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**THE PROTECTION ON GEOGRAPHICAL INDICATIONS IN DEVELOPING
COUNTRIES: THE CASE OF CEYLON TEA**

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Abstract

“Ceylon Tea has its own subculture and a heritage that nurtured over 140 years. It is a way of living and has plethora of attitudes. The rich cultures and secrets of the industry have refined through many generations.”¹

As it is vividly illuminated by commentators, “Sri Lankan Tea” which is well known as “Ceylon Tea” has been not only a geographical indication but also has been pillar of Sri Lankan culture, heritage and identity. Sri Lankan tea industry is, of course, a top contributor of foreign exchange of the economy. With that practical insight, this article attempts to analyse the current protection of geographical indication in Sri Lanka from different perspectives. This article first addresses the economic, cultural and social importance of geographical indications. Secondly, it discusses the international legal instruments relating to Geographical indications. Thirdly, it examines the protection accorded for geographical indications under the current Intellectual Property regimes of Sri Lanka. This article also provides useful insights on Indian experience based on a case study of ‘Darjeeling Tea’. Finally, it offers several suggestions to enhance the protection of geographical indications in Sri Lanka.

Key words: *Intellectual Property, Geographical Indications, Ceylon Tea, Darjeeling Tea*

1. Introduction

The protection of intellectual property plays an important role in a globalized economy in the 21st century. In the last two decades, the protection of Geographical Indications (hereinafter “GIs”) has gained worldwide recognition as a theme of industrial property protection in the global intellectual property (hereinafter “IP”) law agenda, giving both economical and socio-

¹ Ajith Alawatte, ‘Hubble-bubble over Pure Ceylon Tea’ Sunday Times (Colombo, 4 May 2012)

cultural value to them.² Generally speaking, a GI serves as the marketing tool, providing consumers the information about special qualities and attributes of a product. It is not easy to establish a reputation as a GI. It requires long time, patient application and sustained commitment. Therefore, the owners of GIs are required to take measures against direct or indirect use of any false indication, unfair competition or any other malpractices in relation to GIs. As some scholars have pointed out GIs are not exclusively commercial or legal instruments, they are multi-national. They exist in a broader context as an integral form of rural development that can powerfully advance commercial and economic interests, while fostering local values such as environmental stewardship, culture and tradition.”³

Pursuant to Article 22(1) of the Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement⁴, GIs are defined as:

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

According to this definition, a GI has inherent qualities which attributed to its origin. The ‘*other characteristics*’ can be colour, texture and fragrance. Reputation can come through the consumer practices and they can also be created by skilful marketing. The above definition pointed out the significance of GIs as an IP right.

2. Methodology

This study is a normative research and thus based on literature review. Moreover, primary and secondary sources are used to carry out the research. The literature research includes legal enactments such as statutes, international legal instruments, published research on GIs. Also, the case studies are used extensively on the subject matter to enrich the research as to find its objectives.

² For example, Indian Basmati, French Champagne, Italian Parma ham, Feta Greek Cheese, Colombian Coffee, Ceylon Tea, Mexican Tequila, Portuguese Porto wine etc; GIs link a product to a particular region and such inherent characteristics attribute to geographical and human factors.

³Daniele Giovannucci - Tim Josling - William Kerr - Bernard O’Connor - May T. Yeung, “*Guide to Geographical Indications: Linking products and their origins*”, Geneva: ITC, 2009. xix, vii

⁴At the end of the Uruguay Round of the General Agreement on Tariffs and Trade (GATT) in 1994 TRIPS agreement was implemented to regulate standards of IPR Regulations in World Trade Organization (WTO) members. This considers as the most comprehensive multilateral agreement on Intellectual Property ever.

3. Research Objectives

The main objective of this paper is to evaluate, identify and make suggestions on the existing IP protection pertaining to GIs in Sri Lanka. It also attempts to make in-depth analysis on law relating to GIs internationally as well as domestically. Moreover, it discusses the pros and cons of the influence of TRIPS agreement on GIs. Furthermore, it is objected to search the successful story of ‘Darjeeling Tea’ India for the purpose of evaluating Sri Lankan famous GI, ‘Ceylon Tea’. Finally, it offers suggestions to enhance the existing Sri Lankan law on GIs.

4. Results and Discussions

4.1 Importance of Protection of GIs

“GIs pertaining to both agricultural and handicrafts, may contain traditional knowledge which is capable of exploitation in sophisticated consumer market as natural medicinal, culinary, cosmetic or lifestyle products.”⁵ The instrumental importance of GIs is basically derived from development and business aspect of them. In terms of development aspect one can discuss its socio-cultural value and environmental-ecological value. GIs can directly help create rural employment on one hand, and on the other hand, they provide a structure to promote intellectual property rights while promoting the socio-cultural values embedded in indigenous life style of a particular community. Moreover, a GI has a market-oriented business aspect to it. GIs have acquired some inherent qualities through the production and processing methods of particular territory. Therefore, they can have a significant impact on entire supply chain.⁶ In terms of the traditional knowledge aspects of GIs, in many parts of the world, producing and processing methods of GIs are based on traditional methods followed for centuries.⁷ These methods are generated and transmitted from one generation to another. Therefore, it is not amount to skilled or trained labour. Even if the labourers of rural areas are lack of literacy or other skills, it would

⁵Evens G.E and Michael Blakeney, “*The Protection of Geographical Indications after Doha; quo vadis?*”, Journal of International Economic Law, Oxford University Press, 2006. at p. 3.

⁶For example ‘Tuscony’ for Olive oil of Italy and ‘Roquefort’ for cheese produced in France are famous GIs. Climate system of the area, traditional methods of producing and processing added a special taste and quality to that food stuffs.

