

# PROMOTING LOCAL BRANDING UNDER GEOGRAPHICAL INDICATION: PROSPECT AND CHALLENGES FOR PROTECTING INDONESIAN PRODUCTS

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# PROMOTING LOCAL BRANDING UNDER GEOGRAPHICAL INDICATION: PROSPECT AND CHALLENGES FOR PROTECTING INDONESIAN PRODUCTS

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Indonesia has a diverse range of local products with unique quality and special characteristic associated with geographical factors such as Toraja Coffee, Deli Tobacco, Bali-Kintamani Coffee, Banda Nutmeg, and a Batik handcraft, etc that have gained prominence with high reputation either domestically or internationally. This paper argues that Indonesia should equip the reputation of local products and their intrinsic quality with promoting local branding under Geographical indications (GI) regime because GI protects a distinctive sign that permits the identification of products involving unique characteristics influenced by geographical factors. To visualize the above idea, this paper outlines the prospect of local branding based on GI and argues that the use of GI as a basis for local branding becomes an effective tool since it allows producers to gain competitive advantages, achieve market recognition, capture the premiums for their products in the marketplace by creating exoticness or scarcity images, differentiate their products from those produced elsewhere, and gain legal protection. However, promoting local branding under GI system looks uneasy to achieve and may spark challenges at normative and practical level. At normative level, the existing GI regulation under Indonesian trademark act is inherently insufficient because of the limited scope of protection. At practical level, the problems may arise at every step of: a) preparation and registration (b) monitoring and management, (c) promotion and marketing of GI products that are very time-consuming and costly, requiring complicated procedures, difficult researches, multiform equipment/infrastructure and the involvement of a wide range of stakeholders. To overcome the normative challenge, the paper recommends that the sui generis law seems the best solution to provide appropriate GI protection that can accommodate the basic elements of protection and solve the problems of insufficient GI protection under trademark regime. To solve the practical challenge, the paper will draw lessons from the establishment of Indonesian "first GI" protection (Bali-Kintamani Coffee) as a model in promoting GI for other products from other origins in Indonesia.

Keywords : geographical indication, branding, traditional, products.

## 1. INTRODUCTION

As the biggest archipelago consists of about 17.000 islands, Indonesia has different natural condition, cultures, tradition, wisdom, traditional knowledge influencing the unique and distinctive quality to the local products. Those local products are known with their place of origin and they owe their fame and quality to the natural conditions or cultural and traditional features of the place where they were made. Toraja Coffee, Kintamani Coffee, Deli Tobacco, Banda Nutmeg, Yogja Batik handcraft are the examples of Indonesian local products with unique quality and special characteristic associated with geographical that have gained prominence with high reputation.

The reputation of the local products and their intrinsic quality should be protected by promoting local branding under Geographical indications (GI) regime. GI as a basis for local branding will become an effective mechanism because GI permits the identification of products involving unique characteristics influenced by geographical factor. By promoting GI based branding, local producers will gain competitive advantages, achieve market recognition, capture the premiums for their products in the marketplace by creating exoticness or scarcity images, differentiate their products from those produced elsewhere, and gain legal protection.

However, it seems uneasy to promoting local branding under GI system because of normative and practical challenges. At normative level, the existing GI regulation under Indonesian trademark act is inherently insufficient because of limited scope of protection. At practical level, the process requires complicated procedures that are very time-consuming and costly, need difficult researches, multiform equipment or infrastructure and involve a wide range of stakeholders at preparation, registration, monitoring and management, promotion and marketing of GI products.

Therefore, paper then analysis the solution to solve the normative challenge by proposing the GI protection under sui generis law as an appropriate model that solves the problems of insufficient GI protection under trademark regime and can accommodate the basic elements of protection. To overcome the practical challenge, the

establishment of Indonesian “first GI” protection (Bali-Kintamani Coffee) will be explored as a model in promoting GI for other traditional products from other geographical area in Indonesia.

## 2. The GI Concept and Protection

The concept of “geographical indication” comes from the concept of “country of origin” or a regional or sub regional geographic origin.<sup>1</sup> Producers from those locations can benefit from the “geographic origin” image as a set of generalized beliefs about specific products from that geographic origin on a set of characteristic or quality<sup>2</sup> such as German beers, French and Italian wines and cheeses, Swiss chocolates, Russian vodka, Chinese tea and silk, Holland bulbs, Japanese automobiles, etc. The image of quality for products made in a certain area helps local products to achieve consumer acceptance and reputation.

Then, GI has been protected under the Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods (Madrid Agreement), the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration (Lisbon Agreement) and the Paris Convention for the Protection of Industrial Property (Paris Convention) administered by the World Intellectual Property Organization (WIPO). Article 1 of Madrid Agreement states that “all goods bearing a false or deceptive indication by which one of the countries to which this Agreement applies, or a place situated therein, is directly or indirectly indicated as being the country or place of origin shall be seized on importation into any of the said countries”.

The Lisbon Agreement established in 1958 protects “appellations of origin” in countries other than their country of origin. Article 2 of the Lisbon Agreement defines “appellation of origin” as 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 country of origin is the country whose name or the country in which is situated the region or locality whose name constitutes the appellation of origin which has given the product its reputation.<sup>3</sup>

The Paris Convention is one of the treaties to mention the international protection of GIs as “indications of source or appellations of origin”. However, it does not really define indications of source or appellations of origin and not explicit about the form of protection. Article 10 of the Paris Convention only provides the obligation to protect “indications of source” “against direct or indirect use of a false indication of the source of the goods or the identity of the producers, manufacturers or merchants.”

However the Madrid Agreement, Lisbon Agreement and Paris Convention lack of a coordination, uniformity, and dispute settlement mechanisms influencing not significantly to the protection of GIs at international level.<sup>4</sup> The internationalization of GI presents a significant advancement when protected under Trade Related Aspect of Intellectual Property Right (TRIPS) Agreement in 1994 because TRIPS serves not only to define GIs but also aligns the standards of protection and access to an international dispute settlement mechanism. TRIPS regulates GI in three articles (Article 22, 23 and 24) in Part II, Section 3. Article 22 notes the basic definition and general standards of protection for GIs relating to all products including those of agricultural origin. According to Article 22 (1) of TRIPS, GI is defined as : *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.* Article 23 of TRIPS outlines the specific and additional protection that is available for the wine and spirits categories, while Article 24 of TRIPS denotes some important exceptions and details for future negotiation to serve to more specifically protect GI for broader categories of products.

In European Union, GI is the more general term consisting of Protection of Geographical Indications (PGI) and Protected Designations of Origin (PDO), which was greatly inspired by the French model (*Appellation d'origine contrôlée* – AOC). PGI is a “specific quality, reputation, or other characteristics can be attributed to this geographical origin, and the production and/or processing and/or preparation take place in the defined geographical area”, whereas PDO is “the quality or characteristics are essentially or exclusively due to a particular geographical environment with its inherent human and natural factors, and the production, processing and preparation take place in the defined geographical area”.<sup>5</sup> The philosophy of PDO is to protect a unique product that is not reproducible in another region, while the PGI label is based on the reputation of the product, its history, linked to that of a locality,

<sup>1</sup> Sanjeev Agarwal and Michael J. Barone, “Emerging Issues for Geographical Indication Branding Strategies” ,*MATRIC Research Paper 05-MRP 9*, January 2005, at 6.

<sup>2</sup> Id

<sup>3</sup> Article 50 of Lisbon Agreement.

<sup>4</sup> Cerkia Bramley, et.al, *Developing Geographical Indications in the South*, Springer, New York, 2013, at 2-3.

