

Dimensions of Protection Against Deceitful Trade Competition in the Protection of Geographical Indications

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Abstract

The dimension of Geographical Indications protection is not only intended to provide protection to consumers, but is actually also a protection for business actors who own registered Geographical Indications. Competition in the increasingly fierce business creates dishonest business actors who claim to have products of the same quality as registered Geographical Indications. The existence of geographical indication rights as communal rights contains a stronger defense dimension than individual rights. Together and institutionally, the geographical indication rights holder community can design strategic steps to fight this unfair competition. Local governments play a key role in protecting and handling registered Geographical Indications in their regions.

Keywords

Geographical Indications; Deceitful Trade Competition; Legal Protection

Introduction

One way to be competitive is to have quality, reputation, and special characteristics that can be obtained based on geographical factors. This is obtained through the protection of Geographical Indications, for example, among others Mebel Ukir Jepara, Salak Pondoh Sleman Jogja, Kopi Arabika Java Ijen - Raung, Kopi Arabika Gayo Aceh, Bandeng Asap Sidoarjo, Mete Kubu Bali, Kopi Arabika Toraja, atau Tunun Gringsing Bali.

Of the many goods products that become commodities in international trade, there are also various commodity products that have very distinctive characteristics, both for products in the form of natural products such as germplasm and products that are processed products. Such products are usually only found or known to come from a certain region and region or in a certain country, so that they are not found and are not known in other regions or countries. Commodity products like this are referred to as products that are exclusive (Saputra, Pujiyono, Firdaus, 2021 : 146)

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Protection of Geographical Indications in Indonesia has been regulated through Law Number 20 of 2016 concerning Marks and Geographical Indications. It is well recognized that Geographical Indications are strategic potentials for regional development and the community's economy that must be continuously improved.

Based on the search for *E*-Geographical Indications of the Directorate General of Intellectual Property, currently there are 108 Registered Geographical Indications. This number is not entirely a Geographical Indication of Indonesia. In terms of regional potential, not all of the 35 provinces in Indonesia have registered Geographical Indications. This is certainly a challenge, considering that as described in the General Section of the Elucidation of Law Number 20 of 2016 concerning Marks and Geographical Indications, the protection of Geographical Indications is intended to form national potentials that can become superior commodities, which of course must be supported by all potentials. national in all regions. Moreover, considering that this potential can also come from 514 districts/cities in Indonesia, a potential that is actually very large.

Protection of Geographical Indications as in essence the protection of intellectual property is intended to provide protection to the moral rights and economic rights of the rights owners. Potentials that have obtained protection must be recognized and respected as belonging to the institution applying for Geographical Indications rights. The benefits and potential for economic development as a result are fully the rights of the holders of the Geographical Indications. Economically, intellectual property rights holders are entitled to compensation for the commercial exploitation of their inventions, while morally intellectual property rights holders are entitled to recognition and appreciation for themselves as inventors or creators (Martini, Haq, dan Sutrisno, 2018 : 70).

Everyone has the same opportunity to develop their production economic potential in a healthy and reasonable business climate. Often people think that the weak and need to be protected are consumers, when in fact producers also need protection from fraud committed by other producers.

Method

This research is a normative juridical research, which is a process to find the rule of law, legal principles, and legal doctrines to be able to answer the legal problems faced, with the result to be achieved is to give a prescription about what should be (Marzuki, 2016: 57). The approach used is a statutory approach and a conceptual approach with data in the form of secondary data consisting of primary and secondary legal materials. Primary legal materials include Law Number 20 of 2016 on Trademarks and Geographical Indications, Government Regulation Number 51 of 2007 on Geographical Indications, Regulation of the Minister of Law and Human Rights of the Republic of Indonesia Number 12 of 2019 on Geographical Indications, and Regulation of the Minister of Law and Human Rights of the Republic of Indonesia Number 13 of 2017 concerning Communal Intellectual Property Data. Secondary legal materials include the opinions of legal experts in various reference books and journals.