⁷*Prosciutto di Parma* or Parma ham is a well-known example of using traditional knowledge in production. For ham to receive the Parma name, it must be produced in the province of Parma – in the Emilia-Romagna region of north-central Italy – using exclusively pigs from that area. Each step in production, from the breeding of the pigs and their diet through processing to the final packaging, is closely monitored and controlled by the *Istituto Parma Qualità*. Only the Istituto can brand the finished ham with the seal of Parma’s five-pointed ducal crown, qualifying the ham as true Parma ham.

not a barrier to contribute their labour to produce GIs because they are possessing necessary skill through traditional knowledge and practices.

For an example, tea is grown in hill country regions of Sri Lanka since the colonial era and it has acquired well known GI name for “Ceylon Tea” for centuries. In this area, the whole rural lifestyle is established based on tea culture. Sri Lanka relies overwhelmingly on its most famous GI, the Ceylon tea, which brings in nearly \$700 million in annual export earnings and provides employment to over 1 million people.⁸ It provides many job opportunities to countryside residents who are lack of education and who are not skilled labours. If the hill country tea industry is neglected, it would certainly create a major blow to the national economy of the country and to the rural lifestyle of the hill country.⁹

In the view of development characteristics, the GIs are not only providing employment opportunities or greater income, they also promote tourism industry in such areas. In this way promotion of agro-tourism around GIs inter linkage with rural development are well illustrated in case *Boseong* green tea in South Korea. After six years following the introduction of GI, in addition to promoting the product age, doubling production and increasing tea prices by 90 percent, the number of tourists to the Boseong region has been increased by three fold. It leads to the creation of thousands of jobs and development opportunities in the area. There are many case studies on the particular importance of GIs in developing countries and as well as in developed countries¹⁰ throughout the globe.

Arguably, environmental preservation can be discussed as a consequence of GIs. The using of indigenous methods and traditional knowledge in producing goods, automatically contributes to the preservation of the environment. There are pros and cons on environmental protection approach to GIs. Conversely, the cultivation or industry is thinning out in an area it can of course affect the natural environment and its riches. Therefore, from a perspective of environmental

⁸*Surbhi Jain, “Effects of the Extension of Geographical Indications: A South Asian Perspective”, Asia-Pacific Development Journal, Vol. 16, No. 2, December 2009, at p17.*

⁹In 2009 , Sri Lankan Tea production is contributed to earn 534,140million rupees (value added % is 1.6 of Gross Domestic Products), source; Economic and Social Statistic of Sri Lanka, 2011, at <http://www.cbsl.gov.lk>

¹⁰European Union Commission on GIs, 1992, discussed about the issue of rural development by GIs, as a result of these considerations in Regulation 2081/92 made express mention of the common agricultural policy in fulfilling its objective of contributing to ‘...the diversification on agricultural production...so as to achieve a better balance between supply and demand on the markets, ... (and benefiting) rural economy in particular ...less favored or remote areas, by improving the income of farmers.’

protection, GIs contribution can be considered as a narrow one. Moreover, “GIs were perceived as means of changing from quantity based to quality based exports by creating a system that would allow consumers to recognize and pay a premium for high quality products which produce only with traditional raw materials or methods that remain unique within the regions of that the products originally were associated.”¹¹

GIs have their own socio-cultural relationship which has been developed as a result of their long-standing association with particular region.¹² GIs are market-oriented and, therefore, they value the cultural aspects and traditional methods that are intrinsic to the producing and processing methods. One might still argue that, in commercial transmission of modern era, all GIs is not means of protectors of traditional and cultural values. Therefore, other Intellectual Property instruments such as patents or other forms of legal protection may needed to complement GIs. Some countries of the world expect GIs to be legally connected to traditional aspects. For an instance, in France, Appellation of Origin law reference “local fair and constant practices”¹³, and in Tunisia, the Destination of Origin law notes “methods of production must be rooted in local traditions being ancient constant and well known”.

According to the definition adopted by the TRIPS agreement, the protection must be extended for the quality, reputation or other characteristics of the good being linked to the territory. In this sense, this IP right is being capable of using to preserve traditional knowledge (hereinafter TK). GIs have the potential to transform traditional knowledge into intellectual capital.¹⁴ The protection of GIs as collective rights are more appropriate than the protection of GIs under a trademarks regime when they involve community held traditional knowledge. Granting GIs based on collective marks or on other effective system it creates a better way to codify traditional practices. Codification of traditional practices provides effective protection against exclusive private use or irregular use of TK. When granting GIs, the protection for products can potentially

¹¹Evens G.E and Michael Blakeney, “*The Protection of Geographical Indications after Doha; quo vadis?*”, Journal of International Economic Law, Oxford University Press, 2006. at p. 4.

¹²Specially in Greece, France, Italy and other sub continental areas of wine making; rich traditional and cultural diversity has engendered. There are rituals, functions, celebrations, traditional folklore created by wine producing history.

¹³Decree No. 91-368 of April 15, 1991 on the Organization and Operation of the National Institute of Appellations of Origin in France.

¹⁴See *supra* foot note 4; at p.35.

be held on an unlimited period of time. There is no possibility to become generic the production name or method when GIs are recognized.¹⁵

From a different perspective, consideration of GIs as instruments of rural justice, the ends of social equity may be achieved through rewarding the local products. In that sense, GIs also facilitate cultural recognition in marketplaces through cultural communication. Undoubtedly, it is created a very effective platform to rural development. GIs are multi-purpose means which can gain huge amount of benefits in developing scenario. As means of intellectual values, it can easily be utilized to improve economic as well as socio-cultural aspects of a country.¹⁶ In order to make the above mentioned objectives realized in a given country, it is utmost important that the prevailing law must be dynamic, transparent, well-deigned to reflect country's specific characteristics.

