

# Another Look at Basmati: Genericity and the Problems of a Transborder Geographical Indication

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The article uses the case of Basmati to identify a number of problems concerning geographical indications, including the interface with trademarks and the issue of genericity. Attempts to enter and free-ride on Basmati's premium rice market include the use of trademarks and (RiceTec's US) patent. Reviewing these, the article notes the subject matter of geographical indications can be implicated by other forms of intellectual property, such as patents. The case of Basmati is all the more problematic because of its transborder reality for which no provisions exist in the Agreement on the Trade-Related Aspect of Intellectual Property Rights (TRIPS). The article outlines and discusses various institutional models for a joint registration of Basmati between India and Pakistan as a possible solution for the TRIPS requirement of "home protection" (compare article 24.9).

**Keywords** Basmati; transborder GIs; genericity; TRIPS

Rice is one of the oldest grains to be domesticated by humankind, with two cultivated species, *Oryza sativa*, which is the more common and globally spread species, and *Oryza glaberrima*, which is mainly cultivated in West Africa (Richaria, 1990, p. 1). While some 90% of rice cultivation is located in Asia, there is an "extreme antiquity" to rice in the Indian sub-continent with archaeological evidence dating to 2300 BC (Richaria, 1990). Of 27 wild species of rice, some seven are documented in India, showing the wide diversity of rice in India, reflected in morphology, physiology and grain characteristics. The maturing durations vary from 60 to over 200 days, the altitude range covers sea-level to over 7,000 feet, and moisture adaptability includes deep-water rice to rainfall-fed rice. Rice's antiquity is also culturally special, with various scriptures making specific references to their use in rituals. Richaria (1990) documents a number of indigenous varieties of Basmati and selection from these varieties that seek to stabilize particular characteristics. For example, T-34, a selection from *Lal Basmati*, is adapted to upland conditions and has improved yields, while T-23 is a selection from *Desi Basmati*, which is also for upland cultivation and higher yielding than local standard, whereas *Basmati 370* has been developed for the plains (Richaria, 1990, p. 225).

To the relevant public, Basmati is distinguished by the grain's tall and slender shape, tapering at both ends but not bulging at the belly, and its distinct aroma.<sup>1</sup>

The chalkiness of the grain is also a distinguishing characteristic, as is its elongation on cooking to almost double its length; in contrast, its width remains the same. These characteristics and other factors have given Basmati its remarkable reputation and high premium (Bhattacharjee *et al.*, 2002), all of which invite attempts of free riding, such as the translated use of the appellation in the naming of varieties and branding of rice, securing trademarks that incorporate wholly or partly the appellation, and even the use of patents as exemplified by the RiceTec patent. Basmati has also been the subject of disputes at the World Trade Organization (WTO) concerning tariffs in the European Union (EU) (WTO, 1996a; 1996b). With Basmati produced in certain regions of India and Pakistan, the route towards protection through geographical indications (GIs) is complicated. The Agreement on Trade-Related Aspects of Intellectual Property Rights<sup>2</sup> (TRIPS) has no particular provisions nor does it provide any guidance for transborder GIs. As TRIPS raises the obligation for protecting a GI only following home protection (article 24.9), the absence of home protection makes challenging trademarks incorporating Basmati directly or in translated form more difficult, which also generates a threat of genericity in certain markets.

This article takes another look at Basmati, but from a number of different angles and with the intent of mapping an institutional framework for a transborder GI. It begins by presenting a brief sketch of the socioeconomic dimensions to Basmati in India and Pakistan. This is followed by a discussion of various legal aspects to the protection of Basmati. Of particular importance is free-riding on Basmati's reputation and the associated translated use of the appellation. This is reviewed in the light of market regulations (in the United Kingdom) and recent case law on genericity at the European Court of Justice. The third section is devoted to a critical reading of the RiceTec dispute, which reminds the reader that the subject matter of GIs can be implicated by patents as well as trademarks. It is in the penultimate section of the article that different institutional forms for a transborder GI are elaborated.

## **The Socioeconomics of Basmati**

### ***Basmati in India***

The traditional Basmati growing areas in India are in the sub-Himalayas and particular tracts of the Indo-Gangetic plain in the states of Haryana, Jammu and Kashmir, Punjab, Uttarakhand and Uttar Pradesh. Growing districts within each of these states are listed in Table 1.

In terms of area, Haryana is the leading area of production, accounting for 44% of the area under Basmati, followed by Uttar Pradesh (28%), Punjab (22%), Jammu and Kashmir (5%), and Uttarakhand (under 1%).<sup>3</sup> The annual production of Basmati is around 22–23 lakh tonnes a year, of which around two-thirds is exported, and the remaining is consumed within the country.<sup>4</sup> Production is around 22.4 lakh tonnes, though some variations are seen over the years (Table 2). Of the

**Table 1: Basmati Rice Growing Districts in India**

State	Growing districts
Punjab	Amritsar, Gurdaspur, Faridkot, Kapurthala, Nawanshahar, Jullundur, Ludhiana, Patiala, Ropar and Pathankot
Haryana	Karnal, Panipat, Kaithal, Kurukshetra, Jind, Ambala, Sonapat, Sirsa, Hisar, Panchkula, Faridabad, Rohtak, Fatehabad, Yamuna Nagar
Uttar Pradesh	Saharanpur, Muzaffar Nagar, Meerut, Bagpat, Gautam Budh Nagar, Bareilly, Badaun, Shahjahanpur, Pilibhit, Bijnor, Murabadad, Rampur, JP Nagar, Siddhartha Nagar, Sant Kabir Nagar
Uttarakhand	Dehradun, Haridwar, Udham Singh Nagar, Nainital
Jammu and Kashmir	Jammu and Kathua

Source: Personal correspondence with APEDA.

**Table 2: Total Acreage and Production of Basmati Rice (Kharif)**

Year	Area (ha)	Production (MT)	Productivity (MT/ha)
2003	1,452,691	3,168,962	2.18
2004	784,594	2,588,027	3.29
2005	678,749	2,349,782	3.46
2006	536,025	1,803,211	3.36
2007	634,850	2,238,200	3.52

Source: Personal correspondence with APEDA.

above aggregate production, Haryana contributes about 47%, Punjab 18%, Uttar Pradesh 30%, Jammu and Kashmir close to 4%, and Uttarakhand about 1%. The productivity of Basmati paddy in India is around 2,100–3,500 kg/ha against the yield of non-basmati paddy of around 4,500 kg/ha; though, the low-yield is an integral feature of Basmati (Bhattacharjee *et al.*, 2002).

Data on farm incomes and land-holding for Basmati are not easily available. The National Academy of Agricultural Research and Management (NAARM) in India conducted a socioeconomic analysis of the district of Karnal (Soam and Ilyas, 2008).<sup>5</sup> The village has a population of 7,689, with 4,016 males and 3,673 females. It records a literacy rate of 67.67%. Most of the villagers own their own house, which are reasonably good sized, more than 75 square meters, are tiled (“pucca”) and have 100% electrification. Yield of basmati ranged between 12 and 14 quintal/acre.<sup>6</sup> The economic indicators of the farmers in the village are given in Table 3.

From Table 3, we estimate that the Basmati growers had annual savings between Rs. 50,000 and Rs. 2,00,000. But whether this can be used as a generalization for other Basmati rice growers in India is not very clear. In a survey commissioned by the Agriculture and Processed Food Products Export Development Authority (APEDA) medium and large farmers undertake Basmati rice

**Table 3: Economic Indicators of the Farmers in Shamgarh Village**

Category of Farmers	Small Farmers	Medium Farmers	Large Farmers
Landholding pattern	Less than 4 acres	Between 4 and 10 acres	More than 10 acres
Share of agriculture in the source of income	42%	60%	70%
Annual income (estimations)	Rs. 1.1 lakh	Rs. 2.5 lakh	Rs. 4.42 lakh
Monthly expenditure (estimations)	Rs. 4,500	Rs. 7,500	Rs. 19,500

Source: Soam and Ilyas (2008).

