Advancing the Lore: A Proposed Legal Framework for Filipino Traditional Knowledge Protection and Commercialization

Gonzalo D.V. Go III[*]
Paolo Miguel S. Consignado[**]

I. INTRODUCTION

[*] '06 J.D., *with honors*, Ateneo de Manila University School of Law. The Author previously co-wrote *Curbing Domain Name Registration Abuse: A Legal Framework in the Implementation of the Anti-Cybersquatting Provision of the Cybercrime Prevention Act of 2012*, 57 ATENEO L.J. 949 (2013) with Ferdinand M. Negre. The Author currently teaches Legal Accounting at the Ateneo de Manila University School of Law. He is also the Legal Director of Jollibee Foods Corporation, and a member of the Board of Directors of the Licensing Executives Society Philippines.

[**] '16 J.D. cand., Ateneo de Manila University School of Law. Member, Board of Editors, *Ateneo Law Journal*. The Author was the Associate Lead Editor of the third issue of the 59th volume of the *Journal* and the Lead Editor of the *Journal*'s 3d edition of the Legal Citation Guide.

The Philippines is home to at least 110 groups of indigenous peoples (Peoples), composed of more than 12 million individuals,[1] with each group having its own unique bond of rich cultural resources.[2] These cultural resources include *tangible items*, such as land, sacred sites, and religious objects; and *intangible knowledge and customs*, such as tribal names, symbols, stories, ecological, ethnopharmacological, religious, and other traditional knowledge (TK).[3] Part of these Peoples' TK are techniques using biological resources for medical treatment; water management strategies; agricultural timing and production techniques; climate change adaptation policy and practice; visual arts, designs, performances; literature, folklore, and other literary materials.[4] Yet, despite the vitality of TK as a technological resource, the Philippines' present legal framework is seemingly at odds with promoting and clearly situating TK within its protective mantle.[5] Worse, the present legal framework even legitimizes the commercial use of TK by multinational corporations even when unauthorized by the Peoples.[6] This leads not only to the arguable decline of Peoples' means of subsistence and

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1. National Commission on Indigenous Peoples, Indigenous Peoples of the Philippines, *available at* http://www.ncip.gov.ph/indigenous-peoples-of-the-philippines.html (last accessed May 20, 2016).
2. Roberto Nereo B. Samson & Gonzalo D.V. Go III, *Protecting Traditional Knowledge as Cardinal Technology in the Philippines*, 49 LES NOUVELLES 192, 192 (2014) (citing Angela R. Riley, *Straight Stealing: Towards an Indigenous System of Cultural Property Protection*, 80 WASH. L. REV. 69, 77 (2005)).
3. Samson & Go III, *supra* note 2, at 192 (citing FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW § 20.01 (2012)).
4. Samson & Go III, *supra* note 2, at 192.
5. *See generally* Marie Yasmin M. Sanchez, Combating Biopiracy: Harmonizing the Convention on Biodiversity (CBD) and the WTO Treaty on Trade-Related Aspects of Intellectual Property Rights (TRIPS) in Relation to the Protection of Indigenous Traditional Knowledge and Genetic Resources (2012) (unpublished J.D. thesis, Ateneo de Manila University) (on file with Ateneo Professional Schools Library, Ateneo de Manila University). *See also* Marie Grace Cristina G. Faylona, Law on Biodiversity Conservation and Intellectual Property Rights of Indigenous Peoples (1998) (unpublished J.D. thesis, Ateneo de Manila University) (on file with Ateneo Professional Schools Library, Ateneo de Manila University).
6. *See* Federico Lenzerini, *Indigenous Peoples' Biogenetic Resources*, *in* BIOTECHNOLOGIES AND INTERNATIONAL HUMAN RIGHTS 191–92 (Federico Lenzerini ed., 2007).

distinctive cultural identity, but also to possible violations of State obligations as regards conservation of biodiversity.[7]

It is, thus, the Authors' position that it is a State obligation to provide legal protection to TK. Doing so ensures the sustainability of Peoples' cultural heritage and allows Peoples the flexibility to safeguard their TK from unauthorized use, or to otherwise make it commercially available under their own terms and conditions. In turn, the Philippines benefits from protecting the rich cultural heritage of its Peoples, both in compliance with its State obligations as well as in ensuring that TK is harnessed for the benefit of Filipinos.

Accordingly, this Article explains the concept of TK under both domestic and international law, and situates the legal debate and discourse on this issue particularly vis-à-vis intellectual property rights (IPR) and the rights of indigenous peoples, as a way to both protect this knowledge, as well as harness it for commercialization, should certain indigenous communities desire to do so under the rule of law. In this regard, the Article proposes two solutions: first, this Article articulates the available legal options to protect TK within the present Philippine legal regime; second, and the better solution, this Article proposes, given the seeming incompatibility of TK and IPR, that a *sui generis* law be enacted that will specifically cater to protecting Peoples' TK in the Philippines.

A. Demystifying Traditional Knowledge

No single precise definition would fully do justice to the diverse forms of knowledge that are held by traditional communities.[8] Nevertheless, no one would seem to dispute that, at the very least, as defined by and used in the Draft Articles on the Protection of Traditional Knowledge (Draft Articles),[9]

7. *Id. See also* Convention on Biodiversity, *opened for signature* June 5, 1992, 1760 U.N.T.S. 79 (entered into force Dec. 29, 1993) [hereinafter CBD].

8. World Intellectual Property Organization (WIPO), Intellectual Property and Traditional Knowledge (A Booklet Dealing with Intellectual Property and Genetic Resources, Traditional Knowledge, and Traditional Cultural Expressions/Folklore) 4, *available at* http://www.wipo.int/edocs/pubdocs/en/tk/920/wipo_pub_920.pdf (last accessed May 20, 2016).

9. The Draft Articles are being crafted by the WIPO, and are still under negotiation as of writing; thus, the final wording of the instrument is still subject to change. *See* WIPO, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, *The Protection of Traditional Knowledge: Draft Articles*, WIPO/GRTKF/IC/28/5 (June 2, 2014) [hereinafter Draft Articles].

TK includes the "know-how, skills, innovations, practices, teachings[,] and learnings of [Peoples.]"[10]

To illustrate, TK includes "traditional and tradition-based literary, artistic, and scientific works; performances, inventions, scientific discoveries, and designs; marks, names, and symbols; undisclosed information; and all other innovations and creations resulting from intellectual activity in the industrial, scientific, literary, and artistic fields."[11]

Particularly, TK may be associated "with fields such as agriculture, environment, healthcare and indigenous and traditional medical knowledge, biodiversity, traditional lifestyles natural resources and genetic resources, and know-how of traditional architecture and construction technologies."[12]

More importantly, TK is developed over time and used to sustain a community, consisting of experience, culture, environment, local resources, animal knowledge, or plant resources that are generally considered part of the collective ownership of the community and transmitted across generations through traditional stories to selected persons in the community.[13]

Accordingly, given the broad scope of what constitutes TK, protection of such by both international and domestic laws varies depending on how TK is conceived. Generally, however, TK, as an intangible resource, has usually been understood either as a human right or as an IPR by most legal scholars internationally and domestically.

1. TK under International Law

While there is yet no internationally-accepted definition of TK, several international instruments may be cited pointing to its legal recognition.

10. *Id.* Annex, at 5.

11. Coenraad J. Visser, *Making Intellectual Property Laws Work for Traditional Knowledge*, *in* POOR PEOPLE'S KNOWLEDGE: PROMOTING INTELLECTUAL PROPERTY IN DEVELOPING COUNTRIES 207 (J. Michael Finger & Philip Schuler eds., 2004) (citing WIPO, INTELLECTUAL PROPERTY NEEDS AND EXPECTATIONS OF TRADITIONAL KNOWLEDGE RIGHTS HOLDERS (2001)).

12. Draft Articles, *supra* note 9, Annex, at 5.

13. *See* STEPHEN A. HANSEN & JUSTIN W. VANFLEET, TRADITIONAL KNOWLEDGE AND INTELLECTUAL PROPERTY: A HANDBOOK ON ISSUES AND OPTIONS FOR TRADITIONAL KNOWLEDGE HOLDERS IN PROTECTING THEIR INTELLECTUAL PROPERTY AND MAINTAINING BIOLOGICAL DIVERSITY 3 (2003).

Foremost of these is the Universal Declaration of Human Rights (UDHR),[14] which protects the Peoples' human right to freely participate in their community's cultural life, to enjoy the arts, and to share in scientific advancement and its benefits.[15] It also stresses that Peoples have the right to own property[16] and not to be deprived thereof,[17] and to protect their moral and material interests resulting from their own scientific, literary, or artistic production.[18]

The International Covenant on Civil and Political Rights (ICCPR) guarantees that "[a]ll peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social[,] and cultural development."[19] Likewise, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)[20] specifies that "[Peoples] have the right to self-determination."[21]

The UNDRIP further stresses that —

> [Peoples] have the right to maintain, control, protect[,] and develop their cultural heritage, traditional knowledge[,] and traditional cultural expressions, 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, traditional knowledge, and traditional cultural expressions.[22]

Under the Convention on Biological Diversity (CBD),[23] State Parties are mandated to "respect, preserve[,] and maintain knowledge, innovations[,]

14. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (Dec. 10, 1948) [hereinafter UDHR].

15. *Id.* art. 27 (1).

16. *Id.* art. 17 (1).

17. *Id.* art. 17 (2).

18. *Id.* art. 27 (2).

19. International Covenant on Civil and Political Rights art. 1 (1), Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

20. United Nations Declaration on the Rights of Indigenous Peoples, U.N. G.A. Res. 61/295, U.N. Doc. No. A/RES/61/295 (Sep. 13, 2007).

21. *Id.* art. 3.

22. *Id.* art. 31.