Discussion

1. Geographical Indications

The function of intellectual property right is basically to protect intellectual property which is the wealth gained from human intellectual ability (Jened, R. (2016). Geographical Indications is part of Intellectual Property Rights which has the basic objective to help meet challenges in development such as reducing poverty, encouraging economic growth (Sharma, 2014 : 84 - 87). Intellectual Property Rights is becoming more and more interesting for further discussion because of the current role of Intellectual Property Rights that determines the acceleration rate of national development, especially in the current era of globalization (Kasenda, 2017 : 179).

The regulation on Geographical Indications as part of Intellectual Property Rights is guided by Article 22 of the Agreement on Trade - Related Aspects on Intellectual Property Rights (TRIPs) which stated :

“Geographical are for the purposes of this agreement, indication which identify a good as originating in the territory of a Member, or a region or locally in that territory, where a given quality, representation or other characteristic of the goods is essentially attributable to its geographical origin.”

For the purpose of this agreement, it means that the elements of the definition of Geographical Indication are distinctive characteristics that are different from other intellectual property regimes. At least, there are four main elements of geographical indications in the TRIPs Agreement, namely (Wahyu Sasongko, 2012 : 102) :

1. the geographical name element to identify a product, the name used is not absolute to use the name of origin of the product because it may use a non-geographic name;
2. the territorial element in the country as a place of production is not identical with the administrative area but is adjusted to factual conditions. The determination of territory here relates to the area or area as the place or location for goods produced or produced. The criteria used are flexible, that is, they are adjusted to the goods produced;
3. the element of ownership in a geographic indication is not an individual right (private right) but a communal right, then a geographical indication is a right to use;
4. the quality, reputation, or other characteristics of an alternative nature, so that the goods are sufficient to fulfill one of these elements.

In The Paris Convention for the Protection of Industrial Property 1883 (Paris Convention 1883), regarding Geographical Indications the term Appellation of Origin (AO) is used:

“... the geographical name of a country, region, or locality, which serves to designate a product originating therein, the quality and characteristic of which are due exclusively or essentially to the geographical environment, including natural and human factor.”

This understanding can also be found in the 1958 Lisbon Treaty which states :

“In this Agreement, “appellation of origin” means the geographical denomination of a country, region, or locality, which serves to designate a product originating therein, the quality or characteristics of which are due

exclusively or essentially to the geographical environment, including natural and human factors.”

The World of Intellectual Property Office (WIPO) says that basically geographical indications have economic importance, therefore protection of Geographical Indications has benefits, among others:

1. protection of Geographical Indications will create a market characteristic/identity and if advertised correctly with good intentions it will lead to a high price of a product;
2. protection of Geographical Indications will pave the way for local producers to develop their brands and to trade under their own market identities; and
3. protection of Geographical Indications related to property or economic rights (which is the most important meaning).

Geographical Indications are protected through a wide variety of different approaches in different countries, and often by a combination of two or more approached. These include consumer protection acts, agricultural quality control regimes, unfair competition laws (passing off), trademarks, collective marks and certification marks or specific, sui generis Geographical Indications laws (Rahmah, 2018 : 9).

The definition of intellectual property rights is generally described as a right to wealth that arises or is born because of the results of human intellectual abilities and creativity. Intellectual property rights are categorized as rights to wealth considering that intellectual property rights ultimately produce intellectual works in the form of: knowledge, art, literature, technology and to make it happen requires a sacrifice of energy, time, cost and mind. The existence of sacrifice is marked as a value because it is felt that the existence of sacrifice has produced an intellectual work. If this is correlated with the economic benefits enjoyed, then the inherent economic value fosters the conception of property (property) of intellectual works earlier (Escudero, 2012 : 63).

Indonesian 1945 Constitution, Articles 28, 31, 32, 33 and 34, which emphasises that social justice principles must be inherent in the implementation and management of public resources towards the greatest benefit for the greatest number of people. In this respect, public resources may cover not only natural resources, but also intellectual products which are pivotal components for maintaining and guaranteeing the sustainability of collective life (Haq, 2014 : 70).

Trademark can be based on the name of a place, an area, or a region. It can also be adopted from a letter, a word, a picture, or a combination of these elements. The definition of the name derived from a place can be taken from the name listed in the geographical map or the name continuously used to indicate the place of origin of the item. Protection of Geographical Indications includes products produced by nature, agricultural goods, handicrafts or other industrial products.

