

Traditional Knowledge, Biological Resources and Intellectual Property Rights in Asia: The Example of the Philippines

Christoph ANTONS¹

Abstract

The relationship between traditional knowledge and intellectual property rights has become a topic for intensive debates at the national level, in various international settings and within and among different UN agencies, including the World Intellectual Property Organisation (WIPO), the UN Food and Agriculture Organisation (FAO), UNESCO, UNCTAD and the United Nations Environment Programme (UNEP). However, a consensus on a definition of traditional knowledge has yet to emerge due to persistent differences in perception. On the one hand, indigenous communities hold locally specific and holistic views of traditional knowledge, which are difficult to place within the framework of current intellectual property rights. Governments of developing countries, on the other hand, mostly focus on clearly defined aspects of traditional knowledge and their interpretation in the national interest and as expressions of national culture. Asian governments, in particular, have advocated the latter view. The Philippines provide an exception due to a tradition of recognising indigenous people as separate “cultural communities”. However, the practical implementation of so-called “community intellectual rights” thus far is largely confined to access and benefit sharing rules, compensation requirements for traditional farmers and defensive protection measures such as digital libraries documenting traditional knowledge.

1. Introduction

The discussion about traditional knowledge (TK) has intensified in recent years. This reflects the importance of the topic for developing countries, the increasing influence of Non-Governmental Organisations (NGOs) often acting on behalf of indigenous people or other minority groups and, of course, the heightened interest in biological resources for agricultural, pharmaceutical and biotechnological research. For the casual observer, the link between these resources and TK is not immediately obvious, as access to such resources is a matter that is often regulated in laws broadly belonging to the sphere of environmental law, whereas TK as a form of knowledge is discussed particularly in the context of intellectual property rights. However, according to the adherents of broader and holistic definitions of TK, this distinction is an artificial one and it fails to grasp the relationship between the subject matter of traditional knowledge and the way it is transmitted in traditional societies. This article will begin by examining the various definitions of traditional knowledge used in the debate and the continuing dispute at international level about the beneficiaries

of traditional knowledge protection. It will then use the example of the Indigenous Peoples Rights Act of the Philippines to demonstrate the difficulties in implementing the holistic concept of traditional knowledge and draw some conclusions from the Philippine experience.

2. The various definitions of traditional knowledge

The holistic notion of traditional knowledge has been encouraged at the international level by the 1993 ‘Study on the Protection of Cultural and Intellectual property of Indigenous Peoples’, prepared by the UN Sub-Commission on the Prevention of Discrimination of Minorities. The Special Rapporteur, Erica Irene Daes, at the time expressed her belief that “all elements of heritage should be managed and protected as a single, interrelated and integrated whole”. She further found that “all of the aspects of heritage are interrelated and cannot be separated from the traditional territory of the people concerned. What tangible and intangible items constitute the heritage of a particular indigenous people must be decided by the people themselves.” (quoted in Janke 1998: 2–3)

The holistic understanding of TK has been welcomed and taken up by indigenous groups. In her report ‘Our Culture: Our Future – Report on Australian Indigenous Cultural and Intellectual Property Rights’ drafted for the Australian Aboriginal and Torres Strait Islander Commission in 1998, Terri Janke used the working definition of “Indigenous Cultural and Intellectual Property” to refer to indigenous peoples’ rights to their heritage. The term included accordingly literary, performing and artistic works, scientific, agricultural, technical and ecological knowledge (including cultigens, medicines and the phenotypes of flora and fauna), all items of movable cultural property, human remains and tissues, immovable cultural property (including sacred and historically significant sites and burial grounds) and documentation of indigenous peoples’ heritage in archives, films, photographs, videotape or audiotape and all forms of media (Janke: 3, note 2).

Around the same time as the ATSIC report (1998–1999), the World Intellectual Property Organisation (WIPO) went on nine fact-finding missions to inquire into the needs and expectations of traditional knowledge holders. In its subsequent report, WIPO also used a broad definition of TK including “tradition-based literary, artistic or scientific works; performances; inventions; scientific discoveries; designs; marks, names and symbols; undisclosed information; and all other tradition-based innovations and creations resulting from intellectual activity in the industrial, scientific, literary or artistic fields.” (WIPO 2001: 25) This definition is not as wide as the definition used in the ATSIC report and in declarations often made by organisations representing the interests of indigenous people. The WIPO definition, however, does accommodate to some extent the concern of indigenous people that the distinction between various fields of intellectual property is irrelevant and inadequate

for forms of indigenous knowledge. Shortly after publishing its report in 2001, however, WIPO started to move away again from the 'holistic' notion of traditional knowledge advocated by indigenous people. In a document prepared for the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore at the end of 2003, WIPO pointed out that "some national and regional instruments aim to protect both expressions of folklore/traditional cultural expressions and traditional knowledge together", but that "in line with the practice of this committee, this document deals specifically with the protection of traditional knowledge in the strict sense." "Traditional knowledge in the strict sense" was earlier defined as "technical traditional knowledge" (WIPO 2003: 5; Antons 2005: 51). In a further publication, WIPO also acknowledges the holistic understanding and interrelationship between folklore and traditional knowledge, but maintains that TCEs/folklore "is in practice distinct from but related to protection of TK". A separate publication was, therefore, to focus on "the complementary protection of TCEs", whereas this publication focused "on the protection of TK as such, that is to say, the content or substance of knowledge" (WIPO (no publication date provided)).

