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RCEP, Decentralization, and Intellectual Property Rights: Indonesia's Conundrum in Regional Integration

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Abstract

Indigenous Indonesians have traditionally used *adat*, an extensive system of unwritten customary norms. In this system, individual knowledge is regarded as public property and functions mainly to serve the public benefits; as such, *adat* does not recognize intellectual property (IP) protections. After becoming a World Trade Organization (WTO) member in 1995, the Indonesian government sought to implement meaningful IP policy reform as obligated by the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). Presently, the various binding intellectual property rights (IPR) provisions of the Regional Comprehensive Economic Partnership (RCEP) and a composite draft of the RCEP chapter on IP show that Japanese and Korean proposals remain, seeking to elevate IP standards to levels similar to those in the Trans-Pacific Partnership (TPP, now renamed CPTPP). This will cause a severe conundrum for Indonesia, especially in local areas which, because of the country's decentralization policies, adhere predominantly to *adat* (rather than governmental IP regulations).

This paper will examine, from the perspective of distinction between public and private properties, the extent to which Indonesia's legal framework is compatible with the RCEP's provisions. More crucially, it will seek to ascertain Indonesia's commitment and capacity—especially in view of its decentralization reforms—to provide social safety nets that protect traditional knowledge and traditional cultural expressions. Together with its desire to develop the domestic pharmaceutical and vaccine sector, this presents a severe challenge for Indonesia, as it is keen to engage in regional economic integration.

This article will introduce some recent developments in international IPR protection, with a specific focus on the World Intellectual Property Organization (WIPO) conventions and the WTO's TRIPS Agreement (now further expanded through international and transnational trade negotiations such as the RCEP). Next, the argument for IPR protection in and through foreign investment in industrial production, especially in less-developed countries, is discussed, which is followed by an overview of Indonesia's responses to international agreements on IPR protection. The fourth section is an exploration of issues related to Indigenous peoples' rights, with elaboration on various international arrangements in such areas as natural resources, health systems, and traditional culture, as well as Indigenous Indonesians' reclaiming of social justice. In the fifth section, the prospect of delegating power to local institutions is explored, along with said institutions' interactions with the national government, the implications for political and economic reforms, as well as strategic participation in international trade agreements. Brief concluding remarks are provided in the last section.

Keywords: intellectual property, public vs. private property, Regional Comprehensive Economic Partnership, indigenous cultures, decentralization

1 International IPR Protection: From TRIPS to RCEP

Indonesia is one country that has joined the World Trade Organization (WTO) and TRIPS [1] (Sardjono, 2011). Historically, India and several other developing countries were eager to establish a system distinct from the current one, which is dominated by the main demanders (i.e., the United States, the European Community, Japan, Switzerland). As negotiation rounds have progressed, the United States has achieved more and more success in pushing trading partners to accept its "effective and adequate" standard of intellectual property rights[2]—especially in the pharmaceutical field (Watal, 2015, p. 298). As product patents increased in all technical fields, the United States raised the stakes in 1991 by proposing "pipeline protection," or retroactive patent protection, from the beginning of the Uruguay Round in 1986 (Ganesan, 2015, p. 213).

Until negotiations ended in 1993, the demand for pipeline protection was an important one (Field, 2015, pp. 129–157). India and other textile exporting countries in the WTO eagerly hoped for consistency between TRIPS and the Agreement on Textiles and Clothing (ATC, 1994), and demanded a ten-year transition period without pipeline protection. However, the United States and other countries argued this was unacceptable because it could delay the economic impact of TRIPS on the pharmaceutical industry by 20 years (Ganesan, 2015, p. 228; Watal, 2001, pp. 36–39, 2015, p. 299). Why were the United States and other developed countries so persistent in pursuing the goals of the TRIPS negotiations?

1 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS, 1994)

2 19 U.S.C. § 2242 (2018) states "adequate and effective protection of intellectual property rights" and the WTO (n.d.) likewise kept "effective and adequate protection of intellectual property rights" in TRIPS.

Prior to TRIPS, multilateral intellectual property rights were protected and enforced through international treaties—most of which were negotiated and managed via the World Intellectual Property Organization (WIPO). Two of the main treaties, the Paris Convention for the Protection of Industrial Property (Paris Convention, 1883) and the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention, 1886), were ratified in the 1880s. Yet, by 1986, some signers of the General Agreement on Tariffs and Trade (GATT, 1947) had yet to join these, other intellectual property treaties, or even earlier versions of the treaties. For example, the United States did not join the Berne Convention until March 1989; Chile, Colombia, India, and several others did not join the Paris Convention; and Canada only adopted Articles 1–12 of the 1938 edition (Field, 2015, p. 130). On the contrary, Indonesia adopted the 1967 Stockholm Act (with the exception of Articles 1–12) in 1979 (World Intellectual Property Organization [WIPO], 1979). Many of these international intellectual property agreements were taken part-by-part on a country-by-country basis, and in some cases also allowed countries to request reciprocity as a condition of specific rights.

However, the scope and terms of protection for new technologies had yet to be determined. During the 1970s and 1980s, governments saw the development of new technologies such as computer programs and biotechnology, as well as a surge in international trade—including that of counterfeit and pirated goods (Field, 2015, p. 131). Intellectual property owners faced many difficulties in enforcing rights and obtaining remedies to prevent infringement. As such, the United States and GATT parties began negotiating during the Tokyo Round (1973–1979) on an "Agreement on Measures to Discourage the Importation of Counterfeit Goods." However, going into the Uruguay Round (1986–1994), this agreement and the broader settlement of intellectual property issues still faced resistance from many. As such, it was one of the last things to be resolved during the initial objectives phase (p. 133). Ultimately, it was incorporated within the objectives of negotiating TRIPS to "elaborate, as appropriate, new rules and disciplines … dealing with international trade in counterfeit goods, taking into account work already undertaken" (GATT, 1986, sec. D).

