

Protection of Geographical Indications of Goods of Bangladesh: A Comparative Study of Different Protection Systems

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Abstract

The protection of Geographical Indications (GIs) of goods has attracted much attention from the countries around the world in the wake of increased interest of consumers for origin labeled products or goods. This study aims at unearthing various protection systems in vogue in countries to prescribe one particular system for a typical agrarian developing country like Bangladesh. In course of investigation it has been revealed that almost all the countries protect their GIs either under sui-generis system or under certification trademark (CTM) system. The advantages and disadvantages considered, the study found that sui-generis system has some benefits like strengthening of farmers' position, potential for rural development, superior quality maintenance of goods etc., while CTM system has its own strong points as it ensures market oriented approach, encourages more private initiative and promotes corporate branding of goods etc. in GI protection. Considering merits and demerits of both the system for a typical developing country it was shown that it depends on the development policy priority of a country to choose either of the two. If the country wants to strengthen the position of farmers, boost rural economy through GI protection, then it may veiy well go for Sui-generis system of protection. On the other hand, if the country intends to introduce corporate control of agriculture, increase quantity of goods while giving less attention on quality, then CTM system seems appropriate. The case of Bangladesh has been examined separately with the touchstone of a typical developing country and it was revealed that with some empirical studies done, Bangladesh may rather choose sui-generis system for protection of its GIs.

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1.0 Introduction

In a broad sense Geographical Indications refer to signs and symbols which indicate that a given product has its origin in a certain area or place (Asland, 2005). Under the WTO system GI refers to 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 (Trade Related Aspects of Intellectual Property Rights [TRIPS], 1994).¹ Geographical Indications (GIs) belong to the intellectual property family with other family members copyright, patent, trademarks while trademarks can be understood as GIs older brother (Folkesson, n.d.).

Recently, to the prejudice of the interest of Bangladesh three of its GI products namely, *Jamdani Saree* (a kind of women apparel), *Nakshi Kantha* (a kind of well-designed quilt) and *Fazli Mango* (a variety of mango) have been enlisted as GI goods of India (Rahman, 2012). As a result of this Bangladesh is likely to incur huge financial loss because the economic implication of GI goods is enormous.² Moreover, such goods are very much related to the history, culture and subsistence of communities of a country and the absence of proper protection mechanism can thwart the international protection of GIs. Considering these it can be maintained that absence of proper protection mechanism of GIs in individual country can be detrimental to the interest of the country.³ So, countries seem to rather favor protection of GIs. But, Bangladesh is yet to adopt any mechanism for protection of GIs (The Daily Star, 2012)

The protection mechanism of GIs of goods is varied as WTO members have the freedom to determine the legal means of protection of all GIs (TRIPS, 1994). So, GIs may be protected under a sui-generis⁴ specialized or dedicated system such as that in several ASEAN member states, EU and India or under the Trademark System as in Japan, United States and Philippines (Thitapha, 2009). Apart from that there are other countries which

protect their GIs under unfair competition and business practices law or under the passing off system⁵. Worldwide practice considered, protection of GIs of goods can be broadly categorized under trademark system and sui-generis or special type of legislation system. Furthermore, as the protection of GIs against deception is based on the rules of country of protection, there is likelihood of subjectivity. What is unacceptable in one country may be admissible in another country (Kur & Knaak, 2004). Besides, protection of jointly owned GIs (such as **Basmati** rice by India and Pakistan) makes the protection more complicated when the countries cannot reach a consensus (Dutfield, 2000).

The associated administrative and financial costs should also be considered in case of protection of GIs. The various protection systems in vogue worldwide have their own merits and demerits. So, the choice of one particular system has to be weighed against others. Taking all these factors into consideration this study endeavors to find out a suitable protection mechanism of GIs for a developing country like Bangladesh.

2.0 Research Question

What are the different existing protection systems of Geographical Indications of goods around the world? How can Bangladesh better protect its Geographical Indications of goods?

3.0 Literature Review

Most of the studies done on the protection of geographical indications (GIs) are qualitative. Some of the studies were concerned whether the very GIs should be protected or not. Some studies were done in the context of a specific country. Though the issues of investigations were diverse, they mainly centered round one aspects, i.e. the protection of GIs. Bashaw (2008) found that China is following both the trademark meaning certification trademark system and sui-generis system for the protection of its GIs. He concluded that China, in protecting GIs, should follow trademark system as the rural development potentials embedded in sui-generis protection system has little significance in accelerating

China's fast growing economy. Bramley and Kirsten (2007) conducted an investigation to find out appropriate protection system for South Africa and considering different protection system they opined that South Africa rather opt for sui-generis protection system as the system have potential for rural development, farmers' development. The study conducted by Deb (2006) was mainly concerned with protection of GIs as collective marks in the context of Japan and also highlighted on the possible contentions between trademark and GIs. The inadequacy of trademark (which is based on the principle of 'First in time, first in right') in protecting GIs, among others, was particularly highlighted in the study. Rangnekar (2004) conducted study on socio-economics of GIs. The major conclusion of Rangnekar's study is that GIs have positive relationship with rural development and indigenous knowledge protection. The relation between agricultural policy and protection of GIs has been dealt with in the writing of Caenegem (2004). It was opined that countries preferring corporate agriculture branding pursue trademark system of GI protection while countries maintaining rural status quo on the basis of territorial preferences, established ownership patterns prefer sui-generis system of protection of GIs. Teuber, Anders, and Langinier (2011) conducted study about the welfare implications of GIs emanating from different protection systems and concluded that the EU led sui-generis system of protection of GIs has more welfare implications than the US style trademark system. Giovannucci, Josling, Kerr, O'Connor and Yeung in (2009) and explained pros and cons of GIs and how they work. As the studies were qualitative, the question like what system to be preferred for a typical agrarian developing country was not answered.

