

LEGAL PROTECTION OF GEOGRAPHICAL INDICATION IN MYANMAR: A CASE STUDY ON EDIBLE BIRDS' NEST IN MYEIK ARCHIPELAGO

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Abstract

Geographical indication (GI) is a collective intellectual property right used to identify a particular products or goods of a specific place and possess a given quality, reputation or other characteristics attributable to its geographical source of origin. GI system can bolster sustainable economic growth with the restoration, preservation and promotion of cultural identity, specific knowledge and natural resources linked to a particular territory (FAO, 2023). Myanmar has many renowned local products or goods possessing distinct quality or reputation accrued from their place of origin as Puto-O grapefruit, Ywar-Ngan Coffee, etc. These local products can now be enjoyed protection as GI- certified product or goods under Trademark Law, 2019. This study aims to disseminate legal knowledge on GI protection and to provide better understanding in the use of GI among stakeholders and potential GI beneficiaries including SMEs with emphasizing the implementation of GI protection to edible Bird's Nest in Myeik Archipelago. The research highlights that with the adoption of a comprehensive GI protection scheme, policy and legislation framework should be in place so as to ensure that the protection system is adequately prepared and effectively provided to guarantee the sustainability of GI system as well as to secure the environmental sustainability of the local community.

Keywords: geographical indication, edible birds' nest, protection.

Introduction

Mergui (Myeik) Archipelago is a group of over 800 islands located in Tanintharyi Region, Myanmar. These islands are renowned for their rich in natural resources in diversity and also famous for their rich in marine life with an extensive coral reef system. This is also the area where the first and only marine national park _ Lampi Marine National Park was established in 1996 and declared as an ASEAN Heritage Park in 2003.¹ The islands of Myeik Archipelago are also a habitat for the largest population of white-nest swiftlet (*Ziwasoe* bird in Burmese name) in Myanmar. Bird nests created by these small species using their solidified saliva are typically prized as commercial product due to their containment of high nutrition and protein level and edible bird's nest becomes one of the well-known local products of the area.

Bird's nests have been harvested naturally on these islands of the Myeik Archipelago under government 'competitive bidding (tender) system'. Later, with the increase in market demand and price, the production of bird's nests at in-house (man-made) breeding has developed where the authorization to operate is granted with 'permit (contract-based) system'. Eventually, bird's nest production has become one of the main industries in the region and the numbers of producers are tremendously increase during these years. Currently, in Myeik Archipelago including Tanintharyi Region, there are 2 companies operated for birds' nest harvesting under the tender system and over 225 private contracts are being permitted for in-house breeding for bird's nest harvesting as of data 2023, August.

This research highlights the significance of geographical indication to locally-originated goods or products and its contribution to bird's nest production sector in Myeik Archipelago. In addition, it explores the means for legal protection to edible bird's nest as Geographical

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¹ <https://tourism.gov.mm/myeik/>, <https://whc.unesco.org/en/tentativelists/5874/>

Indication under current intellectual property (IP) system. This study aims to provide legal knowledge about geographical indications to the community as well as to disseminate about the potential benefits that can be contributed to the local community through the legal protection of edible birds' nest along with the conservation of natural resources.

Method of the Study

The research paper has been principally applied the qualitative research methodology covering the descriptive and contextual analysis methods and also conducting in-depth interviews with the principal governing body and local business persons. This paper relies its primary data on the national legislation and international instruments dealing with the protection and governance of GI protection. Secondary data of this research comes from literary books, interviews with key informants, publications, articles and also online resources.

Problem Statement

The current monitoring and management system on the bird's nest production sector is governed by the Forest Law¹ and the Conservation of Biodiversity and Protected Areas Law² because edible nest swiftlets are being identified as 'wildlife'. The principal monitoring body concerning the harvesting and production of birds' nests is the 'Department of Forest' under the Ministry of Natural Resources and Environmental Conservation. It can be said that these are the administrative practices solely established on the production of edible bird's nest in the region.