23. CBD, *supra* note 7.

and practices of [Peoples;]"[24] promote their "wider application with [these Peoples'] approval and involvement[;]"[25] and encourage "the equitable sharing of the benefits arising from the utilization of such knowledge, innovations[,] and practices[.]"[26]

The United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention for the Safeguarding of Intangible Cultural Heritage (ICH)[27] also provides for specific protection of "knowledge and practices concerning nature and the universe"[28] as well as respect for "customary practices governing access to specific aspects of such heritage[.]"[29] Notably, the same Convention commands that State Parties must "endeavor to ensure the widest participation of [Peoples] ... [to] create, maintain[,] and transmit [ICH], and to involve [them] actively [in] its management."[30]

As an intellectual property (IP) asset, however, TK is internationally understood within the framework of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement)[31] and related instruments,[32] which governs the level of protection of IPRs among all World Trade Organization (WTO) Member States, whether developed or developing.[33]

Under the TRIPS Agreement, each WTO Member State must maintain the same standards of IP protection for every person within their territories,

24. *Id.* art. 8 (j). *See also* Hanns Ulrich, *Traditional Knowledge, Biodiversity, Benefit-Sharing and the Patent System: Romantics v. Economics*, *in* BIOTECHNOLOGY AND INTERNATIONAL LAW 215 (Francesco Francioni & Tullio Scovazzi eds., 2006).

25. CBD, *supra* note 7, art. 8 (j).

26. *Id.*

27. Convention for the Safeguarding of the Intangible Cultural Heritage, *adopted* Oct. 17, 2003, 2368 U.N.T.S. 1 (entered into force Apr. 20, 2006).

28. *Id.* art. 2 (2) (d).

29. *Id.* art. 13 (d) (ii).

30. *Id.* art. 15.

31. Agreement on Trade-Related Aspects of Intellectual Property, *adopted* Apr. 15, 1994, 1869 U.N.T.S. 299 (entered into force Jan. 1, 1995) [hereinafter TRIPS Agreement].

32. Examples are the Paris and Berne Conventions, which have been homogenized and subsumed within the larger and more modern TRIPS Agreement. *Id.* art 1 (3).

33. Visser, *supra* note 11, at 208.

whether their own nationals or of other Member States.[34] For instance, under the TRIPS Agreement, Member States must make patents available "for any invention[ ], whether products or processes, in all fields of technology"[35] as a minimum standard. Such standard is so encompassing that it can possibly include TK when used as an IP asset in a patentable invention.[36]

But given the diversity and peculiar nature of TK, the WIPO Intergovernmental Committee (IGC) on TK has laid down the following guide points in order for TK to be considered eligible for traditional IP protection, to wit:

(1) It should be distinctively associated or linked with the cultural, social identity, and/or cultural heritage of (a) Peoples; or (b) any other national entity defined by national law;[37]

(2) It should be generated, maintained, shared, or transmitted in a collective context;[38]

(3) It should be intergenerational or passed on from generation to generation;[39] and

(4) It should have been used for a term not less than fifty years, as may be determined by each Member State.[40]

That TK must be subservient to the TRIPS Agreement stems not only from a theoretical standpoint, but also due to practical reasons — since compliance with the TRIPS Agreement is formidable for every Member State as it is linked to the WTO dispute resolution system,[41] wherein non-compliance thereto endangers Member States to retaliatory trade sanctions.[42]

34. TRIPS Agreement, *supra* note 31, art. 1 (3).

35. *Id.* art. 27 (1).

36. Lindsey Schuler, *Modern Age Protection: Protecting Indigenous Knowledge through Intellectual Property Law*, 21 MICH. ST. INT'L L. REV. 751, 757-58 (2013).

37. Draft Articles, *supra* note 9, art.1.

38. *Id.*

39. *Id.*

40. *Id.*

41. Samson & Go III, *supra* note 2, at 195 (citing Laurence R. Helfer, *Regime Shifting: The TRIPS Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 YALE J. INT'L L. 1, 2 (2004)).

42. *Id.*

Outside of the TRIPS Agreement, as already mentioned, the WIPO is presently in the process of crafting an international legal instrument, i.e., the Draft Articles on the Protection of Traditional Knowledge for the protection of TK as an IP asset.[43]

43. Draft Articles, *supra* note 9.

2. TK under Philippine Law

The Philippines constitutionally promotes the rights of Peoples within the framework of national unity and development[44] by recognizing, respecting, and protecting their rights to preserve and develop their cultures, traditions, and institutions.[45]

Proceeding from this constitutional directive, the Indigenous Peoples' Rights Act[46] (IPRA) established the necessary mechanisms to enforce and guarantee the realization of the Peoples' rights to their ancestral domain, cultures, traditions, and institutions. It provided them the right to control, develop, and protect their "sciences, technologies[,] and cultural manifestations, including human and other genetic resources, seeds, 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."[47] It also afforded them the right to the restitution of cultural, intellectual (including TK), religious, and spiritual properties taken without their free and prior informed consent (FPIC) or in violation of their laws, traditions, and customs.[48]

The Natural Cultural Heritage Act[49] mandates the documentation of traditional and contemporary arts and crafts,[50] including their processes and makers,[51] and the sustaining of the sources of their raw materials.[52] It also

44. PHIL. CONST. art. II, § 22.

45. PHIL. CONST. art. XIV, § 17.

46. 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 [Indigenous Peoples' Rights Act of 1997], Republic Act No. 8371, § 2 (1997).

47. *Id.* § 34.

48. *Id.* § 32.

49. An Act Providing for the Protection and Conservation of the National Cultural Heritage, Strengthening the National Commission for Culture and the Arts (NCCA) and its Affiliated Cultural Agencies, and for Other Purposes, Republic Act No. 10066 (2009).

50. *Id.* § 16.

51. *Id.*

52. *Id.*

extends assistance to Peoples in preserving their particular cultural and historical properties.[53]

Likewise, the Traditional and Alternative Medicines Act (TAMA)[54] allows Peoples to require third parties, who use TK, to acknowledge their source and to demand a share of the financial returns from the commercial use of their TK.[55]

On the other hand, as an IP asset, the Intellectual Property Code of the Philippines[56] has nothing categorical about TK. It only briefly mentions for consideration, the enactment of a law providing *sui generis* protection of plant varieties and animal breeds and a system of community intellectual rights protection.[57] Accordingly, as of the present, TK is being considered as similar to any of the traditional IPRs such as patents, copyrights, trademarks, or trade secrets, and protection to it is extended only if it qualifies as such. Consequently, if and when TK fails to meet the demanding criteria for protection under these laws, it will not be secure and thus is open for appropriation by the public. This brings about availability and sufficiency issues in providing legal protection to TK either as a human right or as an IP asset, considering the incongruent philosophical foundations between these two legal regimes as well as the peculiar nature of TK as an intangible and traditional resource.

B. A Clash of Paradigms: Intellectual Property Rights v. Traditional Knowledge

The view that TK must be subservient to and understood solely within the IP regime stems from the unfortunate conception of TK as mere intellectual creations of the individual mind, which is the subject matter of traditional IPRs.[58] But since IPRs are purely statutory in nature, proponents of this

53. *Id.* § 18.

54. An Act Creating the Philippine Institute of Traditional and Alternative Health Care (PITAHC) to Accelerate the Development of Traditional and Alternative Health Care in the Philippines, Providing for a Traditional and Alternative Health Care Development Fund and for Other Purposes [Traditional and Alternative Medicine Act (TAMA)], Republic Act No. 8423 (1997).

55. *Id.* § 2.

56. An Act Prescribing the Intellectual Property Code and Establishing the Intellectual Property Office, Providing for its Power and Functions, and for Other Purposes [INTELLECTUAL PROPERTY CODE], Republic Act No. 8293 (1998).

57. *Id.* § 22.4.

58. *See* Visser, *supra* note 11, at 210.

view perforce argue that in order for TK to be protected under IP laws, then holders of TK must first satisfy the strict requirements of the traditional IP regime.[59] Unfortunately, TK cannot be satisfactorily shoehorned into the traditional IP regime because of the incongruent philosophical foundations between TK and traditional IPRs.

1. Intellectual Property as the Product of the Individual Mind

The Philippines, as signatory to the TRIPS Agreement, subscribes to the Western utilitarian vision of IPR,[60] which is diametrically incongruent with the Peoples' traditional system in several material respects.

Under this school of thought, IP assets are owned (or co-owned) by persons, natural or juridical, by virtue of their creative prowess.[61] Thus, a scholar writes the following —

> Built upon the Cartesian duality of mind and body, intellectual property rights are aligned with practices of rationality and planning. The expression 'intellectual property rights' makes it appear as if the property and rights are products of individual minds. This is part of a Western epistemology that separates mind from body, subject from object, observer from observed, and that accords priority, control, and power to the first half of the duality. The term 'intellectual' connotes as well the [side which emphasizes knowledge,] and suggests that context of use is unimportant[.][62]

As products of individual minds, therefore, traditional IPRs equally benefit individuals with a limited monopoly to benefit from their creativity for a definite period. This statutory monopoly is intended to encourage more individuals to engage in intellectual creation. Production and maintenance of IP assets, in turn, benefits society with novel inventions,[63] creative works,[64] and performances,[65] as well as confidence in the origin of goods in the

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* (citing Stephen Gudeman, *Sketches, Qualms, and Other Thoughts on Intellectual Property Rights*, *in* INDIGENOUS PEOPLES AND INTELLECTUAL PROPERTY RIGHTS 102-21 (Stephen B. Brush & Doreen Stabinsky eds., 1996)).

63. Maurizio Fraboni & Federico Lenzerini, *Indigenous 'Peoples' Rights, Biogenetic Resource and Traditional Knowledge: The Case of the Sateré-Mawé People*, *in* BIOTECHNOLOGY AND INTERNATIONAL LAW 341 (Francesco Francioni & Tullio Scovazzi, eds., 2006).

64. *Id.*

65. *Id.*

market.[66] In sum, traditional IPRs are intended to produce intellectual "'commodities' to be exploited for human needs."[67] As commodities, therefore, IP assets are produced by individuals for public use, such that once the period for exclusivity has lapsed, these IP assets pass to the public domain where no claim of exclusivity can be successfully maintained.