Beyond general patent protection, negotiations involved the unavailability in some countries of product patents for pharmaceuticals and agricultural chemicals as well as the lack of protection for data submitted to governments for approval of marketing and sales (Field, 2015, p. 140). Proponents of data protection like the United States argued that patents should have a longer effective period—for instance, obtaining patents for pharmaceuticals took several years, with several more years for marketing approval. The process, thus, required large amounts of time and resources.

Despite the complexity of international patent negotiations, especially from the perspective of developed countries, we still cannot ignore the industrial development requirements of less developed countries. One of the functions of patents is to help small companies with limited resources to protect their positions from large, well-funded companies. It can be argued that domestic patent systems may protect the ideas of local inventors from being taken by multinational companies without the inventors' permission and without proper compensation. Moreover, acceptance of domestic patent systems does not necessarily require a country to allow foreign patents for inventions that are mainly patented and used abroad. The protection of foreigners' rights through priority clauses[3] and the elimination of discrimination against them through national treatment clauses[4] were core elements of the Paris Convention. However, for non-industrial countries, it may be costly to join the Convention and TRIPS and to accept their provisions regarding inventions that have been patented and are mainly used abroad.

Some leaked text from a recent draft of Regional Comprehensive Economic Partnership (RCEP, 2020) negotiations indicate that the IP clauses proposed by Japan and South Korea far exceed the obligations set by TRIPS (Phurailatpam & Bhardwaj, 2017). These proposals aim to extend the duration of pharmaceutical patents beyond the present 20 years and require data exclusivity to restrict competition. RCEP also treats intellectual property rights as investments by patent-holding companies, allowing private investment disputes when intellectual property rights are threatened. Since all developing countries in RCEP negotiations have implemented TRIPS and granted 20–year patents for medicines, patients and governments can expect to be directly affected by the growth of patented medicines brought about by RCEP. For example, in 2018, about 3.2 million people with HIV in the Asia–Pacific region were treating their condition using antiretroviral therapy—about 78% of those diagnosed (Avert, 2020). Due to patent status and licensing, the prices of antiretroviral therapy in the developing world varies widely (Bartels et al., 2014)—the difference of a year's worth of necessary drugs for a patient in Malaysia would be US$3204 from the originator or US$307 from a generic drug company (Phurailatpam & Bhardwaj, 2017).

3 The Paris Convention (1883)'s "right of priority" gives any person who has filed a patent application in the signing countries of the Paris Convention "protection of industrial property" (Article 1), and a protected 12 months to file in other countries of the union (Article 4C).

4 Under Article 2, each member country is required to give nationals of other member countries the same protections, privileges, and legal remedies as its own nationals.

Responding to these high prices, several developing countries in the Asia–Pacific region have used the flexibility of TRIPS to ensure access to generic medicines. At the conclusion of the Doha Round (2001), the WTO parties released a standalone statement reiterating the right for all WTO members to flexibility when it came to TRIPS and public health: "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" (World Trade Organization [WTO], 2001). Among the RCEP negotiating countries, Malaysia (2003), Indonesia (2004, 2007, and 2012), Thailand (2006 and 2008), and India (2012) have issued compulsory licenses to limit competition among HIV, heart disease, and cancer drugs. India and the Philippines have also ensconced strict patentability standards in their laws, including the prohibition of evergreening.[5] Most of these countries' patent laws also include several other flexibilities, such as "parallel imports, early working, research and experimental exceptions" (Phurailatpam & Bhardwaj, 2017).

2 IPR Protection and Less-Developed Countries

Of course, we cannot deny the benefits of technology transfer through foreign patents. Since most of the technologies needed for industrial development have been patented, and these patents are owned by commercial companies in industrialized nations, the technical disclosures that are public knowledge cannot be applied without the know-how and technical assistance of the patentee. Therefore, patents are a necessary condition for technology transfer, although not sufficient in and of themselves. Moreover, in addition to granting patents to local companies and providing the required knowledge, foreign patents can also promote foreign investment, as foreign investors tend to enter more 'modern' industries where patented technology may be available. Foreign companies will be reluctant to establish manufacturing plants using patented technology in countries or regions where patent protection is not accepted, especially when establishing joint ventures with local companies.

5 A practice in which patent holders extend their drug monopoly by applying continuous and overlapping patents for new forms and new uses of old medicines.

There are several counterarguments. It has been pointed out that patents registered by foreigners in developing countries rarely 'work' in these countries; technology sales contracts and patent licensing contracts are separate and different, and thus there is no reason to assume that the former will be concluded without the latter. Transfers are conducted through contracts related to know-how, which is non-patented technology. If a technology is known only to a company, then the patent is redundant (at least for the time being). On the other hand, if it is not secret, competitors will be willing to sell it, and if the use of the patent does not restrict the use of potential buyers, they will be able to do so. Therefore, it is clear the main effect of granting foreign patents is to "limit" technology transfer by reducing competition among foreign technology sellers.[6]

As for foreign investment, when export markets are threatened by competitors or by government requirements to produce products locally, it is mainly an investment made to defend and protect the export market. The prospect of obtaining patents and the company's maintaining its market position is irrelevant. The reason why companies require patents and obtain patents is largely because patents enable them to impose legal restrictions on the operations of local subsidiaries, and to impose various restrictions more easily, or simply protect their export markets by preventing competitors from participating in production. In this way, investment in the country may be restricted by the operation of the patent system (Vaitsos, 1972, p. 80). As for the protection of the market, the multinational companies that have the most foreign patents so far will not produce their patented products in every country or region where the patent is granted. The main purpose of international patents is to protect the market and licensing rights. Therefore, it can be said that foreign patents are mainly the exclusive import licenses of foreign producers.

