

CHAPTER TWO

LITERATURE REVIEW

A. The Definition of Traditional Knowledge

The Draft of Traditional Knowledge and Expression of Traditional Cultural (PTEBT) gives a definition of Traditional Knowledge and Expression of Traditional Cultural, namely¹ :

Traditional knowledge is knowledge of the community gained as a result of real experience in interacting with the environment, While the Expression of Traditional Cultural is any form of expression, both material (objects) and immaterial (intangible), or a combination of both that show the existence of a culture and Traditional Knowledge that is hereditary.

With reference to the opinion of NunoPires de carvalho, the term "Traditional Knowledge" refers to two different sense, namely² :

- (1) Knowledge consisting of information relating to Genetic Resources and technologies developed by the community in order to adapt with the physical environment and cultural environment. This is categorized as a "*Traditional Knowledge Sensustricto*"
- (2) Traditional knowledge is an expression of material culture known as "*Ekspression of Folklore*" or "*Ekspression of Traditional Culture*". Cultural expressions include verbal expressions (As dogeng and poetry), musical expressions (such as songs

¹ Draft of Law on Traditional Knowledge and Expression of Traditional Cultural (PTEBT)

²Miranda, Harry, 2013, *Hukum sumberdaya genetic, Pengetahuan Traditional danExpresiBudayaTradisional Di Indonesia*, Alumni, Bandung. P.25

and musical instrument), and performances (such as dance, drama and other forms of art performances). This form is categorized as a "Traditional Knowledge Sensu Lato" In terms of relating to biological resources, the definition of "*traditional knowledge stricto Sensu*" Which refers to the term "*Traditional Ecological Knowledge (TEK)*". Freeman and Carby defines TEK as follows³:

“TEK is a cumulative body of knowledge and beliefs, handed down through generations by cultural transmission, about the relationship of living being (including humans) with one another and with their environment. Furthermore, TEK is an attribute of societies with historical continuity in resources use practices by and large, these are non industrial or less technologically advanced societies, many of them indigenous or tribal”

Johnson defines the traditional knowledge⁴ :

“a body of knowledge built by a group of people through generations living in close contact with nature. It includes a system of classification, a set of empirical observation about the local environment, and a system of self-management that governs resources use”

Another definition of traditional knowledge was also proposed by the Director of the United Nations Educational, Scientific, and Cultural Organization (UNESCO)

“The indigenous people of the world possess an immense knowledge of their environments, based on centuries of living close to nature. Living in and from the richness and variety of complex ecosystems, they have an understanding of the properties of plants and animals, the functioning of ecosystems and the techniques for using and managing them that is particular and often detailed. In rural communities in developing countries, locally occurring species are relied

³ Ibid. P.14

⁴BadanPenelitian dan Pengembangan HAM Kemenkumham, 2013, *Perlindungan Kekayaan Intelektual atas Pengetahuan Tradisional dan Ekspresi Budaya Tradisional Masyarakat Adat*, Alumni, Bandung.P.22

on for many-sometimes all-foods, medicines, fuel, building materials and other products. Equally, people's knowledge and perceptions of the environment, and their relationships with it, are often important elements of cultural identity"

Definition of traditional knowledge can also be seen in full in *article 8 J Convention on Biological Diversity*. Traditional Knowledge, Innovations, and Practices Introduction which state⁵ :

"Traditional knowledge refers to the knowledge, innovations and practices of indigenous and local communities around the world. Developed from experience gained over the centuries and adapted to the local culture and environment, traditional knowledge is transmitted orally from generation to generation. It tends to be collectively owned and takes the form of stories, songs, folklore, proverbs, cultural values, beliefs, ritual, community laws, local language and animal breeds. Traditional knowledge is mainly of a practical nature, particularly in such fields as agriculture, fisheries, health, horticulture and forestry"

B. Definition of Folklor and Expression of Traditional Cultural

Folklore is a translation of Folklore in English derived from two words of Folk and Lore. Folk is the same as collective. According to Alan Dundes, folk is a group that has characteristics of physical, social and cultural identifiers, so it can be distinguished from other groups. While Lore means tradition. The definition of folklore as a whole is part of a collective culture, which is dispersed and passed down from generation to generation, between any collective, traditionally in different versions, in both verbal and gestational examples.