With the market production rate is vividly increased lately, the protection upon the quality and distinctiveness/characteristics of edible bird's nest is demanding in order to maintain the originality and quality of the birds' nest that are due to geographical factors in Myeik Archipelago. The argument in this paper is that the maintenance of reputation and quality of the edible bird's nest can be accomplished through geographical indication protection under the new Trademark Law of Myanmar. With strong GI protection scheme, the Small and Medium Enterprises (SMEs) can build consumers trust with GI-certified products and secure, in return, a value chain and good return on their investment. At the same time, production industry will be performed in a way to balancing the conservation of biodiversity and preservation of natural resources in a particular region.

Geographical Indication and Its Importance in Commercial Sector

Geographical indication is an indication which identifies the particular goods and/or products originating in a specific place where a given quality, reputation or other characteristics of the goods/products is essentially attributable to its geographical origin.³ Generally, geographical indication is a sign used on goods or products that have a specific geographical origin and possess distinct qualities or reputation due to that origin.⁴ In Myanmar, a geographical indication (GI) can be defined as an indication which identifies any goods as originating from a particular country, territory or a region, where a given quality, reputation or other distinguishing characteristics of the goods is indicative of its geographical origin.⁵

¹ Pyidaungsu Hluttaw Law No. 29/ 2018, Myanmar.

² Pyidaungsu Hluttaw Law No. 12/ 2018, Myanmar.

³ Article 22 (1) of the TRIPS Agreement, 1995.

⁴ WIPO, 'Geographical Indications: An Introduction', 2021, p-6.

⁵ Section 2 (o) of the Trademark Law 2019, Myanmar

Generally, a geographical indication consists of the name of the place of origin of the goods, such as “Darjeeling” for tea from an Indian Town named Darjeeling or “Blue Mountain Coffee” for coffee bean from a mountain range- Blue Mountains in Jamaica. Such examples show that geographical indications can attach a high reputation and thus may be valuable commercial assets.¹ In Myanmar, there are many well-known goods/products particularly originated in a given geographical region as for instance, “Shwe-bo Thanakha” is well-known for its origin linked to in Shwebo region. Likewise, “Putta-O Grapefruit”, “Myeik Bird’s Nest”, “Ywar-Ngan Coffee”, “Pakokku Blanket” are some examples of the well-known products in Myanmar named after its geographical origin. Therefore, GI can be a tool serving to identify a product or good that originates from a geographical location.

It is obvious that geographical indication is not simply just a name or a symbol but it reflects a reputation closely linked to a designated geographical location. This reputation is in collective nature, intangible asset owned by the local community (producers) as a whole. If it is not protected, it could be used without restriction and its value diminished and eventually lost. Therefore, protection of GI can enhance the reputation and value of particular local product and support local business. Moreover, such protection is a way to forestall registration of the indication as a trademark by a third party (outsiders) and to limit the risk of the indication becoming a generic term.²

It seems that geographical indications can only be used by the producers, whose goods conform to the applicable requirements concerning the area of origin, processing method and typicality of the product. The protection of geographical indication is considered as an effective mean to add value to goods/products, local identity and traditional knowledge in the ASEAN region.³ As such, it can be seen that geographical indications could be a tool for promoting local community’s branding and for generating local production capacity that can upgrade the socio-economic development. With a GI, the small and medium enterprises (SMEs) that produce GI-registered products can build a trust with consumers with strong reputation and quality and thereby secure a good return on their investment.⁴

Difference between Trademark and Geographical Indication

Though Trademark and Geographical indication are the signs with commercial value that is principally used to distinguish the particular products or goods from others, their usage have many different purposes.

Firstly, in terms of ownership, a trademark is owned by an enterprise which offers certain products or services on the market. Geographical indication identifies a geographical area in which several enterprises are located which produce the kind of product for which the geographical indication is used. It means that GI is a collective asset and there is no ‘particular owner’ of it. Any local organization and/or in some jurisdiction, the local administrative body may become the authorized one dealing with the use of GI. Secondly, in terms of visibility, a trademark may be names, letters, numbers, illustrated parts, or combinations of colors, or combination of any of them. On the other hand, a GI is an indication which identifies any goods

¹ WIPO, Ibid, p-20.

² WIPO, ‘Geographical Indications: An Introduction’, 2021, p-21.

³ ASEAN, ‘Guidelines on Protection of Geographical Indication in ASEAN Member States’, 2020.

⁴ https://www.wipo.int/ip-outreach/en/ipday/2022/toptips/geo_indications.html (Access on 10 Sep 2023)

as originating from a particular area where a given quality, reputation or characteristics is attached to its geographical origin.