4.0 Methodology

In conducting the study a qualitative method was followed. Much of the investigation of the research question is related to discovering 'existing protection mechanism of geographical indications around the world. In doing so, I mainly relied on relevant legislation of various countries and the publications of

international organization like World Intellectual Property Organization (WIPO). Once the number of countries pursuing a particular protection system is determined, the next question was why a certain country chooses a particular system, in particular what are the merits and demerits of a particular protection system? In this way the major two protection systems were investigated. The next phase was a try to make generalization and for that the context of a typical agrarian developing country was examined to prescribe a protection system for a developing country. Then with the touchstone of a typical agrarian developing country, attempt was made to prescribe a system for Bangladesh-an agrarian least developed country. In course of study data was collected from mainly various secondary sources comprising books, journals, case laws, internet sources etc.

5.0 Defining Geographical Indications

Geographical indications refer to the origin, more specifically, geographically origin of a thing on which it is used and it also conveys the link between quality of a product and its geographical origin. Champagne from France, Kobe Beef of Japan, Darjeeling tea of India, Basmati rice of India and Pakistan etc. are some but famous examples of geographical indications (GIs). These examples signify that some famous products'/goods' reputation and hence qualities are inextricably linked with its geographical origin. Geographical origin aside, they rather seem to be very much normal products. GIs may be of both goods and services. But, as per the provisions of art. 22.1 of TRIPS agreement goes, it only refers to GIs of goods.⁶

Three conditions must be met for a good to be considered as GI (Rangnekar, 2003a as mentioned in Bramley & Kirsten, 2007), namely:

1. The indication must identify a good and can be non-geographical names, symbols, words and phrases;
2. The good must necessarily possess "given quality", "reputation" or other Characteristics that are essentially attributable to the designated geographical area;

3. The designated geographical area must be indicated by the indication.

GIs mainly serve two purposes in relation to a good: a). Quality indication purpose, b). Product distinguishing function. In case of GIs it is the reputation of a good attributed to its geographical origin which makes it commercially important.

6.0 Rationale for protection of GIs

The justification for protection of GIs stems from multiple factors. However, the major causes behind protection of GIs can be described as follows:

7.0 Consumers' increased interest in GI goods

Perhaps it is one of the very few most important factors behind GI protection. With the rise of health concern and fascination for origin leveled products (OLPs) consumers' now-a-days show more interest in products having level of geographical origin. Several quality criterion such as animal welfare, concern for the environment and sustainability, fair and ethical trading, local and rural development also impact consumers' willingness to pay in this regard. Related to it is consumers' intention to pay a premium price for a product suggesting origin. Several empirical researches substantiate this assumption. For example, a United States consumer survey in 2005 noted that for 72% of the respondents the geographic characteristics such as soils do influence the taste and quality of the foods. Similarly, a large 1999 EU survey revealed that the primary purchase motivation for 37% of the respondents was the guarantee of origin, for 35% it was expected quality, for 31% it was the particular place the product came from and the method of production, and for 16% it was tradition. Furthermore, 51% of respondents (statistically equivalent to 180 million people in the EU) were willing to pay between 10% and 20% more for a GI than a non-GI product (Giovannucci et al., 2009). From these statistics it is evident that protection of GI suggesting origin, quality, reputation etc. is capable enough to attract premium price for the goods or services protected as such.

8.0 GI overcomes information asymmetry and maximizes social welfare

As GIs signal reputation or quality of a product attributed to its geographical origin, it impacts the information asymmetry problem between buyers and sellers in the market. In a typical market setting sellers have more information about the products than the buyers. Nelson (1970) showed that consumers do not have perfect access to information regarding the prices of goods, and even less so as to the quality of the goods. The problem of the asymmetrical information stems from the fact that producers only knows the product attributes while consumers do not know and can only know through search or experience (Organization for Economic Cooperation and Development [OECD], 2000). The information gap in the market acts as a bar in the smooth functioning of the market. It is shown that the information gap leads to typical market information problem in the form of adverse selection and moral hazards, originally developed by Akerlof (1970). The information problem negatively impacts the market in that the quality of total supply in the market drops, higher quality products are driven out of the market and some consumers are no longer be able to satisfy their preferences (OECD, 2000 as mentioned in Bramley & Kirsten, 2007). The high quality producers are being exposed to competition from low quality producers with the result that the former is driven out of the market by the low cost offering low quality producers of the same product as consumer will tend to buy the low cost one if he does not have sufficient information about the quality of the products.

As a quality signal tool protection of GI can help overcome the problem. GIs act as very much in the same manner as brands or certification labels which aims at overcoming the market failure caused by information asymmetry (Teuber et 'al., 2011). This provides strong justification for protection of GI in a manner that acts as a quality signal provider.

9.0 GI protection and niche market formation for farmers

GI protection paves the way for formation of niche market. Given the abundance of agricultural and artisanal GIs such niche

formation is beneficial for the farmers wherefrom they can extract premium price⁷. In fact, decreasing prices, changing consumer preferences and increased competition on commodity markets have created an alternative approach to the production and marketing of agricultural products. As a result, producers are moving away from commodity production and entering more lucrative niche markets (Bramley & Kirsten, 2007). The benefits of niche production lie in the fact that in such market the producer has full control over the supply and can decide on the price. It is based on differentiation of products that the GIs serve. In the niche market of GIs the farmer's differentiated their products than that of regular commodity market and the consumer has belief in the superior quality of the products in niche market. So, countries intending to improve farmers' economic position have strong incentive to protect and promote GIs.