Consequently, WIPO's recently revised objectives and principles distinguish also again clearly between traditional cultural expressions (TCEs) and traditional knowledge (TK) (WIPO 2005). Nevertheless, as the discussions at the Eighth Session of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore show, the differences in understanding of the term 'traditional knowledge' remain. Thus, indigenous groups continue to stress the holistic nature of the material and refuse to see it split up into various neatly confined parts of intellectual property. They agree with some NGOs and intergovernmental organisations and with the majority of developing countries on the importance of basing a protection regime on customary law.² On the other hand, organisations representing performing artists expressed an interest in copyright and in practical distribution mechanisms, because, in that view, "cultural expressions have nothing to do with genetic resources", as one concerned intellectual property and the other industrial property.³

Apart from the overlap between traditional knowledge and folklore or traditional cultural expressions, there is a second confusing overlap between traditional knowledge and genetic resources. This stems from a shift that occurred during the 1980s in the discussions held in the United Nations Food and Agriculture Organisation (FAO). Still in 1984, the International Undertaking on Plant Genetic Resources, a non-binding instrument negotiated under the auspices of FAO, had declared that genetic resources were the common heritage of mankind (Blakeney 2001: 44; Correa 2001: 105). However, as the decade progressed and intellectual property rights in plant material became more widespread, there was a feeling that traditional farmers were missing out and should be

compensated for the contribution they had made over generations to the development and conservation of plant genetic resources.

These ideas finally found expression in FAO Resolutions 4 and 5 of 1989. Farmers' rights were described here as "rights arising from the past, present and future contribution of farmers in conserving, improving and making available Plant Genetic Resources, particularly those in the centres of origin/diversity." In line with the understanding that plant genetic resources were the common heritage of mankind, farmers' rights were understood as being "vested in the International Community, as trustees for present and future generations of farmers, for the purpose of ensuring full benefit of farmers and supporting the continuation of their contribution...". The United Nations Convention on Biological Diversity finally completed the shift from the idea of plant genetic resources as common heritage of mankind to an approach where they are regarded as being under the sovereign control of national governments.⁴ The discussion in FAO finally followed this approach and in 2001, the International Treaty on Plant Genetic Resources for Food and Agriculture was concluded. Article 10 of the new Treaty confirmed the principle of national sovereignty over plant genetic resources. Article 9 required governments to take measures to protect and promote farmers' rights, traditional knowledge relevant to plant genetic resources for food and agriculture, the right to benefit sharing and the right to participate in decision making on matters related to the conservation and sustainable use of plant genetic resources. The wording of these requirements is not very strict, however, as governments only need to take measures "as appropriate and subject to national legislation". Article 9.3 of the Treaty also preserves the so-called farmers' privilege, which refers to the right of farmers to reuse and exchange seed obtained from their harvest. It is important to bear in mind, however, that the term 'farmers' rights' is somewhat of a misnomer, as it does not actually create enforceable individual or collective rights. The nature of 'farmers' rights' is rather that of a bundle of equitable principles attempting to ensure that those who have preserved and enhanced genetic diversity over generations should be compensated for their efforts and provided with incentives to continue them.

While the International Treaty on Plant Genetic Resources for Food and Agriculture is confined to plant material and traditional knowledge related to these sectors, the United Nations Convention on Biological Diversity (CBD) is wider and extends the scope of traditional knowledge to biodiversity as such. The protection of traditional knowledge is encouraged in the CBD in Article 8j.⁵ In contrast to folklore protection, which concerns potentially large sections of the community and farmers' rights, the agents of "traditional" forms of biodiversity protection and holders and beneficiaries of traditional knowledge protection are "indigenous and local communities". As a consequence, a large number of NGOs and international organisations representing the interests of indigenous people have become involved in the debate. As explained above, the demands for a holistic understanding of traditional

knowledge and a wide scope of the protection come especially from representatives of indigenous people.

3. The beneficiaries of traditional knowledge protection

While the definition of traditional knowledge varies with the context in which it is used, there is equally a great variety of beneficiaries. Here, it is important to note that the concept of “indigenous people” is problematic in young Asian nations states and has found little support in government circles (Kingsbury 1998: 414–457; Kingsbury 1999: 336–377). The argument here is that the tracing of an indigenous or “aboriginal” population is typical for the settler societies of North and South America, Australia and New Zealand, but is difficult to undertake in densely populated post-colonial Asia, where most population movements go back many centuries and cultures have intermingled. It is argued that a focus on “indigenous” groups would create inequities and imbalances in such multi-ethnic states (Kingsbury 1999: 352–353). The differences regarding this point came to expression during the discussions in the WIPO Intergovernmental Committee about the creation of a voluntary fund to enable accredited indigenous and local communities to participate in the debate of the Committee. The Delegation of Indonesia expressed the view that the definition of “indigenous people” depended on the historical background involved and that “the tendency of the present use of the term originated in a colonial context, in which the ruling majority of colonialists had to be differentiated from the so-called original people living on the land before the colonialists came.” There were, however, a lot of countries in the world where the majority, and even in some case the whole population, was indigenous. It was, therefore, more advisable to use “traditional community” or “traditional society” or even “society or community bound by customary law” rather than ‘indigenous people’. The delegation noted that this term was already used in other WIPO documents, but proposed to understand it in a broad sense (WIPO 2005c: 26–27). The term “society or community bound by customary law” (*masyarakat adat*) is the term currently used to describe local communities in the revised Indonesian Constitution.⁷

The Indonesian view was supported by the Delegation of India, which pointed out that the terms “indigenous and local communities” were “terms that had a connotation derived from the colonial era when an attempt was made to distinct between colonists and the original people inhabiting a particular country.” This model was not relevant in Asia and would even not be applicable at all in some large parts of that continent. It would, therefore, be inappropriate to exclude the members of non-community based organisations, merely because they would not fit perfectly into the model of indigenous and local communities (WIPO 2005c: 30). After encountering criticism from various representatives of indigenous people, the Indian Delegation clarified that it was never its intention to

oppose the proposal of support for indigenous and local communities in any way, but that it had flagged a slightly different issue, namely that outside the so-called 'New World' there was a lot of TK which resided in the society at large. It would, therefore, not be correct to say that TK was the sole prerogative of the indigenous communities and that other civil society members who may have a special relationship with TK should also be included in the debate (2005c: 40). The Indian government repeated its position during the discussion of the WIPO document containing principles and model provisions on Traditional Cultural Expressions and Folklore (2005c: 48).

