may be”.



## **Trademarks Vs GIs**

Both trademarks and GIs are distinctive symbols. Moreover both differentiate some products from others.

However, trademarks differentiate products made by different producers unlike GIs which differentiate one group of products from others that do not come from the region it protects. To put it a bit differently, while GIs differentiate goods originating from a particular place, trademarks differentiate products (goods and services) originating from a particular person or business unit such as a company. This property of GI makes it a collective mark.

Another difference is that trademarks arise from the creative genius of man while GIs are not created -they are there in nature.

A third difference is that unlike the case of trademark, social recognition must already be there before the idea and need for their protection arise <sup>iv</sup> Further, it is possible to assign or license a trademark to another person, irrespective of his geographical location. On the other hand, a GI can only be assigned or licensed to a person based in the specific geographical area signified by the GI and who can produce goods in conformity with the standards represented by the particular GI

### **Difference between GI and Trademark**

GI	Trademark
1.Product centric	1.Products and services
2. Dependency on territory is high	2. Territory is not a factor
3. Focuses on quality as primary criteria	3. The distinctive nature of the products and graphical representations is given primary importance
4. Registration is two fold, one to the registered proprietor, second to the authorized user for dissemination of the product	4. Registered once by the owner of the trademark to an individual
5. Collective body is given the right of application	5. Individual application based right

6. The nature of application makes it a collective right	6. The nature of application makes it an individual right
7. The right is non-transferable in nature	7. The right is non-transferable in nature
8. Sale, Assignment, License (wholly, partial) is not possible to a person outside the geographical area	8. Sale, Assignment, License are allowed irrespective of geographical location and depends on the owner
9. Registration is not compulsory. However without registration no action for infringement can be initiated	9. Registration is optional and depends on usage, providing with defense of passing off
10. Registered users are responsible and keep a tab on any infringement /counterfeit products during exporting	10. Global recognition makes it easier to use by unauthorized user and difficult to track. It makes easier to deliver infringing copies to potential end users and also falls in public domain.

### **Rights Provided by GI**

A geographical indication right enables those who have the right to use the indication to prevent its use by a third party whose product does not conform to the applicable standards. For example in the jurisdictions wherein the Darjeeling GI is protected, producers of Darjeeling tea can exclude the use of the term ‘Darjeeling ‘ for tea not grown in their tea gardens or not produced according to the standards set out in the code of practice for the GI.

In fact, GIs backed up by solid business management can bring with them

- a) more added value to the product
- b) competitive advantage
- c) a strengthened brand
- d) increased export opportunities.

The rights to GI are enforced by the application of national legislation, typically in a court of law. The right to take action could vest with a competent authority, the public prosecutor or any interested party-a natural person or a legal entity. The sanctions provided for in national legislation could be civil (injunctions, actions for damages etc), criminal or administrative.

## **International Regime of Geographical Indications**

The journey of GIs from indications of source to appellations of origin and finally to geographical indications is the result of various international instruments. The conventions, treaties and agreements relevant in this context are:-

1. Paris Convention for the Protection of Industrial Property 1883
2. The Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods of 1891 and the Madrid Agreement Concerning the International Registration of Marks of 1891.
3. The Stresa Cheese Convention of 1951
4. Lisbon Agreement for the Protection of Appellations of Origin and their International Registration (1958)
5. Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks which also provides for the International Registration of Certification Marks 1989.
6. a) The unsuccessful WIPO Draft Treaty on the protection of geographical indications  
b) The unsuccessful WIPO Model Law on geographical indications.
7. The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)

### **TRIPS and GIs**

The structure of section 3 of the TRIPS Agreement encompasses five main categories of issues- (a) definition and scope of a GI (b) minimum standards and common protection provided for GI corresponding to all kinds of products (c) additional protection for GI for wines and spirits (d) exceptions to the protection of GI and (e) negotiation and review of section 3 on GI.

Article 22 of the TRIPs Agreement provides a definition of GIs. Article 22.2 provides that WTO 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...”.

Thus the use of a GI which does not mislead the public as to its true origin is not an infringement

of the TRIPS Agreement. This is one of the key differences between the TRIPS protection given to all goods and the special protection given to wines and spirits. In fact, Art. 23 & 24 provide broader protection for GIs for wines and spirits than for other products. Special mention must be made here of the TRIPS requirement of home protection (Art. 24.9) which categorically states that

*“there shall be no obligation under this Agreement to protect GIs which are not or cease to be protected in their country of origin or which have fallen into disuse in that country”.*

It is worth mentioning here that the TRIPS-mandated GI regime suffers from some inherent limitations including the extended protection for only selected GIs and difficulties of obtaining protection in foreign jurisdictions<sup>v</sup>.