2. Traditional Knowledge as Communal and Nature-Based

In contrast, even if different Peoples' have their own peculiar beliefs, still, it has been generally observed that these Peoples' TK comes from a perspective which views life as communal.[68] Accordingly, it has been said that —

> indigenous [*viz* traditional] knowledge differs from scientific knowledge in being moral, ethically-based, spiritual, intuitive[,] and holistic; it has a large social context. Social relations are not separated from relations between humans and non-human entities. The individual self-identity is not distinct from the surrounding world. There often is no separation of mind and matter. [TK] is an integrated system of knowledge, practice[,] and beliefs.[69]

Thus, contrary to the prevailing Western vision of IPR in the TRIPS Agreement, TK is a cultural property in the sense that it is a product and property of the community, and not of individual persons or entities.[70] Rather, for the Peoples, "the earth is ... the mother of life, and that any creature which is on the earth, of animal, plant[,] or inanimate character, deserves respect as an essential element of the world's divine order. [Consequently] ... no taking of natural resources occurs other than is strictly necessary for life."[71]

In the Philippines, this view of the Peoples has been memorialized in Justice Santiago M. Kapunan's separate opinion in *Cruz v. Secretary of Department of Environment and Natural Resources*,[72] where he quoted Kalinga Chieftain Macli-ing Dulag, to wit —

66. *Id.*

67. *Id.*

68. Visser, *supra* note 11, at 210.

69. *Id.* (citing Fikret Berkes, et al., *Traditional Ecological Knowledge, Biodiversity, Resilience, and Sustainability*, *in* BIODIVERSITY CONSERVATION: PROBLEMS AND POLICIES 283 (C.A. Perrings, et al. eds., 1995)).

70. Visser, *supra* note 11, at 210.

71. Fraboni & Lenzerini, *supra* note 63, at 342.

72. Cruz v. Secretary of Environment and Natural Resources, 347 SCRA 128 (2000).

> You ask if we own the land ... how can you own that which will outlive you? Only the race own the land because only the race lives forever. To claim a piece of land is a birthright of every man. The lowly animals claim their place; how much more man? Man is born to live. Apu Kabunian, lord of us all, gave us life and placed us in the world to live human lives. And where shall we obtain life? From the land. To work (the land) is an obligation, not merely a right. In tilling the land, you possess it. And so land is a grace that must be nurtured. To enrich it and make it fructify is the eternal exhortation of Apu Kabunian to all his children. Land is sacred. Land is beloved. From its womb springs [ ] life.[73]

Consequently, from the perspective of Peoples, TK, as their collective intangible resource, are not commodities the exploitation of which may rightfully be limited to individuals just so to reward their creativity in the community. Instead, proceeding from the Peoples' belief of stewardship,[74] TK is intended, instead, for the benefit of everyone and is to subsist as long as the Peoples' communities exist, such that TK is passed down over generations and are not usually identified with any author or origination date.[75]

This creates problems within the traditional IP regime, because IP assets are supposed to be intellectual creations of identifiable persons, who are then entitled to statutory monopolies.[76] Accordingly, the manner by which TK and other forms of intangible cultural resources are cascaded among Peoples, when viewed through the lens of traditional IPRs, would thus be considered by the prevailing IP legal framework as having been placed in the public domain — where, according to traditional IP laws, it may be appropriated by anyone, including persons other than Peoples.[77]

That Peoples are not generally able to make use of traditional IPRs for their protection is made worse when the same IP regime is used instead by "outsiders" who are often able to obtain TK without authorization, claim the same TK as their own IP asset, and then proceed to benefit in the

73. *Id.* at 247 (J. Kapunan, separate opinion) (citing Ponciano L. Bennagen, *Tribal Filipinos*, *in* INDIGENOUS VIEWS OF LAND AND THE ENVIRONMENT (Shelton H. Davis ed., 1988)).

74. Visser, *supra* note 11, at 210 (citing Berkes, et. al., *supra* note 69, at 282-99).

75. *Id.*

76. *See* Kretov Kirill, Identifiable Intangible Assets (Recognized in Accounting), *available at* http://kretov.biz/123-Identifiable-Intangible-Assets-(Recognized-in-Accounting) (last accessed May 20, 2016).

77. *See, e.g.*, Filipino Society of Composers, Authors and Publishers, Inc. vs. Tan, 148 SCRA 461 (1987).

statutory monopoly therefrom — to the detriment, and at times, even to the exclusion of the Peoples who were the rightful owners of such TK.

C. Options in the Face of Incongruent Regimes

Despite the seeming incompatibility of international agreements relating to TK, both as a human right and as an IPR, a nuanced understanding of international law would show that protection of TK is still the international obligation of States, including the Philippines. To support this proposition, the Authors will address, first, the arguments purporting that TK must be subservient to the prevailing rules on IPRs under international law, and then proceed to argue how, domestically, the Philippines is obligated to protect TK despite its own IP laws.

There are at least three arguments that are usually offered to support the proposition that TK can only be protected under the regime of the TRIPS Agreement under international law.

First, in case of incompatible treaties, it is a general principle of international law, according to the Vienna Convention on the Law of Treaties (VCLT),[78] that a later treaty prevails over an earlier one.[79] Since the TRIPS Agreement was in force in 1995,[80] and all of the conventions expressing support for TK were in force earlier than that date,[81] then it stands to reason that the provisions of the TRIPS Agreement must therefore prevail over all other treaty provisions incompatible thereto.[82]

Second, since both the CBD and the Heritage Convention provide that it should not do away with other international obligations of State Parties as long as such obligations do not cause "serious damage or threat to biological diversity,"[83] then there is also no reason for States to disregard the clear provisions of the TRIPS Agreement when doing so will not cause serious damage or threat to biological diversity.[84]

78. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) [hereinafter VCLT].

79. *Id.* art. 30.

80. World Trade Organization, Overview: The TRIPS Agreement, *available at* https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm (last accessed May 20, 2016).

81. *See* CBD, *supra* note 7; UDHR *supra* note 14; & Convention for the Safeguarding of the Intangible Cultural Heritage, *supra* note 27.

82. *Compare* TRIPS Agreement, *supra* note 31 *with* CBD, *supra* note 7; UDHR *supra* note 14; & Convention for the Safeguarding of the Intangible Cultural Heritage, *supra* note 27.

83. CBD, *supra* note 7, art. 22 (1).

84. *See* Visser, *supra* note 11.

Third, even if TK is construed as part of customary international law, still, it is indisputable that treaty law may validly annul international customs, such that the TRIPS Agreement must stand even if TK is deemed part of customary international law.[85]

All these three arguments, however, must fail because of two weighty reasons.

First, the VCLT cannot be used to justify the proposition that the TRIPS Agreement prevails over earlier international instruments because the right of Peoples to control whether or not they wish to commercialize their TK is recognized as included within the principle of self-determination[86] — enshrined as a fundamental human right under Article 1 (2) of the United Nations (U.N.) Charter,[87] which explicitly provides that no other international instrument can supersede it.[88]

Second, even if the right to control one's TK is not understood to be an aspect of the right to self-determination of peoples in the U.N. Charter, still, as the protection of TK has been recognized as a *jus cogens* norm under the concept of State sovereignty upon biodiversity,[89] then it necessarily follows that the TRIPS Agreement cannot be used to defeat protection of TK under international law.[90]

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85. MARIA FOGDESTAM AGIUS, INTERACTION AND DELIMITATION OF INTERNATIONAL LEGAL ORDERS 494 (2014).

86. Lenzerini, *supra* note 6, at 226.

87. U.N. Charter art. 1 (2).

88. U.N. Charter art. 103.

89. JONATHAN CURCI, THE PROTECTION OF BIODIVERSITY AND TRADITIONAL KNOWLEDGE IN INTERNATIONAL LAW OF INTELLECTUAL PROPERTY 162 (2010) (citing Subrata Roy Chowdury, *Permanent Sovereignty Over National Resources*, *in* KAMAL HOSSAIN & SUBRATA ROY CHOWDURY, PERMANENT SOVEREIGNTY OVER NATIONAL RESOURCES IN INTERNATIONAL LAW ix (1984) & KEMAL BASLAR, THE CONCEPT OF COMMON HERITAGE OF MANKIND IN INTERNATIONAL LAW 136 (1998)).

90. Article 53 of the VCLT provides the following —

> A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Domestically, the Philippine Constitution itself recognizes and protects the rights of Peoples within the framework of national unity and development.[91] More importantly, the Philippines has also ratified the CBD,[92] the ICCPR,[93] and the ICH,[94] which obligate it to comply with these treaties in good faith under the generally accepted principle of *pacta sunt servanda.*[95]

Thus, clearly, as a constitutionally recognized right and international obligation, the Philippines is duty-bound to "respect, preserve[,] and maintain knowledge, innovations[,] and practices of [Peoples,]"[96] among other State obligations. This is the case even if the Philippines is also party to the TRIPS Agreement.[97] Thus, the task of Philippine legal scholars is to harmonize the constitutional directives, treaties, and statutes protecting TK, as a *jus cogens* norm, with the provisions of the TRIPS Agreement and the Philippine IP regime.

II. IS THE IPRA ENOUGH TO FORTIFY TK?

As an international obligation and constitutional duty, the Philippines must protect the TK of its Peoples. Dutifully, the Philippines has enacted the IPRA to protect its Peoples. But is this enough? The following analysis

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VCLT, *supra* note 78, art. 53.

91. PHIL. CONST. art. II, § 22.

92. The Philippines ratified the CBD on 6 January 1994. Convention on Biological Diversity, Philippines — Overview, *available at* https://www.cbd.int/countries/?country=ph (last accessed May 20, 2016).

93. The Philippines ratified the ICCPR on 23 October 1986. United Nations Treaty Collection, Status of the ICCPR, *available at* https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-4&chapter=4&lang=en (last accessed May 20, 2016).

94. The Philippines ratified the ICH on 18 August 2006. UNESCO, Official List of State-Parties to the Convention for the Safeguarding of the Intangible Cultural Heritage, *available at* http://www.unesco.org/eri/la/convention.asp?KO=17116&language=E (last accessed May 20, 2016).