4.2 International Regime on GIs

The recognition of GIs in international scenario as an intellectual right goes back as far as the late 19th century, but more regulated and active forms of protection have been implemented in recent decades. The laws relating to GIs are deprived from common system but distinct forms of protection can be seen in different countries and regions. Therefore, we could not identify a consistent legal instruments or international consensus on the protection of GIs at international level. This dilemma has caused difficulties in initiating a globally harmonized system of GIs protection. As commentators have pointed out, there is no universal method of protecting GIs, or a common international commercial law, the granting of legal protection for GIs lies within the jurisdiction of separate domestic laws and the regulations of individual countries. Domestic mechanisms are very considerate, therefore different marks, appellations or designations need to be registered in all relevant countries in order to protect the GIs they represent.¹⁷ Nevertheless, there are three main approaches to protect GIs in different jurisdictions:

¹⁵*Cerkia Bramley*, "A Review Of The Socio-Economic Impact Of Geographical Indications: Considerations For The Developing World", Worldwide Symposium On Geographical Indications Lima, June 22-24, 2011 WIPO Publication, No. 798(E), pp54-73

¹⁶The EU's perspective on GIs has been described as "a legal and commercial basis for development of rural areas, the preservation of cultural heritage [and] the promotion of small and medium firms in the rural economies context", Hughes J (2009). "Coffee and chocolate: Can we help developing country farmers through geographical indications?", Report prepared for the International Intellectual Property Institute, Washington DC.

¹⁷See *supra* foot note 1; at page 40

- The use GIs specific laws or *sui generis* systems
- The use trade mark system or other legal or administrative means.
- Some countries do not formally recognize or protect GIs.

There are, at least, more than hundred countries where GIs are recognized as a separate type of intellectual property and *sui generis* protection of GIs are in place.¹⁸ Some countries provide protection by registration of GIs under the particular law. Other countries have established registers and have registered Geographical Indications. Jordan, Mauritius, Oman, Qatar, Singapore and Sri Lanka are the only 6 countries with *sui generis* system of protection of GIs do not have a compulsory registration or protect GIs as such without the need for a register.

There are 56 countries that do not have specific laws for the protection of Geographical Indications but protect them as certification trademarks, collective trademarks or just as ordinary trademarks. Among those countries are the United States, Canada, Australia, Japan, a large number of African countries and many Arabian countries. In fact, many countries with *sui generis* system also have the option of some additional protection via trademarks. Although various jurisdictions provide various forms of protection, the basic guidelines for GI are illustrated in several international agreements. These include; Paris Convention of 1883¹⁹, Madrid Agreement of 1891²⁰, Lisbon Agreement of 1958²¹, and TRIPS Agreement. When analysing the provisions of these agreements, it is clear that different legal norms are used to accord protection of GIs and the definitions of GIs vary according to each international instrument.

The Madrid system has 56 contracting parties. It provides a framework for a central international registration of marks. It was introduced as an effective protection method on a multinational basis, so that rather than filling separate registration in individual countries of interest, owners of marks can simply file one application directly with their national trade mark or IP office. The most important equipment for the protection under the Madrid system is that the country requests

¹⁸Argentina, Chile, Colombia, Costa Rica, European Community, India, Iran, Nicaragua, Qatar, Sri Lanka and Thailand are instances for countries using *sui generis* GIs protection.

¹⁹The Paris Convention for the protection of Industrial Property, 1883.

²⁰The Madrid Agreement concerning the International Registration of Marks and the Protocol relating to the Madrid Agreement., 1891.

²¹The Lisbon Agreement for the Protection of Appellation of origin and their International Recognition, 1958.

the protection, must be a member of the system. Although the Madrid system may or may not constitute a direct protection on GIs, a separate Madrid agreement of 1891, concern the repression of false and deceptive indication of source.²² Moreover, the Lisbon Agreement also provides an effective means of protecting GIs because it directly addresses appellations of origin rather than their country of origin. Specifically, it provides a single registration procedure for an appellation of origin and substantive law such as defining the content of the protection that member states must undertake. According to Article 2(1) of this agreement,

‘appellation of origin means’, the geographical name of a country, region or locality which serves to designate a product originating therein, the quality and characteristics of which are due exclusively or essentially to the geographical environment, including natural and human factors.’

This definition is broader than Madrid agreement’s definition on GIs. It refers to the geographical environment including human factors and natural factors.²³ Although the Lisbon Agreement provides more effective protection of ‘appellation of origin’, it has 26 signatories only and has not been accepted widely.²⁴ The Paris Convention also accords some protection for GIs. Under the Paris Convention, although there are no expressed provisions relating to ‘appellation of origin’ Article 10bis includes the obligation to protect ‘indication of source’ against unfair competition. It provides that the contracting states are required to make masseurs against direct or indirect use of any false indication of source of goods or the identity of the producer, manufacturer or trader. Even more importantly, the TRIPS Agreement set out a more comprehensive interpretation on GIs than any other international agreements. The essential elements of the standards concerning the availability, scope and use of rights involving GIs include the following:

Article 22(1): “Geographical Indications are for the purpose of this agreement indications which identify a good as originated in the territory of a member or a region

²²Article 1(1) of the Madrid Agreement, ‘ All goods bearing a false or deceptive indication by which one of the countries to which this agreement applies, or a place situated therein, is directly or indirectly indicated as being a country or place of origin shall be seized on importation into any of the said countries.’

²³An appellation of origin is a special kind of geographical indication generally consisting of a geographical name or a traditional designation used on products which have a specific quality or characteristics that are essentially due to the geographical environment in which they are produced.

²⁴Lisbon members as of 2008, Algeria, Bulgaria, Burkina Faso, Congo, Costa Rica, Cuba, Czech Republic, Democratic People’s Republic of Korea, France, Gabon, Georgia, Haiti, Hungary, Iran, Israel, Italy, Mexico, Moldova, Montenegro, Nicaragua, Peru, Portugal, Serbia, Slovakia, Togo, Tunisia,

or locality in the territory where a given quality, reputation or other characteristics of the good is essentially attributable to its geographical origin.”

