ESTABLISHING THE SUI GENERIS LAWS FOR PROTECTING TRADITIONAL KNOWLEDGE IN INDONESIA

Rohaini*

This article analysis several potential legal issues that need to consider in order to develop sui generis laws for protecting traditional knowledge in Indonesia. It is important since the uses of intellectual property laws are considered ineffective to protect traditional knowledge in Indonesia. It can be seen from the number of misappropriation of Indonesia's traditional knowledge conducted by other countries. It realizes due to the concept of protection in the IPRs did not fix well with the particularly traditional knowledge characteristic. In order to cover the weakness of IPRs law, to establish a sui generis law is necessity. As the conclusion, the article concludes that at least there are several legal issues that need to consider and solve by the government prior to establish the sui generis law for protecting TK in Indonesia.

INTRODUCTION.....	708
I. THE GENERAL CONCEPT OF TRADITIONAL KNOWLEDGE.....	709
A. What Is Traditional Knowledge?.....	710
B. Why It Should Be Protected?.....	711
C. How to Protect It?	713
II. DESIGNING SUI GENERIS LAWS	713
A. What Is the Policy Objective of the Protection?.....	714
B. Scope of Subject Matter That Should Be Protected.....	714
C. What Criteria Should This Subject Matter Meet to Be Protected?	715
D. The Beneficiaries of Protection: Holders of TK.....	715
E. The Kind of Rights to Be Granted	716
F. How Are the Rights Acquired?	716
G. How to Administer and Enforce the Rights	716
H. How Are the Rights Lost or How Do They Expire	717
CONCLUSION.....	718

INTRODUCTION

The discussion on the protection of traditional knowledge (hereinafter

---

* Rohaini is a lecturer at Faculty of Law of Lampung University, Indonesia. Besides as a lecturer, currently pursuing her Ph.D. from Human, Socio and Environmental Studies of Kanazawa University, Japan. Research fields: Intellectual Property Rights, Company Law, and Banking Law.

referred to as TK) has been done more than 20 years ago. Several international treaties were developed, such as the United Nation of Convention on Biological Diversity (CBD). CBD is an important international regulation for traditional knowledge. It recognizes the right of countries over their traditional knowledge, and introduces the concept of access and sharing of benefit from the utilization of it.

Moreover, in order to achieve the certainty of law, protect TK, and ensure fair and equitable sharing of benefit arising from their utilization, the CBD gives the opportunities to the Parties to develop two forms of protection, are positive protection and defensive protection. In the positive protection form, it grants intellectual property rights (IPRs) over the subject matter of protection. It realizes through the national legislation, neither through the IPRs law or sui generis laws. While in the defensive protection form, it does not grant IP rights. The purpose of it is to stop and prevent granting the IP rights to the wrong parties. Most of the defensive protection is implemented through the documenting the TK, e.g., the database of TK or the journal of TK.

However, using IPRs to protect the TK also has some disadvantages, are: First, the concept of ownership in IPRs is individually, it is contrary with the concept of ownership of TK which is communal; second, IPRs regulation merely protect the economic value of TK, nor spiritual value and cultural identity.

I. THE GENERAL CONCEPT OF TRADITIONAL KNOWLEDGE

Related to the discussion of Traditional Knowledge, some literatures are using different terms. Some use the term “local knowledge”, “indigenous knowledge” or “traditional knowledge”. However, the terms are in principle have the same object that is on the knowledge that has existed for long time and known by the indigenous people or local community within the region. World Intellectual Property Organization (WIPO) and Secretariat of Convention on Biological Diversity itself in documents that they publish are tending to use the term of “traditional knowledge”. For this article, the writer tends to use traditional knowledge term.

Moreover, before making any traditional knowledge arrangement and protecting it, it is necessary to us to understand first several things related to TK.