There is no doubt that patents can enable patentees and their licensees to charge higher prices than those charged by their foreign and domestic competitors. This is the main concern of many host countries, especially in the pharmaceutical industry, where high prices may hinder their policy goals of ensuring national health and improving the environment. Of course, one can also think of many other considerations—especially in medicine—that could produce similar results, such as brand-name protection and transfer pricing to subsidiaries (which would continue regardless of patents) as well as subsidized and loss-making exports (which would not be available on a continuing basis).[7]

6 See Ayyangar (1959), Part I, paras. 28–29.

7 There is also the question of the extent to which the products are really identical, as some are listed by brand name and thus presumably comparable with the nearest equivalent product sold under its generic name.

However, it is precisely because patents can be and are used to restrict imported products and other potential producers that many patent laws have adopted compulsory working provisions and severe penalties, up to and including patent revocation. Under compulsory working provisions, the competent national authority (minister, national patent office, etc.) may grant unauthorized persons the authorization to use and utilize patented products. In his report on the Indian Patent Law, Ayyangar (1959) strongly recommends the inclusion of non-working revoking provisions, because patent holders are more likely to cooperate with local companies to produce patented products if they know that their patents may be revoked otherwise (Chapter V). As long as their expertise is needed in production, patent holders can ignore mandatory licensing regulations; therefore, even when a license is obtained, no one can use their patent without their help. They may not want to revoke the patent, which could open the market to imports from other producers, and thus decided to work under a joint venture. Otherwise, the host country will benefit from cheap imported goods.

3 Overview of Indonesia's Situation on IPRs

Prior to the signing of TRIPS, intellectual property protection was not a familiar concept in Indonesian law, as it contradicted traditions and norms. This does not, however, mean that Indonesia is a latecomer in IP legislation. As early as 1844, Dutch colonial rulers had enacted relevant laws, but these applied only to the Dutch population. During the colonial period, Indigenous Indonesian peoples relied on an *adat* legal system, a broad system of customary norms that did not recognize intellectual property protection. According to this unwritten *adat* law, intellectual property or inventions were not personal property, but rather public property that served the public interest (see below). As soon as Indonesia joined the WTO, it began to implement IP policy reforms to fulfill its obligations under the TRIPS Agreement.

However, after more than ten years of IP policy reforms, the general acceptance of IP protections does not seem to have changed much in Indonesian society. According to the WIPO statistics database, of the 9,352 patent applications filed in Indonesia between 2008 and 2017, more than 75% were filed by non-residents (Karina, 2019). In addition, Indonesia has performed relatively poorly in protecting intellectual property rights compared to other RCEP member states; according to the 2018 property rights index, Indonesia has an average score of 5.3, 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 only slightly better than Thailand (5.3), the Philippines (5.2) and Vietnam (5.07). Moreover, since 2010, Indonesia—along with India and China—has been on the United States Trade Representative (USTR) priority watch list, which shows that piracy and counterfeiting are commonplace in the country (Karina, 2019).

Nevertheless, it is undeniable that Indonesia has made major amendments to its IP-related laws in recent years to better align with regional and international intellectual property standards. In 2000–2002, laws on the protection of plant varieties (UU. 29/2000), trade secrets (UU. 30/2000), industrial designs (UU. 31/2000), integrated circuits (UU. 32/2000), patents (UU. 14/2001), trademarks (UU. 15/2001), and copyrights (UU. 19/2002) were all enacted (European Business Chamber of Commerce in Indonesia [EuroCham], 2018). Between 2005 and 2007, with the support of the European Union Intellectual Property Office (Intellectual Property Expert Group [IPEG], 2012), Indonesia's legal framework for IP protection was further improved by a new Customs Act (UU. 17/2006) and patent attorney regulations (PP. 2/2005). Three of these were also revised in 2014–2016: the Trademarks Act was updated to include geographical indications (UU. 20/2016); the Patent Act now includes protection of genetic resources and traditional knowledge (UU. 13/2016, Article 26); and the Copyright Act now covers traditional cultural expressions and knowledge (UU. 28/2014, Chapter V). Indonesia continues to review its intellectual property laws and negotiate with stakeholders "to clarify issues regarding legal language and integrate details that are missing in the legislation" (IPEG, 2012).

Still, the registration, protection, and enforcement of intellectual property rights are areas of concern for foreign investors, especially in the high-tech sector. The formulation of appropriate IP protection strategies is essential not only for Indonesia's long-term integration into the global trading system, including RCEP, but also for reducing investors' concerns about the infringement of IP rights. Although Indonesia has passed many laws to protect IP rights, implementation has been ineffective in many cases. For example, as mentioned above, piracy remains rampant in Indonesia, and corruption and uncertain legal outcomes are major stumbling blocks for foreign investors.

In Indonesia, trademark owners are usually charged enormous legal fees when seeking to take back trademarks registered by local "squatters". Trademark applications must first be filed, and then the Directorate General of Intellectual Property[8] will decide on its registration. Before this final decision is made, the trademark owner can challenge the applications. However, in many cases, such objections fail to prove that "malicious" applications were clearly inspired by a well-known trademark. In many cases, squatter registrations are not actually used by registrants (in most cases local owners); they simply expect that the real owners will pay them large sums to reclaim the patents (EuroCham, 2018).

All these phenomena raise an important question: Does the general Indonesian population understand intellectual property, at a conceptual level? When asked about intellectual property, most Indonesians are generally unclear. For them, intellectual property is a foreign concept; even some legal scholars are unfamiliar with intellectual property, as the topic is not usually included in legal courses. Meanwhile, the government—especially the institutions responsible for drafting laws or the bureaucracy enforcing regulations—perceives intellectual property is as a single functional concept. The patents, trademarks, copyrights, etc. known to government officials must be protected within the Republic of Indonesia because they are in the laws.

