
Research Article**Legal Protection on the Right of Geographical Indication for Micro and Small Business in Indonesia****Chandra Eka Yustisia, Annisya Dwi Soraya, Pujiyono**Universitas Sebelas Maret, Indonesia

ABSTRACT: Geographical indication is a part of intellectual property rights. Indonesia has the model of legal protection on it. But many unfair competitions that come from other country, especially it is called passing of through international market. Actually there is several international convention provisions that regulate Geographical Indication covering international registration system. The methods of this research is normative, that based on doctrinal legal research. The research result shows that Indonesian law does not provide preventive protection for the citizens in terms of product registration even though product registration is the main requirement for a product to be given exclusive right when it is exported to another country so that passing off as a form of unfair competition can be avoided. Therefore, the government's role in improving citizens' awareness on the importance of exclusive right should be improved. Moreover, the government should ease the product registration access so that the product is able to compete in international market and should expand bilateral as well as multilateral cooperation.

Key words: Geographical Indication, Intellectual Property, Unfair Competition

INTRODUCTION

Aristotle states that a good state is a state having legal sovereignty governed by constitution. There are three concepts of constitutional government that are government should be carried out for the public interest; government should be carried out based on laws governed by general provisions, not the laws that set aside convention and constitution; and government carried out based on citizens' will, not a government carried out as a basis of despotic government pressure (Maria Alfons, 2010:97).

The government should realize all legal provisions beneficial for the citizens. Those legal provisions should be based on the general provisions applied at that time without considering private interest which is beyond the government's authority. The government's role is to protect Intellectual Property Rights, in this case Geographical Indication (GI). Geographical Indication protection is concerned with export trade. This export orientation is based on the idea that commodity having good quality is more wanted by citizens living abroad who have high purchasing power. On the other hand, in a developing country; the consumers in Indonesia as a developing country do not really care on the quality of a commodity. The price difference tends to influence the way the citizens select a certain product. This happens because of the purchasing power difference. In case there are the same products with different price, consumers tend to select those with lower price without considering the quality; especially for products containing Geographical Indication element since if the Geographical Indication is registered, the quality is guaranteed. The demand of Geographical Indication protection in the law system of Intellectual Property Rights is an attempt to protect local and domestic products. A certain brand used by business people to announce their products is usually

related to the name of a place or geographical location showing the origin of the products. However, in Indonesia, there is no instrument regulating international Geographical Indication as the Intellectual Property Rights component. As a consequence, many local and domestic products are commercially exploited by other parties without being protected by the government.

Geographical Indication registration provides protection consequence. However, the protection provided is territorial in a place where the product is registered. In other countries where Geographical Indication is not registered, there will be no legal protection. This registration aims to prevent other parties having no right on certain product to use exclusive right of the one who Intellectual Property Rights is not registered yet so that the other parties get benefit from violating Geographical Indication owned by foreigner. The injustice for the Intellectual Property Rights owner is unrecognized exclusive right. Moreover, the purpose of law to maintain order, legal certainty, and justice will not be achieved.

The piracy of Intellectual Property Rights is rapidly developed since 1999 as a result of technology advancement. The broad existence of illegal products related with Intellectual Property Rights becomes a serious issue for the country, producers, Intellectual Property Rights product, and the credibility of the country. In addition, this phenomenon violates fair trading principles stated on WTO and TRIPs world trade regulations (Linsey, Eddy Damian, et al., 2005:307). The main problem to support Intellectual Property Rights product development especially Geographical Indication is the weak law enforcement in Indonesia. This happens since the Geographical Indication law enforcement in Indonesia

attempting to prevent Geographical Indication violation is still weak. It is also difficult to monitor rapid replication due to technology advancement, low production cost, and pirated Geographical Indication product. Pirated Geographical Indication product is sold without paying taxes and without involving the creator, investor, designer, supporting artist/musician, production house, and promotion cost. Moreover, it is also caused by the low quality of the product and pirated Geographical Indication product which is not optimally monitored. One form of the violation is passing off. Passing off indicates unfair competition done by another party that disadvantages the first party. Passing off is not regulated specially in the legislation so that it is categorized into unfair competition that violates the law.