The problem with the various definitions of beneficiaries is, of course, the continuing link between the communities and the subject matter of protection. As WIPO has pointed out, 'a community might see TK as part of their cultural or spiritual identity. So it is the relationship with the community that makes it "traditional"' (WIPO (no publication date provided): 6). If that is the case, then the difference in understanding as to who are the beneficiaries of the legislation will influence the scope of traditional knowledge protection. There will be a much greater variety of concepts, if the traditional knowledge holders can come from groups as diverse as indigenous people, traditional farmers and traditional healers and practitioners of traditional medicine. The latter forms of traditional knowledge may be quite formalised and well documented in parts of Asia, as in Traditional Chinese Medicine (TCM) or Ayurveda.¹² Equally, national governments will argue in such cases (and probably also in the case of farmers' rights) that these are expressions of a national culture and are appropriately represented by national agencies. Indigenous or local communities, on the other hand, often see their knowledge and the rights to it as an expression of self-determination and they attempt to achieve independence from strong influences by the national government. While national governments will stress the national sovereignty over natural resources guaranteed by instruments such as the CBD and the International Treaty on Plant Genetic Resources for Food and Agriculture, indigenous groups will rely on international agreements in the field of human rights.¹³ What unites indigenous minorities and the governments of developing countries is their hope for a stronger protection of traditional knowledge, ideally in the form of an international treaty. However, much internal division about the forms of traditional knowledge to be protected and about appropriate agencies and forms of representation must be overcome, before such a concept can reach the international stage where developed countries would greet it with much scepticism.

Against this background, the following case study from the Philippines shows an attempt to implement the holistic understanding of traditional knowledge and to link it to indigenous communities in the Indigenous Peoples Rights Act of Philippines.

4. The experience with traditional knowledge protection in the Philippines

The Philippines provides an exception to the generally rather ambivalent attitude of Asian governments towards the notion of indigenous people. Already the Spanish colonial power had begun to distinguish between Christianised Filipinos or *Indios*, Muslim Filipinos or *Moros* and indigenous non-Christian tribes in the hinterland or *infielos*. When US American rule replaced Spanish rule in 1898, President McKinley instructed the Philippine Commission to adopt in dealing with the “uncivilized tribes” of the island “the same course followed by Congress in permitting the tribes of our North American Indians to maintain their tribal organization and government”.¹⁴ Thus, a Bureau of Non-Christian tribes was set up to carry out ethnographic research and with administrative responsibilities for these tribes, which included the *Moros* of the Mindanao and Sulu islands in the South of the Philippines (Eder and McKenna 2004: 60–61; May 1997: 331). Further attempts at assimilation and integration followed after independence and finally also constitutional recognition of “cultural communities” in the Constitution of 1973 and in the Constitution of 1987. The National Commission on Indigenous Peoples (NCIP) identifies nowadays 95 distinct tribes in 14 regions of the country with an estimated population of 12–15 million people (Molinas 2004: 272).

Use of and access to genetic resources as well as traditional knowledge related to or using biological resources is regulated in the Philippines in various pieces of legislation dealing with intellectual property law, the environment or agriculture and with the protection of indigenous people. The general principle in the Intellectual property Code of the Philippines is that plant varieties or animal breeds or essentially biological processes for the production of plants or animals other than micro-organisms and non-biological and microbiological processes are not patentable (Section 22.4). However, the provision continues by leaving room for the enactment of *sui generis* forms of protection for plant varieties and for a system of community intellectual rights protection. The *sui generis* option has meanwhile been exercised with the enactment of the Plant Variety Protection Act of 2002, which follows the 1991 UPOV model.¹⁶ There is some limited reference to traditional knowledge in this legislation. With approval of the National Plant Protection Board, farmers remain entitled to save, use, exchange, share or sell their farm produce of a protected variety, except where the sale is for the purpose of reproduction under a commercial marketing agreement. Exchange and sale of seeds among small farmers for reproduction and replanting on their own land remains equally allowed. The provision is rather confusingly worded, but allows the conclusion that the latter exception applies in an unrestricted manner and would, thus, not require a determination by the National Plant Variety Protection Board.¹⁷ It continues to require, however, a determination as to whether a traditional user is or is not a “small farmer”.

The system of community intellectual rights protection, also envisaged in the Philippine Intellectual Property Code, has so far not been enacted. A draft bill on the subject using model legislation developed by the Third World Network was introduced in 2001, but has been pending in the Philippine Senate for years.¹⁸ Rights granted under this draft would last indefinitely, but they would entitle right holders to the collection of royalties only for a period of ten years. The draft legislation envisages protection for parent strains and genetic material discovered or selected and conserved by local communities, seeds and reproductive material, agricultural practices and devices, medicinal products and processes, cultural products from local communities and all other products or processes discovered through a community process. The prospective beneficiaries of the legislation are among others so-called 'farmer-innovators', which are defined as "i. an individual who has provided or was the source of parent strains used in the development of a new variety; ii. the local community, which has helped to conserve and develop the genetic stocks which have gone into the pedigree of a new variety; iii. the residents of an area rich in plant genetic resources from where breeders or breeding institutions responsible for the new variety have obtained donors of genes for resistance/tolerance/avoidance to biotic and/or abiotic stress or other valuable character."