Thirdly, in terms of negotiability, a trademark can be transferred or assigned to anyone by its owner. In contrast, a GI cannot be transferred or assigned to an outsider that is not belonging to a given geographical area. It implies that a GI may be used by any person/company that produces the goods in a particular area in line with certain quality requirements. Lastly, the objective to protect a trademark is to provide intellectual property rights to an individual manufacturer to protect from counterfeiting and infringement. Meanwhile, the primary aim to protect a GI is for public interests and designs to protect a particular product against misuse or imitation and to guarantee the true origin of the product to the consumers.

Protection of Geographical Indication under Intellectual Property System

Geographical indications are protected in different countries and regional systems through a wide variety of approaches. In the world, there are three main ways to protect GIs among countries which are (a) so-called *sui generis* systems (under the law specifically designed to protect geographical indications); (b) collective and certification marks (under Trademark Law); and (c) modalities focusing on business practices including administrative product approval schemes (under unfair competition law, consumer protection law, etc.).¹ In Myanmar, the protection system on geographical indication is applied under the Trademark law as collective and/or certification marks.

The above-mentioned approaches are the systems typically applied by each country in their local protection systems. The way of obtaining a GI protection abroad is through two international registration systems administered by World Intellectual Property Organization (WIPO): the “Lisbon System” and the “Madrid System”. The Lisbon System was established in 1958 to facilitate the international protection of appellations of origin through a single registration procedure. The Madrid System is an international registration system legally governed by the Madrid Agreement (1891) and the Madrid Protocol (1989) whereby GIs can also be protected in other countries as collective and certification marks. States can enjoy international protection of their GIs through the ratification of these two instruments. Though not yet ratification, Myanmar is on its way to take part in these international protection systems.

Myeik Edible Bird’s Nest and Registration for GI Protection

Edible bird’s nest is one of the distinguished natural products in Myanmar_ originated from the Myeik Archipelago. The protection of GI for edible bird’s nest can be achieved through registration as collective marks and/or certification marks in line with legal provisions under Trademark Law.² Any organization legally formed by the manufacturers, producers of natural and/or industrial products and/or on behalf of them, or government authority can apply the registration of geographical indication.³ In this case, for instance, the formation of Bird’s Nest Manufacturers’ Organization (BMO) comprising with local manufacturers is demanding to perform as authorized local (representative) body to apply for GI registration. According to

¹ WIPO, ‘Geographical Indications: An Introduction’, 2021, p-26.

² Chapter XVI of Trademark Law 2019, Myanmar.

³ Section 53 of the Trademark Law 2019, Myanmar.

interview data, though the local manufactures are planning to form a body, there is no yet formal region representative body dealing with the matter. Otherwise, like in some jurisdictions, the local administrative body may take a representative role to apply for registration.

Currently, Department of Forest is taking primary responsible upon the administration of birds' nest production industry both with bidding (tender) system (for natural harvesting in islands) and with permit system (for in-house breeding harvesting). There are two enterprises doing business for bird's nest harvesting under the tender system whereas over 225 private/individual enterprises are currently operated under the permit system.¹

Registration form can be submitted to the Intellectual Property Department (IPD) under the Ministry of Commerce with prescribed fees outlined in its Notification.² The application is provided with the following requirements;

- a. Name, nationality and address of the application entity or representative;
- b. The geographical indication for which registration is sought;
- c. The applied area to which the geographical indication applies;
- d. The good designated by the geographical indication;
- e. The specific characteristic of the good or quality or its reputation;
- f. The link between the prescribed specific quality, its reputation or characteristic and original area and technology of production;
- g. A copy of payment receipt of fees;
- h. Related documents required by the Department of Intellectual Property (If needed);
- i. Other prescribed particulars.³

After receiving the application by the Registrar, he/she must examine whether an application is in conformity with the prescribed regulations. If all the criteria are met, he/she can publish the contents of the application and specification. If there is no objection within a particular time or the objection is rejected, the Registrar has to accept the registration of a GI.⁴ However, the registration of a geographical indication can be limited if a GI does not conform with its definition mentioned in Section 2 (o), or if the goods for which the geographical indication is used has become common usage or customary in the Republic of the Union of Myanmar, or if a GI which is contrary to public order, morale or public policy of the country.⁵

