



Traditional Knowledge in Taiwan: A Call for Greater Participation of Indigenous Peoples in the Global Intellectual Property Marketplace

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ABSTRACT

This Article explores the plight of the Aborigines of Taiwan and the legal protections that exist for their Traditional Knowledge. While Taiwan continues to face international isolation with a diminished number of states recognizing the Republic of China as the seat of China, the island's government has taken limited steps to recognize language, cultural, and economic rights of its Indigenous peoples. International law has not been helpful in protecting Traditional Knowledge, but Taiwan could use its vast economic resources and positive track record in protecting some of these rights to further its goals of international recognition. This Article details the current regulation of Traditional Knowledge, both internationally and within Taiwan, and calls for a new international treaty in which the Republic of China could take

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I. INTRODUCTION

On August 1, 2016, Taiwanese President Tsai Ing-wen apologized to the Aborigines of Taiwan¹ for centuries of injustice.² For four hundred years, these Indigenous peoples on the island have been marginalized, unable to hunt on their traditional lands or practice their own customs.³ Like Indigenous Peoples in other parts of the world, the Aborigines of Taiwan live at a relatively low socioeconomic level, have a shorter life expectancy, and suffer from higher incidents

1. For this Article, the term “Aborigines” and “Indigenous Peoples” are interchanged. In Taiwan, there is a Shung Ye Museum of Formosan Aborigines was opened in 1994. See generally Lene, *Shung Ye Museum (顺益台湾原住民博物馆) – The History of Taiwan Formosan Aborigines*, AROMA ASIAN (June 3, 2018), <https://aromasian.com/shung-ye-museum-%e9%a1%ba%e7%9b%8a%e5%8f%b0%e6%b9%be%e5%8e%9f%e4%bd%8f%e6%b0%91%e5%8d%9a%e7%89%a9%e9%a6%86-the-history-of-taiwan-formosan-aborigines/> [https://perma.cc/S6FU-YLFD] (archived Sept. 5, 2020). In different countries and cultures, the terms change for the first groups to settle on a land, pre-contact with colonial powers. In Canada, it is “First Nations” and in Australia it is “Aboriginals.”

2. *Full Text of President Tsai Ing-wen’s Apology to Indigenous People*, FOCUS TAIWAN (Aug. 1, 2016), <http://focustaiwan.tw/news/aip/201608010026.aspx> [https://perma.cc/D3M2-XVMD] (archived Sept. 5, 2020) (hereinafter *President Tsai Ing-wen’s Apology*).

3. Jing-jing Guo, Wei Pan, Mei-wan Chen, Chun-ming Wang & Yi-tao Wang, *Overview of Taiwan’s Indigenous Ethnopharmacology in the Perspective of Traditional Knowledge Protection*, 21 CHINA J. INTEGRATIVE MED. 949, 951 (2015) (“[V]arious factors such as urbanization, decrease in indigenous population, and loss of faith in traditional medicine among the younger generations have resulted in a sharp decrease of not only indigenous culture and languages, but also loss of traditional herbs and therapies.”).

of illness and underdevelopment.⁴ They make up only 2.3 percent of the population and are of Malayo-Polynesian heritage.⁵

This apology from Taiwan's leader provides an opportunity for Taiwan to help lead the development of Traditional Knowledge and the protection of Indigenous rights around the region, an area not known for its kind treatment of its Indigenous Peoples. In her apology, President Tsai called for a "shared prosperity and a new future for Taiwan."⁶ One area in which these goals could be achieved concerns the commercialization of traditional medicines and healing methods, also known as Traditional Knowledge (TK).⁷ According to the World Intellectual Property Organization (WIPO), a United Nations agency, TK refers to the content or substance of knowledge resulting from intellectual activity in a traditional context, and includes the know-how, skills, innovations, practices and learning that form part of traditional knowledge systems, and knowledge embodying traditional lifestyles of indigenous and local communities or contained in codified knowledge systems passed between generations.⁸ TK is not limited to any specific technical field and may include agricultural, environmental, and medicinal knowledge, as well as knowledge associated with genetic resources.⁹

Taiwan is in the unique position of being both a provider and user of TK and the healing sciences that stem from it.¹⁰ Taiwan is a provider in that its location and its topography and plant life are rife with opportunities: "Taiwan is somewhat of a hotspot when it comes to biological diversity."¹¹ Taiwan also enjoys an economy and society

4. Xiang Gao, Guy C. Charlton & Mitsuhiro A. Takahashi, *The Legal Recognition of Indigenous Interests in Japan and Taiwan*, 24 ASIA PAC. L. REV. 60, 66 (2016); see also Stephen Allen, *Establishing Autonomous Regimes in the Republic of China: The Sabience of International Law for Taiwan's Indigenous Peoples*, 4 INDIGENOUS L.J. 159, 160 (2005) ("Taiwan's Indigenous peoples are the victims of injustices perpetrated by a series of Asian colonizers that have determined their current status and treatment within the Republic of China.").

5. See *The World Factbook: Taiwan*, CENT. INTEL. AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/tw.html> (last updated Aug. 12, 2020) [<https://perma.cc/3EWC-579A>] (archived Sept. 5, 2020) ("[T]here are 16 officially recognized indigenous groups: Amis, Atayal, Bunun, Hla'alua, Kanakaravu, Kavalan, Paiwan, Puyuma, Rukai, Saisiyat, Sakizaya, Seediq, Thao, Truku, Tsou, and Yami; Amis, Paiwan, and Atayal are the largest and account for roughly 70% of the indigenous population.").

6. See *President Tsai Ing-wen's Apology*, *supra* note 2.

7. See *infra* Part II.

8. See, e.g. World Intellectual Property Organization [WIPO], Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, *Glossary of Key Terms Related to Intellectual Property and Genetic Resources*, WIPO Doc. GRTKF/IC/17/INF/13 (Jan. 10, 2011).

9. See *id.*

10. A country can be both the provider of the TK or Genetic Resources and also the user: "The user/provider dichotomy is no longer mutually exclusive." Chidi Oguamanam, *Genetic Resources & Access and Benefit Sharing: Politics, Prospects and Opportunities for Canada After Nagoya*, 22 J. ENVTL. L. & PRAC. 87, 87 (2011) [hereinafter Oguamanam, *Genetic Resources*].

11. CHUNG-HSI LEE & NICHOLAS VAN HEYST, PROTECTION OF GENETIC RESOURCES IN TAIWAN: RETROSPECT AND PROSPECT 3 (2010) (paper presented at the 15th Asian Bioethics Conference, Beppu, Japan (Nov. 2014)).

that qualify it as a developed country. “[I]n terms of development—both economically and technologically—Taiwan has certainly reached a level that is characteristically within reasonable comparison to nations belonging to the North.”¹²

It is no surprise then that Taiwan has been very successful in its development of biotechnology and life sciences,¹³ given its track record in building a robust knowledge-based economy.¹⁴ The Bertelsmann Transformation Index (BTI), a leading biennial report, which measures the development status and governance of political and economic transformation in developing countries globally, ranked Taiwan as the third highest of 129 developing and transitional countries in 2018.¹⁵ This is after a spectacular performance in 2016, when the BTI ranked Taiwan at the top of 129 developing and transitional countries around the world on the transformation index.¹⁶

Over the years, Taiwan has successfully laid the foundations for a stable market economy, one based on competition and innovation. Strong private property rights and a stable currency, as well as government incentives, have all assisted to foment economic growth and development. A future built on biotechnology and the life sciences industry is part of further growth strategies. The Act for the Development of Biotech and New Pharmaceuticals Industry¹⁷ was passed in 2007. It was amended in 2017 to assist in implementing the national strategy through tax and other incentives. Taiwan’s

12. *Id.*

13. Louise Watt, *Biotech Event Showcases Taiwan’s “Next Trillion-Dollar Industry”*, TAIWAN BUS. TOPICS (Aug. 12, 2020), <https://topics.amcham.com.tw/2020/08/biotech-taiwan-next-trillion-dollar-industry/> [<https://perma.cc/5ECH-EAFB>] (archived Nov. 6, 2020).

