

# Geographical Indications- Need of a Registration System for Sri Lanka

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**Abstract** Sri Lanka is a developing country that possesses varieties of natural resources with great economic value. Many of them have grabbed the international market and they are main sources of foreign exchange for Sri Lanka. Geographical Indications (GI) like Ceylon Tea, Ceylon Cinnamon, Ratnapura Blue Gems and other spices play an important role among them. GIs receive less attention when compared with other Intellectual Property Rights such as Copy Rights, Patents, and Trademarks. Lack of professionalism among academics, practitioners, towards this area has become a major issue in the development of law relating to Geographical Indications & thus legislative innovations with regard to a registration system for GI attracted less public discussion. Ceylon Tea, which is known as 'Black Gold' of Sri Lanka is a good example that has faced the pathetic result of not having adequate legislative provisions, particularly with regard to a registration system of Geographical Indications. Therefore this paper will discuss whether laws available in Sri Lanka to protect Geographical Indications in the domestic level and in the international level are at a satisfactory level. Finally this paper will suggest a registration system of GI should be implemented while emphasizing how successfully such system has been used in other jurisdictions. Author uses secondary resources such as Library Research and Internet inclusive of books, Journal Articles, Cases and other related statues as main sources of this Research. In addition author has interviewed stakeholders in the field in terms of its practical application in Sri Lanka. Furthermore a comparative study was done inclusive of USA and India by the author for the purpose of providing recommendations to Sri Lanka.

**Keywords** Geographical Indication, Registration System, Certification Mark

## I. INTRODUCTION

*"While natural resources are shared quite unevenly among nations, every country has at least one undeniable resource: its geography. A nation, among other things, a defined geographical area. Thus the protection of geographical indications is potentially of interest to all nations."* (Daniel Gervais, 2009)

Sri Lanka being a country that is well equipped with natural resources and traditional knowledge has an immense potential of gaining socio - economic

development through Geographical Indications. GIs like Ceylon Tea, Ceylon Cinnamon, Ratnapura Blue Gems and other spices play an important role in the field of development in Sri Lanka. As defined in the Agreement on Trade- Related Aspects of Intellectual Property Rights (TRIPS Agreement) GIs are indications which identify a good as originating in the territory of a Member, or a region or locality in the territory where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin (TRIPS Article 22.1). Link between the product and the particular Geographical Indication adds a distinct characteristic to Geographical Indications. Natural factors like climate change, soil condition, are determining factors of the characteristics of GIs. For an instance monsoon rain, cold weather & laterite soil are determining factors of the flavour of Ceylon tea. On the other hand historical context, intergenerational skills, are key human factors of determining the characteristics of GIs. More emphatically, local and foreign customers tend to purchase these products due to specific qualities, characteristics and reputation that derive from the place of origin. According to a Consumer Survey performed in European Union, 40% of the consumers are ready to pay 10% of the premium for origin guaranteed products (European Commission, 2003).

Unlike other Intellectual Property Rights, there is rarely a specific law protecting GIs (Watal, 1999). Though it is included as an intellectual property right in the TRIPS Agreement, (TRIPS Article 1.2) GIs being more linked with traditional knowledge that mostly belong to 'old world', it has received less sustained attention from the professionals in the legal arena when compared with other intellectual property rights. Focusing on the geographical aspect of GIs, some argue that GI protection does not cover 'human innovation' in the making of relevant products to justify the recognition of GIs as a form of Intellectual Property (Dagne, 2014).

GIs should be protected in order to prevent consumers from being misled as to the true origin of the product and to protect the rights of the producers. Many Sri Lankan products that carry GIs, have attracted the global community because of the quality, reputation and characteristics that remain in these products. But in the recent past noticeable abusive acts were reported against Sri Lankan products; more emphatically with

regard to Ceylon Tea. One such example would be use of Lion Logo on retail packs that contain 100% Chinese Tea that destined to Libya. In another instance, use of Lion Logo was detected in Dorra Al-Otuor brand tea packs in which the packaging has been done in Jordan and Northern Iran (Worldwide symposium on Geographical Indications, 2014). Sri Lankan Cashew and Cinnamon are other products that are being abused when Vietnam and Indonesia export the same products. This suggests the current domestic and international legal regime is not at a satisfactory level to protect GIs and thus have led to a misappropriation of GIs. Supposedly, a strong legal mechanism is imperative in order to gain the maximum use out of GIs both in the domestic level and at the international level.