After the People Power Revolution of 1986, there was a new emphasis in the Philippines on the environment and on biological resources and new President Corazon Aquino formed the new Department of Environment and Natural Resources (DENR) (Bello et al 2004: 218). Under her successor Ramos, the Philippine Commission on Sustainable Development (PCSD) translated the Rio de Janeiro Earth Summit's Agenda 21 into a local version (Bello et al 2004: 219; Halos et al 2004). RA No. 7568 of 1992 established the National Integrated Protected Areas System (NIPAs) to designate ecologically sensitive areas such as sanctuaries, reserves and natural parks. In 1995, the government issued Executive Order No. 247 "Prescribing a Regulatory Framework for the Prospecting of Biological and Genetic Resources, their By-Products and Derivatives, for Scientific and Commercial Purposes, and for Other Purposes" (EO 247). Implementing regulations of the DENR followed in 1996. EO 247 covered all types of biodiversity collection activities in the Philippines, with the exception of traditional use. It also created a powerful new institution, the Inter-Agency Committee on Biological and Genetic Resources (IACBGR). Members of the IACBGR were drawn from the Departments of Environment and Natural Resources, Science and Technology, Agriculture, Health and Foreign Affairs with additional members from the National Museum, an NGO and a People's Organisation (PO), which represented indigenous cultural communities, as well as two scientists. The IACBGR recommended approval of applications and the conclusion of bioprospecting agreements to the relevant government Departments, it decided on the amount of material that bioprospectors were allowed to take and it monitored compliance with the conditions of a bioprospecting agreement, in particular as far as it concerned conditions imposed for the protection of indigenous and local

communities and here in particular the requirement of prior informed consent of these communities. The immediate monitoring on the ground, however, was left to the Protected Areas and Wildlife Bureau (PAWB) of the DENR. While the IACBGR was the main supervisory agency for the compliance with conditions of bioprospecting agreements, the actual agreement was concluded between a prospective bioprospector and the relevant government department. Here, a distinction was being made between commercial and academic research agreements. Academic research agreements were restricted to recognised Philippine universities, academic institutions, domestic and intergovernmental agencies. They lasted for a maximum of five years, but were renewable. Commercial research agreements imposed certain minimum requirements, such as royalty payments, provision of information about discoveries with commercial value, the involvement of Philippine researchers in the research of foreigners and the termination of the agreement after a maximum of three years.

While the system looked good on paper, implementation in practice was disappointing. Only two research agreements were approved under EO 247 for the period of 1995 to 2001, one of a commercial and one of an academic nature (Swiderska et. al. 2001: 28). In addition, there was criticism of the paternalistic manner of obtaining prior informed consent from indigenous and local communities. A mere public notification and consultation with relevant government officials and agencies was all that was required according to the implementing rules and regulations (Section 7). This procedure changed in 1997, when prior informed consent requirements were included in the new Indigenous Peoples Rights Act (IPRA). At the time of its enactment, IPRA was hailed as landmark legislation in this area of the law in Asia. It contains in Section 2 a broad recognition of Indigenous Cultural Communities/ Indigenous Peoples (ICC/IP) rights to their ancestral domains and to the development of their cultures, traditions and institutions. This includes traditional resource rights defined in Section 3 o) as “rights of ICCs/IPs to sustainably use, manage, protect and conserve a) land, air water and minerals; b) plants, animals and organisms; c) collecting, fishing and hunting grounds; d) sacred sites; and e) other areas of economic, ceremonial and aesthetic value in accordance with their indigenous knowledge, beliefs, systems and practices.” Under the Chapter “Rights to Ancestral Domains”, the Act grants ICCs/IPs subject to existing property rights, the right “to develop, control and use lands and territories traditionally occupied, owned or used; to manage and conserve natural resources within the territories and uphold the responsibilities for future generations; to benefit and share the profits from allocation and utilization of the natural resources found therein; the rights to negotiate the terms and conditions for the exploration of natural resources in the areas for the purpose of ensuring ecological, environmental protection and the conservation measures, pursuant to national and customary laws; the right to an informed and intelligent participation in the formulation and implementation of any project, government or private, that will affect or impact upon ancestral

domains and to receive just and fair compensation for any damages which they may sustain as a result of the project; and the right to effective measures by the government to prevent any interference with, alienation and encroachment upon these rights” (Section 7 b)). To facilitate the exercise of such rights, Section 11 guaranteed the recognition of Native Title in Ancestral Domains embodied in Certificate of Ancestral Domain Titles.

Chapter IV of the Indigenous Peoples Rights Act grants extensive rights to self-governance and empowerment, guaranteeing among other things integrity of ICCs/IPs values, practices and institutions (Section 13), use of their own justice and customary law systems as long as compatible with the national legal system and internationally recognised human rights (Section 15), participation in political decision-making (Article 16) and determination of their own priorities for development (Section 17). The most important rights for the relationship between intellectual property and biological resources, however, are to be found in Chapter VI on Cultural Integrity. Section 29 offers a general protection for indigenous culture, traditions and institutions, which the state shall “consider” in the formulation and application of national plans and policies. Section 32 guarantees “Community Intellectual Rights”, which include manifestations of culture and the restitution of cultural, intellectual, religious and spiritual property taken in an unauthorised manner and without prior informed consent. The term is further defined in the definition section 1 of Rule 1 of the Implementing Regulations to the Act contained in Administrative Order No. 1 of the National Commission on Indigenous Peoples²¹ as including the “rights of ICCs/IPs to own, control, develop and protect: (a) the past, present and future manifestations of their cultures, such as but not limited to archaeological and historical sites, artefacts, designs, ceremonies, technologies, visual and performing arts and literature as well as religious and spiritual properties; (b) science and technology including, but not limited to, human and other genetic resources, seeds, medicine, health practices, vital medicinal plants, animals and minerals, indigenous knowledge systems and practices, resource management systems, agricultural technologies, knowledge of the properties of fauna and flora, oral traditions, designs, scientific discoveries; and (c) language, script, histories, oral traditions and teaching and learning systems.” Section 33 deals with the protection of religious, cultural and burial sites and sacred places.