It can be further argued that the average Indonesian cannot appreciate the distinction between public and private properties. The meaning of property can best be seen by considering the many values associated with property, including income, goods and services, consumption, and savings, as well as health, safety, security, enlightenment, and skill or proficiency. It can even include power, especially the ability to influence the decisions of others, status and prestige, goodness and stewardship, and love and friendship. Conflict between these various values leads to changes in the property system. It is therefore risky to explain property problems in terms of only a few values, such as goods or services while excluding others (Allee, 1972, p. 64). Property distributes claims for the benefits and liabilities for society. It also allocates access to resources. In a private property system, individuals—and various groups acting as individuals—all claim the benefits from property. States express their interests through a set of laws that define the state's role as an arbiter in conflicts between individuals and other participants. It is through these laws that individuals are protected from the power of the state and transfer wealth from the haves to the have nots; the state, thus, acts not only to protect individuals, but also to defend the collective well-being from the economic behavior of the individual.

8 Direktorat Jenderal Kekayaan Intelektual (DGIP)

As a distributor of benefits and liabilities, and as an allocator of resources, property is the basis of power and control. If an individual exercises power and control over property's usage, that individual has property rights. Conversely, if the state and, at more informal levels, the community exercises power and control over use, public rights are expressed. Thus, during the colonial period, the Dutch government granted property rights—specifically IPRs—solely to Dutch citizens and enabled them to exercise power and control. Indigenous Indonesians, meanwhile, were not granted such rights, as they could only recognize public property rights. In modern times, however, the sovereign Indonesian government must establish laws related to IPRs that apply to both foreign and domestic actors; can it convince local people to accept and abide by them?

IPRs can be seen from various aspects and imbued with different meanings. For business actors, IPRs are tools for achieving various purposes, but mainly for earning profits. For high-tech industries, IPRs are all related to patents, which help them maintain the exclusivity of the technologies they have developed. For entrepreneurs trading in goods, IPRs are about trademarks, which complement the goods and services they trade. In the music and film industries, IPRs are about copyright, and can be used to monopolize the copying and distribution of products. For educators, IPRs involve research objects in the context of scientific and technological development. Scholars look at IP using different perspectives—be they philosophical, legal, historical, economic, etc.—and use different theories and empirical methods. Ultimately, however, the formulation and adoption of Indonesia's IP laws have resulted from the transplantation of foreign laws into the national legal system, specifically the execution of tasks after joining the WTO and the ratifying of TRIPS.

The way the government implements IP laws is one thing; the way companies apply them to IP protection is another. Requirements for the protection of IPRs in industrial contexts are inextricably linked with capital issues. If a patent cannot be applied to industrial production, it will never exist. As such, IP protection has nothing to do with personal creativity per se, but the monopolization of creativity in industrial production. Capital owners simply do not want to lose the benefits they gain from using capital to produce patent-protected inventions. Importantly, not all capital owners applying for patents are interested in actually using such patents; some European companies that have applied for patents in Indonesia, for example, may not implement such patents in their investments. The decision to apply patent protection is usually subject to cost–benefit considerations. For example, some multinational pharmaceutical companies have applied for patent protection to monopolize the investment market (Ritchie et al., 1996, pp. 441–442). Their main concern is competition within the host country, which they fear will endanger their investment capital.

The myth of technology transfer provides further evidence that the patent system only protects capital owners. Even though Indonesia's patent law stipulates that all patents issued in Indonesia must be implemented in the country,[9] no control mechanism exists to ensure compliance. The idea of technology being transferred through the patent system[10] is simply an ideal situation stated in the law. Abbott et al. (2019) wrote there that is no evidence that patent systems have significantly impacted technology transfer or contributed to the economic growth of developing countries (p. 9). Foster (1999) additionally noted that the world's large pharmaceutical companies—to protect their research results—have underscored the importance of the patent system, as "without patent protection, much of the research currently available would not exist".

As mentioned above, in Indonesia—as in other developing countries or regions—more than 80% of patent rights are owned by foreign multinational companies. Of these companies, more than 90% have not implemented their patents (Ritchie et al., 1996, p. 439). Recognizing that developing countries require adequate and affordable medicines to solve their health problems, this situation is particularly harmful in the context of the pharmaceutical industry. Multinational companies can raise the price of medicines in developing countries by restricting patents, as the latter must import patents based on the judgment of the former.[11] Such imports may also affect the balance of trade between developed and developing nations, as the financial resources of the latter are absorbed by the former through user fees paid to multinational companies. It may therefore be necessary to take note of David Vaver's idea that only innovations that bring substantial benefits to local communities should be granted patents (Vaver, 1990).

9 Article 17(1) of the Patents Act (UU. 14/2001).

10 "menunjang adanya alih teknologi" (Elucidation of 2001 Patent Act, Article 17(1)).

11 As discussed in Foster (1999).

4 IPR and its Protection of Indigenous People's Rights

Indigenous peoples are specially protected in human rights discourses. Likewise, they play an active role in other areas of international law (environmental law, cultural law, development cooperation law, etc.), and have contributed to such diverse areas as environmental protection, food security, human health, economic development cooperation, and the promotion of cultural diversity. For example, the importance of Indigenous peoples' traditional knowledge[12] for the protection, utilization, and evolution of biodiversity, as well as mitigating the effects of climate change, has long been recognized.[13]

Traditional knowledge is also considered essential for meeting food security and human health needs. The International Treaty on Plant Genetic Resources for Food and Agriculture (2001) emphasizes that Indigenous farmers' communities and their traditional practices have a primary role in ensuring food and agricultural production through (Article 9.1). Similarly, the World Health Organization (WHO) underscores the need to facilitate Indigenous and local communities' access to traditional medicines (Burton et al., 2013). This has prompted the international scientific community to promote the establishment of an international legal system to obtain genetic resources and traditional knowledge involving Indigenous communities (Kamau et al., 2010, pp. 246, 254). However, despite these international conventions and declarations claim to protect the rights of Indigenous peoples, the special rights they delineate only reflect the lived situation in Indonesia and other countries where thousands of self-identified Indigenous communities exist.

