



Protecting Indonesia's Communal Intellectual Property Rights: A TWAIL Perspective

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Abstract

The Third World Approach to International Law (TWAIL) emerges as a critical perspective on the current international legal system, providing a robust framework to aid Indonesia in safeguarding its communal intellectual property rights. This research seeks to emphasize the urgency of adopting TWAIL and elucidates how its application can play a pivotal role in advancing both economic prosperity and social identity in Indonesia. Positioned within a normative juridical framework, this study delves into the TWAIL perspective and its relevance to the protection of Communal Intellectual Property Rights (CIPR). It demonstrates how embracing the TWAIL approach for communal intellectual property rights can establish a legal framework that is more just, inclusive, and respectful of the rights of indigenous communities. By securing strong legal protections at both international and national levels, communities gain the ability to manage their traditional knowledge for commercial use, identifying potential global markets. Consequently, this approach fosters improvement and underscores the potential positive impacts on economic development, particularly in expanding markets and accessing goods.

Keywords: communal intellectual property rights; international law; third world approach to international law (TWAIL)



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Abstrak

The Third World Approach to International Law (TWAIL) muncul sebagai perspektif kritis terhadap sistem hukum internasional saat ini, dan pendekatan ini memiliki kerangka kerja yang bagus untuk membantu Indonesia dalam melindungi hak kekayaan intelektual komunalnya. Penelitian ini bertujuan untuk memaparkan urgensi TWAIL dan bagaimana penggunaan TWAIL untuk melindungi hak kekayaan intelektual komunal di Indonesia memainkan peran penting dalam memajukan identitas ekonomi dan sosial. Dengan menggunakan kerangka yuridis normatif, penelitian ini menggali kerangka TWAIL dan penerapannya dalam perlindungan CIPR. Hasil penelitian menunjukkan bahwa penerapan pendekatan TWAIL terhadap hak kekayaan intelektual komunal dapat menciptakan kerangka hukum yang lebih adil, inklusif, dan menghormati hak-hak masyarakat adat. Dengan perlindungan hukum yang kuat di tingkat internasional dan nasional, masyarakat dapat mengelola pengetahuan tradisional mereka sedemikian rupa sehingga memungkinkan untuk digunakan secara komersial dengan mengidentifikasi pasar global yang potensial. Oleh karena itu, hal ini dapat membawa perbaikan dan menekankan potensi dampak positif terhadap pembangunan ekonomi, terutama dalam perluasan pasar dan akses barang.

Kata Kunci: hukum internasional; kekayaan intelektual komunal; third world approach to international law (TWAIL)

A. Introduction

The Protection of Intellectual Property Rights (IPR) is an important issue in the current global context. IPR includes rights granted to creators or holders of intellectual property rights to protect their works, such as copyrights, patents,

trademarks, industrial designs, and so on.¹ However, the existing IPR system is often criticized for providing disproportionate benefits to countries in the Third World or developing countries. In the current global IPR system, superpowers or developed countries have great advantages compared to countries in the Third World. This is related to the history of colonialism, economic domination and unfair trade policies. Countries in the Third World are often the object of intellectual exploitation by developed countries, which results in inequality in the recognition and protection of intellectual property rights.

Intellectual property rights not only recognize individual intellectual property rights but also the existence of communal intellectual property rights. Individual intellectual rights are things that are given to rights holders or legal entities and provide material benefits. Meanwhile, communal intellectual property rights are rights owned by indigenous communities or regional communities.² Communal intellectual property rights can be in the form of Traditional Cultural Expressions (TCE), Traditional Knowledge (TK),

¹ Sumeet Handa dan Kishor Bhatt. Intellectual Property Rights (IPR) in Digital Environment: An Overview In Indian Digital Environment. *International Journal of Digital Library Services*. Vol. 5. Issue 2. 2015. p. 118. Diakses dari http://www.ijodls.in/uploads/3/6/0/3/3603729/vol-5_issue-2.117-123.pdf pada 04/06/2023.

² Rahma Fitri, et.al. Hak Kekayaan Intelektual. Padang: PT. Global Eksekutif Teknologi. 2022. p. 3.

