

Recognition and Protection of Traditional Cultural Expressions: A Brief Overview of the International and Domestic Legal Regime

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I. INTRODUCTION

The debate on the need for legal protection of traditional knowledge (TK) has existed since the clamor for international protection and recognition of indigenous communities and their members as “Peoples” emerged.¹ Many legal instruments on the protection and recognition of the rights of Indigenous Peoples contain provisions on the protection of TK as part of the wealth of indigenous communities.² While there are many issues surrounding the concept of TK — such as its importance in education,

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1. See generally Andrea Zappalaglio, Traditional Knowledge: Emergence and History of the Concept at the International Level (A Collection of Notes for a Lecture at Oxford University) 1, available at <http://dx.doi.org/10.2139/ssrn.2554132> (last accessed May 21, 2016).
2. *Id.* at 2–3.

cultural preservation, science,³ and law — the most contentious issue on TK is its status and protection as intellectual property.⁴

While the international community has yet to come up with an internationally accepted definition of TK, the World Intellectual Property Organization (WIPO) defines TK as knowledge, know-how, skills, and practices that are developed, sustained, and passed on from generation to generation within a community, often forming part of its cultural or spiritual identity.⁵ This definition of TK is broad enough to include traditional medicine, genetic resources associated with TK, and traditional cultural expressions (TCE) or folklore.⁶

This Article will focus on TCE as TK, their importance, and the need for their legal protection.

II. TRADITIONAL CULTURAL EXPRESSIONS OR FOLKLORE

TCEs, also referred to as Folklore, refer to the different forms of expression, tangible or intangible, which depict a certain community's historical, cultural, and social traditions, and which are passed down from generation to generation.⁷

In many ways, TCEs are important, not only in relation to the community creating it, but also universally. On the community level, TCEs are essential to the preservation of indigenous peoples' identity.⁸ It mimics their history, social values, political, religious, and moral beliefs, and

3. See generally Bureau of Public Information, United Nations Educational, Scientific and Cultural Organization, Traditional Knowledge 1-2, available at http://www.unesco.org/bpi/pdf/memobpi48_tradknowledge_en.pdf (last accessed May 21, 2016).

4. See generally World Intellectual Property Organization (WIPO), Traditional Knowledge and Intellectual Property — Background Brief No. 1 (A Series of Briefs Prepared by the WIPO on Various Topics) 1, available at http://www.wipo.int/edocs/pubdocs/en/wipo_pub_tk_1.pdf (last accessed May 21, 2016) [hereinafter WIPO, Background Brief No. 1].

5. WIPO, Traditional Knowledge, available at <http://www.wipo.int/tk/en/tk/> (last accessed May 21, 2016).

6. *Id.* & Ryan Abott, Documenting Traditional Medical Knowledge (A Paper Published by the WIPO) 3, available at http://www.wipo.int/export/sites/www/tk/en/resources/pdf/medical_tk.pdf (last accessed May 21, 2016).

7. Abott, *supra* note 6, at 3.

8. See generally WIPO, Intellectual Property and Traditional Cultural Expressions/Folklore (Booklet No. 1 in a Series of Booklets Dealing with Traditional Knowledge) 5, available at http://www.wipo.int/edocs/pubdocs/en/tk/913/wipo_pub_913.pdf (last accessed May 21, 2016) [WIPO, Booklet No. 1].

embodies the creativity of their community.⁹ Universally, TCEs are part of the common heritage of humankind.¹⁰

The TCEs of the *Ifugaos* of the Mountain Province, for example, reflect their daily lives in the mountains. As it is passed from generation to generation, these art forms help preserve *Ifugaos'* identity.¹¹ "They help to preserve customs, traditions[,] and values, and the mores that enabled the early [*Ifugao*] to live in relative peace, even without any centralized political organization, until the Spanish-American period when a more constituted authority was installed."¹²

In a country like the Philippines, where there is an estimated 14-17 million indigenous peoples,¹³ TCEs are inevitably a part of its cultural heritage. Approximately 109 ethno-linguistic groups are present in the Philippines, with each group having their own language, socio-political and cultural beliefs, and identity.¹⁴ The TCEs of these indigenous communities reflect the culture of the indigenous peoples of pre-colonial Philippines and are thus part of the country's collective identity.¹⁵

The issue of the protection of TCEs is relevant because of the interplay between the TCE as part of the identity of a specific community on the one hand, and as part of the identity of a nation, or of humankind as a whole, on the other.