Geographical origin indicates the ‘appellation of origin’ as well as ‘indication of source’ and contains rational and standard interpretation on GIs.²⁵ It serves not only to define GIs, but also to align the standards of protection as well as providing access to an international dispute settlement mechanism.²⁶

Article 22(2)(a): *“Members must provide the legal means for interested parties to prevent the use of indications that misleadingly indicate or suggest that a good originates in a geographical area other than the true place of origin.”*

Article 22(2)(b): *“Members must provide means to prevent any use which constitute an act of unfair competition within the meaning of Article 10(b) of the Paris Convention.”*

Article 22(3): *“Members shall refuse or invalidate the registration of a trade mark which consist a misleading indication.”*

Above articles provide obligations to signatories for making appropriate protection with strong commitment for GIs. Article 23 denotes the specific and additional protection for the wine and spirits categories.²⁷ It can be observed that TRIPS mandates two tiered model of protection on GIs.²⁸ Basically, it is giving specific and additional protection on ‘wine’ and ‘spirits’ but leaving the legal means of protection to national governments for other agricultural products and foods. While TRIPS providing higher level of dilution-type protection mechanism for wine and spirits, it only provides minimum safeguards of protection on non-alcoholic GIs. Therefore, the developing countries those own GIs other than wine and spirits have to bargain for a proper

²⁵“...above explanation indicates the broadest term is ‘indication of source’ which may comprise both geographical indications and appellation of origin. On the contrary, it appears that all appellations of origins are GIs but all GIs are not appellations of origins. There can also exists indication of source which are not covered by the definition of GIs under the TRIPS Agreement, namely, indications of source whose use on products does not imply a specific quality, reputation or characteristic of those products.” Karunaratne D.M., *“Elements of the Law of Intellectual Property in Sri Lanka”*, 1st Edition, Nugegoda, Sarasavi Publishers, 2010, at p.297.

²⁶See Article 24 (part II, section 3 of the TRIPS Agreement)

²⁷Article 23(1), “Each member shall provide the legal means for interested parties to prevent use of a geographical indication identifying wines for not originating in the place indicated by the geographical indications in question, even where the true origin of the good is indicated or the geographical indication is used in translation or accompanied by expression such as “kind”, “type”, “style”, “imitation” or the “like”.

²⁸84% of GIs are attributable to four product categories, wines (61.4%), sprits (9.5%), agro (6.7%) and cheese (6.5%). International Protection on Geographical Indications and Developing Countries, South Centre, TRADE Working Papers no 10, 2001.

system to protect their GIs in the global arena.²⁹ But, any such initiatives have been prevented by lack of consensus among different member States of the WTO.

As a solution to this issue of dual protection embodied in the TRIPS Agreement, it can well be argued that the time is ripe for WTO members to initiate new negotiations in order to extend a higher level of protection provided by Article 23 of TRIPS beyond the current scope of wine and spirits to all products. Prior to Seattle Ministerial meeting, in a submission by Turkey on 09th July 1999, proposed the extension of GIs beyond wines and spirits. There had been many arguments for and against such a move. Perhaps more importantly, when it comes to the protection of GIs, one cannot see the traditional divide between developed and developing countries (North-South Dimension of the TRIPS) on the same line of opinion.³⁰ In other words, both developed and developing countries queue up to argue for and against the harmonization of GI protection. Significantly, countries including Kenya, Nigeria and South Africa, African group of countries endorsed a proposal on requesting that the GIs protection be extended ‘to other products recognizable by their geographical origin’, specially agricultural, food and handicraft products.³¹ Their argument of extension is based on making a market differentiation for a verity of common commodities as tea, coffee and rice and as a mean of protecting traditional knowledge which sturdily combined with products of that region. Opponents of the proposal are not only the developed countries, but also developing countries involves as aggrieved party led by United States of America.³² There is so far no outstanding solution being adopted by WTO members on this regard. This dilemma can adversely affect to non-alcoholic GIs, mostly originated from Asian and African and other low-income economies.³³ Therefore, countries need

²⁹Most of non-alcoholic GIs are originated in developing countries, for example; ‘Ceylon Tea’ in Sri Lanka, ‘Antigua Coffee’- Guatemala, ‘Darjeeling Tea’-India, ‘Gobi Desert Camel Wool’- Mongolia, ‘Blue Mountain Coffee’-Jamaica, ‘Kona Coffee’- Hawaii, ‘Pampas beef’, ‘Tellicherry pepper’, ‘Basmati rice’, ‘Rooibos tea’ are well-known agricultural GIs originated in developing countries.

³⁰“TRIPS Agreement cannot be applicable to developed and developing countries equally without attributing due consideration to such rights with particular reference to the mitigatory provisions in the Agreement.” per J. S.N. Silva, *In the Supreme Court Special Determination on ‘A Bill Bearing the title intellectual property’* on 6th June, 2003.

³¹This proposal also is adopted by Cuba, Chez Republic, Dominican Republic of Honduras, India, Indonesia, Nicaragua, Pakistan, Sri Lanka and Venezuela.

³²Australia, Chili, Argentina and Guatemala claims that if the extension of protection be granted it will undoubtedly cause to assign exclusive rights on certain producer groups and also they point out that extension of protection with mandatory system of protection will take high amount of cost.

³³Lack of strong protection on GIs, could cause to original geographic location has been universally lost or GIs could be generic terms. For example Yemen’s Mocha coffee has lost its identity and popularity. India ink,

to take measures to empower regional and domestic legal system as a mean of providing minimum protection to own GIs.

4.3 The Protection of GIs under the current IP regime in Sri Lanka

As we have seen in the above sections, the international regime on the protection of GIs has been modified through last two decades, but countries have not been able to reach a central point of universal commitment. Therefore, countries have individual or collective responsibility to provide proper protection on GIs till an acceptable and a justifiable international commitment is adopted. Most commendably, an identifiable strong regional commitment on protection of GIs has been achieved in the European Union.³⁴ Registration of a GI is not a prerequisite for the protection of GI. When a country seeks judicial intervention for the protection of a GI, it is important to establish that the product claimed protection has duly registered as a GI. Providing national protection for GIs could be used as a weapon when claiming GI protection in an international infringement scenario.³⁵

Sri Lanka is a country with vast ethnical, cultural and bio-diversity. It also has a long historical civilization. Therefore, it has the possession of rich traditional knowledge on producing and processing methods.³⁶ Through the civilization factor, the geographical orientation will lead to add uniqueness, quality and reputation of goods. Climate, soil, humidity, temperature, rainfall and other physical factors contribute to make these specialties. There are several established GIs in Sri Lanka including; ‘*Ceylon Tea*’, ‘*Ceylon Cinnamon*’, ‘*Ruhunu Buffalo Curd*’, ‘*Dumbara Mats*’, ‘*Malwana Rambutan*’, and ‘*Bibile Oranges*’. As a member of WTO, and country which can identify established GIs, Sri Lanka has a responsibility to provide legal means to protect GIs.