Genetic Resources (GR) and Potential Geographical Indications.³

The recognition of intellectual property rights is also regulated in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement). The TRIPS Agreement regulates IPR in the context of international trade. The TRIPS Agreement has the main objective of creating consistent minimum standards for IPR protection across all WTO member countries, as well as to promote and protect innovation and creativity in the fields of economics and trade. This agreement regulates various aspects of IPR, including copyright, trademarks, patents, trade secrets, industrial designs, and plant variety protection.⁴

Under international law, the recognition and protection of Communal Intellectual Property Rights (CIPR) are still complex and controversial issues. At the international level, several legal instruments have been developed to recognize and protect CIPR. For example, the United Nations Declaration on the Rights of Indigenous Peoples recognizes the collective intellectual rights of indigenous peoples, including the right to control, protect and defend their knowledge, practices and cultural heritage.⁵ In addition, the UNESCO Convention on

³ Mario Cimoli, et.al., *Intellectual Property Rights Legal and Economic Challenges for Development*. Oxford University Press. 2014. p. 1.

⁴ *Ibid.*

⁵ Rahma Fitri, et.al. *op.cit.* p. 4.

Cultural Diversity (UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions) also recognizes the importance of protecting and promoting the diversity of cultural expressions, including communal intellectual forms. This Convention provides a legal framework to protect and promote cultural diversity at national and international levels.

However, despite the efforts to recognize and protect IPRs in international law, there are still challenges that need to be overcome. CIPR is not yet widely recognized as an independent form of intellectual property rights within the international legal framework. This can reduce the level of protection provided and make it difficult to recognize and restore communal rights. In addition, the TRIPS Agreement has attracted controversy and criticism because it is considered to provide disproportionate benefits to advanced industrial countries and multinational companies, while ignoring intellectual property owned communally by indigenous peoples, ethnic groups or local communities.

In this context, the Third World Approach to International Law (TWAIL) approach emerges as a critical perspective on the current international legal system. TWAIL was developed by legal scholars from countries in the Third World with the aim of analyzing and studying relations

between superpowers and countries in the Third World in the context of social, economic and political justice.⁶

TWAIL highlights the structural injustices that exist in the international legal system, where countries in the Third World are often victims of policies and practices dominated by developed countries. In the context of IPR protection, the TWAIL approach emphasizes the importance of overcoming inequality and ensuring fair protection of communal intellectual property rights in countries in the Third World.

The TWAIL approach offers an alternative perspective to the existing IPR system, with a focus on human rights, social justice, local community interests, and sustainable development. TWAIL emphasizes the need to recognize and respect traditional knowledge, local knowledge and long-standing communal practices in countries in the Third World. This means involving local communities in decision-making regarding intellectual property rights related to their cultural heritage and traditional knowledge.

The TWAIL approach also emphasizes the importance of overcoming the asymmetry between great powers and countries in the Third World in terms of IPR protection. Countries in the Third World must be empowered and

⁶ Kwadwo Appiagyei-Atua. Ethical Dimensions of Third-World Approaches to International Law (TWAIL): A Critical Review. *African Journal of Legal Studies*. 8(3-4). 209-235. 2015.

encouraged to have a more active role in formulating CIPR policies that support their own interests.

Based on this, this research will further discuss about; (1) how the application of TWAIL approach in protecting communal intellectual property rights works, and (2) the urgency of implementing this approach in Indonesia's framework to protect CIPR.

B. Discussion

1. The Application of TWAIL's Approach in Protecting Communal Intellectual Property Rights

The Third World Approach to International Law (TWAIL) is a movement of scholars and practitioners of international law and policy who are concerned with issues related to the Global South in its broad conception. TWAIL emerged as a theory and methodology for analyzing and challenging international law and its institutions.⁷ One of the reasons for the increase in TWAIL studies is that Third World people are becoming concerned about the dynamics of power relations between states, and that "any proposed international rule or institution would hardly the distribution of power between states and peoples". For instance, the Third World nation-states are increasingly unable to effectively govern their economies,

⁷ Obiora Chinedu Okafor. Critical I Third World Approaches to International Law (To International Law (TWAIL): Theory, Methodology, or Both?, *International Community Law Review*. *Volume 10*. 2008. p. 371-378.

populations or territories, while transnational actors such as the World Trade Organization (WTO) or global financial markets are radically changing the accepted meaning of authority or effectiveness.⁸ TWAIL's goal is therefore to deconstruct and reveal transformative and regressive international law. This can be achieved by paying attention to the interests of the Global South and developing a narrative grounded in colonial history, power, identities, and concerns of Third World countries.⁹

TWAIL is a political and intellectual movement that emerged in the 1990s as a response to injustices in the global order and the domination of the Third World by the industrialized West. The movement is largely inspired by the Latin American resistance to North-South confrontation and has roots in the anti-colonial movement. TWAIL was born at the Bandung Conference in 1955, which brought together leaders from newly independent Asian and African countries to discuss issues of common concern. TWAIL was a response to decolonization and the end of direct European colonial rule over non-European peoples. The aim of TWAIL is to dismantle and deconstruct the colonial legacy of international law, and

⁸ R. Falk, R. Rajagopal, B., & Stevens, J. *International Law and the Third World: Reshaping Justice* (1st ed.). Routledge-Cavendish, (2008), p. 2.