14. *Taiwan Tops Asia as Knowledge-Based Economy*, TAIWAN TODAY (Dec. 10, 2014), <https://taiwantoday.tw/news.php?unit=6,23,6,6&post=12210> [<https://perma.cc/WUC9-NZ9E>] (archived Sept. 5, 2020); see also *Countries of the World*, THEODORA (Jan. 12, 2017), https://theodora.com/world_fact_book_2017/taiwan/taiwan_economy.html [<https://perma.cc/EL2K-RGED>] (archived Sept. 15, 2020) (“Taiwan has a dynamic capitalist economy with gradually decreasing government guidance on investment and foreign trade. Exports, led by electronics, machinery, and petrochemicals have provided the primary impetus for economic development.”).

15. *BTI Country Report 2018: Taiwan*, BERTELSMANN TRANSFORMATION INDEX (2018), https://www.bti-project.org/content/en/downloads/reports/country_report_2018_TWN.pdf [<https://perma.cc/3PSV-NH5N>] (archived Sept. 15, 2020).

16. Robert Schwarz, *And the Winner is . . . Taiwan*, BERTELSMANN TRANSFORMATION INDEX (Apr. 26, 2016), https://blog.bti-project.org/2016/04/25/and_the_winner_is_taiwan/ [<https://perma.cc/RC2Z-L3WN>] (archived Sept. 5, 2020) (“Having achieved impressive gains in economic and social policies (rank 1 in market economy status), the island nation also features stable democratic traditions securely anchored in society (rank 3 in democracy status). Visionary political leadership, robust political and economic institutions and a vibrant civil society account for this success.”); Leaf Chiang & Romulo Huang, *Taiwan Tops Global List of Transformation Index*, FOCUS TAIWAN (Feb. 29, 2016), <http://focustaiwan.tw/news/asoc/201602290023.aspx> [<https://perma.cc/A9DN-XFBW>] (archived Sept. 5, 2020).

17. Act for the Development of Biotech and New Pharmaceutical Industries (Jan. 18, 2017), FAWUBU FAGUI ZILIAOKU (全國法規資料庫) [Ministry of Justice Laws and Regulations Database], <https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=J0040046> [<https://perma.cc/6CAV-SJPE>] (archived Sept. 5, 2020).

Legislative Yuan also passed the Protection Act for the Traditional Intellectual Creations of Indigenous Peoples.¹⁸ While the law has not been implemented in any meaningful way, with President Tsai's apology and promises for further legislative protections in the future, there is an opportunity for Taiwan to take a leadership role in developing a new international regime for sharing the benefits of TK, Genetic Resources (GR), and Indigenous folklore (Folklore).

The protection of these and other Indigenous practices plays a role in a wide variety of policy areas, including agricultural productivity, biological diversity, cultural patrimony, food security, environmental protection, labor relations, business ethics, competition law, human rights, industrial policy, international trade, public health, scientific research, sustainable development, income inequality, and relations between developed and less developed countries.¹⁹

The time is right to bring TK and Traditional Medicine (TM) into wider practice and protection. According to a report from the WIPO,

TM practices, particularly whole medical systems such as TCM [Traditional Chinese Medicine], share many of the same core values. These practices tend to be characterized by a holistic and highly individualized approach to treatment, an emphasis on maximizing the body's inherent healing ability, involving patients as active participants in their own care, addressing physical, mental, and spiritual attributes of a disease, and placing a strong emphasis on prevention and wellness.²⁰

There has been media attention paid to TK and Traditional Chinese Medicine (TCM), which assisted in educating the general public of its strengths. The most decorated Olympic athlete of all time,²¹ swimmer Michael Phelps, competed in the 2016 Rio de Janeiro summer Olympics with marks on his back from "cupping."²² Government

18. Protection Act for the Traditional Intellectual Creations of Indigenous Peoples (Feb. 2, 2004), FAWUBU FAGUI ZILIAOKU (全國法規資料庫) [Ministry of Justice Laws and Regulations Database], <https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=D0130021> [<https://perma.cc/Y4G9-ZWW4>] (archived Sept. 5, 2020) (Taiwan); see also Chih-Chieh Yang, *A Comparative Study of the Models Employed to Protect Indigenous Traditional Cultural Expressions*, 11 ASIAN PAC. L. & POL'Y J. 49, 50 (2010).

19. See Peter K. Yu, *Traditional Knowledge, Intellectual Property, and Indigenous Culture: An Introduction*, 11 CARDOZO J. INT'L & COMP. L. 239, 240 (2003).

20. Ryan Abbott, *Documenting Traditional Medical Knowledge*, WIPO 4 (Mar. 2014), https://www.wipo.int/export/sites/www/tk/en/resources/pdf/medical_tk.pdf, [<https://perma.cc/A27R-YDM3>] (archived Sept. 5, 2020) (citing World Health Organization [WHO], *Traditional Medicine Strategy 2002-2005*, WHO Doc. EDM/TRM/2002.1 (2002), https://apps.who.int/iris/bitstream/handle/10665/67163/WHO_EDM_TRM_2002.1.pdf;jsessionid=E264F68C42FE14ABE02797F1A16651D8?sequence=1 [<https://perma.cc/M38P-G8PV>] (archived Sept. 5, 2020)).

21. Michael Phelps, *The Most Decorated Olympian of All Time*, OLYMPIC, <https://www.olympic.org/michael-phelps> (last visited Sept. 5, 2020) [<https://perma.cc/VE54-RBR4>] (archived Sept. 5, 2020).

22. See, e.g., Gretchen Reynolds & Karen Crouse, *What Are the Purple Dots on Michael Phelps? Cupping Has an Olympic Moment*, N.Y. TIMES (Aug. 8, 2016, 8:24 AM), <http://well.blogs.nytimes.com/2016/08/08/what-are-the-purple-dots-on-michael-phelps-cupping-has-an-olympic-moment/> [<https://perma.cc/7M5K-H938>] (archived Sept. 5, 2020); see also Michael Singer, *Cupping: Why Michael Phelps Was Covered in Red Dots*,

regulators regularly advertise its features.²³ Popular culture has also seized on the heightened interest in Traditional Chinese Medicine.²⁴ Magazine articles,²⁵ documentary films,²⁶ and scholarship²⁷ have emerged in legal and medical fields. A series of web stories emerged questioning different treatments.²⁸

In 2016, a famous teen actress in China died of lymphoma.²⁹ She had tried to use only TCM to treat her illness rather than more Western medical approaches.³⁰ Herbal supplements from China have also caused a ruckus in the medical field over the rise of necessary liver transplants.³¹ In the face of these negative media reports, the Hong Kong government stated: “Traditional Chinese Medicine is of great value and has been making significant contributions to the

USA TODAY (Aug. 9, 2016), <http://www.usatoday.com/story/sports/olympics/rio-2016/2016/08/07/cupping-michael-phelps-suction-red-dots-rio-olympics/88381088/> [https://perma.cc/P4ZE-K9PK] (archived Sept. 5, 2020).

23. See generally *Traditional Chinese Medicine: What You Need To Know*, NAT'L CTR. FOR COMPLEMENTARY & INTEGRATIVE HEALTH (Apr. 29, 2019), <https://nccih.nih.gov/health/whatiscam/chineseemed.htm> [https://perma.cc/BY7J-NWXV] (archived Sept. 5, 2020).

24. *What Is Traditional Chinese Medicine?*, WEBMD (Mar. 15, 2019), <https://www.webmd.com/balance/guide/what-is-traditional-chinese-medicine#1> [https://perma.cc/5WM5-TV5M] (archived Sept. 5, 2020).

25. See generally David Cyranoski, *Why Chinese Medicine is Heading for Clinics Around the World*, NATURE (Sept. 26, 2018), <https://www.nature.com/articles/d41586-018-06782-7> [https://perma.cc/DJ8J-LFQZ] (archived Sept. 5, 2020); WORLD J. TRADITIONAL CHINESE MED., <http://www.wjtcn.org/ch/index.aspx> (last visited Sept. 5, 2020) [https://perma.cc/W9WS-8YV5] (archived Sept. 5, 2020); *Database of Articles on Chinese Medicine*, BIOMED. CENT. (2020), <https://cmjournal.biomedcentral.com/articles> (last visited Sept. 5, 2020) [https://perma.cc/4GG3-ECJR] (archived Sept. 5, 2020); CHINESE TRADITIONAL MED. J., <http://traditionalmedicinejournals.com> (last visited Sept. 5, 2020) [https://perma.cc/9SQ5-KRA2] (archived Sept. 5, 2020).