In this paper, Section II explains why GIs need to be protected and in Section III, the protection for GIs in Sri Lanka is examined. Section IV discusses about the international protection for GIs and Section V focuses on the expansion of the subject matter of GIs at the international level. Section VI discusses about the experience in India with special reference to the GI Act in India, and Section VII presents the recommendations and Section VIII provides the conclusion.

## II. WHY GIS NEED TO BE PROTECTED

*“They make it possible to add value to the natural riches of a country and to the skills of its population, and they give local products a distinguishable identity” (Addor & Grazioli, 2002).*

GIs in its nature are attached with a particular geographical area and thus help to take the maximum use out of resources in the particular area. Because of the qualities, reputation and characteristics attributable to that particular geographical area people tend to buy these products and this reference to the geographical area is inherent in GIs. Although GIs function like a Trade Mark it distinguishes products originating from a certain source. Advantages identified by a United Nations Conference on Trade and Development could be unfolded as follows:

*“...geographical indications and trademarks reward producers that invest in building the reputation of a product. They are designed to reward goodwill and reputation created or built up by a producer or a group of producers over many years or even centuries. They reward producers that maintain a traditional high standard of quality, while at the same time allowing flexibility for innovation and improvement in the context of that tradition ...*

*Geographical Indications and Trade Marks represent legal mechanisms that producers can use to differentiate their products, according to criteria such as the sustainability or traditional nature of production, and thus appeal to consumers. As such they have great relevance to developing countries dependent on primary commodity exports...” (Downes, & Laird, 1999).*

This clearly illustrates that there are obvious advantages of protecting GIs. Hence, it is no longer necessary to treat GIs differently to other IP rights such as Patents, Trade Marks and Industrial Designs. Felix Addor and Alexander Grazioli identify two main criteria that need to be satisfied in order to make the maximum use of the economic potential that lies on GIs.

- Countries provide at the national level adequate protection for their GIs; and
- The protection granted at the international level is effective for GIs identifying all products (Addor & Grazioli, 2002)

More significantly obvious benefits for the development could be identified with regard to Ceylon Tea. “Ceylon Tea is continuing to do a yeomen service to the economy of Sri Lanka while contributing 15% share to the country's foreign exchange earnings. Only the expatriate remittances from the 02 million Sri Lankans employed overseas and the garment trade earn more hard currency for the island. Exports of Ceylon Tea generate an annual income of US\$ 1.5 billion and this revenue covers the hard currency requirement necessary for the entire food import bill of the country. With 2% contribution to the Nation's GDP and dependence of 10% of the population on the industry, Ceylon Tea plays a pivotal role in the economy of Sri Lanka” (De Alwis, 2013). With these notable advantages of GIs it is highly questionable why Sri Lanka still lacks adequate protection to protect GIs at the international level.

## III. PROTECTION FOR GEOGRAPHICAL INDICATIONS IN SRI LANKA

Under the current legal status of Sri Lanka, the Intellectual Property Act No 36 of 2003 (IP Act) provides varieties of protection for GIs. Section 161 (1) (i) of the Act provides *sui generis* protection for GIs and it denotes that an interested party is entitled to prevent use of a GI, if the product does not originate in the original geographical area in a manner that mislead the public as to the geographical origin of goods. Here any interested party means not only producers and consumers, but also it will embrace general public as well. According to Section 161 (1) (ii), parties can rely on unfair competition where there is an act which constitutes unfair competition within the meaning of Section 160 of the IP

Act. As per Section 160 (1) (a) of the Act, any act or practice carried out or engaged in, in the course of industrial or commercial activities, that is contrary to honest practices shall constitute an act of Unfair Competition. Though Unfair Competition could be expounded broadly, it is restricted to the situations where competition is perceptible in the market and also one has to establish his/her right before remedy is granted. Further, pursuant to Section 161 (1) (iii) of the IP Act use of a GI in translation or accompanied by expression such as kind, type, style or imitation or the like is prohibited. The Court can grant an injunction and any other relief deemed appropriate in above circumstances as per Section 161 (4) of the Act.