95. PHIL. CONST. art. II, § 2. *See also* PHIL. CONST. art. VI, § 21; VCLT, *supra* note 78, art. 26 ("Every treaty in force is binding upon the parties to it and must be performed by them in good faith."); & Lim v. Executive Secretary, 380 SCRA 739, 758 (2002).

96. CBD, *supra* note 7, art. 8 (j).

97. *See* World Intellectual Property Organization, Other Intellectual Property Treaties, *available at* http://www.wipo.int/wipolex/en/other_treaties/parties.jsp?treaty_id=231&group_id=22 (last accessed May 20, 2016).

shows that the IPRA and the related administrative rules thereto are not enough to protect the entire gamut of TK possessed by the Peoples, which therefore means that legal scholars in favor of TK protection must seek refuge in other laws.

A. Applicability of IPRA and Related Administrative Issuances

Under the IPRA, Peoples have the right to the "restitution of [their] intellectual ... property taken without their [FPIC] or in violation of their laws, traditions[,] and customs."[98] They are further entitled to the "recognition of the full ownership[,] control[,] and protection of their cultural and intellectual rights[; and they] shall have the right to special measures to control, develop[,] and protect their sciences, technologies[,]cultural manifestations, [and other traditional knowledge]."[99]

Pursuant to this, the National Commission on Indigenous Peoples (NCIP) issued the Rules and Regulations implementing the IPRA,[100] and several administrative orders,[101] particularly on the matter of bioprospecting, researching, and accessing Peoples' TK.[102]

Specifically, the IPRA Rules and Regulations provide that the "NCIP shall establish *effective mechanisms* for protecting the indigenous peoples' community intellectual property rights along the principle of first impression first claim, the [CBD], the [UNDRIP], and the [UDHR]."[103] It also provides that

> [*i*]*ndigenous culture shall not be commercialized* or used for tourism and advertisement purposes *without the free and prior informed consent* of the indigenous peoples concerned. Where consent is alleged, the NCIP will ensure that there is free and prior informed consent.

98. Indigenous Peoples' Rights Act, § 32.

99. *Id.*

100. Rules and Regulations Implementing the Indigenous Peoples' Rights Act of 1997, Republic Act No. 8371 (1998).

101. National Commission on Indigenous Peoples, The Indigenous Knowledge Systems and Practices (IKSPs) and Customary Laws (CLs) Research and Documentation Guidelines of 2012 [NCIP A.O. No. 1, s. 2012] (Mar. 15, 2012) & National Commission on Indigenous Peoples, The Revised Guidelines on Free and Prior Informed Consent (FPIC) and Related Processes of 2012 [NCIP A.O. No. 3, s. 2012] (Apr. 13, 2012).

102. *Id.*

103. Rules and Regulations Implementing the Indigenous Peoples' Rights Act of 1997, rule VI, § 10 (emphasis supplied).

> In instances where the presentation of indigenous culture and artistic performances are held, the [Peoples] shall have *control over the performance in terms of its content and manner of presentation* according to customary laws and traditions, and *shall have the right to impose penalties for violation* thereof.
>
> Indigenous peoples shall also have the *right to equitably share* in the benefits of such presentation or performance.[104]

In formulating these mechanisms, the following are the guidelines —

> Section 15. Protection and Promotion of Indigenous Knowledge Systems and Practices [ ]. The following guidelines, inter alia, are hereby adopted to safeguard the rights of [Peoples] to their indigenous knowledge systems and practices:
>
> (a) The [Peoples] *have the right to regulate the entry* of researchers into their ancestral domains/lands or territories. Researchers, research institutions, institutions of learning, laboratories, their agents or representatives[,] and other like entities shall secure the [FPIC] of the [Peoples], before access to indigenous peoples and resources could be allowed;
>
> (b) A *written agreement* shall be entered into with the [Peoples] concerned *regarding the research*, including its purpose, design[,] and *expected outputs*;
>
> (c) All data provided by the [Peoples] shall be *acknowledged* in whatever writings, publications, or journals authored or produced as a *result of such research*. The [Peoples] will be definitively named as sources in all such papers;
>
> (d) Copies of the outputs of all such researches shall be *freely provided* the [Peoples]; and
>
> (e) The [Peoples] concerned shall be *entitled to royalty* from the income derived from any of the researches conducted and resulting publications.[105]

These "effective mechanisms" and guidelines contemplated in the IPRA Rules and Regulations are spelled out in NCIP Administrative Order (A.O.) No. 1, Series of 2012,[106] (TK Research and Documentation Guidelines) in case of academic or People-solicited research and access to TK; and in the Joint Administrative Order No. 1, Series of 2005, issued by the Department of Environment and Natural Resources, Department of Agriculture, Palawan

104. *Id.* rule VI, § 16 (emphasis supplied).

105. *Id.* rule VI, § 15 (emphasis supplied).

106. NCIP A.O. No. 1, s. 2012.

Council Sustainable Development, and NCIP[107] (Joint Order) in case of commercial prospecting of biological and genetic resources other than medicinal plants intended for use as traditional or alternative medicine[108] — bioprospecting of which is covered instead by the TAMA and its Implementing Rules and Regulations (TAMA IRR)[109] albeit the latter circuitously refers back to the IPRA as to how bioprospecting of traditional and alternative medicines may lawfully be conducted.[110]

Common to all these administrative mechanisms, thus, is the paramount consideration of FPIC, which is governed by NCIP A. O. No. 3, Series of 2012 (FPIC Guidelines),[111] and is so impressed with public interest that it is stressed that —

> Section 3. Declaration of Policy.
>
> (c) No concession, license, permit or lease, production-sharing agreement, or other undertakings affecting ancestral domains *shall be granted or renewed* without going through the process laid down by law and this [FPIC] Guidelines.[112]

Accordingly, the TK Research and Documentation Guidelines provides for the following operating principles in cases of academic or People-solicited research of TK:

(1) Peoples' have the right to self-determination;[113]

(2) Peoples collectively own their TK, as an inherent part of their cultural patrimony. Individuals or specific families, however,

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107. Department of Environment and Natural Resources, Department of Agriculture, Palawan Council for Sustainable Development, & National Commission on Indigenous Peoples, Guidelines for Bioprospecting Activities in the Philippines [Joint DENR-DA-PCSD-NCIP A.O. No. 1, s. 2005] (Jan. 14, 2005).

108. *Id.* § 3.2. The development of medicinal plants for traditional or alternative medical use shall be primarily governed by the Traditional and Alternative Medicine (TAMA) Act of 1997.

109. Rules and Regulations Implementing the Traditional and Alternative Medicine (TAMA) Act of 1997, Republic Act No. 8423 (1998).

110. *Id.* rule IX, § 2.

111. NCIP A.O. No. 3, s. 2012.

112. *Id.* § 3 (c).

113. NCIP A.O. No. 1, s. 2012, § 4 (a).

may serve as 'custodians' or holders of the TK on behalf of the community in accordance with its customary laws;[114]

(3) TK is *sui generis*, being the collective property of the Peoples. Thus, "the author, composer, inventor, writer, choreographer, arranger, lyricist, owner, first user, or preacher is not one individual but *all the members of the community* who belong to the past, present[,] and future generations[;]"[115]

(4) No TK may be academically researched or accessed without FPIC;[116]

(5) In case TK is allowed to be researched, there must be equitable sharing of benefits between the Peoples and the researchers from the research output;[117] and

(6) Peoples shall have the sole and exclusive right to determine the extent, content[,] or manner of presentation of the information or knowledge that may be published or communicated with regard to their TK.[118]

Similarly, in cases of commercial bioprospecting, including medicinal plants, the Joint Order and the TAMA IRR both exhort, as a State policy, that FPIC is mandatory prior to any act of commercial bioprospecting.[119]

FPIC may be obtained from the Peoples who are considered as owners of the ancestral domain where the research or bioprospecting is to be conducted.[120]

Without the FPIC of Peoples, collection, utilization, bioprospecting, or even mere academic research of TK and biological resources of Peoples shall terminate the academic research[121] or commercial bioprospecting.[122]

114. *Id.* § 4 (b).

115. *Id.* § 4 (c) (emphasis supplied).

116. *Id.* § 4 (d).

117. *Id.* § 4 (e).

118. *Id.* § 4 (f).

119. Joint DENR-DA-PCSD-NCIP A.O. No. 1, s. 2005, § 1.2. *See also* Rules and Regulations Implementing the Traditional and Alternative Medicine (TAMA) Act of 1997, rule IX, § 2 (3).

120. NCIP A.O. No. 3, s. 2012, § 20. FIPC may be obtained either through Community Assemblies in case of large-scale extractive activities, or through negotiation with the Peoples' Elders in case of small-scale non-extractive activities. *Id.* §§ 22 & 24.

121. NCIP A.O. No. 1, s. 2012, § 16.

Further, in case of commercial bioprospecting, non-compliance with the Joint Order shall result in the confiscation of collected materials and imposition of a perpetual ban on access to biological resources in the Philippines by the violator.[123] In case of bioprospecting of medicinal plants, however, it is unclear what penalties would be imposed as both the law and the TAMA IRR do not provide any penalty for non-compliance,[124] although the TAMA IRR clearly terms such to be an act of biopiracy and that the IPRA and NCIP administrative orders are to be lawfully complied with.[125]

But even if FPIC is obtained, academic research or commercial bioprospecting would not automatically deprive Peoples' of their collective ownership of TK. Thus, in cases of academic researches,

> *ownership rights to* [such] researches and documentations[,] whether published or unpublished, *shall rightfully belong to*
>
> (a) *the* [*Peoples*], [when] initiated, *solicited*[,] *or conducted by the* [*Peoples*] *themselves*, undertaken within or affecting the ancestral domain[; or]
>
> (b) *the* [*Peoples*] *and the research proponent, jointly*, [when] *conducted by non-members* of the [People], undertaken within or affecting the [Peoples] concerned and/or [their] ancestral domain.
>
> They shall have joint rights to all works and materials resulting from such research, whether or not the same is published or communicated in any medium.
>
> In the event that the research or documentation output are sought to be protected by the research proponent[,] *such copyright shall involve the community concerned in the said research or documentation.*[126]

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122. Joint DENR-DA-PCSD-NCIP A.O. No. 1, s. 2005, § 31 (1).

