PROTECTION OF TRADITIONAL KNOWLEDGE IN RELATION WITH INTELLECTUAL PROPERTY RIGHTS ON THE PRINCIPLE OF JUSTICE FOR PEOPLE AS AN ENDEAVOUR OF NATIONAL ECONOMIC DEVELOPMENT

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Abstract

As one of countries member of World Trade Organization (WTO) and World Intellectual Property Organization (WIPO), Indonesia must concern on and participate on initiatives to prevent infringement on intellectual property rights (IPRs).

The objectives of this paper are to analyze and find answers on several problems as follows: firstly, to find the legal protection on intellectual property rights on traditional knowledge specific regulation in Indonesia which has not yet available; secondly, to find the concept of the governance of traditional knowledge which performs justice principle in term of supporting the economic development in Indonesia.

This paper found that, first, the legal protection for traditional knowledge using the regulations of Intellectual Property Rights, in fact, cannot give a total protection. In essence, the protection of Intellectual Property Rights is monopolistic, exclusive, and individualistic making it to be private domain. This is much different from traditional knowledge more focused on public domain. The purpose of legal protection will not only avoid an unfair competition with Misappropriation but also for the economic development. Second, the governance concept of traditional knowledge will be perfectly designed by making a Sui Generis system, by creating a comparing document (prior art) as a defensive protection mean which accommodate the "benefit sharing" concept. In this concept, the custodian of traditional knowledge is the community. The existing regulation of Intellectual Property Rights after Indonesia ratified TRIPs cannot give any justice for the protection toward traditional knowledge for the existence of misappropriation.

Keywords: *Intellectual property rights, traditional knowledge, benefit sharing, misappropriation*

A. Introduction

In the free trade era, there are many countries seeking for new alternative products to trade in market by maximizing traditional knowledge based products from developing countries like Indonesia and trying to make an acquisition of the products and develop them more. These efforts are intended to rule the global market without giving any contributions to the countries who own the original products.[1]

This is the case commonly found in developing countries like Indonesia where its biological and genetic resources are fraudly explored, especially those related to traditional knowledge based products. This is due to the increasing of *biopiracy* which takes place without any approvals from the rights owner and therefore not giving any significant contribution or compensations. One of the cases is in Indonesia where the rights of

[1] Sudarmanto, *Produk Kategori Indikasi Geografis Potensi Kekayaan Intelektual Masyarakat Indonesia*, Lembaga Pengkajian Hukum Internasional Fakultas Hukum Universitas Indonesia, Jakarta, 2005, p. 109 – 110.

Brotowali and Sambiloto plants is now being illegally acquired by Japan. According to the European Rights Bureau - http.//ep.espacenet.com, there are at least 40 rights of Indonesian medical traditional plants acquired by Japan even though some of them are cancelled. As the owner of those traditional medical plants, Indonesia has not yet been able to economically enjoy the benefits of its traditional plants and natural resources.

Culture is one of the factors influencing on the way how Indonesian people see economic value of their traditional knowledge. In general, Indonesian people do not value the economic benefits of their traditional knowledge and have no intention to prevent it from being acquired by other people. Many Indonesian people belief that traditional knowledge is a general knowledge belongs to everyone in the world. Therefore, giving the knowledge to others is considered to be a noble act. This point of view is surely vulnerable to *misappropriation*[2)] conducted by foreign researchers who develop their research in biotechnology or pharmacy with gaining economic benefits as the driving force.

There is different point of view between Indonesian and Western people about traditional knowledge. The difference lies in the basic concept and ownership aspect. Western people, who are individualistic and capitalistic, view traditional knowledge as a property that belongs to an individual; meanwhile, Indonesian people view it as a cultural heritage and cultural expression. However, there are chances for bridging this gap in point of view about traditional knowledge.

The discussions about protection of traditional knowledge in Indonesia cover at least four following important problems: [3]

(1) The important of protection,
(2) Intellectual rights regime as an internationally recognized protection system,
(3) What most appropriate regime for protecting the rights of local people of Indonesia, and
(4) Efforts conducted by Indonesia Government in the future.

In 1997, WIPO established *the Global Intellectual Property Issues Division* with the purpose to identify problems that may have significant impacts on Intellectual Property Rights (IPR).[4] One of the global issues that has impact on IPR is the one relating to traditional knowledge protection as one of the kind of *intellectual activity in the industrial, scientific, literary or artistic field.*.[5] There are many forums coordinated by *Convention on Biological Diversity (CBD), World Health Organization(WHO)* and *UNESCO* who conducted studies and prepared inputs about things that need to study and to being given exact rules by developing international agreement on utilization of biodiversity existed in a site.

