

Empowering Local Communities Through Traditional Knowledge Protection

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Abstract

This article examines the current state of affairs with respect to local community empowerment through a traditional knowledge protection system in Indonesia, analysis of the potential impact of traditional knowledge protection management on the Indonesian economy, and making recommendations on the formulation and development of a new policy on the protection of traditional knowledge. The study is a doctrinaire research, and used a juridical approach. Secondary data were used, obtained largely through conducting a literature review of both printed and electronic materials publicly available in the library and internet. Content analysis technique based on deductive methods, was used in analyzing the data. The study came up with several findings. First, trade Related aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods (TRIPs) Agreement as embodied in the provisions of the World Trade Organization (WTO) in 1994, succinctly show that Intellectual Property Rights issues are inseparable from world trade and investment. Secondly, protection system for traditional knowledge can achieved by using laws that relate to Intellectual Property Rights (IPR) as well as non-IPR instruments, and using instruments other than laws. Thirdly, IPR is vitally important as it provides legal protection to commercial works.

Keywords: TRIPs, World Trade Organization, Traditional knowledge, Intellectual Property Rights

A. INTRODUCTION

Traditional knowledge is one the interesting issues, which have emerged within the scope of Intellectual Property Rights study. Traditional knowledge, which is constitute intellectual property of indigenous peoples/indigenous/traditional people encompasses many things, which range from traditional knowledge systems, works of art, literature, philosophy, medicine, to what is known as indigenous science and technology. What is interesting is that current Intellectual Property Rights ar-

rangements as they are do not cover traditional intellectual property, especially in the realm of international trade.

In light of that, a paradigm shift in the management of traditional works is emerging in developing countries. This has in the main been attributable to the current realities that objects which once used to be categorized as freely accessible, have overtime acquired economic value. A country which is endowed with rich culture and natural resources today considers ways of leveraging traditional knowledge as a way to enhance its competitiveness in international trade.

There are two mechanisms which serve as framework in providing protection of traditional knowledge: through legal protection,

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and using instruments other than laws or legislation². With regard to legal protection, this constitutes an effort to protect traditional knowledge using binding laws. This form includes Intellectual Property Rights or regulations governing genetic resources. Meanwhile, non-legal form is providing protection to traditional knowledge using other instruments that are nonbinding in nature. This form includes codes of conduct adopted by international organizations, governmental and non-governmental organizations, professional societies and the private sector.

However, protection based on laws, has the advantage that besides being binding, it lasts long. This study explores two ideas. The first, relates to the empowerment of local communities through the Protection of Traditional Knowledge Systems in Indonesia; secondly, prospects of empowering local communities by providing legal protection to traditional knowledge using intellectual property rights framework.

B. INTELLECTUAL PROPERTY RIGHTS UNMATCHED THE TRADITIONAL KNOWLEDGE PROPERTIES

1. *The concept of Community Empowerment*

The concept of empowerment was born as an antithesis to the models of development and industrialization, which do not benefit the majority of the population. This construction of the concept is based on the following framework (Projono, OS and Pranarka, AMW, 1996: 269):

- a. The centralization process of power generated concentration of factors production.
- b. Concentration of factors of production by entrepreneurs pushes work-

- ers and communities on the outskirts.
- c. Power strengthens its hold on knowledge systems, political systems, legal systems, as well as through manipulating ideology and legitimacy. Co-optation system of knowledge, legal systems, political system and ideology, systematically create a polarized population (comprising two categories of people)

2. *Intellectual Property Rights (IPR)*

IPR is the power of creativity and innovation applied through artistic expression. In this case, a person's intellectual potential resource is not limited but can as well accessible to everyone. IPR is a strength which can be used to enhance a person's dignity as well as the future of a nation materially, culturally and socially. Therefore, the development of the national IPR system should not only be done using legal approaches (legal approach) but also technologies and businesses (business and technological approach).

However, the conception of IPR, which is based on legal approach, seems too shallow if applied to traditional knowledge. The logic of the law underpinning IPR, is that the concept of law provides legal protection to intellectual work. Moreover, IPR protection is itself based on providing protection to the individual rather than the community. In light of that, in order to strike a balance between individual interests and interests of the society, the IPR system should be based on the following principles³: 1) justice (the principle of natural justice); 2) economy (the economic argument); 3) principle of culture (the cultural argument); 4) the principle of social (the social argument).

