# Overview of Indonesia's Situation on IPRs

IPR protection was not a familiar concept to Indonesia's laws prior to WTO's TRIPs agreement since it was conflicting with Indonesia's traditions and norms. This does not mean that Indonesia is late-comer in intellectual property (IP) legislation. As early as 1844, the Dutch colonial rulers already set up a relevant law except that it only applied to the Dutches but not local people. In colonial period, the legal system for indigenous Indonesians was *adat*, an extensive system of Indonesian customary norms, which did not recognize IPR protection. Under unwritten adat laws, individual ownership of intellectual works or inventions is not recognized since knowledge is regarded as a public property which is to serve the public interests. No sooner than Indonesia becoming a WTO member that it started to implement IP policy reforms so as to fulfill its obligation in TRIPs agreement.

However, Indonesian society's general acceptance of IPR protection seemed not have changed much after more than a decade of its IP policy reform. This can be seen from the WIPO statistical database from 2008 to 2017, that more than 75 percent out of a total of 9,352 patent applications in Indonesia were made by non-residents.[1] Furthermore, compared with other RCEP member countries, Indonesia's performance in IPR protection based on Property Rights Index in 2018 is also relatively poor. Indonesia, with an average score of 5.3, is behind New Zealand (8.6), Singapore (8.4), Australia (8.3), Japan (8.2), Malaysia (6.49), South Korea (6.47), China (5.9), India (5.6), and slightly better than Thailand (5.3), the Philippines (5.2), and Vietnam (5.07). And, along with India and China, Indonesia has always been on the USTR Priority Watch List from 2010 to 2019, which posited that piracy and counterfeiting of dangerous products are widespread in Indonesia.[2]

Nevertheless, it is a undeniable fact that Indonesia had, in recent years, substantially revised its IPR related laws to bring them in line with regional and international IPR standards. In 2000, laws concerning the protection of new plant varieties (law no. 29), trade secrets (law no. 30), industrial designs (law no. 31), the layout designs of integrated circuits (law no. 32), were enacted and promuigated. In 2001, new laws of trademarks (law no. 15), and patents (law no. 14) were enacted, while the former was repealed and replaced in 2016 by law no. 20 in Trademark and Geographic

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[1] Eva Novi Karina, "Is Indonesia's IPR Framework Incompatible with RCEP? On Intellectual Property Rights, There's a Serioujs Gap Between Domestic Indonesian Law and the Structures of the Proposed RCEP," *The Diplomat*, May 11, 2019.

[2] Karina, "Is Indonesia's IPR Framework Incompatible with RCEP?"

Indications, and the latter was repealed and replaced in 2016 by law no. 13. In 2002, the new copyright law (law no. 19) was issued which later in 2014 was replaced by law no. 28. With support from a development project called ECAP II, in 2005-2007, Indonesia's legal IP protection framework was further enhanced with new customs act and a regulation for patent attorney profession. An implementing regulation of the law on trademark introducing a *sui generis* Geographic Indications protection and registration was also passed. In addition, Indonesia started to work on a legislation to protect genetic resources, traditional knowledge and expression of folklore. The Indonesian Government is currently reviewing all its IP laws, in consultation with all stakeholders. "Explanatory memoranda" specify provisions in the legislation and play an important role in Indonesia, as they could be used by the court to clarify issues concerning legal languages and to integrate details which are missing in the legislation.[3]

However, the registration protection and enforcement of IPRs continue to be an area of concern for foreign investors, particularly in the high-tech sector. The obligation to develop adequate IPR protection strategies is not only essential for long-term integration for Indonesia in the global trading system, including RCEP, but also in decreasing investor concerns about IPR violations. Even though Indonesia has passed many laws for the protection of IPRs, they are, in many cases, not effectively enforced. For example, piracy levels in Indonesia remain among the highest in the world, as mentioned at above. Furthermore, uncertainty in the outcomes of court proceedings, together with corruption, have been identified as the main IRP related problems faced by foreign investors.

