

# THE PROTECTION OF GEOGRAPHICAL INDICATION FOR AGRICULTURAL DEVELOPMENT: CHALLENGES FOR ASEAN

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## THE PROTECTION OF GEOGRAPHICAL INDICATION FOR AGRICULTURAL DEVELOPMENT: CHALLENGES FOR ASEAN

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### ABSTRACT

*This paper aims at exploring the important of Geographical Indications (GIs) for promoting agricultural development in ASEAN. To visualize the above idea, this work will explain the roles of agricultural sector in ASEAN economic development and on how GIs will serve as a vehicle for promoting agricultural development and its utilization and commercialization. The paper shows how GIs protection will commit to encourage the agricultural innovation that support to agricultural development in ASEAN. However, GIs protection in ASEAN for agricultural development will spark three main challenges; doctrinal conflict, regulatory deficiency and technical shortcoming. The doctrinal challenge arises because of conflict between individual character of IP system and the communal nature of GI in ASEAN.. The regulatory deficiency comes up because of fundamentally different of legal system, economic structure and national interest among ASEAN member for promoting agricultural development in the sphere of GIs. Technical shortcoming arises because of different and lack of infrastructure, mechanism, institutional organization, and readiness for implementing GIs protection in agricultural sector. To overcome the challenges, this paper suggests that ASEAN needs to unilaterally and collectively come up with action plans on harmonizing and structuring GIs protection. To visualize the action plans, this paper advises that it is necessarily elaborate the harmonization and structuring of GIs protection with the strategic goals of 2016-2015 of South-East Asia Working Group on Intellectual Property Cooperation (AWGIPC).*

**Keywords:** *Geographical Indications, agricultural development, ASEAN Economic Community, international trade.*

### Introduction

Agriculture occupies an important role in ASEAN socio economic development because agriculture is vital to most ASEAN economies that becomes an important driver for social inclusive growth, an important source of export earnings, a guarantor of food availability, a source of employment (Teng & McConville, 2016) directly that provide income the majority of ASEAN people and through agriculture related value adding activities. Agriculture will also contribute to Gross Domestic Bruto (GDB), improve people welfare, reduce poverty rate, promote the growth of rural and local development.

Agriculture system linking production, processing and retailing has its roots in agrarian societies of ASEAN, thus it is not surprising that ASEAN is powerhouse of reputable agricultural products. Many ASEAN agricultural products have specific quality and characteristic associated with geographical factors including environment and human factor such as Jawak Pepper of Malaysia, Sabah of Malaysia, Toraja Coffee of Indonesia, Cianjur Rice of Indonesia, Thung Kula Rong-Hai Thai Hom Mali Rice of Thailand, Chaiya salted eggs of Thailand, etc.

To promote and protect agricultural products with specific characteristic or quality, ASEAN countries need to utilize GIs system because GIs are distinctive signs that permit the identification of products with the specific quality and characteristic on the market and enable the linking of a specific product to the territory from which it originates. GIs will also make it possible to add value to the natural richness of a country such as agricultural products and give the products a distinguishable identity.

GIs are applicable to wide variety of goods varying from natural, agricultural to manufactured products. Protecting GIs will be valuable to agro-based economies of ASEAN by adding value to local production, particularly for products like coffee and tea, tropical spices - commodities that are commonly grown in the ASEAN and where marketers and consumers are beginning to distinguish between products from different origins (the International Food & Agricultural Trade Policy Council, 2010).

As the natural resource and agricultural products are the fundamental elements for the development of ASEAN economy, GIs can be used as effective marketing of economic value in order to support agricultural development. GI products would bring more income than traditional raw commodity exports. Since many of ASEAN countries have their own typical geographical products and get add value to those products, GI protection and promotion become strategic mechanism to increase product value and improve livelihood of ASEAN people. ASEAN countries have recognized the critical role of GIs for economic development in “the First ASEAN Framework Agreement on Intellectual Property Cooperation” in 1995.

### The Basic Concept of GIs

The basic concept underlying GIs is delightfully simple and is familiar to any consumers who usually buy GI products such as Toraja Coffee of Indonesia, Thung Kula Rong-Hai Thai Hom Mali Rice of Thailand, Sarawak pepper of Malaysia, etc. However, GIs become complex when enter their legal protection and there is no agreement as to the best methods to promote and protect GIs. GIs are protected through a wide variety of different approaches in different ASEAN countries, and often by a combination of two or more approaches. These include consumer protection acts, agricultural quality control regimes, unfair competition laws (passing off), trademarks, collective marks and certification marks or specific, *sui generis* GI laws.

The term of GIs was introduced by Trade Related Aspect of Intellectual Property (TRIPs)- (The Centre of WTO Studies, 2010) that defines GIs 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 22.1 of TRIPs)*. TRIPs is the first multilateral text provided for a comprehensive protection of GIs. TRIPs provides for (a) a base-level protection GIs related to all products (Article 22 of TRIPs; (b) additional protection for wines and spirits and (c) an extra-additional protection only for wines (Article 23 of TRIPs).

According to TRIPs definition, GIs are indications or signs borne by any product identified by GIs as originating in a territory, region or locality, where (a) there is a specific quality, reputation or another characteristic inherent in these products, and (b) this quality, reputation or other characteristic is essentially attributable to the geographical origin of the products. GIs may include local geographical factors such as climate and soil or human factors at the place of origin of the products such as particular manufacturing techniques or a traditional production method.

