

THE LEGAL PROTECTION OF GEOGRAPHICAL INDICATIONS IN INDONESIA TOWARDS THE ASEAN ECONOMIC COMMUNITY

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Abstract

Geographical Indications is a regime of Intellectual Property Rights which is relatively new not only for Indonesia but also for international scope. Geographical Indications is giving legal protection for a group of producers who produce goods which have high qualities and is not intended for individual. Geographical Indications are relevant to goods production yielded by the ASEAN countries which tend to have a similarity that can potentially generate conflicts. Meanwhile, regulation of Geographical Indications in Indonesia has differences from other ASEAN countries such as Malaysia, Singapore, and Thailand. If this matter is not anticipated immediately the plan to establish the ASEAN Economic Community in 2015 will face obstacles. Through the understanding of legal protection of Geographical Indications in Indonesia, hopefully it will bring benefits to reach the ASEAN Economic Community.

Keywords: Geographical Indications, TRIPs Agreement, Trade Mark Law.

1. INTRODUCTION

Indonesia as a member of The World Trade Organization (WTO),¹ has a duty to implement the Agreement on Trade-Related Aspects of Intellectual Property Rights (hereinafter, TRIPs Agreement).² TRIPs Agreement is the international regulatory framework for protection of intellectual property.³ According to TRIPs Agreement, Geographical Indications (GIs) is an intellectual property right.⁴

GIs is a new term which was launched through the TRIPs Agreement in 1995. However, the use of geographical name is as a sign to identify the origin of goods that has been used in international trade practices.⁵ Since 1883, Paris Convention for the Protection of Industrial Property (hereinafter, Paris Convention) has regulated indications of source or appellations of origin to protect the use of geographical name for international commodity.⁶

Every member of WTO is obliged to obey TRIPs Agreement, but they do not have to implement it in its national law more extensively than it is required in TRIPs Agreement.⁷ In other word, The Government of Indonesia is free to determine its protection of law to GIs which refers to TRIPs Agreement with appropriate method according to its national legal system. This rule is known as protection with minimum standard or TRIPs-plus levels of protection.⁸ TRIPs Agreement in this matter

¹ Indonesia registered as a member of WTO on January 1, 1995. See, Member List of WTO at <http://www.wto.org>.

² See, Article II.2 of the Agreement Establishing the World Trade Organization.

³ Albrecht Conrad, *The Protection of Geographical Indications in the TRIPs Agreement*, The Trademark Reporter, Vol. 86, No. 11, January-February 1996.

⁴ See, Part II of TRIPs Agreement.

⁵ Michael Blakeney, *Geographical Indications and Trade*, International Trade Law & Regulation, Vol. 6, No. 2, 2000.

⁶ See, Article 1.2 of Paris Convention.

⁷ See, Article 1.1 of TRIPs Agreement.

⁸ The United Nations Conference on Trade and Development and the International Centre for Trade and Sustainable Development, *Resource Book on TRIPs and Development* (New York: Cambridge University Press, 2005), p. 17.

has an opportunity to generate diversity than uniformity of regulatory for GIs,⁹ because every member state shall make a system of protection for GIs which is appropriate for its national interest. Besides, its regulation in TRIPs Agreement has not been yet clearly stated not only for the system of notification and registration of GIs but also for the regulation on additional protection for wines and spirits which still becomes a controversy.¹⁰

This situation is relevant to the regulation of GIs in Indonesia and ASEAN (the Association of South East Asia Nations) which is planning to establish ASEAN Economic Community in 2015.¹¹ This paper will elaborate the legal protection of GIs in Indonesia which regulates the statute law as the implementation of TRIPs Agreement.