In addition to Section 161 of the IP Act, Act offers protection by way of a Certification Mark or a Collective Mark according to Sections 142 (3) and 138 (3) respectively. Certification marks are marks which indicate that the goods on which they are used are certified by the proprietor of the respective mark with regard to the origin, material, and mode of manufacture, of goods or performance of services, quality, accuracy or other characteristics. Presently, Ceylon Tea has been registered as a certification mark by Sri Lanka Tea Board.

Under the Act, the owner of the certification mark is not authorized to use the mark (Intellectual Property Act No. 38 of 2003. Section 142 (5)). The owner controls the use of mark by making sure that the goods contain certain characteristics, qualifications and standards. Having a certification mark system for the protection of GI provides a number of benefits to a country. It will create a legal regime that is well known to both local and foreign enterprises. The additional cost needed for the implementation of a new registration system of GIs is saved and the resources already in use for applications, registrations, oppositions, cancellations, adjudications, enforcement will be committed for GI protection too.

In USA, GIs are protected through Certification Marks and Collective Marks. 'Florida Citrus' and 'Napa Valley' are famous GIs in USA that are registered as domestic Certification Marks. This protection is available to foreign GIs also. Therefore 'Darjeeling Tea', and 'Prosciutto di Parma' are two foreign GIs registered as Certification Marks in USA. This clearly demonstrates that in order to protect Sri Lankan GIs in USA, GIs need to be registered either as a Certification Mark or a Collective Mark. But still, Sri Lanka has been unable to register at least 'Ceylon Tea' in USA. USA being the major export destination for Sri Lankan products in 2014 which absorbed 24% of our exports (Export Development Board- Sri Lanka, 2014), there still seems the need of Certification Marks and Collective Marks protection for GIs.

However, Sri Lanka doesn't have a registration system for GIs. This has caused to the abuse of Sri Lankan GIs at the international level. If Sri Lanka possesses a registration system of GI, it could have marketed products with great protection more specifically in Europe where there are people who prefer Sri Lankan products. In 2014, 31% of the total export earnings were derived from European Union member countries (Export Development Board - Sri Lanka, 2014).

#### IV. INTERNATIONAL PROTECTION FOR GEOGRAPHICAL INDICATIONS

It is worth examining the international protection for GIs in order to perceive the available protection for GIs since whether it is Sri Lanka or not when goods travel beyond borders, any country has to tackle with the existent protection. There are a number of International Agreements that address the protection of GI, but it is only the TRIPS Agreement that addresses GIs universally. Felix Addor and Alexander Grazioli identify two main reasons for not addressing this issue in a global perspective. That is, other agreements provide protection only where unfair competition arises or the number of countries that are being covered is limited to address the issue universally (Addor & Grazioli, 2002).

##### *A. Paris Convention*

Paris Convention provides protection for Trade Marks, indications of provenance and other Indications of source against misleading acts. Article 10 of the Paris convention stipulates that, where 'direct or indirect use of a false indication of the source of goods or the identity of the producer, manufacture or merchant occurs Article 9 should be applied, and Article 9 guarantees seizure, upon importation of goods bearing a false indication of source. Article 10*bis* denotes the basic international standard against unfair competition and it could be argued that use of false indications of source is prohibited under 10*bis* (3).

##### *B. Madrid Agreement*

Although Article 1 of the Madrid Agreement for the Repression of False and Deceptive Indications of Source on Goods defines an Indication of Source it does not provide a higher international protection. However this includes both 'false' and 'deceptive' indications of source. Article 1.1 denotes 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 the country or place of origin shall be seized on importation into any of the said countries.

### C. Lisbon Agreement

Lisbon Agreement grants a higher standard of protection for appellations of origin, but the number of countries signed are limited. Article 2.1 of the Lisbon Agreement provides the definition for appellation of origin and affords protection against usurpation, imitation including where the origin is indicated and where there is a translation of an appellation or accompanied by 'kind', 'type', 'make', 'imitation' or the like. Due to the less number of signatory countries Lisbon Agreement does not provide an adequate international protection. (As at 6 June 2015, Lisbon Agreement had only 33 member states)

### D. TRIPS Agreement

Among international agreements relating to GIs, TRIPS Agreement provides an immense potential for the protection of GI universally. This is mainly with regard to the signatory states and the level of protection it offers. Although TRIPS Agreement provides one definition for GIs it affords two tiers of protection.

