

The Potentials, and Current Challenges, of Protecting Geographical Indications in Sri Lanka

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1 INTRODUCTION

In a country like Sri Lanka, the importance of obtaining protection for unique products can hardly be overstated. Sri Lanka is a small nation, both in size and in production capacity. Still, Sri Lanka is known globally for its tea, in particular, Ceylon Tea. Although China and Kenya produce more tea than Sri Lanka,¹ Sri Lanka remains one of the largest global exporters of tea.² This has been achieved partly due to the fact that the name of its famous tea, Ceylon Tea, is protected as a registered certification mark³ and under the regime for the protection of geographical indications (GIs),⁴ as is the logo identifying the “Ceylon Tea.”⁵ Sri Lanka is also famous for its “true cinnamon,” the Ceylon Cinnamon,⁶ which is also widely exported, and which also enjoys protection as a certification mark and under the current GI regime.

But what if Sri Lanka could make better use of its existing protection for geographical names and protect additional products coming from specific geographical areas in the country? For example, Sri Lanka is famous for Ceylon Sapphires, Dumbara Mats, and Beeralu Lace – just to name a few products. Yet, the producers of these products have not been successful at

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¹ Food and Agriculture Organization of the United Nations [FAO], *World Tea Production and Trade – Current and Future Development*, at 4, U.N. Doc. I4480E/1/03.15 (2015), available at www.fao.org/3/a-i4480e.pdf.

² *Id.* at 5. ³ See discussion *infra* Section 5. ⁴ See discussion *infra* Section 4.

⁵ See RAVINDRA A. YATAWARA & AMRIT RAJAPAKSE, *GAINING COMPETITIVE ADVANTAGE THROUGH THE PROTECTION OF GEOGRAPHICAL INDICATIONS: AN ANALYSIS OF THE TEA, SAPPHIRES AND CINNAMON INDUSTRIES OF SRI LANKA* (2006).

⁶ See discussion *infra* Section 4.

marketing them internationally, or at least, to the extent of renown enjoyed by Ceylon Tea and Ceylon Cinnamon. The reason for this lies in both gaps in the legal protection for these products and the unawareness among many producers of the potential returns that might be yielded from the further sales that could be promoted by a higher degree of legal protection and marketing of the products.

In particular, there is one major hurdle in the protection of GIs in Sri Lanka to date, namely, there is no registration-based system for GIs under the Sri Lankan GI regime. Instead, producers have to turn to the trademark system to obtain a trademark registration through which they can protect their geographical names. Generally, this involves applying for a certification or collective trademark under Sri Lankan trademark law. The lack of a registration-based system under the Sri Lankan GI regime has attracted criticism and raised concerns about the functionality, enforcement procedures, and level of protection and has prompted a call for an update to ensure that Sri Lankan products enjoy fuller protection.

This chapter first examines the legal protection that is currently afforded to GIs and will proceed to analyze the deficiencies of the current system. It will then evaluate the international system of GI protection and assess Sri Lanka's position within this system. Based on the findings gathered, this chapter will then offer some suggestions that could be undertaken in order to ensure that an effective regime for GI protection is put in place so that Sri Lankan producers may benefit meaningfully from GI protection. In particular, the primary suggestion offered in this chapter is that Sri Lanka could, and perhaps should, consider improving its current GI regime by implementing a national GI registry. In particular, creating a registration-based scheme for GI protection in Sri Lanka could offer additional certainty to GI producers, and in turn competitors and other interested parties who could be made aware of existing GI registrations. In turn, this greater certainty could lead to a greater willingness to invest in marketing and promoting the registered GIs. Still, this chapter concludes that, even with a GI registry, the actual success of any GI product in Sri Lanka would ultimately depend on wise management, product quality, and marketing.

2 GEOGRAPHICAL INDICATIONS DEFINED

The earliest mention of protecting signs indicating “source,” including geographical source, can be found in the 1883 Paris Convention for the Protection of Industrial Property (Paris Convention), even though the Paris Convention

does not protect geographical names per se.⁷ The first international agreement that mentioned and protected GIs was the 1981 Madrid Agreement for the Repression of False and Deceptive Indications of Source (Madrid Agreement).⁸ The next international agreement to focus specifically on the protection of “appellations of origin” was the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration (Lisbon Agreement), which was adopted in 1958, subsequently revised in Stockholm in 1967, and most recently revised in 2015.⁹ Neither the Madrid Agreement nor the Lisbon Agreement had a large membership, however, which made their impact limited at the international level.

It was only in 1994 that GI protection became a more global, and globally contested, issue with the adoption of the Agreement on Trade-Related Aspects of Intellectual Property Rights 1994 (TRIPS),¹⁰ which was adopted as part of the creation of the World Trade Organization (WTO). In particular, TRIPS defines the term “geographical indications” as

[I]ndications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.¹¹

TRIPS also provides for a minimum standard of protection for GIs that all WTO Members have to implement into their national laws,¹² even though TRIPS leaves WTO Members to implement this protection as they

⁷ Paris Convention for the Protection of Industrial Property, March 20, 1883, 21 U.S.T. 1583, 828 U.N.T.S. 305 [hereinafter Paris Convention].

⁸ Madrid Agreement for the Repression of False and Deceptive Indications of Source on Goods, April 14, 1891, 828 U.N.T.S. 163.

⁹ The Lisbon Agreement for the Protection of Appellations of Origin and their International Registration, October 31, 1958, *as revised* July 14, 1967, 923 U.N.T.S. 205 [hereinafter Lisbon Agreement]. Art 2(1) adopted the French definition of “appellation of origin” as signs identifying products “exclusively or essentially” originating from a certain geographical region. In May 2015, a Diplomatic Conference was convened to review the Lisbon Agreement in Geneva, Switzerland. See Diplomatic Conference for the Adoption of a New Act of the Lisbon Agreement for the Protection of Appellations of Origin and Their International Registration, WORLD INTELL. PROP. ORG., (May 20, 2015), available at www.wipo.int/meetings/diplomatic_conferences/2015/en/ [hereinafter Geneva Act of Lisbon Agreement]. Sri Lanka is not a signatory to the Lisbon Agreement (in its original version nor any of the revised versions) and therefore is not technically able to register any geographical names in the Lisbon Registry administered by the World Intellectual Property Organization (WIPO).

¹⁰ Agreement on Trade-Related Aspects of Intellectual Property Rights, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments – Result of the Uruguay Rounds vol. 31, 33 LL.M. 81 (1994) [hereinafter TRIPS Agreement].

¹¹ *Id.* art. 22(1). ¹² *Id.* arts. 22–24.

prefer – generally through existing unfair competition rules, trademark laws, or via the adoption of ad hoc *sui generis* protection.¹³

As has been observed by several scholars, GI protection is generally justified by the fact that GIs perform the function of identifying goods, and they are used to distinguish goods as having certain properties or a reputation attributable to a particular geographic area.¹⁴ In this respect, GI protection aims at protecting the information function of GIs with respect to these properties and reputation. In particular, the distinguishing qualities of the product may be due to local geological factors (such as climate and soil) and/or to human factors present at the location (such as a traditional manufacturing method or any particular manufacturing technique).¹⁵ The GI may also consist of a combination of both these factors, that is, the geological and the human factors that contribute to the uniqueness of the GI products. The inclusion of the human factor as part of the definition of GIs is useful when considering the viability of GI protection for certain types of products such as artisanal products in addition to purely agricultural products. Because GIs identify local products, GI protection is commonly justified based on the assertion that GIs can promote and protect local and rural developments in the GI-denominated areas.¹⁶

3 DIFFERENT TYPES OF PROTECTION AND THEIR IMPLICATIONS

A survey conducted by the World Trade Organization (WTO) in 2003 established that WTO Members use any of the following three possible methods to protect GIs (intended as geographical names or names indicating products coming from a specific geographical region).¹⁷ The first method is to protect GIs through laws focusing on business practices and consumer protection based on the template provided by the Paris Convention. The second is to achieve protection through the law which protects trademarks – a position

¹³ *Id.* art. 22. See discussion *infra* Section 3.