Section 34 provides that ICCs/IPs are “entitled to the recognition of 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.” This is again further defined in Rule VI, Section 11 of the implementing regulations, which speaks of the “protection of community intellectual property”. Section 35 requires free and prior informed consent in accordance with customary laws of the concerned communities for access to biological and genetic resources. Section 36 encourages the recognition and promotion of sustainable agro-technological development among ICCs/IPs.

The Act creates a powerful National Commission on Indigenous Peoples (NCIP) in Chapter VII. Among the many and varied tasks of the NCIP, the following are specifically important in the context of traditional knowledge protection:

- to issue certificate of ancestral land/domain title (Section 44 e)
- subject to existing laws, to enter into contracts, agreements or arrangements, with government or private agencies or entities as may be necessary to obtain the objectives of this Act... (Section 44 f)
- to issue appropriate certification as a pre-condition to the grant of permit, lease, grant, or any other similar authority for the disposition, utilization, management and appropriation by any private individual, corporate entity or any government agency, corporation or subdivision thereof on any part or portion of the ancestral domain taking into consideration the consensus approval of the ICCs/IPs concerned (Section 44 m)
- to decide all appeals from the decisions and acts of all the various offices within the Commission (Section 44 n)
- to promulgate the necessary rules and regulations for the implementation of this Act (Section 44 o).

The implementing regulations to the Act explain that the entering into agreements and the free and prior informed consent of the ICCs/IPs depend on decisions of the Council of Elders and on customary laws respectively. Sections 40 and 41 contain details about the appointment process of the NCIP and require an even spread of appointments from certain ethnographic areas. Among the other conditions for appointment are membership of ICCs/IPs and certification of this by the relevant tribe, experience in ethnic affairs and work for at least ten years with an ICC/IP community and/or government agency involved in ICC/IP. The NCIP is an agency that is directly under the office of the President.

Shortly after its enactment, the Indigenous Peoples Rights Act was facing a constitutional challenge in the Supreme Court of the Philippines. The Act only narrowly survived the challenge when in December 2000, the Supreme Court in *Cruz vs Sec. Of Environment and Natural Resources* was evenly divided so that the petition to declare the Act as unconstitutional did not find a majority. The constitutional challenge meant, however, that the Act was not implemented during this period, because the previously responsible Department of Environment and Natural Resources had placed a

moratorium on further land claims (Eder and McKenna 2004: 67).

Implementation of the IPRA initially seemed to receive a new impetus under the new Arroyo administration in 2001. In her State-of-the-Nation address of 23 July 2001,²³ President Gloria Macapagal Arroyo promised the granting of 100 ancestral domain titles for indigenous people per year. In practice, however, the granting of titles proceeded at a much slower pace. In a report of 2003, the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people of the United Nations Economic and Social Council was able to report only a single successful claim. The report blamed the inefficiency of the NCIP up to that point, unresolved conflicts with mining interests and a lack of recognition of customary law in the Philippine state courts for the meagre result (United Nations Economic and Social Council 2003). Analysts suggested that the prior informed consent requirement was used for some development projects against the interests of indigenous people and that various versions of customary laws were manipulated by various communities in conflicts about the delineation of their respective territories.²⁵

In 2001, Republic Act No. 9147 “providing for the conservation and protection of wildlife resources and their habitats, appropriating funds therefor and for other purposes” began to set the rather ineffective system of bioprospecting regulation on a new footing. It continued the distinction made by Executive Order No. 247 between commercial bioprospecting and collection and utilization of biological resources for scientific research and non-commercial purposes. While this new Act concerned the collection of resources in areas covered by the national Integrated Protected Areas System (such as Natural Parks and Sanctuaries), there was potential for overlap between these areas and ancestral domains and lands under the IPRA.²⁶ In 2003, the Department of Environment and Natural Resources (DENR) and the NCIP, therefore, issued a joint memorandum aiming at the harmonisation of the implementation of the IPRA and Environmental and Natural Resources Laws and Policies.²⁷ The memorandum recognised the customary laws and indigenous knowledge systems and practices of the ICCs/IPs and provided for a joint review of contentious issues and of resource management/utilisation instruments issued under the IPRA. The ICCs/IPs retained the right to participation, whereas the DENR was to provide assistance with the delineation of ancestral domains.