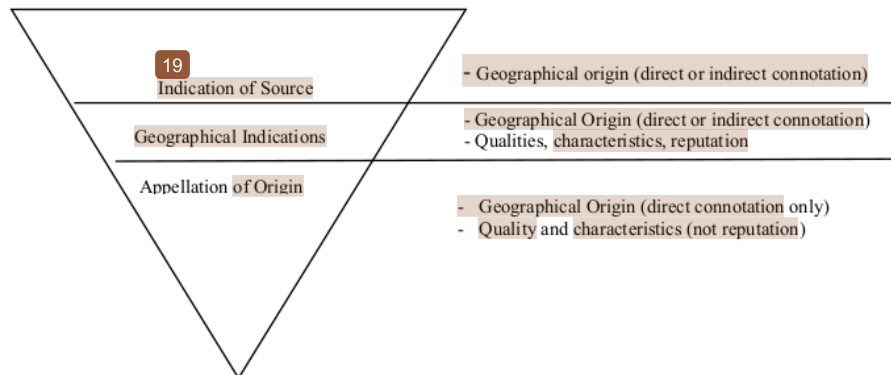
GI concept is a coined bridge between these two old traditional concepts : “appellation of origin and indications of source”. The first concept coined is indication of source that the GIs may comprise the indications of source which are defined as any expression or sign used to indicate that a product or a service originates in a country, region, or a specific place without any element of quality, characteristic or reputation (Addor & Grazioli, 2002). Article 1.1 of Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods (Madrid Agreement) includes elements that determine the term of indications of source : *all goods bearing a false or deceptive 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*. Like GIs, indications of source relate to the geographical place from where the product originates and they may be words directly indicate origin of product such as the name of states, regions or cities or symbols or emblem that evoke indirectly to geographical origin of the product such as Eiffel Tower to identify products of France. However the definition of indications of source is distinguished from GIs because indication of source does not include any specific quality, characteristic or reputation of the identified product attributed to its place of origin. Thus, the TRIPs definition on s does not cover all indications of source since the product identified with GIs must not only originate from a specific geographical place, but must also have a quality, reputation or other characteristic which is essentially attribute to its geographical origin.

Second notion coined by GIs is “appellation of origin” that was origin mentioned in the Paris Convention since 1925 and defined in the 1958 *Lisbon Agreement for the Protection of Appellations of Origin and their International Registration* (the Lisbon Agreement). The TRIPs definition on GI differs from the concept of appellation of origin, however the definition differs in certain extent. The term

“appellation” is understood as narrower than “indication” because “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 (Article 2.1 of Lisbon Agreement). Furthermore, Lisbon Agreement limits appellation of origin to the criteria of characteristic and quality of a product attributable to its geographical origin, while the TRIPs requires also the reputation of the products.

The definition of appellation of origin goes beyond of indication of source because the product identified with an appellation of origin must not only originate from geographical area but must have the quality and characteristic which is essentially to the geographical environment including natural and human factor. The definition of appellation of origin has higher requirements with two main points, first, mere reputation of product is not sufficient to get protection of appellation of origin, specific qualities or characteristic must attached in the particular products. Second, appellation of origin must be direct geographical names of countries, regions or localities, mere symbols or emblems evoking indirectly a geographical origin are not sufficient. However, since GIs are indications which seek to identify the source, they can be both direct, i.e., the geographical names per se, and indirect, i.e., indications expressed via names or symbols (Correa, 2002).

Although GIs are inalienable, existed long before IP regime, GIs recognised as one of the intellectual property rights (IPR), is a sign used on goods that have a specific geographical origin and possess qualities, reputation or characteristics that are essentially attributable to that origin (Dogan, 2012). In general, GIs consist of the name of the geographical origin or the name of the production place names used to identify products and to protect the quality and reputation of a distinctive product originating in a certain region. GIs associate names and places or production areas with products. GIs are any designation which points to a given country, region or locality, which can also a geographical name (such as Florida Orange from United States, Kintamani Coffee from Indonesia) or it may be a denomination that is not a geographical name (such as Basmati rice from India), or may be a symbol or an emblem (like Taj Mahal to Indian products of that region, Borobudur for products from the region of Indonesia). Under the TRIPs, quality, reputation and other characteristic are each in their own right a sufficient but indispensable condition for the existence of a GI (Addor & Grazioli, 2002). It means that if product bears GIs, it must not only originate from a specific geographical area, but must also has a quality, reputation and characteristic which is essentially attributable to its geographical origin.



Source : (Felix & Grazioli, 2002)

The examples of reputable GIs include Champagne from France, Parmigiano Reggiano cheese and Prosciutto di Parma ham from the Parma region of Italy, Toscano olive oil from Tuscany, Roquefort cheese, Irish Whiskey, Darjeeling tea, Florida oranges, Idaho potatoes, Vidalia onions, Washington State apples, and Napa Valley Wines. In ASEAN, some GI products include Coffee of Indonesia, Thung Kula Rong-Hai Thai Hom Mali Rice of Thailand, Sarawak pepper of Malaysia, Phu Quoc Fish Sauce from Vietnam, etc.

In the case of GIs product from Indonesia, Kopi Luwak” or Civet coffee becomes the most tasty and expensive coffee that is around 175-450 U.S. dollars per pound. Kopi Luwak has specific and

unique characteristic because it is from coffee beans which pass through the digestive system of the local Indonesian animal “Luwak” (Civet) - like cat combines with monkey. The quality of Kopi Luwak is prominently to be one of the great taste coffees of the world because of the combination of the best quality of coffee bean that has grown in Indonesian soil combined with the incredible digestive system of Indonesian civet.

Another example of ASEAN GI products is the best of rice of “Thai Hom Mali rice” or “Thai jasmine rice” from Thailand. Thai Hom Mali rice has specific characteristic and quality because of the unique appearance, cooking texture and distinct aroma like jasmine. These characteristic and quality appear when the selected Thai Hom Mali rice grain developed by local farmers from generation to generation is combined with a unique environment, territory and labor skill of Thailand people (Tianprasit, 2016). This product of Thailand has been exported to every part of the world as the pride of the one of the largest rice exporter country of the world.

In Malaysia, Sabah Seaweed is the one of the best quality seaweed of the world with its unique characteristics because of the cultivation in unpolluted seas of northern and south-eastern parts of Sabah (Coral Triangle) and surrounded with tropical, sub-tropical and has wide climatic range. The cultivation of Sabah Seaweed creates the high soluble fiber content which is proven to lower blood cholesterol and lipid level as well as beneficial for constipation, appetite suppression and cough relief.