2. REGULATION OF GIS IN INDONESIA: BRIEF HISTORY

TRIPs Agreement entered into force on January 1, 1995. Indonesia as a developing country is entitled to delay until January 1, 2000.¹² In 1997 two years after TRIPs Agreement entered into force Government of Indonesia attempted to make regulation of GIs by amendment of Trade Mark (hereinafter, TM) Law Number 19 Year 1992 with TM Law Number 14 Year 1997. Regulation of Geographical Indications adopted into TM Law together with Indications of Source. In fact, Government of Indonesia deeming of GIs similar to TM. Whereas, according to legal doctrine, GIs is a branch of IPRs that has special characteristics (*sui generis*).¹³

Regulation of GIs in TM Law 14 / 1997 is very simple. Government of Indonesia realized that compiling the regulation of IPRs nationally has very limited time.¹⁴ Therefore, GIs in TM Law 14/1997 has just regulated in three articles. That is articles of 79A, 79B, and 79C. The implementation of it should refer to government regulation (hereinafter, GR).¹⁵ Unfortunately, TM Law 14/1997 was changed, but GR has never been published.¹⁶

In 2001, TM Law 14/1997 was amended by TM Law 15/2001. The substance of GIs, however, in TM Law 15/2001 is still the same as TM Law 14/1997. The number of its articles remains three articles; the change is only in numbering the articles. The articles are 56, 57, and 58. Formulation of sentences in those articles is the same to TM Law 14/1997. In 2007, precisely on September 4, 2007, The Government of Indonesia promulgated Government Regulation Number 51 Year 2007 regarding Geographical Indications.

The publishing of GR 51/2007 has generated impression among foreign experts impressing that Indonesia has a special regulation (*lex specialis*) to protect GIs.¹⁷ Though, protection of GIs regulated together with Indications of Source and Trade Mark in TM Law 15/2001. According to legal system in Indonesia, legal standing of TM Law 15/2001 in the legal structure is higher than GR 51/2007. Whereas, GR 51/2007 is just as an execution regulation of TM 15/2001.

3. DEFINITION OF GIS

According to Article 56.1 of TM Law 15/2001: "Geographical Indications shall be protected as a sign which indicates the place of origin of goods, which due to its geographical environment factors, including

⁹ Tunisia L. Staten, *Geographical Indications Protection under the TRIPs Agreement: Uniformity not Extension*, Journal of the Patent and Trademark Office Society, Vol. 87, No. 221, March, 2005.

¹⁰ Felix Addor, *The Way Ahead What Future for Geographical Indications? Extension of the more Effective Protection of Article 23 of the TRIPs Agreement to All Products* (Worldwide Symposium on Geographical Indications, organized by WIPO and the Italian Ministry of Productive Activities, Parma, Italy, 27-29 June 2005).

¹¹ Information on ASEAN available at www.asean.org.

¹² See, Article 65 of TRIPs Agreement.

¹³ Bernard O'Connor, *Sui Generis Protection of Geographical Indications*, Drake Journal of Agricultural Law, Vol. 9, 2004; Wahyu Sasongko, *Indikasi Geografis: Rezim HKI yang Bersifat Sui Generis*, Jurnal Media Hukum, Universitas Muhammadiyah Yogyakarta, Vol. 19, No. 1, June 2012.

¹⁴ Minister of Justice Spoke at Parliament of Republic of Indonesia gave official explanation concerning Bill of Trade Mark Law Amendment, Number 19 Year 1992 on December 12, 1996.

¹⁵ See, Article 79A.8 of TM Law 14/1997

¹⁶ Wahyu Sasongko, *Indikasi Geografis: Studi tentang Kesiapan Indonesia Memberikan Perlindungan Hukum terhadap Produk Nasional* (Bandar Lampung: Universitas Lampung, 2012), p. 279.