It is common in Indonesia for brand owners to incur hefty legal fees when seeking to reclaim any trademark which have been registered by local "squatters". A trademark application should first be published prior to any final decision being issued by the Director General of Intellectual Property (DGIP) regarding its registration. A trademark owner then has the opportunity to file an objection against any application before a final decision is made. On many occasions, however, such objections of oppositions prove unsuccessful against the "bad-faith" applications which have clearly been inspired by famous trademark. Most of these squatter registrations are not in actual use by the registrants (local owners in most cases) and have merely been registered in the expectation that the real owners will pay them

[3] "Indonesia and IPR Developments, a New Dimension," ipeg (https://www.ipeg.com/indonesia-and-ipr-developments-a-new-dimension/, accessed July 8, 2020); "Intellectual Property," EuroCham Indonesia Position Paper 2018.

significant sums in the future, in order to take possession of the registrations in question.

All these raise an important question: Do general Indonesians understand the concept of IPR? When asked the question, what is IPR, people would in general respond by asking back, what is IPR? IPR is a foreign concept to the people at large, a concept they seem not understand. Furthermore, even certain law scholars may be unfamiliar with IPR, as IPR topics are not generally included in the courses of law programs. On the other hand, IPR is perceived as a single and functional concept, from the government's point of view, particularly the institutions responsible for drafting laws or the bureaucracy implementing regulations. All the government bureaucrats know about are patents, trademarks, copyrights and the the like the protection of which must be implemented within the regime of the Republic of Indonesia because they are in the laws.

IPR can be seen from various aspects with very different implications. For business people, IPR is a tool to achieve various purposes chiefly in obtaining the highest profits. For high-tech industries, IPR is all related to patents which help to maintain exclusivity in the application of technologies developed in corporations. For entrepreneurs trading in goods, IPR is about trademark which differentiates the goods and services they trades. For music and film sector, IPR is about copyrights which can be used to monopolize the reproduction and distribution of their products. For educators, IPR is an object of study and research in the context of science and technology development. Scholars view IPR from different perspectives such as philosophy, law, history, economics, etc. which use different theoretical as well as empirical approaches. But in reality, the formulation and adoption of IPR laws in Indonesia has been the result of transplanting foreign laws into national legal system. Specifically, it is the implementation of a task mandated by the Law Ratifying the WTO/TRIPs (Law No. 7, 1994).

However, the way government implementing IPR laws is one thing and the applications by businesses to IPR protection is another. The requirement for IPR protection to be industrially applicable is intricately related to the issue of capital. Patents would never exist if they cannot be applied to industrial production. Therefore, it is apparent that IPR protection is not concerned with individual creativity *per se*, but rather with monopolizing such creativity in industrial production. Capital owners just do not wish to lose the advantage they obtained from using capital to produce inventions protected by patents. Furthermore, not all

capital owners applying for patents are interested in actually implementing such patents. Some European companies which had applied patents in Indonesia may not necessarily implement such patents in their investment. Whether they chose to apply patent protection is usually subject to cost-benefit considerations. For example, some multinational pharmaceutical companies applied patent protection such that they could have monopolized the market they invested.[4] Their main concern is the competition they faced in the host country which they feared would jeopardize the capital they invested.

Another proof that patent regime provided protection only to capital owners is revealed in the myth of technology transfer. Even though the Indonesian patent law contains provisions requiring that every patent issued in Indonesia must be implemented in Indonesia,[5] there is no control mechanism, in reality, to ensure that such requirement is complied with by foreign patent owners. The idea of transfer of technology by adoption of patent regime is only an ideal articulated in the law.[6] As Frederick M. Abbot at al. had argued that there is no evidence that the patent regime has had a significant impact on the transfer of technology on that is has contributed to economic growth of developing countries.[7] And as Meika Foster has indicated that gigantic global pharmaceutical companies are constantly behind the issue of the significance of patent regime with the aim of protecting their research results, "without patent protection much of the research currently available would not exist".[8]