9. *Id.*

10. United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, Annex, U.N. Doc. A/RES/61/295 (Oct. 2, 2007) [hereinafter UNDRIP].

11. Lourdes S. Dulawan, *Singing Hudhud in Ifugao* (A Paper Presented at a Conference on Literature of Voice Epics in the Philippines in Ateneo de Manila University) 2, available at <http://epics.ateneo.edu/epics/archives/1/articles/1%20Singing%20Hudhud%20in%20Ifugao%20L.Dulawan.pdf> (last accessed May 21, 2016).

12. *Id.* at 3.

13. United Nations Development Programme, *Indigenous Peoples in the Philippines* 1, available at <http://www.ph.undp.org/content/dam/philippines/docs/Governance/fastFacts6%20-%20Indigenous%20Peoples%20in%20the%20Philippines%20rev%201.5.pdf> (last accessed May 21, 2016).

14. Jacqueline K. Cariño, *Country Technical Notes on Indigenous Peoples' Issues: Republic of the Philippines* (A Paper Published by the International Fund for Agricultural Development (IFAD)) 4, available at <https://www.ifad.org/documents/10180/0c348367-f9e9-42ec-89e9-3ddbea5a14ac> (last accessed May 21, 2016).

15. ANTOLOHIYA NG MGA PANITIKANG ASEAN: MGA EPIKO NG PILIPINAS 1 (Jovita Castro, et al., eds., 1984).

This interrelation between the indigenous community and the greater public poses many issues regarding the ownership, use, and protection of TCEs.¹⁶ *First*, while it is logical to presume that the owner of the TCE is its creator, many also argue that since the origins of the TCE date back to the distant past, it has already fallen into the ambit of public domain.¹⁷ *Second*, since TCEs are not created by individuals but by the community from which they originated, the owner of the TCE is the community.¹⁸ This concept of “communal ownership,” however, seems to be at odds with the concept of “private ownership,” which is the basis of most intellectual property laws in most jurisdictions.¹⁹ *Third*, many also argue that since TCEs are part of the cultural heritage of mankind, it may be utilized by everyone.²⁰

These issues are especially relevant when read in light of the commercialization of these TCEs.²¹ According to a study made on the experiences of the Philippines in the protection of TCEs and folklore, Philippine indigenous art forms have, over time, been exploited, misused, and misappropriated,²² to wit —

However, over a period of time, the misappropriations of [] [TK] and technologies started evoking rays of suspicion in the psyche of the innocent tribal population. Slowly and steadily[,] a sense of realization of the extent of illicit practices is dawning on the indigenous and local communities. The plundering of the vast biodiversity of the regions, indiscriminate copying of art, music[,] and dance forms, commercialization of ritual practices and ceremonies all led to a situation where the inborn innocence of the communities gave way to a syndrome of mistrust and suspicion. ... Many of the fashion designers of the West extensively copy the textile designs of the

16. See Graham Dutfield, *Protecting Traditional Knowledge: Pathways to the Future* (A Paper Commissioned Under the International Centre for Trade and Sustainable Development (ICTSD) Programme on Intellectual Property Rights and Sustainable Development) 7-11, available at <http://www.iprsonline.org/unctadictsd/docs/Graham%20final.pdf> (last accessed May 21, 2016).

17. Dutfield, *supra* note 16, at 22.

18. See CHIDI OGUAMANAM, *INTERNATIONAL LAW AND INDIGENOUS KNOWLEDGE: INTELLECTUAL PROPERTY RIGHTS, PLANT BIODIVERSITY, AND TRADITIONAL MEDICINE* 30 (2006).