<sup>5</sup> European Economic Community , “Regulation (EEC) No. 510/ 2006 on the Protection of Geographical Indications and Designations of Origin for Agricultural Products and Foodstuffs ”, *Official Journal of the European Union*, No. L 93, 2006, at. 14.

and its particular characteristics or qualities.<sup>6</sup> PDO requires that the entire production process must be carried out in the same zone, and the coherence and influence of this zone on the characteristics of the product must be demonstrated, whereas PGI does not impose a single zone in which all the operations must take place, in particular, the raw materials can come from elsewhere.<sup>7</sup>

In Indonesia, GI protection system is based on four principles namely (1) constitutive or “the first to file” principle, (2) substantive evaluation, (3) universal concept and (4) a part of Intellectual Property Rights/under trademark regime.<sup>8</sup> Indonesia regulates GI under Trademark Act No. 15/2001 (Indonesian Trademark Act) and Government Regulation No. 51/2007 (Indonesia GI Government Regulation). According to Article 56(1) of Indonesian Trademark Act, GI is defined as:

*a sign which indicates the place of origin of goods, which due to its geographical environment factors, including the factor of the nature, the people or the combination of the two factors, gives a specific characteristics and quality on the goods produced there in.*<sup>9</sup>

Based on Article 56(1) of Indonesian Trademark Act, GI is a geographic term used in relation to a product indicating three aspects of (1) its place or area of origin, (2) qualities or characteristics of the product and (3) qualities or characteristics due to the geographical and human characteristics of the place of origin.<sup>10</sup> According to the content of provision Article 56(1) of Indonesian Trademark Act has tried to comply with the Article 22 of TRIPS:

*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.*

Although trying to comply with Article 22 of TRIPS, GI definition in Article 56(1) of Indonesian Trademark Act is more limited than TRIPS because the GI definition includes the term of “sign”, while TRIPS uses the term of “indication.” Indonesia should include “indication” because indication may be more subtle and broader than a sign. An indication may be a suggestion as well as a sign, whereas the definition of a sign suggests a more direct connection between the sign and the information conveyed by the sign.<sup>11</sup> According to Mark Davidson<sup>12</sup>:

*“An indication is not restricted to words and could include anything may identify a particular good as originating in the relevant territory, region or locality. The indication must refer to the geographical area and a straightforward interpretation of this aspect of the definition would simply reject any indication did not do so. For example, Champagne” clearly identifies a good as originating in a particular geographic area by using the name of the area.*

In addition, GI definition in Article 56(1) of Indonesian Trademark Act differs from GI definition in TRIPS which it covers all of GI products.<sup>13</sup> TRIPS includes GI protection only for commodities having specific characteristics because of the natural factor not the human factor<sup>14</sup> therefore it excludes handicrafts as human creation. The exclusion of handicrafts as human factor in TRIPS is in order to prevent overlapping protection with the copyright law which protects cultural products. However, Indonesia includes the scope of GI not only the natural but also the human factor and the combination of both, therefore, it includes handicrafts.<sup>15</sup> The inclusion of human factors seems similar to Article 2 (1) of the Lisbon Agreement: *the geographical name of country, region or locality, which serves to designate a product originating therein the characteristic qualities of which are due exclusively or essentially to geographical environment, including natural and human factor.* Inclusion of human aspect in GI definition exceeds the content of GI definition in TRIPS. However, as long as the GI regulation consists of the TRIPs basic standard, member of TRIPS is allowed to provide broader scope of protection. Some also argue that GI covers for any whether natural, agricultural, manufactured or human made.<sup>16</sup> Thus, the scope of GI protection should include

<sup>6</sup> Laurence Be'ard and Philippe Marchenay, “Local Products and Geographical Indications: Taking Account of Local Knowledge and Biodiversity”, *International Social Science Journal*, No. 187, 2006, at 110.

<sup>7</sup> Surip Mawardi, “Establishment of Geographical Indication Protection System in Indonesia, Case in Coffee,” *Paper of WIPO/GEO/SOF/09/3*, Worldwide Symposium On Geographical Indications jointly organized by the World Intellectual Property Organization (WIPO) and the Patent Office of Republic of Bulgaria, Sofia, June 10 to 12, 2009 (hereinafter Surip Mawardi I), at 11.

<sup>8</sup> Yasmon Rangkyo Sati, *Laws on the Republic of Indonesia on Intellectual Property Right*, ShortCUT Gagas Imaji, Jakarta, Indonesia, 2003.

<sup>9</sup> Surip Mawardi I, above note 8, at 11.

<sup>10</sup> Mark Davidson, “Geographical Indication”, *Unpublished Paper*, 2007, at.3

<sup>11</sup> Some argue that handycraft should be excluded from GI protection as TRIPs does not include it, see Budi Agus Riswandi, “Problem of Regulating Geographical Indonesia in Indonesia”, *Paper*, at National Seminar of “Looking for the Format and the Substance of Geographical Indication Regulation” 9 September 2006, Yogyakarta.

<sup>12</sup> Yasmon Rangkyo Sati, above note 9.

<sup>13</sup> Budi Agus Riswandi, above 12, at.16

<sup>14</sup> Id

<sup>15</sup> In the explanation of Article 56 of Indonesian Trademark Act, the scope of GI product expands to the handcraft should be protected under traditional knowledge. However, the inclusion of handicrafts becoming the scope of GI will overlap with the article 10 of Indonesian Copyright Act which protects traditional handcraft as traditional heritage copyright belongs to state, see Article 10 of Law No. 19/2001 on Copyright.

<sup>16</sup> Bernard O'Connor, *The Law of Geographical Indication*, Cameron May, London, 2004, at.53

cultural products, tradition and handicrafts employed by human, even these products relates to the culture of geographical area.<sup>17</sup>

GI is understood as indication which is used to identify goods that can only be produced in a given geographical or cultural zone. GI signals to the consumer that the goods have special characteristics as a result of geographical origin, thus GI is more than an indication of source, but it is a reference to a quality. The environment, by virtue of its soil composition, climate, biodiversity, local know-how and other human factors, confers specific characteristics on these products that make them unique.<sup>18</sup> Natural factors such as climate, soils, local breeds and plant varieties, traditional equipment, and human factors such as know-how and traditional knowledge, play a key role in forming the quality, characteristics, and reputation of origin products.<sup>19</sup> The quality, characteristics and reputation linked to the geographical origin of a product must be sufficiently specific to differentiate it from other products. The concept of quality can be defined in relation to the product's nutritional properties, flavor, appearance, or the process and raw materials used to produce it.<sup>20</sup> The product's characteristics can be determined by various standards, such as physical or chemical or organoleptic traits.<sup>21</sup> The characteristic may comprise attributes such as color, texture or fragrance that may be more neutral or even unfavorable consumers.<sup>22</sup> Reputation refers to the opinion consumers have of a given product, which generally requires a substantial period of time to be formed.<sup>23</sup>

According to the quality and characteristic as basis to differentiate GI products from other products, Article 56 (1) of Indonesian Trademark Act defines that GI is a sign...., gives a specific characteristics and quality on the goods. The words "gives a specific characteristics and quality" may refer to some positive attribute of the goods<sup>24</sup> involves a subjective consideration. While TRIPS includes reputation, GI definition in Indonesian Trademark Act covers quality only which may be objectively verifiable whereas a reputation merely desirable characteristics.<sup>25</sup> The exclusion of "reputation" in Article 56 (1) of Indonesian Trademark Act may create problem that non reputable GI product be protected. It seems unfair to give the same level protection, especially for GI producers who developed a reputation over many years/centuries based on traditional practices or traditionally accepted or slick marketing promotion. The well known or reputable GI should obtain greater protection than non reputable GI.<sup>26</sup> Without including reputation, GI definition in Article 56 of Indonesian Trademark Act adopts the definition of *appellation of origin* in Article 2(1) of Lisbon Agreement : "... the characteristic qualities of which are due exclusively or essentially to geographical environment..." The Lisbon Agreement requires quality and the characteristics of the product. Therefore, the Lisbon Agreement does not cover reputation. TRIPS provides 'either the quality or the reputation or other characteristics of a certain product are attributable to its geographical origin'. It means that TRIPS has a broader scope that covers products having a certain reputation due to their geographical origin with possessing a specific quality or characteristic.<sup>26</sup> Since GI definition in TRIPS is broader in some respects, Indonesia should adopt the concepts in the TRIPS definition.

In setting up GI, it is a fundamental step to define the relevant geographical area. The geographical area includes relevant factors such as historical, economic and/or cultural data (such as ecological setting, know-how, history of production, production stage, social networks, existing administrative zoning).<sup>27</sup> The processing and elaborating a given product may also take place within the geographical area, thereby contributing to the GI uniqueness.<sup>28</sup> The interactions between the physical and biological environment, combined with human factors, produce specific conditions and knowledge that confer specificity and reputation on locally produced goods in certain geographical areas.<sup>29</sup> Such interactions are reflected in the concept of "terroir" defined as "a delimited geographical area defined from a human community which builds along its history a set of distinctive features, knowledge, and practices based on a system of interactions between the natural environment and human factors."<sup>30</sup> Related to the

<sup>17</sup> Id.

<sup>18</sup> Monique Ngo Bagal, Massimo Vittori, *Practical Manual on Geographical Indications for ACP Countries, CTA and origin*, Agridea-Switzerland, 2011, at. 12

<sup>19</sup> Id.

<sup>20</sup> Id.

<sup>21</sup> Id.

<sup>22</sup> David Vivas Eugui, Christoph Spennemann, 'The Treatment of Geographical Indications in Recent Regional and Bilateral Free Trade Agreement, in Meir Perez Pugatch (eds), *The Intellectual Property Debate, Perspective from Law, Economic and Political Economy* (Edward Elgar, Cheltenham, UK, 2006, at. 305

<sup>23</sup> Monique Ngo Bagal, Massimo Vittori, above note 18, at. 12

<sup>24</sup> Bernard O'Connor, above note 16, at.53

<sup>25</sup> Id.