⁹ Luis Eslava and Pahuja, Sundhya. Beyond the (Post)Colonial: TWAIL and the Everyday Life of International Law. *Journal of Law and Politics in Africa, Asia and Latin America - Verfassung und Recht in Übersee (VRÜ)*, Vol. 45(2). 2012. pp. 195-221.

to engage in efforts to support the decolonization of the reality of people in the Global South and carry out a radical transformation of the international legal order that is related to their lives.

The TWAIL study is not limited to one issue related to the Global South. This study has progressed in various stages and has defended several issues related to the Global South. This is due to the term "Third World", which varies and continues to evolve because the "Third World" consists of several countries and their interests.¹⁰ One of TWAIL's studies, namely studies on the protection of communal property rights, TWAIL provides a critical lens to examine how the international legal regime, including intellectual property law, can have a disproportionate impact on people in the Global South. TWAIL scholars highlight the importance of recognizing and protecting communal property rights as a means of addressing historical injustices and promoting social and economic justice.

TWAIL emphasizes the importance of communal property rights as a form of collective ownership and management of resources, knowledge and cultural heritage. In the context of intellectual property, TWAIL scholars argue for an inclusive approach that takes into account the rights of indigenous peoples, local communities, and marginalized

¹⁰ Mohsen A. Attar, TWAIL: A Paradox within a Paradox, *International Community Law Review*, Volume 22 Issue 2, (2020).

groups, whose traditional knowledge and cultural expressions are often exploited without adequate recognition or benefit sharing.

TWAIL scholars criticize dominant intellectual property regimes, which are often rooted in individualistic notions of profit-driven ownership and incentives. They debate alternative approaches that prioritize the collective rights and interests of communities, such as recognizing customary laws and practices, encouraging community participation in decision-making processes, and ensuring equitable access to and sharing of benefits from communal resources and knowledge.

TWAIL's involvement with communal property is in line with his wider criticism of the asymmetries and imbalances of power in international law. It calls for a more inclusive and equitable approach that addresses the historical legacies of colonialism, imperialism and global inequality, and seeks to empower communities in the Global South to assert their rights and interests within the framework of international law. TWAIL has diverse and evolving perspectives, and different scholars within the TWAIL movement may have different views on certain issues, including communal property rights.

a. The Protection of Communal Intellectual Property Rights under International Law

The concept of communal intellectual property rights (IPR) refers to forms of intellectual property rights that are collectively owned by certain groups of people or communities,¹¹ not exclusively individuals. The protection of IPR in international law is necessary because the development of international trade and the existence of free trade movements have resulted in an increasing need for IPR which is no longer reciprocal in nature but is already global in nature between countries. Moreover, protecting IPR is considered as a necessary element for the transition of developing nations to advanced industrial economies.¹²

At the beginning of the 19th century, the development of IP arrangements began to cross national borders, which began with the Paris Convention for the Protection of Industrial Property or the so-called Paris Convention in 1883 which was an international agreement regarding the protection of industrial property rights. Then in 1986 a convention was formed for protection in the field of copyright known as the International Convention for the Protection of Literary and Artistic Works (Bern Convention). Followed by the formation of the WTO, which was then at the insistence of America, TRIP's was formed as a new trading system that aims to

¹¹ Enninya S. Nwauche. The Emerging Right to Communal Intellectual Property. *19 Marq. Intellectual Property L. Rev.* 221. 2015. p. 225.

¹² William R. Slomanson. *Fundamental Perspectives on International Law*. Thomson Wadsworth, 6th ed. 2010. p. 725.

protect and enforce IP law in order to encourage innovation, transfer and dissemination of technology, obtaining mutual benefits between creators and users of technological knowledge, in ways that can creating socio-economic welfare as well as a balance between rights and obligations.

The TRIPS Agreement is an international agreement governing intellectual property rights in general. Although it does not specifically regulate communal intellectual property rights, TRIPS provides flexibility for member states to adopt protective measures according to their needs, including in the context of collective or traditional intellectual property.

Overall, there is sustainability between the standards contained in TRIPs and previous IP systems that were formed over a period of time through domestic processes. There is a continuing domestic impetus for the development and implementation of IP protection systems. Viewed from a policy perspective, IP is not recognized and protected solely for the sake of IP itself, or only as an indirect response to an international obligation, but rather as an integral element of the legal and trade infrastructure needed in order to increase investment and trade. more profitable. Thus, the protection of IP that is currently developing is more in favor of developed countries which place more emphasis on individual interests. This is contrary to the "atmosphere of thought" of people in developing countries who are more familiar with the

protection of IP which always strives not to reduce the interests of society.