19. *Id.* & David Bollier, *Protecting Indigenous Knowledge*, available at <http://www.onthecommons.org/protecting-indigenous-knowledge> (last accessed May 21, 2016).

20. OGUAMANAM, *supra* note 18, at 30.

21. Dutfield, *supra* note 16, at 7-8.

22. P.V. Valsala G. Kutty, *National Experiences with the Protection of Expressions of Folklore/Traditional Cultural Expressions: India, Indonesia and the Philippines* (A Paper Published by the WIPO) 25, available at http://www.wipo.int/edocs/pubdocs/en/tk/912/wipo_pub_912.pdf (last accessed May 21, 2016).

Philippines. Similarly, the weaving techniques, like [*habalon*], are copied by local industrialists. Similarly, music, dance forms, handicrafts[,] and traditional medicines are all used in the production of modern commodities especially in the western markets.²³

In a joint statement published by the United Nations High Commission on Human Rights, the Indigenous World Association and the Indigenous Media Network (IWA and IMN Joint Statement) condemned the commercialization of TK, including TCEs, and stressed that TK is not a commodity but is rather an integral part of the indigenous peoples' culture and identity.²⁴ They called for the creation of an international legal instrument for the protection of their intellectual and cultural property rights over TCEs.²⁵

III. PROTECTION OF TRADITIONAL CULTURAL EXPRESSIONS AS INTELLECTUAL PROPERTY

Like any other form of intellectual property, TCEs are slowly being considered valuable commercial assets.²⁶ Consequently, questions concerning the adequacy of existing intellectual property laws in the protection of indigenous peoples and their proprietary interests are being raised.²⁷

It bears noting that existing intellectual property systems are mostly based on western economic principles.²⁸ In fact, it has been suggested that intellectual property is protected because of its economic and commercial value.²⁹ Thus, the prime concern of existing intellectual property systems is the balance between the economic interests of the society and the proprietary interests of the holder of intellectual property rights.³⁰

23. *Id.*

24. U.N. Commission on Human Rights, Sub-Commission on the Promotion & Protection of Human Rights, *Review of Developments Pertaining to The Promotion and Protection of The Rights of Indigenous Peoples, Including their Human Rights and Fundamental Freedoms*, at 2, U.N. Doc. E/CN.4/Sub.2/AC.4/2005/CRP.3 (July 13, 2005) (Joint Statement from the Indigenous World Association and Indigenous Media Network) [hereinafter Joint Statement].

25. *Id.* at 4.

26. Andrea B. Agillon, *Traditional Knowledge in the Philippines: Progress of IPR Protection*, TECH MONITOR, Mar.-Apr. 2007, at 50.

27. JOANNA GIBSON, COMMUNITY RESOURCES: INTELLECTUAL PROPERTY, INTERNATIONAL TRADE AND PROTECTION OF TRADITIONAL KNOWLEDGE 1-3 (2005).

28. WIPO, Background Brief No. 1, *supra* note 4, at 1.

29. GIBSON, *supra* note 27, at 83.

30. *Id.* at 2-5.

Most existing intellectual property systems are compliant with the minimum standards provided in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement).³¹ Acceptance of the TRIPS Agreement is mandatory for the members of the World Trade Organization.³² Article 7 of the Agreement provides —

Article 7. Objectives — The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.³³

The importance of intellectual property in the facilitation of trade, development of economy, and diffusion of knowledge, is also recognized in the Philippines through Republic Act No. 8293 or the Intellectual Property Code of the Philippines,³⁴ to wit —

SECTION 2. Declaration of State Policy. — *The State recognizes that an effective intellectual and industrial property system is vital to the development of domestic and creative activity, facilitates transfer of technology, attracts foreign investments, and ensures market access for our products.* It shall protect and secure the exclusive rights of scientists, inventors, artists[,] and other gifted citizens to their intellectual property and creations, particularly when beneficial to the people, for such periods as provided in this Act.