It is not only in Indonesia, as we mentioned above, but also in other third world countries that more than 80% of patent rights issued in those countries are owned by foreign multinational companies. Out of them, more than 90% are not implemented by the said companies.[9] In the context of the pharmaceutical industry, the situation is obviously harmful to developing countries which need adequate and affordable medicine to solve their health problems. Multinational companies could have increased prices of pharmaceutical products in developing countries by blocking

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[4] Mark Ritchie et al., "Intellectual Property Rights and Biodiversity: The Industrialization on Natural Resources and Traditional Knowledge," *Journal of Civil Rights and Economic Development*, 11(2) (Spring 1996), pp. 441-42.

[5] Article 17 paragraph (1) of Law No. 14, year 2001, concerning Patent.

[6] As articulated in the Elucidation in Article 17 paragraph (1) of Law No. 14.

[7] Frederick M. Abbot *et al.*, *International Intellectual Property in an Integrated World Economy*, 4th ed. (New York: Kluwer, 2019), p. 9.

[8] Meika Foster, "The Human Genome Diversity Project and the Patenting of Life: Indigenous People Cry Out," *Canterbury Law Review*, 7 (1999), p. 358.

[9] Ritchie et al., "Intellectual Property Rights and Biodiversity," p. 439.

patents as the latter have to import them subject to the discretion of the former.[10] The imports of such high-priced pharmaceutical products could also affect trade balance between developed and developing countries as financial resources in the latter are absorbed by the former in the form of royalty payments to MNCs. Therefore, it could be of interest to note the idea raised by David Vaver that patents should only be granted to innovations that bring substantial benefit to local communities.[11]

Indonesia is one of the countries participating in the WTO TRIPs Agreement.[12] As viewed from the history of TRIPs, India and several other developing countries had been aspiring for a system different from the current one, which was dominated by the key *demandeurs*—the United States, EC, Japan and Switzerland. As the negotiations proceeded and as the United States Trade Representative notched up more and more liberal successes in persuading the US' trading partners to agree to "effective and adequate" standards on IPSs,[13] especially in the pharmaceuticals sector, the greater or more expansive became the demand of its industry. Thus, from initially demanding the introduction of products patents in all fields of technology, the United States upped the ante in 1991 to demand "pipeline protection" from 1986 onwards, when the Uruguay Round was first launched. This meant that all pharmaceutical inventions for which patent application were filed and granted in the United States and other jurisdictions from 1986 onwards would be protected for the balance of the patent term in the jurisdictions of all negotiating parties.

This pipeline protection demand remained an important one up to the end of the negotiations in 1993.[14] India and other textile-exporting countries were keen on parity between the TRIPS Agreement and the Agreement on Textiles and Clothing, and asked for a ten-year clean transition period without such pipeline protection.

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[10] As discussed in Foster, "The Human Genome Diversity Project and the Patenting of Life," pp. 360-61.

[11] David Vaver, "Intellectual Property Today: Of Myths and Paradoxes," *Canadian Bar Review*, 69(1) (1990), pp. 120-21.

[12] Agus Sardiono, *Membumikan HKI di Indonesia* (Bandung: Nuansa Aulia, 2009), pp. 2-5; as cited in Agus Sardjono, "Culture and Intellectual Property Development in Indonesia," *Indonesia Law Review*, 3 (September 2011), p. 243.

[13] The words "effective and adequate protection of intellectual property rights" are part of the Punta del Este Ministerial Declaration, which set the mandate for TRIPs negotiations, and the words "adequate and effective protection of intellectual property rights" are part of US statute governing Special 301—see 19 U.S. Code § 2242—Identification of countries that deny adequate protection, or market access, for intellectual property rights (https://www.law.cornell.edu/uscode/text/19/2242, accessed July 17, 2020)..