⁵Badan Peneliti dan Pengembangan HAM Kemenkumham, 2013, *Perlindungan Kekayaan Intelektual atas Pengetahuan Tradisional dan Ekspresi Budaya Tradisional Masyarakat Adat*, Alumni, Bandung. P. 22

Folklore is a translation of Foklore English derived from two words of Folk and Lore. Folk is the same as collective. According to Alan Dundes, folk is a group that has characteristics of physical, social and cultural identifiers, so that it can be distinguished from other groups⁶. While Lore means tradition. The definition of folklore as a whole is part of a collective culture, which is dispersed and passed down from generation to generation, between any collective, traditionally in different versions, in both verbal and gestational examples.

In the explanation of the definition of folklore above can be seen that folklore is a collective culture passed down from generation to generation traditionally and recognized as their own. Foklore is the work of traditional knowledge and traditional cultural expressions that include the arts or culture of the people. Prof. Edi Sedyawati once wrote although the word "traditional knowledge" is often distinguished by the term folklore, but in social science or culture lessons both are often considered synonymous. The term folklore is intended to narrow the scope of a traditional knowledge into the scope of art, literature and science.

The definition of folklore is mentioned in the Elucidation of Article 10 Paragraph (2) of Law Number 19 Year 2002 regarding Copyright, folklore is referred to as a collection of traditional creations, whether made by a group or individual in a society which shows its social and cultural identity based on standard and value - values spoken or followed for generations, including:

a. Folklore, folk poetry

⁶Elsa M Siburian, 2014, "Pengertian Dan Ciri-CiriFolklor" URL : <https://elshasiburian.wordpress.com/2014/03/05/ciri-ciri-folklor-danpengenal-utamanya>

b. Folk songs and traditional music instruments

c. Folk dances, traditional games

d. Art products include: paintings, drawings, carvings, sculptures, mosaics, jewelry, traditional crafts, clothing, musical instruments and traditional weaving

With the enactment of Law No. 28 of 2014 on Copyright as a new law that supersedes Law Number 19 Year 2002 on Copyright, the existence of works of traditional cultural expression is protected under the provisions of Article 38. In this Article there is no mention of the term folklore but explains about the notion of traditional cultural expression.

In the explanation of Article 38 paragraph (1) of Law Number 28 Year 2014 regarding Copyright is explained on matters that include Traditional Cultural Expression. What is meant by "traditional cultural expression" includes one or a combination of forms of expression as follows:

- a. Textual verbal, both oral and written, in the form of prose and poetry, in various themes and content of the message, which can be either literary or informative narrative;
- b. Music, including vocals, instrumental, or a combination thereof.
- c. Motion, including among other dances.
- d. Theater, including puppets and puppets;
- e. Art, both in the form of two dimensions and 3 dimensions made of various materials such as leather, wood, bamboo, metal, stone, ceramics, paper, textile and others or a combination thereof;
- f. Traditional ceremonies

C. Legal Protection of Traditional Knowledge

There are several reasons which underlie developing countries and development agencies requires the involvement of the international community in efforts to the development, maintenance, and protection of traditional knowledge⁷:

- (1) because the traditional knowledge plays an important role in economic and social life of a country. By recognizing and increasing the value contained in traditional knowledge will help strengthen the identity and improving its utilization to achieve the social and development objectives. In short, traditional knowledge has the potential to create economic development in many countries
- (2) developing countries and advanced countries implement international agreements that affect how traditional knowledge associated with genetic resources is protected and disseminated. thus with national interest they receive protection. Moreover, in the realm of intellectual property rights has occurred related to the scope of the development of the doctrine of intellectual property rights protection⁸.

One of the reasons for this development is the view that the rights concerning intellectual property will not be separated from the rights of human beings that are human, both personally and as an organized human unity.