Indeed, all these international regulations bear the mark of the problems faced by settler countries, that is, the relationship between the "whites"—or a dominating settler—and Indigenous peoples (Merlan, 2009). Consequently, such regulations seem to seek to recognize Indigenous peoples while simultaneously restoring (at least partially) the rights of the states established by the original colonists. Conventions promulgated by UNESCO[14], such as the Convention for the Safeguarding of the Intangible Cultural Heritage (2003; Indonesia joined in

12 From a legal perspective, "traditional knowledge" covers all individual or collective innovations and practices developed by Indigenous peoples that have socio-economic value for the protection of biodiversity, traditional medicine, and folklore expressions. See WIPO Secretariat (2011) for further elaboration by experts of traditional knowledge.

13 Cabrera Ormaza (2013) lists some examples: Convention on Biological Diversity (1993), pmbl., para. 13; Andean Community Decision No. 391 (1996), art. 7; Declaration on the Establishment of the Arctic Council (1996), para. 6; Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity (2010), para. 22. Also, see Groth (2010).

14 United Nations Educational, Scientific and Cultural Organization

2007) and the Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005; Indonesia joined in 2012), emphasize "culture" and underline that such "culture" can be promoted and protected by valuing fundamental human rights and freedoms. While recognizing that Indigenous peoples have historically suffered many injustices, these agreements forefront cultural values and practices; indeed, "culture" is at the core of what Indonesia calls *adat*.[15]

Indonesia's Indigenous peoples, in addition to having a history of oppression and deprivation, also advocate that their specific local culture should be distinguished from that of other ethnic groups. They thus require a specific definition of their own cultural peculiarities to fill the "tribal slot".[16] Indeed, claims to unique culture are foundational for many indigenous political movements. At the same time, however, the politicization of Indigenous culture often corresponds with a definition of said culture as property. Indeed, around the world it is common for Indigenous representatives to talk about themselves as not only representing unique cultures, but also as part-owners of collectively propertied cultures (Brown, 2004).

Such politics is also foundational for certain forms of nationalism and sub-nationalism. State and sub-state polities, especially emerging ones, claim possession of a specific "culture", upon which basis they enact legal exclusion rights and ownership policies to enhance their political legitimacy. Cultural property claims range from the material (human remains, cultural relics, important sites) to the immaterial (sacred symbols, music, cultural heroes, traditional plant knowledge), and are among the most extensive arenas for Indigenous peoples' political and economic activities. However, Indigenous activists' struggle for political and cultural sovereignty often leads them to discuss culture as if it is fixed and tangible.[17] Their methods for requesting the return of land and resources are intertwined with demands for religious freedom and other basic rights, and it is thus sometimes difficult to distinguish between culture and its material expression.

Within a specific Indonesian context, the political reform—including decentralization and democratization—that followed the fall of the Suharto regime in 1998 provided opportunities for the government and Indigenous peoples (*masyarakat adat*) to restore fair treatment and address the deprivation of property rights experienced by these people. The first milestone in the struggle for the rights of Indigenous communities, especially their *adat* land, appeared in

15 For a detailed discussion of *adat* and its significance and use in present-day Indonesia, see Henley & Davidson (2007).

16 See Li (2000).

17 See, e.g., Coombe (1993); Jackson (1989); Jackson (1995).

a May 2013 Constitutional Court ruling (Putusan MK. 35/PUU-X/2012) that abolished the term "state" in Article 1(6) of the Forestry Act (UU. 41/1999). Previously, the law had declared that "customary forests are state forests located in the areas of custom-based communities".[18] Article 5 of this law, which identified customary forests as being state-owned forests, was also revised (Pasandaran, 2013). The state, with this decision, officially lost millions of hectares of forest land, most of which had been used for the private and public exploitation of natural resources—especially in the mining, logging, and agriculture sectors.

In the future, franchisees will have an obligation to negotiate directly with local communities, not just with representatives of the national government. However, in several respects, "Indigenous peoples" is a relational term.[19] In a socio-political context, it refers to the relationship between a smaller, weaker society and a stronger majority, a dominant society, or a nation-state, wherein the minority once experienced marginalization and discrimination due to its culture. In such cases, although a community may have once been the victim of various injustices, its culture has now become a privilege.

According to the currently pending draft law on Indigenous peoples,[20] *masyarakat adat* must show five characteristics to have *hukum adat* (customary community law): having a common history, owning customary land, having *adat* laws, having specific property relationships and inheritance or *adat* artifacts, and having a customary governance system (Arizona & Cahyadi, 2013). Once recognized, Indigenous peoples and customary law communities, by virtue of their heritage (i.e., jus sanguinis), receive given special status and corresponding rights and entitlements that are not enjoyed by other citizens (Tyson, 2011). International conventions like the United Nations Permanent Forum on Indigenous Issues emphasize self-identification as the main factor for determining which communities are "Indigenous" (Gausset et al., 2011, p. 137). In Indonesia's draft PPHMHA law, self-identification is similarly a key criterion for a community self-determination. However, political institutions must undertake further steps before recognition is granted (Arizona & Cahyadi, 2013).

18 "*Hutan adat hutan negara yang berada dalam wilayah masyarakat hukum adat*."

19 See also Merlan (2009).

20 *Rancangan Undang-undang Pengakuan dan Perlindungan Masyarakat Hukum Adat* [Draft Law on the Recognition and the Protection of the Rights of Indigenous Peoples] (RUU. PPHMHA) has been in the making since 2013 (Nugraha, 2019).