[14] Catherine Field, "Negotiating for the United States," in Jayashree Watal and Antony Taubman, eds., *The Making of the TRIPS Agreement* (Geneva: WTO, 2015), pp. 129-57.

The United States and others argued that this would delay the economic impact of the TRIPS Agreement for the pharmaceuticals sector by 20 years, which was unacceptable.[15] Why the United States, and other developed countries, was so persistent in pursuing its objectives in TRIPS negotiations? Perhaps we could review what had happened before the TRIPS Agreement.

Prior to the TRIPS Agreement, multilateral disciplines on the protection and enforcement of IPRs were the subject of international treaties, most of which were negotiated and administered under the aegis of the World Intellectual Property Organization (WIPO). Texts of the two principle treaties, the Paris Convention for the Protection of Industrial Property (Paris Convention) and the Berne Convention of Literary and Artistic Works (Berne Convention), dated back to the nineteenth century. As of 1986, some GATT contracting parties did not participate in these and other IP treaties or adhered to an early version of the relevant treaty. The United States, for example, did not become a party to the Berne Convention until March 1989. Chile, Colombia and India, and several other contracting parties, were not parties to the Paris Convention, and Canada applied the 1938 version of Articles 1-12 of that Convention.[16] Conversely, Indonesia adopted the 1967 version, the Stockholm Act, in 1979 with the exception of Articles 1-12.[17]

These and other international IP treaties were based, in part, on national treatment and, in some cases, permitted parties to require reciprocity as a condition for a particulat right. The scope and terms of protection for new technology, such as computer programs and biotechnology, had not been established, while during the 1970s and 1980w, governemnts saw a surge in both the development of such new technologies and international trade, including trade in counterfeit and pirated goods (counterfeit goods). IP owners faced significant difficulties in enforing IP rights, in particular in obtaining reemdies that deterred infringement. During the Tokyo Round (1974-79), the United States and some other GATT contracting parties began negotiations on an Agreement on Measures to Discourage the Importation of Counterfeit Goods (Anti-Counterfeit Code), which can be found in the broder enforvement section ot the TRIPS Agreement. Action on the Code and addressing IP more generally in the Uruguay Round of multilateral trade negotiations continued to

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[15] Jayashree Watal, *Intellectual Property Rights in the WTO and the Developing Countries* (Oxford University Press, 2001), pp. 36-39; A.V. Ganesan, "Negotiating for India," in Jayashree Watal and Antony Taubman, eds., *The Making of the TRIPS Agreement* (Geneva: WTO, 2015), p. 231.

[16] Field, "Negotiating for the United States," p. 130.

[17] WIPO, "Paris Notification No. 95: Ratification by the Republic of Indonesia of the Atockholm Act (1967) (with the exception of Articles 1-12) (https://www.wipo.int/treaties/en/notifications/paris/treaty_paris_95.html).

face resistance from some delegations as ministers met at Punta del Esta to decide on initiating the Round.

The mandate for the TRIPS negotiations was one of the last element of the Punta del Estte Ministerial Declaration to be resolved. The TRIPS negotiating mandate consisted of three paragraphs, including the instruction that the "negotiations shall aim to clarify GATT provisions and eleboarte, as appropriate, new rules and Disciplines". Negotiations were to aim to develop a miltilateral framewortk of principles, rules and disciplines dealing with trade in counterfeit goods, taking into account work already undertaken in the GATT. Finally, the negotiations were not to prejudice other "complementary initiatives" in WIPO.[18] With respect to the last mandate of non-prejudice the TRIPS Negotiating Group maintained work on international trade in counterfeit goods as a separate agenda item until the end of the negotiations, which resulted in duplicative and often overlapping drafts on this issue.

The negotiations on the patent complex involved, other than general aspects of patent protection, issues related to the unavailability of product patents for pharmaceuticals and agricultural chemicals in some countries and protecting otherwise undisclosed data that must be submitted to obtain government approval for marketing pharmaceuticals and agricultural chemicals. Proponents of addressing the data protection issues, including the United States, were concerned with the diminished "effective" period of patents as the negotiations prolonged far out with no sign of conclusion. Therefore, their strategy was to secure some benefit under the TRIPS Agreement in the short term. They claimed that, unlike other IPRs, obtaining a patent for a pharmaceutical took several years with additional years for marketing approval and, therefore, required large amount of time and resources.