The use of intellectual property bears a social function. To this end, the State shall promote the diffusion of knowledge and information for the promotion of national development and progress and the common good. It is also the policy of the State to streamline administrative procedures of registering patents, trademarks[,] and copyright, to liberalize the registration on the transfer of technology, and to enhance the enforcement of intellectual property rights in the Philippines.³⁵

Existing intellectual property systems often protect intellectual property only over a period of time.³⁶ Upon the expiration of such period, the intellectual property becomes part of the “public domain,” free from intellectual property rights of owners or creators, ineligible from private

31. Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, signed Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter TRIPS Agreement].

32. GIBSON, *supra* note 27, at 2.

33. TRIPS Agreement, *supra* note 31, art. 7.

34. An Act Prescribing the Intellectual Property Code and Establishing the Intellectual Property Office, Providing for its Powers and Functions, and for Other Purposes [INTELLECTUAL PROPERTY CODE], Republic Act. No. 8293 (1997).

35. *Id.* § 2 (emphases supplied).

36. See INTELLECTUAL PROPERTY CODE, § 54.

ownership, and appropriable even without the consent of its creator or owner.³⁷

Creations which do not fall under any specific protection afforded by the existing intellectual property systems are also considered part of the public domain.³⁸

The concept of expiration of rights and “public domain” are in apparent contrast with the interest of indigenous communities over their TK. For one, the nature of TK as part of an indigenous community’s identity is not always consistent with commercialization and information dissemination,³⁹ thus —

Broadly speaking, the system of intellectual property protection, exploitation, dissemination, and commercialization is increasingly founded upon an economic analysis of reward, personal control, and commercial agreement, as it were, between the right holder and the society at large. *In contrast, adequate protection of [TK] is not necessarily compatible with requirements of dissemination but rather, depends upon restriction of access, ideally regulated through the free and prior informed consent of the community according to its shared values and relationship to the knowledge in question.*⁴⁰

In addition, placing TCEs in the realm of public domain also allows third parties to protect “creations” which were actually derived from indigenous knowledge without regard to the “unregistered” rights of the indigenous communities.⁴¹ Thus, in the IWA and IMN Joint Statement, strong objections were asserted against placing TK and TCEs in the realm of public domain —

Placing our knowledge into the public domain turns it into a freely available resource for commercial utilization. Thus, it also creates the pre-condition for using non-indigenous [i]ntellectual [p]roperty [r]ights [] regimes to patent ‘inventions’ based upon our knowledge.

...

Other affected areas include our cultural expressions such as oral traditions, literatures, designs[,] and visual and performing arts. In this context, we also highlight that digital recording and documentation of our knowledge and

37. World Intellectual Property Organization [WIPO], Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, *Note on the Meanings of the Term “Public Domain” in the Intellectual Property System with Special Reference to the Protection of Traditional Knowledge and Traditional Cultural Expressions/Expressions of Folklore*, Annex, at 2-5, WIPO/GRTKF/IC/17/INF/8 (Nov. 24, 2010).

38. *Id.*

39. GIBSON, *supra* note 27, at 3.

40. *Id.* (emphasis supplied).

41. *Id.*

cultural heritage in order to strengthen our own cultures simultaneously contribute to their easy accessibility for inappropriate use and exploitation by third parties [—] as the content is being considered part of the public domain when displayed.

We[,] therefore[,] strongly reject the application of the public domain concept to any aspect related to our cultures and identities, including human and other genetic information originating from our lands and waters. We equally reject the application of IPR regimes to assert patents, copyrights, or trademark monopolies for products, data, or processes derived or originating from [TK] or [TCEs], when conducted without due authorization by our peoples. Genetic material, isolated genes, life forms[,] or other natural processes must be excluded from [intellectual property rights] regimes.⁴²