The protection of IPR is contained in the TRIPs Agreement, which was a product gen-

² Budi Agus Riswandi dan M. Syamsuddin. 2005. *Hak Kekayaan Intelektual dan Budaya Hukum*, Jakarta: PT Raja Grafindo Persada hal 37

³ Budi Agus Riswandi dan M. Syamsuddin. 2005. *Hak Kekayaan Intelektual dan Budaya Hukum*, Jakarta: PT Raja Grafindo Persada page 32

erated by a discussion in the General Agreement on Tariffs and Trade (GATT) in 1994 which has three basic principles⁴. The first principle relates to the establishment of minimum standards of protection and enforcement of IPR for the participating countries signatory to TRIPs Agreement. This includes copyright (and other related rights), trademarks, geographical indications, industrial designs, patents, layout of integrated circuits and trade secrets. The important point to note is that this is a minimum standard, which means that countries are allowed to set higher standards than those stipulated.

The second is that each country must protect IPR amongst citizens, by giving them rights as stipulated in the TRIPs Agreement. This principle is known as the principle of “national treatment”.

The third calls for participating countries to provide treatment which is more detrimental to citizens from countries other than the treatment on its own citizens. Furthermore, the principle of “the most favored nation” applies here, which means that any rights granted to citizens of a country, must also be given to citizens of other countries.

3. *Overview of Traditional Knowledge*

There are several definitions of traditional knowledge propounded by experts on the subject. Nonetheless, one definition which many people use is that developed by the World Intellectual Property Organization (WIPO), namely:

“Traditional based literary, artistic or scientific works, performances, inventions, scientific discoveries, designs, marks, names and symbols, undisclosed information and all

other tradition-based Innovations and Creations resulting form of intellectual activity in the industrial, scientific, literary or artistic fields “.

Agus Budi Riswandi outlines the definition of traditional knowledge as follows⁵: 1) Traditional knowledge is the result of practical thinking, which is based on the teachings and experience from generation to generation; 2) Traditional knowledge is knowledge in the area of the township; 3) Traditional knowledge cannot be separated from the holders of society, including health, spiritual, cultural and language from the public shareholders, as it a way of life. Traditional knowledge holders lend credibility to the community. In this case I need to point out, simply that that traditional knowledge is held by local communities or regions and is hereditary.

C. METHODS

This is study which is solely based on literature review as source of data, and used descriptive methods to analyze the data. The objective of the research is to provide data as expeditiously as possible about the people or circumstances or other symptoms. In this study, the researcher collected data and subsequently constructed and transformed them into a series of research results⁶. Therefore, this study is also a library research.

As regards the location of the research, various libraries with relevant data pertaining to the subject matter were used. These included the Ministry of Industry and Trade of Indonesia Library, particularly the Directorate of Foreign Economic Relations in Jakarta; Foreign Affairs section of the Ministry of Agriculture Library in Jakarta; Library Assessment

⁴ Prasetyo Hadi Purwandoko. 1999. *Implikasi Ketentuan Agreement on TRIPs bagi Indonesia*. Yustisia No 47 Tahun XIII September - Nopember. Surakarta: Fak. Hukum UNS.

⁵ Budi Agus Riswandi dan M. Syamsuddin. 2005. *Hak Kekayaan Intelektual dan Budaya Hukum*, Jakarta: PT Raja Grafindo Persada hal 29.

⁶ Bambang Sunggono. 1997. *Metodologi Penelitian Hukum*. Jakarta: PT. Raja Grafindo Persada.

and Policy Development Board of the Ministry of Foreign Affairs in Jakarta; Library of Graduate Program of Legal Studies University of Padjajaran in Bandung, Indonesia University Graduate School Library; Library of the University of Sebelas Maret; Library of Faculty of Law University of Sebelas Maret; and various reliable websites .

The research used secondary data , which were divided into:

- a. Primary legal materials, namely: Agreement Establishing The World Trade Organization (Agreement Establishing the World Trade Organizations), Law No. 7 of 1994; the Understanding of Trade Related Aspects of Intellectual Property Rights, Including Trade in Goods Counterfeit (Agreement on Trade Aspects of Related to Intellectual Property Rights, Including Trade in Goods Counterfeit); Convention on Biological Diversity of 1992; the International Treaty on Plant Genetic Resources for Food and Agriculture of 2002; the International Union For the Protection of New Varieties of Plants, Indonesia's IPR regulation (Copyright, Patent, Trademark, Industrial Designs, Trade Secrets, Layout Designs of Integrated Circuits, Plant Variety Protection)
- b. Secondary legal materials, namely books, reports, and seminar papers, the news of the mass media such as Kompas, and a variety of draft legislation on Traditional Knowledge Protection Act, as well as issues related to the research.
- c. Tertiary sources of legal materials, which included materials that provide guidance and explanation of the legal materials of primary and secondary legal materials. Examples of the sources are dictionaries, legal encyclopedias, bibliographies.