A. *What Is Traditional Knowledge?*

Although the discussion on the protection of TK has been done since twenty years ago, there is currently no formal legal definition agreed on it, which is universally admitted. There are various definitions of TK in the literatures, proposed by international organization or experts. The Convention on Biological Diversity (CBD) defines the TK as:

The knowledge, innovations and practices of indigenous and local communities around the world. This knowledge developed from experience gained over the centuries and adapted to the local culture and environment, TK is transmitted orally over generation to generation. It tends to be collectively owned and takes the form of stories, songs, folklore, proverbs, cultural values, beliefs, rituals, community laws, local languages, and agricultural practices, including the development of plant species and animal breeds. TK is mainly of a practical nature, particularly in such fields as agriculture, fisheries, health, horticulture, forestry and environmental management in general.¹

While, the World Intellectual Property Office (WIPO) broadly defines TK as:

Tradition-based literary, artistic or scientific works, performances, inventions, scientific discoveries, designs, marks, names, symbols, undisclosed information and all other tradition-based innovations and creations resulting from intellectual activity in the industrial, literary or artistic fields. Moreover, the term “tradition-based” here is refers to the “knowledge system, creations, innovations and cultural expressions” which have been transmitted from one generation to the next.²

In addition, there are several definitions that proposed by experts. Peter Jaszi states from all definitions of TK that existing, it can be said that generally, TK is resulting from intellectual activity that builds on past experience and observation, which has a dynamic nature and changes its character as the needs of the people change.³ In line with Peter Jaszi, J. Janewa defines TK as the result of intellectual activity, which is handed down through the generations, and which pertains to particular cultural groups.⁴ It is emphasizes to the accumulation and transmission of

---

¹ Secretariat of CBD, *Traditional Knowledge and the Convention on Biological Diversity (CBD)*. Available at <http://www.cbd.int/traditional/intro.shtml> (last visited October 8, 2013).

² WIPO/GRTKF/IC/3/9 (May 20, 2002).

³ Peter Jaszi, et.al., *A Step Forward for Protection in Indonesia*, in Avilia, Dewi, *Traditional Knowledge Database: A Defensive Measure Against Traditional Knowledge Cross Border Misappropriation*, Master Thesis 7 (Tilburg University, Netherland). Available at <http://arno.uvt.nl/show.cgi?fid=115001> (Last visited June 10, 2013).

⁴ OseiTutu, J. Janewa, *A Sui Generis Regime for Traditional Knowledge: The Cultural Divide in Intellectual Property Law*, 15 MARQUETTE INTELLECTUAL PROPERTY L. REV. 164 (2011).

knowledge over the generations.⁵

Based on definitions above, as a hereditary knowledge, generally it should be noted that TK is not limited to any specific technical field. In the context of international level, it is agreed that it may include traditional agricultural knowledge, environmental, medical knowledge and also knowledge associated with GR⁶ and traditional ecological knowledge.⁷ It also can be found in a wide variety of contexts, including: agricultural, scientific, technical, ecological and medicinal knowledge.⁸ It concerns to all aspect of life, and the environment.⁹

Even though there is no clear definition for TK, the point that we can agree is all definitions are created to complete each other. For this reason, then it is possible to identify a general characterize of TK such as TK consists of tradition-based innovations, creations and practices that originate from, and used by indigenous and local communities. TK is transmitted orally from one generation to the next. This circumstance resulted the TK is a non-static knowledge. As a non-static knowledge, it is continuously modified and adapted to the changing needs of its user. The community, not as an individual property, mostly holds it. It is used to support the livelihood of its holders and the creation, not for profit oriented.¹⁰ Thus, the present generations are just custodians or administrators of knowledge to their own benefit and also for the future generations.¹¹ Moreover, the subject of it is very wide includes almost all daily human needed such as: arts, medicine, food, agricultural, health, housing, etc.

B. *Why It Should Be Protected?*

According to the discussion on TK protection, there are several reasons

---

⁵ Wekundah, Joseph M., *Why Protect Traditional Knowledge?*, AFRICAN TECHNOLOGY POLICY STUDIES NETWORK 44 Special Paper Series 8 (2012).

⁶ Jaszi, *supra* n 4, at 7.

⁷ Overwalle, Geertrui Van., *Protecting and Sharing Biodiversity and Traditional Knowledge: Holder and User Tools*, 53 ECOLOGICAL ECONOMICS JOURNAL 587 (2005).

⁸ Secretariat of WIPO, *supra* n 2.

⁹ Andriantsiferana, Rabodo, *Traditional Knowledge: What Is It and How (If at All) Is It to Be Protected? Traditional Knowledge Protection in the African Region*, Conference on Biodiversity, Biotechnology and the Protection of Traditional Knowledge 3 (Saint Louis: USA, April 4—6, 2003).

¹⁰ Grabet, Christoph Beat and Martin A. Girsberger, *Traditional Knowledge at the International Level: Current Approaches and Proposal for a Bigger Picture That Includes Cultural Diversity* 247 (2006). Available at http://www.unilu.ch/files/graber-girsberger_tkcd_endg.pdf (last visited October 21, 2013).

