THE WTO PROTECTION OF TRADITIONAL KNOWLEDGE AND INDONESIA'S TRADITIONAL KNOWLEDGE BILL*

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Abstract

As a developing country, it is the interest of Indonesia to ensure that the superimposition of WTO TRIPs provisions on traditional knowledge would not harm national interest. The author notes that traditionalism, which favours harmony between man and nature, has been widely known to be the way of life of many Indonesians. On this matter, the WTO's set of rules concerning intellectual property rights must be greeted with caution as it may contain western or industrialistic values. This article attempts to explain the WTO rules on traditional knowledge and the Indonesia's traditional knowledge bill.

Abstrak

Sebagai negara berkembang, Indonesia harus memastikan bahwa penerapan aturan TRIPs WTO tidak melukai kepentingan nasional. Penulis melihat bahwa konsep tradisionalisme yang menjunjung hubungan yang harmonis antara manusia dengan alam telah menjadi suatu prinsip hidup bagi banyak orang Indonesia. Oleh karena itu, aturan WTO yang berkenaan dengan hak kekayaan intelektual harus diawasi karena aturan-aturan tersebut mungkin mengandung nilai-nilai barat atau industrialis. Tulisan ini bermaksud untuk menjabarkan aturan WTO tentang pengetahuan tradisional dan rancangan undang-undang pengetahuan tradisional di Indonesia.

Keywords: *traditional knowledge, WTO TRIP, Indonesia's traditional knowledge bill.*

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A. Introduction

Herbal medicines have been rapidly growing in popularity in many developed western nations as well as their developing brothers. Tedlock presents that in Australia, nearly 70% of all patients used some form of complementary medicine (Tedlock, 2006, p. 256). Similar trend is identified in Indonesia, where the consumption of traditional herbal medicine (the *jamu*) increased by 5.4% per year in the beginning of this millennium(Musanif, Darusman, & Bermawie, 2008, p. 33).

People's demands for herbal medicines grab industries' attention. Kate and Laird, quoting the study of Farnsworth *et al.*, mentions that 75% of the approximately 120 pharmaceutical products derived from plants in 1985 were discovered through the study of their traditional medical use (Kate & Laird, 2004, pp. 133-158).Furthermore, it has been reported that the market value of Indian herbal drugs in the European Union, Australia, Canada, and the US amounts to US$70 billions (Schuler, 2004, pp. 159-181).

This trend has to be greeted with caution. Because all businesses are typically profit-oriented, the presence of industrial interests in the realm of herbal medicines usages could bring adverse consequences. The most cited impact is the possibility of undue appropriation of local community's medicinal knowledge. Pharmaceutical industries access knowledge such as 'Consuming a lot of papaya fruits would help one's gastrointestinal complaints' and use that piece of knowledge as the basis of identification of potential new products development, in safety and efficacy studies, and in formulation (Kate & Laird, 1999). However, when a patented an clinically-tested pharmaceutical product finally comes out to the market, the local community from which the knowledge was retrieved only gains negligible returns — or in some cases, nothing at all.

While some industries might be generous enough to give something back to the local community as an exchange for the information, these gifts are often minuscule (Tedlock, 2006, p. 257), compared to the potential economic value that the shared information has. Dedeurwaerdere (2005, p. 477) posits that the bilateral contracting between the bioprospector and the

local community is flawed because most bioprospecting contracts offer low financial return.

On this issue, the WTO springs as a regulatory body. The WTO, with the Trade-related Aspects of Intellectual Property Rights Agreement (TRIPs) as one of its pillar agreements, tries to impose standards for intellectual property protection on all WTO member states.

This issue on TRIPs is what this article would dwell on in the following paragraphs. How is the perspective of the WTO on traditional knowledge issues? How does Indonesia's traditional knowledge bill accommodate traditionalism values? These two questions would direct our discussion.

B. The WTO and Traditional Knowledge

The TRIPs Agreement began life in the GATT in 1978 as a response toward the call for an "anti-counterfeiting code". Over the next 15 years, it has developed into "the closest thing the world has yet seen to a comprehensive international intellectual property settlement" (Wadlow, 2007, pp. 350-402).

According to Gervais (2003a, pp. 5-9), in the GATT context, intellectual property was basically considered as an 'acceptable obstacle' to free trade. However, during the Tokyo Round in 1973-1979, trade in counterfeit trademarked goods started to emerge as a serious issue. Efforts to include a specific discipline within the GATT framework to stop trade in counterfeit goods were encouraged. In 1982, a Ministerial Declaration instructed the GATT Council to determine the appropriateness of joint action in the GATT framework on the trade aspects of commercial counterfeiting. In 1987, a proposal was raised by the United States that the fullest possible range of intellectual property issues should be immediately addressed in the Uruguay Round.[1] In 1990, the first detailed drafts of the TRIPs Agreement were submitted and in 1994, the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiation was done in Marrakesh, which encapsulates the TRIPs Agreement.