26. See generally *Pu Ruka Lawen – Mapuche Medicine Meets Modernity*, PROYECTO ACCESO, <http://www.proyectoacceso.com/Mapuche-medicine-city.html> (last visited Sept. 28, 2020) [https://perma.cc/5W65-F3AT] (archived Sept. 5, 2020).

27. See generally CHRISTOPH ANTONS, *TRADITIONAL KNOWLEDGE, TRADITIONAL CULTURAL EXPRESSIONS AND INTELLECTUAL PROPERTY LAW IN THE ASIA-PACIFIC REGION* (2009); see also Steven Andrew Martin, *A Taiwan Knowledge Keeper of Indigenous Bunun – An Ethnographic Historical Narrative of Laipunuk (內本鹿), Southern Mountain Range*, ETHNOGRAPHY (July 23, 2020).

28. Benjamincost, *11 Traditional Chinese Therapies That Will Weird You Out*, SHANGHAIIST.COM (Sep. 30, 2019), <http://shanghaiist.com/2014/07/11/11-traditional-chinese-therapies-that-will-weird-you-out.php> [https://perma.cc/8AU3-BN87] (archived Sept. 13, 2020).

29. See Traci You, *Actress, 26, Dies of Cancer After Choosing Traditional Chinese Medicine Treatment Over 'Painful' Chemotherapy*, DAILY MAIL (Sept. 15, 2016), <http://www.dailymail.co.uk/news/article-3791323/Actress-26-dies-cancer-choosing-traditional-Chinese-medicine-treatment-painful-chemotherapy.html> [https://perma.cc/SG78-T6ED] (archived Sept. 5, 2020).

30. *Chinese Actress' Death Sparks Cancer Treatment Debate*, BBC (Sept. 15, 2016), <http://www.bbc.com/news/world-asia-china-37370201> [https://perma.cc/KK6F-L5XU] (archived Sept. 5, 2020).

31. Emily Tsang, *Link Between Traditional Chinese Medicine and Liver Transplants? 100 Hong Kong Cases Stir Concern*, S. CHINA MORNING POST (May 4, 2016), <http://www.scmp.com/news/hong-kong/health-environment/article/1941090/link-between-traditional-chinese-medicine-and> [https://perma.cc/QNX8-HHQG] (archived Sept. 5, 2020).

health of mankind.”³² The practice is so integral to the Special Administrative Region that the Hong Kong Tourism Board advertises Hong Kong as a destination for Traditional Chinese Medicine.³³ In April 2019, the first TCM hospital opened in Hong Kong.³⁴

The COVID-19 pandemic has also sparked interest in using TK to treat the symptoms of coronavirus.³⁵ Herbs from Madagascar are being touted as helpful.³⁶ Likewise, herbs from China are being studied for their effectiveness in therapeutic treatment of the coronavirus.³⁷ Scientific papers are discussing the efficacy of Traditional Chinese Medicine.³⁸

32. HONG KONG GOV'T, THE 2016 POLICY ADDRESS: INNOVATE FOR THE ECONOMY, IMPROVE LIVELIHOOD, FOSTER HARMONY, SHARE PROSPERITY ¶ 232, <https://www.policyaddress.gov.hk/2016/eng/pdf/PA2016.pdf> (last visited Sept. 29, 2020) [<https://perma.cc/8W5U-TX2S>] (archived Sept. 29, 2020).

33. *Experience Hong Kong's Traditional Rituals and Ceremonies Like a True Local*, H.K. TOURISM BD. (2020), <https://www.discoverhongkong.com/in/explore/culture/experience-hong-kong-s-traditional-rituals-and-ceremonies-like-a-true-local.html> [<https://perma.cc/8JSN-H3YJ>] (archived Sept. 5, 2020).

34. Bonita Wong, Wayne Change & Sarah Poon, *Traditional but Unconventional: Hong Kong's First Chinese Medicine Hospital Signals a Change in Gov't Attitude*, H.K. FREE PRESS (Apr. 20, 2019, 12:00 PM), <https://www.hongkongfp.com/2019/04/20/traditional-unconventional-hong-kongs-first-chinese-medicine-hospital-signals-change-govt-attitude/> [<https://perma.cc/J7PX-QW79>] (archived Sept. 5, 2020).

35. See Nectar Gan, *A Traditional Chinese Remedy Said to Help Fight Wuhan Coronavirus Sparks Skepticism – and Panic Buying*, CNN (Feb. 1, 2020, 10:09 AM), <https://www.cnn.com/2020/02/01/asia/chinese-traditional-medicine-claims-coronavirus-intl-scli-hnk/index.html> [<https://perma.cc/44KA-LCWF>] (archived Sept. 5, 2020).

36. See generally Aryn Baker, *'Could It Work as a Cure? Maybe.'* *A Herbal Remedy for Coronavirus Is a Hit in Africa, But Experts Have Their Doubts*, TIME (May 22, 2020, 10:51 AM), <https://time.com/5840148/coronavirus-cure-covid-organic-madagascar/> [<https://perma.cc/7BVH-QH3B>] (archived Sept. 5, 2020); Linda Givetash, *China Is Encouraging Herbal Remedies to Treat COVID-19. But Scientists Warn Against It*, NBC NEWS (Apr. 5, 2020, 3:33 AM), <https://www.nbcnews.com/news/world/china-encouraging-herbal-remedies-treat-covid-19-scientists-warn-against-n1173041> [<https://perma.cc/UJ8H-95MM>] (archived Sept. 5, 2020).

37. See generally Yang Yang, Sahidul Slam, Jin Wang, Yuan Li & Xin Chen, *Traditional Chinese Medicine in the Treatment of Patients Infected with 2019-New Coronavirus (SARS-COV-2): A Review and Perspective*, 16 INT'L J. BIOLOGICAL SCI. 1708 (2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7098036/> [<https://perma.cc/BRA8-PX7G>] (archived Sept. 5, 2020); David Cyranoski, *China is promoting coronavirus treatments based on unproven traditional medicines*, NATURE (May 6, 2020), <https://www.nature.com/articles/d41586-020-01284-x> [<https://perma.cc/7D8V-MARE>] (archived Sept. 5, 2020).

38. See generally Leonard T.F. Ho, Karina K.H. Chan, Vincent C.H. Chung & Ting Hung Leung, *Highlights of Traditional Chinese Medicine Frontline Expert Advice in the China National Guideline for COVID-19*, 36 EUR. J. INTEGRATIVE MED. (2020), <https://www.sciencedirect.com/science/article/pii/S1876382020303899> [<https://perma.cc/PC9N-E8YW>] (archived Sept. 5, 2020); Erdan Luo, Daiyan Zhang, Hua Luo, Bowen Liu, Keming Zhao, Yonghua Zhao, Ying Bian & Yitao Wang, *Treatment Efficacy Analysis of Traditional Chinese Medicine for Novel Coronavirus Pneumonia (COVID-19): An Empirical Study from Wuhan, Hubei Province, China*, CHINA MED. (2020) https://exploreim.ucla.edu/wp-content/uploads/efficacy_analysis_TCM_covid19_Luo2020.pdf [<https://perma.cc/S8WA-G6GP>] (archived Sept. 5, 2020). Most articles call for further study. One notes that “the National Health Commission of China has not issued a [Chinese Medicine] prevention plan for COVID-19.” Hui Luo, Qiao-ling Tang, Ya-xi Shang, Shi-bing Liang, Ming Yang, Nicola Robinson & Jian-ping Liu, *Can Chinese Medicine Be Used for Prevention of Corona Virus Disease 2019 (COVID-19)? A Review*

This Article examines the timely need to expand the legal framework for TK, conclude a multilateral treaty under the auspices of WIPO, and have it implemented nationally in each country. Taiwan can do its part as academic, political, and civil society leaders to make TK a priority within their territory and help facilitate a global movement towards more inclusion in the global Intellectual Property (IP) regime. This Article is divided into six parts. After this introduction, which comprises Part I, Part II provides a definition of TK and explores the sources in international law for the protection and promotion of these ancient healing mechanisms. There is a weak basis in international law for the protection of Indigenous medicine and other healing arts, thereby necessitating the creation of a new treaty to reflect evolving norms in international law and state practice.