123. *Id.* § 31.

124. *See generally* Traditional and Alternative Medicine (TAMA) Act of 1997 & Rules and Regulations Implementing the Traditional and Alternative Medicine (TAMA) Act of 1997.

125. Rules and Regulations Implementing the Traditional and Alternative Medicine (TAMA) Act of 1997, rule IX, § 2 (3). This states that "the provisions of existing laws and regulations, particularly ... [IPRA] must be complied with." One may thus interpret this as similarly imposing the penalties provided for in NCIP A.O. No. 1, s. 2012 for academic researches and Joint DENR-DA-PCSD-NCIP A.O. No. 1, s. 2005 for commercial bioprospecting, among other possible penalties under other laws. *Id.*

126. NCIP A.O. No. 1, s. 2012, § 18 (emphases supplied).

As for commercial bioprospecting, the Joint Order provides the following — "Access to biological resources *does not imply automatic access to* [ ] (TK) associated with these resources. Should the resource user intend to access associated TK, [he or she] shall explicitly set forth in the research proposal the intention to do so."[127]

Meanwhile, in cases of medicinal plants, the TAMA IRR provides that

> [t]he [Philippine Institute of Traditional and Alternative Health Care (TAMA Institute)] shall endeavor to monitor and inventory Philippine natural health products that *have been inappropriately applied for* [*IPR*] *protection in the Philippines and abroad* without complying with applicable laws and regulations and shall make representations with the appropriate international institutions and agencies ... *to cancel* [*these*] *rights* or *to renegotiate the terms and conditions thereof favorable to Philippine interests.*
>
> The application of existing forms of [IPRs] on biological and genetic resources as well as *indigenous knowledge systems* shall be without prejudice to the application of whatever *sui generis* rights that may be provided by law to the appropriate [Peoples]. The Board [of Directors of the TAMA Institute] or *other governmental bodies* shall also *intervene*, *whenever it becomes necessary* for the protection of the general welfare of the communities involved, to protect and ensure the rights of the communities during the negotiations for benefit sharing.[128]

Lastly, the TK Research and Documentation Guidelines, as well as the TAMA IRR as regards TK on medicinal plants, both provide that such TK, including all research conducted, shall be documented in a registry to be established and maintained by the NCIP.[129]

B. Analysis

Despite all these seemingly staunch protections extended to Peoples' TK, there remains a disconnect between the IPRA and TK protection in the latter's entire complexity. For while it is clear the Peoples are entitled to benefit-sharing arrangements in case of commercial bioprospecting,[130] or empowered to control how academic research outputs are to be

127. Joint DENR-DA-PCSD-NCIP A.O. No. 1, s. 2005, § 10.2 (emphasis supplied).

128. Rules and Regulations Implementing the Traditional and Alternative Medicine (TAMA) Act of 1997, rule IX, § 4 (emphases supplied).

129. NCIP A.O. No. 1, s. 2012, § 17 & Rules and Regulations Implementing the Traditional and Alternative Medicine (TAMA) Act of 1997, rule IX, § 3.

130. *See* Joint DENR-DA-PCSD-NCIP A.O. No. 1, s. 2005, ch. VI & VII.

published,[131] there remains no categorical statutory expression that Peoples' collective ownership of IP assets, such as their TK, entitles them to claim for traditional IPR protection, particularly the statutory monopoly provided by IP laws and the right to prohibit others from commercially exploiting People's TK — even if subject to benefit-sharing arrangements.

Also, the FPIC Guidelines, which serve as the key to any research or bioprospecting of TK, clearly provides that only "concession[s], license[s], permit[s,] lease[s], production-sharing agreement[s], or other undertakings *affecting ancestral domains*"[132] shall not be granted without FPIC. But some TK may not necessarily affect or relate to Peoples' ancestral domains. Relevantly, the IPRA IRR defines ancestral domains as

> all areas generally belonging to [Peoples], subject to property rights within ancestral domains already existing and/or vested upon the effectivity of the Act, *comprising lands*, *inland waters*, *coastal areas*, and *natural resources therein*, held under a claim of ownership, occupied or possessed by [Peoples] by themselves or through their ancestors, communally or individually since time immemorial, continuously to the present, except when interrupted by war, *force majeure* or displacement by force, deceit, stealth, or as a consequence of government projects or any voluntary dealings entered into by the government and private individuals/corporations, and which are necessary to ensure their economic, social[,] and cultural welfare. *It shall include ancestral lands*, *forests*, *pasture*, *residential*, *agricultural*, and *other lands* individually owned whether alienable and disposable or otherwise; *hunting grounds*[;] *burial grounds*; *worship areas*; *bodies of water*; *mineral and other natural resources*; and *lands* which may no longer be exclusively occupied by [Peoples], but from which they traditionally had access to, for their subsistence and traditional activities, particularly the home ranges of [Peoples] who are still nomadic and/or shifting cultivators.[133]

TK Research and Documentation Guidelines further clarify that "[t]he regulation of access to community intellectual property and other resources [*is*] *based on the recognition of ownership of these communities over their ancestral domains/lands.*"[134]

Clearly, FPIC is only required when protecting TK related to Peoples' ancestral lands and the natural resources found therein, but not TK over

131. NCIP A.O. No. 1, s. 2012, § 17 & Rules and Regulations Implementing the Traditional and Alternative Medicine (TAMA) Act of 1997, rule IX, § 3.

132. NCIP A.O. No. 3, s. 2012, § 3 (c).

133. Rules and Regulations Implementing the Indigenous Peoples' Rights Act of 1997, rule II, § 1 (a) (emphases supplied).

134. NCIP A.O. No. 1, s. 2012, § 4 (a) (emphasis supplied).

intangible matters such as dispute-settlement processes and methods of governance, traditional building techniques, farming methods, or water management strategies used outside of ancestral lands.[135]

Moreover, while the IPRA IRR categorically declares that "[i]ndigenous culture shall not be commercialized ... without the [FPIC of Peoples] ... [and that Peoples] shall have control [over its] performance[,]"[136] there are at least three problems which makes it difficult for the Authors to say that the IPRA IRR may be used as basis to fully protect Peoples' TK in the absence of IPRs and other laws.

First, the NCIP may have transgressed the bounds of its rule-making powers in incorporating in the IPRA IRR matters which may affect substantive rights. Particularly, the IPRA IRR allows Peoples to control the performance of their indigenous culture even against the substantive right of any person to freely use a literary or artistic work in the public domain, e.g., folklore which has been passed on for generations,[137] based on the fundamental right to freedom of expression.[138]

Second, even assuming that the IPRA IRR is valid as an exercise of police power curtailing substantive rights, still it does not clarify the meaning of the words "indigenous culture" and "performance," which makes the provision overbroad, arbitrary, and unreasonable until narrowly interpreted by the courts. In one case, the Court held that "[n]otwithstanding its extensive sweep, police power is not without its own limitations. For all its awesome consequences, it may not be exercised arbitrarily or unreasonably. Otherwise, and in that event, it defeats the purpose for which it is exercised, that is, to advance the public good."[139]

Third, even if this provision of the IPRA IRR is valid in all respects, still, it only allows Peoples to prohibit (1) commercialization and (2) performance of its "indigenous culture." It cannot, therefore, authorize the Peoples to prohibit the reproduction of a substantial portion of its

135. WIPO, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, *List of Knowledge, List and Brief Technical Explanation of Various Forms in Which Traditional Knowledge May be Found*, Annex, at 2 & 3, WIPO/GRTKF/IC/17/INF/9 (Nov. 5, 2010).

136. Rules and Regulations Implementing the Indigenous Peoples' Rights Act of 1997, rule VI, § 16 (emphasis supplied).

137. INTELLECTUAL PROPERTY CODE, § 184 (a).

138. PHIL. CONST. art. III, § 4.

139. Philippine Association of Service Exporters, Inc. v. Drilon, 163 SCRA 386, 390 (1988).

"indigenous culture," as may be prohibited by copyright law if only such is applicable.[140]

Accordingly, it is the Authors' position that the IPRA, related laws, and implementing rules and regulations, are inadequate to fully protect the entire range of Peoples' TK.

III. CAN TRADITIONAL KNOWLEDGE BE PROTECTED WITHIN THE EXISTING PHILIPPINE IP REGIME?

If TK in its entirety cannot be protected under the IPRA and related laws, can TK instead be protected through the present IP Code? Unfortunately, the Authors similarly posit that the present IP Code is inadequate to protect TK and, as such, amendments to the law are necessary. This conclusion is justified by the following analysis of traditional IPRs, should these be used to protect TK.

A. Patents

By definition alone, TK cannot be protected by a Philippine patent. The IP Code provides that patentable inventions include "any technical solution of a problem in any field of human activity which is *new*, involves an *inventive step*[,] and is *industrially applicable*[,]"[141] which "may be, or may relate to, a product, a process, or an improvement of the technical solution."[142]

These requisites for patentability cannot apply to all TK, as already demystified. This is because not all TK are patentable technical solutions to a problem in any field of human activity. As discussed, TK encompasses a wide variety of knowledge, including traditional cultural expressions and folklore.[143]

But even when some aspects of TK are indeed processes, products, or improvements in the technical sense,[144] still, the fact that these are passed down over generations means that TK can almost always not satisfy the first requirement of novelty — which means that the knowledge must not have been made "available to the public anywhere in the world" before the filing date or the priority date of the application claiming the invention.[145]

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140. INTELLECTUAL PROPERTY CODE, § 177.1.

141. *Id.* § 21. (emphasis supplied).

142. *Id.*

143. *See* Samson & Go III, *supra* note 2, at 192. *See also* Visser, *supra* note 11, at 207.