Indonesia's customary communities have individual cultural systems with special values, rules, and practices, reflecting the motto "Unity in Diversity" (*Bhinneka Tunggal Ika*). At the same time, they are rarely considered by international and transnational organizations when transferring universal rights from the international through the national and, finally, to the regional and local levels. Such organizations, likewise, tend not to concern themselves with how the relationships between thousands of Indigenous communities (in the case of Indonesia) and a nation-state with specific historical and cultural influences will be configured fairly. The ensuing legal pluralism and its inherent contradictions and different goals are therefore a challenge for all stakeholders (see von Benda-Beckmann & von Benda-Beckmann, 2010), especially policymakers. Further complexity stems from the fact that national laws and Indigenous regulations cannot be independent of each other. There are no clear boundaries, for example, between the national administration and its staff, local representatives, and officials, and the actors who argue and act on behalf of *adat* (Müller, 2013). Ambitious actors can thus unite in this gray area to achieve their own individual or collective goals, depending on their specific situation and purpose.[21]

As suggested by Tania Li (2010), the self-identification of Indigenous peoples can be understood as a defensive response to the many forms of capitalism; this can be seen, for example, when communities are ascribed the role of forest preservers. At the same time, *adat* and its accompanying revival is also a means of reconfiguring power relations, which has provided a powerful tool in Indonesia (Tyson, 2010). As a general term, *adat* is not limited to Indigenous people, but covers all traditional and inherited values. In *masyarakat adat*, the meaning of "Indigenous" overlaps and merges with "autochthonous". Gausset et al. (2011) point out that "indigenous" means people who have been marginalized, while "autochthonous" may be "reserved for people who are dominant in a given area but fear future marginalization", or people who had formerly suffered marginalization (as in Bali) that has nevertheless come to an end.[22] Moreover, the former traditional elites—the nobles, kings, and sultans—also have their own *adat* (Klinken, 2007), to which they refer when advocating for recognition, rights, and especially land. Since many elites have been able to retain their iconic capital (playing a leading role in ceremonies, having the right to confer titles of nobility, etc.), or managed to reach a settlement with the ruling party during the New Order regime, some have gained political recognition.[23]

21 See, e.g., Grumblies (2013); Müller (2013).

22 See Hauser-Schäublin (2013).

23 See Thufail (2013).

5 Regional Autonomy and Indigeneity

Now, as Indonesia has become actively involved in international IPR protection regimes and—as argued above—Indigenous peoples of Indonesia who have been disadvantaged by international IPR regulations seem to have gained more recognition in politics, matters are complicated somewhat by the decentralization of the country's governments. Although the central government may have been eager and pressured to abide by international IPR agreements, local governments (who have their own executive capabilities and their own legislative powers) could have interests other than adhering to international agreements. For example, they may want to increase foreign companies' taxes or other fees, or even to deny their rights in patent protection. On the other hand, they may cater to the demands of foreign investors by sacrificing Indigenous peoples' properties, such as *adat* lands or other natural resources, and disregard or even damage traditional knowledge and cultures.

After the fall of the Suharto regime, and amidst broad support for democratic reform, the issue of economic and political decentralization returned to the center of Indonesian national politics. Law No. 22 of 1999 on Regional Government (UU. 22/1999), for instance officially recognized local political institutions besides villages (*desa*) and greatly devolved central decision-making abilities to regional administrations (*kabupaten*). This law authorized local councils to formulate and enforce their own regulations and allowed for the establishment of village councils (*badan perwakilan desa*) that could pass village-level regulations. Law No. 25 of 1999 on the Fiscal Balance between the Central and Regional Governments (UU. 25/1999), meanwhile, laid the foundation for improving local governments' financial independence. Over the past two decades, the national and regional parliaments have passed a series of laws to adapt and implement the regional autonomy system established through Laws No. 22 and No. 25 of 1999.

The decentralizing of power to local *adat*-based institutions resulted in Indigeneity being politicized in the context of regional autonomy, making it an increasingly common aspect of national and regional party politics. Indeed, the issue of Indigenous rights became incorporated into the agenda of the broader political reform movement (*reformasi*). By the late 1990s, Indigenous rights movement throughout Indonesia had begun to unite—organized mainly by students in Jakarta—and borrowed heavily from international human rights discourse. In March 1999, the Indigenous Peoples' Alliance of the Archipelago (*Aliansi Masyarakat Adat Nusantara*, AMAN) was established. This association has promoted the use of the term "*masyarakat adat*" [24] with a definition that is sufficiently broad to cover politically powerless minorities:

> *a community that lives on* adat *land based on generational ancestry, who has sovereignty over land and natural resources, [and whose] social and cultural life [is] governed by* adat *law and* adat *institutions which manage the continuity of the communities' lives.* [25] *(Aliansi Masyarakat Adat Nusantara, n.d.)*

AMAN's platform focused on power decentralization from "Indigenous" political institutions, the recognition of *hukum adat*, and the abolition of laws restricting village decision-making power (Down to Earth, 1999).

Around this time, political parties began to invoke localized rhetoric. Meanwhile, representatives of customary institutions began accepting regional autonomy as a mechanism for re-enabling their institutions at the local level; indeed, the reform of regional autonomy has contributed significantly to the reconstruction of traditional forms of governance in some areas.[26] Meanwhile, with the promulgation of the Regional Government Act (UU. 22/1999), self-identification as an "*adat* community" became more common (Safitri & Bosko, 2002). After the law came into effect, local lawmakers immediately accepted their newly established powers. Local councils throughout the archipelago passed legislation to impose new fees and taxes on residents, especially immigrants. In many places, this led to the emergence of new types of local elites and the crystallization of new political patronage networks (Rawski & MacDougall, 2004, p. 147).

24 Safitri & Bosko (2002) share several examples of its use: the Human Rights Act (UU. 39/1999), Forestry Act (UU. 41/1999), and Ministerial Regulation on Guidelines for the Resolution of Customary Land Rights with Indigenous Communities (Permenag/KBPN. 5/1999) (pp. 13–20).