The right to Geographical Indication as an exclusive right of the right holder of Geographical Indication is granted by the State to the registered person, as long as the bases for the protection of the Geographical Indication: the reputation, quality, and characteristics still exist (Article 61 paragraph (1) of Law Number 20 Year 2016 on Trademarks and Geographical Indications). The duration of the protection of

Geographical Indications has no time limit when the consistency of the specificity of the Geographical Indications consistency is still registered.

The registration of Geographical Indications adheres to a constitutive system, and this means that new protection is given when the registration has been carried out. Registration applies the principle of first come first served. The party who registers their product first obtains the rights to sell the product. Thus, only the first Geographical Indications can be registered within the Directorate General of Intellectual Property to obtain their exclusive rights. The exclusive rights here are the rights to commercialise Geographical Indications so the rightful owner can enjoy the economic benefits.

The concept of Geographical Indications is based on communal protection (Anggraeni, 2013 : 145). Geographical Indications are of unique characteristics in comparison to other forms of intellectual property. They also require the involvement of multiple parties and aspects. New Geographical Indications will be automatically protected once the registration has been received (Article 53 paragraph (1) of Law Number 20 of 2016 on Trademarks and Geographical Indications).

In Law Number 20 of 2016 on Trademarks and Geographical Indications, Geographical Indications can be submitted by :

- a. Institutions which represent communities in certain geographical areas, such as producer associations, cooperatives, and the Society for the Protection of Geographical Indications. The institution seeks goods and/or products of the following types: natural resources (can be used to meet the needs of human life, including not only biotic components, such as animals, plants, and microorganisms, but also abiotic components, such as petroleum, natural gas, various types of metals, water, and soil); handicrafts; and industrial products: the results of processing raw materials into finished products.
- b. Provincial or District/City Government

2. Deceitful Trade Competition

In principle, everyone has the right to sell or buy goods or services "what", "with whom", "how much", and "how" to produce, this is what is called a market economy (Rokan, 2012: 1). In the business world, competition must be seen as a positive thing and very essential in the business world. With competition, business actors will compete to continuously improve products and innovate on the products produced to provide the best for customers. From the consumer side, they will have a choice in buying products with low prices and the best quality (Tiara, 2017: 344)

Globalization and economic growth today are increasingly rapidly leading to increased trade in goods and services. This requires a barrier so that the parties involved in the economy refer to the frame of rules that have been set (Makka, 2021: 6).

Perfect competition is an ideal market condition. There are at least four assumptions that underlie perfect competition in certain markets (Sugiarto, 2015: 154):

1. Business actors cannot unilaterally determine prices for products or services;
2. Goods and services produced by business actors have the freedom to enter or leave the market;

3. Business actors have the freedom to enter or leave the market;
4. Consumers and market participants have perfect information about things.

To maintain healthy competition, it is necessary to have a set of laws that regulate good business ethics. Businesses that are managed by business actors with difficulty with the aim that the products offered are accepted by the market share in the community. In the business world, fraudulent competition is something that cannot be avoided by business actors. Fraudulent or dishonest competition is the starting point for competition against the law (Utami and Adipradana, 2017: 97-98). The unfair business competition is based on the bad faith of business actors to gain profits by violating the rights of others (Gunawati, 2015: 267). Competition based on bad faith, this competition is always carried out with an unhealthy business, the result of which is to harm other parties, fellow business actors and consumers (Widiyanti, et.al., 2020: 560).

According to Muhammad Djumhana and R. Djubaedillah, dishonest competition is an act that can create errors in any way regarding the origin of goods or with respect to the industrial and commercial businesses of a competing entrepreneur "(Djumhana, 2003: 202). Unfair competition can be divided into 2 (two) categories, namely: anti-competitive action and fraudulent competition (Hermansyah, 2008: 4).