The TRIPS Agreement has drawn controversy and criticism because it is considered to provide unequal benefits to advanced industrial countries and multinational companies, while ignoring intellectual property owned communally by indigenous peoples, ethnic groups or local communities.

b. The Recognition of Communal Intellectual Property Rights

The recognition of Communal Intellectual Property begins with recognition of Traditional Knowledge as part of human rights in line with the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). In the UN Declaration on the Rights of Indigenous Peoples, the recognition and protection of traditional knowledge is based on Articles 11 and 31. Article 11(1) of the UNDRIP regulates the rights of indigenous peoples to carry out and restore their cultural and customary traditions. In the UN Declaration on the Rights of Indigenous Peoples, the recognition and protection of Traditional Knowledge is based on Articles 11 and 31. Article 11(1) of the UNDRIP regulates the rights of indigenous peoples to carry out and restore their cultural and customary traditions. The demand for protection of traditional knowledge arose with the signing of the Convention on Biological Diversity (CBD) in 1992. Since then, various world meetings have been held,

especially in the context of the World Intellectual Property Organization (WIPO), which continue to be held to formulate how an appropriate protection system should be implemented for traditional knowledge and other communal intellectual property.¹³

Meanwhile, Article 31(1) states that: Indigenous peoples have the right to defend, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their science, technology and culture, including human resources and genetics, seeds, medicines, knowledge about the nature of fauna and flora, oral traditions, literature, design, sports and traditional games, as well as visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge and traditional cultural expressions.

Recognition of collective rights as human rights provides benefits for groups that protect and preserve cultural heritage. These collective rights ensure that each individual has the right to access culture and participate in cultural activities based on personal affinity as a member of a particular community group. The cultural identity and rights

¹³ Agus Sardjono, *Hak Kekayaan Intelektual & Pengetahuan Tradisional*, Bandung, Alumni, 2010.

of indigenous peoples are respected according to the times and civilizations.

Communal Intellectual Property (CIP) is knowledge from a community, society, or ethnicity that has been passed down from generation to generation and will always develop according to changes. This shows that KIK is owned by a community group that has been passed down from generation to generation. In other words, CIP is created, maintained, used and protected, and usually refers to a system of customary knowledge that has been accumulated in a community through a long process of experience in a particular location so that this traditional knowledge becomes a form of identity within a community.

This understanding of CIP as part of the inheritance from the ancestors which must be maintained with a sense of shared ownership by the custodians does not contain an element of monopoly as is the case in the concept of Individual IP which is more conventionally known today. When Westerners discover knowledge about traditional medicine, for example, they then take and use that knowledge for their own benefit through intellectual property rights claims. In this context, there is a deviation from the use of CIP from the initial concept as savings from ancestors that are guarded and jointly owned by caretakers to become owners of individual IP. The IP legal system allows someone to use (seize) CIP for

commercial purposes without sharing economic benefits with indigenous peoples who have relevant knowledge. So there is a need for strict protection regarding this CIP.

c. Using TWAIL Approach to Protect CIPR

The Third World Approach to International Law (TWAIL) is a political and intellectual movement that opposes injustice in the global order and seeks to eliminate or reduce any harm or injury that may be experienced by the Third World as a result of injustice in the international legal, political and economic order.¹⁴ TWAIL has three basic objectives that are interrelated and directed. First, TWAIL aims to understand, deconstruct, and reveal the use of international law as a tool used to create and maintain racial hierarchies in international norms and institutions that restrict non-Europeans to Europeans. Second, TWAIL seeks to establish and create alternative normative legal frameworks for international governance.¹⁵ This approach aims to create a more inclusive and equitable legal system that reflects the interests and perspectives of countries in the Global South and local communities. Finally, TWAIL seeks through research, policy, and politics to overcome the underdevelopment experienced by countries in

¹⁴ Larisa Namina. "TWAIL Third World Approaches to International Law" and Human Rights: Some Considerations. *Journal of Constitutional Research*, Universidade Federal do Parana. Vol. 5 No. 1. p. 261-272. 2018.

¹⁵ Endalew Lijalem Enyew. Sailing with TWAIL: A Historical Inquiry into Third World Perspectives on the Law of the Sea. *Chinese Journal of International Law*. Vol. 21 Issue 3, p. 439-497. 2022.

the Third World. TWAIL wants to change global structures and dynamics that provide unequal benefits to countries and communities in the Global South, and aims to achieve greater social and economic justice.¹⁶

The TWAIL approach criticizes the view of international law which is dominated by Western countries and fights for the interests of countries in the third world.¹⁷ TWAIL resolutely opposes the practices of colonialism and imperialism, and emphasizes the importance of fighting for the rights of indigenous peoples and local communities. This approach sees international law as an instrument to fight for justice and equality, not to maintain the dominance of Western countries.

