how to get started with
GENETIC RESOURCES,
TRADITIONAL KNOWLEDGE & CULTURAL EXPRESSIONS

ASEAN INTELLECTUAL PROPERTY ASSOCIATION
20th Annual Meeting and Conference
Kuala Lumpur, Malaysia, 4-6 March 2016
“Looking Ahead – IP in ASEAN”

Miranda Risang Ayu, S.H., LL.M., Ph.D.
Communal Intellectual Property Rights Specialist.
Lecturer and Researcher, Faculty of Law, Universitas Padjadjaran.
Commissioner of National Collecting Management Organization of Indonesia.
NATURE OF GENETIC RESOURCES & TRADITIONAL KNOWLEDGE

- Characterized by traditional values, traditional ways of thinking, traditional forms and fixed styles, and being maintained in the traditional context
- Actively used by the source community as a living culture
- Strongly influenced by the environment where the source community depends their life on
- Maintained, used, developed and transmitted from generation to generation inside and outside the source community
- Serve for the sense of social and cultural identity of the source community

GRTKF PROTECTION PROBLEMS

- spiritual values versus economic values
- reproductive characters versus original, novel and new characters
- strong link with geographical origin and source community versus free flow of a product
- oral tradition versus written tradition
- communal ownership versus individual ownership
- unlimited time of custodianship versus limited time of possession
TYPES OF GRTKCE POSSIBLE PROTECTIONS

Defensive Protection
Establishing national database for GRTK & TCEs for the purpose of re-declaration and IP examination

Case by Case Protection
Enhancing living cultures, implementing Prior Informed Consent and Benefit Sharing provisions in contract to prevent misappropriation

Negative Protection
Using the existing legal system against unfair competition practices

Positive Protection
Creating new regimes (sui generis) in national and international laws

Systemic-Progressive Protection
Structural arrangements in supra and infra structures, that may includes the middle structure

International Intellectual Property Rights Instruments related to GRTKCE

- WTO/Agreement on Trade-related Aspects of Intellectual Property Rights 1995
- Paris Convention for the Protection of Industrial Property 1883
- Berne Convention for the Protection of Literary and Artistic Works 1886
- WIPO Performances and Phonograms Treaty 1996
- Mataatua Declaration on Cultural and Intellectual Property Rights 1993
- Muscat Declaration on Intellectual Property and Traditional Knowledge 2002
International Legal Instruments on GRTK

- Rio Declaration on Environment and Development 1992
- UN Convention on Biological Diversity 1992
- Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization 2002

International Legal Instruments related to TCEs

- UNESCO Declaration of the Principles of International Cultural Co-operation 1966
- UNESCO Convention concerning the Protection of the World Cultural and Natural Heritage of World Heritage 1972
- UNESCO Recommendation on the Safeguarding of Traditional Culture and Folklore 1989
- UNESCO Universal Declaration on Cultural Diversity 2001
- UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expression 2005
International Legal Instruments related to the Beneficiaries of GRTKCE

- Universal Declaration of Human Rights (UDHR) 1948
- International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966
- International Covenant on Civil and Political Rights (ICCPR) 1966
- Universal Declaration on the Rights of Development (UDRD) 1986
- Universal Declaration on the Rights of Indigenous People (UNDRIP) 2007
- ILO Convention No. 169 concerning Indigenous and Tribal People Convention (ILO 169) 1989

Traditional Knowledge

- Traditional knowledge refers to know-how, skills, innovations, practices, teachings and learning of indigenous and local communities (in some extent, could also be a nation or state).

- Traditional knowledge may be associated with fields such as:
  - agriculture
  - environment
  - healthcare and traditional medical knowledge
  - biodiversity
  - traditional lifestyles
  - natural resources and genetic resources
  - know-how of traditional architecture and construction technologies

[WIPO/GRTKI/1/C/28/5 Annex]
Traditional Cultural Expressions

- Traditional Cultural Expression means any form of artistic and literary, creative and other spiritual expression, tangible or intangible, or a combination thereof, such as: actions, materials, music and sound, verbal and written and their adaptations, regardless of the form in which it is embodied, expressed or illustrated which may subsist in written/codified, oral or other forms.