10.0 GIs and rural development

GIs have tremendous rural development implications given the situation that most of the GIs belong to the agricultural and artisanal product categories. In a rural development context, geographical indications provide a tool by which rural producers can enter niche market to reap the concomitant premium to elevate their living conditions. The name of the place in the product also has the tourism implications in that people would like to visit the place where a particular product originates, which would result in increased economic activities in that area. The trade advantage stemming from GI protection also tends to be pro-poor considering the fact that GIs naturally draw upon products such as agriculture, fisheries, handicrafts and other artisanal products. This is in contrast with the other form of intellectual properties such as patent and trademarks where the gainers are mainly rich people (Jena & Grote, 2010).

11.0 GIs as repository of traditional knowledge

The protection of traditional knowledge is implicit in the protection of GIs. By protecting agricultural and artisanal GIs, the state or any collective body, as the case may be, is indeed protecting the traditional knowledge, of producer community

regarding the production of that GI. In fact, GI seems to be relatively more amenable to the traditional and customary practices of indigenous communities (Rangnekar, 2004). Again want of GI protection may result in obliteration of some sort of traditional knowledge in that due to the declining price and low market access, members of a community might lose interest to produce the GI at all. In that case, the state or any other organization, by providing improved price and market access can help continue the production of that GI and thus saves the traditional knowledge

12.0 Various types of GI protection systems

The Trade Related Aspects of Intellectual Property Rights (TRIPS agreement did not prescribe any specific protection system for GI and it is left to the discretion of the member countries to choose its own GI protection system (TRIPS art. 22, Das, 2009, **p.23**). Hence, several protection systems for GIs are in vogue all over the world attributed to the difference legal system. Predominantly, it is commonplace that GIs are protected either under Sui generis system (as is seen in EU, ASEAN countries, India) or under trademark law (as is seen in ANZ, Japan, US, etc.) (Thitapha, 2009, p.173). Generally trademark type of protection system is found in countries following common law (Anglo-Saxon) and the sui-generis system is found in countries following civil law (Roman Law) system^S. However, the existing protection system of GI can be grouped four categories namely: unfair competition and passing off, protected appellations of origin and registered geographical indications (Sui-generis system), collective and certification trademarks (Trademark system), and administrative schemes of protection.

13.0 Unfair competition system and passing off system

The essence of unfair competition law is that it requires all the state parties to provide effective protection against unfair competition which is defined as "any act of competition contrary to honest practices in industrial or commercial matters" (World Intellectual Property Organization [WIPO] Symposium, 2001). It

is accepted that commercial activities which are misleading or likely to mislead the public with respect to an enterprise or its activities, in particular, the geographical origin of products offered by such enterprise, constitute an act of unfair competition (TRIPS Article 22(b)). In order to successfully show that a use of a geographical indication is within the ambit of unfair competition, the plaintiff must regularly show that the use of the GI by unauthorized person is misleading and hence a right to damages accrued.

Action of passing off is also a system in some common law countries to prevent unauthorized use of a GI. The passing off action can be described as a legal remedy for cases in which the goods and services of one person are represented as being those of somebody else. In order to prevent unauthorized use of a GI through successful action of passing off it has to be established that goodwill or reputation is attached to the goods on which geographical indication is regularly used and it is supplied by him, and the defendant falsely cause the public to believe that the goods he supplied by him originate from the plaintiff and that he likely to suffer a damage from such misrepresentation.

14.0 Sui-Generis system

Sui-generis type of protection system is called special type of protection. In this protection system countries have specific law for the protection of GIs. Under these system the countries adopt specific law dealing with GI such as Indian Geographical Indications Law, 1999; EC Council regulation 510/2006 dealing with protection of PDOs and PGIs etc.

In countries that require registration of GIs under a sui-generis system, the claimants to a GI are required to codify distinctive facts related to their products, production processes, uniqueness, geographical origin etc. specifying these facts in rigorous legal requirements as per the requirement of the law. For example, section 11(2) of the Indian GIs Act, 1999 read with section 32(1) of GI rules enlist documentation requirements which include, among

others, documents like: 1. Statement as to how the GI serves the goods as originating from the concerned geographical territory in respect of which the uniqueness of the GI is claimed 2. The geographical map of the territory concerned 3. The particulars about the appearance of the GI, 4. An affidavit as to how the applicant claim to represent the interest of any association of persons or producers established by or under any law, 5. The standard benchmark of the use of GI, 6. The particulars of mechanism to maintain that standard or quality, 7. The particulars of the human skills involved or the uniqueness of the geographical environment contributing to the uniqueness of the GI etc. (Das, 2009). In fact, there are five pillars in registered GI or sui-generis or GI approach of protection. The five pillars can be depicted in figure as follows:

GI organization

Delimitation of the area

A proven link

Control and traceability

A book of specification. [Protected Geographical Indications in Cambodia, 2010]

So, organization building, delimitation of area, preparation of a book of specification to be followed strict compliance with production standard etcetera is discernible features of sui-generis type of registered GI system or GI approach of protection.