**Table 4: Export of Basmati Rice from India**

Year	Quantity (MTs)	Value (Rs. lakh)	Value (\$ million)
2000–1	851,721	216,596	478.0
2001–2	667,066	184,277	392.0
2002–3	710,292	206,259	426.0
2003–4	771,475	199,305	433.0
2004–5	1,162,989	282,390	632.0
2005–6	1,166,563	304,309	687.0
2006–7	1,045,715	279,281	680.0

Source: Directorate General of Commercial Intelligence and Statistics, Government of India and APEDA.

cultivation with average land holding of 2 acres and above.<sup>7</sup> They also reported that the exporters of late had started encouraging contract farming due to which small and marginal farmers are also being attracted to Basmati rice cultivation.

Approximately two-thirds of the country's Basmati output is exported, which amounts to over 10 lakh tonnes. Some 60% of rice exports are constituted by Basmati; thus, clearly, an important export earner—accounting for about 1% of the total exports. Exports in volume terms have increased up from 7.7 lakh tonne in 2003–4 to an estimated 10.5 lakh tonne in 2006–7 (Table 4). In value terms, the exports of Basmati rice rose from Rs. 1,993 crores in 2003–4 to Rs. 2,793 crores in 2006–7.

But exports over the last decade are rising consistently. The Gulf region has emerged as a major export destination for Basmati rice from India. Saudi Arabia accounts for a significant share; close to more than 50% of the total global exports in volume as well as in value terms.<sup>8</sup> The EU is another major market for Indian Basmati, buying on average 1–1.5 lakh tonnes of Basmati rice annually.

The NAARM conducted a survey on perceptions about GIs with respect to Basmati (Soam and Ilyas, 2008). There are high expectations with respect to post-registration increases in sales (100% of all respondents) and in unit price (67% of all respondents). Similarly, all respondents recorded positive expectations with respect

to increases in net profits and market expansion. Not surprisingly, the non-registration of a GI were reported as having negative effects, with 67% expecting lower wages to labour. These results are indicative of a high level of hope and expectation concerning the GI registration for Basmati rice.<sup>9</sup>

### ***Basmati in Pakistan***

Agriculture is central to Pakistan's economy and society, accounting for around 25% of gross domestic product. Rice is the third largest crop in Pakistan in terms of area, after wheat and cotton. Basmati rice is mainly grown in the Kalar tract of Punjab province, but it is also grown in the other parts of the provinces of Punjab, Baluchistan and NWFP (North West Frontier Province).<sup>10</sup> The share of Basmati rice production in overall national rice production has fluctuated between 33% (1997–8) and 52% (2003–4); average yield having gone up from 1,296 kgs/ha in 1995–96 to 1,639 kgs/ha in 2004–5. While the overall share of Basmati rice production is higher for Punjab province, being more than 90%, its yield is reported to be only 1,601 kgs/ha, whereas that for Baluchistan and NWFP in 2004–5 were 2,290 kgs/ha and 1,993 kgs/ha, respectively—the yield of Punjab is about 30% lower than the highest yield. Although its grain yield is lower than the coarse-grained, short-statured International Rice Research Institute (IRRI) rice, the net income per unit area to the growers is almost equal from both types, for the market price of basmati is two to three times higher than the IRRI varieties.

Though different varieties of rice are grown in Pakistan, Basmati and IRRI are the two main types of rice cultivated, consumed in and exported from Pakistan. Main varieties of Basmati from Pakistan are Kernel (Basmati), Basmati 320, Basmati 370, Pusa Basmati and Super Basmati. Super basmati, an extra-long variety, is an evolved variety—a cross between Basmati 370 and Basmati 320, with almost double yield of the Basmati 370 variety (Muhammed and Pirzada, 2005). This evolved variety has emerged as a key export commodity from Pakistan. The EC has notified Kernel (Basmati), Basmati 370, Pusa Basmati and Super Basmati varieties of Basmati from Pakistan for duty free imports.<sup>11</sup>

Pakistan's annual rice exports average less than 10 lakh tonnes (see Table 5).<sup>12</sup> Its traditional export markets are spread out between Gulf countries, accounting for

**Table 5: Export of Basmati Rice from Pakistan**

Year	Quantity (MTs)	Value (\$ million)
2000–1	502,061	237.00
2001–2	550,033	258.00
2002–3	716,726	361.00
2003–4	816,339	422.00
2004–5	814,857	440.00
2005–6	839,002	479.00
2006–7	907,906	556.00

*Source: Pakistan Federal Bureau of Statistics.*

55% of the total exports, such as the United Arab Emirates, Oman, Yemen, Bahrain and Qatar, and the EU. Basmati rice accounts for 2% of Pakistan's total export.

Micro-level and field data or studies are rare; however, there is some scholarly work on the supply responses of Basmati farmers in the Punjab province of Pakistan (Farooq *et al.*, 2001). This is an econometric exercise using profit functions with household level data that the authors collected in three districts of Punjab, Pakistan. It queries the Pakistani government's policy objective of raising Basmati production and the rationale for price support as the preferred policy variables. It finds that output is responsive to price; but inelastic. Yet, it concludes that output is better increased by expansion in paddy area. It might be feasible to extrapolate from the study on the assumption that GI registration would generate market segmentation and a premium on the price; thus, filtering back into output expansion.

### ***Basmati Exports From India and Pakistan***

India and Pakistan are the two Basmati rice-exporting countries. Export share of these two countries in volume terms can be seen in Table 6.

It can be seen that while the world market share for Pakistan has been increasing, that for India has been falling down over the years. The exact reason for such changes (rise or fall) in the market share is not known. Muhammed and Pirzada (2005) consider this to be due to "natural comparative advantage" of Basmati rice production in Pakistan, and also due to an assured market in several Gulf countries where this aromatic, long-grain rice is preferred. But that may not entirely be the case. Reasons of falling share by India may also be due to the rise in domestic consumption of Basmati rice or imposition of taxes or cess on exports by India.

## **Trademarks, Translated Use and the Threat of Genericity**

### ***Regulating Basmati in Export Markets***

In a number of export markets the use of the term Basmati is exclusively retained for particular long-grain aromatic rice from certain areas of India and Pakistan.

**Table 6: Shares of Basmati Rice Exports in the EU**

Year	India	Pakistan
2000–1	62.9	37.1
2001–2	54.8	45.2
2002–3	49.8	50.2
2003–4	48.6	51.4
2004–5	58.5	41.5
2005–6	58.8	41.2
2006–7	53.5	46.5

*Source: APEDA, Directorate General of Commercial Intelligence and Statistics and Pakistan Federal Bureau of Statistics.*

This is the case in Saudi Arabia, by far the largest importer of Basmati rice (Bhattacharjee *et al.*, 2002). This contrasts with the practice in the United States, where the status of Basmati was deliberated upon the filing of petitions by a coalition of civil society organizations with the US Federal Trade Commission (USFTC) and the US Department of Agriculture (USDA).<sup>13</sup> To the USFTC, the petition requested regulation to “prevent U.S. grown rice from being advertised or otherwise represented using the word “Basmati,” including its use in any term or phrase; the words “Basmati rice,” including their use in any term or phrase”. In May 2001, the USFTC responded by dismissing the petition.<sup>14</sup> It found no grounds for consumer injury as evidence of rice packaging submitted by the petitioners was clear in stating “US grown” or “American basmati rice”. This corresponds with statutes concerning “Aromatic rough rice” where “basmati” and “jasmine” are considered special varieties of rice (*O. sativa* L. scented) but not related to any particular geographical origin (see General Regulations and Standards for Certain Agricultural Commodities, § 868.213). While the USFTC cannot be blamed for its “overly legalistic” response (Subbiah, 2004), our reading suggests that the petitions were poorly drafted and insufficient in moving a court of law.