From 2000 to 2012, negotiations intended to develop protection on Genetic Resources, Traditional Knowledge, and Folklore in the forum of Inter-Governmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge, and Folklore (IGC IP-GRTK) on the World Intellectual Property Organization (WIPO) still take place. Observation conducted by WIPO reported that the agreement commonly

[2)]*Misappropriation* : *"the unauthorized, improprer or unlawful use of funds or property for purpose other than that for which intended"*. Black's Law Dictionary (6th ed., 1990), 998.

[3] Agus Sarjono, *Hak Kekayaan Intelektual dan Pengetahuan Tradisional,* Alumni, Bandung, 2006, p. 12-17.

[4] WIPO, *Intellectual Property Needs.* (Geneva, 2001), 16.

[5] Pengertian *intellectual property* yang didefinisikan oleh WIPO mencakup bentuk tersebut, disamping bentuk yang sudah lazim dikenal seperti *inventions, industrial design, trademarks copyrights,* dan lain-lain. WIPO, *Ibid.*, 15.

known as material transfer agreement (MTA) has been clausally protecting and related rights on intellectual property rights are determined independently.[6]

One of the weaknesses in developing protection system on Traditional Knowledge is limited data, documents, and information about the knowledge which actually has been existed for hundred years. The unavailability of written documents about Traditional Knowledge has become the main reason why Patent bureau difficult to issue patent documents as no prior art document available that can be used to decline the related invention. This is surely not beneficial for indigenous people as the owner of the traditional knowledge. [7]

B. Traditional Knowledge Protection and Challenge

Internationally, especially those related to IPR, Indonesia has implemented the *TRIPs Agreement* as one of the point of agreement in *World Trade Organization (WTO).* However, in the other side, developed countries still have no serious intention to consider local people's intellectual rights for traditional knowledge. Premises developed in GATT Uruguay Round agreement, especially those related to world trade commodities with IPR (TRIPs), could not yet able to consider the interest of local people; [8] meanwhile in the other side, developed countries are very much enjoying the benefits of access to genetic resources which widely available in developing countries. There should not be discrimination in the utilization of genetic resources between local and foreign bioprospectors.[9]

Moreover, there are many developed countries like United States showing different attitudes when third world countries exclaim their concern on the utilization and exploration of biodiversity and traditional knowledge through Convention on Biological Diversity (CBD). They refuse to sign the convention. The reason why the United States refuses the convention is that CBD may inhibit the protection on intellectual property rights.[10] This is inconsistent with their interest in developing biotechnology industry.[11]

The demand on the protection of traditional knowledge and biodiversity resources firstly aroused in the Convention of Biological Diversity (CBD) in 1992. Indonesia has agreed to the United Nation Convention on Biological Diversity by enacting the Law Number 5 year 1994 about the Enactment of the United Nation Convention on Biological Diversity which mandated the establishment of a protocol for Biosafety. And on

[6] Claudio Chiarolla, *Plant Patenting, Benefit Sharing and the Law Applicable to the Food and Agriculture Organisationb Standard Material Transfer,* The Journal Of World Intellectual Property, Blackwell Publishing Ltd, Volume 11 Number 1 Januari 2008, p. 2-6

[7] Philip Schuler, *Biopiracy and Commercialization of Ethnobotanical Knowledge,* in : *Poor Peoples's Knowledge Promoting Intellectual Property In Developing Countries,* J. Michael Fingerand Philip Schuler (ed), A Copublication of the World Bank and Oxford University Press, Washington, 2004, p.160.

[8] Frederick M Abbott, "Protecting First World Assets in The Third World: Intellectual Property Negotiations in the GATT Multilateral Frameworld", *Vanderbilt Journal of Transnatonal Law,* (Vol. 22, No. 4, 1989), 712-717.

[9] Daniel Wiiger, *Prevention of Misappropriation of Intangible Cultural Heritage through Intellectual Property Laws,* in : *Poor Peoples's Knowledge Promoting Intellectual Property In Developing Countries,* J. Michael Fingerand Philip Schuler (ed), A Copublication of the World Bank and Oxford University Press, Washington, 2004, p.186.

[10] Anthony D'amato & Doris Estelle Long, *International Intellectual Property Anthology,* (Cincinnati: Anderson Publishing Co., 1996),p. 79.

[11] Mark Anderson, "*Convention on Biological Diversity*", *Solicitor Journal,* (16 Oktober 1992), p. 1030.

August 16, 2004, Indonesian Government passed and enacted the Law Number 12 year 2004 about the Enactment of Cartagena Protocol on Biosafety to the Convention on Biological Diversity.