The term of protection enjoyed by such registration of a GI is provided in Section 59 that the protection is up to the period as long as the registered GI has the distinguished characteristics, quality or reputation for which protection was initially granted exists. In order to maintain its protection, a GI-certified good or product must fulfil certain requirements which local manufactures or producers have agreed upon or adhered to. It can be said that a monitoring system has to be established collaboratively with the relevant departments and organizations (probably, like Department of Forest, BMO, Custom Department and/or Department of Trade, etc.) to supervise not only the consistency of particular product or goods with prescribed

¹ Interview Data with key informants. (26. 06. 2023)

² Notification No 1/2023 of Intellectual Property Agency, Myanmar.

³ Section 54 of the Trademark Law 2019, Myanmar & www.ipd.gov.mm [latest access on 4 May 2023]

⁴ Section 58 of the Trademark Law 2019.

⁵ Section 55 of the Trademark Law 2019, Myanmar.

qualifications but also between the descriptions of the products registered as GI and the relevant products as well as the use of the names of registered GIs in the market.¹

The term of protection provided is unlimited as long as the given quality, reputation or other characteristic of the product remain essentially attributable to that particular geographical origin. Therefore, in respect of bird's nest, specific GI logo should be in place by registration so as to guaranteed or certify the authenticity of such products. Meanwhile, the quality control and/or quality assurance system on the products should be implemented so as to sustain the given quality or reputation of GI-certified products.

Legal Rights enjoyed under the Protection

Upon receiving the protection, the right holder can enjoy "the right to prohibit" the following activities-

- (a) use of a geographical indication in any manner by falsely describing that a product is from the region stated in said geographical indication even though it is from another place of origin in order to deceive the public;
- (b) any use of a registered geographical indication which creates unfair competition;
- (c) the use of a disputed geographical indication for goods that are not from the region indicated in said geographical indication for indicating the origins of goods, for use after translating said geographical indication, or for the use of a geographical indication together with the description of the type, group, form, imitation or similar descriptions.²

Any dispute arising out from the infringement of IP rights can be submitted to the Intellectual Property Rights (IPR) Court as criminal case or civil action or miscellaneous suit.³ Such IPR Court may adjudicate and confer judgment and/or order compensation upon investigation. Recently, the Supreme Court grants jurisdiction and mandate to Yangon High Court as IPR Court to adjudicate cases related to IP rights.⁴

Advantages upon the Protection of Geographical Indication

GI can be a tool for local producers to assist in developing value chain and in promoting market access with origin-linked products. Brand recognition is a crucial part of marketing and nowadays, consumers pay increasing attention to the geographical origin of products, and care about specific characteristics attached to the purchased products. GI conveys information about the origin-bound characteristics of a product.⁵ This trend creates a major opportunity for producers (particularly for SMEs), as it removes the pressure of competing with generic and standardized products.⁶ Improved demand and market access for GI-certified products significantly contribute income generation for all actors in local value chains and improving their livelihoods which have positive impact on reducing poverty (SDG 1).

According to Food and Agriculture Organization (FAO), GIs can boost sustainability which covers combination of three pillars: economic, environmental and social sustainability. GI

¹ Ibid, Section 61.

² Section 57 (c) of Trademark Law 2019, Myanmar.

³ Ibid, Section 77.

⁴ Notification No. 235/2023 of the Supreme Court of the Union of Myanmar.

⁵ WIPO, 'Geographical Indications: An Introduction', 2021, p-13.

⁶ <https://blog.private-sector-and-development.com/2020/11/19/geographical-indications-and-quality-brands-an-effective-tool-to-promote-industrial-smes-market-access/> (latest access on 23 Sep 2023)

is designed to ensure the quality and reputation of a particular product by ascertaining the continuous use of traditional production, processing, marketing practices as well as given geographical contributions such as weather, soil, etc. GI systems act as catalysts for sustainability in the long run, as they ensure the continuous use of traditional production, processing and marketing practices and know-how. Therefore, GI system can be an instrument which local community can exploit to create an endogenous sustainability pathway towards the objectives of the 2030 Agenda.¹ The strong link between the products and their geographical origin focus attention on the need to preserve the local natural resources and products are particularly motivated to adopt environmentally sustainable production methods.

