

The limits of geographical indications

BY DWIJEN RANGNEKAR

In recent years, geographical indications (GIs) have been seen by some as a means to achieve multiple policy objectives including: protecting the environment, promoting sustainable development, securing rural livelihoods, protecting and rewarding holders of traditional knowledge and developing niche markets. There is a need for developing countries to review just how much GIs can deliver, and how.

There is an obvious overlap between some of these policy objectives. For example, efforts at re-balancing economic interests between primary producers and others in the supply chain of globally traded agricultural commodities focus on increasing value-added at the source and changing market access regulations in the North (e.g., tea and coffee). Here, GIs (e.g., Jamaican Blue Mountain coffee or Darjeeling tea) can help develop niche markets and localize economic returns.

It is also true that GIs can dovetail into sustainable development strategies as they can be used alongside other socially constructed markers like ‘organic,’ ‘fair trade,’ and ‘ethically traded.’ In the case of traditional knowledge, authentication marks and GIs can be used to localize control in the manufacture and sale of handicrafts as exemplified by the ‘Igloo tag’ for certifying authenticity of Inuit Art and the ‘Maori Made Mark’ to protect Maori cultural expressions.

According to the GI definition used by the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) the indication can only be used by those within the designated territory. It is this ‘club-like’ exclusionary property of GIs that has appealed to a wide variety of commentators. The rules are, in effect, the codification of long established cultural repertoires of producing a good; thus, easily compatible as a means for protecting artifacts embodying traditional knowledge. Tying the rules of club membership strongly to a particular territory would allow for a greater share of economic returns to be locally appropriated.

Surprisingly, the relationship between GIs and trademarks has not been a focus of policy discussions. This raises important concerns. For instance, the TRIPS Agreement generally prohibits the protection of trademarks that are *misleading* with respect to the geographical origin of the good (Article 22.3) and provides for an outright ban in the instance of GIs for wines and spirits (Article 23.2). However, there are differences on what is considered ‘misleading’ and the lowering of the threshold of distinctiveness (e.g., ‘Texmati’ and ‘Kasmati’) renders the prohibition void. Trademarks incorporating indications of geographical origin are also refused on the grounds that their grant could hinder other companies located in the geographical region. Guidance is needed on situations where GIs can take precedence over trademarks (or vice versa) and in which circumstances the two can co-exist.

It is also necessary to qualify the enthusiasm surrounding GIs. While there is promising evidence in each of these areas, it would be unwise to impose on GIs the multiple expectations of protecting traditional knowledge, localizing economic control and enabling sustainable development. Moreover, in every instance, GIs work in concert with other policy interventions. At times, the results have been adverse (e.g., Tequila).

In addition to these qualifications, there are other important factors to be considered. To begin, use of TRIPS provisions is contingent on the prior protection of the indication in the country of origin; thus, *demandeurs* for stronger protection urgently need to complete their homework.

Second, at the heart of a *club* are membership rules and compliance mechanisms. This requires all firms throughout the supply chain to cooperate in agreeing on a set of rules and adhering to them. In addition to the organizational task, it is crucial that consumers are aware of the rules.

Third, while intelligent framing of rules allows for localization of economic control, it is important to examine the distribution of returns along the supply chain. There is no *a priori* reason for assuming that the returns will be equitably distributed between firms.

Fourth, as GIs protect an ‘indication’ and not a product, process or the embodied knowledge as such, they will remain deficient when used to protect traditional knowledge. To be clear, GIs can be part of a larger strategy for the protection of traditional knowledge.

Fifth, much like trademarks, GIs are about buying and selling. Thus, their benefits depend on complementary efforts at protecting and promoting the ‘indication.’ In many cases (e.g., tea and coffee), this involves overcoming high levels of consolidation at the market end of the supply chain.

Finally, developing country demandeurs need to evaluate their negotiating strategies so as to effectively shape the agenda.

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