In the interrelated relationship is then traditional knowledge or indigenous knowledge becomes a part to get the protection within the framework of the protection of intellectual property rights. Furthermore, in general, there are at least five main reasons why traditional knowledge should be protected :

⁷Sardjono Agus, 2006, *Pengetahuan Tradisional dan Kekayaan Hak Intelektual*, P.T Alumni, Bandung. P.93

⁸ Ibid. P. 95

- 1) Equity is fairness and justice if the owners of traditional knowledge utilized and commercialized it for revenue sharing or compensation that is both monetary and non-monetary.
- 2) Conservation Protection of traditional knowledge, means protection also for the maintenance of the environment, biodiversity, and sustainable agricultural practices.
- 3) Maintaining traditional practices and culture (preservation).The protection of traditional knowledge can be used to increase the value and public confidence both inside and outside the community on the values of traditional knowledge.
- 4) To prevent misuse by unauthorized parties or avoid bio-piracy.Protection of traditional knowledge is one way to reduce the practice of bio-piracy, while ensuring fairness and balanced manner between the owners and users of traditional knowledge.

According to MoniWekesa, to prevent the occurrence of acts misappropriation of traditional knowledge, there are at least three important things to note :

- a) First: the documentation of traditional knowledge carried out through the development of databases of traditional knowledge.
- b) Second: the obligation to include the requirements of the origin of the material to be applied for legal protection through intellectual property regime.

c) Third: the parties who will seek legal recognition through IPR regimes should be able to demonstrate evidence of approval of the use and disposition of property, as well as distribution of profits of the owners of traditional knowledge⁹

- 5) As the promotion of the use and importance of the development of traditional knowledge (promotion of its use). In addition to the protection of restricting access to traditional knowledge, the government must also have the goal to support the use of traditional knowledge itself and develop efforts aimed to prevent abuse.

Efforts to protect traditional knowledge in reality it is not as easy as the back your hand. One of them is due to the protection perspective of advanced countries tend to be different from the perspective of developing countries. They are thinking of how to achieve access to the traditional knowledge in order to create new products and get great benefits from the commercialization of products.

While the perspective of developing countries, especially those thinking about biodiversity and traditional knowledge are abundant, they are thinking about how to create a profit sharing mechanism that is fair and balanced on both utilization.

However, despite the differences in perspective between developed countries and developing countries, one thing that is agreed upon is that protecting biodiversity-related traditional knowledge is important and should be done by both, because the

⁹ArifLutviansori, 2010, *Hak Ciptadan Perlindungan Folklor di Indonesia*, Graha Ilmu, Yogyakarta. P.54

annihilation of both will result in the destruction of global cultural diversity, and this will automatically also result in the preservation and diversity¹⁰.

In addition, another reason why traditional knowledge should be preserved, developed and protected that is considering the outside of the group of advanced countries (LDCs / least developed countries), traditional knowledge is often used as an entrance to modern industries such as pharmaceuticals, agriculture, natural pesticides, and others. As for developing countries, the realization that the effective utilization of biological wealth and its traditional knowledge, traditional knowledge can be a stimulus for economic growth.

World of Intellectual Property Rights (WIPO) generally proposed two models of protection, namely:¹¹

(1) *defensive protection*, In the context of traditional knowledge, the terminology defensive protection refers to efforts aimed at preventing the provision of intellectual property rights over traditional knowledge or genetic resources associated with traditional knowledge by others without the knowledge and permission of the owners of traditional knowledge.

(2) *positive protection*, Defensive protection can be one effective policy to avoid providing intellectual property rights to the unauthorized parties. However, this does not automatically stop doing deeds missappropriation / biopiracy of

¹⁰*Ibid.* 59

¹¹Sardjono Agus, 2006, *Pengetahuan Tradisional dan Kekayaan Hak Intelektual*, P.T Alumni, Bandung. P.18

traditional. Needed the national law of supporting the implementation of this policy. However, positive law is the main mechanism in the effort to achieve the protection and distribution of profits (benefit sharing) for owners of traditional knowledge. Positive protection itself can be done in two forms of legal remedy, namely to make effective use of legislation related to intellectual property rights, or through the establishment of specific laws related to traditional knowledge (*sui generis law*)

D. The Concept of Traditional Knowledge as Intellectual Property Right

Intellectual Property Right is a regime that is totally different from the characteristics of traditional knowledge. Intellectual Property Right is an individualistic regime to monopolize technologies to protect the investment (capital). Intellectual Property Right can not be separated from the interests of the owners of capital. There is no research to achieve new invention that does not require a huge cost. Moreover, research in the fields of pharmaceuticals and biotechnology is currently a feature in Developed countries. Implementation of research results (in the form of patentable inventions) also need capital. Thus, between Intellectual Property Right with particular patents and modal is like two sides of the same coin. IPR protection is the protection for investors.