The limited time over which a creator may exercise his or her intellectual property rights over a work under existing intellectual property protection law proves problematic when applied to TK, particularly TCEs. This is because TCEs are often transmitted from generation to generation, with each generation contributing to the creation.⁴³ In this sense, TCEs are “living” works, the origins of which trace back from time immemorial, and the completion of which remains to be unknown.⁴⁴ Since the time when a TCE is actually created or completed cannot be ascertained, the period from which the prescriptive period should begin cannot be known.⁴⁵

There is also an apparent conflict between the western and indigenous understanding of “ownership” as applied to creations.⁴⁶ The western concept of individualized ownership in existing intellectual property systems does not comprehend the indigenous concept of communal ownership wherein a particular work is created and owned not by a particular person but by the indigenous community as a whole.⁴⁷ Thus, if TCEs, or TK in general, are placed within the ambit of existing intellectual property systems, the question of ownership and exercise of intellectual property rights arises.

However, the seeming inapplicability of existing intellectual property systems to TCEs does not mean that they should not be protected under the

42. Joint Statement, *supra* note 24, at 3.

43. Contrast Dulawan, *supra* note 11, at 2 (asserting that Ifugao *hudhud* singing is “as old as the rice terraces in Ifugao”) with INTELLECTUAL PROPERTY CODE, § 54 (providing for a limited term of 20 years for patents).

44. WIPO, Background Brief No. 1, *supra* note 4, at 1.

45. See Dulawan, *supra* note 11, at 2.

46. Gonzalo D.V. Go III, *Project Gawi: Towards Filipino Knowledge Commercialization*, LES GLOBAL NEWS, Sep. 2014, at 17.

47. *Id.*

intellectual property regime. In fact, the protection of TCEs is important for the benefit of both the indigenous community and the general public.⁴⁸

The necessity to protect TCEs and folklore has been recognized in other jurisdictions as early as 1967,⁴⁹ but it was formally recognized by the international community in 1985 through the adoption of the United Nations Educational, Scientific and Cultural Organization (UNESCO)-World Intellectual Property Organization (WIPO) Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions (Model Provisions).⁵⁰ The Model Provisions are a product of the joint undertaking of UNESCO and WIPO to provide model provisions for the protection of TCEs and folklore and for the possible adoption by States through local legislation.⁵¹ The preliminary statement of the Model Provisions states that folklore is part of a nation's cultural identity. Through the advancement of technology and information dissemination, however, TCEs are in danger of improper exploitation, thus

—

Need for the Legal Protection of Expressions of Folklore

- (1) Folklore is an important cultural heritage of every nation and is still developing [—] albeit frequently in contemporary forms [—] even in modern communities all over the world. It is of particular importance to developing countries which more and more recognize *folklore as a basis of their cultural identity and as a most important means of self-expression of their peoples both within their own communities and in their relationship to the world around them*. Folklore is to these countries increasingly important from the point of view of their social identity, too. Particularly in developing countries, folklore is a living, functional, tradition, rather than a mere souvenir of the past.
- (2) The accelerating development of technology, especially in the fields of sound and audiovisual recording, broadcasting, cable television[,] and cinematography may lead to improper exploitation of the cultural heritage of the nation. *Expressions of folklore are being commercialized by such means on a world-wide scale without due respect for the cultural or economic interests of the communities in which they originate and without conceding any share in the returns from such exploitations of folklore to the peoples who are the authors of their folklore*. In connection with their

48. Dutfield, *supra* note 16, at 15-16.

49. UNESCO & WIPO, *Model Provisions for National Laws on the Protection of Folklore Against Illicit Exploitation and Other Prejudicial Actions*, ¶ 5 (1985) [hereinafter UNESCO-WIPO, *Model Provisions*] & WIPO, Booklet No. 1, *supra* note 15, at 3.