### ASEAN, Intellectual Property and GI Protection

GIs are considered as the “Sleeping Beauty” although GIs have been around for a long time, there has been a widespread awakening in recent years as to their business value (Marcus Höpferger, 2007). The Sleeping Beauty has been already up in many national jurisdictions, including in ASEAN countries.

GIs have been recognized as part of Intellectual Property (IP). IP itself is interchangeable term of Intellectual Property Rights (IPRs) which is defined as ownership of any creation by the human intellect resulting from ingenuity, creativity, and inventiveness which is legally guaranteed by a state or another authority and give the creator an exclusive right over the use of the creation for a certain amount of time (Fitzgerald, 2004). The legal definition of IP focuses on the set (or bundle of rights conferred) creators of products of their creative or intellectual property (Fitzgerald, 2004). IP is characterized as rights given to persons over the creations of their minds, usually take the form of limited exclusive rights that allows the holders to exclude others from using creation without authorization (Taubman, 2012). IP is like other property, allows creator or owner to benefit from their own works or investment in a creation. IP are customarily clustered into two categories of copyright and industrial property (WIPO, 2003). Copyright is divided into two main areas : (a) copyright (right of authors of literary and artistic works) and related rights or neighbouring rights (right of performers over their performance, right of producers over phonogram or sound recordings, and right of broadcasting organizations over broadcasts). While Industrial property comprises various forms: (a) Patents: a right granted for inventions; (b) Trademarks: signs distinguishing certain products and services; (c) Industrial Designs: new and appearance of an article resulting from visual features such as shape, configuration pattern and ornamentation; (d) Trade Secrets/confidential information: confidential industrial or commercial information providing enterprises with a competitive edge; (e) A layout design : the three dimensional layout of an integrated circuit, i.e. the arrangement in a chip of active and passive electronic components, (f) Plant Variety Protection: exclusive rights of breeders over the vegetative and reproductive materials of plant varieties invented or discovered; (g) Geographical Indications: used for goods that have a specific geographic origin and related qualities

As part of IP, GIs become one of the most contentious issues in multiple treaties, WTO and economic unity, including in the ASEAN community. ASEAN which is established in 1967 and became the ASEAN Community which includes ASEAN economic community (AEC) was officially fully established in 2015. Similar to the economic unity of the European Union (EU) in some ways, the broad goals of the AEC are to develop : (a) a single market and production base, (b) a region of more equitable economic development, and (c) a globally integrated economic region.

Preparing for economic integration, particularly in terms of IP including GIs, AEC has focused of five strategic aims (ASEAN briefing, 2016):

- a. A balanced IP system that accommodates varying levels of development of member states, including IP institutions, to make the region favourable to IP holders and creators.

- b. Development of national or regional legal and policy infrastructures that can deal with an ever-changing IP landscape and enable ASEAN states to participate in global IP systems.
- c. Systematic promotion of IP creation, awareness and utilisation, so that IP becomes a tool for innovation and development.
- d. Active regional participation in the international IP community, to develop the capacity of member states and to address the needs of stakeholders in the region.
- e. Intensified co-operation among member states and increased levels of collaboration to enhance the human and institutional capacity of IP Offices in the region.

AEC is one community which realizes the advantage of the GIs protection because many of ASEAN countries have their own typical geographical products and want to add value to those products. Therefore, GIs protection becomes one of the best answer to increase product value and improve livelihood of ASEAN people.

The important role of GIs was recognizes in “the First ASEAN Framework Agreement on Intellectual Property Cooperation” in 1995 which an ASEAN’s cooperation in the field of IP with the goal of fostering closer cooperation and exploring appropriate intra-ASEAN cooperation arrangements in the field of IP in order to provide a firm basis for economic progress and the expeditious realization of the ASEAN Free Trade Area among the ASEAN Member States.

ASEAN’s cooperation in the field of IP is preceded by the ASEAN Working Group on Intellectual Property Cooperation (AWGIPC) established 1996 to formulate the details and modalities to implement the IP cooperative activities. The diverse political, economic and socio-cultural landscape of ASEAN means that purposeful and meaningful collaboration is necessary to fully reap the region’s potential and bridge any gaps within and among countries, therefore, AWGIPC plays a key role in this collaboration. Composed of the heads of the IP offices of ASEAN member states, the Working Group meets regularly to review and enhance IP regulatory frameworks with a view to spurring innovation-led growth and helping the region move higher up the technology ladder. The AWGIPC is also required to facilitate ASEAN’s work to accelerate the pace and scope of IP asset creation, commercialization and protection; to improve the regional framework of policies and institutions relating to IP, to promote IP cooperation and dialogues within the region as well with the region’s Dialogue Partners and organizations; to strengthen IP-related human and institutional capabilities in the region, including fostering greater public awareness of issues and implications, relating to IP. To support the work of the AWGIPC, several sub-committees have been set up such as the Task Force on Trademarks, the ASEAN Task Force on Patent Examination Cooperation and the ASEAN Network of IP Enforcement Experts (ANIEE). In recent years, the work progress and several action plans have been made on enhancing work-sharing arrangements, establishing regional IP databases and the promoting the use of common guidelines for examination. The latest actions plans on IP was established into the ASEAN IP Action Plan 2016-2025 which lists four strategic goals, i.e. (a) a more robust ASEAN IP System is developed by strengthening IP Offices and building IP infrastructures in the region; (b) regional IP platforms and infrastructures are developed to contribute to enhancing the ASEAN Economic Community; (c) an expanded and inclusive ASEAN IP Ecosystem is developed; and (d) regional mechanisms to promote asset creation and commercialization, particularly GIs and traditional knowledge are enhanced.