Chinaware, Worcestershire sauce, Kiwi fruit, Gouda and Swiss cheeses are some instances that have become generic or common in some markets.

³⁴Under European Regulation 510/2006[1], within the European Union (EU), to benefit from a protection designation of origin (PDO) or a protected geographical indication (PGI) a product must be the object of a registration to the European Commission.

³⁵According to Article 3 of TRIPS Agreement, the member countries shall provide ‘national treatment’ for the nationals of other countries also, Article 4, contains the ‘most-favoured nations principle’,-“...any advantage, favour, privilege or immunity granted by member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of other members...”, by initiating these two principles one country can sue against another for the purpose of international infringement of GIs.

³⁶In Vietnam, Decree 54/2000/ND-CP concerning GIs, provides a higher level of protection to all product categories. Vietnam protects traditional knowledge by this means, e.g. ‘Phu Quoc’ fish soya sauce and ‘Tuet Moc Chau’ a variety of tea in Vietnam.

The current protection of GIs in Sri Lanka is governed by provision of the IP Act No. 36 of 2003 (hereinafter 'the act') which may be described as a kind of *sui generis* system.³⁷

Under the IP Act, GIs may also be protected by other regimes such as certification mark, collective mark as well as protection against unfair competition. Pursuant to Section 161 of the IP Act

(1) Any interested party shall be entitled to prevent-

- (i) the use of any means in the designation or presentation of goods that indicates or suggests that the goods including an agricultural product, food, wine or spirit in question originates in a geographical area other than the true place of origin in a manner which misleads the public as to the geographical origin of goods ; or
- (ii) any use of a geographical indication which constitutes an act of unfair competition within the meaning of section 160 ;
- (iii) the use of a geographical indication identifying goods including an agricultural product, food, wine or spirit not originating in the place indicated by the geographical indication in question or identifying goods not originating in the place indicated by the geographical indication in question, even where the true origin of the goods is indicated or the geographical indication is used in translation or accompanied by expression such as kind, type, style or imitation or the like.

According to the above provision, 'any interested party shall be entitled' to prevention of misleading the public as to the geographical origin of goods, by any means of designation or presentation. It expressly provides protection for agriculture products, foods wine or sprits. This provision also under the sub section (ii) provides protection against unfair competition for GIs. The most importantly, the wordings of section 161 which read as 'any interested party' embrace a broad meaning covering not only who has business interests, but also those such as consumers and public spirited persons.³⁸ Moreover, section 161 (2) reads:

³⁷See *supra* foot note 16.

³⁸See *supra* foot note 23 at page 299.

the protection accorded to geographical indications under sections 103, 160 and 161 shall be applicable against a geographical indication for which, although literally true as to the territory, region or locality in which the goods originate, falsely represents to the public that the goods originate in another territory.

This section provides a safeguard against false representation as to origin of goods. If the public are misled by false representation of origin the protection, the section 103³⁹, 160 and 161 of the act, may be applied against such misrepresentation. Arguably, the Act is not granting the trade mark protection for GIs; because trade mark protection is a private/individual right. However GIs are collective rights of people. If individual rights have been granted, it would amount to an infringement of collective rights of people in particular area. The Act also offers special protection to the wine and spirit in accordance with the TRIPS Agreement.⁴⁰ Thus, it is clear that the Act not only provides *sui generis* protection to the GIs, but also keeps other possible option for protection of GIs viz. protection under certification and collective marks regimes. According to Section 142 (3) of the Act:

“Notwithstanding the provisions of section 103, a certification mark which consists of a sign or indication which may serve in trade to designate the geographical origin of the goods and services may be registered: Provided, however, the owner of such mark is not entitled to prohibit the use of such sign or indication in accordance with honest practices in industrial or commercial matters and in particular by a person who is entitled to use a geographical name.”

Certification mark is a mark which indicates goods or services are certified by a ‘certification authority’, which have specific quality, accuracy or other characteristics. Certification mark

³⁹Section 103.(1) (f) of the act offers negative type of protection for GIs. “A mark shall not be registered— which is likely to mislead trade circles or the public as to the nature, the source, geographical indication the manufacturing process, the characteristics, or the suitability for their purposes, of the goods or services concerned” , According to Section 103. (1) (h) which is, according to its ordinary signification, a geographical name or surname

⁴⁰161 (3)In the case of homonymous geographical indications for goods including an agricultural product, food, wine or spirit, protection shall be accorded to each indication, subject to the provisions of subsection (2) of this section. The Minister, in case of permitted concurrent use of such indications, shall determine by prescribed practical conditions under which the homonymous indications in question will be differentiated from each other, taking into consideration the need to ensure equitable treatment of the producers concerned and the protection of consumers from false or deceptive indications.

represents collective right rather than private right.⁴¹ Also under a registered owner it can be protected goods or services which have special quality or reputation, from providing safeguard against misuse, as collective marks.⁴² The act offers certification marks and collective marks protection on GIs as additional means of protection.