50. UNESCO-WIPO, *Model Provisions*, *supra* note 49.

51. *Id.* ¶¶ 15-24.

commercialization, expressions of folklore are often distorted in order to correspond to what is believed to be better for marketing them.⁵²

This need is further highlighted in the 2007 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), which emphasized the right of indigenous peoples to the protection of their cultural heritage, TK, and TCEs. In Article 31 thereof—

- (1) *Indigenous peoples have the right to maintain, control, protect[,] and develop their cultural heritage, [TK,] and [TCEs], as well as the manifestations of their sciences, technologies[,] and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games[,] and visual and performing arts. They also have the right to maintain, control, protect[,] and develop their intellectual property over such cultural heritage, [TK], and [TCEs].*
- (2) *In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.*⁵³

IV. KINDS OF INTELLECTUAL PROPERTY PROTECTION

Two approaches to intellectual property protection have been developed and applied in relation to TK and TCEs — positive protection and defensive protection.⁵⁴ On one hand, positive protection is remedial in nature, as it gives the TCE right-holders the right to seek redress in case of misuse of the TK.⁵⁵ On the other hand, defensive protection is preventive in nature, as it seeks to prevent third parties from obtaining intellectual property rights over TK.⁵⁶ To achieve comprehensive protection of TK and TCEs, both kinds of protections must be used in a complementary manner, thus —

The first two approaches involve ‘positive protection’ — that is, obtaining and asserting rights in the protected material. Positive protection can therefore (i) serve as the legal basis for any commercial and other dealings that TCE holders may choose to pursue with other partners, and (ii) stop third parties from using TCEs in an unauthorized or inappropriate way. Defensive strategies, by contrast, aim at preventing others from gaining or maintaining adverse [intellectual property] rights. Various positive and defensive strategies can be used together, depending on what the holders or custodians of TCEs want to achieve. A community’s secret or sacred TCEs

52. *Id.* 1-2 (emphases supplied).

53. UNDRIP, *supra* note 10, art. 31 (emphases supplied).

54. WIPO, Intellectual Property and Traditional Knowledge (Booklet No. 2 in a Series of Booklets Dealing with Traditional Knowledge) 11-12, available at http://www.wipo.int/edocs/pubdocs/en/tk/920/wipo_pub_920.pdf (last accessed May 21, 2016) [hereinafter WIPO, Booklet No. 2].

55. *Id.* at 12.

56. *Id.*

may be protected defensively; while handicrafts may be positively protected as part of a community trading enterprise and against imitations or fakes.⁵⁷

Another approach has been suggested to apply specifically to TCEs — intellectual property protection to support economic development. “[S]ome communities wish to gain and exercise [intellectual property] in their tradition-based creations and innovations to enable them to exploit their creations and innovations commercially as a contribution to their economic development.”⁵⁸

While these kinds of protections are already in place in most existing intellectual property systems, stakeholders are proposing a *sui generis* system specific to TK and catering to its peculiarities as against other intellectual property,⁵⁹ thus —

In some communities and countries, the [judgment] has been made that even adaptations of existing [intellectual property] rights systems are not sufficient to cater to the holistic and unique character of TK subject-matter. This has led to the decision to protect TK through *sui generis* rights. What makes an [intellectual property] system a *sui generis* one is the modification of some of its features so as to properly accommodate the special characteristics of its subject matter, and the specific policy needs which led to the establishment of a distinct system.⁶⁰

V. INTERNATIONAL PROTECTION OF TCEs

Aside from the UNESCO-WIPO Model Provisions and the UNDRIP, attempts have been made to include provisions of TCE protection in other international instruments. Notably, the WIPO Performances and Phonograms Treaty (WPPT)⁶¹ extends protection to performers of TCEs (such as chanters and dancers) from exploitation,⁶² thus —

[T]he protection already available, internationally, under the [WPPT] may be of great value. *Folklore is often accessed and appropriated by third parties through its most recent traditional performance* [—] for instance, when a performance of a traditional chant is recorded, the recording is what enables

57. WIPO, Booklet No. 1, *supra* note 15, at 13.

58. *Id.* at 12.

59. WIPO, Booklet No. 2, *supra* note 54, at 10.

60. *Id.* at 20-21.

61. WIPO Performances and Phonograms Treaty, *adopted* Dec. 20, 1996, 2186 U.N.T.S. 121 (entered into force May 20, 2002).