In contrast to the United States, there is a (voluntary) code of practice for Basmati in the United Kingdom.<sup>15</sup> It follows separate agreements between the EU and India and Pakistan which identified Basmati varieties that would be applicable for zero duty.<sup>16</sup> Also envisioned was a Community control system based on DNA analysis at the border.<sup>17</sup> Building on this, the United Kingdom’s Food Standards Agency initiated a sector-wide consultation on the “Use of the Name Basmati Rice”.<sup>18</sup> Surveying samples of Basmati rice traded in the United Kingdom, the agency found 17% of the samples had non-Basmati content of more than 20%.<sup>19</sup> This evidence and consultation has resulted in the Grain and Feed Trade Association’s code of practice on Basmati rice: varieties that have been approved by the relevant authorities in India and Pakistan can use the description “Basmati”, with varieties having at least one parent as a Historic Land Race variety and exhibit the unique characteristics of Basmati rice as measured by certain objective tests (Table 7). These empirics are consistent with research by Indian scientists on the quality characteristics of Basmati.<sup>20</sup>

**Table 7: UK Code of Practice for Basmati**

Minimum elongation ratio on cooking	1.7
Minimum average pre-cooked length	6.5 mm
Amylose content	Intermediate 19–26%
Length/breadth ratio	> 3.5
Gel length	60–100 mm
Alkali spreading value	4–5
Typical Basmati Aroma	Present

*Source: Grain and Feed Trade Association, Code of Practice.*

The code came into effect on 1 January 2006 and will be revised in line with amendments to EU Regulation 1549/2004 and Council Decisions 2004/617/EC and 2004/618/EC. In its agreements with India and Pakistan, the European Community welcomed an application for a GI in Basmati, which it would process as “expeditiously as possible”.<sup>21</sup> The 2006 revision to the European Council (EC) Regulation on GIs now allows for the possibility of a transborder GI in article 5.1.<sup>22</sup> There is greater significance to these efforts at establishing a Code of Practice not only in the implications it might have in influencing the Basmati market in the United Kingdom and Europe but more so in terms of contributing to the technical content of Basmati GI. We return to this in the penultimate section of the article.

### *The WTO Panel on Coexistence of Trademarks and GI*

The relationship between trademarks and GIs is complex and “cobweb like” (Jokuti, 2009, p. 118), reflecting a “tempestuous” history suggestive of differing legal cultures (Gangjee, 2007a, p. 1253). Some of these differences were the focus of a dispute at the WTO (2005). There were three broad claims raised by the United States and Australia concerning EU Regulation 2081/92: (a) failure to comply with national treatment and most-favored nation provisions of TRIPS and the General Agreement on Tariffs and Trade; (b) inconsistency with obligations under article 16.1 of TRIPS in terms of the exclusive right to trademark owners; and (c) failure to comply with article 24.5 of TRIPS with respect to the treatment of pre-existing trademarks. Given the article’s subject, the discussion here focuses on the moderation exacted on the “first-in-time-first-in-right” principle.<sup>23</sup>

Article 24.5 of TRIPS allows for trademarks that are “identical with, or similar to” GIs to exist if they have been acquired in *good faith*, either (a) before the application of these provisions by that member, or (b) before the GI is protected in the country of origin. Some read this, conjoined with the scope of protection conferred to trademarks in article 16.1, as laying the grounds for invalidating latter-granted GIs (Grevers, 1999; Harte-Bavendamm, 2000). However, it is also possible to read the exceptions in article 17, in particular “fair use of descriptive terms”, as generating a legal rationale for coexistence, which Grevers (1999, p. 156) suggests could be “without limitation in time and without any other limitation”. It is possibly this understanding that underpins article 14.2 of the EC Regulation:

With due regard for Community law, use of a trademark corresponding to one of the situations referred to in Article 13 which was registered in good faith before the date on which application for registration of a designation of origin or geographical indication was lodged may continue notwithstanding the registration of a designation of origin or geographical indication, where there are no grounds for invalidity or revocation of the trademark . . . .

Article 14.3 of the EC Regulation limits this by disallowing the registration of a GI for well-known marks where there is a likelihood of confusion. Thus, at issue in

the dispute, among others, was whether the construction of article 14 of the EC Regulation was consistent with a reading of the rights conferred by trademarks, article 16.1 of TRIPS and exceptions in article 17 of TRIPS. An exemplar of this problem is the conflict over the rights to the use of the terms “Budweiser” and “Bud”. A dispute running for over a century with over 40 cases that pits the world’s largest brewery Anheuser Busch, against Budejovický Budvar, a Czech beer producer (Resinek, 2007). To some, the possibility of coexistence without confusion understands consumers as more resilient and nuanced in their perceptions: “[T]he two “Budweisers” have inoffensively existed in the UK for several years and one would assume that if there is any scope for paternalistic concerns about fuzzy confusion, consumers of lager are likely candidates” (Gangjee, 2007a, p. 1290). Others are less sanguine and see the result as an erosion of the exclusivity of the trademark and a denial of priority (Resinek, 2007). The case is also an exemplar of the unsettled nature of the relationship between trademarks and GIs (Bird, 2006). The contingency in negotiating the relationship is also evidenced by the withdrawal, in 2003, of mineral and spring waters from the EC Regulation on GIs (Evans and Blakeney, 2006; Resinek, 2007).

Our focus in the WTO dispute concerns priority and exclusivity and whether the principle of first-in-time, first-in-right should be enforced; thus ensuring the exclusivity of the rights conferred to a trademark. The Panel had to deliberate on whether article 14.2 of the EC Regulation was a “limited exception” and within the ambit of article 17 of TRIPS. The Panel’s approach is evident in its construction of the meaning of “fair use of a descriptive term” (WTO, 2005, paragraph 7.650–7.661). It argues that, on the one hand, this is inherently limited as only those signs are implicated which are “purely descriptive terms on its own”, which, as such, should not be protectable as trademarks. It proceeds to note that the use of such descriptive terms are neither limited in terms of the number of third parties who use it or in terms of the quantity of goods and services on which it is used; but these concerns are significant to the extent that the trademark consists of a descriptive term (WTO, 2005, paragraph 7.654). However, procedures underlying the EC Regulation were found to place limits, both sectorally and territorially.<sup>24</sup> For instance, only those designations that qualify for protection under the Regulation might use this exception for specifically defined goods that are produced in territorially demarcated areas. The panel also noted that where the likelihood of confusion was high, the exception was not permitted (WTO, 2005, paragraph 7.658), and additional regulations, such as food labelling, limit the application of the exception (WTO, 2005, paragraph 7.660).

Assessing this legal architecture in terms of article 17 of TRIPS, the panel remains aware of recent WTO jurisprudence but suggests that the different circumstances warrant another interpretation (WTO, 2005, paragraph 7.662). Consequently, it focused on the “limitedness” of the exception as “a small diminution of rights”, while also taking account of the legitimate interests of the owner of the trademark and of third parties. In terms of the latter, the Panel identifies consumers and GI-right holders as third parties. The legitimacy of the

latter, the Panel observed, is warranted by the inclusion of GIs as an IP in TRIPS and the manner in which the exception is constructed (WTO, 2005, paragraphs 7.678–7.682). Thus, it concludes that while the EC Regulation is inconsistent with article 16.1 of TRIPS, the exceptions are justified by article 17 of TRIPS. Gangjee (2007a, p. 1283) cautions exuberance of certain interested parties that the Panel's conclusion does not “necessitate coexistence as a TRIPS obligation; [but establishes that] it's merely a legitimate possibility”.

### **Genericity**

Generics enter TRIPS as an exception to the obligation to protect GIs where the indication “is identical with the term customary in common language as a common name for such goods or services in the territory of that Member” (article 24.6). The movement of signs from their distinctive role of signalling provenance (territorial and/or manufacturing unit) to wider use has mixed blessings. Marking a success of capturing the “mind of the consumer” to the extent that the sign is used as shorthand to refer to the product category, it also slips into common language. Allowing such signifiers to stay in the pool of common language, thus denying protection, is necessary to avoid a monopoly in signs extending into a monopoly over a category of products (Landes and Posner, 1987). Succinctly expressed by Advocate General Colomer: “Generic names are common names used to designate agricultural or food products. They form part of the general cultural and gastronomic stock and may, in principle, be used by any producer”.<sup>25</sup>

Article 3.1 of Regulation 2081/92 identifies three factors to genericity: the situation in the member state of origin and areas of consumption, the situation in other member states, and the relevant national or Community laws. In *Federal Republic of Germany and Kingdom of Denmark v Commission of the European Communities*,<sup>26</sup> the construction of article 3.1 is fleshed out. Rather than narrate the case, we focus on the court's conceptualization of the “relevant public” and the emphasis placed on imagery representing an indication. The court's approach is shaped and informed by the report of the scientific committee,<sup>27</sup> set up by the commission, whose report set the stage for the (re)registration of Feta.<sup>28</sup> The scientific committee sets up the problem in the following terms:

a designation of origin or geographical indication can be considered as having become the common name of a product only when there is in the relevant territory no significant part of the public concerned that still considers the indication as a geographical indication . . . it is with regard to the general public that the designation or indication in question must have lost its original geographical meaning. In determining what the general public perception is, both “direct” measurements are relevant, such as opinion polls and other surveys, and “indirect” measurements, such as the level of production and consumption, the kind and nature of labelling employed, the kind and nature of advertising employed with regard to such products, use in dictionaries, etc.<sup>29</sup>

The evidence collated by the scientific committee for the commission is compelling. In terms of per capita consumption, Greece recorded 10.5 kg/year compared with 1.76 kg/year for the rest of the EU and Greece accounted for 73% of total Feta consumption in the EU (Regulation 1892/02, recital 25). Production of Feta outside Greece is well established, with production in Denmark and France dated to the 1930s and Germany to the 1970s (Regulation 1892/02, recitals 14–16). The court emphasized that this “must be taken into account in the assessment of whether that name has become generic within the meaning of article 3.1 of the basic regulation”.<sup>30</sup> While Greece accounts for 60% of the total Feta in the EU, production in other member states is exported “to non-member countries and [therefore] has no influence on the situation of the designation “Feta” in the single market” (Regulation 1892/02, recital 26). The construction of the problem in this manner suggests a “home-country” advantage (Gangjee, 2007b).