¹⁷ See, Daniele Giovannucci *et al.*, *Guide to Geographical Indications: Linking Products and Their Origins* (Geneva: International Trade Centre, 2009), p. 124.

the factor of the nature, the people or the combination of the two factors, gives a specific characteristics and quality on the goods produced therein.”¹⁸

Definition of GIs above is expressly mentioning certain elements of GIs. *Firstly*, GIs is a sign used to identify the origin place of a good. This element requires the use of geographical name directly as a sign for the identity of goods, for example, Kopi Kintamani (Coffee from Kintamani), Madu Sumbawa (Honey from Sumbawa), Ubi Cilembu (Cassava from Cilembu). The meaning of a sign in GR 51/2007, may in the name of place or area or certain sign which shows the origin of place where the goods are produced.¹⁹ *Secondly*, goods of GIs ought to have quality and characteristic influenced by a factor of geographical environment which is consisting of natural factor, human factor, or the combination of those two factors. This element is requiring that goods of GIs have to use raw materials or production process which related to the factor of environment of nature which becomes a quality and characteristic of goods. If the factor of nature environment is not there, it will be improper to call goods of GIs.

Definition of GIs according to TM Law 15/2001 is different from the definition of GIs of TRIPs Agreement. Article 22.1 TRIPs Agreement: “Geographical indications are, for the purposes of this Agreement, indications 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.” The elements of GIs according to TRIPs Agreement do not requiring of the factor of geographical environment. Definition of GIs in TRIPs Agreement only mentions as alternatively of the factors of quality, reputation or other characteristics. Besides, TRIPs Agreement allows us to use geographical name directly or the other name which indirectly mentioned geographical name. For example, Salak Pondoh produced in Sleman, Yogyakarta, does not use geographical name.

Definition of GIs in TM Law 15/2001 is more similar to the definition of Appellations of Origin than definition GIs in TRIPs Agreement. Definition of Appellations of Origin according to Article 2.1 of Lisbon Agreement 1958: “In this Agreement, appellations of origin means the geographical name of a country, region, or locality, which serves to designate a product originating therein, the quality and characteristics of which are due exclusively or essentially to the geographical environment, including natural and human factors.” Meanwhile, Indonesia is not a member of Lisbon Agreement because Indonesia has not ratified it yet. Not many states ratified Lisbon Agreement,²⁰ because registration requirements of appellations of origin are very difficult.²¹

The elements of GIs in TM Law 15/2001 then mentioned in GR 51/2007. Those elements become standard assessment for goods to be registered as GIs. Therefore, the elements have to be elaborated in the book of requirement. For example, description of geographical environment and also natural factor and human factor as unity in influencing the characteristic or quality of yielded goods.²²

The requirement is only appropriate for goods of agricultural products, but not all goods can fulfill it. As a result, handicrafts such as, kain batik (batik cloth), kain tenun (weaved cloth), kain tapis (tapis cloth) are difficult to be registered as goods of GIs. Pursuant to data of goods which enlist as GIs at Directorate General of Intellectual Property Rights (DGIP), until September 2013 there are 23 of goods, only one good which is not a product of agriculture; Mebel Ukir Jepara (Jepara Carved Furniture),²³ while the others are in the forms of agricultural products.

¹⁸ TM Law 15/2001 available at <http://www.ecap-project.org>.

¹⁹ See, Article 2.1 of GR 51/2007.

²⁰ See, <http://www.wipo.org>.

²¹ Conrad, *supra* note 3 at 26.

²² See, Article 6.3 (d) of GR 51/2007.

²³ See, <http://www.dgip.com>.