¹¹ Pacon, Ana Maria (prep), *The Peruvian Proposal on the Protection of Traditional Knowledge*, UNCTAD Expert Meeting on Systems and National Experiences for Protecting Traditional Knowledge, Innovations and Practices 2 (Geneva, October 30—November 1, 2000).

that can be used by developing countries and development agencies why TK should be maintained, protected, and developed. Generally at least there are five possible reasons why TK should be protected are:

1. Equity considerations

The custodians of TK should receive fair compensation if the TK leads to commercial gain;

2. Conservation concerns

The protection of TK contributes for conserving the environment, biodiversity and sustainable agricultural practices;

3. Preservation of traditional practices and culture

Protection of TK would be used to raise the profile of the knowledge and the people entrusted with it both within and outside communities;

4. Prevention of appropriation by unauthorized parties or avoiding bio-piracy;

Protection of TK is one way to reduce the number of bio-piracy on medical TK, and also to ensure fair and equitable treatment between the holder and user of TK itself;

5. Promotion of its use and its importance to the development

In addition, rather than protecting TK in a way to limits access to it, government should be an aim to promote the use of TK itself, complimenting this with measures to prevent misappropriation.¹²

Moreover, efforts to protect TK in reality are not easy as flipping the palm. The prospect of developed countries toward the value of TK is quite different from the perspective of developing countries. From the perspective of developed countries, they tend to think how they can get the widest access to the knowledge for creating new products, and get huge benefits from commercialization of it. Meanwhile, from the view of developing countries, especially those that have a wealth of biodiversity and TK, they tend to think how to create fair and equal equitable sharing of benefit that arising from utilization of their TK related to GR.

However, despite there is an existing different perspective between developed and developing countries, it was agreed that to protect the TK it is very important for both parties, because the loss of it is impacting to loss of global cultural diversity, and it is automatically affecting to conservation and biodiversity.

---

¹² Correa, Carlos M., *Protection and Promotion of Traditional Medicine Implications for Public Health in Developing Countries* 5 (2002). Available at <http://apps.who.int/medicinedocs/pdf/s4917e/s4917e.pdf> (last visited May 3, 2013).

C. *How to Protect It?*

In order to protect TK, generally World of Intellectual Property Rights (WIPO) propose two kinds of protection of TK, are:

1. Defensive Protection

Based on WIPO, when applied to TK, the terms of defensive protection refers to measures aimed to prevent the acquisition of intellectual property rights over TK or GR by other parties than the customary custodians of the knowledge or resources.¹³ It refers to the establishment adopted in the law or by the regulatory authorities to prevent IPRs claims to the knowledge, a cultural expression or a product being granted to unauthorized parties.

2. Positive Protection

Defensive protection of TK is one way to prevent third parties from obtaining or exercising invalid IPRs over the TK. It can be an effective way in blocking and preventing granted IP rights to the wrong parties. However, it does not automatically stop the misappropriation act on TK. It needs national regulations. National regulations are the primary mechanism for achieving protection and practical benefits for TK holders. Positive protection requires legal recognition of rights over TK, either under IPRs regime or sui generis regimes.

II. DESIGNING SUI GENERIS LAWS

Even though, intellectual property can play a role for protecting traditional knowledge,¹⁴ however a sui generis intellectual property rights system may impede the equity-oriented goals of some traditional knowledge communities.¹⁵ It is related to the subject matter of protection does not fit well within the existing of IPRs property law. Several possible characteristics of a traditional knowledge right include timeless protection, and protection of historical communal cultural works.

A sui generis law is needed to protect intangible property right that will prohibit anyone other than the rights holders from making any utilization of

¹³ WIPO/GRTKF/IC/5/6 (May 14, 2003).

¹⁴ Hasan, Emmanuel, et.al., *Intellectual Property and Developing Countries: A Review of the Literature* 4—45 (RAND Corporation: UK 2010).