A number of studies has shown that under appropriate conditions, geographical indications can contribute to development in rural area. The entitlement to use a GI generally lies with local producers, and the added value generated by the GI accrues to all such producers.² Meanwhile, GI can enhance local governance through collaborative decision-making and governance structures whereby SEMs enjoy greater opportunities to market their local products abroad. This raises the region's international profile and boosts tourism.³ The development of Agro-based tourism can be seen, as an example, in “Buon Ma Thuot Coffee Festival” have been organized in *Buon Ma Thout* (Viet Nam) with the aim to introduce the potential and strength of the Dak Lak Province, promote investment in coffee processing and agricultural products in the area, and attract domestic and foreign tourists to Dak Lak Province.⁴ It can be said that GI can foster social fairness and gender equality with the participation of male and female entrepreneurship and the preservation of local and natural heritage and traditions.

The protection of GI shows a positive impact in terms of volumes, prices and local development. The most important benefit for a registered GI is the enjoyment of legal protection to take legal measures against misleading and deceptive trading practices. Such legal protection extends as a way to encounter forestall registration of the indication as a trademark by a third party and to limit the risk of indication becoming generic term.⁵

Findings

Edible birds' nests are one of the well-known local products in Myeik Archipelago due to its rich nutrients. With the expansion of traditional cave-breeding method to in-house breeding, bird's nest production industry becomes the growing business sector in the area. At the moment, the Department of Forest is focal governing body concerning the harvesting of birds' nest. Under new Trademark Law, it recognizes the geographical indication as an indicative sign to protect any goods originating from a particular place where a given quality, reputation or other distinguishing characteristics of the goods is attached to its geographical origin. Any origin-linked goods including Myeik birds' nest can now be registered as collective marks and/or certification marks under the trademark system. Therefore, the stakeholders can enjoy legal rights as well as many benefits accrued from such GI protection system though there may be challenging in preparing processes.

¹ FAO, 2023, 'Using geographical indications to improve sustainability – Lessons learned from 15 years of FAO work on geographical indications', Rome. <https://doi.org/10.4060/cc3891en>

² WIPO, 'Geographical Indications: An Introduction', 2021, p- 15.

³ <https://www.wipo.int/sme/en/geographical-indications.html> (latest access on 23 Sep 2023)

⁴ <https://daklak.gov.vn/web/english/-/the-8th-buon-ma-thuot-coffee-festival-2023-bigger-scale-with-special-program> (Latest access on 25 Sep 2023)

⁵ WIPO, Ibid, p- 21.

Recommendation

Geographical indication is crucial in identifying products from a particular place known for its unique characteristics and quality. It cannot be denied that the influence of GI upon market expansion of a particular product lies with quality and authenticity attached to its geographical origin. Legislation, policy and regulatory framework should be in place to ensure that the protection system is adequately prepared and effectively provided to maintain the sustainability of GI system. At the national level, it is necessary to develop a comprehensive geographical indication scheme covering the rules and mechanisms underlying the functioning of a GI including strong administrative and enforcement mechanism. In Myanmar, the application for GI registration can be submitted by any local representative body in respective sector or by any responsible local government authority. It is important to disseminate knowledge about GI including benefits to the local community and then encouraging them to strengthen the cohesion of group of producers and other stakeholders for the accomplishment of GI registration processes for instance, identification of product's characteristics, traceability.

Conclusion

In conclusion, the protection of geographical indication can be applied to industrial, agricultural, natural and handicraft products. Upon registration, it can be a tool to protect the local producers/ manufacturers against unfair competition and prevent third party from using the registered GI to identify goods that are not originated from the designated region or goods that are not manufactured/produced in compliance with the prescribed standards. Due to its well-known quality and reputation of GI products, it can increase the commercial value of the products and foster national, regional and international trade. Creating higher income for producers and stakeholders of the value change, a registered GI can support the local and rural development with jobs creation and attract investment as well as tourism in somehow. To summarize, with the establishment of effective legal protection and enforcement, a strong institutional support and cohesion between the group of producers and other stakeholders are so demanding and crucial upon the development of a comprehensive GI protection scheme in Myanmar.

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