144. INTELLECTUAL PROPERTY CODE, § 21.

145. *Id.* § 24.1.

B. Copyright Protection and Related Rights

Likewise, copyrights are inadequate to fully protect TK from abuse and unauthorized use. Copyright protection, in the form of economic and moral rights, extends only to the expression of an idea but not to the idea itself.[146] This means that the unauthorized use of the idea or knowledge contained in an expression will not vest to the Peoples a cause of action to prohibit the use of such information, even if the expression is protected by a copyright.[147]

There is also the matter of who is given copyright protection. Copyright presupposes that there is an author, producer, or publisher behind a work who may claim copyright protection.[148] And even in cases where the author is anonymous, copyright is to be claimed by the publishers deemed to represent the author.[149] But that is not the case with TK which is based on tradition and where no author is usually identifiable[150] — or where the author may be identified but may have died long ago, such that the copyrighted work may have already lapsed into the public domain.[151]

In fact, even assuming, *in arguendo*, that an author of TK can be identified, still, extending copyright protection to TK would probably not be beneficial as it might fracture the Peoples' community, given that the ostensible copyright holder would obtain exclusive rights to a particular expression of the TK — thus, potentially prohibiting the other members of the Peoples' community to similarly express the same, and which thus flies in the face of the very essence of TK, i.e., communal use.

C. Trademark, Names, and Secrets

The law on trademarks, names, and secrets are also inadequate to protect TK, since the governing laws on the matter are intended to protect the commercial goodwill of a person or enterprise.[152] TK, however, is not always intended for commercial use — some Peoples consider their TK to be sacred and outside the commerce of man.[153]

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146. *Id.* § 175.

147. *See* Pearl and Dean (Phil.), Incorporated v. Shoemart, Incorporated, 409 SCRA 231, 245-46 (2003) (citing Baker v. Selden, 101 U.S. 99, 102-05 (1879)).

148. INTELLECTUAL PROPERTY CODE, § 178.

149. *Id.* § 179.

150. *See* HANSEN & VANFLEET, *supra* note 13, at 3.

151. INTELLECTUAL PROPERTY CODE, § 213.

152. *Id.*

153. *Id.*

But more importantly, in all these cases of traditional IPRs, protection is only in the form of a statutory monopoly for a definite period — upon the lapse of which, the subject matter shall pass to the public domain where it may be used by anyone. Thus, the use of traditional IPRs to protect TK is, ultimately, a step towards making TK publicly available even when Peoples' may not wish to do so. What, then, can the People legally do to protect their TK?

III. PROPOSED LEGAL FRAMEWORK

Given the incompatibility of traditional IPRs with the nature of TK, and the inadequacy of IPRA and related laws, the Authors echo the call that a *sui generis* law is necessary to protect TK in the Philippines.[154] But even though the diversity of Peoples and their close intertwining with their respective cultural identity make the goal of producing a *sui generis* law very challenging, the Authors, nonetheless, are certain that it would be worthwhile because TK protection through a *sui generis* system will undoubtedly contribute to the Peoples' ultimate demarginalization and improved lives. Of course, lobbying for a *sui generis* law for TK protection would surely take time. Thus, given this, the Authors first offer the following remedies for the protection (even if admittedly inadequate) of TK in the Philippines, before proceeding to identify the ideal characteristics of a law for the *sui generis* protection of TK.

A. Protections Within the Existing IP Regime

These remedies may be categorized into two: *positive* and *defensive* protections.[155] The former pertains to the approach whereby Peoples are encouraged to use the present IP regime to acquire and assert IPRs over certain aspects of their TK.[156] The latter pertains to those options which prevent the illegitimate acquisition and maintenance of IPRs by third parties

154. *See generally* Sanchez, *supra* note 5. WIPO, Intellectual Property Needs and Expecations of Traditional Knowledge Holders (A WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge) 72, *available at* http://www.wipo.int/edocs/pubdocs/en/tk/768/wipo_pub_768.pdf (last accessed May 20, 2016).

155. WIPO, Intellectual Property and Genetic Resources, Traditional Knowledge, and Traditional Cultural Expressions (A Booklet Dealing with Intellectual Property and Genetic Resources, Traditional Knowledge, and Traditional Cultural Expressions) 22, *available at* http://www.wipo.int/edocs/pubdocs/en/tk/933/wipo_pub_933.pdf (last accessed May 20, 2016).

156. *Id.*

over TK.[157] The following is a brief discussion of the legal options under these two approaches.

1. Positive Protection

Despite the incompatibility of traditional IPR with TK, the Authors suggest that, for certain aspects of TK, Peoples may make use of the protection available in traditional IP law for the time being.

For instance, Peoples' innovations and practices based on TK may be patented as long as the elements of novelty, inventive step, and industrial applicability are met.[158] As already discussed, the requirement of novelty does not pertain to the "date" of the invention but to the manner by which the invention has been kept undisclosed to the public.[159] Thus, TK not forming part of prior art may actually be patented, even if difficult.[160]

Likewise, TK in the form of traditional cultural expressions and folklore may be protected by copyright from the moment of creation.[161] In Australia, members of Peoples have successfully sued "outsiders" for copyright infringement.[162] In the same case, the relationship among individual members of Peoples has been decided to be one of mutual trust, implying a cause of action for the Peoples-trustor to derivatively enforce copyrights in case the copyright owner-trustee refuses to enforce it.[163]

157. *Id.*

158. *Id.*

159. Samson & Go III, *supra* note 2, at 198.

160. *Id.*

161. *See* WIPO, Traditional Knowledge and Intellectual Property, *available at* http://www.wipo.int/pressroom/en/briefs/tk_ip.html (last accessed May 20, 2016).

162. *See* Bulun Bulun and Milpurrurru v. R and T Textiles Pty Ltd. (1998) 41 I.P.R. 513 (FCR) (Austl.).

163. *Id.* In this case, an artist, who is also a member of the Peoples, sued for copyright infringement of a painting that he drew for the Peoples. While the case was pending, another member of the same Peoples intervened as equitable owners of the painting. The Australian court granted permanent injunction in favor of the artist, though it denied the intervention of the People. The court ratiocinated that though the artist and the People are in a relationship of mutual trust, and that the artist owes fiduciary obligations to the People as regards the painting, the right of the People, however, is *in personam* against the artist to compel the latter to enforce the copyright against "outsiders." But since the artist successfully sued for copyright infringement here, then there is no need for the Peoples to intervene. *Id.*

Lastly, distinctive marks of Peoples may also be registered as trademarks if these are capable of distinguishing goods or services of Peoples.[164] In case TK is of a type that is "not generally known among [ ] persons within the circles that normally deal with the kind of information in question,"[165] then the law on undisclosed information, or trade secrets, may also be used to protect TK from unauthorized disclosure.[166]

These traditional IPRs may be claimed by Indigenous Peoples' Organizations (IPO), which are given juridical personality upon registration by members of the Peoples and are intended as personality vehicles in order to allow Peoples to pursue and secure their collective rights over their ancestral domains.[167]

In all these cases, Peoples' communities do not lose the freedom to make use of what are supposedly traditional and communal knowledge. This is because IPRs are private in character, such that Peoples' communities will not be barred from making use of the protected TK as long as the IPR holder, such as the People's IPO, uses IP laws to exclude only unauthorized persons or non-members of Peoples' communities from misappropriating the IPR obtained over a particular TK.[168]

2. Defensive Protection

Even if members of Peoples do not wish to obtain exclusive rights over their TK — and again, it is stressed that acquisition of IPRs may in fact be detrimental to Peoples especially when the period of protection lapses and the TK subject of the IPR legally becomes part of the public domain — TK may still be protected using "defensive" measures. The following are just some of these measures available to Peoples.

a. Prior Informed Consent

Although there is yet no case law squarely ruling on the matter, construing the IPRA and the IP Code together may evince the proposition that

164. *See* Visser, *supra* note 11, at 207. *See also* INTELLECTUAL PROPERTY CODE, §§ 121.1 & 123.

165. TRIPS Agreement, *supra* note 31, art. 39 (2) (b).

166. INTELLECTUAL PROPERTY CODE, § 4 (g).

167. National Commission on Indigenous Peoples, The General Guidelines on the Confirmation of Indigenous Political Structures and the Registration of Indigenous Peoples' Organizations [NCIP A.O. No. 2, s. 2012], § 19 (Mar. 15, 2012).

168. Samson & Go III, *supra* note 2, at 199.

protection based on IPRs may be withheld or cancelled in the absence of proof that the FPIC of Peoples have been obtained for TK — which, again, must relate or affect Peoples' ancestral domains — that were used in a matter subject of traditional IPRs. As discussed in Part II of this Article, Section 32 of the IPRA provides that the State shall "preserve, protect, and develop the past, present, and future manifestations of [Peoples'] cultures as well as the right to the *restitution* of cultural, intellectual, religious, and spiritual property taken *without their* [*FPIC*] or in violation of their laws, traditions[,] and customs."[169]

Section 34 of IPRA proceeds to affirm that 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, 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.[170]

Likewise, Section 35 of IPRA strictly mandates that "[a]ccess to biological and genetic resources and *to indigenous knowledge* related to the conservation, utilization[,] and enhancement of these resources [located in the ancestral domain], *shall be allowed ... only with* [*the*] [*FPIC*] of [the Peoples concerned], obtained in accordance with [their] customary laws[.]"[171]

As property unlawfully taken or accessed, such manifestly goes against the public order, which takes it outside the protective ambit of patent and trademark law.[172] Thus, without IP protection, and by being contrary to the IPRA, restitution is statutorily mandated, which is understood to mean the "return of the actual thing lost by the offended party,"[173] or to provide

169. Indigenous Peoples' Rights Act, § 32 (emphasis supplied).

170. *Id.* § 34 (emphases supplied).

171. *Id.* § 35 (emphasis supplied).