Table 1 : Registered of Geographical Indications

Products	Registered Numbers
1. Kopi Arabika Kintamani Bali	ID G 000000001 (5 December 2008)
2. Champagne	ID G 000000002 (14 November 2009)
3. Mebel Ukir Jepara	ID G 000000003 (28 April 2010)
4. Lada Putih Muntok	ID G 000000004 (28 April 2010)
5. Kopi Arabika Gayo	ID G 000000005 (28 April 2010)
6. Pisco	ID G 000000006 (1 July 2010)
7. Tembakau Hutan Sumedang	ID G 000000007 (28 April 2011)
8. Tembakau Mole Sumedang	ID G 000000008 (28 April 2011)
9. Parnigiano Reggiano	ID G 000000009 (21 October 2011)
10. Susu Kuda Sumbawa	ID G 000000010 (15 December 2011)
11. Kangkung Lombok	ID G 000000011 (15 December 2011)
12. Madu Sumbawa	ID G 000000012 (15 December 2011)
13. Beras Adan Krayan	ID G 000000013 (6 January 2012)
14. Kopi Arabika Flores Bajawa	ID G 000000014 (28 March 2012)
15. Purwaceng Dieng	ID G 000000015 (20 July 2012)
16. Carica Dieng	ID G 000000016 (20 July 2012)
17. Vanili Kepulauan Alor	ID G 000000017 (19 October 2012)
18. Kopi Arabika Kalosi Engrekang	ID G 000000018 (15 February 2013)
19. Ubi Cilembu Sumedang	ID G 000000019 (24 April 2013)
20. Salak Pondoh Sleman Jogja	ID G 000000020 (21 June 2013)
21. Minyak Nilam Aceh	ID G 000000021 (10 September 2013)
22. Kopi Arabika Java Preanger	ID G 000000022 (10 September 2013)
23. Kopi Arabika Java Ijen-Raung	ID G 000000023 (10 September 2013)

Source: Modified from DGIP, available at <http://www.dgip.com>.

The data above indicate that there are three products of GIs originally from foreign country. There are 20 products of GIs domestic enlist, consist of agricultural product in a broad meaning and one product which is not a product of agriculture, is Mebel Ukir (Carved Furniture) from Jepara. However, its raw material is in the form of teak representing agricultural product, but the teak comes from the area of Jepara which still needs further study.

So, we can understand that definition of GIs in TM Law 15/2001 does not refer to TRIPs Agreement. But, it is more similar to the definition of appellations origin in Lisbon Agreement. Its definition is different from the definition of GIs which is regulated by the ASEAN countries like Malaysia, Singapore, and Thailand. Those countries adopted the definition of GIs from TRIPs Agreement.

Table 2 : Some Definitions of GIs as Comparative Study

TRIPs Agreement	Geographical indications are, for the purposes of this Agreement, indications 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.
Indonesia	Geographical indications shall be protected as a sign which indicates the place of origin of a good, which due to its geographical environment factors, including the factor of the nature, human factor or combination of both factors, gives a specific characteristic and quality on a good produced therein.
Malaysia	Geographical indication means an indication which identifies any goods as originating in a country or territory, or a region or locality in that country or territory, where a given quality, reputation or other characteristic of the goods is essentially attributable to their geographical origin.
Singapore	Geographical indication means any indication used in trade to identify goods as originating from a place, provided that: (a) the place is qualifying country or region or locality in the qualifying country; and (b) a given quality, reputation or other characteristic of the goods is essentially attributable to that place.
Thailand	Geographical indication means name, symbol or any other thing which is used for calling or representing a geographical origin and can identify the goods originating from such geographical origin where the quality, reputation or other characteristic of the goods is attributable to the geographical origin.

Source: TRIPs Agreement, TM Law 15/2001 and Act of GIs from Malaysia, Singapore, and Thailand.

According to the definitions above unless Indonesia GIs is stated as an indications to identify goods. Indonesia, the only country which mentions geographical factor, natural factor, and human factor. Only Indonesia is using formulation of sentence cumulatively for the element of quality and characteristic. While, other definitions use a sentence formula alternatively.

4. PROTECTION OF GIs BY REGISTRATION

According to Article 56.2 of TM Law 15/2000, GIs shall be protected after registration. Process and procedure of registration regulated in detail in GR 51/2007. Registration will be done after all of requirements are fulfilled. Goods will be registered such as agricultural products, foodstuffs, handicrafts, or any other goods.²⁴ The term of agriculture shall be understood in the broadest meaning, shall also include forestry, plantation, breeding, fishery, and maritime. Whereas, the meaning of other goods shall include among others raw material and/or results of process from agricultural products as well as from mining products. However, as we have been told, that goods of non-agriculture products are difficult to fulfill the elements of definition of GIs.