Study of Literature or desktop method, was used in data collection. Meanwhile, content analysis technique based on juridical perspective was used to analyze data in a logical and systematic manner.

D. SPECIFIC REGULATION IS REQUIRED FOR THE PROTECTION OF TRADITIONAL KNOWLEDGE

1. Local Community Empowerment Through the Protection of Traditional Knowledge Systems

Fundamental issues relating to Law enforcement in Indonesia can be divided into three categories. First, with respect to substance, traditional knowledge does not have explicitly, both in terms of substance and procedural sense any legal protection. Protection is only limited to a symbolic form, making rule ineffective and with no benefits from it.

Secondly, legal aspects of the apparatus. There are still very few legal personnel who are knowledgeable about the problems and issues that relate to traditional knowledge.

Thirdly, cultural aspects of the law, which are rooted in the fact that traditional societies are in general very reluctant to take legal action in dealing with any infringement on intellectual property rights relating to traditional knowledge.

On the other hand, the government, which arguably has the necessary capacity and awareness to use the due process of the law in the protection of traditional knowledge, is still busy with other problems of the state. Moreover, the commitment of the government to enforcing law and order as enshrined in various national legislation is very much in doubt.

Thus, providing protection to traditional knowledge which exist in Indonesia, especially based on IPR framework, is still problematic. However, there is need to note that efforts are underway to provide protection to traditional knowledge, thanks to the use of extraordinary funding tailored to the identification of tradi-

tional knowledge. This is vivid evidence of the existence of serious attention and concern for traditional knowledge problems. By providing protection to traditional knowledge, the nation has an opportunity to enhance its competitiveness in global trade, which in turn will pave the way for higher local and national revenues and incomes.

The protection of traditional knowledge can be done in two ways, namely, using legal protection, and taking recourse to non legal instruments. As regards using legislation, the protection of traditional knowledge is achieved through adopting a binding legal form, for instance Intellectual Property Rights Law, the regulations relating to genetic resources, traditional knowledge in particular and customary law.

Meanwhile, protection of traditional knowledge using non-legal instruments is achieved through the application of instruments that are not binding,, which include among others codes of conduct adopted by international, governmental and nongovernmental organizations, professional societies and the private sector. Other protections include the compilation of the discovery, registration and a database of traditional knowledge.

2. The prospect of Empowering local People through the Protection of Intellectual Property Rights contained in Traditional Knowledge

The development and application of IPR has raised serious cause for concern. This relates to the legal terms as well as trade and human rights. Indonesia is endowed with a wealth of traditional knowledge, which calls for better management, if its benefits are to be optimized. As Henry Soelistyo of the Association of Community Intellectual Property Rights, argues:

“Accepting and accommodating the concept of globalization of IPR protection does not necessarily go

against national interest. However, keeping public interest in mind, remains a justification in the principles of regulation and the rationale of the various areas of IPR protection at the national level. However, all that should be done within the corridors of law and international norms⁷”.

The opinions expressed above are precise in the context of the legal system in Indonesia. This is because the legal system in Indonesia acknowledges three other legal subsystems, namely the national law, Islamic law and customary law.

Under such conditions, it is ideal that whatever is stipulated in corresponding legal norms do not contravene or conflict with other legal norms. In other words, what is set out in the norms of the prevailing /positive laws should not be contrary to the norms stipulated in Islamic law and customary law. The same applies to legislation relating to traditional knowledge. Ideally, Indonesia should have in place national norms translated into regulations on traditional knowledge. Such regulations should not contravene or contradict other legal norms, especially those enshrined in Islamic law (Mohammed Djumana, 2006: 5).

Moreover, providing protection to traditional knowledge can create immense opportunities that can contribute to the generation of foreign exchange revenues, which in turn will help to propel Indonesia’s economic development.

Appreciation of works of traditional society and culture will increase and as will be the sense of belonging and pride (sense of belonging or pride). If Indonesia were to show its serious commitment to exploring and uti-

⁷ Henry Soelistyo Budi. 2000. *Status Indigenous Knowledge dan Traditional Knowledge dalam Sistem HaKI*. Makalah. *Kajian Sehari “HaKI di Indonesia: Mewujudkan Masyarakat Etik dan profesional”*. Pusat Pemberdayaan Masyarakat dan Pengkajian Strategis dan IIPS, 3 Juni. Semarang: PPMPS.

lizing the potential of traditional knowledge, the country and its people will reap a lot more advantages in terms of economic benefits and preservation of noble values inherent in traditional knowledge. Greater government attention to the vast potential this nation has in traditional knowledge and better still increase its contribution to turning into icons for the people, will no doubt help in generating more value added as well as strengthening national character and identity as a nation.