25 "Komunitas-Komunitas yang hidup berdasarkan asal-usul leluhur secara turun-temurun di atas suatu wilayah adat, yang memiliki kedaulatan atas tanah dan kekayaan alam, kehidupan sosial budaya yang diatur oleh hukum adat, dan lembaga adat yang mengelola keberlangsungan kehidupan masyarakatnya".

26 See, e.g., Cohen (2001, p. 55).

Laws are made by society's most powerful groups, and the government—as a country's most powerful entity—has the greatest power to determine the form, content, and intentions of laws. When seen from this perspective, new regional regulations may be understood not only as tools for realizing decentralization, but also manifestations of specific vested interests. Indeed, a few months after the Regional Government Act (UU. 22/1999) came into effect, "*perda* mania" began to plague Indonesia.[27] Similarly, De Soto (1989/2002) noted an explosion of laws in 1980s Peru, their inability to fix problems, and the influence of certain groups with parasitic interests.

Gradually, local communities, Indigenous communities, and regional governments began making claims for the once centralized and nationally controlled IP rights system. The first came in 2008 from the province of Papua, which sought to protect the IPRs of Indigenous Papuans[28] using an autonomy law that distinguished between them and the province's other residents. Under Article 1(t) of the 2001 Special Autonomy for Papua Province Act (UU. 21/2001), Indigenous Papuans were defined as *rumpun ras Melanesia* (descending from Melanesian racial stock) who are recognized by Papua's *adat* communities; the same definition is used in the 2008 Act for Protection of the Intellectual Property Rights of Indigenous Papuans (Perdasus Papua. 19/2008, art. 1(8)).

Later, other provinces began drafting their own IP rules and regulations. For example, West Java issued Regional Regulation No. 5 of 2012 on the Protection of Intellectual Property (Perda Jawa Barat. 5/2012). In Banka Belitung, it was made clear that the regional regulation on intellectual property was meant to raise income and to channel royalty fees from the central to the regional government (Oktaviano, 2014). This proliferation of local IP regulations inevitably created inconsistencies between local and national IP laws. For instance, West Java's IP protection regulations include geographic indications (GIs) in a rather confusing category called *hak terkait* (neighboring rights),[29] which is generally used for copyright in other provinces and even in the same regulation.[30]

27 *Perda* are regional government regulations. See, e.g., Abdurrahman (2015).

28 Papua Province Special Regional Regulation No. 19 of 2008 on the Protection of Intellectual Property Rights of Indigenous Papuans (Perdasus Papua. 19/2008).

29 Perda Jawa Barat. 5/2012, art. 7(2).

30 For example, in Articles 8(3–4), the term is used to cover performances, recordings, and broadcasting rights.

Are local governments allowed to enact such wide-ranging regulations? Article 70 of the new Trademarks and Geographical Indications Act (UU. 20/2016) merely states that the specific government (central or regional) is responsible for setting guidance, including legal protection, with respect to GIs, depending on their respective authority. The matter, therefore, was left undecided. On the other hand, the most recent version of the Regional Government Act (UU. 23/2014) clearly states several areas for the national government, while including an annex designating fields in which both national and regional governments may act. The central government is responsible for community IP rights related to culture,[31] and the development of the nation's creative industries.[32] Governments of all levels, meanwhile, are responsible for empowering *adat* communities, depending on their location.[33] Recognition of *adat* communities, traditional knowledge, and related rights is included in the section on environmental matters, and are entrusted to local authorities; when communities are spread across several provinces, power is delegated to the central government.[34]

By the early 2000s, this problem had been recognized, and representatives of the regional and national chambers of commerce approached President Megawati Sukarnoputri, providing her with a list of 1,006 local regulations that they considered "foolish" and "anti-business" (Simarmata, 2002, p. 4). A few months later, the repeal and revocation of 100 "problematic" regional regulations was requested by the International Monetary Fund (IMF) through the Ministry of Finance; this request was later included in a letter of intent signed between the IMF and the Indonesian government. Soon afterwards, the Ministry of Finance proposed that the Ministry of Home Affairs overturn 71 regional regulations claimed to restrict the free trade of goods, services, and capital. At the 2001 Annual Session of the People's Consultative Assembly (MPR), it was recommended that—rather than waiting for court challenges of individual laws—the Supreme Court should conduct a judicial review of all local regulations that could conflict with national laws (Butt, 2010).

31 Appendix V (UU. 23/2014, App. pp. 90–92).
32 Appendix Z (UU. 23/2014, App. pp. 108–109).
33 Appendix M (UU. 23/2014, App. pp. 52–53).
34 Appendix K (UU. 23/2014, App. pp. 44–49).

Many processes occurred with minimal transparency or public participation. As a result, political reform only changed the relationship between Indonesia's central and local governments; it did little to affect the relationship between the government and the public (Simarmata, 2002, p. 5). Central decision-making powers have been distributed to multiple local centers, where local political elites have used legislative procedures to further strengthen their political powers. In doing so, they have been supported by fees and taxes imposed on local producers, traders, service providers, and consumers. Local politicians in resource-rich areas try to get the most benefit from local resources. At the same time, the exposure of human rights violations during and after the fall of the New Order undermined the prestige and effectiveness of the Indonesian military. New parties have won seats in the national and regional parliaments, something unknown throughout the New Order regime.

Under current law, Indonesia's central government can regulate any affairs over which local governments also have jurisdiction. Indeed, the Regional Government Act (UU. 23/2014) reserves some affairs specifically for the central government: foreign affairs, national defense, security, national monetary and fiscal matters, and religion (Article 10(1)). The central government also has exclusive powers over judicial affairs (*yustisi*), including establishing judicial institutions, appointing judges and prosecutors, determining judicial departments and immigration policies, and enacting statutory laws and other national laws (Elucidation to Article 10(1, d)). However, the central government can delegate jurisdiction over these matters to local governments (Article 10(2)). However, where local laws are inconsistent with national laws, the latter shall prevail (Establishment of Legislative Regulations Act No. 10 of 2004 [UU. 10/2004], Article 7(5)). At present, *perda* only have formal and legal legitimacy when passed without conflicting with higher-level laws. Once passed, they can easily be replaced by statutory laws, government regulations, or presidential regulations—all of which are "higher" in the legal hierarchy (Article 7(1)).