Concerning a sign to be registered have to fulfill certain requirements. According to Section 3 GR 51 / 2007, there are four requirements for a sign to be registered. A GIs shall not be registered if the sign which is being applied for registration: (a) contradicts with laws and regulations, religious moral values, ethics or public order; (b) misleads or deceives the public as to the characteristics, natures, quality, place of origin, production process of the good and/or its use; (c) constitutes the name of local geography that has been used as the name of a plant variety, and used for the same plant variety; or (d) has become generic.

According to that article, GIs shall not be registered if the sign has become generic. An indication which is generic is an indication of a good which has become a public domain because it has frequently been used in daily language, and is therefore not protected. For example: Tahu (bean curd), Tempe (food made from fermented soybeans), Batik, Jeruk Bali (Bali orange), Pisang Ambon (Ambon banana), and other.²⁵

Referring to that example, Jeruk Bali (Bali orange) shall not be registered. However, fruit that is similar to, in Malaysia enabled shall be registered so-called Buah Limau Bali Sungai Gedung registered on 12 February 2009, enlisting as GI No. 08-00003 at Intellectual Property Corporation of Malaysia.²⁶ On the contrary, in Indonesia Jeruk Bali cannot be registered because Jeruk Bali has become generic. Similar to Indonesia, Thailand also regulate of prohibition for such indication has become generic. According to Article 5.1 of Thailand Act on Protection of Geographical Indications B.E. 2546 (2003): "A geographical indication which may be applied to register for any goods must not be composed of any of the following prohibited features being a generic name of the goods that are to use such geographical indication."²⁷

Next requirement is Book of Requirement which means a document containing information on the description concerning the quality and specific characteristics of a good which can be used to differentiate one good from other goods of the same category. Some information about the good shall be mentioned in the book of requirement, such as:

- a. description of the specific characteristics and quality which differentiate the particular good from other goods of the same category, and explain the relation where the good is produced;
- b. description of the geographical environment and the natural and human factors which as a unity give effect to the quality or characteristics of the good produced;
- c. description of the boundaries of region and/or maps of the area that is covered by the Geographical Indication;
- d. description of the history and tradition in relation to the use of Geographical Indication to designate the good in that area including a description of the recognition by the relevant public of the Geographical Indication;
- e. description of the production process, processing, and process of making which is used to allow any producer within the region to produce the relevant good;
- f. description of the method used to examine the quality of good produced.²⁸

²⁴ See, Article 2.2 of GR 51/2007.

²⁵ See, Article 3 (d) of GR 51/2007 and its Explanation.

²⁶ Available at <http://www.myopo.gov.my>.

²⁷ GIs Act of Thailand available at <http://www.ecap-project.org>.

²⁸ See, Article 6.3 of GR 51/2007.

It is not easy to fulfill those requirements, except the expert who is capable of doing it. The ordinary peoples will find difficulties to explain and describe comprehensively which is required in the book of requirement.

After all of the requirements are fulfilled by applicant, next phase is administrative examination within a period of 14 days from the date of the application received. Applicant admits to complete the requirement if there is insufficiency.²⁹ Afterwards, the GIs expert team shall conduct a substantive examination on the Application within a period of two years at the latest from the date of the application received.³⁰ Process and procedure registration of GIs seem complicated and need the long time because applicant admit to objection, rebuttal, and appeal petition against the decision of the GIs Expert Team. Meanwhile, Singapore does not require registration of GIs.³¹

Products of GIs which have been registered in the General Register of GIs at DGIP shall be protected as far as the specific characteristics and qualities which have been the basis of the grant of the protection still exist.³²