<sup>26</sup> L.Baeumer, *Symposium on Geographical Indications in the Worldwide Context*, Eger, Hungary, WIPO Publication No. 760(E), 1997, at. 12.

<sup>27</sup> Vandecandelaere et al., *Linking People, Places and Products*, United Nations (FAO) and SINER-GI, Rome, 2009, at. 63.

<sup>28</sup> Monique Ngo Bagal, Massimo Vittori, above note 18, at.13

<sup>29</sup> Id., at. 14

<sup>30</sup> Id.

geographical area, Article of 56 (1) of Indonesian Trademark Act regulates that GI is a sign which indicates "the place of origin of goods". However, the meaning of "the place of origin of goods" seems limited to a geographic name only, therefore it cannot cover a non geographic name traditionally associated with a particular geographic region. It is important to extend the GI definition not only for geographical names because GI is not only necessarily direct geographic names but it is also for traditional names.<sup>31</sup> In the context of relation to the geographical area, the GI definition in Indonesian Trademark Act also provides the words of "the goods produced there in". The meaning of "the good produced there in" can be interpreted as the good must be mined, grown or manufactured in that territory.<sup>32</sup> However, it is unclear whether the manufacturing process could be outsourced or not. This provides potential dispute because of unclear and different/flexible interpretation of *the good produced there in*.

### 3. Benefits and Prospect of GI Branding

Local producers must decide to develop their own branding to become distinctive among their equals because the role of branding process is helping producers differentiate from their competitors. Without any means of differentiating goods, there will be no incentives for producers of high-quality goods to remain in such a market because all goods tend to be sold at the same price.<sup>33</sup> One mean to differentiate product is to convey the product quality by introducing labeling or branding schemes. Branding by using various signs has been developed by producers as markers, quality and assurance of reputation, thus, distinctive signs and reputation, which denote the persistence of quality, play an important role in identifying a certain level of quality.<sup>34</sup>

The quality of products could be incorporated to the geographical aspects such as natural factors, local tradition, culture, and human factor as the main factors lead to excellence and reputation of products. Numerous local products are designated by their place of origin which is the geographical name of the place where they were elaborated. This association establishes the link between the quality, the origin, and the reputation that derive from their place of origin.<sup>35</sup>

GI products with market reputation and quality may serve as a basis for the creation of a strong and well-known local branding. Local branding may be founded on natural, tradition, culture attraction and on original, unique, distinctive products that constitute the local identity.<sup>36</sup> GI is a crucial tool to promote local branding for local agricultural-ecological, traditional or cultural characteristics products.<sup>37</sup> Therefore, Indonesia should equip the reputation of local or traditional products<sup>38</sup> and their intrinsic quality by promoting local branding under GI because GI protects a distinctive sign that permits the identification of products involving unique characteristics influenced by geographical factors.

GI enables the producers to convey a considerable quantity of products and become a worthwhile marketing tool. In addition, there is also evidence that GI can provide higher economic returns to local producers through price premium, fostering tourism and enhancing rural development<sup>39</sup> if they are used properly and are well protected. The use of GI as a basis for local branding will become an effective tool since it allows producers to gain competitive advantages, achieve market recognition, capture the premiums for their products in the marketplace by creating exoticness or scarcity images, differentiate their products from those produced elsewhere, and gain legal protection. GI helps local producers to gain market power because if a product is to bear a GI, it must have special the qualities attributable to the good's geographical source.<sup>40</sup> In addition, GI allows producers to create an image of "exoticness" or scarcity that enables them to obtain premium prices for products that would otherwise be ascribed commodity

<sup>31</sup> Hard O'Connor, above note 16, at.52

<sup>32</sup> United Nations Conference on Trade and Development; International Centre for Trade and Sustainable Development *Resource Book on TRIPS and Development*, Cambridge University Press, Cambridge, 2005, at.290.

<sup>33</sup> Chuthaporn Ngokkuen and Ulrike Grote, "Challenges and Opportunities For Protecting Geographical Indications In Thailand", *Asia-Pacific Development Journal*, Vol. 19, No. 2, December 2012, at 94.

<sup>34</sup> Id., at 100.

<sup>35</sup> Laurence Be'ard and Philippe Marchenay, "Local products and geographical indications: taking account of local knowledge and biodiversity", *International Social Sci*, No. 187, 2006, at. 110.

<sup>36</sup> Ernes Oliva, et.al, "Agricultural Produce of Istria Used in Regional Branding : Strategic Concept", *Paper*, 22nd Cromar Congress, Marketing Challenges in New Economy, 2011, at. 3

<sup>37</sup> Mevhibe Albayrak and Melda Ozdemi, "The Role of Geographical Indication in Brand Making of Turkish Handcrafts", *International Journal of Business and Social Research (IJBSR)*, Volume -2, No.-3, June 2012, at. 111.

<sup>38</sup> Traditional product is "a product frequently consumed or associated with specific celebrations and/or seasons, normally transmitted from one generation to another, made accurately in a specific way according to the cultural heritage, with little or no processing/manipulation, distinguished and known because of its sensory properties and associated with a certain local area, region or country", see Luis Guerrero, et.al, "Perception of traditional food products in six European regions using free word association", *Food Quality and Preference*, Volume 21, 2010, at. 225.

<sup>39</sup> Chuthaporn Ngokkuen and Ulrike Grote, above note 33, at 94.

<sup>40</sup> Article 22 (1) of TRIPS Agreement.

9 status.<sup>41</sup> The main source of this exoticness comes from unique quality differences that may be attributed to production in a particular geographical area based on quality characteristics associated with that location.<sup>42</sup> These products may also derive exoticness from the history and tradition associated with the production processes used in the specific geographical areas from which the products originate.<sup>43</sup> The other mechanisms to create an aura of exoticness and mystique surrounding a GI brand is to add human diligence, heroism, morality, or sacrifice.<sup>44</sup> The exoticness and scarcity of products will allow the GI producers to capture the premium price for their products in the marketplace, thus, GI will add economic value of local products and encourage more quality and niche products to be put on the markets. Therefore according to Kamp, promoting GI will give benefit that GI: (a) can be used in marketing strategies in both domestic and international spheres; (b) adds value to the potential GI product and improves producers' livelihoods; (c) become tools to develop rural areas on the basis of the good reputation of their quality; (d) improve the reputation of the GI product in global trade; (e) ensure equal treatment regarding GI protection and can be used as a tool for promotion abroad; (f) avoid unfair competition, misrepresentation or leading, deceptive conduct.<sup>45</sup> Moreover, according to Mevhibe Albayrak and Melda Ozdemi, GI functions as: (a) *Indication of source*, showing the geographical origin of a product; (c) *Differentiation*, for distinguishing a product from other similar type products on the market; (c) *Indication of Quality and Guarantee* for the continuity of the quality of a product and the consumers' positive perception related to a product; (c) *Protection of Traditional Knowledge*, implied that the features of GI product are the result of not only the natural materials of a region but also the influence of cultural factors and a knowledge accumulation of centuries (d) *Advertisement and Promotion of the Country* by creating the continuity of the fame of a product gained over the years that contributes to the promotion of a country because the GI of certain products includes a reference to the country of origin. (d) *Rural Development* by providing important privileges to local producers of traditional product who earn their living from it that will be advantageous for rural development.<sup>46</sup>

Then, developing GI will attract investment in local products because strengthening or expanding GI makes investments more secure and consequently raises levels of investment. Since there are various unique products in local region, GI protection will attract foreign investors to these regions. Development through foreign investment would help close the gap between developing and developed countries. Increased investment due to heightened GI protection would allow producers in developing countries to develop economies of scale.<sup>47</sup> To promote economic equality between the develop and developing countries, developing countries must participate in the undeniable economic advantage of GI. Therefore, there is the need to increase investment in regional products by promoting local branding under GI system. Investment in GI products tends to be from the rural, agricultural and handicraft sectors developed by developing countries, thus, implicating the interests of the developing countries.<sup>48</sup> The investment in origin link sectors may create employment, local revenue and value added, plays a role in economic growth in local areas, which can reduce migration from the rural to the city, may bridge the income gap between the rural and urban areas and at the same time have a positive effect on the income distribution. Therefore, the possible benefits by developing GI branding includes : (a) maintaining and/or increasing local revenues and local employment in the different stages of the production process (production, processing, distribution), (b) allowing local people to stay and live in the production area (c) preserving the environment and biodiversity, (c) maintaining traditional farming with its potential positive contributions to the landscape, favorable habitats for biodiversity and soil preservation, (d) maintaining traditional processing systems and recipes, (e) keeping alive local traditions and local culture related to the product.<sup>49</sup> By developing GI branding and protection for origin-linked products allow local products to continue to be produced and prevent local people to leave local area because numerous local/traditional products are at risk of disappearing, as production is not competitive in cost of production and imitation by actors outside the area.