A final element of the court’s reasoning related to labelling, thus intertwined with imagery and representation. The scientific committee reviewed the labelling of *Feta* and found “explicit or implicit reference to Greek territory, culture or tradition . . . by adding text or drawings with a marked Greek connotation” and therefore concluded that such imagery and allusion is “deliberately suggested and sought as part of a sales strategy that capitalizes on the reputation of the original product . . . [which] creates a real risk of consumer confusion” (Regulation 1892/02, recital 20). The court agreed, indicating that it would be legitimate to think that consumers associated “Feta” with Greece even if produced elsewhere in the Community (*Feta* 2006, p. 87). It also observed that “[T]he Danish legislation does not refer to “feta” but to “Danish feta”, which would tend to suggest that in Denmark the name “feta”, by itself, has retained a Greek connotation” (*Feta* 2006, p. 92).

There is some resonance here with the approach in the United States—though, with a number of serious differences. In *Chablis with a twist*, the court queried:

whether the relevant portion of the American public, that portion being consumers of wine and wine products, would perceive the mark Chablis with a Twist or even the term “Chablis” to indicate that the product came from the Chablis region of France.<sup>31</sup>

This sets out an empirical reference for understanding of a geographical term—the relevant public. An approach that also occurs in *Wineworths Group Ltd v Comité Interprofessionnel du Vin de Champagne*, where rather than approach the *mere* public, the emphasis shifts to “the significance of the name “Champagne” in the market place, how it is used and how it is understood in the course of trade” (*Wineworths v Comité*, p. 340). Taubman (2008, p. 241) reminds us of the significance of these deliberations as *norm-setters* with legal effect. And he urges us to recognize that “the signification of GIs will ultimately be determined by context” that includes perception of communities receiving the sign, the makeup of the label, and various associations related to the physical product, and language associations. Context generates temporality, which in certain instances can be

shaped by trade interests effected through bilateral negotiations that see particular generic and semi-generic terms return into the fold of “legitimate” GIs:

Bilateral negotiators haggle over and settle on a list of terms to be deemed as GIs, pre-empting independent review of the actual denotation or connotation of the terms . . . [consequently] risks losing consistency and balance in the application of underlying principles (*Wineworths v Comité*, p. 262).

### *Lessons for Basmati*

The section sought to map out some of the regulatory landscape that confronts Basmati and to draw in implications from the WTO dispute and the *Feta* decision. The WTO Panel ruling on coexistence has resonance for the future GI protection of Basmati. Establishing the TRIPS compatibility and legitimate possibility of coexistence between a trademark and a GI, the ruling makes for a moderation to the principle of “first-in-time-first-in-right”. The latter, originating in a language of trumps, is iniquitous for potential GIs (Gangjee, 2007a). A similar perception exists in Resinek’s (2007, p. 451) reading of the legal battles mounted by the Consortium of Parma Ham producers in North America: “the application of the principle of priority within trade mark systems may be viewed as facilitating misappropriation of goodwill, consumer confusion and dilution”. Obviously, there have to be specific limits to the manner in which “fair use of a descriptive term” is permitted. Yet, by establishing that the priority of trademarks is not automatic and that coexistence is a legitimate possibility, the Panel has immediate resonance for existing and potential GIs (particularly from the Global South).<sup>32</sup>

It is in juxtaposing the panel’s decision with recent GI case law in Europe that other legal realities may be also noted. Beyond a focus on the *knowing* public and the use of the term in the “course of trade”, *Feta* demonstrates that a wider constellation of issues are at stake—not least the imagery and allusions accompanying the good. In this respect, recall that the USFTC’s response that packages of Basmati are clearly labelled “US grown” and/or “American Basmati Rice”. An internet search identifies product imagery and brand names with translated use of Basmati that evoke an association with India or Pakistan.<sup>33</sup> Building an allusion between the product and South Asia is deliberate of a strategy to capitalize on the reputation of Basmati. The government of India raised these issues while challenging a series of trademarks acquired by RiceTec in the United Kingdom: Texmati and Kasmati (Nair and Kumar, 2005, pp. 179–84). In challenging the Texmati trademark it put together a “mosaic of evidence” that included affidavits from culinary experts and from the London Rice Brokers. RiceTec surrendered its trademark (Nair and Kumar, 2005, p. 180). The Kasmati trademark is more telling as the packaging of the rice includes a caricature of the Taj Mahal and uses the phrase “Indian-Style Basmati”.<sup>34</sup> Again, RiceTec opted not to contest the challenge; thus, surrendering the registration and denying the possibility of a ruling. All this contrasts with the

treatment of Basmati in the United States, where the petitions by a coalition of non-governmental organization were rejected. Neither is this ruling from a quasi-judicial body either legal fiat nor is it determinative of Basmati's status elsewhere. It is not easy to predict either how a US court would respond to similar evidence or how the WTO Panel's views might translate into domestic law.

This discussion of the regulatory landscape concerning Basmati in external markets is suggestive of positive attempts at restoring a certain degree of equity for legitimate right-holders. However, the case of Basmati and a discussion of the regulatory landscape remain incomplete without an analysis of the RiceTec patent and the current impasse on home protection. The RiceTec patent, which the article addresses in the next section, is an important reminder of how the subject matter of a GI can be implicated by other forms of intellectual property, such as patents.

### **The RiceTec Patent Dispute**

No discussion of Basmati is complete without an analysis of the RiceTec patent dispute<sup>35</sup> as it crystallized a global campaign that challenged courts and adopted extra-legal engagement. The dispute can be read from a number of different perspectives and has for some become emblematic of a form of successful resistance to capitalist globalization (Vidal, 2005). Significantly, it demonstrates that the subject matter of a GI may be implicated in a patent; thus a reminder of the need to look beyond trademarks as well. As our narrative briefly hints, the dispute is also a gentle reminder of the possibilities for and problems in cooperation between the governments of India and Pakistan.

The global campaign against the patent saw a range of issues being raised including claims of misappropriation of genetic material<sup>36</sup> and the free-riding on the cultural reputation of a group of peoples, among others. In November 1998, a single issue Canadian civil society group, the Basmati Action Group, was established that, among other initiatives, spearheaded a global boycott of RiceTec products. Symptomatic of a twenty-first century activism, there were numerous online petitions and chain emails. For instance, the Rural Advancement Fund International (RAFI), also headquartered in Canada, launched a postcard campaign and had personalities like M.S. Swaminathan and Gordon Conway making public statements.