The final step in the revision of the regulation in this field is Joint Administrative Order No. 1 Series of 2005 of the DENR, the Department of Agriculture (DA), the Palawan Council for Sustainable Development (PCSD) and the NCIP with new Guidelines for Bioprospecting Activities in the Philippines. The Guidelines apply according to Section 2 to all bioprospecting activities in the Philippines, to *in-situ* as well as *ex-situ* collections of biological resources and to all areas, including ancestral domains and ancestral lands in accordance with the IPRA. The Guidelines distinguish

between the free and prior informed consent to be obtained from ICCs/IPs and the prior informed consent to be obtained from other local communities, which are also defined in the Act and are represented by their *Barangay* Assembly.²⁸ The Guidelines require a Bioprospecting Undertaking (BU) between the prospector and the Secretary of the Department of Agriculture (DA) or of the DENR. Implementing agencies are those of the DENR, DA and NCIP, whereby the NCIP takes the leading role in assisting indigenous peoples who are resource providers, in documenting free and prior informed consent and in negotiating for benefits under the BU (Section 7.4). The issuing of certificates of free and prior informed consent follows the rules and regulations of the IPRA. The Guidelines create a general procedure for benefit sharing agreements with a minimum bioprospecting fee to be collected by the national government (Section 15.1), which may rise in cases where the bioprospecting involves access to traditional knowledge (Section 15.2 e.). The national government also receives a share of the royalties, but local governments may share in those, if that is provided under a Local Government Code (section 14.4 c. and d.). Up-front payments, on the other hand, belong to the various local resource providers (Section 14.4. b.). The agreements are negotiated by representatives designated by the various resource providing communities (Section 14.1). The bioprospecting fee is to be used for a Wildlife Management Fund or Protected Area Fund (Section 15.5), but in cases of collection from ancestral domains, the monetary benefits are to be used in accordance with the IPRA. Section 16 of the Guidelines contains various formulas for the calculation of the financial benefits and Section 17 lists examples of other benefits that may be negotiated in addition to the monetary benefits. The new Guidelines provide also that the earlier DENR Administrative Order No. 20 of 1996 is repealed as well as Executive Order No. 247 in so far as it is inconsistent with the Wildlife Act (Section 34). In particular, the Inter-Agency Committee on Biological and Genetic Resources is dissolved, as its functions are now exercised by the Secretary of the DENR or DA (Section 6.4). Apart from royalties and fees, there is also provision for a rehabilitation/performance bond, which amounts to 25% of the project cost as reflected in the research budget and which is to be posted before the beginning of the activities.

What happens if the bioprospector does not comply with the obligations imposed by the BU and the benefit sharing agreement? There is currently a discussion at the international level to harmonise the provisions of the WTO-TRIPS Agreement and the CBD by requiring disclosure of origin of biological material and proof of prior informed consent for the granting of patent rights to biological inventions. However, differences persist not only about the appropriateness of such a disclosure requirement in general, but also about the penalties, which could be imposed, where such disclosure and proof of prior informed consent is absent. The most far-reaching proposals are aiming at the cancellation of patents granted under such circumstances, whereas others are giving priority to the certainty provided by the patent system and would prefer if any penalties are administered outside of

the patent system (Chouchena-Rojas et. al. 2005; WIPO 2006: 4–5). The Philippines has not opted for an approach based on the patent system. There is nothing in the Intellectual Property Code of the Philippines, which would allow for the revocation of patents based on inappropriately obtained biological material. Instead, Administrative Order No. 1 of 2005 foresees a monitoring process via annual progress reports and various certifications for prior informed consent, benefit sharing and collection quotas. Non-compliance with the BU will lead to the cancellation of the agreement, confiscation of the material, forfeiture of the rehabilitation and performance bond of 25% of the projected project cost, imposition of a perpetual ban on access to biological resources in the Philippines and imposition of administrative and criminal sanctions under the Wildlife Act. There is also provision for the ‘shaming’ of the violator in national and international media and the reporting of the violations to international and regional monitoring bodies. The Departments of Foreign Affairs and of Science and Technology are responsible for monitoring overseas. NGOs and People’s Organisations are specifically encouraged to participate in the monitoring process in general.

There are certain limited exemptions from the guidelines for scientific research on agrobiodiversity and wildlife, for traditional use, subsistence consumption and the use of *ex situ* collections, which are already subjected to international agreements. Medicinal plants developed for traditional and alternative medicines are supposed to be primarily governed by the Traditional and Alternative Medicine Act as specialised legislation. For the remaining purposes of a commercial nature, the BU will make reference to certain standard terms and conditions, which are contained in an annex to the guidelines. These include requests such as the deposit of specimens of the material with various agencies in the Philippines, research collaboration with Philippine agencies, retaining of ownership by the Philippines to the material and prescribed content for a material transfer agreement if there are third party recipients. Many of the conditions are compulsory (Section 9.1.), while others depend on the agreement between the parties and they may, therefore, be waived.

The Traditional and Alternative Medicine Act (Republic Act No. 8423) of 1997 is a final piece of legislation, which must be mentioned in the context of traditional knowledge, biological resources and intellectual property rights in the Philippines. Main purposes of the Act are the establishment of the Philippine Institute of Traditional and Alternative Health Care (PITAHC), the development of traditional and alternative health care and the establishment of a Traditional and Alternative Health Care Fund. However, much of this legislation is in fact concerned with the standardisation of traditional and alternative forms of medicine, with safety standards and the integration of these forms of medicine into the national health care system. The Act obliges the national government to seek a legally workable basis by which indigenous societies would own their knowledge of traditional medicine (Article I Section 2). Intellectual property rights are identified as providing such a basis

(Article II Section 4(i)), which also speaks of compensation, but it remains unclear how precisely such schemes are to be implemented. Implementing rules and regulations required in Article VI Section 19 have apparently not yet been issued, so that much of the legislation remains unimplemented. It is also quite clear that the Act does not cover traditional forms of medicine only and that the traditional knowledge of indigenous communities is not at the forefront of the interest. There is no representation of indigenous communities on the Board of the PITAHC. Equally, “traditional healers” are not necessarily indigenous, but defined as “the relatively old, highly respected people with a profound knowledge of traditional remedies.”