15.0 Certification marks system of protection

This system of protection is available under the trademark law of a country. It is also called trademark approach of protection as certification mark is a kind of trademark. This is U.S. system of protection of trademark as counterpart of EU system. It stems from the inadequacy of a trademark in that the trademark cannot necessarily contain descriptive geographical terms. Trademark law generally prohibits the registration of a name with a geographical name because it does not help to distinguish the product of one enterprise from that of another enterprise as the geographical name

indicates a region rather than a specific enterprise (Das, 2009). Hence, to protect GIs under the trademark law, certification marks system came into being. Certification marks are marks which indicate that the goods or services on which they are used contain certain qualities, which may also include geographical origin. Section 45 of the US Lanham Act, defines CTM as "any word, name, symbol, or device, or any combination thereof...used...to certify regional or other origin, material mode of manufacture, quality, accuracy, or other characteristics of....goods..."(Monten, 2006, p.326). In contrast to trademarks, the certifying entity, rather than the producers, owns the certification marks. An example of a certification mark is Good Housekeeping's Seal of Approval, with respect to GI CTMs are used to certify the regional origin of a good (Monten, 2006). As a general rule, the owner of a certification mark does not use the mark but licenses it to other enterprises and certify the goods or services carrying the mark are of certain quality (OECD, 2002 as mentioned in Rangnekar, 2004). Use of certification marks to protect GI is predominantly seen in the countries like the US, Japan, Australia etc.

16.0 Administrative schemes of protection

Administrative scheme of label protection is meant for ensuring fair trade and consumer protection. But it is not a widely exercised system of GI protection in that most of the countries in the world protect their GIs under sui-generis system or under certification mark system. In the coming sections on analysis of various protection systems, the paper will mainly concentrate on trademark and sui-generis system-the two major GI protection system in the contemporary world. Discussion on unfair competition and administrative schemes of protection may also relevantly come.

17.0 A look into world-wide GI protection systems

Among the 167 countries that protect GIs, 111 countries protect GI under sui-generis system while 56 follow sui-generis system (Giovannucci et al., 2009). And there are some countries which do not follow either sui-generis or trademark system. A 2001 WTO

review of 37 developing countries notes that, outside formal GI protection, a number of different legal means are available to safeguard GIs. These comprise regulations which protect trade (from unfair competition, counterfeiting, etc.) and consumers from misrepresentation of goods and services (food safety, fraud and labeling or "passing off" in Common Law jurisdictions). As regards Eurasia, a study conducted on 60 countries on Eurasia found that, in the region 29 countries follow sui-generis, 20 countries trademark follows trademark system, 6 countries both, 3 countries none and 2 countries are switching over to sui-generis protection system from trademark system (Giovannucci et al. 2009). Two countries Laos and Cambodia are switching to sui-generis system. Worldwide protection considered, Sui-generis system of protection is much exercised one.

18.0 Comparing different protection regimes

Under the unfair competition system In order to successfully show that a use of a geographical indication is within the ambit of unfair competition, the plaintiff must regularly show that the use of the GI by unauthorized person is misleading and hence a right to damages accrued. Rights holders are often required to show that their GI is not a generic name and it has acquired distinctiveness. This can be done through consumer surveys which are expensive and not always conclusive (Das, 2009). Protection under passing off action seems to be inadequate in that it is based on common law tradition where there is no specific law or regulation for the protection of GI. It is available for unregistered GIs and every time the claimant has to prove distinctiveness. It is a difficult, expensive and largely an uncertain process (Das, 2009). The administrative scheme system is an inadequate and uncommonly exercised system of GI protection. So, in prescribing an appropriate system of protection for Bangladesh, the research from now onwards will be confined to measuring between two systems: certification mark system and sui-generis system.

Comparison between TM and GI approach (Sui-Generis approach): The similarities found can be summarized as follows:

As of principle trademark (certification mark) are distinctive signs identifying goods of an enterprise and thus not limited by any territorial link. In contrast, Geography lies at the heart of GI or sui-generis approach (Rangnekar, 2004). The overall difference between trademark based certification mark and sui-generis registered GI approach can be summarized as follows:

Under certification mark system it is not required to meet any predefined public or private minimum quality standard

CTM unlike GIs are not linked to a specified geographical area

In CTM the rules of participation are solely defined by the owner.

GI registration give the right of use and to sue for infringement to the authorized user and registered proprietor whereas CTM (As the owner cannot use it) give the right of transfer of mark which is more private in nature (Das, 2009)

In case of registered GI it is mainly a public right as the indication is owned by the state and the protection is the result of mix of public and private actors. In contrast, as a species of trademark, CTM is mainly a private right owned by trade association or producer group and the protection is the result of private actions by the trade associations. (OECD, 2002 as mentioned in Rangnekar, 2004).

19.0 Choosing an appropriate protection system

In this section, for convenience to reach to choose an appropriate protection system, only major two systems of protection, namely; certification system and sui-generis system (GI approach) will be investigated to show the strengths and weaknesses of both the systems. After that generalization will be drawn in the context of developing countries, which will be followed by considering the case of Bangladesh for providing an appropriate GI protection prescription.

20.0 Rationale for supporting certification marks system

The arguments in support of certification mark (a kind of trademark) protection system are follows:

In case of sui-generis or special type of protection system, in various stages of protection government agencies have to be involved. This requires expenditure from the public purse ultimately the taxpayers are to bear the burden. Much of the cost of the government in this regard is related to delineation of the geographical area. Such delineation of area is often found to be contentious and culminates into litigation involving cost both from the private and public actors. Unlike certification trademark system, in the sui-generis system, central or local government bodies own the GI and collective organization of producers are given the right of use. So, bureaucracies at different level are to determine whether a GI should be registered or not and also to supervise the compliance to the specifications underlying granted GIs (Caenegem, 2004). On the other hand, in case of certification trademark system it is the registrants rather than the taxpayers, who incur most of the expenses associated with administrative responsibilities such as drafting regulations on use, standards formulation, product inspection and enforcement (Bashaw, 2008).