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[1] Statement by United States at Meeting of 25 March 1987, MTN.GNG/NG11/W/2 of 3 April 1987.

The TRIPs Agreement is actually silent on traditional knowledge issue. However, following the continuous lobbying of developing countries, the Doha Declaration eventually mandates the Council for TRIPs in pursuing its work programme [...] under [...] Art. 27.3(b), [...] to examine [...] the protection of **traditional knowledge and folklore**".[2] The examination has begun as early as 2003 and controversies were reported to be numerous.

Article 27.3(b) addresses one of the most controversial issues covered in TRIPs: the biotechnological inventions, genetic resources, plant variety protection, and traditional knowledge.[3] It allows for the *sui generis* approach for the member countries of the WTO to protect their traditional knowledge in their own domestic legal system. *Sui generis*is a term used to denote alternative legal régimes for the protection of local community innovations that might not be protectable under conventional intellectual property systems (Ombella, 2007, p. 6).

From the summaries of issues raised and points made on the WTO Paper IP/C/W/370/Rev.1, it is apparent that the world is still arguing over the best way to protect traditional knowledge. Some countries insist on having the issue of traditional knowledge be regulated under WIPO administration instead of WTO, and some other wish to adjust the existing IPR régime rather than creating a *sui generis* protection system.[4] Prof. Sard-

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2 Ministerial Declaration, WT/MIN(01)/DEC/1 dated 20 November 2001, ¶19 (emphasis added).

3 Article 27: Patentable Subject Matter: "Members may also exclude from patentability: (a) diagnostic, therapeutic and surgical methods for the treatment of humans or animals; (b) plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. However, Members shall provide for the protection of plant varieties either by patents or by an effective *sui generis* system or by any combination thereof. **The provisions of this subparagraph shall be reviewed four years after the date of entry into force of the WTO Agreement.**

4 The main clashes between intellectual property system and traditional knowledge are: 1) IPRs protect individual property rights whereas traditional knowledge is by and large collective;2) traditional knowledge is developed over a period of time and is intergenerational and, therefore, may not meet the criteria of novelty or originality or inventive step required by IPRs; 3) communities often hold this knowledge in parallel which makes it difficult to determine title holders; 4) communities lack adequate education, awareness and

jono's book *Hak Kekayaan Intelektual dan Pengetahuan Tradisional*even dedicates 86 pages to show that there is an incompatibility between intellectual property rights and traditional knowledge. Firstly, he contends that intellectual property system strives to protect capital owner since it is treats intellectual works as a commercial commodity. Secondly, he shows that patenting does not have a scintilla of relevance with traditional knowledge protection due to its complexity. Thirdly, he argues that any traditional knowledge-related right is a collective right and therefore is not compatible with intellectual property's concept of individual right (Sardjono, 2006, pp. 147-233).

The stipulation of a universally-recognised system to protect traditional knowledge remains in a very distant future. Therefore, states are free to draft their own *sui generis* law to protect traditional knowledge, provided that conformity with WTO general rules is still ensured.

resources to take advantage of IPRs; and5) communities do not use scientific methods but trial and error over time.

There is no one singular and exclusive definition of traditional knowledge that has been internationally adopted (Daulay, 2011, pp. 25-26; Dutfield, 2001; Gervais, 2003b, pp. 403-419). However, for the sake of our discussion, let us indulge in the WIPO Fact-finding Mission's[5] fomulation of traditional knowledge:

> "Tradition-based" refers to knowledge systems, creations, innovations and cultural expressions which: have generally been transmitted from generation to generation; are generally regarded as pertaining to a particular people or its territory; and, are constantly evolving in response to a changing environment. [...] Excluded from this description of TK would be items not resulting from intellectual activity in the industrial, scientific, literary or artistic fields, such as human remains, languages in general, and other similar elements of "heritage" in the

[5] The Fact-finding Missions were designed to enable WIPO to identify, as far as possible, the intellectual property needs and expectations of traditional knowledge holder.

broad sense(World Intellectual Property Organization, 2001, p. 25).