Despite complexities involved in negotiating international patenting, especially from the perspective of advanced countries, we still cannot ignore industrial development requirements in less-developed countries. One of the effects of patents is supposed to assist the small potato with few resources to protect its position against the large well-financed firms. One can argue that a domestic patent system may protect a local inventor from having his/her ideas taken over without his/her permission and without adequate compensation by MNEs operating in the country. And the acceptance of a domestic patent system does not necessarily require a country to

[18] "Ministerial Declaration on the Uruguay Round," 20 September 1986 (World Trade Organization) (https://www.jus.uio.no/lm/wto.gatt.ministerial.declaration.uruguay.round.1986/).

permit the granting of patents to foreigners on inventions patented and used primarily abroad. The protection of the rights of foreigners through the priority provisions,[19] and the elimination of discrimination against them through the national treatment provision,[20] are the very heart of the Paris Convention. But the cost to non-industrial countries of acceding to the Convention, as well as the TRIPS Agreement, and accepting its provisions regarding patents on inventions which are patented and primarily worked abroad may be considerable.

Of course, we could not deny the benefit of technology transfer through foreign patenting. As most of the technology required for industrial development is patented and the patents are owned by business corporations in the industrial countries, the disclosure of the technology which is contained in the patent grant and is public knowledge is not sufficient for its full application without the know-how and technical help of the patentee. Therefore, patent is necessary, though not sufficient, condition for the transfer of technology. Furthermore, in addition to licensing patents to local firms and providing the required know-how, foreign patenting promotes foreign investment, as foreign investors tend to enter the more "modern" industries where technology is likely to be patented. Foreign firms would be reluctant to set up manufacturing plants using patented technology in countries where patent protection was not accepted, especially in circumstances to set up joint ventures with local enterprises.

There are several counterarguments. It has been pointed out that very few of the patents registered by foreigners in developing countries are actually "worked" in those countries; that contracts for the sale of technology are separate and distinct from contracts to license patents and, therefore, there is no reason to assume that the former would be made in the absence of the latter. Transfer is accomplished through contracts related to know-how, which is non-patented technology, and if this technology is secret to the firm, a patent is redundant, at least for the time being. On the other hand, if it is not secret, then competitors will be willing to sell it and they will be able to do so if its use is not restricted for the potential buyers by a patent. It is therefore apparent that the chief effect of granting foreign patents is to "restrict" the transfer of technology by reducing the competition that would otherwise have

[19] The right of priority gives any person who has filed an application for a patent in one country of the International Union for protection of Industrial Property, established through the Paris Convention, twelve months in which to file in other countries of the Union, during which period his/her claim cannot be invalidated by acts of third parties.

[20] Under Article 2 of the Paris Convention each member country of the Union is required to give nationals of other member countries the same protection and privileges as it gives its own nationals and is prohibited from imposing any requirement as to domicile or establishment.

taken place among foreign sellers of the technology.[21]

As to foreign investment, in the circumstances that investment is undertaken largely to defend and protect export markets when they become threatened either by rival producers or by government to force local production, the prospect of obtaining patents is less relevant for firms to retain their marketing positions. Firms ask for and obtain patents largely because patents enable them to impose legally and more easily a variety of restrictions on the operations of their local subsidiaries, or simply to preserve the market for their exports by preventing rivals from taking up the production. In this way, investment in the country may actually be restricted by the operation of the patent system.[22] As for preserving the market, MNCs, who by far the greatest amount of foreign patenting, do not in any case produce their patented products in every country in which they take out patents. The chief purpose of international patenting is to protect the markets and licensing rights. Therefore, we could say that foreign patents serve primarily as exclusive import permit for the foreign producers.