Part III of this Article then examines the ways which national laws, including those related to patents and copyrights, with limited success, have been used to protect Traditional Knowledge. To redress cases of biopiracy, Indigenous Peoples, nongovernment advocacy, and cause/social justice lawyering have worked together to advance civil society through litigation. This Part concludes by surveying some of the difficulties in applying international IP laws to TK and the tension that exists in trying to fit Indigenous collective practices into Western-centric IP law that is more individually based.

Part IV of this Article examines the attempts to make good on President Tsai's promises to Taiwan's Aborigines of August 1, 2016, and steps that have been taken to create a legal framework to better protect TK of the island's Aborigines. Part V demonstrates the need for an international treaty to protect TK and surveys the most recent iteration of such a draft treaty negotiated at the WIPO. It also examines the reasons why Taiwan should take a leadership role in developing mechanisms to embrace TK in its IP laws and encourage its diplomatic partners to do the same. It is important to note the difficult diplomatic and legal challenges that Taiwan faces, given that only 14 countries (plus the Vatican) now recognize the Republic of China as a state.³⁹ The conclusion, which forms Part VI of this Article,

of Historical Classics, Research Evidence, and Current Prevention Programs, 26 CHINA J. INTEGRATIVE MED. 243, 248 (2020).

39. In mid-September 2019, two countries – the Marshall Islands and Kiribati – switched their recognition of “China” from Taiwan to the People’s Republic of China. Tom O’Connor, *Which Countries Still Recognize Taiwan? Two More Nations Switch to China in Less than a Week*, NEWSWEEK (Sept. 20, 2019), <https://www.newsweek.com/who-recognizes-taiwan-two-change-china-1460559> [https://perma.cc/CF44-JY9S] (archived Sept. 5, 2020). This loss came after May 2019 when two more countries – Burkina Faso and the Dominican Republic – broke diplomatic relations with Taiwan and recognized the People’s Republic of China instead. Rob Schmitz, *Taiwan Loses 2 More Allies to China and Scrambles Jets to Track Chinese Bomber Drills*, NAT’L PUB. RADIO (May 25, 2019), <https://www.npr.org/sections/parallels/2018/05/25/613620512/china-poaches-2-more-allies-from-taiwan-as-beijing-continues-military-drills> [https://perma.cc/RA68-T4PB] (archived Sept. 5, 2020).

reflects on the highly charged political and formal international legal matter that “cross-Straits” relations have become.⁴⁰

This geopolitical reality, however, is also an opportunity. While the Republic of China is not a member of the WIPO, it is a Member of the World Trade Organization (WTO).⁴¹ With over \$430 billion in foreign reserves,⁴² a robust postindustrial knowledge-based economy, and a vibrant democracy, Taiwan can position itself as a leader concerning Indigenous rights. The country can work to grow the economy, provide benefit sharing and inclusion, and provide a model for export and emulation. It can work to help influence the evolving global trade law regime to better integrate Indigenous demands and worldviews on TK into the Doha Round, the WTO’s latest trade negotiations.⁴³

II. TRADITIONAL KNOWLEDGE IN INTERNATIONAL LAW

Unfortunately, the definition of TK remains a moving target in international law: “There is no agreed upon definition for the concepts of ‘traditional knowledge’ or ‘traditional cultural expressions,’ which is the copyright related subset of traditional knowledge.”⁴⁴ Some scholars propose that TK is “the conservation of native sciences, medicine, folklore, artistry, and biological diversity within an indigenous culture.”⁴⁵

According to WIPO, TK can include a wide variety of spiritual and cultural beliefs and practices, tangible works, folklore, folk art, and folk remedies.⁴⁶ WIPO’s Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge, and Folklore (IGC) further defined TK as

the content or substance of knowledge that is the result of intellectual activity and insight in a traditional context, and includes the know-how, skills, innovations, practices and learning that form part of traditional knowledge systems, and knowledge that is embodied in the traditional lifestyle of a community or people, or is contained in codified knowledge systems passed between generations. It is not limited to any technical field, and may include

40. See CENT. INTELLIGENCE AGENCY, *supra* note 6, intro.

41. Press Release, World Trade Org., WTO Ministerial Conference Approves Accession of Chinese Taipei (Nov. 11, 2001), https://www.wto.org/english/news_e/pres01_e/pr253_e.htm [<https://perma.cc/AU6U-49BQ>] (archived Sept. 5, 2020).

42. See CENT. INTELLIGENCE AGENCY, *supra* note 6.

43. See *Intellectual Property: Geographical Indications and Biodiversity*, WTO (Dec. 2008), https://www.wto.org/english/tratop_e/dda_e/status_e/gi_e.htm [<https://perma.cc/6PZZ-LB9V>] (archived Sept. 5, 2020).

44. Doris Estelle Long, *Traditional Knowledge and the Fight for the Public Domain*, 5 J. MARSHALL REV. INTELL. PROP. L. 317, 318 (2006).

45. See *Traditional Knowledge*, PROYECTO ACCESO, <http://www.proyectoacceso.com/traditional-knowledge.html> (last visited Nov. 3, 2020) [<https://perma.cc/6Y3F-5CF4>] (archived Nov. 3, 2020); see also Silke von Lewinski, *The Protection of Folklore*, 11 CARDOZO J. INT’L & COMP. L. 747, 748 (2003).

46. See World Intell. Prop. Org., *Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-finding Missions on Intellectual Property and Traditional Knowledge (1998–1999)*, at 25 (2001).

agricultural, environmental and medicinal knowledge, and knowledge associated with genetic resources.⁴⁷

The United Nations Convention on Biological Diversity 1992 (CBD),⁴⁸ which was adopted at the United Nations Conference on Environment and Development, refers to TK as “knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity.”⁴⁹

TK is much less of a concrete or tangible item than it is a system through which methods, creations, and discoveries are transmitted. Article 8(j) of the CBD states:

Knowledge, innovations and practices of indigenous and local communities around the world. Developed from experience gained over the centuries and adapted to the local culture and environment, traditional knowledge is transmitted orally from generation to generation. It tends to be collectively owned and takes the form of stories, songs, folklore, proverbs, cultural values, beliefs, rituals, community laws, local language and agricultural practices, including the development of plant species and animal breeds. Traditional knowledge is mainly of a practical nature, particularly in such fields as agriculture, fisheries, health, horticulture, forestry and environmental management in general.⁵⁰

TK often encompasses local biological resources, animal and plant breeds, and the way those living organisms grow and interact together. TK is dynamic and includes experimentation and improvement. The traditional part of “Traditional Knowledge” simply means that the particular knowledge is created, transmitted, recorded, and preserved in the context of a traditional culture.

TM, another example and a key component of TK, is defined by WHO as “the sum total of the knowledge, skill and practices based on the theories, beliefs, and experiences indigenous to different cultures, whether explicable or not, used in the maintenance of health as well as in the prevention, diagnosis, improvement, or treatment of physical and mental illness.”⁵¹ TM is based on TK and, in many developing

47. World Intell. Prop. Org., Intergovernmental Comm. on Intellectual Prop. & Genetic Res., Traditional Knowledge and Folklore, Recognition of Traditional Knowledge in the Patent System, U.N. Doc. WIPO/GRTKF/IC/13/7, annex at 5 (Sept. 18, 2008) [hereinafter WIPO, Recognition of Traditional Knowledge].

48. See generally Convention on Biological Diversity, June 5, 1992, 1760 U.N.T.S. 79.

49. *Id.* art. 8(j); SECRETARIAT OF THE CONVENTION ON BIOLOGICAL DIVERSITY, HANDBOOK OF THE CONVENTION OF BIOLOGICAL DIVERSITY INCLUDING ITS CARTAGENA PROTOCOL ON BIOSAFETY 8 (3d ed. 2005).

50. Convention on Biological Diversity, *supra* note 49, art. 8(j).

51. *Traditional, Complementary and Integrative Medicine*, WORLD HEALTH ORG., https://www.who.int/health-topics/traditional-complementary-and-integrative-medicine#tab=tab_1 (last visited Sept. 29, 2020) [<https://perma.cc/PE97-5KT5>] (archived Aug. 24, 2020).

countries, 80 percent of the population continues to rely on TM for primary health care.⁵²

Typically, TK can be divided into two categories: folklore and methods. Folklore consists of native craftsmanship, storytelling, tools, and ceremony.⁵³ Methods consist of ways of planting, the breeding of plant and animal species, traditional healing, medicine, and ways of coexisting with the land.⁵⁴ In order to understand the complexities and challenges presented by TK in the global IP scheme, it is helpful to view TK at the intersection of international law, Indigenous rights, and IP law.