Moreover, preservation of traditional knowledge will avert the danger that this vast and invaluable resource will one day become extinct. Like the saying goes “what is in the grip should be maintained”, there is need to maintain and manage the resources and wealth of the nation which we already have.

With well streamlined and regulated protection of traditional knowledge, means that all other countries or parties that use traditional knowledge will have to be subjected to share the profits they earn from doing so with Indonesia. Such a process generates revenues for the host nation.

Additionally, protection of traditional knowledge, also improves Indonesia’s position in world trade. Regrettably, providing protection to traditional knowledge is no mean feat. For example, the implementation of the Copyright Act in Surakarta, has not been accomplished so far because of⁸ a) the IPR provisions are contrary to the nature of traditional knowledge; b) the absence of institutions that serve as umbrella for the protection of traditional knowledge; c) the absence of database of traditional knowledge in Surakarta; d) differences in IPR system if applied to traditional knowledge; and e) other factors that lead to inefficient implementation of the Copyright Act in Surakarta, which relate to the substance of legislation, law enforcement structures, and cultural communities.

⁸ Nurulla Tri Siswantiti. 2007. *Implementasi Undang-Undang Nomor 19 Tahun 2002 tentang Hak Cipta di Kota Surakarta*. Surakarta : Skripsi page 71

With respect to problems and challenges likely to emerge if the traditional knowledge is protected under IPR laws. This relate much to the nature of the IPR, which is limited and narrow in scope because of the requirement that there should be new and original elements. This is contrary to the nature of traditional knowledge, which does not constitute or is a new element, because it has been there for generations. So the prospect of using the IPR protection is not effective, and requires a separate arrangement. This issue has been discussed in the Draft Law of Traditional Knowledge and Traditional Cultural Expressions.

The scope of subjects, which are currently under discussion relating to the above bill include : a) Consideration / policy underlying the need for protection (preservation, moral, economic, etc.); b) Who should benefit and who the owners of related objects; c) Object to be protected (Definitions/Scope of Traditional Knowledge and Traditional Cultural Expressions); d) The criteria that must be met and limits, which must not be violated; e) The rights and liabilities of the owner, as well as exclusion; f) the aspect of protection, which has not been accommodated by conventional Intellectual Property Rights systems

Other provisions in the bill include, g) the procedure to obtain utilization permits (how to administer) and enforce such rights (sanctions and fines); h) issues which cannot be dealt with at the national level, hence need addressing at the international level, and attendant mechanisms to use; i) the treatment of objects that are belong to foreign culture/heritage; j) terms of protection; k) the notion that the state has a moral obligation (ethical imperative) to preserve cultural diversity and traditional knowledge; l) Development of the state must support the creative industries which focus on economic growth and job creation.

The Bill on Bill of Traditional Knowledge and Traditional Cultural Expressions has important points, which include⁹:

a. General Provisions

1) Traditional Knowledge is the intellectual work in the field of knowledge and technology that contain elements characteristic of traditional heritage produced, developed, and nurtured by the community or society; 2) Traditional Cultural Expressions is defined as intellectual work in the field of art which contains elements characteristic of traditional heritage that produced, developed, and maintained by the community or society, 3) Tradition is a cultural heritage of the community, maintained and/or developed in a sustainable manner over generations by a community or traditional community; 4) Protection is an effort to protect all forms of utilization Traditional Knowledge and Traditional Cultural Expressions done without violating the rights and decency; 5) The owner and/or Custodian Traditional Knowledge and Traditional Cultural Expressions is a community or traditional communities that maintain and develop the traditional Knowledge and Traditional Cultural Expressions and communal, 6) utilization is the utilization Traditional Knowledge and Traditional Cultural Expressions outside the context of tradition; 7) the Expert Team on Traditional Knowledge and Traditional Cultural Expressions is a special independent team in the environment department in charge of Traditional Knowledge and Traditional Cultural Expressions; 8) Petitioner is a foreign person or foreign legal entities applying for permits access to utilization and application utilization agreement registration; 9) The application is a request to obtain access permits utilization, and utilization recording agreement; 10) Use Access Permit is a permit that given by the Minister to a foreign person or foreign legal entity prior to the use agreement; 11) Holders of permits access to the utilization of a foreigner are foreign legal entities which have obtained permits of access and utilization; 12) utilization agreement is an agreement between the owner and/or Custodian of Traditional Knowledge and/or Traditional Cultural Expression and

foreigners or foreign legal entities, the utilization of Traditional Knowledge and/or Traditional Cultural Expression outside the context of the tradition.