Unlike certification system, under sui-generis system huge cost is also involved on the part of the state to promote registered GIs. Unlike other form of intellectual properties like patent, copyright; the registration of GIs under sui-generis system or otherwise per se does not bring any reward. The reward is dependent on the promotion of GI brand which is needed at both national and international level. The promotion needs much time and expense as is evident from the fact that even for the well-known GI like champagne the cost of promotion and protection of the name around the world was very considerable (Caenegem, 2004). The huge short term expense may bring benefit in the long run. As such there is trade-off between short term expense and long term gain. Expenditure from the public fund should not be involved in any speculative undertaking. So, opposition to sui-generis approach

puts forward arguments against ambitious undertaking of the govt. and is of the opinion that it should come from private sector via certification mark system.

Another point in favor certification system is that the system, unlike sui-generis system which provides stakeholders only the right of use, creates better local stakeholders in that it provides both the right of use and the right to control of GI to the mark holders. This makes the stakeholders more responsible. One point is to be considered here that the certification mark system creates stakeholders by encouraging the "Discovery of GIs". By virtue of proprietary right, CTM registrants cannot use their marks, but they can assign and license them, which motivates them to discover new GIs (Bashaw, 2008).

The efficacy of protection of GIs through CTM system can also be found by looking at the export sector and number of well-known GIs of **countries**. The real beneficiaries of sui-generis system of **protection are those countries which have significant** number of GIs reputed around the world. On the other hand, where a country has few or no GIs with a foreign reputation, it faces a very arduous, expensive and hectic task of building reputation of its GIs in the world market (Caenegem, 2004). For such countries the speculative benefits of sui-generis protection is not significant and thus warrants for protection under CTM system.

The sui-generis system requires the registration of the GI itself so that the maintenance of standard, delineation of area for the registered, oversight activities etc. could be done easily. The system requires rigorous standard maintenance as it is based on good-place link. But in case of certification mark, the mark may be geographically descriptive (Bendekgey & Mead as mentioned in Monten, 2006 Rangnekar, 2004). So, good-place link is not that acute in case of CTM as it is in case of sui-generis or registered GI system. Such difference regarding standard is attributable to the agriculture policy of a country. The strict standard compliance in sui-generis or registered GI system prefers established, small-scale methods of rural production over alternative land uses and

production methods. Eventually, the registered GI system is more appropriate where agricultural method is traditional, the crop choices are established and the established industries in rural areas maintains geographic integrity and have an established reputation. Conversely, where there is no small-scale rural production, entrenched by tradition, geographic integrity and reputation; the registered trademark as corporate brands or certification marks are preferred system (Caenegem, 2004). So, a country which puts emphasis on quantity and alternative land use has a strong case to pursue certification mark system.

21.0 Arguments in favor of Sui-Generis (GI) approach

There are many convincing arguments in favor of sui-generis protection system of GIs; some of which are as follows:

One of the major problems trademark and hence certification mark (a kind of trademark) system of protection lies in the fact that it is based on the principle-'First in time, First in right'. The consequence of this principle in relation to GI protection is that speed in registering a mark becomes the single most important factor. As a result GI-squatting occurs when someone from outside the geographical region in question apply for a trademark and get it, which prevents the genuine claimant from the concerned geographical area from getting the registration(Deb, 2006). In case of sui-generis system of protection; the geographic area is properly delineated, the membership to the GI association is clearly defined, and the code of conduct to be followed is specified etc., which provides almost no scope to any producer outside the geographic region to register or otherwise being benefitted from the GI.

The sui-generis approach of protection presupposes the existence of very well defined and limited GI region with a good management participation by the local producers. A comparison between café de Colombia and Mexican Tequilla found that the goals of rural development and sustainable agriculture are best accomplished when the GIs are managed by local producers because the producers make management decision in ways that

value the link between **terrior**, environmental conservation and traditional farmers' knowledge for they know that their livelihood depends on sustaining the unique characteristics of the product which position it in more profitable market segments. (Barnette, 2013).

The nature of a large number of GIs is such that exercise of private rights over them seems to be illogical and absurd. So, the notion that a common good belonging to a specific territory could be privately owned, as is the case with the trademark or certification mark, is not accepted (Bramley & Kirsten, 2007). Hence, public rights nature of GIs considered, the sui-generis system of protection of protection is more legally sound.

Another argument in favor of sui-generis protection system is that it hinges on good-place link and endows the authorized registered users with only the right to use. In contrast, the owner of certification mark cannot use the mark rather he has the right to **assign or license to others. This is in contrast with the philosophical foundation of collective, regional ownership** (Bramley & Kirsten, 2007).

In case of certification mark protection is the result of private action (Rangnekar, 2004). Private entrepreneurship is interested in only profitable sectors. But there must be some GIs which are related to the history, culture, tradition of the society. In that case government initiative to protect is warranted. As the registration in GI approach or sui-generis approach is the result of both public and private action, it can better protect GIs related to culture, tradition etc.

The vulnerability of small scale producers to institute legal action in case of infringement of GIs in home country or at abroad under the trademark or certification system is also a justiciable cause for state involved sui-generis system of protection of GIs. Unlike certification mark system, in the sui-generis system ideally the state is to take legal action in case of any infringement of GIs so that the rights of the small scale are protected (Bramley & Kirsten, 2007).