Although Traditional Knowledge is the result of human intellectual work, it does not mean that the concept is in line with the concept of the conventional intellectual property such as patents, trademarks, trade secrets, and copyrights. Bouckaert asserts that

the term intellectual property was developed by legal scholars, as a species of property terms. In this context the property right is a right that contains economic value, and is part of the right material. However, it should be noted that Intellectual Property Right (IPR) as the material right here arises not in the context of the Continental European legal tradition, but rather due to the intervention of political power. This can be evidenced by the absence of the concept of IPR in the BurgerlijkWetboek (BW) long. The absence of the concept of IPR in BW can be interpreted that the continental European legal tradition (at least at the time of the formation of the BW) is not yet understood if IPR does not appear as the examples mentioned in the BW regarding the kind of disembodied material (right).

Regarding the intellectual property right is meant, for example is the Patent. Is this right attached to the object of production of the invention in question (zakelijkrecht), or the right to sue others based on relationships that are personal (personal recht) as a result of a contract? The answer turns out to be not both. Then people can ask for more if that means that IPR is protected by the human mind or Idea. to answer to this question can be seen in the legislation concerned.

In the law of copyright, what is protected as copyright is not their creation but rather the expression of an idea that has been set out in a particular form, such as books, movies recorded video, photography, etc., in the legislation brand, what is protected is a sign that can be in the form of pictures, words, letters, numbers, color composition and not the idea to make a mark in question. In patent law what is protected are claims on inventions, and not the mind that produced the discovery. Thus, it becomes clear that the IPR does not protect ideas, but rather an expression of the mind. What is protected by IPR is the

economic importance of the results of the human mind, and not the form of the object (such as medicines, herbs, books, cassette, image, etc.) nor creation (knowledge make medicine or herbal medicine, knowledge of writing the book, the idea of composing , etc.).

Protected by IPR is the economic importance of the creation of man-made composition of herbs or drugs, the economic interests of the songs that have been created, economic importance of the ideas outlined in the books, and so on. In other words, property (wealth) is referred to in the word intellectual property (wealth intellectual) is the economic importance of the ideas of the human individual, and not a thing (goods or rights) as mentioned in the Book of the Law of Civil Law (traditions of law European continental) , However, it should be understood that although the property in intellectual property is not the goods or rights referred to in the book of the Law of Civil Law, it remains an object of ownership because it was in the past Intellectual property rights also called Intellectual Property Rights. Which is owned by its creator is the economic interest (possession of the economic interest) on the results of their works, either in the form of songs, books, medicines, drawings, designs, and so on. A buyer of books, may use his book, may borrow it to someone else, may resell the book, and may even destroy it. However, he should not copy and resell the results of its duplication. Rights to reproduce and sell the results remain the property of a publisher or author. This is economic interests which are protected by intellectual property rights institutions

E. Traditional Knowledge as National Identity¹².

¹²Miranda, Harry, 2013, *Hukum sumberdaya genetic, Pengetahuan Traditional danExpresiBudayaTradisional Di Indonesia*, Alumni, Bandung. P.27-28

Basically, the 1945 Constitution and all of its amendment has put the legal basis to protect Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions maximally. Unfortunately, in the middle of 2012, none of one sui generis protection exists. The House of Representative Council is processing some Draft on this protection, i.e. Draft on the Utilization Genetic Resources and Draft on Traditional Knowledge and Traditional Cultural Expressions.

There are also some related draft which need to be processed and it needs harmonization of material with other bills i.e. Draft on Culture and Draft on Indigenous People. The most important thing is the policy made by the Ministry of Health of the Republic of Indonesia. Ministry of Health of the Republic of Indonesia has arranged the implementation of a regulation that is related to the Material Transfer Agreement/MTA, especially to transfer the virus.