b. Protection of Traditional Knowledge and Traditional Cultural Expressions

1. Traditional Knowledge and Traditional Cultural Expressions covers elements of culture, which :
 - a. Have special characteristics that are integrated within the cultural identity of certain people who preserve it;
 - b. prepared, developed, maintained, and transmitted within the scope of tradition,
2. Traditional Knowledge-protected works include literary tradition based, artistic or scientific works, performances, inventions, scientific discoveries, designs, marks, names, names and symbols, undisclosed information, and all the updates based on traditions and creations resulting from intellectual activity in the field industrial, scientific, or artistic,
3. Traditional Cultural Expressions protected includes one or a combination of the following expression:
 - a) verbal textual, whether oral or written, in the form of prose and poetry, in a variety of themes and content of the message content, which may be a work of literary or narrative informative;
 - b) music, including among others: vocal, instrumental or a combination thereof;
 - c) motion, including among other things: dance, martial arts, and game;
 - d) the theater, including among others: puppet shows and theatrical people;
 - e) art, whether in the form two-dimensional and three-dimensional made from various materials such as leather, wood, bamboo, metal, stone, ceramics, paper, textiles, etc. or combinations thereof;
 - f) customary ceremonies,

which also includes the manufacture of tools and materials and presentation.

c. *Scope of Protection Traditional Knowledge and Traditional Cultural Expressions (Article 3)*

Traditional Knowledge And Traditional Cultural Expressions protection includes the prevention and prohibition of :

1) Utilization is done without the use of access permissions and agreements utilization by foreigners or foreign legal entities; 2) Utilization of the implementation of utilization did not mention clearly the origin region and the community or society is the source of these Traditional Knowledge and Traditional Cultural Expressions; and/or 3) Utilization conducted distorted and incorrect impression of the community concerned, or that make the community feel offended, insulted, reprehensible, and/or contaminated.

d. *Period of Protection (Article 4)*

The term of protection provided for intellectual property Traditional Knowledge and Traditional Cultural Expressions still maintained by the owner

e. *Documenting (Article 5)*

1. The Government shall conduct the data collection and documentation of Traditional Knowledge and Traditional Cultural Expressions throughout Indonesia, 2) Traditional Knowledge and Traditional Cultural Expressions are documented to provide information about the Traditional Knowledge and Traditional Cultural Expressions which are owned by the Indonesian people in general, and traditional community or society at in particular, 3) Data Collection and documentation of Traditional Knowledge and Traditional Cul-

tural Expressions as referred to in number one can also be organized by universities, research institutions, and other interested parties, 4) Minister to coordinate a data base that collects documentation of Traditional Knowledge and Traditional Cultural Expressions referred to in number one and three at the top in a national network, 5) The database referred to in number are placed in a medium that is easily accessible by everyone, 6) Further provisions concerning data collection and documentation of Traditional Knowledge and Traditional Cultural Expressions is regulated by government.

E. TRADITIONAL KNOWLEDGE: WE PROTECT IT, WE CAN GAIN ADVANTAGES FROM IT

There is urgent need for a system that protects Traditional Knowledge. Two mechanisms can be used to create such a system: firstly, using legal protection, and using instruments other than law. By providing protection to Traditional Knowledge, we can get the benefits of exploring and preserving it and use it as the means of community empowerment to generate a wealth of advantages for the nation and the population.

Unfortunately, the prospects of providing protection to Traditional Knowledge using Intellectual Property Rights Law framework is still blurry because of the nonexistence of special rules that specifically apply to it. The absence of regulations, if it continues as it is, will disrupt the harmony and tranquility of the society, which will have implications for providing protection to traditional knowledge.

Unless a reliable, sustainable, and appropriate protection system to traditional knowledge is conceived and implemented, there is little doubt that it is a matter of time that our invaluable traditional knowledge will be extinct. Once that occurs, the nation will lose all the benefits which are the vast wealth of traditional knowledge contain.

To that end, there is urgent need for the government to expedite the deliberations and passing of the bill on Traditional Knowledge and Traditional Cultural Expressions as it is only through that process that better management and protection of folklore will be ensured to posterity. Local governments also have an important role to play in this endeavor, which is the creation of database and inventory of folklore in the region.

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