5. Conclusion

The discussion about traditional knowledge has been plagued by uncertainties about the terminology and the beneficiaries of the protection. While many developing countries in Asia have been swift in enacting the more clearly defined aspects of traditional knowledge protection, such as farmers’ rights, few have made attempts to implement the holistic concept of traditional knowledge that is advanced by many indigenous groups. The Philippines is an exception here, because of an administration of indigenous issues that was originally introduced by the US American colonial administration in the early 20th century. However, the Filipino experience shows the difficulties with the attempt to introduce a broadly worded, holistic concept of traditional knowledge. Not only is it difficult to harmonise the efforts of various government agencies, but the link to land and self determination issues is likely to clash with interests in other sectors of the economy, in this case for example with the mining industry. What remains under the circumstances in the revised legislation, is the requirements of free and prior informed consent and of benefit sharing. Here, Asian developing countries, including the Philippines, show a preference for the involvement of government agencies that negotiate on behalf of indigenous or local communities on the basis of certain minimum conditions outlined in the legislation.

At the international level, the discussion has been complicated by the many different international agencies involved, whose efforts at least initially seem to have been little coordinated. While developing countries and indigenous groups often agree over the desirability of international protection for traditional knowledge, there are still many differences in agreeing on a definition of the protected subject matter, the scope and the beneficiaries of protection. For the time being, protective measures remain, therefore, confined to access and benefit sharing rules, compensation requirements for traditional farmers and defensive protection measures such as digital libraries documenting traditional knowledge to prevent patenting.

Note

- 1 Professor of Comparative Law and Director, Centre for Comparative Law and Development Studies in Asia and the Pacific, University of Wollongong, Australia; QEII Fellow, Australian Research Council; Chief Investigator, ARC Centre of Excellence for Creative Industries and Innovation; Adjunct Research Fellow, Max Planck Institute for Intellectual Property, Competition and Tax Law, Munich.
- 2 See the statements of the representative of the Kaska Dena Council as well as those of the Institute of Advanced Studies of the United Nations University and of the International Institute for Environment and Development (WIPO 2005c: 17–22).
- 3 See the statement of the representative of the Ibero-Latin American Federation of Performers (FILAIE), WIPO 2005c: 21.
- 4 Article 3 CBD gave nations the “sovereign right to exploit their own resources pursuant to their own environmental policies” and Article 15(1) provided that “the authority to determine access to genetic resources rests with the national governments and is subject to national legislation”. The shift in emphasis in the CBD was, however, preceded by similar resolutions at FAO conferences in 1989 and 1991 that added Annexes to the International Undertaking on Plant Genetic Resources (Rose 2003: 595).
- 5 Article 8 CBD: “each contracting party shall as far as possible and appropriate:...(j) Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices...”
- 7 According to Article 18B(2) of the revised Constitution of 1945 the state “recognises and respects adat law communities along with their traditional rights”. “Adat” originally had a wider meaning covering both the supernatural and the secular social reality, but the Dutch colonial government treated it as a legal system and it refers since then to forms of customary law that are enforceable and have legal consequences (von Benda-Beckmann 1979: 113–118).
- 12 For other examples of differences between traditional knowledge in Asian mainstream culture and traditional knowledge of indigenous minorities see Antons (2005: 43–44).
- 13 See the statement by the representative of the Saami Council in WIPO (2005c: 77–78).
- 14 See the discussion of the history of indigenous communities in the Philippines in the separate opinion of Puno, J., in the decision of *Cruz vs Sec. Of Environment and Natural Resources* of December 6, 2000, on the website of the Supreme Court of the Philippines (<http://www.supremecourt.gov.ph/jurisprudence/2000/dec2000/135385.htm>, accessed on 19 January 2006).
- 16 Republic Act No. 9168: An Act to Provide Protection to new Plant Varieties. Establishing a National Plant Protection Board and for Other Purposes.
- 17 Sec. 43(d): “...This provision shall also extend to the exchange and sell of seeds among and between said small farmers: *Provided*, That the small farmers may exchange or sell seeds for reproduction and replanting in their own land.”
- 18 <http://www.senate.gov.ph/bills/status/sbn-35.htm>, accessed on 12 July 2006.
- 21 National Commission on Indigenous Peoples, Administrative Order No. 1, Series of 1998, Rules and Regulations Implementing Republic Act No. 8371, Otherwise known as “The Indigenous Peoples Rights Act of 1997”
- 23 Available at http://www.cyberdyaryo.com/features/f2001_0724_06.htm, accessed on 7 March 2006.
- 25 See the various sources in Molintas (2004: 296–298).
- 26 This overlap was already addressed by Section 13 of the Act Providing for the Establishment and Management of National Integrated Protected Areas System, Defining its Scope and Coverage, and for other Purposes, Republic Act No. 7586 of 1992.
- 27 Joint DENR-NCIP Memorandum Circular No. 2003–1.

- 28 The *barangay* is a traditional Philippine administrative unit consisting of a varying number of households. The *Barangay* Assembly is based on a Presidential Decree from the early 1970s, which formalised the size of *barangay* to between 100 and 500 families, see Rüländ, *Politik und Verwaltung in Metro Manila—Aspekte der Herrschaftsstabilisierung in einem autoritären politischen System*, Munich-Cologne-London: Weltforum Verlag 1982, p. 120.