### **Cross Border GIs**

Cross Border GI (also called trans-border GI) has been defined as “a GI which originates from an area that covers regions, territory or locality of two or more countries where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin extending over those countries<sup>vi</sup>”. Though the majority of GIs are essentially located within the territory of a state, there are also a number of GI products across the world that have originated from the territory of two or more countries. A classic instance is Basmati rice- a product originating from both India and Pakistan. There are other examples too-for instance Irish Whiskey and Ouzo. The latter, it needs to be mentioned here, comes from both Greece and Cyprus. Needless to say, the recognition and enforcement of shared GIs across borders should claim more attention due to its economic attractions in a multilateral trading system.

### **TRIPS and Cross-Border GIs**

TRIPS does not explicitly prohibit the protection of cross-border GIs. But it remains silent as to the way out for the determination of the precise geographical origin of a GI where two or more countries have competing claims. In such a situation, member countries may depend on historical and geographical evidence, objective legal requirements and shared cultural understandings to substantiate their claims over GIs across borders<sup>vii</sup>. Further, except for a few legislative provisions in the EU to protect cross border GIs which provide for transborder GI registration for agricultural products, foodstuffs and wines (but not for spirits),

international practices in this regard are quite heterogeneous. Classic examples of first EU legislations are Regulation 1151/12 of the European Parliament and of the Council of 21<sup>st</sup> November 2012 on Quality Schemes for Agricultural Products and Foodstuffs as well as Regulation 479/2008 of the European Parliament and of the Council of 29<sup>th</sup> April 2008 on the Common Organization of the Market in Wine. In the EU case several groups within different territories may lodge a joint application within the EU centralized system.

Mention must also be made here of Art 24.1 of the Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore within the Framework of the ARIPO (African Regional Intellectual Property Organization) adopted by the Diplomatic Conference at Swakopmund (Namibia) which read as follows: “Eligible foreign holders of traditional knowledge and expressions of folklore shall enjoy benefits of protection to the same level as holders of traditional knowledge and expressions of folklore who are the nationals of the country of protection”. This Article can no doubt be extended to trans-border GI protection.

The manner in which WOOLMARK is protected can also be a leading light in this regard. The said mark is a certification mark collectively shared by the Wool Boards of Australia, New Zealand, South Africa and Uruguay. These respective Boards have set up a common Secretariat called the International Wool Secretariat which in turn has established a company called IWS Nominee Company Ltd which is responsible for protection of the WOOLMARK name and logo against all acts of infringement. Nevertheless, while drawing lessons from this example, one must not forget the basic and fundamental differences between a private right (certification mark) and the public element (rights of a GI).

The Geneva Act of the Lisbon Agreement on Appellations of Origin and GIs which was adopted in 2015 extends the Lisbon system of appellations of origin to GIs and such protection extends further over transborder geographical areas of origin. Article 5.4 of the Act lays down the procedure for joint application in the case of a trans-border geographical area. This paves the way for a single registration of cross-border GI. But it is only a humble beginning.

### Pisco

Pisco is a grape brandy geographically and culturally embedded in the identity of Chile and Peru. It is made exclusively using the varieties of “Pisqueras Grapes” and is an alcoholic

beverage made with no additives-sugar, water or any other elements strange to the grape itself. Pisco comes from the Quechua word Pisu that means bird.<sup>viii</sup>

The rivalry over the ownership of the product and its GI has confronted both nations since their very independence. It is mainly grounded on political claims rather than practical reasons. The latest debates have been located in India and Thailand. In the Indian context, Peru sought a GI tag in India for Pisco brandy while Chile opposed the move saying that they also sell the same product with the same name. The GI Registry Office in India passed an order renaming the GI as 'Peruvian Pisco' in order to end the conflict among the countries and the confusion among people regarding the product. However, Peru filed an appeal against the order before the IPAB (Intellectual Property Appellate Board) as they wanted the tag as 'Pisco' only. The IPAB after hearing the case ruled that the application filed by the Embassy of Peru for GI tag for 'Pisco' is eligible for registration without any prefix or suffix. The IPAB while making its decision noted that the word 'Pisco' is undoubtedly a denomination of origin exclusively from Peru and it cannot be compared under any circumstance with the Chilean liquor and that there cannot be any confusion or deception among the consumers.