One form of passing off ever being claimed by other countries towards Geographical Indication product of Indonesia is *Kopi Toraja* and *Kopi Gayo*. The name of *Kopi Toraja* accompanied with *Rumah Toraja* picture is used by other countries as their brand, one of the country is United States of America. Since there is no special regulation regulating Geographical Indication in Indonesia, the symbol of Toraja cannot be claimed as Geographical Indication originated from Indonesia. Consequently, the ownership of Toarco Toraja brand is owned by Key Coffee, Inc. Corporation Japan. Japanese claim the name of the product since they believe that they are the ones who developed *Kopi Toraja* so that it is well-known in international coffee trade. Besides, *Kopi Gayo* originated from North Sumatra exported by CV Arvis Sanada cannot be sold in Europe with the name of *Gayo* in its packaging even though the coffee bean is originated from Gayo, Aceh. However, the coffee is claimed by Netherland as Europe trademarks. They always prevent and question the use of word *Gayo* in Arabica Sumatra Gayo exported by CV Arvis Sanada to Netherland (Adrian Sutedi, 2009:161). Concerning on that case, the government should protect Geographical Indication products when the products are marketed in international market. Based on the above explanation, the researcher is interested to write about Indonesia Legal protection Model towards Geographical Indication Goods and Services of Micro and small Enterprises to Avoid Passing Off as an Unfair Competition Practice.

RESEARCH METHOD

Research method is the most important part of a research since research method is a guideline for a research. With the help of research method, a research along with the way it is carried out is easier to be done and understood. This research uses normative and doctrinal legal research. As stated by Peter Mahmud Marzuki, the researcher uses normative and doctrinal legal research in conducting this research. Normative research method is scientific research procedures to find facts based on legal scholarship from its normative side (Peter Mahmud Marzuki, 2011:33). This research is related to the characteristic of prescriptive or applied research. The prescriptive characteristic of legal scholarship is substantial in jurisprudence. Jurisprudence is characterized by prescriptive

and applied knowledge as it concerns with purposes of law, justice, legal validity, legal concepts, and legal norms. As an applied knowledge, it has standard procedures and regulations to implement the law (Peter Mahmud Marzuki, 2011:35). In this research, the researcher employed primary sources in law in the form of legislation, legal records, and legal publications including textbook, legal dictionaries, legal journals, and comments on court decisions. Secondary sources in law was also used as the graduates' and legal advisers' scientific papers, and the results of legal journals from which the conclusion was drawn by analyzing the data to answer the research problems.

DISCUSSION

Nowadays, Indonesia cooperates with Europe through European Union-Indonesia Trade Cooperation Facility (TCF). TCF is a four-Of long project started in 2013 to strengthen the government agency capacity in improving trade and investment in Indonesia and in contributing on sustainable long-term economic growth (<http://www.euind-tcf.com/id/about-tcf/> downloaded on April, 26th 2017 at 10 p.m.). TCF focuses on Intellectual Property Rights which is to develop local Intellectual Property Rights and support effective law enforcement in a border area of a country. The main focus of TCF project on Geographical Indication is important for remote areas economic growth. It creates and supports Geographical Indication and shows how they can be well protected in national or international market. This is as a result of weak Geographical Indication in Indonesia (e.g. the first Geographical Indication registration of *Kopi Gayo* in European Union).