In dishonest business competition, the following things can be identified (Rokan, 2012: 15)

1. Business actors in competing with other business actors use dishonest methods;
2. Business competition conducted in a way that is against the law, can be seen from the way business actors compete with other business actors by violating the provisions of the applicable regulations; or
3. Competition is carried out by preventing the occurrence of competition among business actors in order to see a healthy market condition in which there is no competitive competition between business actors.

Attitudes to attract customers or attract clients by fraudulent means are usually carried out by entrepreneurs in advancing their own trading business and expanding the market by increasing their sales capacity for goods and/or services. However, this is done in a dishonest way and does not use bad faith in obeying and carrying out unwritten and written norms in economic relations (Syafi'i, et.al., 2021 : 2124) .

Consumer protection and competition are two things that are interconnected and mutually supportive. Therefore, competition law must be in line with or support consumer protection law. Maximizing consumer welfare should be the only main goal of competition policy (Lubis, 2017: 37).

One risk in the model presented by the EU Directive on Unfair Commercial Practices is the invocation of a very personalized standard of appropriate conduct on the part of a trader, in assessing whether a business practice is unfair. Under Article 2(h): 'professional diligence' means the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers, commensurate with honest market practice and/or the general principle of good faith in the trader's field of activity (Paterson, Bant, 2021 : 12).

In comparison, in the United States according to this Unfair trade Practices include untrue or fraudulent business act or practice, untrue or misleading advertisement or others." The definition of Unfair trade Practices can be extended to even unlawful business practice and the person even may sue for unfair practice to everyone (Karn, 2021 : 1945).

3. Legal Protection from Deceitful Business Competition through Protection of Geographical Indications

According to Fitzgerald, law aims to integrate and coordinate various interests in society (Raharjo, 2000: 53). Preventive legal protection aims to prevent disputes, which directs government actions to be careful in making decisions based on discretion and repressive protection aims to resolve disputes, including their handling in the judiciary (Alfons, 2010: 18). Legal protection includes the form or form or purpose of protection, the protected legal subject and the object of protection provided by law to the legal subject (Salim and Nurbani, 2014: 263).

Intellectual property rights, including Geographical Indication Rights are "The Absolute Ownership". One of M. Sherwood's theories, namely the Basic Economic Growth Stimulus Theory, states that IPR is a tool for economic development. Economic development is the overall goal of establishing an effective IPR protection system. Stimulus Theory is very relevant to be used as the basis for the protection of IPR today, especially in the face of the era of free trade (Sherwood, 1990: 37). Economic development is the overall goal of building an effective IP protection system (Sherwood, 1997: 6).

Richard A. Posner through the Theory of Economic Analysis of Law states that something must provide benefits or utility values for others so as to create social welfare. This includes transaction costs of economy, economy institutions, and public choice. Economy Institution deals with human actions including formal legal rules, informal customs, traditions and social rules. Public Choice is related to the democratic decision process by considering the microeconomy and trade methods (Radjagukguk, 2011: 146).

Property rights attached to the term intellectual property cannot be separated from the economic value of a property as part of material rights. The economic rights are in the form of a monetary benefit obtained due to the use of intellectual property itself, or because of the use by other parties based on a license. The fact that there is economic value shows that intellectual property is one of the objects of trade (Ramli,et.al., 2010 : 85).

Protection of Geographical Indications is expected to bring benefits: first, on a macro basis it is expected to improve the welfare of the community of distinctive and quality products and other communities around the community of these distinctive and quality products; second, legally, the unique and quality products that exist in each region can be legally protected; and third, in terms of quality and quality, the competitiveness of distinctive and quality products in their respective regions will be able to be further increased.

Protection of Geographical Indications is important in business and economic development because:

- a. Consumers' right of the genuineness of a product should be protected;

- b. Producers are obliged to guarantee that no fraudulent practices occur in the trade practices;
- c. Product authenticity and quality assurance are the keys to success in international trade;
- d. To develop agrotourism; and
- e. Increase the regional income.
- f. Business actors with competition are required to offer products that are superior to their competitors in order to win market competition. In this context, the product must have advantages in terms of price, quality, and service because otherwise the business actor will naturally be eliminated from the market.