Despite the absence of a consistent definition of TK, “Traditional knowledge’ at its broadest meaning covers a potentially large body of knowledge and practices, which have been handed down through generations.”⁵⁵ There are a number of sources for which to look for guidance, some of them less weighty than others. For example, WIPO’s IGC provides a forum for governments to discuss IP matters concerning the access to genetic resources, benefit sharing, the protection of TK, innovations and creativity, and expressions of folklore.⁵⁶ The CBD and its Nagoya Protocol on Access and Benefit Sharing (the Nagoya Protocol)⁵⁷ provide a normative framework for the discussion of these issues. Other sources include treaties, policies, and declarations from the Food and Agriculture Organization of the United Nations (FAO),⁵⁸ the United Nations Conference on Trade and Development (UNCTAD),⁵⁹ the United Nations Educational Scientific

52. *Traditional Knowledge, Innovation and Practices*, SECRETARIAT OF THE CONVENTION OF BIOLOGICAL DIVERSITY, <https://www.cbd.int/undb/media/factsheets/undb-factsheet-tk-en.pdf> (last visited Sept. 29, 2020) [<https://perma.cc/NPZ5-U4UC>] (archived Aug. 24, 2020).

53. Traditional Knowledge has also included methods to deal with natural disasters like flash floods. See Queenie S. Quilo, Mary Antoniette T. Mabini, Nincie Pale O. Tamiroy, Myrma Jean A. Mendoza, Sulpecia L. Ponce & Liwayway S. Vilorina, *Indigenous Knowledge and Practices: Approach to Understanding Disaster*, 63 PHILIPPINE SOC. REV. 105, 110–20 (2015).

54. JONATHAN CURCI, THE PROTECTION OF BIODIVERSITY AND TRADITIONAL KNOWLEDGE IN INTERNATIONAL LAW OF INTELLECTUAL PROPERTY 15, 59 (2010).

55. Long, *supra* note 44, at 318.

56. See *Traditional Knowledge and Intellectual Property: Background Brief*, WORLD INTEL. PROP. ORG., http://www.wipo.int/pressroom/en/briefs/tk_ip.html [<https://perma.cc/5VKU-2AWZ>] (archived Aug. 24, 2020).

57. See generally Conference of the Parties to the Convention on Biological Diversity, *Decision Adopted By the Conference of the Parties to the Convention on Biological Diversity at Its Tenth Meeting*, U.N. Doc. UNEP/CBD/COP/DEC/X/1, annex I (Oct. 29, 2010).

58. See FAO and Traditional Knowledge: *The Linkages with Sustainability, Food Security and Climate Change Impacts*, FOOD AND AGRIC. ORG. 3–9 (2009), <http://www.fao.org/3/i0841e/I0841E.pdf#:~:text=FAO%20is%20developing%20innovative%20projects%20that%20support%20the,and%20sustain%20able%20management%20of%20agro-ecosystems%2C%20among%20others> [<https://perma.cc/J72N-E9JP>] (archived Aug. 24, 2020).

59. See Graham Dutfield, *Protecting Traditional Knowledge and Folklore: A Review of Progress in Diplomacy and Policy Formulation*, INT’L CTR. FOR TRADE & SUSTAINABLE DEV., U.N. CONFERENCE ON TRADE & DEV. v–vi (2003), https://unctad.org/en/PublicationsLibrary/ictsd2003ipd1_en.pdf [<https://perma.cc/LV73-UE7C>] (archived Aug. 24, 2020).

and Cultural Organization (UNESCO),⁶⁰ and the aforementioned World Health Organization.

The recognition of TK and the need for its protection in international law can be viewed as the result of repeated efforts by Indigenous peoples to “articulate[] their demands in terms of self-determination.”⁶¹ National legal mechanisms to protect TK are often ineffective since Indigenous issues are transnational in nature;⁶² therefore, efforts within international law are necessary to adequately protect Traditional Knowledge.⁶³

International law sources support the protection of Traditional Knowledge. The Charter of United Nations played a crucial role by emphasizing the need to recognize human rights and specifically the right of self-determination of peoples.⁶⁴ Soon after, the General Assembly of the United Nations adopted and proclaimed the Universal Declaration of Human Rights (UDHR), which, while not legally binding, enshrined the principles of equality and nondiscrimination for all human beings.⁶⁵ Article 27 of the UDHR states in part:

(1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits. (2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.⁶⁶

In the meantime, the late decolonization process (e.g., India became independent in 1947,⁶⁷ French Sub-Saharan African Colonies

60. See *Local Knowledge, Global Goals*, U.N. EDUC., SCI. & CULTURAL ORG. 8–45 (2017), http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/SC/pdf/ILK_publication_E.pdf [https://perma.cc/8F55-4WD7] (archived Aug. 24, 2020).

61. S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 75 (2d ed. 2004).

62. *The Double Life of International Law: Indigenous Peoples and Extractive Industries*, 129 HARV. L. REV. 1755, 1758–59 (2016).

63. See Graham Dutfield, *TK Unlimited: The Emerging but Incoherent International Law of Traditional Knowledge Protection*, 20 J. WORLD INTELL. PROP. 144, 145–47 (2017).

64. U.N. Charter art. 1, ¶ 2.

65. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, arts. 1, 2 (Dec. 10, 1948).

66. *Id.* art. 27. To celebrate the 70th anniversary of the UDHR and to “highlight what the Universal Declaration means for people in their everyday lives,” the UN Human Rights launched an international public education campaign. See generally *Universal Declaration of Human Rights 70th Anniversary*, FORUM ON HUMAN RIGHTS (July 9, 2018), <https://forum.cartercenter.org/media/universal-declaration-human-rights-70th-anniversary> [https://perma.cc/J6GP-LLC2] (archived Sept. 15, 2020).

67. Barney Henderson, *Indian Independence Day: Everything You Need to Know About Partition Between India and Pakistan 70 Years on*, TELEGRAPH (Aug. 15, 2017), <https://www.telegraph.co.uk/news/2017/08/15/indian-independence-day-everything-need-know-partition-india/> [https://perma.cc/KLK9-QYXN] (archived Aug. 24, 2020).

in the 1960s⁶⁸) fixed the right of self-determination.⁶⁹ Both the International Covenant on Political and Civil Rights and the International Covenant on Economic Social and Cultural Rights have the same Article 1:

All 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.

All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.⁷⁰

In the end, this process of self-determination was reserved for the remaining colonies, trusts, and territories, and selected national liberation movements.⁷¹ Indigenous peoples did not benefit directly from decolonization and further exercises of self-determination. Their exercise of sovereignty could not override the principle of territorial integrity of the countries in which they were located; therefore, the decolonization process has not touched them.⁷²

The International Labour Organization (ILO), an agency created in the aftermath of the First World War, was “the first international organ to consider formal protection of Indigenous rights.”⁷³ It adopted the ILO Convention Number 169, the Convention concerning Indigenous and Tribal Peoples in Independent Countries, which provided for rights of Indigenous peoples and obligations of states to protect those rights.⁷⁴ This convention, however, “is not highly

68. Tony Chafer, *Decolonization in French West Africa*, OXFORD RESEARCH ENCYCLOPEDIA OF AFRICAN HISTORY (Oct. 2017), <http://africanhistory.oxfordre.com/view/10.1093/acrefore/9780190277734.001.0001/acrefore-9780190277734-e-166#> [<http://perma.cc/4SVD-V6KK>] (archived Sept. 5, 2020).

69. See generally James M. Cooper, *State of the Nation: Therapeutic Jurisprudence and the Evolution of the Right of Self-Determination in International Law*, 17 BEHAV. SCI. & L. 607 (1999).

70. G.A. Res. 2200A (XXI), International Covenant on Economic, Social and Cultural Rights, art. 1 (Dec. 16, 1966) (entered into force Jan. 3, 1976); G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights, art. 1 (Dec. 16, 1966) (entered into force Mar. 23, 1976).

71. See Cooper, *supra* note 69, at 629–31.

72. Peter-Tobias Stoll & Anja von Hahn, *Indigenous Peoples, Indigenous Knowledge and Indigenous Resources in International Law*, in INDIGENOUS HERITAGE AND INTELLECTUAL PROPERTY: GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE 7, 9, 15–16 (Silke Von Lewinski ed., 2d ed. 2008).