The application of the TWAIL approach in the protection of communal intellectual property rights is very important to legally recognize and record traditional intellectual property, traditional cultural expressions, genetic resources, and potential geographical indications or known as Communal Intellectual Property (CIP). Communal Intellectual Property

¹⁶ Makau Mutua, What is TWAIL? American Society of International Law Proceedings, Washington, vol. 94, 31-38, (2000). Available at <https://www.cambridge.org/core/journals/proceedings-of-the-asil-annual-meeting/article/abs/what-is-twail/F6186DDA7E7CBFB50CC61A2D7836C5F0#article-tab> on 14/06/2023.

¹⁷ Hend Youssef Abdel Rahman Hosny, Intellectual property rights and pharmaceuticals: The impact of the intellectual property rights regime on the access to medicine in developing states. 2017. American University in Cairo, Master's Thesis. AUC Knowledge Fountain. <https://fount.aucegypt.edu/etds/639>.

(CIP) is intellectual property owned by the general public that is communal. CIP is a valuable asset that can advance a nation's economy, which includes traditional knowledge, traditional cultural expressions, genetic resources, and potential geographical indications.

Communal intellectual property rights are not specifically regulated in international law. International law is more focused on protecting the intellectual property rights of individuals or companies. The concept of communal intellectual property rights refers to the recognition and protection of the collective rights of indigenous peoples or local communities to their collectively owned traditional knowledge, cultural heritage and natural resources. However, several attempts have been made to pay attention to and recognize the importance of communal intellectual property rights in the context of international law. For example, the United Nations has adopted a Declaration on the Rights of Indigenous Peoples which recognizes the collective rights of indigenous peoples to their traditional knowledge. In addition, several international agreements such as the Convention on Biological Diversity also contain provisions that seek to protect and promote the traditional knowledge of indigenous peoples regarding living resources.

TWAIL emphasizes the importance of fighting for the rights of indigenous peoples and local communities, and sees international law as an instrument to achieve this goal.¹⁸ Countries around the world must pay attention to the protection of communal intellectual property rights to ensure that indigenous peoples and local communities can maintain their rights to their traditional knowledge and cultural expressions. This approach also emphasizes the importance of paying attention to the perspectives of developing countries in the development of international law. In this case, developing countries can play an important role in determining the direction of international legal policies that are more just and equitable. In addition, this approach is important for the recognition of knowledge, practices and intellectual property generated by local communities. In the context of communal intellectual property rights, this means recognizing that knowledge and practices developed by local communities are a valuable form of intellectual property and must be protected. The application of the TWAIL Approach to the protection of communal intellectual property rights

¹⁸ Valerie Phillips. Indigenous Rights, Traditional Knowledge, and Access to Genetic Resources - New Participants in Future International Law Making. *American Society of International Law*. Vol. 101. 2007. p. 319.

involves an approach centered on justice, recognition and empowerment of local communities.

Applying the TWAIL approach to the protection of communal intellectual property rights can provide a useful framework for considering equity issues in the context of local communities with unique knowledge and cultural heritage. Protecting communal intellectual property rights with the TWAIL approach will involve several steps. First, countries in the third world must fight for the rights of indigenous peoples and local communities in international forums, such as the World Trade Organization (WTO) and the World Intellectual Property Organization (WIPO). Second, countries in the third world should adopt national laws protecting communal intellectual property rights. This law should ensure that indigenous groups and local communities have rights to their knowledge and wealth, as well as the right to receive fair compensation for the use of their knowledge and wealth. Third, countries in the third world must fight for the rights of indigenous peoples and local communities in the context of international trade. They must fight for their right to control their knowledge and wealth, and their right to benefit from their knowledge and wealth.¹⁹

¹⁹ Rashwet Shrinkp. Evolution of Indigenous Rights Under International Law: Analysis from TWAIL Perspective. *The Oriental Anthropologist*. Volume 19 Issue 1 7–24. 2019.