References

- Antons, Christoph 2005. 'Traditional Knowledge and Intellectual Property Rights in Australia and Southeast Asia', in: C. Heath and A. Kamperman Sanders (eds), *New Frontiers of Intellectual Property Law: IP and Cultural Heritage, Geographical Indications, Enforcement and Overprotection*. Oxford and Portland, Oregon: Hart Publishing, pp. 37–51.
- Bello, Walden, Docena, Herbert, de Guzmán, Marissa and Malig, Marylou 2005. *The Anti-Development State: The Political Economy of Permanent Crisis in the Philippines*. London-New York: Zed Books.
- Benda-Beckmann, Franz von 1979. *Property in Social Continuity: Continuity and Change in the Maintenance of Property Relationships Through Time in Minangkabau, West Sumatra*. The Hague: Martinus Nijhoff.
- Blakeney, Michael 2001. 'Intellectual Property Aspects of Traditional Agricultural Knowledge', in: P. Drahos and M. Blakeney, *IP in Biodiversity and Agriculture*, Perspectives on Intellectual Property Series, Vol. 9. London: Sweet & Maxwell.
- Chouchena-Rojas, Martha, Ruiz Muller, Manuel, Vivas, David and Winkler, Sebastian (eds) 2005. *Disclosure requirements: Ensuring mutual supportiveness between the WTO TRIPS Agreement and the CBD*. Gland, Switzerland-Cambridge-Geneva: IUCN and ICTSD.
- Correa, Carlos 2001. 'Access to Plant Genetic Resources and Intellectual Property Rights', in: P. Drahos and M. Blakeney, *IP in Biodiversity and Agriculture*. London: Sweet & Maxwell.
- Eder, James F. and McKenna, Thomas M. 2004. 'Minorities in the Philippines: Ancestral Lands in Theory and Practice', in: C.R. Duncan (ed.), *Civilizing the Margins: Southeast Asian Government Policies for the Development of Minorities*. Ithaca and London: Cornell University Press.
- Halos, S., La Vina, A.G., Lim, M.S. and Caleda, M.J. (eds.) 2004. *Developing the National Biosafety Framework for the Philippines*. Quezon City: Department of Environment and Natural Resources — Protected Areas and Wildlife Bureau.
- Janke, Terri 1998. *Our Culture, Our Future — Report on Australian Indigenous Cultural and Intellectual Property Rights*, prepared by Michael Frankel & Co. for the Australian Institute of Aboriginal and Torres Strait Islander Studies and the Aboriginal and Torres Strait Islander Commission, Sydney.
- Kingsbury, Benedict 1998. '“Indigenous Peoples” in International Law: A Constructivist Approach to the Asian Controversy'. *American Journal of International Law*, pp. 414–457.
- Kingsbury, Benedict 1999. 'The Applicability of the International Legal Concept of “Indigenous Peoples” in Asia', in: J.R. Bauer and D.A. Bell (eds.), *The East Asian Challenge for Human Rights*. Cambridge: Cambridge University Press, pp. 336–377.
- May, R.J. 1997. 'Ethnicity and Public Policy in the Philippines', in: M.E. Brown and S. Ganguly (eds.), *Government Policies and Ethnic Relations in Asia and the Pacific*. Cambridge, Mass. and London: MIT Press, pp. 321–350.
- Molintas, Jose Mencion 2004. 'The Philippines Indigenous Peoples' Struggle for Land and Life: Challenging Legal Texts'. *Arizona Journal of International and Comparative Law*, Vol. 21 No.1, pp. 269–306
- Rose, Gregory 2003. 'International Law of Sustainable Agriculture in the 21st Century: Resources for Food and Agriculture'. *The Georgetown International Environmental Law Review*. Vol. XV, Issue 4, pp. 583–632.
- Rüländ, Jürgen 1982. *Politik und Verwaltung in Metro Manila—Aspekte der Herrschaftsstabilisierung in einem autoritären politischen System*. Munich-Cologne-London: Weltforum Verlag.
- Swiderska, Krystyna, Dano, Elenita and Dubois, Olivier 2001. *Developing the Philippines Executive Order No. 247 on Access to Genetic Resources*. Participation in Access and Benefit-Sharing Policy, Case Study no 4, London:

- International Institute for Environment and Development (IIED).
- United Nations Economic and Social Council 2003. Doc. E/CN.4/2003/90/Add.3 of 5 March 2003, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Mr. Rodolfo Stavenhagen, submitted in accordance with Commission on Human Rights resolution 2002/65*. .
- World Intellectual Property Organization 2001. *Intellectual Property Needs and Expectations of Traditional Knowledge Holders — WIPO Report on Fact-finding Missions on Intellectual Property and Traditional Knowledge (1998 – 1999)*, Geneva.
- World Intellectual Property Organization 2004. WIPO/GRTKF/IC/6/4 of 12 December 2003, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Sixth Session, Geneva, 15–19 March 2004 — Traditional Knowledge: Policy and Legal Options. Geneva.
- World Intellectual Property Organization 2005a. WIPO/GRTKF/IC/8/4 of 8 April 2005, The Protection of Traditional Cultural Expressions/Expressions of Folklore: Revised Objectives and Principles. Geneva.
- World Intellectual Property Organization 2005b. WIPO/GRTKF/IC/8/5 of 8 April 2005, The Protection of Traditional Knowledge: Revised Objectives and Principles. Geneva.
- World Intellectual Property Organization 2005c. WIPO/GRTKF/IC/8/15 Prov. 2 of 5 October 2005, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Eighth Session, Geneva, 6–10 June 2005 — Second Draft Report. Geneva.
- World Intellectual Property Organization 2006. WIPO/GRTKF/IC/10/INF/2 of 29 September 2006, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Tenth Session, Geneva, 30 November to 8 December 2006 — Circulation of Comments Received on Documents WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/9/4. Geneva.
- WIPO (no publication date provided). *Intellectual Property and Traditional Knowledge*. Geneva. Booklet no 2. Geneva.