The unity concept in Indonesia was set in the third *Sila* in the Pancasila. It was the main source of written law in Indonesia since 1945 (The 1945 Constitution). This *Sila* also becomes the ideology for Indonesia to be united, whether genealogically or territorially. Based on this *Sila*, law of politics in the context of national culture is the politics of “Unity in Diversity”. This concept is inspiring the existence of Section 32 of 1945 Constitution. Since the 1945 Constitution was implemented, Section 32 of 1945 Constitution has become “Chapter of the National Culture” because it concerns on the importance of improving the national identity through national culture.

Theoretically, Traditional Knowledge and Traditional Cultural Expressions are part of national identity. It is because all of things related to Traditional Knowledge and

Traditional Cultural Expressions that are growing in Indonesia are living in Indonesia. But it was not easy to be applied because of some reasons, as follows:

1. Traditional Knowledge and Traditional Cultural Expressions are not originally from Indonesia. They came from the customs of other nations which have relation with Indonesia in the past, such as India, Persia, China, European States, Japan and Southeast Asian States.
2. Traditional Identity from every society and local community in Indonesia has had a specific shape which was well-know for more than 460 years, while the age of Indonesia is 71 years old.

F. Basic Law of Traditional Knowledge on Expression of Traditional Cultural

a. Law Number 28 of 2014 on Copy Right

Law of the Republic of Indonesia Number 28 of 2014 on Copyrights famous as the Copyright Laws of the most friendly to the Protection of Traditional Cultural Expressions¹³

Article 38 Paragraph (1), (2), (3), and (4) :

1. Copyright on traditional cultural expressions held by the State
2. The State shall inventory, maintain, and preserve traditional cultural expressions as Referred to in paragraph (1).

¹³Undang-Undang nomor 28 tahun 2014 tentang Hak Cipta

3. The use of traditional cultural expressions as Referred to in paragraph (1) must Consider the values that live in the community owners.

Article 39 paragraph (1), (2) and (3) of Law No. 28 of 2014 on copyright set the rulers of the State on the creation Whose authors are unknown are as follows:

1. In the case of the creation of an unknown creator and the creation of an announcement has not been made, the copyright in the creation is held by the State for the benefit of the creator.
2. In the case of creation has made the announcement but it is not known creators, or just listed the name or the pseudonym of the creator, the copyright in the creation is held by the party conducting the announcement on behalf of creators.
3. In the case of creation has been issued but the creator is unknowand Reviews those who have done the announcement, the copyright in the creation held by the State for the benefit of the creator.

Some Traditional Cultural Expressions for tangible objects are also protected in article 40 of Law No. 28 of 2014 on copyright, which includes details of various types of creations protected. These objects are all forms of knowledge, art and literature, which also includes the performing arts of puppetry, batik art, along with works of transfer proceeds form.

Bern Convention for the Protection of literary and Artistic Works or Berne Convention for the Protection of Literary and Artistic Works has become Indonesian national law by Presidential Decree No. 18 of 1997. In addition to the content that protect various types of literature and art in general, it is important to

noted in this Convention is the existence of Article 6 Bis Paragraph (1), (2) and (3) of the Moral Rights.

Berne Convention Article 6 Bis Says:

1. Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.
 2. The right granted to the author in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or the institution authorized by the legislation of the country where protection is claimed. However, in those countries whose legislation, at the moment of their ratification of or accession to this Act, does not provide for the protection after the death of the author of all the rights set out in the preceding paragraph, that country may provide that some of these rights may, after his death, cease to be maintained.
 3. The means of a redress for safeguarding the rights granted by this article shall be governed by the legislation of the country where protection is claimed
- b. Precedential Regulation Number 78 of 2007 about Ratification of Convention for The Safeguarding on The Intangible Cultural

As described before, the objects of Traditional Cultural Expressions basically coincides with the object of the Intangible Cultural Heritage. In a number of provisions of this Convention, the most important provisions to protect

Traditional Cultural Expressions as an intangible cultural heritage is Article 1 Paragraph (3) of the Convention, which states that:

Safeguarding” Means measure aimed at ensuring the viability of the intangible cultural heritage, including the identification, documentation, transmission, particularly through formal and non formal education, as well as the revitalization of the various aspects of such heritage.

b. Law Number 11 year 2010 on CagarBudaya (*tangible*)

Refers to the Draft of Law on Traditional Knowledge and Traditional Cultural Expressions Article 1, paragraph 2 explained that the scope of Traditional Cultural Expressions includes Expression of Material.