The application of TWAIL in the protection of communal intellectual property rights is as follows:

1. Recognition of communal intellectual property. The TWAIL approach encourages recognition of the knowledge, traditions, innovations and practices developed by local communities as appropriate forms of intellectual property. This involves recognizing and respecting the knowledge and practices acquired by local people over many years and making them part of the cultural heritage that must be protected.
2. Protection of the rights of local communities. The application of TWAIL in the context of communal intellectual property rights involves protecting the rights of local communities to their knowledge and practices. This can be done through recognizing communal intellectual property rights, developing legal mechanisms that protect communal knowledge and practices, and ensuring that local communities have control over the use and utilization of their intellectual property.
3. Encouraging local community involvement in decision-making. The TWAIL approach encourages the active participation of local communities in decision-making processes related to the protection of communal intellectual property rights. This involves in-depth consultation with local communities, recognizing their

knowledge and expertise, and empowering them in the management, development and protection of communal intellectual property.

4. Overcome inequality and exploitation. The application of TWAIL in the protection of communal intellectual property rights also focuses on addressing the inequality and exploitation that often occurs in the relationship between local communities and external entities, such as multinational corporations. TWAIL promotes fair mechanisms for sharing the benefits and wealth that results from communal knowledge. This involves fair bargaining, avoiding extortion, and ensuring that local people benefit fairly from the use and utilization of their knowledge.
5. Building solidarity and cooperation between third world countries. The TWAIL approach also involves building solidarity and cooperation between third world countries in the context of protecting communal intellectual property rights. This involves exchanging knowledge and experiences between local communities from different countries and strengthening collaboration to protect communal intellectual property at an international level.

d. The Implications of the Application of the TWAIL Approach in the Protections of Communal Intellectual Property Rights

The application of The Third World Approach to International Law (TWAIL) in the protection of communal intellectual property rights has significant political, economic and social implications. Following are some of the implications of implementing the TWAIL approach:²⁰

1. Political Implications
 - a. Empowerment of Countries in the Global South: The TWAIL approach promotes the empowerment of countries in the Global South in regulating and protecting their communal intellectual property rights. This can strengthen the sovereignty of countries in the Global South in managing and exploiting their own intellectual property without unfair interference from Western countries.
 - b. Encouraging Active Participation of Local Communities: TWAIL encourages active participation of local communities in decision-making regarding communal intellectual property rights. This can strengthen the role of local communities in determining policies relating to the protection and use of their communal knowledge.
 - c. Defending Global Justice and Equality: The TWAIL approach promotes the creation of a more just and

²⁰ Pratyush Nath Upreti, A TWAIL critique of intellectual property and related disputes in investor-state dispute settlement, *The Journal of World Intellectual Property*, Volume 25, Issue 1 p. 220-237. 2022.

equal international legal system. This means addressing the gap that exists between politically and economically strong countries and weaker countries. In the context of communal intellectual property rights, this means fighting for the protection of the rights of local communities and indigenous peoples who are often victims of exploitation and abuse by more powerful global entities.

2. Economic Implications

- a. Community economic empowerment. The TWAIL approach recognizes that communities with traditional knowledge have the potential to develop a sustainable local economy. By protecting communal intellectual property rights, communities can maintain control over the knowledge and resources they own. This includes traditional knowledge passed down from generation to generation, customary practices related to the environment, traditional medicines, agricultural techniques, handicrafts and other forms of intellectual property. In the context of community economic empowerment, the TWAIL approach encourages local skills and capacity building, training, access to financial resources, and technical support to help communities manage and utilize their intellectual property. This has the potential to increase community incomes, create local jobs, improve living

standards, and strengthen community economic sovereignty.

- b. Access to global markets. Through legal recognition and protection of their traditional knowledge, communities can manage and use it commercially, enter into partnerships with businesses, and gain economic benefits from the sale of products or services based on communal knowledge. With strong legal protections, communities can manage their traditional knowledge in a way that allows for commercial use. They can identify potential global markets that require their knowledge or knowledge-based products and develop relevant business strategies. Thus, the community can enter the global market with unique and different products or services. In addition, through the protection of communal intellectual property rights, communities can enter into partnerships with local or international businesses. This partnership can assist them in developing, producing, and market their products or services more effectively in global markets. Businesses can provide needed knowledge and resources, while communities can provide valuable traditional knowledge. Such partnerships create opportunities to access global markets with greater support.

3. Social Implications

- a. **Maintaining Local Identity and Culture:** Through the protection of communal intellectual property rights, TWAIL assists local communities in maintaining their cultural identity. Traditional knowledge and local practices can be safeguarded and preserved, preventing the loss of unique cultural treasures.
- b. **Promoting Sustainable Development:** The TWAIL approach seeks to create legal frameworks and practices that support sustainable development. By involving local communities in decision-making and the use of communal knowledge, TWAIL can help achieve socially, economically and environmentally sustainable development.