¹⁵ OseiTutu, J. Janewa, *A Sui Generis Regime for Traditional Knowledge: The Cultural Divide in Intellectual Property Law*, 15 MARQUETTE INTELLECTUAL PROPERTY L. REV. 164 (2011).

this intergenerational knowledge without consent. It has been developed within general IP laws to deal with particular practical needs or policy objectives relating to specific subject matter: Include specific legal provisions and practical or administrative measures.¹⁶

In order to develop the sui generis law in Indonesia, it is also possible for the government refers to the Committee's¹⁷ formulation. It identifies several minimum important legal issues that system must contain in order to be effective, inter alia:

A. What Is the Policy Objective of the Protection?

In line with the objectives of the CBD, thus the formulation of sui generis law shall be aimed to achieve it. It should be able to express the rights of TK owners, which are indigenous people. In sum, it should be different from other objectives protection 'modern' know-how.

Moreover, refers to the Document of WIPO/GRTKF/IC/7/5 at least there are possible 15 aims the protection of TK that can be identified as the policy objectives of the sui generis law, are: Recognize the value of TK, promote respect, meet the actual needs of holders of TK, empower holders of TK, support TK systems, contribute to safeguarding TK, repress unfair and inequitable uses, concord with relevant international agreements and processes, promote innovation and creativity, promote intellectual and technology exchange, promote equitable benefit sharing, Promote community development and legitimate trading activities, preclude the grant of invalid IP rights, enhance transparency and mutual confidence, complement protection of traditional cultural expressions.

B. Scope of Subject Matter That Should Be Protected

Another issue that should be considered in order to establish the sui generis law is the scope of the subject matter of protection. It is important, as mentioned before that scope of TK itself is wide, encompassing: art, architecture, medicine, etc., it should be stated expressly. Related to the TK, the Indonesia Draft Law on the Protection and Utilization of Intellectual Property of TK and Traditional Cultural Expression have tried to formulate the scope of subject matter that should be protected in this sui generis law. However, what is TK in this Draft is still not fixed yet. It seems the Draft

---

¹⁶ WIPO/GRTKF/IC/3/8 (June 13—21, 2002).

¹⁷ The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore

still ‘confuse’ to decide which one TK definition is needed for Indonesia, due to until now it has two alternative definitions. Both definitions are quite similar. Nevertheless, as the requirement for a good law, it is very important the words shall be systematic, obvious or easy to understand, and non-multi interpretations. Based on these considerations, the second alternative seems better meet these criteria.

C. What Criteria Should This Subject Matter Meet to Be Protected?

Whether all TK can be protected under the sui generis law? To answer this question, it can refer to the Panama sui generis. It states that the criteria subject matter to be protected must be capable for commercial use,¹⁸ must be base upon tradition, its tradition doesn’t need ‘old’,¹⁹ must be collective or must be regarded as belonging to one or more of indigenous communities in Panama.²⁰ It shows there are some requirements that need to meet for the TK so that can be protected under this Law.

In addition, the owner of the knowledge possible individual or collective. According to this issue the sui generis law that to be formed should be considered specific criteria of protection and condition that the subject matter should meet for protection encompassing originality, novelty, or distinctiveness, collectively or individual.

D. The Beneficiaries of Protection: Holders of TK

Protection of TK should be aimed to ensure the sharing of benefit for the holder of knowledge. However, in practice it is not simple. The determination of whom and why one party is considered to be the owner of the TK should be regulated in the sui generis law. In certain cases, it is often individual produces the TK (e.g. traditional medicine) without engaging the traditional community. In other cases, it possessed by some members in the traditional community. The knowledge asymmetrically distributed among individual within the group. Last possibility is certain knowledge maybe known by all members of the traditional community (common knowledge), and even held across national boundaries. For these issues, we can refer to the Nagoya Protocol Article 11.

---

¹⁸ Panama Law No. 20 (June 26, 2000) Article 1.

¹⁹ Panama Law No. 20 (June 26, 2000) Article 15.

²⁰ Panama Executive Decree No.12 (March 20, 2001).

E. The Kind of Rights to Be Granted

After determination of the owner of TK, the sui generis law must be able to explain the kind of rights to be granted. Whether exclusive rights, moral rights or merely remuneration rights. Generally, most of the countries that use the sui generis law, granted the exclusive rights to the owner of TK. It gives the owner the privilege to give permission or prohibits other parties to do the utilization of knowledge. The countries who granted the exclusive rights to the owner among others, Costa Rica, Brazil, Philippines, India, and Portugal.

F. How Are the Rights Acquired?

Provide the description of how the acquisition of the rights in the sui generis law is important in order to prevent the unjustified claiming of subject matter. It was conducted through harmonizing the sui generis law and IP Laws, such as China. In addition to harmonize the Sui Generis Law and IP Laws, it possible to harmonize the sui generis law with others regulation such as Ministerial Regulations, such as Thailand.