<sup>41</sup> Sanjeev Agarwal and Michael J. Barone, above note 1, at. 2.

<sup>42</sup> Id

<sup>43</sup> Id

<sup>44</sup> Id, at. 3.

<sup>45</sup> Surip Mawardi, "Advantages, constraints and key success factors in establishing origin- and tradition-linked quality signs: the case of Kintamani Bali Arabica coffee geographical indication, Indonesia," *Paper for case study of Case study on quality products linked to geographical origin in Asia* carried out for FAO, 25 May 2009, (hereinafter Surip Mawardi II), at. 7

<sup>46</sup> Mevhibe Albayrak, Melda Ozdemi, above note 37, at. 112-113.

<sup>47</sup> Id

<sup>48</sup> Dwijen Rangnekar, "the Socio-34 omics of Geographical Indications: A Review of Empirical Evidence From Europe," *Paper*, 2004, at 1.

<sup>49</sup> Emilie Vandecandelaere, et.al, *Linking People, Places and Products: a Guide for Promoting Quality Linked to Geographical Origin and Sustainable Geographical Indications*, Food and Agriculture Organization of the United Nations (FAO) and SENER-GI, Rome, 2009-2010, at.19

#### 4. The Challenges of GI Branding

Promoting local branding under GI system looks uneasy to achieve and may spark challenges at normative and practical level.

##### A. Normative Challenge

At normative level, the existing GI regulation under Indonesian trademark act is inherently insufficient because of limited scope of protection. GI provisions in Indonesian Trademark Act are very limited because they only appear to four articles (Article 56 to 60) and the contents do not cover sufficient elements of GI protection. In addition, the GI content in trademark law is too general because it consists of the very general of GI definition, the formalities for protection, duration of protection, the refusal of GI registration and legal action for GI infringement. Therefore, it can be assumed that there is insufficient GI protection under trademark law.

The trademark regime to protect a GI name does not provide for a protection as comprehensive as the one offered by a *sui generis* GI system. It is unreliable for GI producers to depend on GI protection in the trademark regime<sup>50</sup> because the trademark law may not be the best mechanism of securing exclusive rights of GI producers. The trademark system is often ill-equipped to provide protection geographical names have specific characteristics that allow them to be unique development tool.<sup>51</sup> The experience of GI producers shows that the use of a trademark regime has proved extremely difficult, very complicated, often very costly and not always effective to protect GI.<sup>52</sup>

The inclusion of GI protection under Indonesian Trademark Act is likely not appropriate because trademark regime is not compatible to protect GI. The GI protection in trademark regimes is not only inadequate but also inherently unsuitable because of its different nature and a total conflict between them. The effort to protect GI under trademark law seems to fit 'circle of geographical indication into the square or oval of trademark discourse.' Although the essence of trademarks and GIs is that both regulate the use of signs in the marketplace by enabling their communicative function<sup>53</sup> and ultimately both built on existing reputation, there are significant distinctions between them<sup>54</sup> and they have different legal concepts.<sup>55</sup> According to WIPO :

*trademark is a sign used by an enterprise to distinguish its goods and services from those of other enterprises. It gives its owner the right to exclude others from using the trademark. A geographical indication tells consumers that a product is produced in a certain place and has certain characteristics that are due to that place of production. It may be used by all producers who make their products in the place designated by a geographical indication and whose products share typical qualities.*<sup>56</sup>

Differ from trademark, GI describes the geographical origin of the product rather than its trade or commercial origin, so they lack the requisite distinctiveness.<sup>57</sup> GI cannot be created by an intention to use or by the mere lodgment of an application with a registration system, whereas trademarks system allow to do so.<sup>58</sup> Trademarks are personal property, while GI is clearly a collective right of some kind, not capable of ownership by any individual but rather a fixture to the region or locality which represent.<sup>58</sup> A trademark must indicate only one origin of source of goods, whereas GI can indicate many origins of goods as long as all origins emanate from the same geographical area.<sup>59</sup> Moreover, while trademark very well might be invalidated because it has become generic term for the product in question, registered and protected GI cannot become generic. A trademark must be renewed in certain period,<sup>60</sup> while a GI will obtain perpetual protection and does not need to be renewed to gain validity as long as the specific characteristics still exist.<sup>61</sup>

According to the principle of "first to fill" applicable to trademarks, it is therefore impossible for GI producers to seek trademark registration of geographical name is already legally owned by others. If the principle of *first to fill* is applied, then these applications will be able to prohibit others (including authentic GI producers) from selling their product under the same GI name. Such a situation has occurred in the past, when Italian producers of *Parma ham* were obstructed from initially registering their marks in both the US<sup>62</sup> and Canada<sup>63</sup> because of a prior registration for

<sup>50</sup> Emes Olivas, et.al, above note 36.

<sup>51</sup> Id, at 2

<sup>52</sup> Dwijen Rangnekar, <sup>63</sup> e note 48.

<sup>53</sup> Dev Saif Gangjee, "Quibbling Siblings: Conflicts between Trademarks and Geographical Indications", *Chicago-Kent Law Review*, volume 2, 2007, at 6.

<sup>54</sup> Stephen Stern, 'Geographical Indications And Trade Marks: Conflicts And Possible Resolutions', *Paper At WIPO Symposium On Geographical Indications*, San Francisco, California, July 9 To 11, 2004, at. 3

<sup>55</sup> Jeremy P <sup>79</sup> s, *Trademark Law – A Practical Anatomy* (Oxford University Press, 2<sup>nd</sup> ed. 2003), see also Bernard O Connor, above note 27, at 107

<sup>56</sup> WIPO, "Geographical Indications," [http://www.wipo.int/aboutip/en/geographical\\_ind.html](http://www.wipo.int/aboutip/en/geographical_ind.html).

<sup>57</sup> WIPO, *Summary of Replies to the Questionnaire on Trademark Law and Practice*, at 80, WIPO Doc. SCT/14/5 Rev. (Nov. 1, 2005).

<sup>58</sup> <sup>59</sup>

<sup>59</sup> Clark W. Lackert, "Geographical Indications: What Does the WTO TRIPs Agreement Require?," *Trademark World*, August, 1998, at 23.

<sup>60</sup> Article 35 (1) of Indonesian Trademark Act

<sup>61</sup> Article 56 (7) of Indonesian Trademark Act

<sup>62</sup> *Consorzio del Prosciutto di Parma v Parma Sausage Products* 23 USPQ 2d 1894 (1992 TTAB).



Parma. Indonesia also faced the problem to sell or export Gayo Coffee since Holland Coffee B.V has registered the Gayo coffee under trademark in Netherlands.<sup>64</sup> In such a case GI has been registered as trademark by others, GI producers have only two options, they can launch proceedings to obtain the cancellation of the registered trademark, or they can enter into negotiation with the owner of the trademark to buy it. In both cases, actions launched by GI producers have proved very costly and not always 100 percent successful.<sup>65</sup>

Trademarks are used in order to distinguish particular goods and services from other goods, whereas GI signs are used in order to distinguish products from a particular region from products coming from outside that region. Trademarks are the result of human creativity, while GI linked to something more than mere human activity but topography, climate or other factors independent from human creativity.<sup>66</sup> Trademarks function as the main communication between a manufacturer and the consumers to give information about quality, therefore a trademark puts emphasis on the producers, whereas GI underlines the geographical origin of a good and the characteristics derived there from.<sup>67</sup>

Trademarks can be licensed to third parties, whereas the licensing of GI is prohibited. Controversially, some argue that GI is not property because they cannot be bought, sold, or licensed to producers outside of the region.<sup>68</sup> GI is categorically not associated with private ownership but instead characterized as a right to use.<sup>69</sup> It can never be privately owned, and thus GI differs from intellectual property (IP) law.<sup>70</sup> As a result, inclusion of GI in the TRIPS as a type of IP is controversial since some WTO members still believe that GI are not IP<sup>71</sup> and should not be subject to IP disciplines. Therefore, inclusion of GI in trademark law is inherently unsuitable.

## B. Practical Challenges

### (i) Preparation and Registration

At preparation and registration, the process of GI registration will be very time-consuming and costly, requiring complicated procedures and the involvement of a wide range of stakeholders such as local producers' organizations, research institutions, government (local and central) and the private sectors for application and inspection.