Under the sui-generis protection system no individual or firm exercises the monopoly control over the knowledge embedded in the GIs and as such knowledge remains in the public domain. This prevents the commodification of traditional knowledge as protection involves the codification of well-established practices into rules that becomes part of public knowledge (Bramley & Kirsten, 2007).

The duration of certification mark and the associated renewal costs also justifies protection of GIs under sui-generis system. Trademarks/certification marks are periodically renewable, usually every ten years. But in case of GI approach (Sui-generis system), there is possibility of once off registration resulting in protection for as long as the condition of protection are upheld (Bramley & Kirsten, 2007). Rights under the later system being more perpetual in nature, is preferred one. In this aspect, it is financially viable for small scale producers if GIs to be protected under sui-generis system.

It is commonly claimed that under sui-generis system huge cost is involved on the part of the state to promote the GI and it is time consuming as well. But the counter argument is that the lags in promotion of GI would be offset by the ensuing premium price which will continue for long time. Moreover, some of the cost has already been invested by the producers in the form of sunk cost, for which certain goods come in the list of GI in a certain country (Teuber et al., 2011). Moreover, under the government initiative many private entrepreneurs, NGOs could be successfully involved in promotion of GIs. NGOs specially working with environment, agriculture can be very well engaged in this process. So the cost of brand building which seems to be prohibitive will not be actually so.

22.0 Context of a typical developing country

A typical developing country can be characterized by lower level of income, higher population growth rate, large rural population, lower level of industrialization and manufactured exports etc. (Todaro & Smith, 2011) So, government in such a country has

strong incentive to adopt agriculture and rural development policy triggered at ameliorating the position of rural inhabitants. At the same time to accelerate economic growth government will go for labor intensive manufacturing sector as Lewis two sector model suggest that there is abundant labor in agricultural sector. In fact, many ASEAN countries in the 1970s and China in 1980s and Japan in 1950s-1970s experienced their high economic growth through rapid industrialization based on technology borrowing, starting with labor intensive manufacturing sector which graduate into technology intensive sector (Hayami, 2007). The rise in labor intensive manufacturing sector is dependent on cheap labor which is dependent on capital food like rice, wheat, corn at a low price. That means the country has to either import or produce (Preferred) staple food in increased quantity. The country is to maximize its land use meaning multiple cropping, mechanized agriculture; relaxation on restrictions on quality will be pursued. If the country seeks to protect GI in terms of a staple food such as species of rice commonly eaten in sui-generis system, the country has to dedicate a large chunk of land for the production of that species of rice with much emphasis on quality, which is not desirable in the given situation. In such case, certification mark system which does not place too much restriction on quality dimension may be conducive as the system favors quantity. But if the species of rice is rather special one (which is commonly the case), say, for example, Basmati, the protection under sui-generis system signaling better quality may earn premium price-which is again dependent on branding of the species. In fact, in some developing countries there is a debate whether a group of applicant (or even the government) can limit production (Giovannucci et al., 2009). The nature of the agricultural good considered, a developing country can go for sui-generis or certification mark system of protection.

Strengthening local producers' position aimed at increasing sale of their GIs with, premium price can be a tool for planners in developing countries to boost rural development. In such case, trademark or certification marks system of protection may not yield good result as is seen in the case of Jinhua Ham in China-a

well-known GI in China. In this case, trademark (in the form of certification mark) was acquired by a corporation which could successfully bar local producers from using the GI name "Jinhua Ham" by exercising its legal rights. As a result, though the corporation was benefitted, the local producers were affected as the sales of local Jinhua Ham producers squeezed significantly (Wallet et al., 2007 as mentioned in Giovannucci et al., 2009). But such thing is not likely to happen in sui-generis (GI approach) system in that the system requires that the association and the members going to register the GI are from the local community and they have very good link with the production and also they have to fulfill the quality criteria, which is not possible for the outsider.

The EU style sui-generis system considers GI as an integral part of food quality policy aimed at protecting consumers against fraud, fostering rural development and securing cultural and biological diversity. In contrast, US trademark system views GI primarily as intellectual property rights that can be used by producers to enhance competitiveness (Giovannucci et al., 1999, as mentioned in Teuber et al., 2011, p.2). Given the rural development potential of sui-generis system, the developing countries would rather seem to favor the system. But the sui-generis GI registration is not the only tool to promote rural development. The high level sui-generis system by strictly delineating the area of production puts a limitation on production level and it may not be appropriate for a developing country whose government seeks the expansion of rural production (Caenegem, 2004). So, developing countries which seek to increase rural production of crops may not find itself very well with the sui-generis system.

Certification mark under the trademark regime is a kind of private right. So, under the system the cost of protecting GI may be prohibitively high for the resource poor producers as the trademark system is mainly territorial in nature and multiple registrations will be needed which is really costly. Also to protect GIs internationally under trademark law, the indication needs to be registered as a trademark in every country where the protection is sought and if

the misappropriation takes place, it would make the certification mark owner responsible to take legal action. Under sui-generis system, for small producers it is the state which will do it. For the poor farmers of a developing country it may be convenient (Bramley & Kirsten, 2007).

23.0 The case of Bangladesh

Bangladesh is a LDC with huge population of 160 million in a rather land area of about 56,000 square kilometers. It is a low income country by classification of income (Todaro & Smith, 2011) About 62% of her population is involved in agriculture sector. The contribution of agriculture to GDP is around 23.50% (Ministry of Agriculture, 2013).