Law No. 11 of 2010 on cultural heritage of Article 2, the Heritage object man-made, movable or immovable in the form of a unit or group, or parts or remains, aged at least 50 (fifty) years or represent the distinctive style and represents the force of at least 50 (fifty) years, and is considered to have significant value for the history, science, and culture then the natural objects are considered to have significant value for the history, science, and culture

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Preservation of cultural heritage (CagarBudaya) is essential based on the properties owned by the cultural heritage (CagarBudaya) objects and in

accordance with the mandate of the Act No. 11 of 2010 which states that the objects of cultural heritage (CagarBudaya) is a cultural richness that is important to the understanding and development of history, science, and culture, so it needs to be protected and preserved for fertilization and awareness of the nation's identity and national interests.

Since the fall of the Government Regulation No. 25 Year 2000 regarding Government Authority and Provincial Authority as Autonomous Region, Government Regulation No. 10 of 1993 on the implementation of Law No. 5 of 1992 on Objects of Cultural irrelevant. Cultural heritage preservation has become the authority of the provincial government that had been done by the central government. Protection of Cultural Heritage can also be found at the Jakarta Regional Regulation No. 9 of 1999 on Conservation and Utilization of Environment and Heritage

G. Basic Law of Traditional Knowledge on Genetic Resources in National Law

1. 1945 Constitution

Based on Article 18 B and paragraph (2) of the Constitution 1945, the State recognizes the existence of customary law, along with their rights and traditional. This recognition was based on a few caveats: First, as long as they live. Secondly, in accordance with the development of society and the principle of the unitary state of the Republic of Indonesia. And, third, regulated by law. In line with this, the first paragraph of Article 28 (3) of

the Constitution of 1945 affirms that cultural identity and the rights of traditional communities are to be respected in line with the times and civilization.

2. Law No. 5 of 1960 on the Basic Regulation of Agrarian (UUPA)

This legislation reaffirms the State's sovereignty and control over natural resources are set out in article 33 paragraph (3) of the 1945 Constitution . Article 3 also stipulates that the implementation of customary rights and similar rights that are owned by communities of indigenous law is recognized throughout in accordance with national and State interests. In addition, Article 5 also stated that the agrarian law applies to the earth, water and air space is customary law, this does not contradict national interests and other legislation. Thus, these arrangements acknowledge directly that the Traditional Knowledge in management Genetic Resources by Indigenous law remains in force and respected.

3. Law No. 5 of 1990 on Conservation of Natural Resources and Ecosystems.

These laws regulate the conservation of the Natural Resources and ecosystems to seek the realization of conservation of the Natural Resources as well as the balance of its ecosystem through protection of life support systems, preservation of diversity of plants and animals and their ecosystems, and sustainable use of these resources. Material setting of this Act is one of the main guidelines in formulating regulation policies related to Traditional Knowledge of Genetic Resources.

4. Law No. 5 of 1994 on Ratification of the UN Convention on Biological Diversity (UNESCO)

Finally, in 1992 successfully agreed on the Convention on Biological Diversity by the United Nations Convention, in principle aims to regulate the conservation of biodiversity, sustainable use of biodiversity components, and sharing of benefits arising from the utilization of genetic resources fairly and equitably. Convention on Biological diversity is the international treaties that are binding upon the participants of the agreement. Indonesia has signed and ratified the Convention through Law No. 5 of 1994.

Based on this Convention, the Nagoya Protocol was born. The Nagoya Protocol is an international environmental agreement that the implementation of the Convention on Biological Diversity is to bind the parties in terms of accessing the settings on Genetic Resources and Traditional Knowledge Related to Genetic Resources, as well as equitable sharing of benefits and equitable arising from the consumer.