Enforcement mechanism for the protection of GI rights is provided under both civil and criminal litigation. Therefore, one could find a reasonably effective procedure under the Act in the event of infringement of GIs. Civil litigation applies to the *sui generis* protection, as well as to the rights under collective and certificated mark protection. In an infringement action involving a GI, the Act provides the courts⁴³ with power to grant an injunction to prevent such infringement. Only after paying due consideration on the matter, the court may grant compensation or other civil remedies.⁴⁴ In terms Section 191 of The Act, any person who-

- (a) Makes a false declaration to the Director-General ;
- (b) Makes a false declaration in respect of geographical indication inclusive of Ceylon Tea and Ceylon Cinnamon, shall be guilty of an offence and shall be liable on conviction by a Magistrate to a fine not exceeding five hundred thousand rupees.

According to this section Magistrate Court is empowered to impose criminal sanctions on infringers of GIs. It is clear that Sri Lankan law on GIs is rather effective, but there is no registration procedure for GIs in place in Sri Lanka. Thus, any violations would happen the without the notice of the right holders.

⁴¹A certificate is a written guarantee by an independent certification agency that the production process or the product complies with certain standards. These standards can be environmental issues (as soil conservation, water protection, pesticide use, or waste management), or social issues (such as producer income, workers' rights, occupational health and safety) or on other aspects of production like food safety.

⁴²138 (3) Notwithstanding the provisions of section 103 a collective mark may be registered which consists of a sign or indication which may serve, in trade, to indicate the geographical origin of the goods or services: Provided, however, the owner of such a mark shall not be entitled to prohibit the use of such sign or indication in accordance with honest practices in industrial or commercial matters and in particular, by a person who is entitled to use a geographical name.

⁴³See section 212 of the Intellectual Property Act, No.36 of 2003. Other than western province this jurisdiction is held with High Court of the province. In western Province this power vested with commercial high court of the Western Province.

⁴⁴See chapter xxxv of the Intellectual Property Act, No.36 of 2003.

An effective system of GIs protection must have minimum standards. Such a system must have four essential components as follows.⁴⁵

1. Strong organizational and institutional structure to maintain market and monitor GIs. In this component, it should consider, fairly demarcating GIs, organizing existing practices and standards, establishing a plan to protect and market the GIs.
2. Equitable participation among the producers and enterprises in a GI region. This would be helpful to share not only profits or benefits of the GIs, but also in the control and decisions regarding these public assets.
3. Strong market partners committed to promote and commercialized over the long time.
4. Effective legal protection including a strong domestic GI system. Especially a strong domestic protection is very effective to enforce GIs in international regime.

In view of these four features, it is worth considering Indian experience GIs protection. For our purposes, case study of 'Darjeeling Tea' has been selected.

4.4 Indian perspectives on Geographical Indications: Case study on 'Darjeeling Tea'

India is in the early stage of developing and exercising its GI protection regime. As a developing country, with vast variety of culture, population and climate and other factors are contributed to originate GIs; India has to develop an effective mechanism for the protection of GI in order to prevent violation of GI rights. Indian approach of protecting GIs has been designed based on lessons learned domestically as well as from other jurisdictions such as European Union and United State of America.

The Indian Geographical Indications of Goods (Registration and Protection) Act, 1999, came into effect in 2003. It expressly provides a registration⁴⁶ and protection procedure for the GIs. The goods may registered under the Act are categorized to several classes such as natural goods, agricultural goods, manufactured goods (handicrafts, foodstuffs) so long as production, processing and preparation methods includes in this list.⁴⁷ According to section 11 of the Indian

⁴⁵See *supra* foot note, at page xvii.

⁴⁶Under section 6 of the Indian GI act, a record called Register of Geographical Indications shall be kept at the head office of the GI Registry, wherein shall be entered all mandatory descriptions regarding to the registered GIs.

⁴⁷After the act of 1999 is enforced in 2003, well regarded GIs of India have registered under the provisions of act, for examples, Darjeeling Tea, Chandrisaree, Kotfad Handloom fabric, Kancheepuram silk, Mysore Agatbathy,

GI Act 1999, any applicant who apply for registration of GI must be representing the interest of the producers of the concerned goods; and desirous of registering a GI in relation to such goods.

⁴⁸ Section 21 of the Indian GI Act of 1999, confers on the proprietor of the GI and the authorized user, exclusive rights to use of a GI in relation to goods which the registration is obtained.⁴⁹

Section 67 of the Indian GI Act of 1999, provides for the relief that the court may grant in any suit for infringement of passing off which includes injunctions and damages or account of profits. The registration under the Geographical Indications of Goods Act, 1999 prevents people by instituting proceedings on unregistered GIs, registered owner or authorized users are granted with exclusive right use of GIs, registered owner or authorized users can institute proceedings against infringement of their rights and it also confers public rights.

In the world of GIs, Darjeeling Tea is a well-known name not only in also throughout the world. Among the teas grown in India for more than a century, Darjeeling tea offers distinctive characteristics of quality, flavour and reputation. Darjeeling district in West Bengal State is the place where Darjeeling tea is grown, cultivated and produced.⁵⁰ Above two third of the annual production Darjeeling tea is exported.⁵¹ Most notably, the Indian Tea board has been taken several efforts to ensure the supply of genuine Darjeeling tea.⁵² In year 2000, the tea board of India initiated a system of compulsory certification for Darjeeling tea suppliers. Under this system the licensees must provide information relating to the production and manufacture of Darjeeling tea to tea board. This information is useful to maintain aggregate production and sales reports on Darjeeling tea. After the essential parameters are fulfilled by the producers; the tea board issues a certificate of origin authentication. The custom authority of India also instructed to prevent exporting Darjeeling tea without the certificate of tea board of India. By this

Mysore Milk, Kullu Shawl, Kangra Tea, Coorg Orange, Mysore Betel Leaf, Mysore Sandal soap, and Nanjanagud Banana.

⁴⁸According to the meaning of section 11, 'Applicant' indicates; any association of persons or producers or any organization or authority established by or under any law for the time being in force.

⁴⁹In terms of the section 23 of the Indian GI Act of 1999, the fact of registration of the geographical indication shall be *frima facie* evidence of the validity thereof.

⁵⁰Darjeeling is an area near to Mount Himalayan of North East India, above 2000 meters of mean sea level and has suitable climate for tea cultivation.