62. World Intellectual Property Organization, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge, and Folklore, *Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions/Expressions of Folklore*, ¶ 79, U.N. Doc. WIPO/GRTKF/IC/5/3 (May 2, 2003).

others to get access to that chant, so it is vital to determine how the recording is used and distributed. Countries that ratify the WPPT must give performers of folklore the right to authorize sound recordings of their performances, and the right to authorize certain dealings with those recordings.⁶³

In 2001, the WIPO established an Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) to address issues specifically concerning, among others, TCEs.⁶⁴ The objective of the IGC is to agree on and draft a *sui generis* international instrument for the effective protection of TK in general.⁶⁵ Since its creation, the IGC has provided an avenue for further understanding the issues surrounding TCE protection.⁶⁶

Other *sui generis* international legislation on the protection of TCEs include the Tunis Model Law on Copyright for Developing Countries (1976),⁶⁷ the Bangui Agreement on the Creation of an African Intellectual Property Organization (1999),⁶⁸ the United States' Indian Arts and Crafts Act Enforcement Act (2000),⁶⁹ and the Pacific Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture (2002).⁷⁰

VI. EXISTING PROTECTION OF TCEs IN THE PHILIPPINES

Strictly speaking, the Philippines has yet to adopt a *sui generis* law for the protection of TCEs. However, this is not to say that the necessity of protecting TCEs is not recognized in the Philippines.⁷¹ No less than the 1987 Philippine Constitution recognizes the need for legal protection of TK, including TCEs. Under Section 17, Article XIV of the 1987 Philippine Constitution, “[t]he State shall recognize, respect, and protect the rights of indigenous cultural communities to preserve and develop their cultures,

63. WIPO, Booklet No. 1, *supra* note 15, at 16-17 (emphases supplied).

64. WIPO, Booklet No. 2, *supra* note 54, at 3.

65. WIPO, Booklet No. 1, *supra* note 15, at 22.

66. WIPO, Booklet No. 2, *supra* note 54, at 3.

67. United Nations Educational, Scientific and Cultural Organization & World Intellectual Property Organization, *Tunis Model Law on Copyright for developing countries* (1976).

68. Agreement Revising the Bangui Agreement of March 2, 1977, on the Creation of an African Intellectual Property Organization, *revised* Feb. 24, 1999 (entered into force Feb. 28, 2002).

69. Indian Arts and Crafts Enforcement Act, 25 U.S.C. § 305 (2000).

70. Secretariat of the Pacific Community, *Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture* (2002).

71. See Kutty, *supra* note 22, at 25-29.

traditions, and institutions. It shall consider these rights in the formulation of national plans and policies.”⁷²

Currently, TCEs are protected if it falls under any of the protections afforded by the Intellectual Property Code, thus —

The Intellectual Property Code of the Philippines, however, does not provide protection of [TK]. Like all the other intellectual property regimes, it provides protection to creative works which are original to persons (either natural or juridical) for a certain period of time. [TK], which by nature existed and developed through time and collectively owned by the community, is considered as part of public domain, hence, could be used by anybody.⁷³

The Indigenous Peoples’ Rights Act of the Philippines (IPRA)⁷⁴ is also a source of legal protection of TK and TCEs. The IPRA recognizes the “Community Intellectual Rights” of indigenous cultural communities (ICC), including their right to the restitution of cultural property taken without their free and prior informed consent in accordance with their customary law, thus —

SECTION 32. Community Intellectual Rights. — ICCs/[indigenous peoples] have the right to practice and revitalize their own cultural traditions and customs. The State shall preserve, protect[,] and develop the past, present[,] and future manifestations of their cultures as well as the right to the restitution of cultural, intellectual, religious, and spiritual property taken without their free and prior informed consent or in violation of their laws, traditions[,] and customs.⁷⁵

The IPRA also recognizes the ownership of ICCs over their cultural manifestations, including their right to control, protect, and develop the same, as found in Section 34 —