2. The Urgency to Applicate TWAIL Approach on the Protections of CIPR in Indonesia

Adopting TWAIL in the context of Indonesia's protection on ICPR is a wise choice since Indonesia has abundance and variety resources, both tangible and nontangible. It reflects Indonesia's commitment to protect the holistic well-being communities, the preservation of cultural diversity, and the ethical treatment of indigenous knowledge in a global context.

However, in order to create an adequate and compatible protection, it is necessary to use a diverse approach in

studying international legal system.²¹ It means that in the law making process, the applications of TWAIL is necessary to encourage a compatible legal framework in Indonesia and not merely stimulated by the Western views. The urgency to avoid this bias is essential as it will affect how Indonesia regulates CIPR, where two points can be considered:

1. If there is a monotonous and uncritical approach in international law study, it may influence the development and interpretation of legal frameworks related to communal intellectual property rights in Indonesia. A lack of diverse perspectives could lead to regulations that do not adequately consider the unique cultural and communal aspects of intellectual property.
2. The incompatible legal framework will result in inadequate regulations to protect CIPR. If future researchers and policymakers are not exposed to the related alternative perspectives that emphasize the importance of safeguarding communal knowledge, there may be a tendency to prioritize individual rights or commercial interests over communal rights.

The consequences of inadequate legal framework reflected on the emerging cases of misappropriation and

²¹ Stephanie Kristina Susanto, et. al. Third World Approaches to International Law and Eurocentrism: Deconstruction-Reconstruction Urgency in International Legal Pedagogy. *Brawijaya Law Journal*. Volume 10 No 2. 2023. p. 195.

biopiracy in the context of CIPR.²² For instance, in the case of Geographical Indication area when Toraja Coffee was registered as Key Coffee Inc. in Japan, it makes the Toraja Arabica Coffee farmers and entrepreneurs can no longer trade this coffee to Japan.²³ The same case happened with Gayo Arabica Coffee which registered as “Wild Gayo Luwak” in United States, “Gayo Mountain Coffee”, and “Amaro Gayo Coffee” by English citizens, and the brand of “Equador: Sumatra Gayo Mountain”. Not only that constitutes a violation on Geographical Indication rights, but also provides losses for the community and consumers.²⁴

All sorts of modern/conventional intellectual object can be linked to genetic power, wisdom representations as well as historical wisdom.²⁵ By applying the Third World Approach to International Law (TWAIL) approach to the protection of communal intellectual property rights can provide a useful framework for considering equity issues in the context of local communities with unique knowledge and cultural heritage.

²² Diah Imaningrum Susanti. Eksplorasi Perlindungan Kekayaan Intelektual Komunal Berbasis Hak Asasi Manusia. *Media Juris*. Vol. 5 No. 3. 2022. p. 402.

²³ Fokky Fuad and Avvan Andi Latjeme. Perlindungan Indikasi Geografis Aset Nasional Pada Kasus Kopi Toraja. *Jurnal Magister Hukum (Hukum dan Kesehatan)*. Vol. 2 No. 2017. p. 13.

²⁴ Yoan Nursari Simanjuntak. Pelanggaran Indikasi Geografis ditinjau dari Aspek Perlindungan Konsumen. *Perspektif Hukum*. Vol. 23 Issue 1. 2023. p. 61.

²⁵ Putu Ayu Sriasih Wesna. Legal Protection of Communal Intellectual Property in Traditional Culture Expression of the Bali Region. *ICLSSEE* 2022.

The role of TWAIL in Indonesia's regulations for ICPR protection is important due to several reasons:

1. Decolonizing Legal Frameworks.

TWAIL aims to decolonize international law by challenging historical injustices and power imbalances in the global legal system.²⁶ This is particularly relevant for Indonesia, given its colonial history. TWAIL provides a framework to reevaluate and reshape legal structures, ensuring they are more equitable and respectful of the rights of formerly colonized nations and indigenous communities.

2. Global Justice and Fair Trade

While the treaty-making negotiations in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) were dominated by the developed countries, TWAIL addresses issues of global justice and fair trade as TWAILism applies not only or specifically to the economic sphere but the entire gamut of international law.²⁷ In the context of communal intellectual property, this implies advocating for fair and equitable trade

²⁶ Antony Anghie. Rethinking International Law: A TWAIL Restrospective. *The European Journal of International Law*. Vol. 34 No. 1. 2023. p. 24.

²⁷ Kwadwo Appiagyei-Atua. Ethical Dimensions of Third-World Approaches to International Law (TWAIL): A Critical Review. *African Journal of Legal Studies*. 2015. p. 222.

practices that respect the rights of indigenous communities. It aligns with the principles of fair benefit-sharing and prevents the exploitation of traditional knowledge by external entities.

