

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

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## INTRODUCTION

In the last two decades, the protection of Geographical Indications (hereinafter referred to as GIs) has gained worldwide recognition as a theme of industrial property protection in the global Intellectual Property (hereinafter referred to as “IP”) law agenda, attracting both economical and socio-cultural value to them. According to the Section 161 of the Intellectual Property Act, “a GI means an indication which identifies any goods as originating in the territory of a country or a region or locality in that territory where a given quality, reputation or other characteristics of the goods is essentially attributable to its geographical origin.”<sup>1</sup> For example, *Indian Basmati*, *French Champagne*, *Italian Parma ham*, *Feta Greek Cheese*, *Colombian Coffee*, *Ceylon Tea*, *Mexican Tequila*, *Portuguese Porto wine* etc...

According to the definition embedded in Article 22(1) of the Trade Related Aspects of Intellectual Property Rights (hereinafter referred as TRIPS) Agreement<sup>2</sup>, a GI has inherent qualities which can be attributed to its origin. 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 necessary 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 effectively advance commercial and economic interests, while fostering local values such as environmental stewardship, culture and tradition.”<sup>3</sup>

The main objective of this research is to analyse and make suggestions on the existing IP protection pertaining to GIs in Sri Lanka. It also attempts to make in-depth analysis of the 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 explores lessons from successful experience of other jurisdictions such as from India, in particular, the case of ‘Darjeeling Tea’ for the purpose of evaluating Sri Lankan protection for, ‘Ceylon Tea’. Finally, it offers suggestions to enhance the existing legal regime in Sri Lanka.

## 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 review includes legal instruments such as statutes, international conventions, published research on GIs.

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<sup>1</sup> Intellectual Property Act, No.36 of 2003

<sup>2</sup>At 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.

<sup>3</sup>Daniele 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

Furthermore, the case studies on other countries such as Darjeeling Tea, Italian Parma Ham are used extensively on the subject matter to enrich the research as to find its objectives.

## RESULTS AND DISCUSSION

The contemporary importance of GIs is basically derived from development and business aspect of them. In terms of developmental 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.

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.<sup>4</sup> It provides many job opportunities to countryside residents who lack of education and who are not skilled labours. If the hill country tea industry is neglected, it would certainly create a major blow on the national economy of the country and to the rural lifestyle of the hill country<sup>5</sup>.

The laws relating to GIs are deprived from common system but distinct forms of protection can be seen in different countries and regions.<sup>6</sup> Nevertheless, there are three main approaches to protect GIs in different jurisdictions:

- The use GIs specific laws or *sui generis* systems
- The use of 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.<sup>7</sup>

Even more importantly, the TRIPS Agreement set out a more comprehensive interpretation on GIs in Article 22(1), 22(2) (a), 22(2) (b) and 22(3) than any other international agreements. It can be observed that TRIPS mandates two- tiered model of protection on GIs.<sup>8</sup> Basically, it gives specific and additional protection for ‘wine’ and ‘spirits’, but leaving the legal means of protection to individual countries 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 who own GIs other than wine and spirits have to bargain for a proper system to protect their GIs in the global arena.<sup>9</sup> However, any such initiatives have been prevented by

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<sup>4</sup>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.

<sup>5</sup>In 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>

<sup>6</sup>the basic guidelines for GI are illustrated in several international agreements. such as; Paris Convention of 1883, Madrid Agreement of 1891, Lisbon Agreement of 1958, and TRIPS Agreement

<sup>7</sup>Argentina, Chile, Colombia, Costa Rica, European Community, India, Iran, Nicaragua, Qatar, Sri Lanka and Thailand are instances for countries using *sui generis* GIs protection.

<sup>8</sup>84% 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 Center, TRADE Working Papers no 10, 2001.

<sup>9</sup>Most 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,

the lack of consensus among different member States of the World Trade Organization (WTO).

There are several identified 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 probably establish a number of GIs, Sri Lanka has a responsibility to provide legal means to protect GIs. The current protection of GIs in Sri Lanka is governed by provision of the IP Act No. 36 of 2003 (hereinafter referred to as ‘the act’) which may be described as a kind of *sui generis* system. In addition to the Section 161 of the Act, a GI in Sri Lanka can be protected as a collective mark, {Sec. 138 (3)}, certification mark {Sec. 142(1)}, trade mark {Sec. 103 (h)} and under the unfair competition law.<sup>10</sup>

On the other hand, India has developed an effective mechanism for the protection of GI in order to prevent violation of GI rights. Indian protection mechanism on GIs can be basically divided 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.<sup>11</sup> India has taken fruitful steps to protect ‘Darjeeling tea’ at international level. 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.<sup>12</sup>

## CONCLUSIONS/RECOMMENDATIONS

This part aims to analyse the practical issues relating to protection of ‘Ceylon Tea’ as a GI and the legal measures that Sri Lanka should introduced to strengthen the GIs protection at domestic as well as global level. According to the Sri Lanka Tea Board (hereinafter 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 the global scene, Kenya, China and Sri Lanka accounted for more than 60% of global export of tea.<sup>13</sup>

Therefore, 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 for international registration. The Indian perspectives on ‘Darjeeling tea’, Sri Lanka can learn a lot to improve protection for GIs in Sri Lanka. 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 be 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,

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‘*Blue Mountain Coffee*’-Jamaica, ‘*Kona Coffee*’- Hawaii, ‘*Pampas beef*’, ‘*Tellicherry pepper*’, ‘*Basmati rice*’, ‘*Rooibos tea*’ are well-known agricultural GIs originated in developing countries.

<sup>10</sup> See Section 160 of the Act.

<sup>11</sup> This registration is proceeded under the Trade and Merchandise Market Act, 1958

<sup>12</sup> On 3<sup>rd</sup> August 2001, the UK trade registry granted the word ‘Darjeeling’ under the UK Trade Marks Act, 1994.

<sup>13</sup> World Tea Production Statistics, Annual ICT Bulletin of Statistics, 2010.

increasing market value and profitability, elevating land values, complementary effects on other products and increasing employment.<sup>14</sup>

Enacting a domestic legislation on GIs may be a more effective way to deal with the situation and it can be considered as a preliminary step in protecting GIs.<sup>15</sup> India is one of the best examples 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. Last, but certainly not least, Sri Lanka has an obligation to contribute to other countries to constitute an effective legal instrument and multilateral agreement on protecting GIs. In sum, if Sri Lanka is to reap the benefits of its GIs, the country should design a sound, competitive, user-friendly, and strong legal regime to protect Geographical Indications.

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Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement

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<sup>14</sup> *Ibid*, Srivathsava S.C.

<sup>15</sup> Eg: 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.