¹⁴ Irene Calboli & Daniel Gervais, *Socio-Economic Aspects of Geographical Indications*, WORLD INTEL. PROP. ORG. (2015), available at www.wipo.int/edocs/mdocs/geoind/en/wipo_geo_bud_15/wipo_geo_bud_15_9-annex1.pdf.

¹⁵ YATAWARA & RAJAPAKSE, *supra* note 5, at 1; Calboli & Gervais, *supra* note 14, at 1–4.

¹⁶ Calboli & Gervais, *supra* note 14, at 1–4.

¹⁷ Council for Trade-Related Aspects of Intellectual Property Rights, *Note by the Secretariat: Review under Article 24.2 of the Application of the Provisions of the Section of the TRIPS Agreement on Geographical Indications: Summary of the Responses to the Checklist of Questions (IP/C/13 AND ADD.1)*, WTO Doc. IP/C/W/253/Rev.1. (November 24, 2003) [hereinafter WTO Review].

supported by the United States (US) and several common-law countries. The third, and most significant, is to create a special *sui generis* system of protection for GIs.

It is important to note that TRIPS does not impose any system of protection for GIs for WTO Members. As mentioned in Section 2, TRIPS merely provides a minimum standard of protection that all WTO Members should implement with the legal means that they see most appropriate for their individual legal systems.¹⁸

With respect to the first type of protection, the laws focusing on business practices are laws that have not been enacted with the specific purpose of protecting GIs but which nevertheless do so through the broader objective of regulating business practices or consumer protection. Some examples of such legislation are those which deal with unfair competition, consumer protection, trade descriptions, food standards, and the common-law action for passing off. These could be used to protect GIs when the misuse of a GI in a particular situation falls within the conduct regulated by such laws. For example, the false use of a GI that misleads consumers as to the origin or qualities of the goods would be actionable. Quite often these laws are a good alternative to a *sui generis* law because firstly these laws are available in most legal systems, and secondly they are usually familiar to business lawyers. On the downside, these laws are not specifically geared for GI protection, and hence may not be useful in more complex situations involving GIs.

Under the second type of protection, trademark protection, GIs are generally protected and registered under a special category of trademarks – collective marks and certification marks. In particular, collective marks identify a mark as belonging to a group of enterprises, such as a union of producers in a particular area. Certification marks identify the goods of an enterprise as having met certain standards or having certain qualities, such as a particular geographical origin. Prominent scholars have observed that, of these categories, certification marks are the most suitable to protect GIs because they can underpin the requisite product origin and quality and/or characteristics that are embodied in the GI product.¹⁹

¹⁸ Article 22 of the TRIPS Agreement only requires that member states provide the legal means for interested parties to prevent (a) the use of any means in the designation or presentation of a good that indicates or suggests that the good 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 the good and (b) any use which constitutes an act of unfair competition within the meaning of Article 10bis of the Paris Convention (1967). See TRIPS Agreement, *supra* note 10, at art. 22.

¹⁹ YATAWARA & RAJAPAKSE, *supra* note 5, at 1.

A collective mark is usually owned by the association of enterprises, while a certification or guarantee mark is owned either by an association of enterprises or by a separate entity. In order to avoid a conflict of interest, it is usually provided that the owner of a certification or guarantee mark may not itself use the mark or carry on a business in the kind of goods or services certified. Registration of this type of mark has to be accompanied by registration of the conditions governing the eligibility of interested parties to use the mark. If the interested party meets the requirements listed in the certification, then that party may then use the mark. The mark owner is also obliged to monitor compliance with the conditions of use by mark users.²⁰ Compared to the first system (laws focusing on general business practices), trademark protection appears to be better suited to protect GIs as it contains more precise rules related to the geographical and quality standards of the products.

The third system of GI protection is that of a *sui generis* GI regime, that is, the adoption of a specialized regime for GI protection listing the specific requirements for and the rights granted as part of this protection. Frequently, a *sui generis* system for GI protection is also based on a national registration system under which GIs are registered in a national registry administered by the national authorities. In addition to the general rules set by TRIPS, individual countries may set administrative procedures for the national protection and registration of GIs.²¹ In the EU, *sui generis* GI protection applies at the EU level, as GIs are protected and registered as a matter of EU law. Interestingly, countries that have traditionally opposed or been resistant to GI protection also protect some types of GIs with their own unique GI regime. This includes Australia and the US, which protects GIs for wines with *sui generis* protection, while other geographical names are currently protected under the trademarks regime, the unfair competition regime, or passing off.²²

Where a *sui generis* system includes the registration of GIs, the necessary criteria to be satisfied for such registration generally include the definition of the geographical area; the link between the geographical area and the product (e.g., that all stages of production, or a particular stage, take place in the particular geographical area); the indication of the particular quality, reputation, or other characteristic of the product; and the inspection requirements to

²⁰ *Id.* at 9. ²¹ *Id.*

²² The US protection for appellations for wines is detailed in Irene Calboli, *Time to Say Local Cheese and Smile at Geographical Indications? International Trade and Local Development in the United States*, 53 HOUS. L. REV. 373, 396–97 (2015).

be put in place, including the control bodies in charge of certifying and controlling the quality of the products. In addition, the applicant should be able to demonstrate that it has a legal interest in the GI or is in a position to control the use of the GI.²³ Overall, a *sui generis* GI regime certainly offers the most comprehensive protection for GIs, but also requires considerable investments – financially and administratively – from the applicants (the collective of GI producers).

As elaborated in the various chapters in this volume, the majority of WTO Members have adopted a combination of the three types of systems that have been described. Still, as noted by scholars, important differences continue to exist with respect to national eligibility requirements, and the scope of protection.²⁴ These differences undoubtedly make the international protection of GIs cumbersome and increase costs when an enterprise seeks to develop and manage international marketing strategies for their GI products, which may have a bigger impact on developing countries as compared to developed countries.

4 PROTECTION FOR GEOGRAPHICAL INDICATIONS CURRENTLY AVAILABLE IN SRI LANKA

The Sri Lankan legal framework for protecting GIs includes the three types of protection identified above. Each of these types of protection will be discussed briefly below.

4.1 *Laws Focusing on Business Practices or Consumer Protection*

In this category, there are four separate types of protection that can be used to protect GIs in Sri Lanka under different legal provision or doctrines.

First, is the unfair competition provision set out in section 160 of the Intellectual Property Act, No. 36 of 2003 (IP Act of 2003).²⁵ This provision defines acts of unfair competition as any acts that are contrary to honest practices,²⁶ and those that are misleading as to the GIs of the goods or services

²³ WTO Review, *supra* note 17.

²⁴ Ludwig Bäumer, *Protection of Geographical Indications under WIPO Treaties and Questions Concerning the Relationship between Those Treaties and the TRIPS Agreement*, in SYMPOSIUM ON THE INTERNATIONAL PROTECTION OF GEOGRAPHICAL INDICATIONS IN THE WORLDWIDE CONTEXT 9–38 (1997), available at www.wipo.int/edocs/pubdocs/en/geographical/760/wipo_pub_760.pdf.

²⁵ Intellectual Property Act, No. 36 of 2003, § 160 [hereinafter IP Act of 2003].