73. Julie Debeljak, *Indigenous Rights: Recent Developments in International Law*, 28 INT'L J. LEGAL INFO. 266, 267 (2000).

74. International Labor Organization [ILO], Convention Concerning Indigenous and Tribal Peoples in Independent Countries (No. 169), June 27, 1989, 1650 U.N.T.S. 383 (entered into force Sept. 5, 1991). This convention revised the Indigenous and Tribal Populations Convention that was adopted in 1957. ILO, Convention

regarded by many indigenous people”⁷⁵ mainly because “there was no consultation with indigenous peoples in the drafting of the document . . . and [it] fails to fully comprehend that indigenous peoples live in communities and that their rights have a collective character, rather than an individual character.”⁷⁶ The convention was entered into force on September 5, 1991, but only twenty-three states have ratified it.⁷⁷

In 1992, tribal leaders from the Inuit, the Onodaga, the Aymara, and the Maori, among others,⁷⁸ gathered at the United Nations Conference on Environment and Development (UNCED) in Rio de Janeiro, Brazil to push the sovereign states for more collective rights to reflect Indigenous interests.⁷⁹ The results were the Kari-Oca Declaration and the Indigenous Peoples’ Earth Charter—legally nonbinding documents that specifically acknowledged the need for “recognition and respect of traditional knowledge held by Indigenous healers” and the protection of traditional medicines against exploitation.⁸⁰ Furthermore, the declaration called for the protection of artistic and artisan creation against “plunder, plagiarism, undue exposure and use.”⁸¹

At an international legal level, the CBD exemplifies the demands of the Kari-Oca Declaration by stipulating that Parties to the convention shall “take into consideration indigenous and local communities’ customary laws, community protocols and procedures . . . with respect to traditional knowledge associated with genetic resources.”⁸² The Nagoya Protocol that was adopted in 2010 supplements the Convention on Biodiversity. The Nagoya Protocol went into force on October 12, 2014. There are currently 127

Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries (No. 107), June 26, 1957, 328 U.N.T.S. 247 (entered into force June 2, 1959). The 1957 treaty was “highly discredited because of its assimilationist and integrationist thrust and paternalistic attitudes.” Debeljak, *supra* note 73, at 267.

75. Debeljak, *supra* note 73, at 268.

76. *Id.*

77. *Ratifications of C169 – Indigenous and Tribal Peoples Convention, 1989* (169), INT’L LAB. ORG., https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312314 [<https://perma.cc/69VP-3TNG>] (archived Aug. 24, 2020).

78. *Introduction: Kari-Oca World Conference of Indigenous Peoples on Territory, Environment and Development*, DIALOGUE BETWEEN NATIONS, <https://www.dialoguebetweennations.com/IR/english/KariOcaKimberley/KOIntroduction.html> [<https://perma.cc/W9LU-RMGR>] (archived Aug. 24, 2020).

79. *See id.* The UNCED is also known as the Rio Declaration, Rio Conference, Rio Summit and Earth Summit.

80. World Conference of Indigenous Peoples on Territory, Environment and Development, Kari-Oca Declaration and Indigenous Peoples’ Earth Charter, art. 26, (May 25–30, 1992).

81. *Id.* art. 104.

82. Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilization to the Convention on Biological Diversity art. 12, Oct. 29, 2010, U.N. Doc. UNEP/CBD/COP/DEC/X/1 [hereinafter Nagoya Protocol].

ratifications and ninety-two signatures on the Protocol.⁸³ The Nagoya Protocol creates “greater legal certainty and transparency for both providers and users of genetic resources . . . by establishing more predictable conditions for access to genetic resources and helping to ensure benefit-sharing when genetic resources leave the contracting Party providing the genetic resources.”⁸⁴ The Nagoya Protocol provides incentives to conserve and sustainably use genetic resources, thereby enhancing biodiversity and human development.⁸⁵

Another source for unpacking the meaning of TK, albeit with the weight of soft law, is the United Nations Declaration on the Rights of Indigenous Peoples, which was adopted on September 13, 2007.⁸⁶ Several articles of this United Nations General Assembly resolution acknowledge the protection of TK, most notably Article 24, which states, “indigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals.”⁸⁷ In addition, Article 31 outlines,

[I]ndigenous 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.⁸⁸

As part of the aforementioned Earth Summit in 1992, the United Nations Conference on Environment and Development adopted Agenda 21.⁸⁹ Chapter 16 of Agenda 21 seeks to “foster internationally agreed principles to be applied to ensure the environmentally sound management of biotechnology, to engender public trust and confidence, to promote the development of sustainable applications of

83. *Parties to the Nagoya Protocol*, CONVENTION ON BIOLOGICAL DIVERSITY, <https://www.cbd.int/abs/nagoya-protocol/signatories/default.shtml> (last visited Sept. 29, 2019) [<https://perma.cc/3GW2-JRAH>] (archived Aug. 24, 2020).

84. *The Nagoya Protocol on Access to Genetic Resources and Benefit-Sharing*, CONVENTION ON BIOLOGICAL DIVERSITY, <https://www.cbd.int/undb/media/factsheets/undb-factsheet-nagoya-en.pdf> (last visited Sept. 29, 2019) [<https://perma.cc/C272-235M>] (archived Aug. 24, 2020).

85. *About the Nagoya Protocol*, CONVENTION ON BIOLOGICAL DIVERSITY, <https://www.cbd.int/abs/about/> (last visited Sept. 29, 2019) [<https://perma.cc/ZM83-3NNV>] (archived Aug. 24, 2020).

86. G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007). The Resolution was adopted with an overwhelming majority of 143 votes in favor with 11 abstentions. Australia, Canada, New Zealand, and the United States cast the four votes against the resolution. Press Release, General Assembly, General Assembly Adopts Declaration on Rights of Indigenous Peoples; ‘Major Step Forward’ Towards Human Rights for All, Says President, U.N. Press Release GA/10612 (Sept. 13, 2007).

87. G.A. Res. 61/295, *supra* note 86, art. 24.

88. *Id.* art. 31.

89. *See generally* U.N. Conference on Environment and Development, U.N. Doc. A/CONF.151/26 (Vol. I, II) (June 3–14, 1992).

biotechnology and to establish appropriate enabling mechanisms, especially within developing countries.”⁹⁰

The International Treaty on Plant Genetic Resources for Food and Agriculture⁹¹ was adopted by the Thirty-First Session of the Conference of the FAO on November 3, 2001.⁹² The Treaty was aimed at recognizing the enormous contribution of farmers to the diversity of crops that feed the world, establishing a global system to provide farmers, plant breeders, and scientists with access to plant genetic materials, and ensuring that recipients share benefits they derive from the use of these genetic materials with the countries where they have been originated.⁹³

The Declaration of Belem⁹⁴ consisted of “leading anthropologists, biologists, chemists, sociologists and representatives of indigenous populations.”⁹⁵ The declaration affirmed that “procedures must be developed to compensate native peoples for the utilization of their knowledge and their biological resources.”⁹⁶ Similarly, in 1994, the “indigenous peoples from South America gathered in Santa Cruz de la Sierra (Bolivia)” to voice their concerns “regarding the existing global intellectual property laws.”⁹⁷ Specifically, the Santa Cruz de la Sierra Statement on Intellectual Property addressed IP laws, which legitimize “the misappropriation of [indigenous] peoples’ knowledge and resources for commercial purposes.”⁹⁸ The authors of the Sierra Cruz de la Sierra Statement acknowledge the inefficiencies of Western IP property laws in protecting TK “because traditional knowledge is collective and intergenerational, so that nobody can sell or transfer ownership of resources which are the property of the people.”⁹⁹ As a result, the Statement “calls for alternative ways of protection which recognize indigenous peoples’ worldviews.”¹⁰⁰

Aside from various initiatives from some transnational and international organizations, some civil society groups, governments,

90. *Id.* ¶ 16.1.

91. The Treaty is also known as the International Seed Treaty. *See generally* Mike Muzurakis, *The International Seed Treaty at a Crossroad: Who Wants the Collapse?*, INT’L PLANNING COMM. FOR FOOD SOVEREIGNTY (Nov. 5, 2019), <https://www.foodsovereignty.org/mls-9contoewg/> [<https://perma.cc/S3GR-ABXR>] (archived Dec. 19, 2020).