According to the ASEAN IP Action Plan 2025, GIs promotion becomes one of four strategic goals in order to enhance regional mechanisms to promote asset creation and commercialization, particularly GIs and traditional knowledge. The implementation of the strategic goals under the Action Plan, including GIs promotion will facilitate improved GIs systems and services delivery with a higher level of confidence in the integrity and transparency for GIs users.

GIs have an important role in contributing to the achievement of national and regional socio-economic development goals of the AEC. GIs protection is critical for ASEAN countries and strengthening GIs will be one of the characteristics of a competitive, innovative, and dynamic ASEAN. To attain this goal, the AEC Blueprint 2025 encourages ASEAN Member States to establish a policy environment that is supportive of innovation so as to improve the productivity growth in the region. ASEAN has identified GIs as a fundamental element of the ASEAN Blueprint 2025, which sets out specific steps to be taken by member countries to transform ASEAN into a highly innovative and competitive region. ASEAN recognizes GIs provides a good starting point for member states to encourage regional development as part of a comprehensive package of national and regional economic

incentives. By protecting GIs, businesses, entrepreneurs, consumers flourish in a fair environment that enhances public access to a competitive market of goods and services. The advantage of the GIs protection in ASEAN does not only to safeguard the quality of those products, but also to ensure a constant flow of GIs goods, contribute to social well-being. The GIs protection is playing an important role in bolstering the region's competitiveness and reinforce its national identity in the global marketplace for supporting economic development. In agricultural sector, for instance Viet Nam is developing GIs to control the quality and promote the visibility of products, and to ultimately improve the lives of its farmers and harness its agricultural export potential. Likewise, Cambodian which is including Kampot pepper and palm sugar, are gaining worldwide recognition. With diverse genetic resources and agricultural products with global reputation such as Toraja Coffee, Banda Nege, etc, Indonesia is strengthening its legal landscape for GIs protection in the new regulation (Law No 20 Year 2016 on Trademark and Geographical Indications) in order to enhance market power and Indonesian economic development.

GIs protection has a long tradition in many of the ASEAN countries through unfair competition, consumer protection, and food standards or even appellation of origin (Kuan Ng & Austin, 2017). However once they become WTO member, the adherence to the WTO become the moment of adopting new legal scheme for GIs protection based on TRIPs standards. Since every member of ASEAN Community has already joined WTO, it is guaranteed that ASEAN countries must have the protection on IP at minimum standards of the TRIPs Agreement, including GIs. However, there are only seven out of ten ASEAN countries have national law regulating GIs protection (Ja, 2017). Three countries Philippine, Brunei and Myanmar protect GIs through certifications or collective trademarks under national trademark laws (Ha, 2017). In 2014, the Philippines drafted Rules and Regulation on GIs, whilst Myanmar allows protection through the Trademark Law of Myanmar 2017 which was approved in September 2014. Brunei Darussalam plans to develop a specific law on GIs.

The legislations of all ASEAN countries allow producers, traders to register or claim on the GIs. The claim on GIs in ASEAN mostly base on registration. At present, there are existing registration systems for GIs in Indonesia Malaysia, Thailand and Vietnam. In Singapore, GIs are protected as a new class of IP, but without a registration system, while the protection of GIs is also ensured under the trademark system in the Philippines. Thailand, Vietnam, Malaysia, Cambodia, Lao, Myanmar and Indonesia allow and accept the registration and recognition for both national and foreign GIs. ASEAN countries start to establish cross registration of GIs within ASEAN countries.

However, there is no common legal framework for the protection of GI at the level of ASEAN because is no standard of regional legal framework and no agreement as to the best methods to GIs protection. Therefore, GIs protection seems uncoordinated and occurs in the most diverse approaches. The legal framework for GIs protection in each ASEAN country as the compliance to TRIPS Agreement has been established in a wide variety of different approaches mostly on three different major points of substance: definition and eligible indications; mean of protection; and scope of protection including ownership. The diverse of approaches do not only occur on the substance of regulation, but also the type of regulation that can be grouped into three groups: (a) *sui generis* protection system (in Thailand, Singapore, Malaysia, and Cambodia); (b) protection under trademark system (the Phillipines); (c) protection under different legal means (in Vietnam, GIs are protected under the IP Law, while Indonesia combines the GIs protection under trademark law and *sui generis*).

### **The Role of Agriculture in ASEAN Economy**

Agriculture has played and continues to play an important role in the ASEAN region and occupies a special role in ASEAN's socio economic development. It is an important driver for social inclusive growth, an important source of export earnings, a guarantor of food availability to its citizens, and a source of employment directly and through agriculture related, value adding activities. Agriculture is vital to most ASEAN economies and provides livelihoods to a large segment of the population. In some ASEAN countries, agriculture employs over 60 per cent of the workforce and is an essential driver for growth and poverty alleviation (Teng and Andrew McConville, 2016). Agriculture remains a major source of employment for rural populations and provides much value add for agrifood industries.

Agriculture become an important source of fulfilling regional consumption and export earnings that contribute to the ASEAN trade surplus. Some ASEAN countries such as Indonesia and Malaysia has focused their development policies on more “export oriented” agriculture, especially palm oil and rubber, while Vietnam exports high value beverages like cacao and coffee (Banerji, 2012). In Malaysia, the agro-based natural products sectors contribute substantially to export revenue and subsequently affect to the growth and development of the Malaysian economy (Mohd. Noor & Abd. Aziz, 2011). Others ASEAN countries such as Thailand and Vietnam have chosen the importance of both export and food security needs.

ASEAN agriculture remains a powerhouse for the production and supply of important food items. The two of the world’s largest rice exporters are Thailand and Vietnam and has amongst it the top three exporting countries for pineapples, bananas, mango, sugarcrops, coffee, cashew nuts and cassava. Recently Indonesia is the world's largest producer of palm oil, coffee, rubber, cocoa, and spices such as nutmeg, cinnamon, and cloves (Barichello, 2009).