C. Indonesian Traditional Principles

How is our cultural environment surrounding traditional knowledge issues? To answer the question, we would have to revisit *adat* law principles. The present author argues that *adat* law frowns upon individualism and therefore our national legislation must stand on the principle of communalism. According to Hooker, *adat* law describes the relationship between man and nature, including non-empirical natural forces (Hooker, 1978, pp. 53-55). Van Vollenhoven showed that there were common elements in the existing customary law in the various regions of Indonesia, which *inter alia* are “preponderance of communal over individual interests”and a “strongly family-oriented atmosphere” (Li, 2005, p. 101).

In such behaviour, individualistic and liberalistic views cannot live in the minds of Indonesians, as fiercely contended by Djojodigoeno:

We are socio- and traditio-bound people [...] an individualistic pattern of behaviour and action will arouse opposition, disapproval, and condemnation. Freedom of contracting and competition is out of place, as are definite actions in law, containing definite claims (Djojodigoeno, 1952, p. 13).

The rejection of individualism is apparent from the lack of institutions in *adat* law which provide for the possibility of an individual exercising a right against any other individual (Hooker, 1978, p. 63). Ownership, especially to land resources, is communally-based. The purpose of *adat* law is not to establish an individual right, but to re-establish peace and harmony in the community.

The communal nature of Indonesia’s culture may be found in a number of *adat* law, to mention a few:

1. Karo of Bukit Bangun and Kuta Mbaru have a customary rule that prohibits the sales or utilisation of village land to residents of other villages.
2. *Glebagan* is a rotation of communal land among villagers to ensure equality of land access to the best-irrigated parcels.

3. The Minangkabau people have a *hak ulayat* institution, where property rights are regarded as a communal right; (Li, 2005, pp. 93, 221, 292)
4. Javanese people are said to have a social system that is very family-based, as proven from its concept of acquiescence, sincerity, sacrifice, and ungrudging or unreserved acceptance[6] to achieve common benefits and inner happiness.

D. Traditional Knowledge Bill and the Importation of Traditionalism Values

Since a uniformed legal framework governing traditional medicinal knowledge under intellectual property régime is yet to be realized, this discussion would be confined to the Traditional Knowledge Bill which is currently under consideration at the House of Representatives. According to Indonesia's position paper in Seminar on Genetic Resources and Protection of Traditional Knowledge, there have been some "significant efforts" that the Government of Indonesia takes in order to protect genetic resources and traditional knowledge (Government of Indonesia, 2008, p. 1).

Has the Draft Bill on the Protection and Development of Traditional Knowledge and Traditional Cultural Expressions recognized Indonesia's traditionalismvalue?

The present author argues that there are two philosophical considerations that the drafter of the Bill use to justify the protection of traditional knowledge, i.e. 'personality' consideration and 'common welfare' consideration.

Personality Consideration. The academic draft for the TK Bill provides meticulous details of the bill's philosophical, juridical, and sociological foundations, lengthy literature review, cost-benefit analysis, enforcement mechanism, and related legal provisions. The main reason featured by the academic drafter (page 2-3) why traditional knowledge deserves a specific protection measure is that "traditional heritage is an important aspect for

[6] in Bahasa Iandonesia: *konsep kerukunan, kerelaan,* and *kesediaan untuk melepaskan kepentingan pribadi.*

a nation or an ethnic group". Heritage is the 'markings' or 'identity' of a culture or a nation. By this reason, the academic drafter seems to follow Hegel's personhood theory.

Hegelian rationale provides that when a person pours his personality into an intellectual work, he would be injecting the *substance of his being* into the work, thereby personifying the work with his personality. The more creative and expressive an author's intellectual work is, the greater the embodiment of his personality in that particular work and the more important the need for granting ownership rights to safeguard the moral integrity of his work (Spinello & Bottis, 2009, p. 164).

Traditional knowledge almost always absorbs the cultural identity of the ethnic group who develops the knowledge. Take as an example the *jamu*-making art of Javanese people. *Jamu* is often regarded as a media to get blessings from the ancestors and as a means of protection against evil spirits. The author takes this belief as an indication that Javanese people pour down their personality, their most intimate divine experience to *jamu*, thereby making *jamu* imbued with Javanese identity.[7]

The identity of Javanese people must forever be attached to Javanese as an ethnic group. Unsupervised exploitation or commercialization of traditional knowledge may compromise its dignity and position as the identity of a nation.

Common Welfare. In the preambulatory section of the Bill, the drafters consider that there has been "commercial interests to exploit Indonesia's ethnic diversity". Therefore, the state should regulate any exploitation activities to ensure the finest quality of society's common welfare.