Article 56(2) of Indonesian Trademark Act provides that GI shall be protected after registration, based on the application. It is clear that the "first to file" principle is applied to protect GI.<sup>72</sup> However, there are small number of GI applications<sup>73</sup> that have been registered at Directorate General of Intellectual Property (DGIP) because of several obstacles. Firstly, although GI is regulated under trademark, GI registration is much more complex than trademark registration. To register GI, applicants must<sup>74</sup>: (a) register the product name and GI name; (b) describe in detail the distinguishing characteristics and quality of the product and how; (c) relate to the originating location of production; (d) provide an acknowledgement of the GI product from the community of origin; and (e) describe the geographical environment, and the natural and human factors to make the products, including the production process and quality testing methods.

Also, the applicant must provide a book of requirements (specification book) in relation to GI registration process.<sup>75</sup> Providing book of requirements is also difficult because it must define qualities and characteristics of the product that distinguish from other products in the same category, description of the geographical factor to the or characteristic and description of method used to examine the characteristic of product. As there is no database of GI identification in Indonesia,<sup>76</sup> it is also difficult when the specification book requires description of history and

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<sup>63</sup> *Consorzio del Prosciutto di Parma v Maple Leaf Meats Inc* [2001] 2 FC 536 (Federal Court of Canada, Trial Division).

<sup>64</sup> The Jakarta Post, 'Dutch Company Claims International Trade Rights Over Gayo Coffee', February 11, 2008.

<sup>65</sup> Emes Olivas, et al, above note 36, at 3.

<sup>66</sup> Id.

<sup>67</sup> Id.

<sup>68</sup> Jeremy Phillips, above note 55.

<sup>69</sup> Response to the Checklist of Questions: Review under Art 24.2, IP/C/W/117/Add.10 (Mar. 26, 1999).

<sup>70</sup> Louis Lora, 'You've Got to Fight for Your Right to Party: A Response to Professor Jim Chen' (1996) *Minn. J. Global Trade* 65, 69 (1996).

<sup>71</sup> Eleanor K. Meltzer, 'Pass the Parmesan? What You Need to Know about Geographical Indication and Trademarks', *Intellectual Property Feature*, June/July 2002, at.19.

<sup>72</sup> First to file principle (First in time, First in right) is also adopted in Article 2(3) of Indonesian GI Government Regulation.

<sup>73</sup> Denise Miranda, 'Indonesia GI Protection', available at <http://www.hg.org/article.asp?id=5041>

<sup>74</sup> ru Lukiantoro, 'Geographical Indication Protection to Boost the National Economy', at <http://www.asialaw.com/default.asp?page=14&PUB=48&ISS=24557&SID=702199>

<sup>75</sup> Article 6(3) of Indonesian GI Government Regulation.

<sup>76</sup> Directorate General of International Trade Cooperation, 'The potential improvement of High Quality Export of agricultural product by the protection of geographical Indication', *Paper* at Workshop of 'With Geographical indication Protection, We enhance the Image and Competitiveness of Indonesian Local Specific Products', 12-13 December 2006, Bali, Indonesia.

tradition of GI use including acknowledgement from society related to GI use. Another difficulty is the description of the border of geographical area that can arise conflict between local authorities.

In addition, the GI producers must also register to use and to produce GI.<sup>77</sup> Hence, the granting GI registration will likely not give automatic exclusive right to use and produce GI products. It seems an additional burden for an applicant register, first for GI registration and second to use and produce GI.

Another problem is about the announcement process. Article 56(3) of Indonesian Trademark Act provides that the announcement provisions for trademark<sup>78</sup> also apply for GI. The announcement period is three months,<sup>79</sup> **10** during this period any person or legal entity can oppose the application by filing an objection, the GI applicant **shall be entitled to file a rebuttal to the** opposition.<sup>80</sup> However, **as** GI has different nature compared to trademark, the period of announcement should be longer than trademark to provide the opposition and rebuttals regarding GI registration.

In addition, there is also problem in re-examination GI registration. It is argued that re-examination must exist if there are opposition and rebuttal actions. However, the Indonesian GI Government Regulation provides re-substantive examination,<sup>81</sup> which has longer period (six months)<sup>82</sup> than Indonesian Trademark Act (only two months).<sup>83</sup> The different period of re-examination indicates unparallel provisions of examination between Indonesian Trademark Act and Indonesian GI Government Regulation.**1**

Furthermore, Indonesian GI Government Regulation also provides facility for parties who used GI prior to its registration to continue using it for two years after its registration, as long as they acknowledge its registration **and** **1** to not attempt to mislead the public about its prior use and existing registration.<sup>84</sup> While Government Regulation also provides the facility for continued use of registered trademarks that have an element of a sign recognized as a GI, the regulation does not further explain how the trademark owners should acknowledge the GI. Thus, the question remains whether or not the rights of the owners of such trademark registrations will be limited in terms of enforcing their trademark rights against any use that represents GI.

In addition, **the** problem of potential double registration of geographical name both under GI and trademark may arise. Trademarks and GI acquiring reputation with special quality and high commercial value, may be exposed to misappropriation, counterfeiting or misuse. Some parties may try to register the geographical name under trademark registration or try to obtain double protection by registering both under trademark and GI **re** **73** **es**. Thus, the problems can be identified concerning the relation between a trademark and GI : (a) parties use the **same sign as a trademark and as GI for the same product**; (b) sign is used by different parties as a trademark and GI for different goods, and either the trademark or the GI is well-known, (c) registered trademark, consisting of a geographical name, which is not the same as the designation of origin, has existed for a long time and become famous (not even being aware of the existence of a geographical area with the same or similar name).<sup>85</sup>

In Indonesia, to avoid double registration<sup>31</sup> and potential conflicts of trademark registration, Article 6(1)(c)<sup>86</sup> of Indonesian Trademark Act provides that: *an application for registration of a mark shall be refused by the Directorate General if the relevant mark has a similarity in its essential part or in its entirety with a known geographical indica***12**. It seems that Article 6 of Indonesian Trademark Act adopts the Article 23(3) of TRIPS providing that : *the registration of a trademark for wines which contains or consists of a geographical indication identifying wines or for spirits which contains or consists of a geographical indication identifying spirits shall be refused or invalidated, ex officio if a Member's legislation so permits or at the request of an interested party, with respect to such wines or spirits not having this origin*. However, the conflict between GI and trademark prevented under Article 6(1)(c) of Indonesian Trademark Act is unlikely useful because of the ambiguous regulation in Article 27(2) of Indonesian GI Government Regulation that allows the good faith party continue to use trademark having similarity to GI if the trademark is used and registered before GI registration.

Moreover, the issue may arise in the refusal of trademark registration because although the DGIP has responsible and may have the power to independently inquire into the invalidity of a trademark due to the existence of GI, it can unlikely be executed. Gathering evidence of the existence of GI is likely to be outside the role and beyond the resources of the DGIP. Article 6(1)(c) of Indonesian Trademark Act can also be used by interested party

<sup>77</sup> Article 15 (2) of Indonesian GI Government Regulation.

<sup>78</sup> Article 21, 22, 23, 24 and 25 of Indonesian Trademark Act

<sup>79</sup> Article 22(1) of Indonesian Trademark Act and Article 11 (4) of Indonesian GI Government Regulation.

<sup>80</sup> Article 24 of Indonesian Trademark Act and Article 12 (1) of Indonesian GI Government Regulation.

<sup>81</sup> Article 13 the of Indonesian GI Government Regulation.

<sup>82</sup> Article 13 (2) of Indonesian GI Government Regulation.

<sup>83</sup> Article 26 (2) of Indonesian Trademark Act.

<sup>84</sup> Article 27 (1) of Indonesian **49** Government Regulation, this regulation is similar to Article 56 (8) of Indonesian Trademark Act.

<sup>85</sup> Lena Göransson Norrsjö, 'Indications of Geographical Origin as part of the Intellectual Property Law', *Thesis*, Stockholm Universitet, at 52

<sup>86</sup> Yasmon Rangkyo Sati, above note 9, at. 109.

as a basis for revocation of registered trademark that has similarity to GI.<sup>87</sup> However, Article 68(1) of Indonesian Trademark Act does not identify clearly the interested party who can proceed the revocation. Can the competitors take a part?. This provision can be used by “naughty” competitor as a weapon to stop trademark and to market product because Indonesian Trademark Act and GI Government Regulation is also unclear to regulate revocation of trademark which is similar to GI. In addition, the revocation of the GI registration shall be filled within period of 5 years after the date of trademark registration. If no party takes action to revoke the registration within the period of years, there is no opportunity to cancel the registration of trademark which is similar to GI. Consequently, without cancellation, this will block the GI registration using the same geographical name and consumers will confuse to identify the genuine products. As the “first to file” principle is also applied to GI protection, it seems unfair that the GI producer developing GI for long periods cannot register it because it has been already registered as trademark.