The Regional Government Act (UU. 22/1999) provided the central government with the power to review *perda*. In practice, this has most commonly been done after bylaws are enacted by the local legislature. Regional legislators are required to submit their perda to the central government within seven days of enactment, after which it will be reviewed based on two criteria: whether the perda contravenes with the "public interest" (*kepentingan umum*) or contradicts a "higher law" (*peraturan perundang-undangan yang lebih tinggi*) (Article 72(2)). By the end of 2006, the central government had received more than 12,000 regional laws for review—with 1,406 local laws abolished between 1999—2007 (Butt, 2010, p. 10). The Ministry of Finance alone received 7,200 *perda* by 2008, and proposed revoking about 2,000 of them, most of which attempted to collect illegal taxes or fees (Rosdianasari et al., 2009, p. ix).

One common subject of bylaws has been the recognition and protection of local traditional ethnic groups' *adat* rights. Examples, such as the Dayak Pitap community in South Kalimantan Province; the Enggano in Bengkulu Province; the *adat* people of Biak Island, Papua; the people of Guguk and Batu Kerbau Villages in Merangin Regency; and the village communities of Benung in West Kutai Regency show that Indonesia's era of regional autonomy has enabled legislative procedures to attract active public engagement and participation. They also suggest that pressure from community groups may influence local administrative departments and government legislative departments to formulate laws that reflect the will of the people and protect their interests, even as they are allowed to manage their own affairs and resolve their own conflicts in accordance with their own cultural norms and traditions (Simarmata, 2002).

Although there are doubts about the importance or benefits of these new regulations, it seems that many are promoted by external NGOs in cooperation with local communities. This is an experiment in realizing NGOs' ideological agenda of participatory local government, based on traditional communities' *adat* values. The success of these undertakings depends, to a large extent, on the acceptance and goodwill of local officials in the legislative and executive branches of the government.

Nonetheless, there are still significant limitations. For instance, a bylaw in Banten Province that protects the community property of the Baduy people applies only to land that has been reclassified for other purposes under the agrarian or forestry law, and stipulates that all conflicts with external firms, agencies, and individuals must be resolved in Indonesian courts (Simarmata, 2002, p. 13). Furthermore, once regulations enter the implementation phase, many encounter problems, as seen in Tana Toraja Regency's *perda* on *Lembang* government (de Jong, 2009) or Wonosobo Regency's community forest *perda* (Nomura, 2008). These problems result not only in delays in implementation, but also indicate the government's lack of commitment and accountability for these problems as well as local communities' overall weakness when applying political pressure to complete the process. Once NGOs leave, momentum slows and the enthusiasm wanes. The "social movements" that first push for decrees can only affect the process in the policy-making stage. During the implementation stage, old relationships and interests reappear, replacing the participatory and inclusive dynamics that were briefly evident the drafting and deliberation process. As a result, even relatively progressive regulations can be manipulated to serve the interests of local businesses and political elites, thereby creating a new rent-seeking system. In most of Indonesia's rural communities, even when such problems are resolved through promises and concessions, the real power remains in the hands of politicians and business interests. Unconstrained power and insufficient incentives further encourage rent-seeking among government officials.

Decentralization does, on the other hand, limit opportunities for rent-seeking by establishing institutional arrangements that formalize the relationship between citizens and public servants. When coupled with a strong legal framework, political decentralization—especially the election of local officials by citizens—can create accountability and therefore enhance officials' legitimacy, improve citizens' participation and interest in politics, and deepen the democratic nature of state institutions.[35] Most anti-poverty programs seek to increase the possibility of participation, improve access to services, and provide public goods more effectively at the local level. Realizing these goals, however, may not be that simple.

35 See, e.g., Manor (1999); Crook & Manor (1998).

6 Concluding Remarks

Indonesia is now facing the challenge of a so-called TRIPS-plus clauses, proposed by Japan and South Korea for inclusion in RCEP. These are most relevant to Indonesia in two respects. First, Indonesia strongly encourages and develops local production capacity in the medicine and vaccine sector, and it hopes to see that local production capacity will help ensure that more high-quality medicines are available at reasonable prices. It is even believed that Indonesia can use the flexibility of TRIPS (reaffirmed at the Doha Round) to protect public health and promote access to medicines for all. However, the country has introduced a new rent-seeking regime with foreign multinational companies and companies.

The second challenge is protecting traditional knowledge and cultural expressions. Using intellectual property protection to develop a system for protecting traditional knowledge has several disadvantages: (1) it is ineffective, as intellectual property protection deals with the private domain, which is essentially exclusive, monopolistic, and individualistic, while traditional knowledge is collective and thus does not consider economic interests and has no intention to protect the knowledge from outsiders; (2) data, literature, and information on traditional knowledge are very limited, despite the lengthy existence of such knowledge, and there is thus no comparative document (prior art) that can be used as a reason for not granting patent rights (Rosidawati, 2013).

Furthermore, Indigenous culture is politicized in Indonesia, where it is commonly defined as property. At the same time, Indigenous cultural systems—the particular values, rules, and practices of the customary communities (*masyarakat adat*)—are only marginally taken into account by international and transnational organizations when they transfer universally conceived rights such as IPR from the international through the national and, ultimately, to the regional and local levels. Especially when we consider the inseparability of national laws and Indigenous regulations, this creates a broad gray area in which actors can take advantage of and combine both domains to achieve their own goals or those of their parties. This area requires further exploration and study, especially if we want to disentangle the complexities involved in international trade agreements such as the RCEP.

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