²⁶ *Id.* § 160(1) (a).

concerned.²⁷ In the case of infringement, possible remedies include injunction and damages.²⁸

Second, the consumer protection law, embodied in the Consumer Affairs Authority Act, No. 9 of 2003 (CAA Act of 2003),²⁹ is also applicable under this category. In particular, if a GI is used to mislead or deceive consumers by conveying a message that is not truthful about the origin or quality of the products, the State or the Consumer Affairs Authority has the right to sue the offender on the basis of a complaint lodged by the affected consumer.³⁰ Penalties in this case are more severe than under the unfair competition law and include the possibility of a fine and/or imprisonment for the offenders.³¹

Third is the false trade descriptions law that is contained in section 186(1) (d) of the IP Act of 2003.³² Under section 186(1) (d) of the IP Act of 2003, it is an offense to apply for a false trade description to goods, unless it can be proved that the act was committed without intention to defraud.³³ A false trade description includes, among others, any indication as to the origin of any goods, which is false or misleading in a material respect.³⁴ Therefore, this provision can be used to counter false or misleading uses of a GI. Affected parties should alert the authorities, who will initiate proceedings.³⁵ The infringer may be fined, imprisoned,³⁶ and/or may face an order for destruction or forfeiture of the offending goods.³⁷

Fourth, and last, the common-law action for passing off is also available and applicable to the misuses of GIs in Sri Lanka. The elements of the action, as outlined in the case of *Reckitt & Colman v. Borden*,³⁸ are as follows: (a) the claimant should have goodwill;³⁹ (b) the defendant should have made a misrepresentation that is likely to deceive the public;⁴⁰ and (c) the plaintiff must demonstrate that he has suffered or is likely to suffer damage due to the misrepresentation.⁴¹ The passing-off action is used widely in the United Kingdom (UK), where GIs have often been protected through this avenue.⁴²

²⁷ *Id.* § 160(4). ²⁸ *Id.* § 160(8) (a).

²⁹ Consumer Affairs Authority Act, No.9 of 2003, § 30 [hereinafter CAA Act of 2003], notes that “no trader shall, in the course of a trade or business, engage in any type of conduct that is misleading or deceptive or is likely to mislead or deceive the consumer or any other trader.” CAA Act of 2003, § 31(c) provides that no trader shall represent that goods or services have characteristics they do not have.

³⁰ *Id.* §§ 12–13. ³¹ *Id.* § 13(6). ³² IP Act of 2003, *supra* note 25, at § 186(1)(d).

³³ *Id.* at § 186(1). ³⁴ *Id.* at § 189(1). ³⁵ *Id.* at § 170. ³⁶ *Id.* at § 186(4).

³⁷ *Id.* at § 186(5). ³⁸ *Reckitt & Colman Ltd. v. Borden Inc.* [1990] 1 WRL 491 (HL)

³⁹ *Id.* at p. 499 (Lord Oliver of Aylmerton, concurring). ⁴⁰ *Id.* ⁴¹ *Id.*

⁴² Some notable cases are *Bollinger v. Costa Brava* [1959] 1 WRL 277 (related to the name “Champagne”), *Vine Products Ltd v. Mackenzie & Co* [1969] RPC 1 (related to the name

Additionally, the origin of Sri Lanka's passing-off action derived from the UK legal system.⁴³ Under an action for passing off, the remedy is an injunction and/or damages for loss.⁴⁴

4.2 Trademark Law

The relationship between the Sri Lankan trademark regime and its interaction with the protection of GIs is complex.

At the outset, section 102(3) of the IP Act of 2003 provides that a trademark may consist of, inter alia, geographical names.⁴⁵ Accordingly, it would seem that GIs can be registered as ordinary marks under the language of this section. However, section 103(1) (h) of the IP Act of 2003 states that a mark cannot be registered if it is, according to its ordinary meaning, a geographical name.⁴⁶ If we compare the two sections, it thus seems that, under the IP Act of 2003, a GI can be registered as a trademark only where the name no longer identifies the geographical origin of the good in that it has acquired a secondary meaning; in other words, it has become distinctive of the source of the products in terms of the products' manufacturer rather than their geographical origin.⁴⁷

Rather than registering GIs as ordinary trademarks, an easier option is to protect GIs as a certification mark or collective mark, as is the case in many other countries. In particular, the IP Act of 2003 allows the registration of geographical names as certification or collective marks. The relevant legal provision for certification marks is contained in section 142 of the IP Act of 2003,⁴⁸ and those which relate to collective marks are contained in sections

"Sherry"), *John Walker & Sons Ltd v. Henry Ost & Co Ltd* [1970] RPC 489 (related to the name "Scotch Whisky"), and *Taittinger v. Allbev* [1994] 4 All ER 75 (related to "Elderflower Champagne"). The claimants in each case were associations of producers in the area denoted by the GI.

⁴³ IP Act of 2003, *supra* note 25, at § 200(1). ⁴⁴ *Id.* at § 170. ⁴⁵ *Id.* at § 102(3).

⁴⁶ *Id.* at § 103(1) (h).

⁴⁷ For example, section 3(1) (c) of the Trade Marks Act 1994 in the United Kingdom does not allow geographical names to be registered as trademarks. "The following shall not be registered – . . . (c) trade marks which consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, *geographical origin*, the time of production of goods or of rendering of services, or other characteristics of goods or services" (emphasis added). See Trade Marks Act 1994 (U.K.). The reason for this prohibition is that such names should be free for all to use; to allow someone a monopoly over the name of a place or city would have an unfair effect on the surrounding producers and businesses in the area. Several other trademark legislations in the EU and other countries include a similar provision. See also YATAWARA & RAJAPAKSE, *supra* note 5, at 13.

⁴⁸ IP Act of 2003, *supra* note 25, at § 142.

138–141.⁴⁹ The registration of a collective mark or certification mark grants the exclusive right of use of such mark to the applicants, who are generally a collective group of producers in the state. Notably, third parties, without the consent of the mark owners, are prohibited from the following:

Section 121(2) (a) – Use of the mark, or of a sign resembling it in such a way as to be likely to mislead the public, for goods or services in respect of which the mark is registered or for similar goods or services in connection with which the use of the mark or sign is likely to mislead the public.⁵⁰

Section 121(2)(b) – Use of the mark, or of a sign or trade name resembling it, without just cause and in conditions likely to be prejudicial to the interests of the registered owner of the mark.⁵¹

Still, under Sri Lankan trademark law, third parties cannot be precluded from using a name that is a geographical name even when the name is registered either as a certification mark or a collective mark if (1) they are entitled to use the geographical name, and (2) they are acting according to honest practice.⁵² Similarly, the rights of a registered owner of a mark that is comprised of a geographical name do not include the power to prevent other parties from using the name in good faith and descriptively to indicate the place of origin of their goods or services.⁵³

In addition to names that are purely geographical names, the following names can be registered as a collective mark under section 138(3) of the IP Act of 2003: “indication[s] which may serve in trade to designate the geographical origin of the goods.”⁵⁴ The same type of indications can also be registered as certification marks under section 142(2) of the IP Act of 2003.⁵⁵ This includes, as elaborated in the following paragraphs, the most famous Sri Lankan GIs – Ceylon Tea and Ceylon Cinnamon – which are registered as certification marks, even though the name “Ceylon” is no longer a geographical name in Sri Lanka. Notably, the word “Ceylon,” the name that the British had given to Sri Lanka when it was a British colony, is no longer officially used to describe

⁴⁹ *Id.* at §§ 138–41. ⁵⁰ *Id.* at § 121(2) (a). ⁵¹ *Id.* at § 121(2) (b).

⁵² *Id.* at § 138(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. IP Act of 2003, sec. 142(3) contains the same restrictions in relation to the use of a certification mark.

⁵³ *Id.* at § 122(a). ⁵⁴ IP Act of 2003, *supra* note 25, at § 138(3). ⁵⁵ *Id.* at § 142(2).

the island nation, and Sri Lanka officially changed its name in 1972. Still, the name “Ceylon” clearly refers to the geographical origin of the products that it identifies – tea and cinnamon that originate from Sri Lanka – and thus can be validly registered as a certification mark under the IP Act of 2003.

However, differently than certification marks that are comprised of indications which are actual geographical names, certification marks that are comprised of indications which are no longer proper geographical names enjoy a broader scope of protection. In particular, the owners of these marks can prevent any use of these marks also where a third party seeks to use the name descriptively.⁵⁶ For example, the Sri Lanka Tea Board (SLTB), the owner of the certification mark “Ceylon Tea,” can prevent the use of any identical and similar signs sought to be used, even if the party who would like to use it would use the term “Ceylon” descriptively. Instead, every interested party would be entitled to use the term “Sri Lankan Tea” to indicate geographical origin.⁵⁷ Accordingly, the name Ceylon receives a stronger protection under Sri Lankan trademark law than the term Sri Lanka.