There is no doubt that patents do permit patentees and their licensees to charge higher prices in the protected markets than those charged by other competitors, foreign or domestic. This is the major concern of many host countries, especially in the pharmaceutical industry, where high prices may hinder their policy goals in ensuring national health or environmental improvement. Of course, one can think of a number of considerations other than patents which could produce similar results, especially in pharmaceuticals, such as brand-name protection, transfer pricing to subsidiaries which would continue regardless of patents, subsidized or loss-making exports which would not be available on a continuing basis, etc.[23] However, it is precisely because patents can be and are used to restrict imports, as well as other potential producers, that compulsory working provisions have been adopted in many patent laws and that penalties as drastic as revocation of patent are still permitted for non-working in international patent convention and other international agreements.

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[21] See Shri Justice N. Rajagopala Ayyangar, *Report on the Revision of the Patent Law* (New Delhi: Ministry for Commerce and Industry, India, 1959).

[22] Constantine Vaitsos, "Patents Revisited: Their Function in Developing Countries," *Journal of Development Studies*, 9(1) (October 1972), pp. 77-79; cited in Edith Penrose, "International Patenting and the Les-Developed Countries," *Economic Journal*, 83(331) (September 1973), p. 772.

[23] There is also the question of how far the products compared were really identical since some were listed by brand name and presumably, therefore, were compared with the nearest equivalent product sold under its generic name.

A compulsory license is an authorization given by a national authority (minister, national patent office, etc.) to a person for the use and exploitation of a patented product or process without the consent of the patent holder(s). In his report on the Indian patent law, Ayyangar strongly recommended the inclusion of provisions for revocation for non-working, since, as he argued, a foreign patent holder would be more willing to collaborate with local firms to produce under the patent if he/she knows that his/her patent might be revoked for non-working. The patent holder can afford to ignore compulsory licensing regulations as long as his/her know-how is required in the production and therefore, even with a license, no one can work the patent without his/her help. Thus he/she may not want the patent revoked resulting in a market open to imports from other producers, and may be more willing to work under joint ventures. Otherwise, the host country would benefit from cheaper imports.[24]

Some leaked texts from RCEP negotiations show that Japan and South Korea are proposing IP provisions referred to as TRIPS-plus, in that they go far beyond the obligations under the TRIPS. The proposed provisions seek to extend pharmaceutical corporations' patent terms beyond the usual 20 years and also would require data exclusivity that limits competition. RCEP also treat IP as an investment made by patent holding corporations, allowing private investment disputes (ISDS) to be raised against the host country whenever there is a threat to their IP.[25] Since all developing countries in the RCEP negotiations are now implementing the TRIPs Agreement and granting 20 year patents on pharmaceutical products, the expected rise in patented medicine resulting from RCEP is being felt directly by patients and government programs. Around 2.1 million people living with HIV in the Asia-Pacific region had access to antiretroviral therapy in 2015, which accounts for approximately one in three people living with HIV. A 2014 WHO report found widely varying prices for HIV medicines in middle-income countries impacted by their patent status and licensing deals. According to information provided by the Positive Malaysian Treatment Access and Advocacy Group (MTAAG), the second line combination of tenofovir + emtricitabine + lopinavir/ritonavir costs US$ 3,204 per year in Malaysia while generic prices for these drugs could total to as low as US$ 207 per year.[26]

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[24] Ayyangar, *Report on the Revision of the Patent Law.*

[25] "RCEP & Intellectual Propety," bilaterals.org (https://www.bilaterals.org/IMG/docx/rcep-ip-chapter-15october2015.docx?lang=en, accessed July 23, 2020)