172. INTELLECTUAL PROPERTY CODE, §§ 22, 61 (on non-patentable inventions), & 123 (registrability of marks).

173. PHILIPPINE LAW DICTIONARY 832 (3d ed. 1988). *See also* MELENCIO STA. MARIA, OBLIGATIONS AND CONTRACTS 121-30 (2004).

"compensation for loss"[174] in case return of the actual thing is impossible, so as to "restore the parties to their original positions."[175]

Accordingly, absence of FPIC in the use of TK related to ancestral domains may be used, as a matter of policy, to deny patent applications, as well as trademark registrations;[176] or as a ground to cancel an existing patent or trademark.[177]

This is consistent with the TRIPS Agreement, as discussed in Part I, because such agreement only imposes minimum standards of IP protection,[178] but the same does not prohibit Member States from imposing additional substantive requirements for IP protection, provided there is compliance with the most favored nation clause.[179] Accordingly, mandating proof of FPIC as an additional requisite for IP protection is supported by the practices of India,[180] Peru,[181] Costa Rica,[182] Switzerland,[183] Denmark,[184] and

174. People v. Combate 638 SCRA 797, 811 (2010) (citing BLACK'S LAW DICTIONARY (8th ed. 2004)).

175. Maglasang v. Northwestern University, 694 SCRA 128, 133 (2013).

176. INTELLECTUAL PROPERTY CODE, §§ 22 & 123.

177. *Id.* §§ 61 & 151.

178. TRIPS Agreement, *supra* note 31, art. 27 (1).

179. It may be debated whether the TRIPS Agreement effectively closes the list of substantive requirements for patentability, in that "patents shall be available for any inventions, whether products or processes, in all fields of technology, provided they are new, involve an inventive step[,] and are capable of industrial application." Visser, *supra* note 11, at 214. *But see* Frederick M. Abbott, *Patents and Biodiversity*, *in* BIOTECHNOLOGY AND INTERNATIONAL HUMAN RIGHTS LAW 324 (2007) (arguing that disclosure of any related TK in a patent application is a "reasonable requirement" to determinations of novelty and inventive step, which is thus consistent with the TRIPS Agreement).

180. Office for the Harmonization in the Internal Market, Guide to protection of Intellectual Property Rights in India 8, *available at* https://euipo.europa.eu/ohimportal/documents/11370/2167171/Guide+to+protection+of+intellectual+property+rights+in+India (last accessed May 20, 2016).

181. CURCI, *supra* note 89, at 142.

182. *Id.*

183. *See* Schweizerische Eidgenossenschaft, II. A Few Facts about the Federal Act on Data Protection, *available at* http://www.edoeb.admin.ch/org/00129/00131/index.html?lang=en (last accessed May 20, 2016).

184. CLAUS ELMEROS & JENS VIKTOR NØRGAARD, DENMARK 1 & 4 (2013).

Belgium[185] which all similarly require the disclosure of origin[186] in patent applications in their jurisdictions — beyond the TRIPS requisites of novelty, inventive step, and industrial applicability.[187]

But even if it may be debated whether the Philippines can impose additional substantive requisites for IP protection, there is no gainsaying the proposition that, at the very least, Peoples can demand mutual benefit-sharing arrangements with patent-holders incorporating TK, on the basis of related domestic laws and regulations[188] as well as Article 8 (j) of the CBD which "encourage[s] the equitable sharing of the benefits arising from the utilization of such knowledge, innovations[,] and practices."[189]

b. Patent Revocation based on Prior Art

One of the requisites for patentability is that the invention must be novel.[190] Accordingly, one way to protect TK is for Peoples' to file "Third-Party Observations"[191] concerning the patentability of inventions, or petition for cancellation of a patent, on the ground that the invention subject of the patent is a prior art for which no patent can be obtained.[192]

Of course, this means that the TK has been publicly disclosed in one way or another. This can easily be done by documenting and publishing TK

185. Practical Law, Patent litigation in Belgium: overview, *available at* http://uk.practicallaw.com/6-621-5794?q=&qp=&qo=&qe= (last accessed May 20, 2016).

186. *See* Chatham House, Disclosure of Origin in IPR Applications: Options and Perspectives of Users and Providers of Genetic Resources, *available at* http://ecologic.eu/sites/files/download/projekte/1800-1849/1802/wp8_final_report.pdf (last accessed May 20, 2016).

187. *See* TRIPS Agreement, *supra* note 31, art. 27 (1). *See also* WTO, Overview: The TRIPS Agreement, *available at* https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm (last accessed May 20, 2016).

188. Please see the discussion in Part II of this Article.

189. CBD, *supra* note 7, art. 8 (j).

190. WTO, *supra* note 187.

191. The European Patent Convention provides that in proceedings before the European Patent Office, any third party not a party to the proceedings may present observations concerning the patentability of the invention to which the application or patent relates. Convention on the Grant of European Patents (European Patent Convention) art. 115, *concluded* Oct. 5, 1973, 1065 U.N.T.S. 199 (entered into force Oct. 7, 1977).

192. *See* WIPO, Third Party Observations, *available at* http://www.wipo.int/pct/en/faqs/third_party_observations.html (last accessed May 20, 2016).

as searchable prior art. However, documentation of TK should not be carried out recklessly, particularly when Peoples do not allow public disclosure of their TK — for it may even pave the way for the unauthorized use of TK by "tipping off outsiders" to such knowledge.[193]

Note, however, that in challenging patents, the Peoples have the burden of proving that the process, product, or improvement subject of the patent was, in fact, publicly available *anywhere in the world* including the Peoples' community where it is traditionally held.[194]

c. Infringement of Expressions of TK

Likewise, in case of TK expressed in folklore or other forms, Philippine IP laws provide that unauthorized reproduction or publication of such constitutes copyright infringement whenever the expressions are protected subject matter.[195] Hence, in cases of TK expressions, Peoples may prohibit the reproduction, public performance, recording, broadcasting, translation into other languages, and adaptation of expressions of their TK,[196] as long as the author, or the publisher, of the TK expression is identifiable.[197]

Moreover, even if copyright law is unavailable, the IPRA IRR already allows Peoples to prohibit the commercialization and to control the manner of performance of their "indigenous culture"[198] (albeit, again the Authors have reservations regarding the validity of this implementing rule and regulation).

If the TK is, instead, subject of an academic research, then the TK Research and Documentation Guidelines may be invoked by the Peoples' to exclusively control the manner by which research outputs on their TK are to be published.[199]

193. Deepa Varadarajan, *A Trade Secret Approach to Protecting Traditional Knowledge*, 36 YALE J. INT'L L. 371, 385 (2011).

194. INTELLECTUAL PROPERTY CODE, § 24.1.

195. *Id.* § 177. Although, again, the Authors submit that traditional IPRs, such as copyright law, are inadequate for these only protect particular expressions and not the very idea that is the TK. *See* INTELLECTUAL PROPERTY CODE, § 175 (mere ideas are unprotected subject matter under the law).

196. INTELLECTUAL PROPERTY CODE, § 177.

197. *Id.* § 178.

198. Rules and Regulations Implementing the Indigenous Peoples' Rights Act of 1997, rule VI, § 15.

199. NCIP A.O. No. 1, s. 2012, § 8.17.

d. False Suggestion of Connection and Misleading Marks

Peoples may oppose or cancel registered trademarks when it "may disparage or falsely suggest a connection with persons, living or dead, institutions, [and] beliefs,"[200] or when it is "likely to mislead the public, particularly as to the nature, quality, characteristics[,] or geographical origin of the goods or services."[201]

A trademark is disparaging when it "dishonor[s], by comparison, with what is inferior, slight, deprecated, degraded, [ ] affected, or injured by unjust comparison,"[202] as reasonably determined by the views of a "substantial composite [of the referenced group.]"[203]

Additionally, in case a Peoples' product or service has gained a reputation because of its characteristics attributed to its geographic origin, Peoples may then oppose or cancel the registration of a false mark on the ground that it misleads the public into thinking that the false mark refers to a good or service originating from the Peoples.[204]

The constant caveats, however, which are appended to every legal remedy presented, only reinforces the point that a *sui generis* law is what is needed to protect TK in the Philippines.

B. The Need for a Sui Generis Legal Framework

The changing IP landscape requires a need to redefine the role of IP in both the traditional areas of concerns (i.e., copyrights, trademarks, and patents) and the emerging issues (i.e., TK, genetic resources, and health). During the past two decades, the level, scope, territorial extent, and role of IP protection have expanded at an unprecedented pace.[205] TK protection should enable the Peoples the enforcement or protection of their right, and the redress or prevention of any wrong committed against their TK.

200. INTELLECTUAL PROPERTY CODE, § 123 (a).

201. *Id.* § 123 (g).

202. Pro-football v. Harjo, 284 F.Supp.2d. 96, 124 (2003) (U.S.).

203. In Re Lebanese Arak Corporation, 94 U.S.P.Q.2d 1215, 1248 (2010).

204. INTELLECTUAL PROPERTY CODE, § 123 (g). *See also* Samson & Go III, *supra* note 2, at 199.

205. United Kingdom's Commission on Intellectual Property Rights, Integrating Intellectual Property Rights and Development Policy (Executive Summary of the Report of the Commission on Intellectual Property Rights) 9, *available at* http://www.iprcommission.org/graphic/documents/final_report.htm (last accessed May 20, 2016).

Sui generis is a Latin term which means "of its own kind,"[206] and "is used in [IP] law to describe a regime designed to protect rights that fall outside the traditional patent, trademark, copyright, and trade-secret doctrines."[207] Under a *sui generis* law, when IP laws do not generally protect an object, a statute can be enacted specifically for the purpose of using IP law to protect non-traditional subject matter. *Sui generis* protection stems from a belief that a new form of invention needs legal protection, but does not conform to the current IP protections available.[208] Theoretically, "a [*sui generis*] system could be created individually and enacted differently from one country to another."[209] Accordingly, several countries have already been successful in implementing *sui generis* laws in their territories. For instance, there are the *sui generis* laws of Peru,[210] Costa Rica,[211] Brazil,[212] India,[213] Portugal,[214]

206. BLACK'S LAW DICTIONARY 1572 (9th ed. 2009).

207. *Id.*

208. *See* John Bagby, Who Owns the Data?, *available at* http://news.psu.edu/story/140724/2003/01/01/research/who-owns-data (last accessed May 20, 2015).