4.3 *Sui Generis Protection*

The provisions relating to Sri Lanka’s *sui generis* GI system are contained in Chapter XXXIII of the IP Act of 2003, which repeats and expands the definition of “geographical indications” provided in TRIPS.⁵⁸ In particular, unlike TRIPS, the definition of “geographical indications” under the IP Act of 2003 extends beyond goods to include services.⁵⁹ Moreover, the Chapter goes even further than TRIPS in its scope of protection and extends the higher level of protection granted by TRIPS to GIs for wines and spirits to GIs for all products in Sri Lanka.⁶⁰ The rationale for extending this enhanced protection to all GIs originates from the fact that Sri Lanka does not produce wines and spirits but rather other products. Protection for homonymous indications is also made available to all GIs, which under TRIPS is limited to GIs for wines. Any “interested party” is given standing to file action under this Chapter.⁶¹ The relief available includes injunction, damages, and destruction of infringing goods.⁶²

⁵⁶ *Id.* at § 161(2). ⁵⁷ YATAWARA & RAJAPAKSE, *supra* note 5, at 13.

⁵⁸ IP Act of 2003 *supra* note 25, at § 161(5), § 101.

⁵⁹ *Id.* at § 101. The definition of “certification mark” and “collective mark” expressly includes marks used in relation to goods and services.

⁶⁰ *Id.* at § 161(3). ⁶¹ *Id.* at § 161(1). ⁶² *Id.* at §§ 161(4), 170.

However, one of the most problematic aspects of the GI regime in Sri Lanka is that, unlike most other GI regimes, Sri Lanka has not opted for a registration system. In turn, this has raised concerns about the effectiveness, enforcement procedures, and level of protection in practice for GIs under the current GI regime.⁶³ Instead, the enforcement of rights in relation to GIs in Sri Lanka is based on establishing the statutory eligibility criteria.⁶⁴

Still, section 191(b) of the IP Act of 2003 provides for a special prohibition against any use of the terms “Ceylon Tea” and “Ceylon Cinnamon.”⁶⁵ Notably, the provision states that “any person who makes a false declaration in respect of [a] geographical indication inclusive of Ceylon Tea and Ceylon Cinnamon” shall be guilty of an offense.⁶⁶ This provision was originally inserted into the IP Act of 2003 because, at the time of the enactment of the IP Act of 2003, neither Ceylon Tea nor Ceylon Cinnamon were registered as a certification mark. Accordingly, both terms were granted indirect GI protection under the IP Act of 2003, even in the absence of a GI registration system, because of their existing economic importance in Sri Lanka. Remedies for infringement of Ceylon Tea and Ceylon Cinnamon under the *sui generis* GI protection include a fine,⁶⁷ injunction, damages, and destruction of infringing goods.⁶⁸

As noted before, the system of *sui generis* protection contained in Part IX, Chapter XXXIII of the IP Act of 2003 applies to GIs that identify any type of product, including artisanal products and handicrafts.⁶⁹ In addition, special legislation regulating particular national, regional, or local industries or sectors often confer power on the relevant minister or statutory authority to adopt regulations for the purpose of carrying out the objects and purposes of the *sui generis* GI protection in the IP Act of 2003. This can provide a means for the implementation of ad hoc systems of protection for GIs in the particular industry or sector covered by these legislations.⁷⁰

4.4 Relative Weaknesses of the Current System

As discussed above, the major flaw of the current *sui generis* GI regime in Sri Lanka is that it does not allow for the registration of GIs in a national registry.

⁶³ YATAWARA & RAJAPAKSE, *supra* note 5, at 14, 40–42.

⁶⁴ IP Act 2003, *supra* note 25, at § 191(b). ⁶⁵ *Id.* at § 191(b). ⁶⁶ *Id.* ⁶⁷ *Id.*

⁶⁸ *Id.* at § 170. ⁶⁹ *Id.* at § 161(1) (ii), § 160.

⁷⁰ See YATAWARA & RAJAPAKSE, *supra* note 5, at 13.

Accordingly, in order obtain a registration for a geographical name – or a name that indicates a geographical region – in Sri Lanka, producers have to still register that name as a certification or collective trademark. As also noted above, the protection of geographical names under the trademark system too has flaws, as it confers only a limited exclusivity and cannot prevent third parties from using these names descriptively. Only the names that are not a purely geographical term – as it is the case with respect to Ceylon Tea and Ceylon Cinnamon – are granted heightened protection under the trademark system in Sri Lanka.

5 PRODUCTS CURRENTLY PROTECTED IN SRI LANKA: CEYLON TEA AND CEYLON CINNAMON

Even though Sri Lanka has been famous for its spices from time immemorial,⁷¹ the protection of these products' geographical names is a recent phenomenon. As highlighted above, the most relevant examples of protection in Sri Lanka today are for the names “Ceylon Tea” and “Ceylon Cinnamon.” These names are registered as certification marks and are also protected under the current GI system.⁷² The specific details of the protection granted to each of these products will be discussed in the following sections.

5.1 *Ceylon Tea*

Considering the success and fame of Ceylon Tea, it may be remarkable to learn that tea is not a plant native to Sri Lanka. In fact, coffee was the main crop grown in the country for most of the 1800s. In the 1820s, experiments with the cultivation of coffee in Ceylon (the current Sri Lanka) began and by 1848 coffee cultivation was the backbone of the Ceylon economy. However, in the 1870s, a fungus devastated the coffee monoculture and the coffee industry in Ceylon turned bleak.⁷³ Eventually, and in response, tea was cultivated instead.⁷⁴ Since then, Sri Lanka has never looked back and has instead

⁷¹ The flagship products from Sri Lanka are well known abroad. In particular, the main export markets for Sri Lanka products are the US and EU markets. Additional markets include the Middle East for tea and some Latin American countries for spices.

⁷² Any false declarations in respect of “Ceylon Tea” are considered to be offenses under § 191(b) of the IP Act of 2003 and any false declarations in respect of “Ceylon Cinnamon” are considered to be offenses under § 191(b) of the IP Act of 2003.

⁷³ ROLAND WENZLHUEMER, FROM COFFEE TO TEA CULTIVATION IN CEYLON, 1880–1900 AN ECONOMIC AND SOCIAL HISTORY 31 (2008).

⁷⁴ *Id.* at 75–89.

embraced the production of tea aided by the perfect climatic conditions of the hill country to grow this herb. Tea has since become synonymous with this tiny island nation.

Still, locals refused to work in the tea plantations, complaining that the conditions were hazardous, the work too strenuous, and the wages were too low. Accordingly, the British brought workers from South India to Sri Lanka to work in the tea estates.⁷⁵ It cannot, therefore, be stated that Ceylon Tea is a GI, in the sense that a GI reflects some local custom, culture, or tradition. Ceylon Tea is, instead, a commercial product that acquired a GI status because of its internationally recognized quality. Be that as it may, it is now an undeniable fact that Ceylon Tea is here to stay.

The SLTB⁷⁶ was at the forefront of the efforts to obtain exclusive protection for Sri Lankan tea. The term “Ceylon Tea” had been promoted by Sri Lanka globally for decades, and the SLTB had spent a substantial amount of funding on this exercise.⁷⁷ As Ceylon Tea became synonymous with high quality, counterfeiting and misuse of the term became rampant. It became imperative that these acts be stopped if the brand was to maintain its reputation. A year after the introduction of the IP Act of 2003, the SLTB attempted to register “Ceylon Tea” as a certification mark. However, it was not until 2010 that the SLTB managed to obtain Home Registration for “Ceylon Tea” as a certification mark.⁷⁸

The SLTB has also obtained a certification mark for a special type of tea grown in an ozone-friendly manner. Historically, the use of the chemical methyl bromide (MB) was widespread in the tea sector. The industry had set a target date of January 1, 2015, for the phase out of this chemical, which was harmful to the environment. The tea sector in Sri Lanka phased out the use of MB well before the target date. In 2011, the “Ozone Friendly Pure Ceylon

⁷⁵ After the British left when Sri Lanka gained independence, these workers found themselves being discriminated against as they were denied citizenship in Sri Lanka. This was done through the Citizenship Act of 1948, which disenfranchised the estate Tamils.