Based on legal protection theory by Pjillipus M. Hadjon, legal protection for the citizens is the government preventive and repressive act (Pjillipus M. Hadjon, 1987:2). Preventive legal protection aims to prevent dispute and to direct government in the process of careful decision making based on discretion. Meanwhile, repressive legal protection aims to prevent dispute along with its management in the judiciary (Maria Alfons, 2010:97). Thus, preventive legal protection can be used before making decision so that it helps the government in carefully making decision. Preventive protection protects one's right from the possibility of being violated by others or third party. Based on freedom of action, preventive legal protection has a significant role for the government. On the other hand, repressive legal protection aims to solve dispute after violation happens. Competent judicial having absolute or relative authority are the ones responsible to solve the dispute by using both litigation and non-litigation.

Registration access as one of Geographical Indication protections is difficult to be done, especially for international registration. National law does not regulate the process and procedures to export Geographical Indication products. Registration access benefits the citizens to develop their micro and small enterprises and to market their products in international market. The Act on Trademark and Geographical

Indication has not regulated yet Geographical Indication registration from Indonesia to other countries. That regulation only regulates the trademark. Based on Article 54 on trademark Law and procedures of international Geographical Indication registration: The application proposed by an applicant living outside the Unitary State of Republic Indonesia shall be proposed through his/her attorney in Indonesia

The application proposed in Verse (1) can be registered if that Geographical Indication has been recognized by his/her government or has been registered in accordance with his/her country's provisions The Act of Trademark and Geographical Indication does not regulate international Geographical Indication registration. It only regulates trademark registration. The case on *Kopi Toraja* and *Kopi Gayo* which are claimed by another country is a result of the citizens' low awareness to register Geographical Indication especially for local registration. Besides the importance on local Geographical Indication registration, international regulation is also crucial since there are many products having Geographical Indication element which have not been registered yet. This phenomenon causes passing off.

Emphasized by Wahyu Sasongko, "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(Wahyu Sasongko, a) 2013: 62)."

As a form of Indonesia participation to protect Geographical Indication; Indonesia has ratified some international Geographical Indication provisions as follows:

- 1) Paris Convention GI can be found in Article 1 (2) of the Paris Convention for the Protection of Industrial Property 1883. It is stated that "The Protection of Industrial Property has its object Patents, Utility Models, Industrial Designs, Trademarks, Servicesmarks, Tradenames, Indication of Source of Appellation of Origin, and the repression of Unfair Competition." GI as stated in Paris Convention regulation is a part of Intellectual Property Rights. GI concept in this convention has been regulated with the name *Indication of Source dan Appellation of Origin*. However, it only describes the protection towards originated production indication which may not enter a certain country if the product is not really originated from that country (Article 10).
- 2) Madrid Agreement Another international agreement that provides protection towards GI is *Madrid Agreement* or *Madrid Agreement Concerning the International Registration of Marks* signed in 1981. In Article 1, it is stated that: "All goods bearings a false or deceptive by which one of the countries to which this agreement

applies is directly indicated as being the country or place of origin shall be seized in importation into any of the said countries."

This regulation actually provides protection provision towards information which misleads the goods. However, this agreement does not specially regulate GI concept. It only regulates the obligation to seize every GI product which is misled. TRIPs TRIPs agreement provide protection towards GI in two levels. They are: Article 22 (2) points a and b obliges the member countries to prevent ill-used GI that can bring misconception on the people. Article 23 (1), (2), (3), and (4) state the additional protection for GI. Lisbon Agreement

Lisbon agreement is not yet ratified by Indonesia. This agreement states about the protection towards Appellation of Origin and international registration system. Lisbon agreement aims to answer the need of international law about the protection of GI as well as to facilitate it like by giving Appellation of Origin outside the GI origin country through single registration system in international bureau WIPO. The main purpose of this registration is to be the basis or the reason in making the international registration system. It is widely known that protection towards GI in several countries regarded as a complicated issued due to the difference of law concept among countries including the difference of national custom law in a certain framework both in historical and economic perspectives. This agreement has given a complete and systematical regulation towards the international protection of GI. There are several special regulations about GI in this agreement:

In terms of definition, there is a new concept of GI as perfection for the previous one in article 2 verse 1 and 2:

Geographical name of a country, region, or local indicates that a certain product comes from there and has exclusive and essential quality and character due to its geographical factor – both environmental and man factor. "Origin country" is a country located in a region in which the appellation of origin is given to the product.