92. *See International Treaty on Plant Genetic Resources for Food and Agriculture*, FOOD & AGRIC. ORG. OF THE UNITED NATIONS (Nov. 3, 2001), <http://www.fao.org/plant-treaty/overview/en/> [<https://perma.cc/WJ59-B9BY>] (archived Sept. 5, 2020) [hereinafter ITPGRFA].

93. *Id.*

94. INT’L CONG. OF ETHNOBIOLOGY, DECLARATION OF BELEM (July 1988), <https://web.archive.org/web/20111101174928/http://ethnobiology.net/docs/DeclaracionofBelem.pdf> [<https://perma.cc/VV7R-FBJN>] (archived Sept. 5, 2020).

95. *Id.*

96. *Id.*

97. TOBIAS KIENE, THE LEGAL PROTECTION OF TRADITIONAL KNOWLEDGE IN THE PHARMACEUTICAL FIELD 163 (2011).

98. *Id.* *See also* *Santa Cruz de La Sierra Statement on Intellectual Property*, 6 AUSTR. INDIGENOUS L. REP. 107, 107 (2001), [hereinafter *Santa Cruz Statement*].

99. KIENE, *supra* note 97; *see also* *Santa Cruz Statement*, *supra* note 98, art. 7.

100. KIENE, *supra* note 97; *see also* *Santa Cruz Statement*, *supra* note 98, art. 15

and individuals also made efforts to promote access to knowledge.¹⁰¹ “The A2K (Access to Knowledge) movement takes concerns with copyright law and other regulations that affect knowledge and places them within an understandable social need and policy platform: access to knowledge goods.”¹⁰²

The draft A2-K treaty seeks generally to expand public access to creative and innovative works, and to strike a balance between traditional IP rights under copyright and patent (among others) and the enhanced informational demands of the Digital Age.¹⁰³ By facilitating copyright law into a more accessible form for the developing world, the draft treaty aims to lower the costs of technology transfer and ensures that Indigenous peoples and other marginalized groups can participate in the global economy in a more equitable fashion.¹⁰⁴

In addition, the United Nations Permanent Forum on Indigenous Issues (UNPFII) held its eighteenth Session from April 22 to May 3, 2019, with the theme of TK: generation, transmission, and protection.¹⁰⁵ This transnational group of Tribes (without any legal authority) highlighted the increased global awareness of Indigenous peoples, and positive environmental impact by helping countries to meet international (but not legally enforceable) targets.

These current international law sources are not effective enough to protect TK at the transnational level as they are not legally binding on all Member States of the United Nations, nor are they dispositive of customary international law.¹⁰⁶ That leaves the world with a patchwork of approaches in Member States’ domestic laws. For those countries with more robust IP laws, there are opportunities to utilize their current laws to protect TK in national legal systems. It is to those efforts in Taiwan that Part III now turns.

101. Becky Hogge & Vera Franz, *The Rise of the Access to Knowledge Movement: An Interview with Vera Franz*, OPEN SOCIETY FOUNDATIONS (Feb. 1, 2011), <https://www.opensocietyfoundations.org/voices/rise-access-knowledge-movement-interview-vera-franz> [<https://perma.cc/AK22-TGP7>] (archived Sept. 5, 2020).

102. *Overview*, ACCESS TO KNOWLEDGE (A2K), <http://www.cptech.org/a2k/> (last visited Sept. 29, 2019), [<https://perma.cc/88W4-TG72>] (archived Sept. 5, 2020).

103. Long, *supra* note 44, at 319.

104. See TREATY ON ACCESS TO KNOWLEDGE, DRAFT (May 9, 2005), https://zoo.cs.yale.edu/classes/cs457/backup/A2K_Treaty_consolidatedtext_may9.pdf (last visited Sept. 6, 2020) [<https://perma.cc/EWJ8-TP4B>] (archived Sept. 6, 2020); Amy Kapczynski, *The Access to Knowledge Mobilization and the New Politics of Intellectual Property*, 117 YALE L.J. 804, 833–34 (2008). The A2K movement “helped to bring down the prices of AIDS medicines in developing countries by more than ninety-five percent.” *Id.* at 807.

105. U.N. Permanent Forum for Indigenous Issues, Report of the Eighteenth Session, 5, UN Doc. E/2019/43 (2019). The author was a presenter on Traditional Knowledge at the 16th Session of the UNPFII in April 2017, sponsored by the Mission of the Republic of Chile to the United Nations.

106. See OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 36 (1991).

III. CAN TRADITIONAL KNOWLEDGE BE PROTECTED THROUGH CURRENT INTELLECTUAL PROPERTY LAWS AT THE NATIONAL LEVEL?

Like some of the other Asian “tiger” countries¹⁰⁷—with their focus on export-led growth and move towards the knowledge-based economies¹⁰⁸—Taiwan had to play catch up to update its IP laws. The IP laws were also part of the geopolitics of the Chinese Civil War and, later, the conflict with the People’s Republic of China.¹⁰⁹

Taiwan’s IP laws were first promulgated during the period before 1949 when the Republic of China governed both Taiwan and the mainland of China, and these laws were brought in when the Republic of China moved its government to Taiwan in 1949.¹¹⁰ They are best described as minimalist and did little to protect rights holders’ interests.

In order to better ensure their trading relations with the United States, Taiwan was forced to amend its IP laws in the mid-1980s. Once a haven for pirates and counterfeit manufacturing,¹¹¹ Taiwan was diplomatically encouraged to promulgate new trademark and copyright laws in 1985 and new patent law in 1986. As Taiwan moved to high-technology industries—semiconductor chips and pharmaceutical and biotechnology production—it again had to change its laws to appease the United States. Taiwan was not the only trading partner incentivized or otherwise guided into adopting the United States’ approach to IP rights. Other developing countries through the decades have likewise been cajoled, influenced, or had imposed upon them the northern industrialized countries bent on IP protection. This is a source of income for Western companies and their governments’ tax revenues. And the developing world is ripe for such profit-generating industries.

By virtue of geography, the developing world has an abundance of natural resources including plant life. “By some accounts well over 70 [percent] of global biological or genetic resources are located in

107. There are four Asian tiger economies – Taiwan, South Korea, Singapore and Hong Kong. *THE FOUR ASIAN TIGERS: ECONOMIC DEVELOPMENT AND THE GLOBAL POLITICAL ECONOMY* xiii (Eun Mee Kim ed., 1998).

108. Between 1970 and 1980 the newly industrialized East Asian countries such as Singapore and South Korea were able to reduce the technological gap through national policy; specifically, “by selectively supporting technological development in some key sectors of their economies.” Kumar Swapan Patra & Mammo Muchie, *What Can South Africa Learn From High Technology Patents in India*, in *BEYOND IMAGINATION: THE ETHICS AND APPLICATIONS OF NANOTECHNOLOGY AND BIO-ECONOMICS IN SOUTH AFRICA* 152, 153 (Zamanzima Mazibuko ed., 2018). Oftentimes, this was achieved through more robust Intellectual Property regulations being adopted.

109. The President of the Republic of China, Chiang Kai Shek, made security and defense arrangements as an ally of the United States and other anti-Communist countries in its battle against the mainland Communists (the People’s Republic of China). See *Chiang Kai-shek’s Secret Military Advisors Unveiled*, HOOVER INSTIT. (May 13, 2013), <https://www.hoover.org/news/chiang-kai-sheks-secret-military-advisers-unveiled> [<https://perma.cc/D6AL-5J8Y>] (archived Sept. 5, 2020).

110. ALAN S. GUTTERMAN & BENTLEY J. ANDERSON, *INTELLECTUAL PROPERTY IN GLOBAL MARKETS: A GUIDE FOR FOREIGN LAWYERS AND MANAGERS* 282–83 (1997).