⁵¹Japan, Russia, the United States, United Kingdom, France, Germany and the Netherlands are the key buyers of the Darjeeling tea.

⁵²See the Tea Act of 1953 in India, and Tea Marketing and Distributing Control Order 2000 in this regard.

procedure the originality of Darjeeling tea can be protected without any harm of passing off or unfair trade practices.

Indian regime on GIs can basically divide into two levels of protection against infringement of GIs viz., the protection of domestic level and the steps taken at international level. At domestic level, the tea board of India has registered the 'Darjeeling Logo' and the word 'Darjeeling' as a certification trade mark.⁵³ This certification trade mark is also registered under the Geographical Indications of Goods Act of 1999. Enacting a legislation to protect GIs, amount to the complementation of India's obligation, as a signatory of TRIPS Agreement and a member of WTO.⁵⁴ India has taken rudimentary steps to protect 'Darjeeling tea' in international level also. Indian Tea board has registered the 'Darjeeling logo' and 'Darjeeling' marks in various countries through out of the world such as Canada, Japan, Egypt, the United States and United Kingdom.⁵⁵ Also Indian tea board has hired since 1998; the service of 'Compu mark', a Worldwide Watch Agency to prevent the misuse of 'Darjeeling logo' and 'Darjeeling' marks. Moreover, the Indian Tea Board constantly communicates with overseas buyers and tea boards in order to supply genuine 'Darjeeling tea. These initiatives at the international level have been contributed to protect 'Darjeeling logo' and 'Darjeeling' marks worldwide.

With this statutory context, the Indian tea board has been playing an outstanding role in protecting 'Darjeeling logo' and 'Darjeeling' GIs. It tries to reach negotiations with other countries, applies for registration of 'Darjeeling logo' and 'Darjeeling' marks in other countries, institutes proceeding against misuse of 'Darjeeling logo' and 'Darjeeling' marks contributing to enhance the effectiveness of the GI protection on Darjeeling tea.⁵⁶ The high cost of enforcement and protection of 'Darjeeling logo' and 'Darjeeling' marks is the another major problem that the Indian tea board is constantly facing. Specially in hiring an international agency, fighting infringements in overseas jurisdictions are expensive matters.⁵⁷ In this case study on 'Darjeeling'

⁵³This registration is proceeded under the Trade and Merchandise Market Act, 1958

⁵⁴Enacting domestic legislation to protect GI amounts to fulfil of the obligation expressed in article 23 of the TRIPS Agreement.

⁵⁵On 3rd August 2001, the UK trade registry granted the word 'Darjeeling' under the UK Trade Marks Act, 1994.

⁵⁶The Tea Board of India has faced a series of hurdles and difficulties in protecting and enforcing the 'Darjeeling tea in the world. Some of the major challenges faced by the tea board are in Japan, France, Russia and United States.

⁵⁷According to the reports of Indian Tea Board, without including administrative expenses; India has spent approximately US\$ 200,000 during last four years for the purpose of protecting Darjeeling tea.

tea, we could identify the soundness of the legal protection and the effectiveness of the procedural aspects both separately as well as conjunctively have contributed to make a better safeguard on GI ‘Darjeeling logo’ and ‘Darjeeling’ marks.

4.5 What Lessons for Sri Lanka?

This part aims to analyse the practical issues relating to protection ‘Ceylon Tea’ as a GI and what are the legal parameters that Sri Lanka should introduced to strengthen the GIs protection at domestic as well as global level. According to the Sri Lanka Tea Board (herein after SLTB), production report in 2010, Sri Lankan total tea production was 331426 (metric tons), and has earned 148.6 billion SL Rupees, by exporting pure “Ceylon Tea”. In global scene Kenya, China and Sri Lanka accounted for more than 60% of global export of tea.⁵⁸

World famous “Ceylon Tea” as a GI holder needs to be better protected both national and international markets. At domestic level, Sri Lanka Tea Board is the authorized body entrusted with this daunting task. The Sri Lanka Tea Board was established as a fully government-owned statutory institution by Act of Parliament on 1 January 1976.⁵⁹ The Board renders its service under the preview of the Ministry of Plantation Industries. The primary objects of the SLTB under the above Act are development of the tea industry in Sri Lanka, promotion of Ceylon (Sri Lanka) tea globally and the implementation of regulatory requirements to be followed by the industry.

SLTB is the legitimate owner of the ‘Ceylon Tea Lion Logo’ and has applied to register as a GI, in Intellectual property office in Sri Lanka. ‘Ceylon Tea Lion Logo’⁶⁰ has registered in 96 countries of the world by the end of the year 2010. Furthermore, the SLTB has planned to register ‘Ozone Friendly Free Ceylon Tea Logo’ which carrying the idea of that when you reach for the Ceylon Tea flavor you are not only refreshing yourself, but also help to renew and protect

⁵⁸World Tea Production Statistics, Annual ICT Bulletin of Statistics, 2010.

⁵⁹By the amendment introduced in Sri Lankan Tea Board Law, No. 14 of 1975, SLTB was amalgamated in to four sections. (Tea Control Department, the Tea Export Commissioner’s Department, the Ceylon Tea Propaganda Board and the Tea Research Institute)

⁶⁰The franchise to the lion logo has been granted only for the branded value added tea products which contain 100% pure ‘Ceylon Tea’ compliance with ISO 3720 stranded and a minimum reference standard to each destination packed in Sri Lanka.

the limited resource on the Earth for yourself as well as for the unborn generation.⁶¹ This registration does not amount to a registration of GI but it is registered as certificated trade mark (CTM) in other countries. Sri Lanka Tea Board has just concluded the local registration of the name “Ceylon Tea” and the main seven tea growing regions (NuwaraEliya, Dimbula, Uva, Udapussella, Kandy, Ruhuna & Sabaragamuwa) as certification marks under Geographical Indications. According to the latest information, the relevant steps are currently being taken to register ‘Ceylon Tea’ as a GI in other countries by SLTB and Ministry of Industry & Commerce.