5. Act No. 39 of 1999 on Human Rights

Law No. 39 of 1999 became the basis of the main considerations in the development policies of Traditional Knowledge associated with Genetic Resources. Article 6 of this Act provides that the enforcement of Human Rights (HAM), differences and needs of their communities' customary law must be observed and protected by law, society, and government. In addition, the cultural identity of Indigenous People, including katas ha of communal land is also protected in tune with the times.

H. Traditional Knowledge in International Law

Traditional knowledge in the international community has been hotly debated. Until now, the World Intellectual Property Organization (WIPO) discussions about the proper protection of traditional knowledge is still debated. International regulations are not yet adequate to protect traditional knowledge. It takes a sui-generis arrangements so that the protection of traditional knowledge can be maximized, there are several sources of international law, which until now is used as a source of law international, to accommodate the protection of traditional knowledge, among others :

1. United Nation's Convention on Biological Diversity (CBD)

Convention on Biological Diversity (CBD) was agreed in Rio de Janeiro, Brazil in the United Nations Conference on Environment and Development (UNCED) in June 1992. This Convention has been ratified by most countries in the world which reaffirms the sovereignty of States over the natural resources that exist in its territory. This convention became the first environmental multilateral agreements explicitly linking biodiversity conservation and sustainable development. This is reflected in the objectives of biodiversity convention, namely : (1) The conservation of biological diversity, (2) The sustainable use of its components, and (3) The fair and equitable sharing of the benefits arising out of the utilization of Genetic Resources.

CBD is an International agreement is important in the promotion of biodiversity. This Convention sets out basic principles about the way and the purpose of utilization and conservation of biological resources. The Convention creates a principle on its territory, including the natural resources therein. Before codified in the CBD, in general, this principle affirmed in the constitution of each country regarding the rights of the State authorities on the natural resources in its territory.

The regulation of the sovereign rights over natural resources is formulated in the provisions of Article 3 of the CBD. Under its terms, it is affirmed that each State has the sovereign right to exploit its resources (own resources) according to their own environmental policies in a responsible manner that ensures to not cause damage to the environment.

Associated with the recognition of traditional knowledge as a local community rights, Article 8 (j) CBD covers a broad understanding of the responsibility of the State to protect its existence. Based on the article, stated regarding the knowledge, innovations and practices of indigenous peoples and the relationship between the public knowledge to the conservation and sustainable use of biological resources. In this spirit, it is expected that the national government not only recognizes the rights, but also provides a mechanism for exercising the right of participation so that people can benefit from the commercialization of their resources. In international forums, article 8 (j) CBD

have marked the development of the discourse of the rights of indigenous peoples.

Article 15 of the CBD, describes the mechanisms of access to genetic resources, including increased transparency in the patent application process, namely the delivery of information about the origins of the present invention. In paragraph (1), it is confirmed that the State has the authority to determine access to genetic resources based on the sovereignty of the State over its territory and natural resources contained therein. Pursuant to paragraph (4), it is possible to regulate access to Genetic Resources based on a mutually agreed agreement.

2. Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable sharing of Benefit arising from their Utilization to the Convention on Biological Diversity (CBD)¹⁴

Nagoya Protocol 2010 on Access to Biological Resources and Benefit Sharing Fair and Equitable on Utilization. The protocol provides protection of traditional knowledge associated with Genetic Resources. Article 3 of the Protocol clearly states that:

¹⁴BadanPenelitiandanPengembangan HAM Kemenkumham, 2013, *PerlindunganKekayaanIntelektualatasPengetahuanTradisionaldanEkspresiBudayaTradisionalMasyarakatAdat*, Alumni, Bandung. P. 145

“This Protocol shall apply to genetic resources within the scope of Article 15 of the Convention and to the benefits arising from the utilization of such resources. This Protocol shall also apply to traditional knowledge associated with genetic resources within the scope of the Convention and to the benefits arising from the utilization of such knowledge.”

Rights of the community as the owners of traditional knowledge in general have been accommodated in various international conventions.