This argument makes use of Lockean philosophy of natural rights. Locke justifies intellectual property system by pointing out that labor is the instrument of individuation of common property. In this context, 'labor' is the creative or innovative activities of the creator or inventor of traditional knowledge while 'common property' is understood as

[7] because studies show that Javanese people maintain a very close relationship between God and man as reflected from Javanese proverb *sangkan paraning dumati* (God is the ultimate origin and destination of being) (Purwadi, 2010)/

ideas, theories, or raw materials. To avert the emergence of absolutism interpretation of this Lockean justification, a proviso is in place: that "the right of property is conditional upon a person leaving in the commons enough and as good for the other commoners" (Locke, 1690).

The author agrees with Gathegi's argument that when a pharmaceutical company leverages traditional knowledge to patent a drug, it is unclear that there is enough and as good left in common for the others. Patented drugs would bar the community's access to the results of leverage (Gathegi, 2007). Even though what is left in the world after extraction may be enough, it is not as good because it is no longer a common good, but a 'devalued common good' (Gordon, 1993).

The present author praises the drafter of TK Bill for having identified that a devalued common good is not 'as good'. It is important to be aware that individualistic business interests have to be strictly regulated to the effect that protection of the general welfare of the common society can always be ensured.

Table 1
Indonesia's Endeavours to Protect Genetic Resources and Traditional Knowledge

Nr.	Year	Endeavour	Remarks
1	2002	Establishing a National Working Group on Genetic Resources, Traditional Knowledge, and Expression of Folklore (WG-GRTKF)	Pursuant to the Decree of Minister of Justice and Human Rights Nr. M.54.PR.09.03 of 2002 *juncto* M.HH-01.PR.01.04 of 2008.
2	2005	Hosting Asian African Summit, which eventually adopted a Joint Ministerial Statement on the Plan of Action	The Plan stresses the need to take concrete and practical measures to maximise the benefits arising from the protection of intellectual property rights.
3	2011	Drafting Bill on the Protection and Development of Traditional Knowledge and Traditional Cultural Expressions	Last revision: 7 April 2011.

Furthermore, the definition of traditional knowledge seems to have been inline with the WIPO Fact-finding Mission's formulation of traditional knowledge (see our discussion, *supra*).

Under this Bill, traditional knowledge is defined as any intellectual works in the field of science and technology, which hold characteristics of traditional heritage that a local community or a traditional society creates, develops, and nurtures (*vide* Art. 1.1). The Bill further limits the scope of tradition to cultural heritage which has been transmitted from generation to generation.

The Government of Indonesia (2008) explains that traditional knowledge shall be traditionally and communally preserved and developed by local community or traditional society, coined as the 'Traditional Knowledge Custodian'. Traditional Knowledge is defined as the community living in a particular territory with similar values and social cohesion, who traditionally and communally preserves and develops their traditional knowledge or traditional cultural expression. Custodian must be members of the community from which the knowledge was retrieved or must be acting for and on behalf of the owner of traditional medicinal knowledge.

The author believes that this shows a tendency in the part of the drafters to maintain the spirit of community and common ownership of traditional medicinal knowledge.

On another point of view, the Bill's support to spirit of community is strengthened byits discouragement to foreign commercial exploitation. Hawin (2011) explains that this Bill discriminates between the conditions for commercial exploitation by foreigners or foreign legal entities and those by Indonesian nationals or Indonesian legal entities. The foreign needs to obtain a license in order to utilise traditional knowledge, while the locals only need to enter into an agreement with the owner or the custodian of the traditional knowledge.

E. Conclusion

The aim of this article was to study the regulation on traditional medicinal knowledge, both from the WTO TRIPs perspective and from Indonesia's traditionalism principle. This study allows us to conclude that

the WTO is yet to draft a comprehensive internationally-binding treaty on traditional knowledge and that Indonesia's legislation on traditional medicinal knowledge is heavily influenced by its *adat* and traditionalism values.

The TRIPs never regulates traditional knowledge in an explicit manner. Only in Art. 27.3(b) we can find a scintilla of reference to traditional knowledge. The states have ample room too draft a traditional knowledge protection system: whether to have it protected under existing intellectual property laws or to draft a *sui generis* law.

Literature studies have pointed out that Indonesia seems to favour a *sui generis* protection of traditional medicinal knowledge. The author believes that this

preference to *sui generis* protection is based on the belief that intellectual property law does not share similar values with Indonesian *adat* law. One is individual in nature, the other is communal. Our Traditional Knowledge Bill, fortunately, has properly accommodated Indonesia's disapproval of 'individual ownership' over common goods.

The most important thing now is to ensure that the Bill would be able to accommodate the interests of grass-root society (the *jamu* maker or the *dukun*).This question will be the subject of our further studies.

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