Traditional knowledge is intellectual activities results that include skills, innovations, and practices related to cultural tradition. The definition refers to the recommendation of World Intellectual Property Rights Organization (WIPO) which defines traditional knowledge with the following two components:

1. "Knowledge" defined as one thing that is known and not merely a form of expression;
2. "Traditional", means that the knowledge related to certain culture.

Traditional knowledge are innovations and the volume of knowledge continually developed, acquired, used, practiced, transmitted and sustained by communities through generations supported by their ecology, environment, life styles, attitudes, societies and culture.[12]

The definition of Traditional Knowledge by WIPO is not difference to the one defined by Convention on Biological Diversity (CBD). Traditional Knowledge is a key concept consisted in Article 8 (j) which determines the importance of traditional knowledge roles as follows: .... *To encourage the equitable sharing of the benefits arising from the fillsation of such knowledge, innovation, and practices."*

The complete statement of Article 8 (j) is as follows:

> " *Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovation and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovation and practices. "*

The natures of Traditional Knowledge are as follows:

1. It is a collective and communal rights;
2. It transcends from generation to generation;
3. It is a means for natural conservation and sustainable utilization of biological diversity;
4. It not market oriented;
5. It is not widely known in international trade forum; and
6. It is well known in the Convention on Biological Diversity.

Of the following three focuses: Genetic Resources, Traditional Knowledge, and Folklore Expression, genetic resources are the most interesting challenge for all stakeholders to develop a law in Intellectual Property Rights (IPR) since it has concept, system, originality, ownership, and time-frame for protection which difference to the well-known conventional IPR. Genetic Resources, Traditional Knowledge, and Folklore Expression consist of ideas that have been preserved through oral and unwritten tradition. In term of ownership, all conventional IPR regime, except Collective Brand and Geographic Indication, centered on individual ownership and limited by time-frame. Meanwhile, Genetic Resources, Traditional Knowledge, and Folklore Expression are communal ownership in nature and have no limit of ownership time due to its continual and generation to

[12] Charles R. McManis, Biodiversity, Biotechnology and Traditional Knowledge Protection : Law, Science and Practice, *Biodiversity Law Intellectual Biotechnology Traditional*, , Earthscan Sterling, VA, London, 2007, p.4.

generation development.[13]

The issues of IPR related to Genetic Resources, Traditional Knowledge, and Folklore Expression have been existed in many policies including the ones about food and agriculture, biological diversity and environment, human rights, culture, trade, and economic development. Genetic Resources, Traditional Knowledge, and Folklore Expression are related to one another since additional values derived by a genetic resource are coming from traditional knowledge belongs to a community. For example, traditional knowledge is a means for discovery and development of medicines made of plants and able to save research fund and no need long time to be discovered.

As the consequence, efforts intended to protect traditional knowledge should involve initiatives how to consider it as a prior art and enforce that the unlawful PRI acquisition should be declined.

C. Sui Generis Concept System for Equitable Protection of Traditional Knowledge

Costa Rica is the first country to have concern on traditional knowledge and enacted a law for protecting it. The country enacted the law using Sui Generis system in which the Article 82 of *The Biodiversity Law of the Republic of Costa Rica of 1998* [14] determined that:

> *"The State expressly recognizes and protects, under the common denomination of sui generis community intellectual rights, the knowledge, practices, and innovations of indigenous people and local communities related to the use of components of biodiversity and associated knowledge. This right exists and is legally recognized by the mere existence of the cultural practice or knowledge related to the genetic resources and biochemical; it does not require prior declaration, explicit recognition nor official registration; therefore it can include practices which in the future acquire, such status. This recognition implies that no form of intellectual or industrial property rights protection regulated in this chapter, in special laws and in international law shall affect such historic practices."*

The Philippine has also developed a regime for protecting its traditional knowledge. Section 17 in Article 14 of their constitution says that:[15]

"The State shall recognize, respect and protect the rights of the indigenous cultural communities to preserve and develop their cultures, traditions and institution. It shall consider these in the formulation of national plans and policies."