Agriculture’s role in ASEAN has been developed by the public sector especially in the “Green Revolution” (Swainathan, 2004) era when modern technologies fuelled both production and productivity. The Green Revolution has facilitated institutional and social changes and provided opportunities for self-sustaining agricultural growth and productivity. The growth of agricultural production has increased food availability and accessibility. The agricultural development will affect to agricultural trade patterns, the food security status, and the outlook for these trends.

### GIs As Vehicle for Promoting Agricultural Development

Given the establishment of the AEC that creates a single market and allows free flow of goods, services, investments, skilled labour, and the free movement of capital across the region, GIs becomes one issue in establishing a single market for agriculture sector in AEC. In increasingly globalized ASEAN economy, GIs become much more than a mere of IP and play an important economic role.

GIs are not limited to industry and commerce, but are most often applied all manufactured or natural and agricultural products such as “wines, grain, tobacco leaf, fruit, cattle, minerals, mineral waters, beer, flowers and flour” (WIPO, 2013) since the natural resource and agricultural products are the fundamental elements for the development of grass root economy in ASEAN, GIs can be used as effective marketing of economic value. In economic term, GIs can be commercially valuable because they essentially permits producers to increase profit based on product differentiation which is a form of monopolistic competition prevalent in the modern economy where there are elements of both monopoly and perfect competition (Correa, 2003). GIs allow ASEAN market domination and differentiation on agricultural sector because GIs usually represent high quality of products.

GIs are a growth area of IP, offering a very effective tool for wealth creation and social advancement (Rubio, 2007). GIs indeed offer great opportunities and benefit for the development of national and local economies. An intensive promotion of GIs will drive the dynamic agricultural export activities and a wide-growing trade surplus in the ASEAN market. The monopoly and exclusive rights granted by GIs combined with the the increased demand of agricultural products have increased the price of products and generated profit for agricultural producers.

GIs enable the linking of a specific agricultural products with special quality or characteristic to the territory from which it originates. GIs convey the identity of a nation, region or a locality and add a human dimension to agricultural products that are increasingly subject to standardized production for mass consumption (Rubin, 2009). GIs are understood by customers to denote the origin and the quality of products, thus GIs are increasingly recognized as a tool for securing consumers’ loyalty by establishing the link between product attributes and the geographical origin.

The basic economic function of GIs is to protect the goodwill of agricultural products to which they relate. In economic terms, GIs also protect market differentiation, reputation and quality standards (Jain, 2009). The agricultural producers may benefit from giving certain recognition for their product distinctiveness, differentiating them from other products in the marketplace. GIs essentially allow agricultural producers to increase profits through product differentiation and enable add economic value for agricultural products because of their quality and reputation.

GIs will be valuable to agro-based economies of ASEAN by adding value to local production commonly grown in the ASEAN and where marketers and consumers are beginning to distinguish



between products from different origins (The International Food & Agricultural Trade Policy Council, 2004). Producers of high-quality products may be incentivised to remain in the market as differentiated products may tend to be sold at the different premium price (Ngokkuen & Grote, 2012). This incentive has been ensured by GIs system because GIs serve not only as an indication of origin, but also a guarantee of quality, so if a product is to bear a GI, it must have special qualities (Article 22 (1) of TRIPS Agreement). Producers of agricultural product may obtain quality premium due to the reputation of differentiated products as preferable to the standard ones by the consumers. Product differentiation creates a demand with high willingness to pay, accordingly GIs encourage producers to charge a price premium.

GIs allow the identification of products with specific quality and characteristics based on geographical factors and distinguishes agricultural products from other similar products on the market. GIs 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 GI product would bring in more income than traditional raw commodity exports. Without GIs to distinguish the products, the high-quality product will be considered undifferentiated one and sold at the same price (Ngokkuen & Grote, 2012).

As a reference of quality, GIs become an effective marketing tool for agricultural producers that enables to achieve competitive advantages and help producers to gain market recognition and power by differentiating their products from those produced elsewhere. Given the added economic value of agricultural products, this will attract more people to enter the agricultural sector by starting up the agricultural business and potentially encouraging the existing producers to develop their agribusiness to be more efficient and bigger. GIs are recognized as a qualification strategy for the development of agribusinesses in that territory. Considering that products that can be protected by GIs are usually produced in rural areas, the local development will arise because of possibility of earning important privileges, creating new employment opportunities, increasing local revenues and bridging income flow distribution for locals across the different stages of the agricultural production process (production, processing, distribution, marketing and promotion).

In this context, GIs will provide for the growth of the agro-industry and related investments. If there are various unique products in a locality or region, it will attract investors to establish related businesses in these regions, thus increasing the growth of investments in agro-industry since investment in GI products tends to be from the rural and agricultural. Generating new employment opportunities, boosting local revenue, adding economic value to products, bridging the income gap between the rural and urban areas, preventing local people migration and positively impacting income distribution will be the positive contribution of investment for local economic growth.

Since ASEAN economy is mainly based on agriculture and is rich with biodiversity, GIs represent an excellent opportunity for ASEAN to promote the development of agriculture, to increase producers' income and foster dynamic local development. GI registration is a kind of guarantee about the originality of the product and provides quality information about the products for consumers. GIs generate positive perception towards product among consumers and this positive perception of consumers towards products, leads to improving market demand and access for these products (Queen Mary Intellectual Property Research Institute, 2004). The increasing demand of agricultural products will enhance the market.

Furthermore, GIs highlight the geographical name of the product as an effective tool for attracting consumers attention into the local identity. This would lead to increase in tourism activities in areas since GIs symbolize the local characteristic of a region through the harmonisation of natural resources and the cultural methods and they are perceived as nostalgic and interesting products (Dogan & Gokovali, ). In 2016 alone, 108.8 million tourists visited ASEAN region, of whom 42.4 percent were intra-ASEAN. Increase in tourism activity due to recognized GIs does not only benefit to the producers but also creates income and employment opportunities to other sectors such as hotel services for accommodation, gift shops and restaurants, therefore this will substantially contribute to the local economic development.