3. Respecting Cultural Diversity

TWAIL recognizes the importance of respecting and preserving cultural diversity in legal frameworks. It encourages the inclusion of diverse perspectives, ensuring that communal intellectual property rights are understood and protected within the context of Indonesia's rich cultural tapestry.

4. Addressing Historical Injustices

TWAIL acknowledges historical injustices and seeks to rectify them. Indonesia, with its colonial past, can benefit from an approach that takes into account historical inequalities. This includes addressing past injustices related to the appropriation of traditional knowledge and ensuring that future legal frameworks are more just and inclusive.

5. International Collaboration and Solidarity

TWAIL encourages collaboration and solidarity among developing nations. Indonesia, by adopting TWAIL principles, can align itself with a global movement seeking justice in international legal relations. This solidarity can strengthen Indonesia's position in advocating for

communal intellectual property rights on the international stage.

Therefore, it can be concluded that TWAIL provides a framework that aligns with Indonesia's historical context, cultural diversity, and the need to protect communal intellectual property rights. By adopting TWAIL principles, Indonesia can work towards a legal framework that is more just, inclusive, and respectful of the rights of its indigenous communities.

The establishment of legally recognized and enforceable exclusive rights on the exploitation of specified inventions²⁸ and to worth the value of the invention can be achieved by providing an appropriate framework of intellectual property rights. With this positive growth, it also encourages the innovation and creative output by allowing inventors to recoup expenses and benefit from their creations exclusively for a period of time and/or negotiating payment in return for others using them, as the main goal of intellectual property rights (IPR).²⁹ As crucial as individual intellectual property rights, the protection of communal intellectual property rights is important to ensure the survival of the culture and traditions of indigenous groups and local communities, as well

²⁸ World Intellectual Property Organization, *The Intersection of Intellectual Property Rights and Innovation Policy Making—A Literature Review*, July, 2015, p. 4.

²⁹ Congressional Research Service, *Intellectual Property Rights (IPR) and International Trade*, In Focus February 2022.

as to support their economic development.³⁰ In constituting the ICPR protection with the TWAIL approach, Indonesia needs to:

1. Ratify the relevant international instruments on communal intellectual property rights, such as Convention on Biological Diversity (CBD)—which has been adopted by Indonesia through Law Number 5 of 1994.
2. Undertake legal reforms to align domestic laws with TWAIL principles—the government as ratified Government Regulation (PP) Number 56 of 2022 concerning Communal Intellectual Property (KIK) on 20 December 2022. This PP is intended as the legal basis for the inventory of CIP owned by Indonesia.
3. Engage in international advocacy efforts that align with TWAIL principles, such as *World Trade Organization* (WTO).
4. Encourage the development of benefit-sharing agreements between communities and external entities seeking to commercialize traditional knowledge. These agreements should be negotiated transparently, ensuring that communities receive fair compensation and benefits from the commercial use of their intellectual property.³¹

³⁰ World Intellectual Property Organization (WIPO). WIPO Intellectual Property Handbook. WIPO Publication, 2nd ed. 2004. p. 63.

³¹ Client Earth. Benefit Sharing And Community Contracting: From Legal Design to Full Operation. p. 2. Accessed at <https://www.clientearth.org/media/bk3lhzkj/benefit-sharing-memo.pdf>, 05 January 2024.

By taking these steps, Indonesia can work towards implementing TWAIL in a manner that protects communal intellectual property rights, respects cultural diversity, and addresses historical injustices within the international legal system. Continuous collaboration with communities, legal experts, and international partners is crucial for the success of these efforts.

C. Conclusion

As crucial as individual intellectual property rights, the protection of communal intellectual property rights is important to ensure the survival of the culture and traditions of indigenous groups and local communities. By giving the opportunity for the local communities to expand their markets, it will raise their chance in developing their economic and even affecting the export and import supplies. The Third World Approach to International Law (TWAIL) approach is very relevant in this context, because this approach fights for the rights of indigenous peoples and local communities in a global context. Applying the TWAIL approach to the protection of communal intellectual property rights can provide a useful framework for considering equity issues in the context of local communities with unique knowledge and cultural heritage. The application of TWAIL in protecting communal intellectual property rights includes recognizing communal intellectual property, protecting the

rights of local communities, encouraging local community involvement in decision making, overcoming inequality and exploitation and defending global justice and equality. Indonesia can work through several steps towards a legal framework that respects CIPR, embraces cultural diversity, and addresses historical injustices within the international legal system. Subsequently, it will pave the way for the local community to identify their potential global target of their valuable traditional knowledge, and enhance the opportunity of the businesses of the global trade.

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