#### (ii) Monitoring and Controlling

It can be argued that GI is the only form of IP related to place or territory, thus, GI represents a type of collective property. At monitoring and management, GI has collective right character that cannot be owned by a single producer but rather by a collectives in a geographical area, therefore it will be difficult to internally and externally manage and control the use of GI over the producers, including maintain the quality of products.

The monitoring and management of GI quality and characteristic is very important because the objective of GI protection is to preserve and maintain the reputation of the GIs, thus, ensuring the quality is the most vital factor to remain GI protection. According to Article 22(2) of the TRIPS, there is obligation of TRIPs members to ensure the quality control of GI under their national laws. However TRIPS does not clearly provide the method of controlling the quality, thus there could be different ways of ensuring the quality while protecting the GI which depending on the legislation in each of the countries. The obligation to ensure quality control should be a precondition for registration. In Indonesia, quality or the peculiar features is made the basis for protection. According to Article 56 (7) of Indonesian Trademark Act : *a registered Geographical Indication enjoys a legal protection, which persists as far as the features and or the quality on which the protection has been conferred still exist*. It means that the GI producers remain enjoy protection in Indonesia as long as the quality or unique features that form the basis for protection are preserved or maintained.

However, it is uneasy to control the quality and characteristic of GI. Once a GI brand is successful, new entrants will enter the geographical area to take advantage of the brand equity residing in the GI as long as they are able to adhere to the regulations governing the GI collective. As the consequence of collective ownership, the GI brand is not restricted to a single producer or a group of producers that could lead to an increase in production in the GI area, reducing the scarcity and hence premiums related to the product. In addition, if everyone in that group has same right they will try to produce according to the order received from their consumers then that will result lack of quality. If one produces low standard product, it will affect the entire group and over a period of time it will become worst product.<sup>88</sup>

#### (iii) promotion and marketing of GI products

At promotion, it is not easy to develop and maintain GI products market, thus it requires strategies and the involvement of a wide range of stakeholders. Promoting and marketing of GI is important to reward quality perception and develop improved reputation.<sup>89</sup>

Retaining market trust and ensuring ongoing sales is important to maintain consistent excellence of quality. However, marketing of GI represents challenges in relation to the lack of high degree of empowerment of producers and processors, and the capacity to incorporate certain number of technical or management innovations for sustainable development of the marketing system as the problems of GI promotion and marketing. According to Anson C. J, producers of GI are not able to utilize the brand value and effectively adopt marketing techniques and to effectively manage it as an asset.<sup>90</sup>

Principally, marketing management is highly depended on supply and demand. However, in the case of GI marketing, if GI producers can't control the supply, it will result to the price strategy and if they produce GI items as their own wish, this will generate marketing very difficult.

<sup>87</sup> Article 68 of Indonesian Trademark Act.

<sup>88</sup> Anson C. J, “Marketing flexibilities in Geographical Indications (GI) and trademark: a Comparative Study”, *International Journal of Marketing, Financial Services & Management Research*, Vol.1 Issue 11, November 2012, at 105.

<sup>89</sup> Chengyan Yue, et.al, “ How to Promote Quality Perception in Wine Markets: Brand Advertising or Geographic Indication?”, *Paper at the 3rd International Wine Business & Marketing Conference, Montpellier, July 6-8, 2006*, at.1

<sup>90</sup> Anson C. J, above note 88, at 105.

## 5. Solutions

### A. Sui Generis System

To overcome the normative challenge, the paper recommends that the sui generis law seems the best solution to provide appropriate GI protection that can accommodate the basic elements of protection and solve the problems of insufficient GI protection under trademark regime.<sup>61</sup> The term *sui generis* derived from a Latin expression<sup>91</sup> meaning 'of its own kind'<sup>92</sup> meaning 'of its own kind', is a term used to identify a legal classification that exists independently because of the specific creation of an entitlement or obligation.<sup>93</sup> As it means 'of its own kind', some argue that *sui generis* of GI would have to be different from the main systems of IP protection<sup>94</sup> and a totally new form of monopoly over GI.<sup>95</sup> They affirm that *sui generis* right exists independently of IP<sup>96</sup> on the basis that GI rights are inalienable existed long before IP regime.<sup>97</sup> However, since GI is one of subject matters protected by TRIPS, *sui generis* system for GI must comply with TRIPS standards. It means that the standard of *sui generis* should provide at least<sup>98</sup>: IP right, the principle of National Treatment,<sup>99</sup> the principle of Most Favored Nation,<sup>100</sup> the scope of protection and rights, the formalities and enforcement mechanism.<sup>42</sup>

Actually, countries are free to protect GI through their own legal regimes because Article 1 (1) of TRIPS regulates that "members shall be free to determine the appropriate method of implementing the provisions of this within their own legal system and practice".<sup>101</sup> Since the spirit of Article 1 (1) of TRIPS has always been one of latitude and discretion,<sup>102</sup> there is no single method of implementing TRIPS obligations.<sup>103</sup> In addition, Article 22(2) of TRIPS only requires to provide legal means for protecting GI:

*In respect of geographical indications, Members shall provide the legal means for interested parties to prevent:*

*(a) the use of any means in the designation or presentation of a good that indicates or suggests that the good in question originates in a geographical area other than the true place of origin in a manner which misleads the public as to the geographical origin of the good;*

*(b) any use which constitutes an act of unfair competition within the meaning of Article 10bis of the Paris Convention (1967).*

Although TRIPS obligates state members to provide legal means for GI protection, TRIPS does not specify the legal means and leaves the TRIPS members to decide the form of protection.<sup>104</sup> As a result, GI implementation occurs in the most diverse and uncoordinated manner.<sup>105</sup> Practically, there are three models of GI protection: (a) laws focusing on business practices such as unfair competition, misleading of consumers passing off; (b) protection under trademark law, (c) special protection such as collective, certification, guarantee marks and prior recognition requirement.<sup>106</sup> The special protection could be under PGI or PDO applied by European Union.<sup>107</sup>

Since TRIPS does not specify the legal means for GI protection, TRIPS members can adopt *sui generis* system that best suit their own social and economic development,<sup>108</sup> or their national interest. As long as members have same way to effect to Article 22 GI,<sup>109</sup> they are free to establish any legal regime including *sui generis* system that

<sup>91</sup> G. E. Evans, "The Comparative Advantages of Geographical Indications and Community Trademarks for the Marketing of Agricultural Products in the European Union", *C-INT REVUE JELL*, vol. 41, No. 6, 2010, at. 5.

<sup>92</sup> Patricia Lucia Cantuaria Marin, *Patents, Sui Generis Systems and Biopartnerships*, Kluwer Law International, Netherland, 2002, at. 68.

<sup>93</sup> G. E. Evans, above note 91.

<sup>94</sup> Patricia Lucia Cantuaria Marin, above note 92.

<sup>95</sup> The Thammasat Resolution, "Building and Strengthening Our Sui Generis Rights. Final Declaration of the meeting held by the Thai Network on Community Rights and Biodiversity (BIOTA) and Genetic Resource Action International (GRAIN), in Bangkok, Thailand, from 1 to 6 December 1997.

<sup>96</sup> Id.

<sup>97</sup> Id.

<sup>98</sup> Patricia, above note 92, at 69. 28

<sup>99</sup> National treatment means that Each Member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection of intellectual property, subject to the exceptions already provided...(Article 3(1) of TRIPS).

<sup>100</sup> Most Favored Nation mean that with regard to the protection of intellectual property, any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members (Article 4 TRIPS).

<sup>101</sup> Article 1 (1) of TRIPS.

<sup>102</sup> Aaron C. Lang, "On the Need to Expand Article 23 of The TRIPS Agreement", *Duke J. Comp. & Int'l L.*, Vol. 6, 2006, at 507.

<sup>103</sup> Id.

<sup>104</sup> Michael Blakeney, 'Geographical Indication and TRIPS', in Meir Perez Pugatch (eds), *The Intellectual Property Debate, Perspective from Law, Economic and Political Economy*, Edward Elgar, Cheltenham, UK, 2006, at. 293.

<sup>105</sup> J.Watal, *Intellectual Property in the WTO and Developing Countries*, The Hague, 2001, at.264.

<sup>106</sup> Budi Agus Riswandi, above note 12, at. 4.

<sup>107</sup> Michael Blakeney, above note 104, at. 300, see also Phil Evan, "Geographical Indication, Trade and the Functioning of Markets", in Meir Perez Pugatch (eds), *The Intellectual Property Debate, Perspective from Law, Economic and Political Economy*, Edward Elgar, Cheltenham, UK, 2006, at. 347.

<sup>108</sup> Patricia Lucia Cantuaria Marin, above note 92, at. 79.