### **The Challenges of GIs Protection in ASEAN Doctrinal Conflict**

The doctrinal challenge will arise because the conflict of individual character of IP system with the communal nature of GIs in communal ASEAN people. Under TRIPs, GIs form a subset of the corpus of IP which are used to identify products having certain qualities and characteristics and coming from specific geographical regions (Felix & Grazioli, 2002). However, there are significant differences between GIs and IP because collective approach inherent to a GIs that they owned and exercised collectively, while IP bears individual ownership basis. The GIs right protected appear to belong to a very unique public sphere rather than in private (de Almeida, 2005) because GIs beneficiary is almost often an association or group in the particular field rather than an individual producer. Since GIs can never be privately owned, GIs differs from IP (Lorvellec, 1998).

In addition, while other IP subject matters are defined by the spatial and temporal factors such as patents, trademarks, copyrights and design rights which have specific terms of protection, GIs are not restricted by any such conditions and appear to be protected by uninhibited rights to exclude others perpetually. Furthermore, GIs have characteristic as a relative impersonality of right, i.e the protected subject matter is related to the product itself and not dependent on a specific right holders, whereas IP is attached to single and clearly distinguishable right holders (Felix & Grazioli, 2002).

Some ASEAN member countries choose to protect GIs under trademark system such as in the Philippines and Indonesia. The protection of GIs in trademark will arise doctrinal challenge because of the different nature between GIs and trademark. Doctrinally, like other IP subject matters, a trademark is personal property, while GIs are collective right with a fixture to the region or locality which represent Trademarks human creativity which functions to distinguish similar products, whereas GIs linked to something more than sign to distinguish products and not mere human creativity but topography, climate or other factors independent from human creativity (Oliva et.al, 2011). GIs will obtain perpetual protection as long as the specific characteristics still exist, while trademark need to be renewed for further protection.

#### Regulatory Deficiency

TRIPS obliges the WTO member, including ASEAN member to protect GIs by providing legal means to prevent the use of GIs which misleads the public and constitutes an act of unfair competition (Article 22.2 of TRIPS). The TRIPs Agreement becomes the most powerful multilateral agreement on the protection of GIs because every WTO member has to accept the terms and conditions of the TRIPs Agreement if they want to be the members of WTO. However, according to TRIPS does not mandatorily determine the form of legal means for GIs protection at national level. Accordingly, Article 1.1 of TRIPS, TRIPS members shall be free to determine the appropriate method of implementing the provisions of TRIPs within their own legal system and practice:

*Members shall give effect to the provisions of this Agreement. Members may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement.*

In this sense, TRIPs Agreement does not aim to harmonize the protection of GIs of all members but wants to set the minimum standard in countries of members (Matthews, 2002). Consequently, GIs protection are embedded in the different legal and institutional frameworks, mainly divided into three models: (a) laws focusing on business practices such as unfair competition, quality control, or consumer protection; (b) laws focusing on IP such as trademark, collective marks or certification; and (c) *sui generis* GIs laws.

In ASEAN, GIs are also protected through a wide variety of different approaches in different countries. There is no standard of regional legal framework and no agreement as to the best methods to promote GIs in ASEAN, thus GIs protection occurs in the most diverse and uncoordinated manner in ASEAN countries. This becomes the main normative challenges because there is no regional standards applied for GIs protection in ASEAN.

In addition, many ASEAN countries had joined the TRIPS Agreement, however, legal protection as envisaged under the TRIPS Agreement has not been *sui generis* established in ASEAN member countries (Brunei Darussalam, Cambodia, Lao PDR, Myanmar, Philippines, Vietnam). Among the ten member countries of ASEAN, only Malaysia, Singapore, Indonesia and Thailand have progressively established and regulated the systematic GIs protection under their own GIs Act.

Although seven ASEAN countries (Thailand, Vietnam, Singapore, the Philippines, Malaysia, Indonesia and Cambodia) have set GIs regulations, the regulations differ in some extent. The type of

ASEAN regulations can be divided into three groups, first, *sui generis* protection system is applied in Thailand (the Geographical Indication Protection Act B.E.2546 (A.D.2003)), Singapore (Geographical Indications Act (Cap.117B)), Malaysia (Geographical Indications Act 2000 and Geographical Indications Regulation 2001), and Cambodia (Prakas No.105 MOC/SM 2009 (GI Prakas). Second, some member countries choose to protect GIs in trademark system such as in the Philippines. In the Philippines, GIs is protected under the trademark system (collective or certification marks) and there is no *sui generis* protection system of GIs in the country, although in 2014 the Philippines drafted Rules and Regulation on GIs. Third, the GIs protection occurs in the different legal means. For instance instance, in Vietnam, GIs are protected under the Intellectual Property Law, while Indonesia combines the GIs protection under trademark law and *sui generis* (Law No. 20 Year 2017 on Trademark and Geographical Indication, and Government Regulation No.51 Year 2007 on Geographical Indications).

In addition, the regulation on the GIs protection in ASEAN countries is a fully technical law with complex structures that can not easily understand by the most applicants from countryside and foreign applicants. The complex structure does not only consist of the complicated requirements for GIs protection, but also the unclear and ambiguous contents of GIs provisions without uniform interpretation.

### **Technical Shortcoming**

The technical challenge arises because of lack of institutional organization and mechanism to administer GIs protection. There is also problem of the different infrastructure and ASEAN countries readiness for implementing GIs protection for agricultural development.

Practically, the GIs registration process in ASEAN is the most critical obstacle for achieving GIs protection since GIs registration is complex, costly, time consuming and requiring many stakeholders involvement. Most applicants cannot understand the complex procedures, thus government organizations have duty to provide necessary information. However, there is lack of personnel administration with appropriate knowledge to provide information about GIs registration. In addition, there is also problem for initiating GIs registration because it does not only requires the stakeholders involvement, but also it needs the effort of empowering local community or farmer's organization, or establishing GIs community organization followed by effort of defining unique and specific characteristic of a product, identifying the quality of products, undertaking study to provide information on estimated area of plantation, distribution of growing area and distribution of production, training on GIs and preparing certain requirements for GIs registration.