⁷⁶ A body incorporated under the provisions of the Sri Lanka Tea Board Law No. 14 of 1975, which aims to promote the tea industry in Sri Lanka.

⁷⁷ As can be seen from the filings for the mark around the world: CEYLON TEA SYMBOL OF QUALITY, Registration No. 3753672 (U.S.); CEYLON TEA SYMBOL OF QUALITY, Registration No. 005751227 (EU); CEYLON (with device), Registration No. T0211757J (Singapore); CEYLON TEA SYMBOL OF QUALITY, Registration No. 4-0052528-000 (Vietnam).

⁷⁸ In addition, in 2011, the SLTB was successful in obtaining separate certification trademark registration for the seven major agro-climatic regional teas where Ceylon Tea is grown. The seven agro-climatic regions for tea in Sri Lanka are Nuwara Eliya, Dimbula, Uva, Uda Pussellawa, Kandy, Ruhuna, and Sabaragamuwa.

Tea” logo was launched as a certification mark.⁷⁹ This logo certifies that the teas cultivated are grown or manufactured in tea gardens and factories in the tea growing districts of Sri Lanka without the use of any ozone depletion substances. The “Ozone Friendly Pure Ceylon Tea” logo is thus a valuable addition to the island’s best-known export product. It is also expected that the ozone-friendly logo will help Ceylon Tea gain a competitive advantage in the global markets, as environmentally responsible products are gaining value in markets all over the world. Through the new logo, the Ceylon Tea industry has marketed the tea as a premium product in and outside Sri Lanka.

5.2 Ceylon Cinnamon

Ceylon Cinnamon is also called “true cinnamon,” as there are many other types of cinnamon which originate from other countries. The spice found in the Ceylon Cinnamon is the dried bark of *Cinnamomum zealanicum*, which is indigenous to Sri Lanka (as denoted by the word “zealanicum,” which has reference to the word “Ceylon”). This spice has its origins in the central hills, in places such as Kandy, Matale, Belihuloya, Haputale, and the Sinharaja forest range. Today, the cinnamon plantations are concentrated along the coastal belt stretching along from Kalutara to Matara, but cultivations of cinnamon have made inroads also to the areas of Ambalangoda and Ratnapura – areas between the coast and mountain.

In 2013, land used for cinnamon cultivation in Sri Lanka had expanded to reach a total of 31,278 ha.⁸⁰ Sri Lanka is also the largest producer of Ceylon Cinnamon, with an estimated annual production of over 16,000 metric tons in 2013.⁸¹ The unique method of processing and curing of cinnamon has resulted in a unique flavor, which results in a taste unlike any other variety of the same plant. A key part of the process is the preparation of the cinnamon quills. This involves a combination of art and skill unique to Sri Lankans, as the knowledge of these skills has been handed down from generation to generation over

⁷⁹ The mark is also protected in Malaysia: OZONE FRIENDLY PURE CEYLON TEA, Registration No. 2012007431 (Malaysia). But it should be noted that the application for registration for the mark in the US (Trademark: 85590777) has been suspended.

⁸⁰ K.H.K.L. Piyasiri & M. Wijeratne, *Comparison of the Cultivated Area and the Production Trends of Ceylon Cinnamon with the Main Competitors in the Worlds’ Total Cinnamon Market*, 6(1) INT’L J. SCI. & RES. PUBLICATIONS 476, 477 (2016), available at www.ijsrp.org/research-paper-0116/ijsrp-p4973.pdf.

⁸¹ *Id.* at 478.

centuries. At present, Sri Lanka is the world's largest exporter of true cinnamon, with 97 percent of the global market.⁸²

In order to ward off competition from inferior varieties of cinnamon such as Cassia, the Spice Council of Sri Lanka, together with the Sri Lanka Exports Development Board, has engaged in efforts to protect locally grown cinnamon. The result was the registration of the name "Pure Ceylon Cinnamon" as a certification mark. The mark can be used on any products made using cinnamon from Sri Lanka.⁸³ The Sri Lanka Export Development Board, which is the registered owner of the mark, has developed comprehensive guidelines for the mark's use, including listing out product categories, as well as producers, who are entitled to apply for the mark.⁸⁴ The mark has also been registered in a few key foreign markets including the US, the EU, Peru, and Colombia.⁸⁵

6 PRODUCTS THAT COULD BENEFIT FROM ADDITIONAL PROTECTION FOR GEOGRAPHICAL INDICATIONS IN SRI LANKA

Boasting a long and proud history and a rich and diverse heritage, Sri Lanka is home to many products that could also benefit from stronger GI protection. A few of these products are outlined in the following paragraphs. To date, these products are not registered as certification or collective trademarks in Sri Lanka and, in the absence of a registration system for *sui generis* GI protection, cannot be registered as *sui generis* GIs. Thus, they can only be protected under the current language for GI protection in the IP Act of 2003 and with a possible action for passing off in the event of misuse of these names. Moreover, some of these products have also suffered from a lack of patronage, or have not been able to withstand the march of global development. Still other products have

⁸² Embassy of Sri Lanka, Washington DC, *A Development Oriented Budget for All Citizens in 2015*, NEWS SRI LANKA (November 2014), <http://slembassyusa.org/NewsLetter/201411/NL201411.pdf>.

⁸³ PURE CEYLON CINNAMON, <http://pureceyloncinnamon.srilankabusiness.com/index.html> (last visited August 2, 2016).

⁸⁴ Sri Lanka Export Development Board, *Guidelines for the Use of "Pure Ceylon Cinnamon" Logo*, EDS <http://pureceyloncinnamon.srilankabusiness.com/docs/guidelines.pdf> (last visited August 2, 2016).

⁸⁵ Press Communiqué, Ministry of Industry and Commerce, Sri Lanka, *World's First Official True Cinnamon Pass Now Live* (August 10, 2014) (on file with author), available at http://pureceyloncinnamon.srilankabusiness.com/docs/cinnamon_live.pdf. For the trademark registrations, see the following: Pure Ceylon Cinnamon, Registration No. 4643497 (U.S.); Pure Ceylon Cinnamon, Registration No. 010353092 (EU).

been noticed by the global markets and have been subsequently revived by producers that have managed to survive into the twenty-first century as small cottage industries.

17.6.1 Ceylon Sapphires

Sri Lanka has a proud and long history relating to gemstones in general and sapphires in particular.⁸⁶ Sapphires are part of the Corundum gem family and are reported to be a royal gem with extreme hardness. Ceylon Sapphires are mined in Sri Lanka and are known for their unique color.⁸⁷ Ceylon Sapphires are very famous among both locals and foreigners. Generally, the gem industry in Sri Lanka is heavily regulated by the government to ensure minimal environmental impact. This has the potential to become a point of concern because of the traditional mining methods that are still used.

Not surprisingly, the popularity of the Ceylon Sapphire has led to other types of sapphires being passed off as Ceylon Sapphires. In order to curb this problem, the Gem and Jewellery Authority of Sri Lanka has been engaged in efforts to register Ceylon Sapphires as a certification mark. Based on the success of Ceylon Tea and Ceylon Cinnamon in registering their respective certification marks, it is expected that this registration will be granted in the near future.⁸⁸ This would allow the producers of Ceylon Sapphires to protect their sapphires against others traders who misuse the name “Ceylon.”