Moreover, the constitution was described in *Indigenous People Rights Act* 1997 which consisted of the following things:

> *"Indigenous cultural communities/indigenous peoples have the right to practice and revitalize their own cultural traditions and customs. The state shall preserve, protect and develop the pass, present and future manifestation of their cultures as well as the right to the restitution of cultural, intellectual, religious and spiritual property taken without their free and prior informed consent or in violation of their laws, traditions and customs."*

[13] Miranda Risang ayu, Pentingnya Perlindungan Defensif Terhadap Sumber Daya Genetik, Pengetahuan Tradisional dan Ekspresi Budaya Tradisional Indonesia, Penemuan Hukum Nasional Dan Internasional, Dalam Purnabakti Prof.Dr. Yudha Bhakti, SH.,MH. , Fikahati Aneska, Bandung, 2010, p. 390

[14] Andriana & Gazalba Saleh , Perlindungan Hukum Varietas Baru Tanaman Dalam Perspektif Hak Paten dan Hak Pemulia, Raja Grafindo Perkasa, Jakarta, 2004, p. 43

[15] David Daoas, "Efforts at Protecting Traditional Konwledge: The Experience of Philipines", *Roundtable on Intellectual Property and Traditional Knowledge,* (WIPO/IPTK/RT/99/6a, October 27, 1999), 9.

The laws are not only declarative in nature, but also normative which regulates what compensation people will have when their rights are taken forcefully and without any agreement; or when the takeover of rights is against the law, tradition, and people's rules.

Australia has also tried to implement Aboriginal traditional law with modern IPR regime as in the case of Milpururu vs Indofurn (pty) Ltd.[16] In this case, Australian court combined Aboriginal Law System and modern IPR system. Common law is implemented to determine who has the rights on Aboriginal traditional design of carpet; meanwhile, the protection of the rights is achieved through modern IPR system. This combination is possible to make according to the common law system. In this system, the judges are the law makers.[17]

In New Zealand, the protection of traditional knowledge is conducted through *prior informed consent* (PIC) system. The implementation of the system is conducted in form of collaboration between Maori people and *Cancer Genetics Research Team* of University of Otago. There were 12,000 Maori people contributed their information needed by the team such as *genealogical and medical information.*

The collaboration (*Kimihauora Trust*) is supported by *New Zealand Gastroenterologist Association and New Zealand Health Research Council.* Therefore, there is a mutual relationship between indigenous people and researcher in applying the protection model which involves direct participation of people and implementation of rights regime.

There are many studies conducted through many forums such as in WIPO (*Standing Committee on Information Technology, Standing Committee on Patent, Committee of Experts of the Union of the International Patent Classification*) and other organizations (such as *World Health Organization, Convention on Biological Diversity, United Convention to Combat Desertification, United Nation Educational, Scientific and Cultural Organization, United Nation Conference on Trade and Development, World Trade Organization,* and *World Bank).*[18]

From *Asian – African Forum on Intellectual Property and Traditional Knowledge and Genetic Resources*, 18-21 June 2007 in Bandung to The World Intellectual Property Organization (WIPO) forum in 2012 there were identified that there were many spaces available for conducting further studies. There was also some recommendation that the realization of law protecting genetic resource, traditional knowledge, and folklore expression should be immediately enacted, and sui *generis intellectual property system* is implemented in those issues.[19]

There are some alternatives that can be taken by government in order to protect the rights of indigenous people in Indonesia such as enacting new laws using Sui Generis system which regulates the access for foreign people to biological diversity resources and traditional knowledge in Indonesia and also the benefits sharing between indigenous people and the users of the resources. Indonesian government needs also to take an action to

[16] WIPO, *Intellectual Property Needs*, 64-65. Lihat juga Christine Haight Farley, "Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?", *Connecticuit Law Review*, (Fall, 1997), 4-7.

[17] Rene David & John E.C. Brierley, *Major Legal Systems in the World Today*, 3rd *ed.*, (London: Stevens & Sons, 1985), p. 312-313.

[18] Christopher May, *The World Intellectual Property Organization Resurgence and the Development Agenda*, Routledge Taylor &Francis Group, London and New York, 2006,p. 3.

[19] Ian F Spellerberg, *Biological Diversity, Concerevation and Resource Management, Biodi versity Conservation In Asean Emerging Issues & Regional Needs*, Asean Academic Press, London, Printed and bound in Malaysia 2007,p. 7

encourage participation of indigenous people in utilizing and exploring genetic resources and traditional knowledge for the sake of welfare of the people.

In other countries in Africa, South America, and Asia, WIFO-FFMs have found many different models of protection.[20] However, they share one thing in common in which they believe that traditional knowledge is importance as an intellectual rights just like other rights such as copy rights, brand, and design that included in IPR regime. It means that there is no yet a common law model available for protecting traditional knowledge. This creates an opportunity for Indonesia to implement a protection system for its indigenous people. Here, the question about what the most appropriate regime is for protecting indigenous people's rights relevance to be asked.