Technically, there is practical problem in difficulty of proofing the linkage between product and geographical origin because some of the products have to be approved by scientific evidence about the quality, characteristic or geographical origin. Some ASEAN countries are not ready to certify the linkage between product and geographical origin with the reasons of technology, revenue and scientific machines (Tianprasit, 2016).

Moreover, scientific evidence needs database to determine quality, characteristic or geographical origin of GIs products. Since there is no database of GIs identification in ASEAN comprehensively, it is also difficult to determine the description of the history and tradition of GIs use, social acknowledgement related to the GIs use, and the description of the border of the geographical area. The scientific evidence may be a certificate from government organizations or reliable private organizations. Unfortunately, there is lack of institutions to certify the scientific evidence about the quality, characteristic or geographical origin of GIs products. In addition, providing scientific evidence is costly, even in some cases, if applicants intent to apply for GIs registration quicker they must pay more (Tanapojana, 2004).

There is also lack of mechanism and institutional body to control and ensure the quality of GIs products internally and externally in ASEAN countries, although the most vital factor to remain GIs protection is ensuring the quality or characteristic of products. In ASEAN, there is no regional mechanism and institutional body to control and ensure the quality of GIs equipped with the rules and regulation applied to the GIs users as well.

Controlling quality of GIs products becomes the technical problems in ASEAN because GIs ownership is collective which can not be owned and not restricted to a single producer, therefore it will be difficult to internally and externally manage and control the use of GIs over the producers, including maintain the quality of products. In fact, some agricultural producers in certain geographical origin try to reduce quality of the product to increase their excessive profit. This may against the virtue and damages

not only the reputation of products, the geographical origin, but also effects to other honest producers in that region.

ASEAN countries has also problem of promoting and marketing GIs for agricultural products. There is inability of agricultural producers to utilize the GIs brand value and efficiently adopt promoting and marketing techniques and to effectively manage GIs as asset. The lack of ability to incorporate number of technical or managerial innovations for sustainable promotion and marketing system of agricultural product and the lack of empowerment of agricultural producers, become the technical problems of GIs promotion and marketing.

### Solution

In order to solve doctrinal problem, it is necessary to eliminate the protection of GIs under IP system because of the different nature between them. Although TRIPS does not specify the form of legal means for GIs protection at national level and allows each member to establish the best scheme of GIs protection, it is relevant for ASEAN countries to develop *sui generis* GIs system rather than transplanting trademark regime for GIs protection. The promotion of *sui generis* system probably overcome the doctrinal challenge because *sui generis* system will be able to identify more specific aspects of GIs protection such as to 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, as well as the complements or interaction with existing IP standards (International Intellectual Property Institute, 2004). Despite to adopt IP standard for GIs protection that is doctrinally conflicting, it is necessary to establish own *sui generis* system which offers different approaches for GIs protection which can be designed differently from IP standards. Given meaning of "of its own kind," (Marin, 2002) *sui generis* differs from the main systems of IP and a totally new form of GIs protection (Thammasat Resolution, 1997). The *sui generis* exists independently from IP because GIs are inalienable existed long before IP regime (International Intellectual Property Institute, 2004).

To solve regulatory problems, every ASEAN countries must immediately regulate and ensure GIs protection and to guarantee that GIs will be protected in every country member of ASEAN Community. The regulation should be legislated by use the minimum standard of the TRIPS Agreement as a role model.

Furthermore, since there is no agreement as to the best scheme for GIs protection in ASEAN and GIs protection occurs in the most diverse and uncoordinated manner in ASEAN countries, it necessarily sets up the regional standards for GIs protection. With the standard GIs protection among ASEAN countries, the countries that are about to govern their own GIs Act can adopt the best practises.

It is also important to discuss to the possibility about how to harmonize the regulation of GIs of each country into the ASEAN Community regulation on GIs. The advantage of harmonization of the different national GIs regulation in ASEAN countries into single regional regulation is the uniformity and simplicity of GIs regulation that can be easily understand by ASEAN people and IP officers. In addition, the uniform regulation on GIs in ASEAN will lead to the same direction of GIs protection in the future together.

The harmonization of GIs regulation seems undeniable since the regional trade integration in ASEAN lead to political demands for harmonization to trade regulation, including GIs. The regional GIs protection need to be strengthened by harmonization and structural adjustment of ASEAN member countries. Without structural adjustment and harmonization, structuring and implementing regional standard of GIs protection in ASEAN will be difficult to realize. The harmonized GIs system commonly consisting of GIs protection, facilitation and cooperation, promotion and marketing, and liberalization will be effective and efficient to support ASEAN economic development. Therefore, ASEAN member countries need to unilaterally and collectively come up with structuring harmonized GIs system to move ahead and reap the benefits from GIs in trade and market. Protection of the economic interests of ASEAN by using GIs system is expected to provide fundamental basis for contesting national interests of each ASEAN member.

However, it seems uneasy for establishing ASEAN Community regulation on GIs and its harmonization because of different character and economic systems reflecting different political system, economic and social culture in accordance with the philosophy of life value, and interests of each

country. ASEAN member countries may resist and protest against the uniform standard for GIs protection into ASEAN Community regulation on GIs and its harmonization. Therefore, the synchronization of perception and action plans of each ASEAN countries on GIs are essential to protect the regional interests of ASEAN. The pre-agreed flexibilities to accommodate the interests of all ASEAN countries may also eliminate the problem of harmonization. In addition, it is necessary to elaborate the harmonization and structuring of GIs protection with the strategic goals AWGIPC: (a) “a more robust South-East Asia IP system is developed by strengthening IP offices and building IP infrastructure in the region; (b) regional IP platforms and infrastructures are developed to contribute to enhancing the AEC; (c) an expanded and inclusive South-East Asia IP ecosystem is developed; and (d) regional mechanisms to promote asset creation and commercialization.