"Hence, member countries would have to ensure that kind of usurpation or imitation including use of qualifiers such as 'kind' 'type' 'style' etc. as referred to in this article is prohibited under their laws. Further, use of an appellation of origin a dissimilar goods may also be considered an usurpation of the appellation" (Varon Sukla, 2016 : 2)

Based on judicial interpretation commonly used in Appellation of Origin, the most affecting factor to determine whether or not a place regarded as Appellation of Origin is the environmental factor. This factor includes the characteristics of the land, climate, or the unique combination of them that makes a product growing or coming from the place has special quality compared to products in the same classification coming from different environment.

There are two scopes in this agreement, usurpation/imitation and unfair competition. Usurpation/imitation is regulated in article 3: "Protection shall be ensured against any usurpation

or imitation, even if the true origin of the product is indicated or if the appellation is used in translated form or accompanied by terms such as “kind,” “type,” “make,” “imitation”, or the like.” Meanwhile, unfair competition is regulated in article 4 of Lisbon Agreement: confirms the protection that may already exist in a member country by virtue of other international instrument, national law or court decision”. This agreement is added in Records Lisbon Conference 1958, paragraph 816, “apart from usurpation or counterfeiting, there are a whole range of acts that may qualify as acts unfair competition and are to be prohibited.

The Lisbon Agreement allows, but does not obligate, its Members to adopt or continue to use: (1) the "first in time, first in right" approach, as promoted, inter alia, by INTA1 23 and the International Association for the Protection of Intellectual Property (AIPPI)12 4; (2) a coexistence approach (that is, a GI and trademark with similar legal effect1 25); or (3) a GI superiority approach. Members may do so with or without a good faith requirement concerning the prior trademark. Some members actually use more than one approach (Daniel J. Gervais,2010: 97)

This convention facilitates the protection of GI through international registration system. Based on article 5 of Lisbon Agreement, appellation of origin international registration is done by the corresponding country, rather certain individual or group proposed to WIPO in Geneva. WIPO then shall announce that registration to the member countries. Each country has right to object the registration of appellation of origin in their country, and the objection has to be stated no more than the given period of time. Besides giving an ease in registering the appellation of origin, Lisbon Agreement grants protection towards appellation of origin in terms of the use of appellation of origin by countries excluded in the agreement.

Article 6 of Lisbon Agreement has an obligation for the member countries that every product under the protection of this agreement cannot be generic although it has had reputation by which consumers try to generalize similar products as that product. Besides, in order to ease the process of registration,WIPO has provided database system named “Lisbon Express” that can be used to find the data of the appellation of origin/GI product that has been registered in Lisbon Agreement, the products that will be registered, types of product, GI product copyright owner, objection, and other kinds of data.

Unfortunately, however, only few countries ratify this agreement. Indonesia is encouraged to give more protection especially in terms of GI, knowing that Indonesia is rich of natural resources by which high quality products with potential to be sold in international market can be made. Indonesia is also encouraged to expand both the bilateral and multilateral agreement; if needed Indonesia also has to sign the Lisbon Agreement, so registering the GI to the overseas will be easier through the Stand-alone Agreement – which uses single registration system. In other words, both Indonesia and other countries can recognize each other GI. Since

Indonesia is the member of ASEAN, it is needed for Indonesia to renew the system of regulation in terms of making agreement among the members of ASEAN so it can be beneficial for all members. Such agreement can refer to the single registration system, that registration is only focused in one registration bureau, used in Lisbon Agreement that once the GI product is registered through several signed requirements checking, the protection of the GI will be obliged by all the members.