<sup>109</sup> Aaron C. Lang, above note 102.

goes beyond trademark regime as long as it offers some sort for IP protection to GI.<sup>110</sup> Based on Article 1(1) and Article 22 of TRIPS, Indonesia can establish *sui generis* system that suit the Indonesian national interest. By establishing *sui generis* system, Indonesia can also address several existing GI problems under trademark.

Many countries recognizes the need for a *sui generis* GI protection system<sup>111</sup> and have established *sui generis* systems for GI protection.<sup>112</sup> Since 2000, 12 countries from North and Latin America (such as Colombia, Venezuela, Cuba or Costa Rica) and 13 countries in Asia (such as Mongolia, North Korea, Thailand and Vietnam) have established *sui generis* protection systems for GIs in the years.<sup>113</sup> According to WIPO, when countries have considered a *sui generis* system for GI protection, they must demonstrate how the law specify the policy objective of protection, the subject matter, the criteria of protection, the exclusive rights and its exceptions, procedures and formalities of protection and maintenance of the rights conferred, enforcement mechanism including effective remedies or penalties, how the rights are lost or expired, the complements or interaction with existing IP standards.<sup>114</sup>

*Sui generis* must define the subject matter such as identify clearly what names can be registered. Some system only allow for the registration of direct geographical names such as in the Russian Federation, while other systems permit inclusion of traditional names, geographical or figurative representations or any combination suggesting of GI.<sup>115</sup> In addition *Sui generis* law must provide the formalities of protection. Generally, GI protection is based on registration like in EU,<sup>116</sup> although Singapore, India, and Latvia have passive or non registration protection.<sup>117</sup> Indonesia adopts the registration system because it affords better protection and legal certainty.

*Sui generis* should adopt the clear provision of generic GI. It is important to consider Article 3 of EC Regulation 2081/92 which establishes whether or not a name has become generic.<sup>118</sup> In EC Regulation 2081/92, relevant factors considering the generic or homonymous GI includes<sup>119</sup> the existing situation in the EC Member State in which the name originates; the situation of the area of consumption; the existing situation in other states; the relevant national or community laws. The homonymous GI or generic GI can be registered only if the registrar is satisfied that there will be no confusion, after considering the practical conditions under which the homonymous indication in question can or would be differentiated from other homonymous indications.

In addition, *sui generis* law must regulate the legal basis for establishment of national GI agency or a team of GI experts that has an authority to coordinate GI identification,<sup>120</sup> to protect and control GI protection at national level. Moreover, *sui generis* law must provide the legal power for a team of GI experts to examine GI registrations and control GI use and quality. To control registered GI effectively, Indonesia may adopt the system in EC Council legislation (Regulation 2081/92)<sup>121</sup> that allow public or private body to control GI under coordinating national GI agency.

*Sui generis* should also clarify ownership of GI and mechanism to identify the border of geographical area. Principally, GI is collective ownership, therefore GI owner should be not individual rather collective that allow local government, the local producers or the farmers group to register GI. The border of geographical area is needed to be

<sup>110</sup> Id.

<sup>111</sup>Ernes Olivas, et. al., above note 36.

<sup>112</sup>Ernes Olivas Caceres, 'Perspectives for Geographical Indication', *Paper*, International Symposium On Geographical Indications – WIPO & State Administration for Industry and Commerce (SAIC) of the People's Republic of China, Beijing, June 26 to 28, 2007, WIPO/GEO/BEI/07/13, June 22, 2007, available at [wipo.int/edocs/mdocs/geoind/en/.../wipo\\_geo\\_bei\\_07\\_www\\_81780.doc](http://wipo.int/edocs/mdocs/geoind/en/.../wipo_geo_bei_07_www_81780.doc), at 4.

<sup>113</sup> Id.

<sup>114</sup>International Intellectual Property Institute (IIPi), 'Is a *Sui Generis* System necessary?', *IPTF Luncheon*, New York, January 14, 2004, at 3.

<sup>115</sup> Id. 24.

<sup>116</sup> EC Regulation 2081/92 of 4 July 1992 on the protection of geographical indications and designation of origin for agricultural products and foodstuffs, OJ L 208, 24/07/1997, as last amendment by EC Regulation 692/2003 of 8 April 2008, OJ L 99, 17/04/2003.

<sup>117</sup> Bernard O Connor, above note 16, at 74.

<sup>118</sup> Article 3(1) EC Regulation 1081/92 states that : ... generic names or indications in relation to goods, means the name of a good which, although related to the place or the region where the goods was originally produced or manufactured, has lost its original meaning and has become the common name of such goods and serves as a designation for or indication of the kind, nature, type or other property or characteristic of the goods.

<sup>119</sup> Article 3 of EC Regulation 2081/92.

<sup>120</sup> Indonesia has divided the GI identification tasks to several agencies : (a) DGIP, has a task to identify the regulations for GI protection; (b) Secretariate of Cabinet (Vice Presidential Secretary) and DGIP, have tasks to analyse and accommodate the required regulation for implementation of GI protection; (c) Ministry of Research and Technology and Ministry of Environment, have a task to identify GI product; (d) Research and Development Institution of the Department of Forestry, has tasks to identify and undertake R&D GI agricultural products ; (e) Supervision of Medicine and Food Body, has task to identify GI medicinal products; (f) Directorate General of Small and Intermediate Industry, has task to help centre of industries to develop GI products; (g) Directorate General of Cooperation of International Trade, has task to monitor international negotiation and overseas GI registration.

<sup>121</sup> For private body, EC Regulation 2081/92 requires that private inspection bodies are required to be accredited to European Standard EN 45011, equivalent to the ISO Standard 9001. Private bodies must also offer adequate guarantee of objectivity and impartiality with regard to all producers to their control and have permanently qualified staff and resources to carry out inspection. See Article 10 EC Regulation 2081/92.

regulated to prevent the potential problem when GI product is located in middle border area or in the relevant region, or when geographical area may not be clearly defined, particularly where there are no clear natural or political borders such as rivers or provincial borders.<sup>122</sup> Unclear GI border will create a potential conflict between local governments to claim the GI ownership because each government may be entitled to be the GI owner and has authority to register or develop GI. Thus, *sui generis system* should also anticipate and address potential conflict between local and central government related to ownership and the border of geographical area.

Furthermore, according to Article 7 of Indonesian Plant Variety Protection Act (the Act No 29/2000), the traditional agricultural products are owned by state. Also according to Article 10 of Indonesian Copyright Act (the Act No. 19/2002), traditional handicrafts and folklore are belong to state. However, if the definition of “state” is interpreted as the central government, there will be no opportunity for local governments, local producers, local farmers or local handcrafters to register traditional agricultural products and handicrafts to gain GI protection.

## B. Practical Overcomes

Indonesian government interested to develop GI system in order to improve the quality and the competitiveness of local products. A pilot project in developing GI was initiated for Bali Kintamani Coffee in 2002. The lesson can be drawn from the effort to protect Bali Kintamani Coffee is that although the initiation in establishing of GI system is time consuming, the involvement of different stakeholders such as local producers organization, research institutions, the government (local and central), private sectors (coffee exporters and local roasters) and other institutions are the key success to develop GI protection.<sup>90</sup> In establishing GI for the Bali Kintamani coffee, external supports from research institution such as ICCRI/ (Indonesian Coffee and Cocoa Research Institute) and foreign research institutions - CIRAD (International Cooperation Centre on Agrarian Research for Development (*Centre de coopération internationale en recherche agronomique pour le développement*, Montpellier, French National Origin and Quality Institute (INAO), and French Embassy in Jakarta<sup>123</sup> were also very important in building the capacities of local community by initiating intensive technical training courses on the application of the GI system, particularly in improving knowledge, technological expertise and market access. Support from government (local and central) is also key factor for promoting GI by establishing public policies on GI, building up physical infrastructure such as equipment grant, training, assistance and facilitation of access to financial support (soft loans) and access to market. Therefore, from the establishing GI for Kintamani coffee, the lessons can be learnt: (a) innovation and support from research and development institutions (ICCRI and CIRAD), (b) government (central and provincial) support, (c) the farmers’ traditions and philosophy, (d) traditional farmers’ organizations, (e) the commitment of stakeholders to special quality, (f) the partnership between farmers’ organizations and coffee exporters for the marketing of quality coffee, and (g) significant price differences between conventional and unique product, which provided an incentive to coffee growers.<sup>124</sup>

In addition, when other areas in Indonesia try to promoting GI for their products, they must undertake the main preparation steps developed by Bali government that includes the empowering farmer’s organization, improving the quality of product, marketing good quality product/coffee, defining unique and specific characteristic of a product, undertaking remote sensing study (to provide information on estimated area of coffee Arabica, distribution of Arabica growing area and distribution of each Arabica coffee-based agro system), training GI application, establishing GI organization and preparing “Specification Book” for applying registration.<sup>125</sup> GI organization such as Community of GI Protection” can be established based on pre-existing traditional producer/farmer organization as a representative of community. In the Kintamani coffee, pre-existing traditional farmer organization called “Subak Abian” has been empowered to establishing “Community of GI Protection for Kintamani Coffee” as an important organ to the management of preparation, registration, controlling and marketing activities, also helping to avoid social conflict.