Under Article 22.2 of the TRIPS Agreement, acts that mislead the public or which constitute an act of unfair competition under Article 10*bis* of the Paris Convention are prohibited. Also Article 22.3 of the TRIPS Agreement affords *ex officio* refusal or invalidation of Trade Marks which contain or consist of a GI, if the use of GI in the Trade Mark misleads the public as to the true origin of the product. According to Article 22.4, states have the obligation to provide protection against GIs that are literally true, but which falsely represent to the public that the product identified by the GI originates from another territory.

Article 23 of the TRIPS Agreement provides additional protection for wines and spirits. Article 23.1 prohibits the use of a GI, even where the use of a GI is not misleading or it does not constitute an act of unfair competition. Also it allows member states to prevent the use of a translation of a GI or GI, accompanied by expressions such as kind, type, style, imitation, or the like.

Many of the Sri Lankan products do not fall under wines and spirits. Therefore general protection under Article 22 applies to these products. In comparison to the protection for wines and spirits, protection for other products are limited. It is seen as a historical anomaly favouring producers of certain agricultural products who had the good fortune of being at the right place at the right time when international agreements were forged. (Sanders, 2005) Under the general protection one has to prove that public is being misled or the act constitutes unfair competition. But wrongful exploitation of the reputation of another product may harm manufacturers

and customers. 'Since lawsuits based on passing off or unfair competition are only effective between the parties of the proceedings, the distinctiveness of a given Geographical Indication must be shown every time that GI is enforced' (WIPO Doc. SCT/5/3 of 8 June 2000).

However, the obligation to fulfil this requirement is satisfied in many countries by allowing GIs to be registered as certification marks, collective marks and allowing passing off actions to be instituted in civil courts. It is evident that when reading Article 22 of the TRIPS Agreement together with Article 1.1, member states are not obliged to implement more extensive protection than is required by the Agreement and also member states have the power to determine the appropriate method to implement the provisions of the Agreement. This demonstrates that the standard of protection that could be expected is low for products other than wines and spirits where many of the Sri Lankan products such as Ceylon tea, Ceylon cinnamon and other agricultural products fall. Also, Article 24(9) of the TRIPS Agreement stipulates, 'There shall be no obligation under this Agreement to protect geographical indications which are not or cease to be protected in their country of origin or which have fallen into disuse in that country.' By virtue of Article 24(9) of the TRIPS Agreement, a GI needs to be protected in the particular country in order to protect internationally. In these circumstances, at least to grab the available protection in the countries where there is a good market for Sri Lankan GIs, a registration system would provide a suitable mechanism to the country.

### V. EXPANSION OF THE PROTECTION OF GEOGRAPHICAL INDICATIONS

However, there is an ongoing debate whether Article 23 should be extended to cover products other than wines and spirits. In support for the extension of Article 23, WTO members such as Sri Lanka, Bangladesh, Cuba, Egypt, Iceland, India, Kenya and Switzerland joined hands together. On the other hand Australia, Canada, Chile, and Uruguay led by United States oppose the extension. They argue that it will create an obligation on WTO member states to protect GIs of other countries at a very high level and thus 'this could involve a considerable burden, particularly in view of the fact that some members such as the ECs, have over 700 domestic GIs'(Evans & Blackney, 2006). It is with foremost significance to mention that if additional protection under Article 23 is extended to cover products other than wines and spirits, along with a registration system for GI in Sri Lanka, Sri Lankan products would be granted a fruitful protection for GI at the international level.

In June 2005, European Communities (hereinafter referred to as EC) submitted a proposal suggesting a

multilateral register for GIs which involves three steps in the process (European Communities Proposal, 2005). According to this proposal, once WTO members notified their GIs to WTO Secretariat, they must publish them, and that will provide an 18 month period for the members to examine and object the registration of such a GI. Finally the notified GIs will be registered in the multilateral register with reference to any objection made by the member countries (European Communities Proposal). Therefore it is clearly visible that the countries which lack a registration system will have to face more difficulties to satisfy a mandatory registration system. Sri Lanka being a country which falls in the same category will find it difficult to comply with and accordingly needs to take positive steps to confer the potential protection for GIs.