[26] "RCEP and Health: This Kind of 'Progress' Is Not What India and the World Need," bilaterals.org (https://www.bilaterals.org/?rcep-and-health-this-kind-of&lang=en, accessed July 23, 2020). See also "Full Use of TRIPS Flexibilities Critical to Ensuring Access to Medicines and Fulfilling Commitments on UHC," MTAAG, December 20, 2019 (https://mtaagplusmalaysia.wordpress.com/2019/12/20/full-use-of-trips-flexibilities-critical-to-ensuring-access-to-medicines-and-fulfilling-commitments-on-uhc/,

To deal with the high prices of patented medicines, several developing countries in the Asia-Pacific region are using TRIPS flexibilities to ensure access to affordable generic medicines. The right of all WTO members to use these flexibilities was reiterated in 2001 in the Doha Declaration on TRIPS and Public Health which stated that "the [TRIPS] agreement can and should be interpreted and implemented in a manner supportive of WTO members' right to protect public health and, in particular, to promote access to medicines for all".[27] Among the RCEP negotiating countries, Malaysia (2003), Indonesia (2004, 2007 and 2012), Thailand (2006 and 2008) and India (2012) have issued compulsory licenses to ensure generic competition for medicines for HIV, heart disease and cancer. India and the Philippines have included statutory provisions in their laws that incorporate strict patentability criteria including a prohibition on evergreening—the practice of patent holders extending monopolies on medicines by filing successive and overlapping patents on new forms and new uses of old medicines. The patent laws of most RCEP developing countries include several other TRIPS flexibilities as well, such as parallel imports, early working, research and experimental exceptions among others.[28]

Indigenous People's Rights

While indigenous peoples are subjects of special protection in the human rights discourse, in other fields of international law—international environmental law, international law of culture, law od development cooperation, etc.—indigenous peoples paly a more active role. The potential contribution of indigenous peoples includes environmental protection, food security, human health, economic development cooperation, and promotion of cultural diversity. Taking traditional knowledge for example, it has been internationally recognized that the traditional knowledge of indigenous peoples is of enormous significance in the conservation, use and evolution of biodiversity, as well as in the management of climate change.[29]

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accessed July 23, 2020).

[27] "RCEP and Health."

[28] "RCEP and Health."

[29] Convention on Biodiversity, preamble, Para.12; The Nagoya Protocol, Preamble, Para. 20; Andean Community of Nations, Decision 391, Preamble, Para. 5; Ottawa Declaration, Preamble, Para. 6. See Stefan Growth, "Perspektiven der Differenzierung: Multiple Ausdeutugen von traditionellem Wissen indigener Gemeinschaften in WIPO Verhandlungen," in R. Bendix, K. Bizer and S. Growth, eds., *Die Konstituierung von Cultural Property: Forschungsperspektiven*, Göttinger Studien zu Cultural Property, Vol. 1 (Göttinger: Universitätsverlag, 2007), pp. 177-95; as cited in Maria Victoria Cabrera Ormaza, "From Protection to Participation? Shifting Perceptions towards Indigenous Peoples under International Law," in Brigitta Hauser-Schäublin, ed., Adat *and Indigeneity in Indonesia: Culture and Entitlements between Heteronomy and Self-Ascription*, Göttinger Studies in Cultural Property, Vol. 7 (Göttinger: Universitätsverlag, 2013), p. 36.

From a legal perspective, traditional knowledge encompasses all individual or collective innovations and practices for the conservation of biodiversity, traditional medicine and expressions of folklore, among others, developed by indigenous peoples and carrying a socio-economic value.[30]

The use of traditional knowledge is also considered fundamental in meeting the demands of food security and human health. The International Treaty on Plant Genetic Resources for Food and Agriculture underlines the major role of indigenous farmer communities in assuring food and agriculture production through their use of traditional practices (Art. 9, Para. 1). Similarly, the World Health Organization stresses the importance of facilitating access to traditional medicines of indigenous and local communities on behalf of global population.[31] This has motivated international scientific community to push towards the creation of an international legal regime for access to genetic resources and traditional knowledge involving indigenous communities.[32] However, no matter how international conventions and declarations advocated rights toward indigenous peoples, the formulation of special rights for them in these agreements only marginally reflects the situation in countries such as Indonesia with thousands of self-identified indigenous communities.