Some campaign literature raised questions about the role of the late Hank Beachell in terms of the source of germplasm (RAFI, 1998). Beachell, a rice breeder at IRRI between 1963 and 1982, was a recipient of the World Food Prize in 1996 (with Gurdev Khush) for breeding IR-8, the "miracle" rice of the Green Revolution. Following retirement he became a consultant to RiceTec. One of the earlier varieties that The Farms of Texas Company—a precursor to RiceTec—bred was CB-801 (US plant variety certificate No. 8500011), which is said to be derivative of IR-8. According to RiceTec's patent, the 22 Pakistani Basmati rice lines used were acquired from the USDA World Germplasm Collection. While this may raise ethical questions concerning material held under a trust agreement between IRRI

and the Food and Agriculture Organization of the United Nations, the germplasm was acquired before the entry into force of the Convention on Biological Diversity and not foul in a legal sense (Centre for Science and Environment, 1996). However, Swaminathan decried the patent as “unethical” and Conway found it “unreasonable” to stake a claim on crops of distinct national origin.<sup>37</sup>

The public campaign in India shifted between different forums and involved a diverse group of actors. Rice breeders were particularly perplexed that something as mundane as a “new variety” could be patented (Ramachandran, 2000). In April 1998, a “Peoples’ Memorandum” was submitted to the US Ambassador to India at a public demonstration in front of the US Embassy (Anonymous, 1998a). The memorandum alleged biopiracy and, apart from demanding the patent be rescinded, claimed that the United States owes India an estimated US\$100 bn in terms of lost royalties from biopiracy. Also in 1998, civil society groups in India filed public interest litigation in the Supreme Court<sup>38</sup> demanding the government take action on the matter and some even suggested raising a dispute at the WTO.<sup>39</sup> The government took numerous steps, such as establishing two committees, one of which produced a 1,500 page dossier, recruiting law firms Kumaran and Sagar to prepare a response, and introduced domestic measures, like DNA fingerprinting (Anonymous, 1999). Additionally, the government pursued 19 other cases worldwide concerning the misuse of the term Basmati, which includes the trademark challenges discussed earlier. Recognizing that challenging the patent is a “one-shot” option (Anonymous, 2000a) the preparation moved with efforts at seeking collaboration with the government of Pakistan (Anonymous, 2000c). While little observable collaboration took place at this instance, the foundations for consultation on a transborder GI were established here.

RiceTec’s patent application listed 20 claims and was titled “Basmati Rice Lines and Grains”. The retention of Basmati in the title was seen by some as silent endorsement by the US Patent and Trademark Office (USPTO) (Subbiah, 2004, p. 551). The patent claimed novel rice lines (*viz.* Bas 867, RT1117 and RT1121) based on crossing Basmati varieties of Pakistani provenance with American semi-dwarf long-grain varieties. The novel lines bred were claimed to be semi-dwarf, photo-period insensitive, high-yielding and—most significantly—with grain quality and characteristics similar or superior to those of good quality Basmati of India and Pakistan. The other set of claims alleged a discovery that a rice grain’s “starch index” can predict the grain’s cooking and starch properties; thus, be a reliable method for selecting desirable segregants in rice breeding programmes. Nair and Kumar (2005, p. 183) emphasize the potential threat of infringement arising from the broad and stand-alone claims that were also not territorially limited. Further, the patent claimed a “surprising discovery” that certain Basmati plant and grain characteristics are not dependent on growing environment.

The public debate on challenging the patent was rich in its analysis and conflicting in its diagnosis. Even in a narrow legal sense, commentators differed in how to proceed, with a few focusing primarily on issues of novelty and inventive

step, whereas others sought to broaden the canvas by introducing issues of farmers' rights, biopiracy and misappropriating cultural property. Research Foundation for Science Technology and Environment (RFSTE) saw the patent as a threat to the livelihood of farmers and an act of biopiracy; thus, advocated introduction of new, and amendment of existing, IP-laws (RFSTE, n.d.). This mix included a national *sui generis* law protecting farmers' rights, a Convention on Biological Diversity inspired legal framework on access and benefit sharing, and amendment of patent law. Notably absent was any reference to GIs. Others recommended a specific focus on the alleged novelty of the "invention" with Indian Council of Agricultural Research scientists challenging the novelty.<sup>40</sup> In focussing on the claims for inventiveness—thus, within the parameters of patent law—the strategy was to accumulate scientific evidence that might conclusively dismiss the patent. In this respect, Professor K.R. Bhattacharya, who also served on the committees set up by the government, was of the view that the only novelty are new rice lines and the grains thereof as other claims were well-known in the state of the art, arguing that some of the claims are "fallacious, artificial" and "deliberately got up to manufacture a patentable claim" (quoted in Srinivas, 1998a). A few also thought of a more composite strategy that would involve the mix of contesting patent law—obviously within the terms of patent law—and also argue for the GI-status of Basmati and issues of biopiracy (Rangnekar, 1999). In this cauldron of public opinion, RiceTec sought to shore up its position with the US Rice Federation issuing a communiqué stating that "the terms basmati and jasmine [sic] refer to types or generic classes of aromatic rice . . . . Additionally, these terms are not restricted to products or varieties produced in any specific country or group of countries" (quoted in American Seed Trade Association, 1999). RiceTec's Chief Executive, Robin Andrews was dismissive of the public outrage and confident of the veracity of the patent:

I do not personally think it would help the Indian rice industry to have the RiceTec patent overturned, unlikely as that is . . . I also believe that the legal costs involved in attempting to reverse history might be best spent otherwise (quoted in Anonymous, 1998b).

In April 2000, the government filed for re-examination at the USPTO through the APEDA. The challenge was limited to three claims (nos. 15–17) concerning grain and grain quality. Beyond demonstrating prior art, the petition also suggested that the claims were drafted too broadly. In contrast to its public posture, RiceTec surrendered the claims. However, using APEDA documentation, the USPTO initiated a scrutiny of the patent, which identified concerns about the validity of numerous other claims. Responding in April 2001, RiceTec accepted to withdraw the three claims challenged by APEDA and also the 11 claims identified by as contestable. In the end, in August 2001, RiceTec was left with a patent for three rice lines (Bas 867, RT1117, RT1121) and particular claims with respect to these three varieties (original claims 8, 9 and 11). For that matter, the examiner also decided to change the title of the patent by deleting the appellation Basmati from the title.

This makes for a significant victory for the Indian government and the global campaign, demonstrating the ability to mobilize resources and political will to challenge patent grants in external jurisdictions. Though, the results should not be normalized as indicative of the self-corrective dynamics of the patent system. Lawyers involved in this dispute conclude that this is a “milestone in the never ending dynamic struggle for [the] establishment and preservation of its [i.e. Basmati’s] significance as a geographical indication” (Nair and Kumar, 2005, p. 184). Yet, it is the latter that remains pertinently elusive as the transborder origins of Basmati raise a series of political and legal complications.

### **Proposals for a Transborder Geographical Indication**

One of the foremost issues concerning the GI-registration of Basmati is whether to proceed with separate and independent registrations in India and Pakistan or to undertake a joint registration through a novel institutional mechanism. Under the former, each country would register Basmati as a GI under its respective domestic law, which would result in an “Indian Basmati” and “Pakistani Basmati”—situation is actually unfolding, as discussed shortly. While it may transcend some of the immediate political conflicts concerning Basmati between India and Pakistan, it potentially generates a Sherry-like<sup>41</sup> situation with a possible threat of rendering Basmati semi-generic.<sup>42</sup> Yet, the export of Basmati requires the two countries to arrive at shared notions of Basmati and an institutional mechanism to deal with GI-rights in third countries—if not domestically as well. It would be a strange post-colonial case if the (voluntary) code developed in the United Kingdom (see discussion earlier) comes to constitute the technical content of Basmati. The section begins with a brief political commentary of the efforts at joint-registration of Basmati by India and Pakistan, then focuses on different proposals for an institutional mechanism for joint-registration and ends with analyses of the outlines of a technical content of a GI for Basmati.

Both India and Pakistan have been aware of the need for joint-registration as in the context of the challenge to RiceTec patent; however, real efforts were initiated in 2005 when the Indian Minister for Commerce and Industry wrote to his counterpart in the Pakistan Government proposing mechanisms for holding consultations to achieve joint GI-registration of Basmati Rice.<sup>43</sup> In 2006, a joint study group was constituted and meetings between representative trade bodies from India (All India Rice Exporters Association) and Pakistan (Rice Exporters Association of Pakistan) took place (Anonymous, 2006). However, over time little appears to have happened (Das, 2008), though in the November 2008 meeting, in Islamabad, both groups agreed to deem 2009 the “Year of Basmati” as a means to emphasize the efforts towards joint registration which included submitting an application in Europe (Anonymous, 2008). It has been suggested that delays in either publishing or processing a GI-application in India were designed to avoid jeopardizing these negotiations (Marie-Vivien, 2008).