Today, Ceylon Sapphires seems to have been recognized as a GI by the Intellectual Property Office of Sri Lanka.⁸⁹ However, if Sri Lanka would create a national GI registry, so that Ceylon Sapphires could be registered as

⁸⁶ It is reported that Marco Polo wrote that the island had the best sapphires, topazes, amethysts, and other gems in the world. Ptolemy, the second-century astronomer, is supposed to have recorded that beryl and sapphire were the mainstay of Sri Lanka’s gem industry. Records from sailors that visited the island state that they brought back “jewels of Serendib.” Serendib was the ancient name given to the island by middle-eastern and Persian traders that crossed the Indian Ocean to trade gems from Sri Lanka to the East during the fourth and fifth centuries. This proves that the gem industry in Sri Lanka has ancient roots. See John Pinkerton, *The Curious and Remarkable Voyages and Travels of Marco Polo, A Gentleman of Venice, in A GENERAL COLLECTION OF THE VOYAGES AND TRAVELS IN ALL PARTS OF THE WORLD* 101 (1811).

⁸⁷ Peter C. Zwann, *Sri Lanka: The Gem Island*, 18 *GEMS & GEMMOLOGY* 62, 66 (1982).

⁸⁸ Ajith Perera, *Sri Lanka World’s Sapphire Capital*, *DAILY NEWS* (May 17, 2010), <http://archives.dailynews.lk/2010/05/17/bus25.asp>.

⁸⁹ Ceylon Sapphires are listed as an example of geographical indications on the website of the National Intellectual Property Office of Sri Lanka, see National Intellectual Property Office of Sri Lanka, *Geographical Indicators (GI)*, www.nipo.gov.lk/gi.htm (last visited August 2, 2016).

a GI, this would promote greater certainty and hence better protection for this name due to the advantages of a system based on registration. The name “Ceylon Sapphires” could also be registered as a certification mark, as this could afford the same, stronger protection that Ceylon Tea and Ceylon Cinnamon enjoy today. In addition, it would be beneficial to protect the name “Ceylon Sapphires” in foreign jurisdictions either as a *sui generis* GI system or as a trademark to prevent misuse of the name outside Sri Lanka. Finally, it is important to note that the Ceylon Chamber of Commerce had been instrumental in advocating for the higher level of protection offered to GIs for wines and spirits under TRIPS to be extended to all products carrying the name Ceylon in Sri Lanka.⁹⁰ The IP Act of 2003 went a step further and granted the additional protection to all products. This heightened protection for the name “Ceylon Sapphires” can offer protection against confusing and misleading uses of the name as well as provide relief against misappropriation also in the absence of consumer confusion.

6.2 Ruhunu Curd

Ruhuna is the traditional name for the southern part of Sri Lanka. Historically, this area has been famous for its curd, made primarily from buffalo milk. Buffaloes were the traditional source of labor in the paddy fields; hence, buffalo milk was once plentifully available. However, changes in society and the times have brought this once-thriving industry to its knees.

A study done by Ulluwishewa of the University of Sri Jayewardenepura identifies several reasons for this decline. The replacement of buffaloes with tractors and modern farm equipment resulted in lowering the demand for buffaloes, which were then sold as meat instead of being retained for labor. Further, the reduction of grassland, as well as the reduction of female labor, required for curd production also contributed to the problem.⁹¹ As far back as 2005, it was reported that the Ruhunu Curd industry was facing a downturn, with many cattle farmers deciding to leave the industry for good.⁹² This is one

⁹⁰ Dwijen Rangnekar, *The International Protection of Geographical Indications: The Asian Experience*, UNCTAD / ICTSD Regional Dialogue, University of Hong Kong, P.R.C., at 14 (November 8–10, 2004), available at www.ictsd.org/downloads/2008/09/rangnekar_2004-11-08.pdf.

⁹¹ Rohana Ulluwishewa, *Crisis of Dairy Farming in Ruhuna – An Overview*, 5 VIDYODAYA J. SOC. SCI. 17 (1991), available at <http://dl.sjp.ac.lk/dspace/bitstream/123456789/4771/Crisis%20of%20Dairy%20Farming.pdf>.

⁹² *Id.*

of the examples of a traditional product from a specific region of Sri Lanka possibly disappearing due to changes in society and the modern economy.

Today, Ruhunu Curd can only be protected under the current language of the IP Act of 2003 as a GI. As illustrated extensively in the chapter, however, the IP Act of 2003, grants limited protection to GIs in the absence of a registration system. Still, in Sri Lanka, GIs are currently granted the higher level of protection provided by TRIPS, which implies that the name “Ruhunu Curd” can enjoy protection against confusing as well as misappropriating uses of the name in Sri Lanka. The name could also be registered as a certification mark, even though the protection for this mark could not extend to the descriptive use of the name “Ruhunu” as mentioned above. Hence, it is admitted that it cannot be affirmatively concluded that protecting Ruhunu Curd by registering it as a certification mark, or as a registered *sui generis* GI should a national GI registry be implemented in Sri Lanka, necessarily saves the industry from its current downfall. Given the experience of other traditional products, which are dependent on local culture, traditions, and raw materials⁹³ and are protected as GIs or trademarks in other countries, it could nonetheless be argued that this protection (and in turn the possibly following extra attention to the product) could positively impact the Ruhunu Curd industry and help to keep it afloat.⁹⁴

6.3 Dumbara Mats

Dumbara mats are woven in the village of Henawela, located in the Dumbara valley, in the city of Kandy, in the central province of Sri Lanka.⁹⁵ Weaving the mats is an activity performed mainly by women, though some men are also experts at mat weaving. The leaves used for these mats are found in the valley itself, and after the pulp of the leaf is stripped, the remaining fiber is boiled and mixed with local dyes to form the colorful strips used in these eye-catching mats.⁹⁶ The mats themselves are used more as ornaments than as utility items.

⁹³ There have been similar calls in India to protect the Indian Chilika curd. See Dhiraj Kumar Nanda et al., *Indian Chilika Curd – A Potential Dairy Product for Geographical Indication Registration*, 12 INDIAN J. TRADITIONAL KNOWLEDGE 707 (2013).

⁹⁴ W.A. Sanath Sameera Wijesinghe, *The Protection on Geographical Indications in Developing Countries: The Case of Ceylon Tea*, 1 BALANCE–MULTIDISCIPLINARY L. J. 11 (2015), available at www.slsh.edu.in/assets/balancepdf/sanath-geographical%20indicators.pdf.

⁹⁵ Laksala Sri Lanka, *Dumbara Mats*, <http://laksalas.weebly.com/dumbara-mats.html> (last visited August 2, 2016).

⁹⁶ ARNOLD WRIGHT, TWENTIETH CENTURY IMPRESSIONS OF CEYLON: ITS HISTORY, PEOPLE, COMMERCE, INDUSTRIES AND RESOURCES 186–87 (1907, reprinted 1999).

In the past, mat weaving in the Dumbara valley was considered a necessary craft to be practiced by every female villager. Today, the region largely functions as a cottage industry with few established sales outlets. Weavers generally market their mats at festivals, fairs, and pilgrimage sites.

A recent article titled “The Waning Weave” highlights the problems faced by the Dumbara mat weavers. In the past, these weavers enjoyed royal patronage, but today only about ten to fifteen families are still engaged in this craft. The craft has declined due to several reasons. Firstly, the Niyanda leaf used to make the mats has reached near extinction, and weavers are forced to turn to the less delicate hemp leaf. Unfortunately, this leaf is also difficult to access. Secondly, this craft was passed down traditionally from parents to children, but it has found little favor with the younger generation, as this generation is not interested in the hard hours of labor required to turn out a single mat. Thirdly, and most importantly, the income derived from these mats is not sufficient for many people to sustain on mat weaving as a livelihood option. The National Craft Council of Sri Lanka has attempted to assist the weavers by advertising and marketing Dumbara mats, which has partially helped. The council has also advised the weavers on trying out new and more practical items such as book covers, bags, mobile phone covers, tablemats, cushion covers, and handbags, as opposed to the more traditional items such as mats and wall hangings that they were previously confined to.⁹⁷

As with the case of the Ruhunu Curd, the Dumbara Mat appears to be recognized as a GI, and thus enjoys, at least in writing, the higher level of protection granted to GIs under the IP Act of 2003, despite the absence of a GI registry.⁹⁸ Here again, the name Dumbara Mat could also be registered as a certification mark. However, protecting the name “Dumbara Mats” via the registration as a certification mark, or in the future possibly as a registered GI, may not necessarily assist this industry’s recovery due to the fact that the industry’s problems rest primarily on its need to modernize and find new customers that could support the industry and the weavers.