SECTION 34. Right to Indigenous Knowledge Systems and Practices and to Develop own Sciences and Technologies. — ICCs/[indigenous peoples] are entitled to the recognition of the full ownership and control and protection of their cultural and intellectual rights. They shall have the right to special measures to control, develop[,] and protect their sciences,

72. PHIL. CONST. art. XIV, § 17.

73. Chairperson of the Philippine National Commission on Indigenous Peoples, *Efforts at Protecting Traditional Knowledge: The Experience of the Philippines*, 8, World Intellectual Property Organization, WIPO/IPTK/RT/99/6A (Oct. 27, 1999) (by David Daoas).

74. An Act to Recognize, Protect and Promote the Rights of Indigenous Cultural Communities/Indigenous Peoples, Creating a National Commission on Indigenous Peoples, Establishing Implementing Mechanisms, Appropriating Funds Therefor, and for Other Purposes [The Indigenous Peoples’ Rights Act of 1997], Republic Act No. 8371 (1997).

75. *Id.* § 32.

technologies[,] and cultural manifestations, including human and other genetic resources, seeds, including derivatives of these resources, traditional medicines and health practices, vital medicinal plants, animals and minerals, indigenous knowledge systems and practices, knowledge of the properties of fauna and flora, oral traditions, literature, designs, and visual and performing arts.⁷⁶

However, it has been suggested that the IPRA does not provide for specific provisions for the protection of these cultural rights.⁷⁷ To remedy this alleged void, Senator Loren Regina B. Legarda filed in the Senate of the Philippines a bill which sought to create a comprehensive archive of all TCEs of all ethno-linguistic groups in the Philippines, to ensure the registration of the ownership of the ICCs over these TCEs, and to mandate the payment of royalties for the use of these TCEs.⁷⁸ Unfortunately, the 16th Congress has adjourned without the bill passing into law.

The National Commission on Indigenous Peoples (NCIP) and the Intellectual Property Office of the Philippines (IPOPHE) also spearheaded a series of consultations with stakeholders for the enactment of a joint administrative order providing for the rules and regulations on “Intellectual Property Rights Application and Registration Protecting the Indigenous Knowledge Systems and Practices of the Indigenous Peoples and Indigenous Cultural Communities.”⁷⁹ These rules seek the utilization of the current intellectual property system in the Philippines for the protection of TK and TCEs.⁸⁰ The NCIP-IPOPHE Joint Administrative Order is now on its second draft.⁸¹

76. *Id.* § 34.

77. An Act Safeguarding the Traditional Property Rights of Indigenous Peoples, S.B. No. 669, explan. n., 16th Cong., 1st Reg. Sess. (2013).

78. *Id.*

79. Intellectual Property Office of the Philippines (IPOPHE), Notice to the Second (2nd) Public Consultation of the Joint IPOPHE-NCIP Administrative Order, available at <http://www.ipophil.gov.ph/releases/archive-2015/343-notice-to-the-second-2nd-public-consultation-of-the-joint-ipophil-ncip-administrative-order> (last accessed May 21, 2016).

80. IPOPHE & National Commission on Indigenous Peoples, Rules and Regulations on Intellectual Property Rights Application and Registration Protecting the Indigenous Knowledge Systems and Practices of the Indigenous Peoples and Indigenous Cultural Communities, whereas cl. (draft as of Aug. 17, 2015).

81. IPOPHE, *supra* note 79.

VII. CONCLUSION

TCEs are expressions of an indigenous community's culture. It is a mirror of their everyday life, a manifestation of their religious and spiritual beliefs, and a window to the history of their people. These expressions must be protected not only because they are valuable property, but also because they define who these indigenous communities are. Without the appropriate protection, TCEs are in danger of being exploited. As it is now, these expressions are used not only without the indigenous communities' permission, but without regard to their cultural value to the people who created them. Verily, the lack of adequate protection over these expressions translates to a lack of adequate protection of communities who are struggling to preserve their ethnic identities in the midst of modernization.