We can identify the SLTB has initiated some rudimentary steps to protect the quality of Ceylon Tea by initiating Quality Empowerment Activities (hereinafter referred as QEA) as per the provisions of Tea Control Act No. 51 of 1957. These QEA’s are as follows;

1. SLSI-SLTB Quality Certificate
2. Randalu Strategy to improve leaf standard
3. Rush Crop Management programme during festival season
4. Low NSA Strategy
5. Quality Monitoring System (Task Team Operation- TTO)
6. Factory Modernization subsidy scheme
7. Tea Re Planting Subsidy Scheme
8. Working capital loans
9. Factory base tea development programme
10. Establishment of GMPs (Good Manufacturing Practices) in Tea Factories⁶²

Basically, by implementing this QEA’s the SLTB aims to monitor the quality of productions, maintain fixed price on tea production in domestic level, licence of dealers, Therefore, as to protect ‘Ceylon Tea’ as well as other GIs in Sri Lanka, it should be given priority to enact proper legal provisions domestically. Registration of Geographical Indications for a particular product in the home country is a pre-requisite prior to applying for international

⁶¹ Sri Lanka is the first and foremost country in the world which has registered ‘Ceylon Tea Logo’ as a Eco-Friendly mark. The Sri Lanka Tea Board plans to register ‘Ozone Friendly Free Ceylon Tea Logo’ in thirty tea importing countries. This is a prominent step which has been taken by the Sri Lanka Tea Board by initiating sustainable development standards in local tea production sector.

⁶² For further details on QEA’s see the ‘Sri Lanka Tea Board Annual Report-2010’, pp 50-53.

registration. Domestic registration gains lot of advantages in internationally enforcement of GI rights. If GI is registered in home country, it is useful when,

- application of registration is not accepted in a jurisdiction where protection is sought.
- it creates well recognized status on GI and indicating clear link with geographical origin.⁶³

In this regard SLTB is acted wisely and prominently by affording domestic registration. From the Indian perspectives on ‘Darjeeling tea’, Sri Lanka can learn a lot to improve protection for GIs in Sri Lanka. In fact, India has provided further protection for ‘Darjeeling tea’ via GI act of 1999. The most important feature of the Indian legislation is that it provides a clear and efficiency registration procedure and registry for GIs. In this regard, Sri Lankan legislation the Intellectual Property Act, No.36 of 2003 lacks of registration mechanism for GIs.

Establishing a new GI registration system is not an easy task. It needs patient application and sustained commitment which would also involve high costs, for registration, monitoring and legal enforcement process. Specially, the establishing of a domestic legal framework, defining exact physical boundaries, establishing criteria and standards, marketing and promoting, assessing and applying in overseas involve high costs. Nevertheless, such a system can create a number of benefits such as improving market access, increasing sale, increasing market value and profitability, elevating land values, complementary effects on other products and increasing employment.⁶⁴

Enacting a domestic legislation on GI may be a more effective way to deal with the situation and it can be considered as a preliminary step on protecting GIs.⁶⁵ India is the best example in providing effective domestic legal protection for GIs. Therefore, Indian perspectives on GIs could be used affirmatively in developing a specific Law on GIs in Sri Lanka. Most importantly, providing for a proper system of domestic registration is a fundamental requirement for a successful regime on GIs. Sri Lankan *sui generis* protection on GIs must at least be extended

⁶³ Srivathsava S.C., “Protecting the Geographical Indication for Darjeeling Tea”, Managing the Challenges of WTO Participation, case study 16.

⁶⁴ Ibid, Srivathsava S.C.

⁶⁵Eg: Georgia- Law on Appellation of Origin and Geographical Indication of Goods 1999, Lebanon- Wine Law of 2000, Switzerland- Federal Law on Trade Marks and Indication of Sources 1994, Vietnam- Intellectual Property Law 2005.

with registration procedure for facilitating sound legal protection for every goods which have intrinsic qualities inherited by their place of origin.

5. Conclusion

“The enduring competitive advantages in a global economy lie increasingly in local things – knowledge, relationships, motivation – that distant rivals cannot match.”

Michael Porter (1998)

As have seen, Geographical Indications are valuable assets, which have potentials of competing for a great share in the global market. GIs are unique by their origin. Trust and authenticity are implicit in GIs, making them powerful instruments in today’s markets. Through market mechanisms, GIs recognize and support the concept of ‘local’. There is evidence that the potential long-term value is not only economic (jobs, greater income, tourism) but also social in terms of the recognition of customary and value-adding traditions that convey a very local sense of a people, their history and their relationship to a place. GIs could be used as means of protecting traditional knowledge and customs of a country. Therefore, GIs should be treated as an Intellectual Property Right with higher value.

International commitments on protecting GIs are still in the stage of progression or unconvinced. An accepted multilateral system of notification and registration of all GIs cannot be found in international arena. The TRIPS Agreement, most influential international instrument on IP rights, also does not specify the ‘legal means’ for protecting GIs. Article 22 of the TRIPS Agreement provides higher level of protection to wine and spirits, but other agricultural, handicrafts, goods including tea, only gets a lower level of protection by this provision. Also the hierarchy in protection within TRIPS has caused proliferate different legal means across jurisdictions of the countries on GI protection.

Therefore, the developing countries such as Sri Lanka face with many difficulties when providing proper legal protection on their GIs domestically as well as internationally. Indian perspectives on GIs, especially on ‘Darjeeling Tea’, offer effective guidelines on protecting GIs. Therefore, Sri Lanka has to play a major role in providing proper protection on ‘Ceylon Tea’ and other GIs originated in its territory. Indian examples could well be used to provide more effective protection on GIs. Last, but certainly not the least, Sri Lanka has an obligation to contribute with other countries to constitute an effective legal instrument and multilateral agreement on

protecting GIs. If we are eager to reap the benefits of our own GIs, we should cultivate a sound, competitive user-friendly and strong legal background on protecting Geographical Indications.

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