Bangladesh does not have full-fledged GI protection law and that is why it has no official GI list. Nevertheless, it has prepared draft GI protection law in the year 2012, which is yet to be finalized. The country has primarily identified 73 goods as GIs belonging to various categories. The tentative list of GI goods of Bangladesh comprises 52 food items and 21 non-food items (See Appendix). For the purpose of protection of GIs Bangladesh rather follows trademark system i.e. it protects its GIs through certification or collective mark system. Bangladesh has in place the Trademarks Act, 2009 and the sections 55-65 of the Act talks about certification mark.

GI protection in Bangladesh has more relevance in Bangladesh than ever when it is reported that three of its most important GIs like Jamdani Saree (A kind of women ware known as Dhakai Jamdani after the name of Capital city, Dhaka), Nakshi Kantha (A kind of embroidered quilt having traditions and mention in literature of Bangladesh), Fazli Mango (A higher variety of mango) has been incorporated in India as Indian GI by virtue of Indian GI Act, 1999. In the existing certification mark regime no one protects those products as certification or collective mark. Government is under pressure to claim the GI back. But article 24.9 of the TRIPS agreement says that GI protection will not be extended to GIs

which are not nationally well protected. When India got registered all the three GIs, the trademark law, 1940 was still in place, which was later replaced by Trademark Act, **2009**. But under trademark regime no corporation or association or agency got the certification mark of those goods meaning that those goods were not nationally protected. This can be attributed to the private right centric certification mark system which depends on private initiative and centers round profitable business. Moreover, if Bangladesh claims them under certification mark system, then as per the judgment of **Parma Ham** case (Mentioned in Deb, **2006**) where the courts in both the US and Canada rejected the application of an Italian applicant (Who happened to claim that **Parma** being an area in Italy, the Italian association only has the right to use the name) arguing that the prior registration of the same or similar mark on the same or similar goods was enough to prohibit the subsequent registration as a certification mark, as this could lead to confusion. So, relying on certification mark nationally could be disastrous as national protection influences international protection. Instead, Bangladesh has to show strong good place link of the goods in terms of geography, culture, tradition etc. and has to prove that the use of those names by India or Indian association is geographically deceptive. In such case sui-generis system of protection is worthwhile. This justifies the protection of various GIs of Bangladesh under special law or sui-generis system.

Given the abundance of agricultural products, the huge number of population in a pretty small land, the economic condition of the country; Bangladesh will also face the problem of quantity vs. quality question in choosing GI protection regime. As is described the EU sees GIs as a way to change from quantity based to quality based exports (Monten, **2006**). So, it adopted sui-generis system of protection. In Bangladesh, increasing the quantity of food has always remained a challenge as it is the most densely populated area in the world. Sui-generis system works well if the government intent on sticking to established cropping and production method. If general policy setting reflects that the rural industry fluctuates over time, crop choices are unsettled, the sui-generis or registered

GI system is less attractive (Caengem, 2004). In this regard, it is worth mentioning that in Bangladesh only 4.14% of net cultivable land remains as current fallow meaning that there is hardly any scope for increasing cultivable land. So, to meet the demand of ever increasing populations, government policies are triggered at increasing inter cropping in a field instead of single cropping (Agriculture Policy, 1999).

Sui-generis system would require a chunk of land dedicated to mostly production of one crop. So, on a macro level it seems contradictory to agriculture policy. But a microscopic view would reveal that if the GIs sought to be protected do not need huge chunk of land, or there are lot of GIs from handicrafts category, or some GIs are fish from natural source, such as, Hilsha fish; the quality of the GI is that the soil and environment of the area is suitable for the production of only that good such as Fazli Mango of Rajshahi district; then the problem of single cropping and inter cropping do not seem to be much relevant.. As most of the GI goods are from special category, sui generis system might not harm quantity dimension of food that much. So, in such case the sui-generis system may seem suitable as it may earn premium price for the products.

Section 11 of the policy reads as follows: "Export of agricultural commodities will be increased through grading and standardization. Also, to increase local consumption of such crops, necessary measures will be taken for grading, standardization, labeling and quality development according to consumers' taste and preferences and food value". Such explicit tendency to increase agricultural exports through standardization, labeling, grading seems to commensurate with the sui-generis system of protection of GI as the system puts much importance on standardization of good and manifests a good place link as quality indicator.

Another motivating factor in choosing a protection system for Bangladesh can be worldwide protection system of GIs. As has already been mentioned, among the 167 countries 111 protect GI

under sui-generis system while 56 follows sui-generis system (Giovannucci et al., 2009). Singapore and South Korea use Sui-generis system for protection of agricultural, fisheries, handicrafts and trademark system for other GI products, suggesting that sui-generis system better for protection of agricultural, fisheries and handicrafts. Two countries Laos and Cambodia are switching to sui-generis system. Of them the experience of Cambodia can be much relevant here as it is switching to sui-generis system and has already got some positive experience with registered GI system. Cambodia is an agricultural country in that agriculture constitutes 36% of its GDP and 55.8% of its people depends on agriculture directly (Central Intelligence Agency [CIA], 2013). Aspiring to protect GIs under sui-generis system, Cambodia got its first two GIs: 1. Kampot Pepper 2. Kampong Speu Palm Sugar registered on April 2, 2010; which is required in sui-generis system. The resultant effect of such registration as GI was that the sale of Kampot Pepper under the GI label earned higher producer sale price. In the year 2010 the sale of 20,000 kg Kampot pepper earned \$61,500 whereas in the year 2011 after registration as a GI the same amount Kampot Pepper earned \$1,16,000 for the Similarly in Thailand which follows sui-generis system of protection, the enforcement of GI protection in the country has helped raise the price of certain agricultural products by 20-30 percent. (Tunsarawuth, 2009). In India, agriculture constitutes employment of 53% of its population and it contributes 17.4% of GDP of India (CIA, 2013). After the promulgation of "The Geographical Indications of Goods (Registration & Protection) Act, 1999" India began to exploit potentials of GIs and well ahead in its march (Das, 2009). However, given the number of countries pursuing sui-generis system of protection, given the success and tendency of some agriculture based countries to protect their GIs under sui-generis system, Bangladesh, as an agricultural and village dominated country, can pursue sui-generis system of protection.