Contrasting these movements towards joint-registration have been efforts to acquire independent rights. Thus, in India, in 2004 a non-governmental organization, Heritage Foundation, filed an application at the GI Registry for Basmati (see Marie-Vivien, 2008, for a discussion). The consultative group's examination in November 2006 responded by citing numerous inaccuracies and incompleteness of the application (Marie-Vivien, 2008). For instance, neither was the list of varieties or the areas of production complete and exhaustive. Newspaper reports suggest that application was rejected (Manoj, 2008); however, it appears on the GI Registry website as "Pre-Examination" (Show-Cause Hearing).<sup>44</sup> In Pakistan, the legal means for protecting GIs exist in the Trade Mark Ordinance 2001, which have been implemented through Trade Mark Rules 2004.<sup>45</sup> In Pakistan the application concerning Basmati comes under section 82 of the Ordinance and was filed in December 2005 as No. 216742 by a recently constituted collective, the Basmati Growers Association. The possibilities of GIs being acquired by private entities and protected through collective marks raise the attendant risks that are reflected in the continuing impasse on the trademark with a tussle between different representative groups, viz. the Rice Exporters Association of Pakistan and the Basmati Growers Association, with the former filing opposition proceedings. Opposition proceedings have also been filed by APEDA (No. 203/2006)<sup>46</sup> raising issues related to the collectivity of Basmati, its shared origins and "ownership" between India and Pakistan, the error in using collective marks as the preferred mechanism of acquiring rights in Basmati and emphasizing that Basmati as a geographically descriptive term is foul of the trademark doctrine of distinctness. APEDA's opposition was dismissed on technical grounds that it has no statutory rights in Basmati. This has prompted the Indian government to amend the act constituting APEDA to empower it to acquire rights in Basmati and fight infringement likewise (Ramesh, 2009).<sup>47</sup> Consequently, APEDA has filed opposition proceedings in Pakistan's Sindh High Court (Anonymous, 2008; Shah, 2008) and in November 2008 has applied to the Indian GI Registry for a GI (Ramesh, 2009).<sup>48</sup> These developments are demonstrative of the tenuous and contingent nature of diplomatic relations between the two countries which are themselves complicated by various border skirmishes, wars and terror-attacks. Always a politics of possibilities, there remains continuing ambivalence on joint-registration. Thus, even while expressions of a joint-registration of Basmati in Europe persist (see Ramesh, 2009), ambivalence persists with news reports of the further meetings of the joint working group being put on hold (Joshi, 2009). Yet, without the working group being suspended, there is always a politics of the possible in the ebbs and flows, which demands serious attention to the modalities and technical content of a joint-registration. It is to these issues that the article now attends.

### *Institutional Mechanisms*

We note out three possible institutional forms that a joint-registration of Basmati might take. One approach (Proposal A) towards considering the institutional

framework could be that two entities—one in India and another in Pakistan—may separately register the GI under their respective country laws. These two entities, as discussed above, may be in the form of a statutory body (like APEDA) or a company or it could be a registered society. These institutional bodies constitute a single legal entity for registering Basmati in domestic and other jurisdictions.

But registration in a third country is often fraught with its own danger. It is not clear at this stage how such registration in a third country would eventually be seen legally. Doubts are also there whether this would lead to expropriation by the third country in the long-run. Some lessons may be drawn from the manner in which WOOLMARK is protected. WOOLMARK is a certification mark<sup>49</sup> 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 (IWS), which works throughout the world to promote the use and usefulness of wool by all forms of industry (other than actual selling) and also by education, research and publicity. IWS has established a company, called IWS Nominee Company Limited, limited by guarantee and having no share capital. The objective of this company is to act as a nominee or trustee, either solely or jointly, for the IWS and for the four Wool Boards. In India also, WOOLMARK has been registered as a certification mark in the name of IWS Nominee Company Limited. As registered proprietor of WOOLMARK in India and other parts of the world, IWS Nominee Company Limited is responsible for protection of the WOOLMARK name and logo against all acts of infringement and passing off arising from the use of identical or similar names and logos in respect of any wool which does not conform to the specifications defined by the proprietor and entered on the register.<sup>50</sup> While illustrative, the differences between a private right as a certification mark and the “public” element to the rights of a GI must be kept in mind.<sup>51</sup>

Another mechanism for a joint registration could be to form a company with participation from Indian and Pakistani entities (Proposal B). These entities could be any association of persons or producers or any organization or authority established or existing under law, having an interest in the protection of Basmati rice. This company could register Basmati as a GI under the respective laws of the two countries, India and Pakistan, and also in relevant third countries.<sup>52</sup> This composite body, say the “Basmati Holding Company” of India and Pakistan would basically be a GI holding company, and could either be incorporated in a neutral jurisdiction which offers offshore company structure or in one of the two countries. Such companies normally do not undertake any trading or other commercial activities in the jurisdiction it is registered in.<sup>53</sup> As holding companies do not have any significant day-to-day operation there may be minimal risk of a dispute. But should a dispute arise, the bye-laws of the company would provide an appropriate mechanism for referring the dispute to an international body or an International Arbitral Forum for settlement of binding or non-binding resolution. The flip side of such registration in a third jurisdiction as in the earlier case (Proposal A) is that a national property of great value would be in the hands of a third country.

Another mechanism (Proposal C) that could be considered for joint registration would be to form a Joint Commission of India and Pakistan on Basmati through an agreement between the two countries. This Commission could be conferred legal personality by treaty. Normally, states are primary subjects of international law, but this is not exclusive. To the extent that bodies other than states directly possess some rights, powers and duties in international law, they can be regarded as subjects of international law, possessing international personality. In fact, the constitution of many international organizations contain express provision intending to establish for the organization a legal personality in international law separate from that of the member states. But this may particularly need further consideration as the intellectual property right, in this case, moves from the community to the state—a feature that is equally shared with the other institutional solutions identified here.<sup>54</sup>

A precursor to these considerations is collecting and representing the various interest groups in the two countries that would collectively “hold” the GI rights in Basmati. India’s GI Act provides for any association of persons or producers or any organization or authority established by any law, which represent the interest of the producers of the concerned goods, could apply for registration of a GI.<sup>55</sup> As noted earlier, APEDA has now been empowered to register Basmati as a GI. As Pakistan has proceeded to provide the legal means for GIs through trademarks, private entities can acquire rights in Basmati; thus, the tussle between different representative bodies. We feel it is essential to go beyond these two formalizations and actually empower the constituency of farmers who maintain and grow Basmati. This would be reflective of the general rhetoric surrounding GIs that talks to endogenous development and local economic and cultural control; thus, enabling the requirements of Basmati to be defined locally (compare Vidal, 2005).

### *Content of a Transborder GI*

Independent of the institutional framework that is politically adopted, any registration, joint or otherwise, needs to consider the technical content of the application. This includes details on defining Basmati, its constitutive properties, the manner in which new varieties might be included (if at all), the demarcated areas of production, on-farm and post-harvest production rules, and any other specifications that might be pertinent maintaining the integrity of Basmati. As we are dealing with GIs, there are the juridical requirements of establishing the essential links between the emblematic and distinguishing properties of Basmati and its area of origin.

Generating the technical content of the GI, or as Vidal (2005) catchily terms “creating a Basmatisthan”, is a highly complicated exercise that involves negotiating a multitude of interests and groups—all doubly troubled by the politics of a transborder reality. It is not only a trading matter of adulteration of samples and/or establishing geographical borders to the areas of cultivation, but also concerns the denomination of new rice varieties to join the prestigious collective of Basmati, which encapsulated a range of interests: of breeders (in accomplishing a breeding

achievement) with traders (in securing a broader mix of varieties to blend) and farmers (in terms of loss/gain of patrimony). It is well beyond the remits of this article to provide a template for resolving such issues; however, we end with a sketch of some concerns as to how the technical content might be constituted.