209. HANSEN & VANFLEET, *supra* note 13, at 27.

210. Law Introducing A Protection Regime for the Collective Knowledge of Indigenous Peoples Derived from Biological Resources, Law No. 27811 (2002) (Peru).

211. Ley de Biodeversidad, Ley 7788 (1998) (Costa Rica) [hereinafter Costa Rica Biodiversity Law].

212. Patrimônio genético e conhecimento tradicional, Lei Provisional No. 2.186-16 (2001) (Braz.).

213. *See* Balavanth Kalaskar, Traditional Knowledge and Sui-Generis Law, *available at* http://www.ijser.org/researchpaper%5CTRADITIONAL-KNOWLEDGE-AND-SUI-GENERIS-LAW.pdf (last accessed May 20, 2016). *See also* Biological Diversity Act of 2002, No. 18 (2003) (India).

214. Kalaskar, *supra* note 213. *See also* Establishing a Legal Regime of Registration, Conservation, Legal Custody and Transfer of Plant Endogenous Material, Decree Law No. 118 (2002) (Port.).

Panama,[215] and Thailand.[216] There are also the African[217] and Pacific model laws,[218] which countries may use as basis for their own *sui generis* laws.

But developing an effective *sui generis* system for the protection of Filipino TK that conforms with the State obligation to "respect, preserve[,] and maintain knowledge, innovations[,] and practices,"[219] requires a recognition of the holistic character of TK systems and the holistic worldview of Peoples.[220]

Thus, according to the WIPO IGC, in formulating the appropriate *sui generis* law for a particular TK, it is imperative that there be clear identification of the policy objectives; subject matter to be protected; criteria to qualify for protection; designation of beneficiaries; rights to be conferred; and the manner by which these rights may be acquired or lost, as well as administrated and enforced.[221]

Critical among these key issues is the task of identifying the rightful holders of TK in the Philippines. This is because while Peoples' have a special link with their ancestral lands,[222] there are cases when cultural interchanges between different Peoples allow the spread of TK outside of the original geographical and communal boundaries of each particular TK.[223] As

215. Kalaskar, *supra* note 213.

216. *Id. See also* Act on Protection and Promotion of Traditional Thai Medicinal Intelligence, B.E. 2542 (1999) (Thail.).

217. African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources (2000) (African Union) [hereinafter African Model Law].

218. *See* Pacific Island States, Protection of Traditional Knowledge and Expressions of Culture Act, Pacific Model Law of 2002, *available at* http://www.spc.int/hdp/Documents/culture/RegionalFrameworkE.pdf (last accessed May 20, 2016).

219. CBD, *supra* note 7, art. 8 (j).

220. Visser, *supra* note 11, at 210 (citing Berkes, et. al., *supra* note 69, at 283).

221. WIPO, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, *Revised Objectives and Principles*, Annex, at 17-87, WIPO/GRTKF/IC/18/5 (2011).

222. John Scott & Federico Lenzerini, *International Indigenous and Human Rights Law in the Context of Trade in Indigenous Cultural Heritage*, *in* INTERNATIONAL TRADE IN INDIGENOUS CULTURAL HERITAGE 66 (Christoph B. Graber et al., eds., 2012).

223. Lenzerini, *supra* note 6, at 225.

a consequence, ownership of TK may not be easily determinable on the basis of a geographical approach since it may be shared by various Peoples.[224]

One way to go about this is to establish a repository of TK in the Philippines. But while the TK Research and Documentation Guidelines and the TAMA IRR already mandate the documentation of TK related to ancestral domains and traditional or alternative medicine,[225] and the National Cultural Heritage Act already mandates the conservation, registration, and protection of *tangible* cultural properties,[226] still, there is no statutory fiat mandating the documentation of *intangible* resources, such as the "know-how, skills, innovations, practices, teachings[,] and learnings of [Peoples]" in the form of TK *unrelated to People's ancestral domains as defined by the IPRA*, i.e., those affecting ancestral lands and natural resources therein.

In India, for instance, there is the India Traditional Knowledge Digital Library which "provides information on [TK] existing in India, in languages and format understandable by patent examiners at International Patent Offices to prevent the grant of wrong patents."[227] Thus, TK over folklore, performances, literary works, tribal names and marks, or even water management techniques, and other TK are apt for documentation based on a *sui generis* law for TK protection.

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224. *Id.*

225. NCIP A.O. No. 1, s. 2012, § 17 & Rules and Regulations Implementing the Traditional and Alternative Medicine (TAMA) Act of 1997, rule IX, § 3.

226. National Cultural Heritage Act, § 4. The following are considered as cultural properties of the country:

(a) National cultural treasures;
(b) Important cultural property;
(c) World heritage sites;
(d) National historical shrine;
(e) National historical monument; and
(f) National historical landmark.

Id. While national cultural treasures are defined as referring to "a unique cultural property found locally, possessing outstanding historical, cultural, artistic and/or[,] scientific value which is highly significant and important to the country and nation, and officially declared as such by pertinent cultural agency." *Id.* § 3 (bb).

227. WIPO, Meeting of International Authorities under the Patent Cooperation Treaty (A Document Submitted by India) Annex I, *available at* http://www.wipo.int/edocs/mdocs/pct/en/pct_mia_22/pct_mia_22_8.pdf (last accessed May 20, 2016).

However, documentation of TK should not be carried out recklessly, as already pointed out given the danger of disclosure.[228] In such case, the FPIC of the Peoples, as well as their participation in the documentation process, must be carefully obtained to protect the integrity of TK documentation. In developing a Philippine *sui generis* law for TK protection, reference may be made to the African Model Law, which provides for "an institutional arrangement providing for the development of a system of registration of items protected by community intellectual rights and farmers' rights according to their customary practices and law;"[229] as well as the Biodiversity Law of Costa Rica, which similarly provides a participatory process by which Peoples "will determine the nature, extent[,] and conditions of the *sui generis* community intellectual right, as well as the form the right will take, who will be entitled to hold the legal right, and who will receive [its] benefits."[230]

Another option, according to the WIPO, is to entrust to a specialized government agency the duty to "exercise [such] rights in close consultation with and for the benefit of relevant Peoples."[231] This way, the burden of ensuring that TK is protected from unauthorized use, and the costs of challenging illegitimate appropriation thereof, rests on the government, which presumably has the resources to carry out such mandate. This is consistent with the State obligation of the Philippines to protect the TK of its people under the CBD.[232] It is also consistent with the Philippine Constitution and the IPRA affirming the right of Peoples to the control of, and to demand restitution for unauthorized use of, their respective TK.[233]

In determining the manner by which rights over TK may be acquired, lost, administered, or enforced, it is the Authors' submission that the customary laws of Peoples must be considered. The *sui generis* laws of Costa Rica, Panama, Peru, and the Pacific Regional Model Law all similarly exhort that the rules regarding acquisition, resolution of conflicts, and use of TK must be based on the customary laws of Peoples.

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228. *See* Varadarajan, *supra* note 193, at 385.

229. ANIL K. GUPTA, WIPO-UNEP STUDY ON THE ROLE OF INTELLECTUAL PROPERTY RIGHTS IN THE SHARING OF BENEFITS ARISING FROM THE USE OF BIOLOGICAL RESOURCES AND ASSOCIATED TRADITIONAL KNOWLEDGE 127 (2004) (emphasis omitted) (citing African Model Law, art. 29.6.).

230. Costa Rica Biodiversity Law, arts. 84 & 85.

231. G.A. Res. 50/157, ¶ 8, U.N. Doc. A/RES/50/157 (Feb. 29, 1996).

232. *See* CBD, *supra* note 7.

233. *See generally* Indigenous Peoples' Rights Act & PHIL. CONST. art. XII, § 5 & art. XIV, § 17.

Finally, a *sui generis* law is necessary to affirm that indigenous ownership of TK by the Peoples is immemorial, intended as they are for all future generations. This is distinct from the indigenous ownership of ancestral lands and the traditional resources therein as provided by Section 5 of the IPRA.[234] Again, one of the criticisms in trying to fit TK into traditional IPRs is the eventual passage of TK to the public realm, particularly when Peoples are not inclined to allow "outsiders" from making use of TK, especially those which Peoples consider to be sacred knowledge.[235] Thus, even if for this reason alone, a *sui generis* law or amendment is imperative to clarify the concept of TK ownership as immemorial in this jurisdiction.

IV. CONCLUSION

Providing and promoting TK protection should no longer be an aspiration, but a mandatory objective in response to the fast-paced singular global economy. Peoples have to be empowered with the appropriate rights and mechanisms to govern their sets of indigenous knowledge, which they consider as basic element to sustain their lives, cultures, traditions, and patrimony.

Harmonizing diversity is the key to a *sui generis* and effective TK protection system. Each group of Peoples has its priorities and knowledge system, which may not necessarily be aligned to those of the other groups. TK holders and owners should have available choices of protection, to empower them to assess their interests and choose their own directions for the protection and use of their TK, and to ensure adequate capacity through protection strategies.

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234. Section 5 of the IPRA provides the following —

> Indigenous concept of ownership sustains the view that ancestral domains and all resources found therein shall serve as the material bases of their cultural integrity. The indigenous concept of ownership generally holds that ancestral domains are the ICC's/IP's private but community property which belongs to all generations and therefore cannot be sold, disposed[,] or destroyed. It likewise covers sustainable traditional resource rights.

Indigenous Peoples Rights Act, § 5. *See generally Cruz*, 347 SCRA at 318 (J. Panganiban, concurring and dissenting opinion) (where the persuasive opinion Justice Artemio V. Panganiban held that indigenous ownership pertains only to the native title to ancestral lands and not to natural resources found therein).

235. *See generally Bulun Bulun and Milpurrurru*, 41 I.P.R.