Indonesia has actually own its protection regime for traditional knowledge in form of folklore, [21] such as the one determined in the Article 10 of the Law Number 19 year 2002 about copyrights. However, the regulation determined in the article is still difficult to implement. One of the reasons why it is difficult is that the article still needs a supporting implementation regulation which is not yet available until today.

The most important thing of sui generis system is that it recognizes firmly that indigenous people are the owner of the traditional knowledge. Common law or customary law could become an alternative source of law or materials for formulizing indigenous people's rights in sui generis law. Principles consisted in common law could be accommodated into sui generis law as follows:[22]

1. Regulation consisted in sui generis law is simple.
2. Sui generis law should not neglect components of religion norms. This is in accordance with common law system which magis religious in nature.
3. Sui generis law should be based on community system that appreciate togetherness and harmony.
4. Sui generis law should be able to guarantee or provide higher possibilities for supporting the implementation of traditional knowledge including the knowledge about biological diversity in order to provide benefits for the welfare of people.

Indonesia could also take an action to refer to *WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC-IPGRTKF).* If it is agreed, there are some important components that could be included in sui generis law as follows:

The objectives of providing protection for traditional knowledge through sui generis law system are as follows:

a) Creating a preservation, protection, and development system of the traditional knowledge.
b) Protecting the rights of traditional knowledge owners.
c) Developing the community's capacity who own the traditional knowledge in Indonesia.
d) Improving national capacity to innovate based on traditional knowledge.

[20] WIPO, *Intellectual Property Needs*, (2001).

[21] Michael Blakeney, "What is Traditional Knowledge? Why Should It Be Protect? Who Should Protect It? For Whom?" Undestanding The Value Chain", dalam *WIPO Roundtable on Intellectual Property and Traditional Knowledge*, WIPO/IPTK/RT/99/3, (October 6, 1999), 2. Dalam perspektif WIPO, *folklore* adalah bagian dari pengetahuan tradisional. See WIPO, *Intellectual Property Needs*, 26.

[22] Agus Sarjono, Hak Kekayaan ……., *Op. Cit*.,p.304

Therefore, the protection of traditional knowledge is not only intended for avoiding it from being missappropriationed by foreigners, but also to protect and preserve the traditional knowledge and provide benefits for the indigenous people.

There are efforts intended to protect traditional knowledge, genetic resources, and folklore by formulizing a law have been initiated. However, of the three law drafts, there is an inclination that law for protecting genetic resources is separated from the law for protecting traditional knowledge and folklore which combined together into one legal draft.

In sui generis law, there must be a clear definition that traditional knowledge should have exclusive rights for the people who own traditional knowledge to announce and/or utilize their own knowledge which covers the following things:

A). the rights holder over traditional knowledge has official rights to utilize and manage their knowledge by considering the practice and habit of the community;
b). the rights holder over traditional knowledge has full rights to have protection from fraud claim over the traditional knowledge;
c). the holder rights over traditional knowledge has the rights to have protection from acquisition and utilization of the knowledge without any legal permission; and
d). the holder rights of traditional knowledge has the rights to share the equitable benefits of the utilization of the traditional knowledge for the commercial interest of other parties.

Difference to the IPR regime, rights over traditional knowledge owned by people is not a timely limited rights. The rights over traditional knowledge is granted without any time limitation. Therefore, the issue about time limitation of rights is not relevance in sui generis law. The protection of traditional knowledge means nothing if the law or regulation protecting the knowledge cannot be implemented effectively. One of the factors supporting the effective implementation of the law is that the law implement sanctions in form of compensation for breaching over the law. In the system of traditional knowledge in Indonesia, it is difficult to ask indigenous people to actively participate on law enforcement efforts. Therefore, active initative should be taken by government.

D. Conclusion

1. In conclusion I wish that the protection Traditional Knowledge of expressions of folklore should not be undertaken for its own sake or as an end in itself, but “as a tool for achieving the goals and aspirations of relevant peoples” including the respect for cultural rights and the protection of tradition-based creativity as an ingredient of sustainable economic development. Apart from their core historical, cultural, spiritual and social significance, they are also economic assets.

2. Intellectual Property Rights protection over traditional knowledge by implementing IPR Law such as through Law of Patent has not yet fully provided an appropriate protection. This is due to the characteristics of IPR that is difference to traditional knowledge. IPR protection is exclusive, monopolistic, individualistic, and private domain in nature; meanwhile traditional knowledge has collectivism nature.
3. The most appropriate concept of traditional knowledge management is implementing sui generis law based on tradition. The protection is intended to improve people's welfare, and not only for the purpose of humanity initiatives, but also for the sake of welfare of the indigenous people through providing access to foreigners to share equitable benefits with the indigenous people who own the traditional knowledge.

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