A primary element would be to develop a genealogy of Basmati varieties that would also guide the development of new and evolved varieties; thus, building on the work of rice breeders (see Richaria, 1990). It is remarkable that despite the tradition of surveys and gazettes that a similar exercise on Basmati appears absent (Vidal, 2005). Towards this end, it would be useful to integrate the regulatory debate with available research on the relationship between local and environmental factors with the specific agronomic characteristics that distinguish Basmati. Existing research provides reliable evidence in this regard (e.g. Bhattacharjee *et al.*, 2002; Kamath *et al.*, 2008). The methods and tests described therein also demonstrate how certain cultivars, notably the RiceTec varieties like “Texmati” and Kasmati, have neither the genetic structure of Basmati nor the full range of agronomic attributes. In addition to some minimum criteria for Basmati, this also concerns the notification of evolved varieties and the maintenance of traditional varieties (Marie-Vivien, 2008). If there are variations in those parameters, it may give rise to ambiguity; thus, affecting the “identity preservation” that is essential for a GI.<sup>56</sup> The voluntary code that has emerged in the United Kingdom (compare Table 7) responds favourably to the findings of Indian scientists. However, any such attempt to generate an audit table of Basmati would remain deficient and incomplete if it did not incorporate associated cultural practices.

A second feature of the technical content would be a demarcation of the areas of cultivation and specifications concerning methods of cultivation and post-harvest practices. Considering only the issue of areas of cultivation, there is an obvious temporality in terms of the borders of Basmati-growing areas; thus, demanding a difficult political task of negotiating patrimonial interests with existing commercial practice. While Vidal (2005) makes this amply clear with respect to the changing alliances in creating “Basmatisthan”, he fails to reflect that this is not unique to Basmati. Here consider the origins of the borders of the Champagne area that were decreed in 1927. This decree included 71 communes from Aube only after the bloody riots that ensued following their exclusion in the 1908 decree. The area has expanded somewhat haphazardly; though, raising problems of justice in recent years (Sciolino, 2007). Responding to growing global demand for the bubbly in Russia, China and India, a French-government group of experts over a period of 4-years drew up a list of 40 communes to include within the designated territory in October 2006. While those included are pleased and will benefit from a tremendous increase in land-rents; however, the *just-excluded* communes are not pleased and have moved to the European Court of Human Rights to appeal the re-bordering (Sandforth, 2008). Similar dynamics are expected to play out in the case of Basmati as traders, farmers and agricultural scientists negotiate their competing values of culture, patrimony and commerce. For that matter, such problems already portend

with the application submitted by APEDA with excluded regions, such as Madhya Pradesh, registering their grief. In Pakistan, the tussle between the Rice Exporters Association of Pakistan and the Basmati Growers Association is symptomatic of differences in the way patrimony is being mobilized for future earnings.

Two final points on a future technical content for a GI must be expressed. First, as GIs are inherently cultural objects it is imperative that social and cultural practices that layer their presence are acknowledged. Thus, in addition to productivist and agronomist rendering of the characterization of Basmati, it would be useful to introduce a cultural marker to distinguish Basmati. Second, a monitoring of the borders of the GI club is essential. No doubt, GI rights hinge on degrees of exclusion; thus, are difficult to negotiate and maintain. Such regulatory stipulations can only be achieved through reasonable enforcement mechanisms as exemplified by the Tea Board's activities with respect to Darjeeling (Srivastava, 2005).

## Conclusion

Basmati is a culturally and economically important commodity in India and Pakistan (Vidal, 2005) and the socioeconomic dimensions are quite compelling. Its reputation and high unit value of Basmati has invited a number of "imitators" and "intrusions". Thus, the regulatory landscape confronting Basmati is complicated by patents, trademarks and brands. In reviewing this landscape, the article also sought to draw in implications from the WTO dispute and the *Feta* decision at the European Court of Justice. While the WTO Panel establishes the legitimate possibility of coexistence of trademarks and GIs, the *Feta* decision demonstrates that a wider constellation of factors are at stake in determining the genericity of an appellation. In raising opposition proceedings in the United Kingdom against RiceTec's trademarks, Texmati and Kasmati, the government of India assembled a "mosaic of evidence". It argued that these marks, including packaging with the use of a caricature of the Taj Mahal, were deliberate in building an allusion of association with South Asia; thus, seeking to capitalize on the reputation of Basmati. In both cases, RiceTec surrendered the mark without contesting the challenge. The article drew attention to other regulatory initiatives that seek to restore a certain degree of equity for legitimate right-holders. These include the voluntary Code of Practice for Basmati in the United Kingdom (and Europe). A pertinent issue for Basmati was the RiceTec patent which crystallized a global campaign. Discussing this case, the article also emphasized the possibility of the subject matter of GIs being implicated by other intellectual property rights, such as patents. However, the case also highlighted the consequences of deficient home protection for GIs. While pursuing this line of argument is one matter, the bigger (and more urgent) challenge is dealing with the transborder dimensions of Basmati. Despite the extant reality of independent efforts to acquire rights in Basmati in India and Pakistan, the article noted that political initiative for a joint registration in external jurisdictions exists but remains on hold. With this ambivalence in mind,

the article mapped out three institutional forms for a transborder system—one of which reflects on the example of WOOLMARK. The article also sketched the essential contours of the technical content for a Basmati GI, drawing out the need for shared understandings in India and Pakistan on the attributes, specifications and geography of cultivation. No doubt, beyond these legal and technical factors, the transborder reality of Basmati raises a substantive political challenge for legislators and citizens.

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### Notes

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- 1 Various agronomic features have been documented, such as the long (4–7 mm) and slender (length–breadth ratio of over 4) grains, its extreme elongation on cooking (at over 75%) and its distinct aroma, which is said to be a complex effect of over 40 compounds and not only 2-acetyl-pyrroline (Bhattacharjee *et al.*, 2002; Kamath *et al.*, 2008).
- 2 Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, TRIPS, 15 April 1994, 33 ILM (1994) 81.
- 3 APEDA (personal correspondence, 7 January 2009), on file with authors.

- 4 1 lakh is 100,000, and 1 crore is 10 million.
- 5 The study selected Shamgarh village of Taraori belt in Karnal district of Haryana, which is famous for producing Basmati rice. Karnal is at 29°43' N latitude and 76°58' E longitude with an altitude of 245 m above mean sea level in the Indo-Gangetic alluvial plains. The village has an area of 2,600 acres, of which 2,500 acres is the net cultivated area. With agriculture being the major occupation in the village, Basmati consists of 25% of the paddy cropped area in the kharif season.
- 6 A quintal is 100 kg.
- 7 The survey was conducted in 2008 by M/s Agrinet Solutions (APEDA, personal correspondence, 7 January 2009, on file with authors).
- 8 Basmati rice export with destinations, APEDA [online]. Available at (<http://www.apeda.com>) [Accessed August 2008].
- 9 GI normally results in socioeconomic gains. It has been reported that registration of Kota Doria as a GI resulted in tripling the earnings of weavers in the area (Menon, 2009). The report also states that weaver women are much in demand in marriage, and traditional weavers were now back in business after more than a decade of migration. This report is on the basis of a study done by the Rajasthan Chamber of Commerce on Kota Doria. The study also claims that about 70% of weavers knew the benefits of being GI registered and were enthusiastically weaving in the Kota Doria GI logo on the clothes made by them.
- 10 Variety-Wise Area and Production of Rice Crops, table 1.8, p. 59, *Pakistan Statistical Year Book*, 2007, Federal Bureau of Statistics, Pakistan. Data reported in this paragraph are from this source, unless indicated otherwise.
- 11 Commission Regulation (EC) 1594/2004 of 30 August 2004 derogating from Council Regulation (EC) No 1785/2003 as regards the arrangements for importing rice and laying down separate transitional rules for imports of basmati rice [2004] OJ L280/13, where the following Basmati varieties were noted: Kernel (basmati) and Basmati 370, Super Basmati and Pusa basmati.
- 12 Muhammed and Pirzada (2005) report that Pakistan's annual rice exports average 1.5–2 million tonnes. During 2003–4, the exports were valued at US\$627 million, registering a growth of 12.8% over the preceding year.
- 13 The petitions, on file with the authors, were broader in requesting similar clarification for the term "Jasmine". The petitions were part of the larger campaign initiated by the RiceTec patents, which this article discusses elsewhere.
- 14 Available at (<http://www.ftc.gov/os/2001/05/riceletter.pdf>) [Accessed August 2008].
- 15 Basic information about the code is available online on the Agency's website at (<http://www.food.gov.uk/foodindustry/guidancenotes/labelregguidance/basmatiguide>) [Accessed August 2008].
- 16 EC Basmati Imports Regulation [2004] OJ L280/13 and Council Decisions in the Exchange of Letters with India, (EC) 618/2004 of 28 August 2004 Agreement in the form of an Exchange of Letters between the European Community and India pursuant to article XXVIII of the GATT 1994 relating to the modification of concessions with respect to rice provided for in EC Schedule CXL annexed to the GATT 1994 [2004] OJ L279/19, and Pakistan, (EC) 617/2004 of 28 August 2004 Agreement in the form of an Exchange of Letters between the European Community and Pakistan pursuant to article XXVIII of the GATT 1994 relating to the modification of concessions with respect to