From an economic standpoint, Geographical Indications are seen as a form of collective monopoly right that erects entry barriers on producers either within or outside the relevant geographical area. In sum, Geographical Indications define who can make a particular product, where the product is to be made, and what ingredients and techniques are to be used so as to ensure 'authenticity' and 'origin' (Rangnekar, 2004 : 15). Geographical Indications are understood by customers to denote the origin and the quality of products, thus Geographical Indications are increasingly recognized as a tool for securing consumers' loyalty by establishing the link between product attributes and the geographical origin (Rahmah, 2018 : 4). Geographical Indications allow the identification of products with specific quality and characteristics based on geographical factors and distinguishes agricultural product products from other similar products on the market. Geographical Indications will distinguish and protect goodwill or reputation and quality standards of agricultural product and essentially enables agricultural producers to increase profits through product differentiation. A Geographical Indication product would bring in more income than traditional raw commodity exports. Without Geographical Indications to distinguish the products, the high-quality product will be considered undifferentiated one and sold at the same price (Ngokkuen, 2012 : 93-103).

Based on a study from the European Union-Indonesia Trade Cooperation Facility, there is an assessment that Indonesia's Geographical Indications have had positive results since they were registered, including:

- a. There has been a significant increase in the number of producers involved in each Geographical Indications (eg the number of Sumbawa honey collectors has tripled in 5 years).
- b. Several registered Geographical Indications have succeeded in obtaining premium prices for their Geographical Indications products (eg there has been a 40% price increase in 5 years for Sumbawa honey).
- c. Export volume also increases (eg more than 1 million tons of Gayo Arabica Coffee in 5 years).
- d. Registered Geographical Indications have consolidated the organization, gathering stakeholders, through the important role of the Geographical Indications group managing each Geographical Indications.
- e. There is also a progressive improvement in management for product quality, through a traceability system in the formation process in several Geographical Indications.
- f. The stakeholders of the Geographical Indications group have become increasingly aware of the importance of having a control system in place to monitor product quality.

- g. The traceability system has made a positive contribution to improving coordination in the supply chain, building a database that is maintained and updated by the Geographical Indications group.
- h. Several Geographical Indications registered in Indonesia have taken an active role in strengthening their reputation and recognition towards customers and consumers (for example through the Muntok White Pepper exhibition by the Regional Government)
- i. Stakeholders of registered Geographical Indications have increasingly understood the importance of product sustainability and protection through Geographical Indications. The fact that there is an economic value to intellectual property above, shows that the protection of Geographical Indication products which is one of the policies of intellectual property will have an impact on increasing the economy (Caceres, 2016 : 319).

In practice, the geographical indication rights holders are not easy to deal with. Even though it has received legal acknowledgment that the geographical indication belongs to it, from an economic right perspective, it does not get optimal benefits due to the act of a fraudulent competitor.

Cost and benefit calculations primarily serve as the basis for actions. Traders or merchants do not pay careful attention to the quality or the origin of the goods, and the most important thing is "selling goods and obtaining profits." Even though in order to get the profits, the traders lie to the consumers about the origin of the goods. This situation will recur as long as it yields profit. For this group, protecting Geographical Indications means losing their advantage.

The public can use Tregear's thinking to make strategic recommendations for Geographical Indications products: including: product strategy, communication strategy, pricing strategy, and distribution strategy. In product strategy, when considering product identity, it is important to ensure that other brand identities - Geographical Indications Label, individual company or retailer label, are consistent with one another. In the communication strategy: Geographical Indications producers should consider establishing a series of message campaigns that highlight the links between their products and local development, environment, etc. It is necessary to develop a separate communication package for distant consumers where images and other symbolic links are being exploited. Pricing strategy: Willingness to pay a premium for Geographical Indication products has been demonstrated in numerous studies; however, the premium level will vary with the product and consumer experience with the product. Distribution strategy: Evidence suggests that Geographical Indication producers have to adopt different distribution channels in different countries. Thus, selling through retailers and supermarkets in countries with highly concentrated supply chains and using local markets, direct selling and specialised outlets in places where they dominate (Tregear, 2002 : 2002)

Counterfeiting of Geographical Indications by unauthorised parties is very detrimental to consumers and official producers. Consumers are misled to believe that the 'original' products are of specific qualities and characteristics, but actually receive fake products. At the same time, the producer of the original products suffers huge losses because his valuable business has been corrupted by irresponsible parties, and the reputation the honest producer builds for his product is now tarnished.