5. POTENTIALLY CONFLICT

Different regulation of GIs between ASEAN Countries potentially can cause conflicts. At least, it will generate unfair competitions. A few years ago, there was a conflict between Indonesia and Malaysia. Although, it was not the conflict of GIs, peoples of Indonesia were angry with the government of Malaysia. They demonstrated to Embassy of Malaysia in Jakarta because there were artistic products and Indonesian foods which were claimed by Malaysia as the owner, such as song of Terang Bulan, song of Rasa Sayange, song of Injit-Injit Semut, traditional dance art of Reog Ponorogo from East Java, Pendet from Bali, Batik Tumbuk Lada and Batik Parang, and Rendang which is traditional food from West Sumatera.³³

Both of the government immediately solved the conflict. In the future, conflicts on GIs products which are produced by ASEAN countries will potentially generate a problem.³⁴ The ASEAN communities have to realize that interaction of social and cultural in the region of ASEAN have been going for years. Even, Indonesia and Malaysia expressed as a family. It is very possible that there are the same products which are produced by nations of ASEAN. If ASEAN communities have consciousness and common interests of GIs protection,³⁵ hence, it will be easier for them to solve the conflict. According to Bondan Indonesian expert of culinary that we do not need to conflict just because there is similarity of cooking.

Referring to that matter, ASEAN Economic Ministers' meeting in August 2013 in Bandar Seri Begawan, Brunei Darussalam decided four pillars as key achievements. One of them is Pillar II (competitive economic region): launch of publications on competition policy and law in ASEAN; launch of website to facilitate the flow of information on the region's IP systems, comparative IP-related data and web links to ASEAN IP offices.³⁵

6. CONCLUSION

Qualified products which are produced or originally from a certain area shall have a legal protection by giving a sign or name for identity. Legal protection is aiming to protect the goods against counterfeit goods as well as to facilitate consumers in searching and obtaining goods. Products whose quality protected will have a certain excellence.³⁶

²⁹ See, Article 7 of GR 51/2007.

³⁰ See, Article 8 of GR 51/2007.

³¹ See, Geographical Indications Act the 44 of 1998. O'Connor, supra note 15, at 365.

³² See, Article 4 of GR 51/2007.

³³ See, Kompas newspaper, *Perlindungan Budaya Lemah*, August 31, 2009, p. 1.

³⁴ See, Lee Wei Lian, *Singapore already ahead in "food fight" with Malaysia*, at <http://www.themalaysianinsider.com/index.php/malaysia/38539-singapore-already-ahead-in-food-fight-with-malaysia>.

³⁵ Min-Chuan Wang, *the Asia Consciousness and Interests in Geographical Indications*, the Trademark Reporter No. 96, 2006.

³⁶ According to Babcock and Clemens: "Numerous examples demonstrate how protection increased has led to increase profit for producers in Europe." See, Bruce A. Babcock and Roxanne Clemens, *Geographical Indications and Property Rights: Protecting Value-Added Agricultural Products* (Midwest Agribusiness Trade Research and Information Center (MATRIC), Iowa State University), MATRIC Briefing Paper 04-MBP7, 2004, p. 13.

Indonesia' products are very heterogeneous and have a high quality. Unfortunately, they are having difficulties to be registered as GIs because collided with requirement of registration. Therefore, regulation of GIs in Indonesia needs to be revised to adjust to national interests. GIs essentially is the regime of IPRs which has a special characters or *sui generis*. Regulation of GIs, should be separated from TM Law to facilitate the regulation of GIs products which are heterogeneous.

Legal protection of IPRs is following the trade. The faster commercial transaction moves, the more urgent the legal protection to consumer and product legalized. Learning from the conflicts of GIs that happened internationally,³⁷ we shall think of GIs regulation between ASEAN countries.³⁸ Harmonization of GIs regulation needs to be done to anticipate and prevent the conflicts. It will be more relevant to the plan of establishing the ASEAN Economic Community.

³⁷ Justin Hughes, *Champagne, Feta, and Bourbon: the Spirited Debate about Geographical Indications*, *Hastings Law Journal*, Vol. 85, No. 299, 2006.

³⁸ Malobika Banerji, *Geographical Indications: Which Way Should ASEAN Go?* Boston College Intellectual Property & Technology Forum, 2012, 1.