6.4 Ambalangoda Masks

Ambalangoda is a coastal town in the Galle District, famous for traditional wooden masks and puppets. The traditional masks are carved from light balsa-

⁹⁷ Hiranthi Fernando, *The Waning Weave*, SUNDAY TIMES (October 17, 2010), www.sundaytimes.lk/101017/Plus/plus_01.html.

⁹⁸ Wijesinghe, *supra* note 94, at 11.

like kaduru wood, the trees of which grow in the marshy lands that border paddy fields. Before being crafted on, the wood is smoke-dried for a week in preparation. The hand-carved and hand-painted masks are then used in traditional dance dramas that are both vibrant and colorful.

There are three different types of dancing rituals, and accordingly three different types of masks: the “Kolam” masks, the “Sanni” masks, and the “Raksha” masks. The “Kolam” masks are used in a Kolam, which is a comic folk play, set in a rural setting, with dances, mimes, and dialogues. The types of masks range from devils and animals to humans and human royalty.⁹⁹ The “Sanni” masks are used in the Sanni Yakuma, which is an exorcism ritual. The wearers of the “Sanni” mask would represent the different types of Sanni (diseases).¹⁰⁰ The belief was that the ritual would, as depicted in the ritual with the exorcists ridding the Sanni, rid people of diseases.¹⁰¹ Finally, there are “Raksha” masks, which are used in festivals and processions. The Naga Raksha (Cobra demon) mask of the “Raksha Kolama” (demon dance) is particularly famous and consists of a ferocious face with bulging, popping eyes, a carnivorous tongue, and protruding hood-distended cobras.¹⁰²

These masks were highly popular for many decades, due to their attractive nature and perceived powers. The Kolam dances were the primary recreational outlet for villagers, and prior to the advent of television, highly popular in the villages. Belief in devils and other spirits persisted, and the Sanni masks were used in exorcism ceremonies, also termed as “devil dancing ceremonies.” The low-country tradition of dancing also uses masks, and the Raksha masks were used in this type of dancing as well as for the processions that were also an integral part of community life in the village. All this meant that there was a steady source of demand for the masks for many years.

In recent times, however, demand for the masks has changed. As television has changed viewer preferences, viewership of Kolam dances has also dropped. Similarly, festivals and processions are also not as popular as they used to be, and to add to these problems, the low-country dance form is practiced by very few. In addition, devil dancing is not perceived as the most

⁹⁹ Richard Boyle, *Masks Unmasked*, SRI LANKAN (February 2013), <http://serendib.btoptions.lk/article.php?id=968&issueId=38>.

¹⁰⁰ Mark S. Bailey & H Janaka de Silva, *Sri Lankan Sanni Masks: An Ancient Classification of Disease*, 333 *BMJ* 1327–28 (2006), available at www.bmj.com/content/333/7582/1327.

¹⁰¹ Alan Pate, *Devil Dance Masks of Sri Lanka*, L’ASIE EXOTIQUE (September 1998), www.lasieexotique.com/mag_masks/mag_masks.html.

¹⁰² Boyle, *supra* note 99.

efficient remedy for ailments, as it used to be in the past. Accordingly, demand for the masks has diminished.¹⁰³ Still, masks have become popular as ornaments in recent years, and both locals and foreigners seek them as decorations. Mask-making has thus become a cottage industry in Ambalangoda, though there are also a few large-scale mask-making enterprises in the region. There are also museums dedicated to this craft.¹⁰⁴ For all these reasons, Ambalangoda masks could benefit from protection, both as a certification mark and as a *sui generis* registered GI should a GI registry be created in Sri Lanka. Today, as with the other examples mentioned above, Ambalangoda masks can be protected as GIs under the current protection offered under the IP Act of 2003.

6.5 Moratuwa Furniture

Moratuwa is a town to the South of Colombo, which is well known for its skilled wood craftsmen and beautifully crafted furniture. The town houses many furniture shops, and any online search on the term Moratuwa will inevitably yield information about these shops and furniture galleries. Moratuwa has been referred to as the “heart of quality furniture products in Sri Lanka.”¹⁰⁵ Moratuwa craftsmen are skilled in the manufacture of older Sri Lankan designs, which are characterized by intricate carvings, but they are also able to create the more modern pieces that the market craves.

Unlike some of the other products discussed in this section, the Moratuwa furniture industry has thrived and has managed to survive the ravages of time and changing tastes. To a large extent, this is due to the fact that the industry has been able to market their products effectively. Further, even though furniture designs may have evolved in modern society, the need for furniture is a basic need for most people, and furniture remains a useful and necessary item to purchase as opposed to other crafts that may not be equally necessary.

Perhaps also relevant is the fact that Moratuwa artisans are largely male, and thus the primary care providers for many families. In turn, this may have pushed these artisans to update their designs and business models in order to continue selling their products. As described below, the same has not been the

¹⁰³ *The Ambalangoda Mask Museum*, ARIYAPALA & SONS, www.masksariyalas.com/mask_museum.htm (last visited August 3, 2016).

¹⁰⁴ For example, there is an Ambalangoda Mask Factory & Museum located in Thoranagama, Hikkaduwa.

¹⁰⁵ *About us*, ARATUWA WOOD WORKS, www.furniturestrilanka.com/about-furniture-sri-lanka.html (last visited August 6, 2016).

case for other crafts such as Beeralu lace, which is almost exclusively carried out by women.

As in the case of the Ambalangoda masks and the other cases above, this industry could benefit from protection of the name “Moratuwa furniture” both as a certification mark and as a *sui generis* registered GI in addition to the protection that is granted to the name under the current GI provisions in the IP Act of 2003.

6.6 Beeralu Lace

Beeralu lace refers to the lace made in the southern region of Sri Lanka, most notably in the Galle District. Introduced originally by the Portuguese, lace-making flourished as an industry in the sixteenth and seventeenth centuries. Many women engaged in making lace for pleasure or profit. Traditionally, there was good local as well as foreign demand for Beeralu lace.¹⁰⁶ However, with the advent of the open economic policy in 1977, women began to abandon their homes and crafts for more profitable day jobs. In addition, the lace industry saw the rise of intermediaries, which resulted in reduced profits for producers.¹⁰⁷ These factors reduced Beeralu lace-making into a hobby practiced by very few. Today, a few organizations have sought to support the industry, at least as a cottage industry.¹⁰⁸ Still, many of the weavers are old, face poverty, and have difficulties in addressing the threat of competition from mass-produced items and cheaper imports.¹⁰⁹ Moreover, Beeralu lace-making is a time-consuming activity, which results in the final products being fairly expensive, which may, in turn, affect consumer demand.

Similar to Ceylon today, and unlike Ruhuna, Moratuwa, and Dumbara, the term “Beeralu” is not a geographical name. The word comes from the term used to describe the wooden bobbins that are used to weave a single piece of lace. However, the term has become synonymous with the region where the lace is made. Accordingly, the name “Beeralu” could be registered as a certification mark as well as could be registered as *sui generis* GI should Sri Lanka implement a national registry. Instead, today, the name “Beeralu” can only be protected under the current GI regime, which does not include

¹⁰⁶ Sassanka, *The Beauty of Beeralu Lace*, LANKA HELP MAGAZINE (September 4, 2011, 7:38 PM), <http://magazine.lankahelp.com/2011/09/04/the-beauty-of-beeralu-lace/>.