With regard to fraudulent business competition, there may be violations against business actors as stipulated in Article 66 of Law Number 20 of 2016 on Trademarks and Geographical Indications, namely:

- a. use of Geographical Indications, either directly or indirectly on goods and/or products that do not meet Geographical Indications Description Documents;
- b. the use of a Geographical Indication mark, either directly or indirectly on goods and/or products that are protected or not protected with the intent to:
 1. show that the goods and/or products are comparable in quality to the goods and/or products protected by Geographical Indications;
 2. benefit from the use; or
 3. benefit from the reputation of Geographical Indications.
- c. the use of Geographical Indications that can mislead the public regarding the geographical origin of the goods;
- d. the use of Geographical Indications by non-registered Users of Geographical Indications;
- e. imitation or misuse that can be misleading in relation to the place of origin of the goods and/or products or the quality of the goods and/or products contained in:
 1. wrapping or packaging;
 2. information in advertisements;
 3. information in the document regarding the said goods and/or products; or
 4. misleading information about its origin in a package.
- f. other actions that can mislead the wider community regarding the truth of the origin of the goods and/or products

For violations of the use of Geographical Indications, as stipulated in Article 69 paragraphs (1) and (2) of Law Number 20 of 2016 on Trademarks and Geographical Indications, a lawsuit may be filed against the users of Geographical Indications without rights in the form of requests for compensation and termination of use and destruction of the labels of Geographical Indications which are used without rights. In order to prevent greater harm to the party whose rights have been violated, the judge may order the violator to stop the activities of making, multiplying, and ordering the destruction of the Geographical Indication label that is used without rights.

Even though it is possible for the public to carry out surveillance (Article 71 paragraph (2) of Law Number 20 of 2016 on Trademarks and Geographical Indications juncto Article 34 paragraph (2) Regulation of the Minister of Law and Human Rights of the Republic of Indonesia Number 12 of 2019 on Geographical Indications, the government can actually minimize these violations because based on Article 70 of Law Number 20 of 2016 on Trademarks and Geographical Indications, the central government and/or local government in accordance with their authority to provide legal protection, facilitate the development, processing, and marketing of goods and/or products of Geographical

Indications. Article 71 of Law Number 20 of 2016 on Trademarks and Geographical Indications stated that central government and/or regional governments supervise to prevent misuse of Geographical Indications.

The state needs to coordinate various multiple stakeholders, both highly inclusive groups, as well as those outside the value chain such as representatives of local authorities, merchants, and possibly consumers. The results of the coordination are applied as mandatory rules. The state must act as the justice of the peace (Pick and Marie-Vivien, 2021 : 15).

Conclusion

The fierce competition in business requires producers to always protect their business from unfair trade practices and fraudulent behavior from other producers. Protection of Geographical Indications is an absolute necessity so that the distinctive and superior product of a region can provide optimal economic benefits and welfare for the community that owns it, not even benefiting parties who act fraudulently.

This dishonest competition must be seen as a challenge for the registered Geographical Indication owner community to continue to think about strategies to suppress and lock competitors' fraudulent steps. In fact, the existence of Geographical Indications rights as communal rights becomes a much stronger potential than intellectual property rights owned individually because it is possible to seek systematic and widespread handling measures.

In the end, all these efforts will not be fully successful if the local government does not intervene. The protection of communal rights of geographical indications requires active action from the local government to carry out supervision to prevent unauthorized use of Geographical Indications because the local government is the most aware of the conditions and culture of the local community. To confirm its policy, the regional government must issue regional regulations and create a trade and economic process mechanism to eradicate fraudulent competition against protected Geographical Indications.

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P-ISSN : 2549-2055
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HTLJ | Hang Tuah Law Journal

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April 2022

Published by :
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FAKULTAS HUKUM UNIVERSITAS HANG TUAH

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0

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