- The expressions may include:
  - dance, works of mas, plays, ceremonies, rituals, rituals in sacred places and peregrinations, games, traditional sports & games, puppet & other performances, whether fixed or unfixed; handicrafts, ceremonial masks or dress, handmade carpets, architecture, and tangible spiritual forms, and sacred places; songs, rhythms, instrumental music, the songs which are the expression of rituals; stories, epics, legends, popular stories, poetry, riddles and other narratives; words, signs, names and symbols.

Intangible Cultural Heritage of Mankind

- Intangible cultural heritage of mankind refers to a communal moral rights of a community

- Individual right is acknowledged in so far as the individual concerned is a member of the community and/or has been authorized by the community to implement the individual right on certain intangible cultural heritage based on the customary laws and protocols of the community

- The characters of the Intangible Cultural Heritage are:
  - being inter-generationally transmitted
  - Being constantly re-created, reproduced and developed by the community.
### Important Aspects to be Added on the Existing IPR System

<table>
<thead>
<tr>
<th>IP Subject Matters</th>
<th>Aspects to be Added</th>
</tr>
</thead>
<tbody>
<tr>
<td>Copy Rights-Related Rights and Industrial Design</td>
<td>protection of Traditional Cultural Expressions including oral traditions, respect to religious values, communal ownership, silent prior informed consent, equitable and fair benefit sharing</td>
</tr>
<tr>
<td>Patents and Trade Secrets</td>
<td>protection of Traditional Knowledge including Traditional Knowledge associated with Genetic Resources, communal ownership, prior informed consent, equitable and fair benefit sharing, extensions of objects of Trade Secret.</td>
</tr>
<tr>
<td>Trade Marks</td>
<td>communal ownership as a variety of collective ownerships, new form of Certification Marks, prior informed consent, equitable and fair benefit sharing.</td>
</tr>
</tbody>
</table>

### Important Aspects to be Added on the Existing IPR System

<table>
<thead>
<tr>
<th>IP Subject Matters</th>
<th>Aspects to be Added or Strengthened</th>
</tr>
</thead>
<tbody>
<tr>
<td>Geographical Indications</td>
<td>Source community of Indication of Source, protection of indirect Geographical Indications, protection of Geographical Indications on services, disclosure of geographical origins for Traditional Knowledge including those which are associated with Genetic Resources, and the existence of Additional Traditional Cultural Expressions on Geographical Indication main Protection</td>
</tr>
<tr>
<td>Plant Variety</td>
<td>Farmers’ Rights, indication of geographical origins of the Plant Variety</td>
</tr>
<tr>
<td>Unfair Competitions</td>
<td>Affirmative actions for minority rights of traditional and local communities, traditional or local dispute settlement mechanisms.</td>
</tr>
</tbody>
</table>
### BASES FOR THE PROTECTION
OF GENETIC RESOURCES, TRADITIONAL KNOWLEDGE & CULTURAL EXPRESSIONS
IN THE 1945 CONSTITUTION OF THE REPUBLIC OF INDONESIA

<table>
<thead>
<tr>
<th>Section</th>
<th>Clauses</th>
<th>Basis</th>
</tr>
</thead>
<tbody>
<tr>
<td>18 B</td>
<td>2</td>
<td>The existence of the United Community of Adult Laws, The existence of Living Traditional Rights</td>
</tr>
<tr>
<td>20 C</td>
<td>1(2)</td>
<td>Human Rights to personal development and to benefit from the advancement of technology, arts &amp; cultures, Collective rights to develop their society, nation &amp; state</td>
</tr>
<tr>
<td>28 H</td>
<td>1</td>
<td>Cultural identity of Traditional Community (Cultural Rights), Rights of Traditional Community (Cultural Rights)</td>
</tr>
<tr>
<td>32</td>
<td>1(1)</td>
<td>State enhances Indonesian national culture in a global civilization, State guarantees freedom of the society to maintain and develop their cultural values (local values)</td>
</tr>
<tr>
<td>33</td>
<td>2(1,2,3)</td>
<td>Authority upon primary production sectors is held by the State, Authority upon land, water, and natural resources is held by the State for the utmost welfare of the society, National economy is ruled based on democratic economy</td>
</tr>
</tbody>
</table>