¹⁰⁷ *Id.*

¹⁰⁸ Aysha Aseef, *Living in the Shadows: The Lace Makers of Galle*, THE SUNDAY TIMES (February 15, 2009), www.sundaytimes.lk/090215/Plus/sundaytimesplus_03.html.

¹⁰⁹ *Id.*

a registration system. In particular, even though it does not seem that competitors are misusing the name to date, it cannot be excluded that producers of mass-produced lace may decide to use a similar name for their lace in order to create an association with the more famous Beeralu lace. Some producers of Beeralu lace have also called for the government to support the export of this product in order to protect the dying trade.¹¹⁰ In this respect, Beeralu lace does appear to have global popularity, as can be seen by its showcase at the London Asia House Design 2016.¹¹¹ Thus, the possibility exists that getting protection for the heritage of Beeralu lace could increase the price and consequently the survivability of the Beeralu lace industry as well.

7 COMPARATIVE ANALYSIS: SHOULD SRI LANKA ADOPT AN INDIAN-STYLE PROTECTION FOR GEOGRAPHICAL INDICATIONS?

As I mentioned in Section 4, the current standard of protection for GIs in Sri Lanka, particularly with respect to the *sui generis* GI regime, is unsatisfactory and could be improved. In this respect, it could be useful to look at the approach adopted in India. India is Sri Lanka's closest neighbor and shares many similarities with Sri Lanka in terms of culture and traditions. However, India has been more proactive than Sri Lanka in protecting its cultural and traditional items.¹¹² In particular, India enacted a *sui generis* system for GI protection in 1999, which includes a registration-based system – the Geographical Indications of Goods (Registration & Protection) Act (India GI Act) – after its accession to the World Trade Organization (WTO).¹¹³ This law came into force with effect from September 15, 2003.

Notably, section 8 of the India GI Act provides that a GI can be registered for any of the goods listed in the GI registry.¹¹⁴ The India GI Act extends

¹¹⁰ Ananda Kannagara, *Beeralu Sustained as a Cottage Industry*, SUNDAY OBSERVER (March 18, 2012), www.sundayobserver.lk/2012/03/18/fea04.asp.

¹¹¹ See *Beeralu Lace, Handicrafts Showcased at London Asia House Design 2016*, DAILY FT (March 16, 2016), www.ft.lk/article/531324/Beeralu-lace-handicrafts-showcased-at-London-Asia-House-Design-2016.

¹¹² For example, India has put in place a traditional knowledge digital library that records all the uses of traditional knowledge, in order to defeat the novelty aspect of patent applications made using pirated Indian traditional knowledge.

¹¹³ Geographical Indications of Goods (Registration & Protection) Act 48 of 1999 (India) [hereinafter Indian GI Act].

¹¹⁴ The reasons for which a GI registration will be denied are described in Section 9 of the Indian GI Act.

GI protection to all types of goods and thus covers a spectrum of goods from handicrafts to agricultural products. The India GI Act further lists out the procedure to be followed. Interestingly, and unlike the case in Sri Lanka, section 25 of the India GI Act prohibits the registration of a GI as a trademark (other than a certification mark under the Indian Trade Mark Act, 1999).¹¹⁵

The first GI registered in India was Darjeeling tea in 2004, and to date 236 GIs have been registered in India. Initially, GIs were registered primarily for handicrafts, but recent GI registrations have been made in favor of agricultural products, which include types of litchi, mandarins, and lemons.¹¹⁶

At this time, it remains unclear if the system of GI protection in India and the GI registrations have, in fact, improved the financial viability of any of the industries for which GI protection was obtained. Still, it remains a fact that the large number of registrations have been granted, and that these registrations represent a vehicle that can help producers in advertising the GI products. Moreover, producers have to agree on common standards and product quality control as part of the application for GI registration. This process alone can assist in motivating producers in a particular area to invest in the quality of their products and in promoting their products in the national and international markets.

Thus, even though Sri Lanka may need some more time before it can implement a system of GI registration similar to India, it should be noted that the system in India does allow for GI registration and, in turn, GI producers can enjoy the full protection of a *sui generis* GI protection system. In contrast, the only avenue for producers in Sri Lanka to register their geographical names is through the trademark system.

8 CONCLUSION

As described above, the current status of GI protection in Sri Lanka is still a work in progress. To date, the strongest form of protection is found in the trademark system, as geographical names can be registered as certification

¹¹⁵ See the full text of the Indian GI Act, available at http://ipindia.nic.in/girindia/GI_Act.pdf (last visited August 3, 2016).

¹¹⁶ The following GI registrations can be found in the Geographical Indications Registry, published by Intellectual Property India: Tezpur Litchi, Registration No. 438 (India); Khasi Mandarin, Registration No. 465 (India); Temple Jewellery of Nagercoil, Registration No. 36 (India); Kachai Lemon, Registration No. 466 (India). See *Registered GIs*, GEOGRAPHICAL INDICATIONS REGISTRY, <http://ipindia.nic.in/girindia/> (last visited August 3, 2016).

and collective marks, as in the case of Ceylon Tea, Ceylon Cinnamon, and (likely) Ceylon Sapphires. In contrast, the *sui generis* Sri Lankan GI regime does not include a registration system; thus, it offers a less comprehensive level of protection. In particular, even though a system without registration still grants protection to the GIs, a registration-based scheme can provide additional certainty for producers (and competitors who can be made aware of GI registrations). In turn, this greater certainty may lead to a greater willingness to invest in marketing and promoting the registered GIs on the part of GI producers and other interested parties.

As indicated in this chapter, several products from Sri Lanka could benefit from a more comprehensive system of protection and the creation of a GI registry similar to the one operating in India and in several other countries today. As it has been the case with Ceylon Tea and Ceylon Cinnamon, the primary consideration in seeking protection for geographical names is to prevent the misuse of these names by third parties that are not authorized to use them and, in turn, ward off competition from cheap product imitations. Still, while Ceylon Tea and Ceylon Cinnamon are protected today through the trademark system, and also enjoy (the so far limited in Sri Lanka) GI protection, several other products do not enjoy any form of meaningful protection, as these products are not registered marks and so far enjoy only limited protection under the current *sui generis* GI regimes. Hence, the producers of these products also have concerns about cheap alternatives, as could become the case with respect to Beeralu lace.

Naturally, the creation of a GI registry would not become a panacea for protecting traditional products in Sri Lanka. In fact, the mere fact of having a system of GI registration may not help an industry that is already unprofitable or for which there is no consumer demand. However, if the industry at issue already has a good target market, and consumers are interested in the products, then GI registration has the potential to position the products more meaningfully within that market. In particular, granting exclusive rights through GI protection (and more meaningfully GI registration) would likely serve to incentivize producers to invest and capitalize in the GI name, which could potentially lead to greater returns. Moreover, many of the industries that rely on culture and traditions in Sri Lanka (such as Dumbara mats and Ruhunu Curd) could also benefit from some intervention and assistance, either by the State or by other public or private entities.

In this respect, it should be noted that the intervention of the State is an important component of the process of registering GIs under the current *sui generis* GI regime. Furthermore, the registration process requires

identifying ad hoc entities in charge of controlling the quality of products. Again, this series of controls could benefit several traditional products in Sri Lanka. Finally, the State and these entities could further assist producers in marketing and managing the GI products in the national and international markets.

Finally, while repeating that a registration system could be beneficial from Sri Lanka, we must note that moving into a registration system and then maintaining it can be a relatively costly endeavor. Thus, in order for this to be a successful change in the current system, it would be important that a considerable number of products be registered as GI. It would also be important that, in addition to seeking GI registration, producers work toward maintaining the quality of GI products and managing the GIs wisely. For example, should a GI gain popularity, GI producers should be mindful and not try to increase production unsustainably. Product quality should not be sacrificed for quantity. Overall, it is important to remember that GI protection is a useful tool for local and rural development, but the proper managing of GIs remains the primary strategy for potential long-term success of these products in Sri Lanka, as it is with the rest of the world.