The aforementioned protection is called preventive protection that requires a very strict regulation in order to realize a real protection in terms of registration. Since registration is the main requirement for protection, the registering practice has to be made easy. Registration should not only be local, instead it should be international as well. Besides the government has to make such regulation, socialization about the importance of intellectual property protection is also needed. Such socialization will raise the motivation of the enterprise especially the regional micro and small enterprises to improve the quality of the local product and to involve in either local or international market.

For repressive protection towards GI againsts unfair competition, the Indonesian government entrusts the law court for litigation case, and for non-litigation case, the government establishes National Consumer Protection Agency, Non-governmental Consumer Protection Agency, dan Consumer Dispute Redressal Commission. In order to give more protection to the consumers, National Consumer Protection Agency is established. One of the tasks of National Consumer Protection Agency is to give recommendation and suggestion to the government in making policy in terms of national protection. The task of Non-governmental Consumer Protection Agency is to spread information for the people in order to raise their awareness about the importance of consumer protection. Meanwhile, Consumer Dispute Redressal Commission has a task to mediate, consolidate, or arbitrate among consumers with dispute. They also give consultation about consumer protection. Consumer protection deals with the protection of their rights from fake or imitation product.

Consumer protection has a relation with legal protection theory. According to Stjipto Rahardjo, legal protection is an act to facilitate human rights that is damaged by the others, and such protection is given to the people, so they can freely express their own rights – as long as it is lawful (Satjipto Rahardjo, 2000 :54). Legal protection theory is a theory focuses on the people. People here refer to them who are regarded as weak both economically and judicially. Legal protection theory itself is a theory that studies and analyzes the form and the purpose of protection, the subject of protection and the object of protection given by the law to the subject (H. Salim dan Erlies Nurbani, 2014 : 263). Law is made to balance what is unbalanced by eradicating any form of injustice, so the people can live in order. In the Act of Trademark and GI itself, legal protection is already stated in article 101 by giving

punishment for any violation made including unfair competition. However, in order to get such protection by doing registration, people still find it so hard to do. It is implied that the law does not yet focus on the public interest.

According to John Rawls, justice with population dimension has to hold on two principles of justice. First, it has to give the same right and chance to express the basic freedom for every people with no exception. Second, it has to be able to reconstruct social and economic gap, so it can give beneficial feedback for the people (John Rawls, 2016 : 72). Therefore, the role of the government is so important to give the same right and chance for their people who live in remote areas to explore the potential GI they have. Physical and non-physical supports are very essential to improve their potential; hence, there will be no more economic gap among regions in Indonesia.

CONCLUSION

Legal protection model in Indonesia to protect GI for the micro and small enterprises to be exported overseas does not yet protect in a whole. Repressive protection in terms of solving dispute is done by the official law boards either absolutely or relatively has stated clearly in Act Number 20 Of 2016 about Trademark and GI. However, preventive protection in Indonesia in regulating the GI does not yet cover in a whole; registration access, which is the most important part to get the protection, is still hard to do, especially for international registration. National regulation does not yet regulate about the process and procedure in exporting the GI overseas. For example the claim of Gayo coffee and Toraja coffee by other countries is regarded as passing off case and it reflects the practice of unfair competition. It is due to less awareness of the people and the unthoroughness of the government to do local and international registration for this GI product. The regulation about international registration in Indonesia is not yet stated implicitly. In Act Number 20 Of 2016 about Trademark and GI, regulation about the renewal of international registration only regulate in terms of trademark instead of GI as well. Therefore, it is so hard for the people with low natural resources to attempt a registration when the product will be exported.

SUGGESTION

The government has to expand the scope of both the bilateral and multilateral agreement with the other countries in the world which are beneficial for exporting market in Indonesia. Stand-alone Agreement is one solution to ease the acknowledgement of GI of both countries. Regulation on single registration can also be a new law that can be implemented as a liberal or multilateral agreement system. As the first step, it can be implemented among the members of ASEAN especially in facing the challenge of Asean Economic Community.

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