---

### GRTKF Protection in the Indonesian IP System

- TCEs are protected under Article 38 of Copy Rights Law Number 28 Year 2014
- Several TKCEs final products are protected by Geographical Indication under Trade Mark Law Number 15 Year 2001 and Geographical Indication Regulation under Geographical Indication Government Regulation Number 51 Year 2007
- In practices, the origins of TKCEs are afforded by Indication of Source and Certification Marks labelling system afforded by Regional or Local Governments
- GRTK on plants and agricultural products could be afforded based on Law Number 29 Year 2000 concerning the Protection of the New Variety of Plants which acknowledges the inscription of Local Varieties from traditional farmers
Formality

Principles
- Declaratory based protection
- Non formality protection

Implementations
- Documented, in the forms of database
  (open, half-restricted, restricted)
- Non Documented
  » identified by custodians
  » implicit prior informed consent

Utilization of GRTKCE
Cultural Rights Based Approach
in the Indonesian Provincial and Local Governments

Principles
- The Rule of Law and the Supremacy of Law
- Code of Conducts of Creativity Principle
- Fair and Equitable Benefits
- Accountability
- Participation
- Progressive realizations of the Cultural Rights by the Government
Utilization of GRTKCE
Cultural Rights Based Approach
in the Indonesian Provincial and Local Governments

Substantial Aspects

- Original rights of the communities
- Optional use of rights for the communities
- Obligatory management system of the government as the manager of rights
- Objects of the protection should be GRTKCE which are still existed as a living culture

Utilization of GRTKCE
Cultural Rights Based Approach
in the Indonesian Provincial and Local Governments

Administrative Aspects

- Compulsory disclosure of origins for GRTKCE
- Compulsory prior informed consent from the community of GRTK or silent consent from the community of TCEs
- Mutually Agreed Terms for GRTK and several types of TCEs
- Compulsor benefit sharing
Inputs for Regional IP Arrangements

- Clear definitions of beneficiaries: indigenous people, indigenous communities, local communities, tribal, cultural minorities, cultural societies, extended family
- Requirements of the presence of the State or active responsibility of the government as the representation of a ‘nation’
- PIC in TCEs should be ‘silent PIC’, differently with administrative PIC in the protection of GRTK
- Perpetuity/indefinite time of protection as long as the knowledge/expression is still existed and/or fulfill the requirements of the knowledge/expression of GRTCE;
- Benefit sharing: monetary benefit sharing, non monetary benefit sharing, direct benefit sharing, indirect benefit sharing;
- Biopiracy dealing with microorganism

Inputs for Regional IP Arrangements

- Formality: non formality but inscriptioned. Non formality and non inscription: self-affirmation by custodians;
- Time, is not simply about how long it has been passed on from generation to generation, but also that a long history has been embodied in a very recent expression;
- Cultural Resources needs the definition also on the term of ‘Strategic Resources’
- Special notice on the open access in ITPGRFA versus Access regulation in UN CBD and Nagoya Protocol
Inputs for Regional IP Arrangements

Utilization of GRTKCE should be integrated with:

- Systemic cultural conservation, especially for several endangered cultural heritages, not only by protecting the knowledge/expressions/objects, but also the site related to them, such as: by the establishment of cultural conservation area or eco-cultural tourism area;

- Revitalizations and sustainable protection programs for GRTKCE as ‘living cultures’

- Programs of cooperation between ASEAN countries