G. How to Administer and Enforce the Rights

The rights were useless if they cannot be enforced. The protection of TK will be not effective if the protection is not accompanied with the availability of effective and expeditious solutions against their unauthorized reproduction and/or utilization such as injunctions and adequate compensation. Article 67 of African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources of 2000 is an example the sui generis law that provide the administration and to enforce the rights.²¹

---

²¹ Article 67 [2] States that without prejudice to the exercise of civil and penal actions, which may arise from violations of the provisions of this legislation and subsequent regulations, sanctions and penalties to be provided may include: i) written warning; ii) fines; iii) automatic cancellation/revocation of the permission for access; iv) confiscation of collected specimens; v) permanent ban from access to community knowledge and biological resources; [4] The violation committed shall be publicized and reported by the National Competent Authority to the secretariats of relevant international agreements; [4] When the collector conducts his/her operations outside of national jurisdiction, any alleged violations by such a collector may be prosecuted through the cooperation of the government under whose jurisdiction the collector operates. Moreover Art. 68 decisions on agreements regarding access to community knowledge may be appealed through appropriate administrative channels. Recourse to the courts shall be allowed after exhaustion of all administrative remedies.

H. How Are the Rights Lost or How Do They Expire

Related to this issue, generally there are two approaches. First approach is not giving the time restriction of protection. It speaks to intergenerational and incremental nature of TK.²² The second approach is to provide the time restriction of protection. This approach sees the protection of TK should be started since the first commercial exploitation of the GR was started, and it can be renewed for a period of time.²³ From both approaches, the first approach is generally more chosen by countries that have dealt with the protection of TK.²⁴

In addition to all issues above, to achieve the purposes of its protection, the sui generis law further should be considered several important things, are:

- To prevent the disintegration, it should be remembered that although the people of Indonesia consists of hundreds of tribes, the tribe is unity. It has the collective rights on the Indonesian's TK including traditional medicine knowledge. Thus, the knowledge of particular indigenous peoples, for example, the knowledge of *Jamu* is not the only Java's property but its shared heritage of the unity of the local Indonesian community. Hence, other Indonesian outside from Java also can use it;²⁵
- Strengthen the state control over their biodiversity as mandated by Article 33 of the Constitution of the Republic of Indonesia 1945;
- It must recognize the right of indigenous people and local community as the owner of the knowledge and the provider of GR;
- In a sui generis law, it must ensure the sustainable development of the local indigenous community creativity. Thus, all Indonesian can do the utilization and development of traditional medicine. In other words, the law should not hinder the creativity development of TK itself.

---

²² As an example through African Model Legislation Article 23 (1) specifies states that "Community Intellectual Rights of the local communities, including traditional professional groups, particularly traditional practitioners, shall at all times remain inalienable."

²³ As an example through the Act on Protection and Promotion of Traditional Thai Medicinal Intelligence, B.E 2542 Section 33 states that the IP right on traditional Thai medicine shall be valid for a lifetime of the right holder of the registration and extend for another 50 years after his decease. Moreover Section 34 states in the case of joint ownership, the right extends for 50 years from the date, which the last joint owner deceased.

²⁴ WIPO/GRTKF/IC/5/8 (April 28, 2003).

²⁵ Sardjono, Agus, *Hak Kekayaan Intelektual dan Pengetahuan Tradisional (Intellectual Property Rights and Traditional Knowledge)* 252—253 (Bandung: Alumni 2010).

CONCLUSION

In conclusion, it can be said that to develop protection of TK is cannot merely relies on the intellectual property laws. Even though, intellectual property can play a role for protecting traditional knowledge, however a sui generis law may impede the equity-oriented goals of some traditional knowledge communities. A sui generis law is needed to protect intangible property right that will prohibit anyone other than the rights holders from making any utilization of this intergenerational knowledge without consent. It has been developed within general IP laws. Moreover, as well as ensuring the State sovereignty and recognition the rights of indigenous communities, efforts to establish the sui generis laws there are several potential legal issues that need to be considered. In short, it can divide into eight issues, are: the policy objective of the protection; scope of Subject matter that should be protected; criteria of subject matter meet to be protected; The beneficiaries of protection; The kind of rights to be granted; the way to acquire the rights; the way to administer and enforce the rights; and how are the rights lost or how do they expire.