To solve technical shortcoming, particularly the problem of different infrastructure and readiness for implementing IP protection in agricultural sector, the assistance and cooperation of all ASEAN countries should be strengthened. ASEAN countries need to unilaterally and collectively come up with action plans to move ahead and reap the benefits from agricultural development as a common tool for contesting their interest in international trade.

The development of a balanced and well-founded GIs strategy – one that frames policies and programs in support of regional development priorities – is a significant step toward ensuring that GIs works for agricultural development. In this regard, countries like Indonesia, the Lao People’s Democratic Republic, Myanmar, the Philippines and Viet Nam have ongoing cooperation with WIPO to enhance their respective national IP strategies, including GIs. This is a long-term process that requires the active support of all stakeholders, including the private sector, government and the individual purveyors of original ideas themselves.

To develop and implement the initiatives in GIs for agricultural development, and accelerate the progress towards completion of the current action plans, it is important to continue to enhance its relationship and active partnership and cooperation with IP institutions and related agencies. These include IP Australia, European Patent Office (EPO), European IP Office (EUIPO), Japan Patent Office (JPO), Korean IP Office (KIPO), IP Office of New Zealand (IPONZ), State IP Office of PRC (SIPO), United States Patent and Trademark Office (USPTO), WIPO, ASEAN IP Association (AIPA), Business Action to Stop Counterfeiting and Piracy (BASCAP) – under the International Chamber of Commerce (ICC), the International Trademark Association (INTA), etc. These stakeholder partnerships are also needed to overcome current inefficiencies such as low levels of farmer aggregation, difficulties to access technology, markets and financial services.

In order to support agricultural development, it will be necessary for ASEAN to align and actively contribute to meet the goals enshrined in the ASEAN Vision 2025, through : (a) explicit pronouncements at highest ASEAN government levels to support public private collaboration; (b) encouraging policies which increase private sector investment in R&D for food production, processing, distribution and safe supply chains; (c) support for policies and implementation guidelines which enable inclusive agribusiness, and Support for joint governance mechanisms within the ASEAN Vision 2025 to promote initiatives involving relevant public and private sector entities; (d) complementary relationship between the public and private sectors has to be encouraged for inclusive agriculture which adds value and strength to ASEAN economies.

To overcome the problem of the control mechanism, institutionally, ASEAN countries should establish the GIs team nationally and regionally. In addition, ASEAN countries need to select the appropriate method of control, for example they may merge auto control or self-control by each producer, control by GIs organization, and external control by national and regional GIs Expert Team. The mechanism of GIs quality control must be equipped with the a set of rules and regulations. A bundle of common rules for GIs use among agricultural producers is crucial to prevent misuse or expropriation, avoid unfair production and commercial practices, prevent abuse or damage to the GIs reputation, ensure quality of the product, direct the behavior of local producers and coordinate support and cohesion to create, preserve or improve the GIs product’s reputation and GIs name value.

ASEAN countries need to develop initiatives for promoting and marketing of GIs by improving empowerment and skill in marketing and market access, building a close and direct business partnership between producers and traders or exporters to obtain guaranteed sales and premium prices for agricultural products. The constant communication with both current and potential consumers and

provide information about the specific quality and characteristics of the GIs product will increase consumers' willingness to purchase and pay GIs products. It is important to establish initiatives in order to empower the integrated collective by GIs organization and individual marketing (by its members).

The initiatives for promoting and marketing of GIs should be complemented by the updated GIs database under the cooperation of IP offices in ASEAN. Recently ASEAN has developed GIs Database with the support of the EU-ASEAN Project on the Protection of Intellectual Property Rights (ECAP III Phase II) administered by EUIPO. Upgrading ASEAN GI Database is essential for GIs promotion and marketing because it is the common online GIs platform of the ASEAN Member States aimed at making the information of all registered GIs in the ASEAN region widely available and easily accessible to all interested stakeholders. ASEAN GIs database gives the possibility to explore the GIs landscape in the ASEAN region that contains information on GIs having effects in the ASEAN countries, including comprehensive information fiches with the most relevant information for each one of them.

### Conclusion

Protection of GIs helps to sustain economic activities in agricultural sector and settlement in ASEAN region and increase the life standards of ASEAN people. GIs protection of a specific product - by creating positive externality to agricultural sector, in terms of income and employment generation, increasing agricultural productivity, investment and tourism, etc - have a potential effect of the development of agriculture in ASEAN.

Some challenges may appear in protecting GIs for agricultural development in ASEAN. However, the doctrinal challenges can be overcome by developing *sui generis* GIs system rather than transplanting trademark regime of GIs protection, while regulatory challenges can be solved by establishing GIs nationally and setting up the regional standard for GIs protection, including the harmonization initiatives. To overcome the technical challenges, the assistance and cooperation of all ASEAN countries should be strengthened in order to address the problem of different infrastructure and readiness for implementing IP protection in agricultural sector. It is important for ASEAN to unilaterally and collectively come up with action plans to move ahead and reap the benefits from agricultural development as a common tool for contesting their interest in international trade. The development of a balanced and well-founded GIs strategy are needed to enhance its relationship and active partnership and cooperation with IP institutions and related agencies. It will be necessary for ASEAN to align and actively contribute to meet the goals enshrined in the ASEAN Vision 2025. To overcome the practical challenges on controlling GIs, institutionally, ASEAN countries should establish the GIs team nationally and regionally. In addition, ASEAN countries need to select the appropriate method of control. ASEAN countries should develop initiatives for promoting and marketing of GIs complemented by the updated GIs database, by improving empowerment and skill in marketing and market access, building a close and direct business partnership between producers and traders or exporters to obtain guaranteed sales and premium prices for agricultural products.

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