All of these international regulations bear the mark of the problems settler states had—the relationship between the "white" or, in any case, dominant settlers and the indigenous peoples.[33] These regulations, therefore, seem to aim at recognizing the original inhabitants and at least partly restoring their rights in the states established by the former colonizers. The special rights the decrees endowed with the indigenous peoples apply to the indigenous communities in all states, at least to those who had signed these agreements. The conventions promulgated by UNESCO, such as The Convention for the Safeguarding of the Indigenous Cultural Heritage (2003) and the Convention on the Protection and Promotion of the Diversity of Cultural Expression (2005, in force since 2007; accession by Indonesia in 2012), focus on "culture" , and underline that "Culture" can be protected and promoted only if human rights and fundamental freedoms are guaranteed. Here, apart from the fact

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[30] Further elaboration on the concept of traditional knowledge can be found in WIPO, "Draft Articles on the Protection of Traditional Knowledge Prepared at IWG 2," WIPO/GRTKF/IWG/2/3 (March 17, 2011).

[31] WHO, *Traditional Medicine Strategy 2014-2023* (World Health Organization, 2013).

[32] Evanson Chege Kamau, Bevis Fedder and Gerd Winter, "The Nagoya Protocol on Access to Genetic Resources and Benefit Sharing: What Is New and What Are the iMplications for Provider and User Countries and the Scientific Community?" *Law, Environment and Development Journal*, 6(3) (2010), pp. 246, 254.

[33] Francesca Merlan, "Indigeneity: Global and Local," *Current Anthropology*, 50(3) (June 2009), pp. 303-33.

that indigenous peoples as social groups that have suffered historical injustices in many ways, cultural values and practices are in the foreground. As a matter of fact, "culture" lies at the core of what in Indonesia is called *adat*.[34] Indigenous peoples in Indonesia, apart from their history of oppression and dispossession, had argued, with their particular localized culture distinguished from others, that a specific definition of their cultural particularity is required to fill the "tribal slot".[35] Indeed, claims to distinct cultures give validities on which much indigenous politics is based. The politicization of indigenous culture is accompanied by a tendency to define it as property. Indigenous representatives across the world now commonly speak about themselves not merely as representatives of distinct cultures but also as part-owners of collectively propertied cultures.[36]

As Richard Handler had demonstrated that such politics is also central to certain forms of nationalism and subnationalism. National and subnational polities, as he suggests, especially emerging ones, claim to "have" culture and construct policies of legal exclusion, rights, and ownership around in in an effort to bolster their political legitimacy.[37] Contemporary indigenous cultural property claims range from the material (human remains, artifacts, significant sites) to the intangible (sacred symbols, music, cultural heroes, traditional plat knowledge), which represent one of the most spheres of indigenous political, as well as economic,[38] actions.

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[34] For a detailed discussion of *adat*, its significance and use in present-day Indonesia, see David Henley and Jamie S. Dvidson, "Introduction: Radical Conservatism—the Protean Politics of *Adat*," in Jamie Seth Davidson and David Henley, eds., *The Rivival of Tradition in Indonesian Politics: The Deployment of Adat from Colonialism to Indigenism* (London: Routledge, 2007), pp. 1-49.

[35] See Tania Murray Li, "Articulating Indigenous Identity in Indonesia: Resource Politics and the Tribal Slot," *Comparative Studies in Society and History*, 42(1) (2000), pp. 149-79.

[36] Michael Brown, *Who Owns Native Culture?* (Cambridge: Harvard University Press, 2003).

[37] Richard Handler, *Nationalism and the Politics of Culture in Quebec* (Madison: University of Wisconsin Press, 1988).

[38] Share Greene, "Indigenous People Incorporated? Culture as Politics, Culture as Property in Pharmaceutical Bioprospecting," *Current Anthropology*, 45(2) (April 2004), p. 212.