#### VI. LESSONS FROM INDIA

An effective protection for GIs was of considerable importance for a country like India which was richly endowed with natural agricultural products and which already had in its possession renowned geographical names such as 'Darjeeling' (Tea), 'Alphonso' (mango), 'Basmati' (Rice) etc (Hiriwade & Hiriwade, 2006). In the same way Sri Lankan 'Ceylon Tea' is abused in the international market, Basmati Rice and Darjeeling Tea of India triggered a lot of controversies in the international market. In this scenario Geographical Indication of Goods (Registration and Protection) Act of 1999 was enacted and came into force in 2003. (Hereinafter referred to as the GI Act) Under the GI Act, a Geographical Indications Registry was established with all India jurisdiction in Chennai and it is administered by the Controller General of Patents, Designs and Trade Marks. Although registration of GIs is not mandatory in India, according to section 20(1), no person "shall" be entitled to institute any proceeding to prevent, or to recover damages for the infringement of an unregistered GI. Therefore as per section 21(a) only a registered owner and its authorized users can take necessary actions against infringement. Section 6(1) specifies a GI Register, which is divided into two parts: Part A and Part B. In terms of Section 7 of the GI Act, the distinguishing characteristics of the goods and the registered proprietor (ex. Tea Board, Coffee Board, Spices Board) are incorporated in Part B. As per section 8 of the GI Act Part B contains the details of the authorized users of GIs.

Registration of GIs in India indicates a number of benefits to the country. First it prevents unauthorized use of GI by others and thus grants legal protection. Thereafter registered owners and authorized users can register their products in WTO member countries and can confer a higher level of protection for GI at the international level

also. Further, only the registered owners have the advantage of instituting an action in the courts against infringement of registered GIs and it is the registered owners who possess the exclusive rights of GI (Pandey & Dharni, 2014). According to a post-registration survey, with reference to other changes discovered in post registration, product demand has increased by 33% while another 33% has resulted in revenue increment. 17% of respondent demonstrates that registration has resulted a decrement in duplication whilst increasing the brand value (Bagade & Metha, 2014). Thus India has been able to benefit from the current registration system available in India.

#### VII. RECOMMENDATIONS

It is clear that the protection granted by the current law in Sri Lanka for GIs is not adequate when the products travel beyond its boundaries. But the commercial value that could be gained through GIs is imperative with regard to the development of the country. Therefore it is recommended to have a system that will protect GIs at the international level also. This could be achieved by implementing a registration system for GIs. Apart from this a multilateral registry at the international level is recommended and also author suggests that Article 23 should be extended to cover products other than wines and spirits

#### VIII. CONCLUSION

Despite the fact that adequate protection has not been coffered for GIs in Sri Lankan legal framework, GIs have become a great economic tool with the potential of bringing foreign exchange to the country. The current situation of GI in Sri Lanka suggests that the available legal mechanisms to protect GI is adequate as far as the domestic protection is concerned, nonetheless, it is not sufficient when GIs travel beyond borders to the international market. Therefore GIs have been often misused in the world market. More specifically 'Pure Ceylon Tea' known as 'Black Gold' in Sri Lanka had to face so much controversies in the world market. Albeit the four corners of the domestic protection is wider than the protection granted by the TRIPS Agreement, failure to introduce the registration system for GI has caused to place GIs back in the queue among other intellectual property rights.

Protection granted for agricultural products and other foodstuffs is also lower than the protection granted for wines and spirits according to Article 22 of the TRIPS Agreement, and due to the fact that WTO countries being not obliged to confer a higher level of protection Sri Lanka at least needs to have a registration system to grab the available protection in the international level.

Experience from India reveals that post registration period has resulted in an increase in the revenue and has brought so many benefits to the producers, consumers and to the country as a whole. Some scholars argue that introducing a separate registration system will cause additional cost for a country and thereby suggest the existing certification mark and collective mark registration system for the protection of GIs. But this study recommends a registration system for Sri Lanka along with other available protection mechanisms in the light of the above mentioned basis.

Moreover, harmonization of the countries with regard to the extension of the subject matter of the Article 23 of the TRIPS Agreement is imperative, which will thereby allow products other than wines and spirits to be entitled for a higher standard of protection. Similarly, an international registry of Geographical Indications will best fit for a more efficacious worldwide GI regime.

One cannot disagree when Felix Addor and Alexander Grazioli say that,

*“All countries have products with a given quality, reputation or other characteristics which are essentially attributable to their geographical origin. Their domestic and international marketing could greatly benefit from the use of GIs. However in order to fully benefit from this intellectual right protection, authorities and producers in WTO members, especially in developing and least-developing countries, need to be pro-active”* (Addor & Grazioli, 2002).

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