- rice provided for in EC Schedule CXL annexed to the GATT 1994 [2004] OJ L279/25. The Basmati varieties from India were Basmati 370, Basmati 386, Type-3 (Dehradun), Taraori Basmati (HBC-19), Basmati 217, Ranbir Basmati, Pusa Basmati and Super Basmati and those from Pakistan were Kernel (Basmati), Basmati 370, Pusa Basmati and Super Basmati.
- 17 EC Basmati Imports Regulation [2004] OJ L280/13, article 6.
  - 18 See the report available online on the Agency's website at (<http://www.foodstandards.gov.uk/multimedia/pdfs/basmatiumupdate.pdf>) [Accessed August 2008].
  - 19 Food Standards Agency 2004 Survey on Basmati Rice, March [online]. Available at (<http://www.food.gov.uk/multimedia/pdfs/fsis4704basmati.pdf>) [Accessed August 2008].
  - 20 In this respect, see the review of literature in Bhattacharjee *et al.* (2002).
  - 21 Council Decisions 2004/617/EC and 2004/618/EC (see *supra* n. 16). Whether "expeditiously" is anything more than hortatory remains unclear; though, it is difficult to suspect any treatment that would differ from what the law otherwise provides.
  - 22 The possibilities of a transborder GI within the construction of the Indian GI Act remain ambiguous; while not scripted, nothing in the Act emphatically prohibits it as well. For instance, section 2(e) begins by constructing "territory" as within a country but also ends by leaving other possibilities in the phrase "as the case may be".
  - 23 The dispute has been analysed in the literature and interested readers are guided to the following: Evans and Blakeney (2006), Gangjee (2007a), Handler (2006) and Resinek (2007).
  - 24 For an illuminating discussion of these principles with respect to GIs, see WIPO (2002).
  - 25 Advocate General Colomer in Case 317/95 *Canadane Cheese Trading AMBA and Adelfi G. Kouri Anonymos Emoriki Kai Viomichaniki Etaireia v Hellenic Republic* [1997] ECR I-4681 at [28] (AG).
  - 26 Joined Cases C-465/02 and C-466/02 [2006] ETMR 16, henceforth (*Feta* 2006).
  - 27 A scientific committee was established to assist the Commission on technical matters relating to registration of GIs. See Commission Decision of 21 December 1992 Setting Up a Scientific Committee for Designations of Origin, Geographical Indications and Certificates of Specific Character (93/53) [1993] OJ L13/16.
  - 28 Commission Regulation (EC) 1829/2002 of 14 October 2002 amending the annex to Regulation 1107/96 with regard to the name Feta [2002] OJ L277/10.
  - 29 Quoted in Regulation 1892/2002, Recital 23.
  - 30 *Feta* (2006) at 70.
  - 31 *Chablis with a Twist* 954 F. 2d 1574, 22 U.S.P.Q. 2d 1190 (Fed. Cir. 1992).
  - 32 We are well aware, like Addor and Grazioli (2002), that GI producer groups from the Global South may not be in a position to launch the legal challenges to achieve coexistence.
  - 33 The translated use of Basmati appears to be a constant refrain in the naming of brands or varieties in the United States. In addition to examples noted before, consider Calmati, a variety released by the California Rice Research Board in 1999, which is advertised as "California's first, early, basmati type, aromatic, long-grain variety" that will "permit grower entry into this market [and] compete in the market with basmati [sic] rice currently imported from India and Pakistan" [online]. Available at (<http://www.carrb.com/Variety/CM-201.htm>) [Accessed August 2008].

- 34 For the curious minded, a picture is reproduced in Nair and Kumar (2005, p. 181).
- 35 US patent no. 5,663,484 granted on 2 September 1997.
- 36 Such misappropriation is often called by the pejorative term of “biopiracy”. For an account on the dispute by an anthropologist, see Vidal (2005).
- 37 Both are quoted in campaign literature published jointly by RAFI, Berne Declaration and Gene Campaign (2000) *Controversy Still Steaming*, 4 January (on file with author).
- 38 Writ petition no. 212 of 1998 (Supreme Court of India).
- 39 Suman Sahai, Convenor of Gene Campaign in India, was quoted as suggesting a WTO dispute on Basmati to raise the broader problem of biopiracy and inadequate GI protection (quoted in Jayaraman, 1998). For that matter, Mashelkar, then Director of CSIR and a member of the government’s committee on the Basmati challenge, was quoted as saying “How long can we fight these cases one by one? There is a need for policy and proper intellectual property regulation” (quoted in Anonymous, 2000b).
- 40 See the breeders quoted in Ramachandran (2000) and Srinivas (1998a; 1998b).
- 41 See *Vine Products Ltd & Ors v MacKenzie & Co Ltd & Ors* 1969 RPC 1.
- 42 As discussed earlier with reference to the *Feta* case, it is not totally unambiguous that an adjective preceding the indication renders the indication either generic or semi-generic.
- 43 Replying to a question (no. 3701) in Lok Sabha on 16 May 2006, the Indian Minister of State for Commerce and Industry informed about the steps taken by the government for joint registration of Basmati rice by India and Pakistan (for a media report, see Anonymous, 2007).
- 44 See the GI Registry available online at [https://www.ipindiaonline.gov.in/gi/\(S\(oz0z1j55ltumzi4530rsywbh\)\)/gisearch.aspx](https://www.ipindiaonline.gov.in/gi/(S(oz0z1j55ltumzi4530rsywbh))/gisearch.aspx) [Accessed June 2009].
- 45 It was brought in force on 12 April 2004. But this ordinance would only provide for filing of collective marks and certification marks. But certification marks’ registrations are often not accepted as a GI in some jurisdictions, for the reasons that they have civil jurisprudence (e.g. in France and Russia). These countries require GI registration under the *sui generis* GI Act in the home country. Marie-Vivien (2008) suggests that the definition of GI in the Ordinance deviates from the TRIPS standard.
- 46 On file with the authors.
- 47 The amendment is broader in its scope as it gives APEDA responsibility for special products that will populate schedule 2 of the GI Act, which concerns the higher level of protection of TRIPS, article 23 (Anonymous, 2009).
- 48 Application No. 145, submitted on 26 November 2008 and (at the time of writing, June 2009) remains under pre-examination status.
- 49 For example, IWS Nominee Company holds trademark registration no. 758504 for the plain word trademark; WOOLMARK is 758504 (27 March 1998). This company is engaged in technical innovation, technical consultation research and development, business information, commercial testing of wool fabrics and the promotion of quality assurance in respect of wool products. The company licenses the use of its trademark to others, not only in Australia, but also in a number of countries—more than 60 countries in respect of the manufacture, promotion, and sale of pure new wool and blended wool products.
- 50 An example of the action it takes is located in the challenge to oppose the registration of MERINOMARK (application no. 881976) in Australia. In filing opposition in 2002,

- IWS Nominee Company Limited cited their earlier trademarks; however, they failed to convince the hearing officer of the merits of their case (Decision of a Delegate of the Registrar of Trade Marks with Reasons, Re: Opposition by TWC Holdings Pty Ltd to registration of trademark application no. 881976(25), 27 April 2004).
- 51 The case of WOOLMARK is not comparable to a GI case. But this illustration is instructive as it shows that trademark registration is vulnerable in a third country. Pakistan does not have a GI Act and so it is trying to go for trademark registration. This would be considered a weak option.
- 52 The rights of this company in India and Pakistan would be as any entity would have as per the laws.
- 53 Some of these jurisdictions could be Mauritius, Isle of Man, British Virgin Islands, Cyprus, etc. Typically, laws in these countries are simple and permit the companies to conduct the internal management and affairs in accordance with their incorporation documents such as memorandum and articles of association.
- 54 We thank one of the anonymous referees for this observation.
- 55 See section 11(1) of the Geographical Indications of Goods (Registration and Protection) Act 1999 (48 of 1999).
- 56 See Taubman (2008) for a discussion on identity preservation.

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