Furthermore, identifying the quality or characteristic or reputation is also the main important preparation step to gain GI protection. In the case of Bali Kintamani Coffee coffees, it has been recognized that Bali Coffees are well known as one of “geographical coffee” from Indonesia similar to Mandheling, Toraja, Lintong, Gayo, etc.<sup>126</sup> Bali

<sup>69</sup> 26  
<sup>69</sup> Ubrecht Conrad, ‘The Protection of Geographical Indications in the TRIPS Agreement’, *Trademark Reporter*, volume 86, 1996, at 12. See also *Geographical Indications Committee v The Honourable Justice O’Connor* [2000] FCA 1877.

<sup>123</sup> Surip Mawardi I, above note 8, at 15.

<sup>124</sup> Surip Mawardi II, above note 39, at 45, at 26.

<sup>125</sup> Surip Mawardi, et al, “Developing Geographical Indication Protection in Indonesia: Bali Kintamani Arabica Coffee as a Preliminary Case”, Paper presented in Seminar on Geographical Indication: A Land of Opportunities”, Hanoi (Vietnam), 15 – 16 November 2005 (hereinafter Surip Mawardi III), at 3-10.

<sup>126</sup> Id, at 2.

coffees for a long period have been identified as good quality since the beginning of the 19th century.<sup>127</sup> Bali Kintamani Coffee has specific characteristic on the farming process organized by unique farmer organization called “Subak Abian” which is established and operated under Hindu Philosophy. Another characteristic is the Kintamani territory favorable for Arabica coffee growing and inhibited by the Balinese people whom hold tightly Hinduism philosophy of “*Tri Hita Karana*” (three happiness causes) meaning “harmonization of relationship to the God, human and environment.” The Hita Karana - Hinduism philosophy guides the Balinese farmers to have tradition in cultivating land and applying farming technique in respect to the God, human and environment. The farming system in Kintamani territory such as organic farming, single stem pruning, shade trees application as well as diversification with tangerine is expected to be unique factor influencing coffee taste produced from Kintamani territory.<sup>128</sup> The combination of local specific characteristics, agricultural farming, processing practices and philosophical aspect, produce high quality of Kintamani coffee beans with specific taste. The main characteristics of Kintamani Bali coffee are : (a) a medium to high acidity, (b) very good aroma quality and intensity, (c) a fruity taste (often lemony), (d) a medium body, not too high bitterness, (e) a very light astringency (f) a clean cup, free from defects.<sup>129</sup> From the success of GI Bali Kintamani coffee, the quality, characteristics and reputation linked to geographical origin of a product must be sufficiently specific to differentiate and not only geographical factors or natural factors such as climate, soils, local breeds and plant varieties), but also traditional equipment or planting, and human factors such as know-how, philosophical background, or tradition play a key role in forming the quality, characteristics, and reputation of origin products. To identify quality or characteristic, it can be the geographical aspects including historical, or cultural data such as ecological set, know-how, history of production, production stages, social networks, existing administrative zone and the interactions between the physical and biological environment, combined with human factors, producing specific conditions and knowledge that confer specificity and reputation on locally produced goods in the area. According to FAO, the characteristics may involve specific species or breed, local feeding, the processing, storage, native local plant varieties, traditional practices and know-how, soil and climate conditions that play an important role and give special quality attributes to flavor, aroma, color, texture.<sup>130</sup>

The objective of GI protection is to preserve and maintain the reputation of the GI based on the specific quality and unique characteristic. Therefore, the most vital factor to remain GI protection is ensuring the quality or characteristic. It has been argued that ensuring the quality of GI in controlling mechanism is very difficult because of the collective nature of GI owner.<sup>131</sup> However, in GI Kintamani Coffee, internal and external control of quality has been successfully established in order to ensure : (a) the fulfilment of the Book of Requirements, (b) origin of the product and (c) the quality and the specific characteristic of product. Internal controls have been established by Community of GI Protection and *Subak Abian* that include three elements: (a) auto control / self control by each producer to check the coffee plantation meets the stipulations of the Book of Requirements (b) Control by *subak abians* that is carried out annually then to be reported to Community of GI Protection (c) Control by Community of GI Protection carried out each year to check the conformity coffee farming with the Book of Requirements. From the control practices of Kintamani Coffee, it can be learned that to control the use of GI brand, the association of producers has an important role in guarantee system, especially : (a) to define the guarantee system, especially the control plan, by identifying the control points, and sanctions related to each requirement, (b) to organize the internal control of the GI value chain or when applicable, to be part of a participatory guarantee system, (c) to contribute to the controls and keep records of them (traceability system). Whereas external control is carried out by the national Geographical Indications Expert Team of the DGIP.

The control must be equipped with the rules applied to the GI users. A set of common rules for GI use at the local level required to prevent misuse or expropriation of GIs is important for : (a) identify the product and define its production and processing practices shared by stakeholders using the GI; (b) avoid unfair production and commercial practices, preventing abuse or damage to the GI reputation through the making and selling products with different and/or lower quality characteristics while benefiting from the reputation of the quality sign; (c) guarantee quality assurance of the product and of the geographical origin, fostering consumer confidence; (d) guide the behavior of local producers and support coordination and cohesion to create, preserve or improve the GI product's reputation and name value.<sup>131</sup> The absence codified rules and a regulatory framework may threaten the legitimate local GI system, and collective efforts to promote and preserve local resources, mislead consumers and misuse of geographical names. To enforce GI rules, local stakeholders may choose ways to ensure the conformity to the rules established and protect their rights to use the GI under a legal protection system, guarantee system and enforcement.

<sup>127</sup> Sunip Mawardi II, above note 45, at 2.

<sup>128</sup> Id, at. 3.

<sup>129</sup> Sunip Mawardi III, above note 125, at. 7.

<sup>130</sup> Emilie Vandecandelaere, et.al, above note 49, at.55.

<sup>131</sup> Id, at.33.

In order to develop promoting and marketing of GI, the GI producer (Subak Abian) and the Community of GI Protection have got the training to improve skill in marketing and market access, for example in 2001 the Bali Province and ICCRI ran a quality and marketing improvement program for Subak Abian. The program to improve promotion and marketing efficiency was carried out by establishing a direct business partnership between *subak abians* and coffee exporters in order to obtain guaranteed sales and better prices for high-quality coffee by using the “mediated partnership model.” GI promotion is crucial to be developed since promotion will keep in constant communication with both current and potential consumers and provide information about the specific quality and characteristics of the GI product in order to increase consumer willingness to purchase and pay.<sup>132</sup> The GI promotion must explain GI meaning in general, the unique features of the product, its tradition, its associates with the territory or its history, or present the typical product using traditional and creative methods, etc. Whereas, marketing encompasses all the tasks needed to sell and aims to reach consumers according to market opportunities, taking into account the potential and limitations of the GI product. It is important to develop knowledge on market demands, selling and competition, the risk of business failure and increase chances of generating income and profit for the GI.<sup>133</sup> Quality aspects, territory, social and cultural issues as well as other related economic sectors, such as tourism, trade exhibition/promotion also need to be considered in the marketing ways of GI products. In addition, GI needs integrated collective (by GI organization) and individual marketing (by its members) based on right balance and coherence ensured between them, depending on the concrete situation. If the members are well organized and have clearly defined their marketing strategy, GI organization may intervene on specific tasks where it is more effective to marketing work collectively, while if the member are small-scale GI producers with limited capacity and resources, the GI organization may define the whole marketing plan by enhancing the participation of all stakeholders in its marketing activities.

## 6. Conclusion

Branding by using various signs has been developed by producers as markers of quality and assurance of reputation. Reputation requires the use of legal instruments to protect the geographical name under GI mechanism since GI identifies products and signals to consumers that products has specific quality and unique characteristic. Various challenges may appear in promoting GI branding, however the benefits of GI branding such as such allowing producers to gain competitive advantages, achieve market recognition, capture the premiums for their products in the marketplace by creating exoticness or scarcity images, differentiate their products from those produced elsewhere, etc. largely outweigh the challenges that can be solved using a model developed by previous establishment of GI branding.

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<sup>132</sup> Id, at. 121.

<sup>133</sup> Id, at. 55.



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