The choice between CTM and sui-generis system of protection also depends on whether the state wants to intervene in rural and

agricultural production or not. CTM is not an instrument of state intervention and it is more consistent with private enterprise and private philosophy (Caengem, 2004). On the other hand, the involvement of public enterprise is discernible in sui-generis system in that the ownership remains with the state and the authorized users have only right to use and sue in case of infringement. GI can be one of the tools that lead governments to positively intervene in rural development. Scrutinizing govt. policy on rural and agriculture development, government in Bangladesh, being that of a rural and agriculture based country, can go for choice between the two systems.

24.0 In search of alternatives

So far it is clear that Sui-generis protection system puts much attention on products standard and it limits production. On the other hand, certification mark system is private rights based approach and it has some spectacular limitations. As a compromise between the systems, there is another system proposed, i.e. low-level version of GI registration (Caengem, 2004). The registration of GI would serve the purpose of sui-generis system while 'low-level' indicates that as regards product standard the system will not put much emphasis on standard which concurs with the CTM system. This low-level will also solve the problem of quantity in that the production will not be limited as is the case with rigid sui-generis system. Because of having the lower costs of implementation and control due to absence of product standards, it is a ready way in which protected foreign registered GIs can be incorporated domestically, if multilateral international obligations so require. But this system arguably lacks legitimacy in that in the system product characteristics and quality cannot be guaranteed, which is the main strength of a GI. So, there is possibility of dilution of overall reputation by the actions of one or more individual users of GI (Caengem, 2004). Both the CTM and Sui-generis can be allowed to go together as is the case in China (Bashaw, 2008). But the problem with the system is that it increases legal complexity and gives poor signal about legal system of a country.

25.0 Concluding remarks

The absence of proper GI protection mechanism can be detrimental to the national interest of a country. Various types of protection systems of GIs have their own merits and demerits. From the discussion above it is clear that protection under sui-generis type has greater implications for rural development as it strengthens farmers' position in the supply chain by maintaining strict quality mechanism and encouraging farmers' organization. On the other hand, CTM system encourages corporate branding of GIs and it does not put restriction on quantity to be produced. Most of the countries of the world choose sui-generis system to protect their agricultural GIs. From the tentative GI list of Bangladesh it is clear that most of her GIs are agricultural and handicrafts in nature. Though the country still officially protects her GIs under CTM system, the CTM has very little or no implication on its GIs. So, with some empirical findings as to quantity of land required, prospects, branding prospects etc. of her GIs; Bangladesh may well go for Sui-generis system of protection of her GIs.

Notes

1. Article 22.1 of TRIPS defining GI reads as follows "Geographical indications are, for the purposes of this Agreement, indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.
2. Various surveys indicate the economic potentialities of GI, say, for example, A consumer survey undertaken in the EU in 1999 found that 40% of the consumer would pay a 10% premium for origin-guaranteed products (WTO, 2004, as cited in Das, 2009).
3. Article 24.9 of TRIPS agreement underscores the need for ensuring appropriate GI protection at national level of a WTO member, in the absence of which WTO members would have no obligation whatsoever to protect the GIs of the former country within their respective territories (Das, 2009).

4. *Sui generis* is the Latin expression, literally meaning "of its own kind" or "unique in its characteristics". In Intellectual Property law this expression is mainly used to identify a legal classification that exists independently of other categorizations due to its uniqueness or the specific creation of an entitlement or obligation. In the EU, the system revolves around two protocols: Protected Designation of Origin (PDO), and Protected Geographical Indication (PGI).

5. Passing off action is a remedy under the common law system. Rangnekar (2004) notes that, in common law jurisdiction GIs are protected on the basis of the reputation or goodwill that they enjoy, with or without any prior registration, citing court decisions; *Wineworths Group Ltd. V.Comite Interprofessional du vin de Champagne*, 2 NZLK 327 (1991), *Bollinger v. Costabrava Wine Company Ltd.* (1959) 3 All ER 800.

6. See note i-it speaks of GI of goods not services.

7. The benefit of niche market based production is that in such market farmers/producer become as price maker instead of price taker and has greater control over supply and remain free from price fluctuations and associated suffering (Bramley & Kirsten, 2007, p.77)

8. The system known as Civil (or Roman) law gives precedence to written law and is used in many, though not all, European, African, Asian and Latin American countries, whereas Common Law systems that give precedence to prior case-law or precedent are used in a smaller group of nations, the most prominent of which are the United Kingdom and the United States. These systems also tend to have evolved different approaches to the protection of GIs. So far as the protection of GIs is concerned, deviation is commonly from such generalization in that India, Sri Lanka etc. being within the common law family follows *Sui-generis* system of protection. Bangladesh, another common law family member is also eyeing on protection under special law/*sui-generis* system. In fact, *sui-generis* system is mostly practiced protection system around the world.

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