The IPAB also mentioned that there are 22 countries where Pisco has been given sole registration to Peru. In certain countries Peru has been given registration of Pisco with a condition that even Chile can also register Pisco as a result of the Free Trade Agreements (FTAs) signed by these countries with Chile. IPAB observed that FTAs were political arrangements having no account of the historical, geographical or cultural aspects of Peru. Further IPAB agreed with Peru's claim that Chile has renamed a region called 'La Union' to 'Pisco Elqui' with malafide intention solely to establish a link between geography and Chilean liquor. IPAB also disagreed with the argument that due to Chile's occupation of Peru, there was an extension of Pisco region geographically from Peru to Chile. Subsequent to this decision, the GI Registry gave Peru registration to the tag 'Pisco'. The matter got worse with 'Chilean Pisco' getting registered as a GI in 2022. In fact, the GI application of Chilean Pisco was advertised in the GI journal in November 2022 and since there was no opposition to it within the stipulated time, it was deemed registered as a GI from the date of application (viz) 3<sup>rd</sup> June 2020 for a period of three years.

In this connection, it is worth mentioning that many regimes including USA and European Union have granted simultaneous registration to both the countries. In fact

suggestions are galore that IPAB while delivering its decision should have noted the practice around the world and must have taken an approach which could have lessened the complexity of the situation. The decision of granting registration of 'Peruvian Pisco' was probably more logical than IPAB rejecting it.

It has to be kept in mind that in future, Peru could file an objection to the granting of 'Chilean Pisco' in India especially since the IPAB has already given a decision in their favour for registering the word 'Pisco' without any prefix or suffix. In case such an objection comes from Peru, the questions that arise are:-

- (a) What will be India's stand?
- (b) Will India allow only 'Pisco from Peru' to use the GI tag or will it grant simultaneous registration to both the countries?

Regarding Thailand, litigation over the IPRs of the grape brandy began in 2007. In September 2019, the CFIIPIT (Court of First Instance on Intellectual Property and International Trade) ruled in favour of Chile regarding the use of the DO (Denomination of Origin) of Pisco. Since initially the Thaiandese Registry of Industrial Property had recognized exclusive rights to Peru, the decision of the CFIIPIT meant that both countries could legally sell and merchandise their product within the local market, as long as the name of the country of origin was expressly mentioned with the word Pisco. Peru appealed against the decision and on the 8<sup>th</sup> of April 2021, the Court of Appeals of Thailand ruled in favour of Chile, accepting the arguments of the Chilean local producers association, confirming the registration of the DO Pisco Chile.

Chile has offered Peru several times a joint solution for the use of the GI of Pisco. Unfortunately historically Peru has been reluctant to accept the offer. Heavily based on old nationalist resentments, Peru considers Pisco to be a national emblem not to be shared-or rather surrendered- to Chile. Yet scholars have suggested that the GI should actually be shared because producers of the two countries contributed to the origin and consolidation of this product. Put it a bit differently, the two countries have co-ownership rights since they are co-founders. Perhaps a joint exploitation with a homonymous indication would represent a right effort from a legal political, technical and social perspective.

## Conclusion

Cross-border GI protection requires maintaining an appropriate balance between national sovereignty-based policy considerations and a non-discriminatory approach with regard to foreign right holders. It also needs amendment of the domestic legislation and a more uniform, consistent and flexible enforcement system. We have miles to go towards such a framework which can only be achieved through shared understanding between neighbouring countries, mutual consultation and consensus to enable maximum protection for GIs across borders. To put it a bit differently, we have to tide over the legal vacuum in trans-border GI protection through bilateral, plurilateral or regional arrangements, nay inter-governmental bodies or joint commissions which can only be arrived at through political initiatives accompanied by the administrative will to execute. Till then, cross-border GI protection will at best remain to be a premise on paper.

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<sup>i</sup> <http://www.wipo.int/geo-indications/en>

<sup>ii</sup> Yogesh Pai and Tania Singla, 'Vanity GIs': India's Legislation on Geographical Indications and the Missing Regulatory Framework available at <https://www.cambridge.org/core/terms>, <https://doi.org/10.1017/9781316711002.015>

<sup>iii</sup> A peculiar type of metal (combination of tin and copper) mirror. The high quality of the mirror makes it different from ordinary mirrors

<sup>iv</sup> WIPO/GEO/BEL/07/4, Geographical Indications and Trademarks: Combined Efforts for a Stronger Product Identity: The Experience of Cuban Cigar Trademarks And Geographical Indications

<sup>v</sup>Islam, Mohammad Towhidul& Ansari, Masrur, Cross-Border GI protection: Challenges and Ramifications for Bangladesh (2017), WIPO-WTO Colloquium Papers.

<sup>vi</sup>Ibid.

<sup>vii</sup>Ibid.

<sup>viii</sup> Precolonial settlements within the territories of modern Chile and Peru spoke Quechua