111. *Id.* at 283.

indigenous and local communities across the globe.”¹¹² The incorporation of ancient medicines into the modern urban context has helped keep some of the world’s largest indigenous groups connected to their respective culture. It is also a potential windfall in terms of economic growth. There have been many examples of commercialization of products and art forms that derive from Indigenous cultures and communities.¹¹³ A Duke University project catalogues the use and misuse of indigenous knowledge.¹¹⁴

Much of the misuse of TK is related to biopiracy or bio-poaching.¹¹⁵ For Graham Dutfield:

“Biopiracy” has emerged as a term to describe the ways that individuals and corporations from the developed world free ride on the genetic resources and traditional knowledge and technologies of the developing countries. . . . It is by no means clear how much biopiracy actually goes on. Apart from lack of information, the answer depends on how one differentiates between legitimate and unfair exploitation The problem with the “biopiracy” rhetoric . . . is that if you cannot agree on what it is, you cannot measure it. Neither can you agree on what should be done about it In short, how you define biopiracy goes a long way towards determining what you should do about it.¹¹⁶

The term “biopiracy” is not a modern phenomenon but one that has existed “under colonialism, capitalism and, more recently, globalization.”¹¹⁷ Biopiracy can be defined as “the unauthorized use of biological resources and/or associated traditional knowledge, or the patenting of spurious inventions based on such knowledge, without

112. Oguamanam, *Genetic Resources*, *supra* note 10, at 89.

113. See *Bio-piracy of Traditional Knowledge*, TRADITIONAL KNOWLEDGE DIGIT. LIBR., <http://www.tkdlib.res.in/tkdlib/langdefault/common/BioPiracy.asp?GL=Eng#Intro> (last visited Sept. 5, 2020) [<https://perma.cc/B978-DPM9>] (archived Sept. 5, 2020); see also MARGO A. BAGLEY, TOWARD AN EFFECTIVE INDIGENOUS KNOWLEDGE PROTECTION REGIME CASE STUDY OF SOUTH AFRICA: CTR. FOR INT’L GOVERNANCE INNOVATION PAPERS NO. 207 (Dec. 2018), https://media.africaportal.org/documents/Paper_no.207web.pdf [<https://perma.cc/B978-DPM9>] (archived Sept. 5, 2020).

114. See *Indigenous/Traditional Knowledge & Intellectual Property*, CTR. FOR THE STUDY OF THE PUB. DOMAIN, <http://web.law.duke.edu/cspd/itkpaper3> (last visited Sept. 5, 2020) [<https://perma.cc/B2AS-DMMT>] (archived Sept. 5, 2020).

115.

[I]ndigenous peoples are developing techniques to isolate essential oils or other ingredients from plants in order to use them for medicinal purposes and healing, as well as applying them in many other areas, such as agriculture and fishery. Such knowledge is often appropriated and exploited by industries that have recognized the potential for the development of new products or services, which may then be exploited on a larger scale. The industries have an interest in benefiting therefrom - encouraged by the increasing presence in western civilizations of recourse to knowledge of ancient cultures, such as acupuncture and ayurveda.

von Lewinski, *supra* note 45, at 748.

116. Graham Dutfield, *Protecting Traditional Knowledge: Pathways to the Future*, INT’L CTR. FOR TRADE AND SUSTAINABLE DEVELOPMENT 6, 7 (June 2006), https://www.researchgate.net/publication/253434625_Protecting_Traditional_Knowledge_Pathways_to_the_Future (last visited Sept. 5, 2020) [<https://perma.cc/L6C2-QNVZ>] (archived Sept. 5, 2020).

117. IKECHI MGBEOJI, GLOBAL BIOPIRACY: PATENTS, PLANTS AND INDIGENOUS KNOWLEDGE xi (2006).

compensation.”¹¹⁸ Furthermore, biopiracy is exploitative in nature and “also refers to the asymmetrical and unrequited movement of plants and [traditional knowledge use of plants] from the South to the North through the process of international institutions and the patent system.”¹¹⁹

An example of biopoaching concerns Kava, a plant native to the South Pacific islands, and a member of the pepper family, which has been used in traditional Samoan ceremonies for centuries.¹²⁰ Although the country of Samoa is slowly increasing its attempt to protect TK, a simple search shows twenty-three patents for the use of the Kava plant, none which belong to Samoa.¹²¹ Billions of dollars are being earned by various supplement and body care companies using TK patents, without any compensation being paid to the Samoan people.¹²²

The case of the Maca plant represents another example of the exploitative nature of biopiracy in the Andean region, particularly in Peru. In July 2001, and during the “Viagra craze” in the United States, two US companies were granted patents to extracts of the Maca plant, which had “long been used by indigenous peoples to promote sexual function and fertility.”¹²³ The patents are held by Biotechs Research Corporation from Rosenberg, Texas and Pure World Botanicals, Inc. from South Hackensack, New Jersey.¹²⁴

These examples illustrate that the use of the patent system disregards “the intellectual contributions of holders and practitioners of traditional knowledge.”¹²⁵ The expansion of modern biopiracy through the use of the patent system is also attributed to the implementation of the Agreement on Trade-Related Aspect of Intellectual Property Rights (TRIPs).¹²⁶ The TRIPs Agreement was

118. *Id.* at 13.

119. *Id.*

120. *Samoa Culture and Kava*, KAVA (Dec. 9, 2008), <https://kava.com/samoa-culture-and-kava/> [<https://perma.cc/VDW9-5KSR>] (archived Sept. 5, 2020). See also Elizabeth T. Jayne, *King's Kava Ceremony American Samoa Island of Tau Manua Group*, DIGIT. HIST. PROJECT (Oct. 22, 2011), <http://www.digitalhistoryproject.com/2011/10/kings-kava-ceremony-american-samoa.html> [<https://perma.cc/M6K5-CJHJ>] (archived Sept. 5, 2020).

121. See Fei Ji, *Pass the Kava: Implications For Patent Protections Over Traditional Knowledge in Samoa's New Intellectual Property Act of 2011*, 36 HOUS. J. INT'L L. 789, 820 (2014).

122. See *id.*

123. E. Jane Gindin, *Geographical Indications and International Trade (GIANT)*, MANDALA PROJECTS (Dec. 2002), <http://mandalaprojects.com/giant-project/maca.htm> [<https://perma.cc/4PUY-JLGY>] (archived Sept. 5, 2020).

124. See *id.*; see also U.S. Patent No. 6,093,421 (filed Aug. 31, 1999); U.S. Patent No. 6,267,995 B1 (filed Mar. 3, 1999).

125. MGBEOJI, *supra* note 117, at 13.

126. *Id.*

While the trade agreements under the WTO function to eliminate the trade barriers and produce the adequate circumstances for international free trade, the TRIPs agreement is engaged in harmonizing national intellectual property laws to secure the necessary reward to stimulate the incentive for intellectual property owners in the global community.

signed on April 15, 1994 during the Uruguay Round of Trade Negotiations,¹²⁷ one of the seventeen plurilateral agreements concluded as the General Agreement on Tariffs and Trade transitioned to the World Trade Organization. While the TRIPs Agreement did harmonize many IP rules at a global level, it failed to recognize the role of Indigenous knowledge in innovation and did not take steps to protect it. It has been heavily criticized due to its incompatibility with “the traditions of many agricultural and indigenous communities, where knowledge of the nutritional and medicinal uses of plants and the results of plant breeding are shared as a community resource.”¹²⁸ Moreover, the TRIPs Agreement historically was “a means in part for developed countries to protect their intellectual property rights against piracy by developing countries.”¹²⁹

Despite the criticisms, the TRIPs Agreement was also seen as advantageous because it creates uniformity of IP standards and regulations among its Members, such as by creating obligatory twenty year patent grants on pharmaceutical products.¹³⁰ The TRIPs Agreement led to the patentability of knowledge, which became “the source of profits in modern global markets.”¹³¹

The third paragraph of the Bellagio Declaration, from the 1993 Rockefeller Conference on “Cultural Agency/Cultural Authority: Politics and Poetics of Intellectual Property in the Post-Colonial Era,” states: “Increasingly, traditional knowledge, folklore, genetic material, and native medical knowledge flow out of their countries of origin unprotected by IP, while works from developed countries flow in, well protected by international IP agreements, backed by the threat of trade sanctions.”¹³²

James Boyle has explained: “Shamans from the Amazon basin have generations of lore about the properties of herbs and flowers. Some of these plans are placebos; others are extremely valuable. Drug companies have found that if they test the plans from the

Chung-Lun Shen, *Intellectual Property Rights and International Free Trade: New Jurisprudence of International Exhaustion Doctrine Under the Traditional Legal System*, 7 J. INT'L COM. L. & TECH. 176, 207 (2012).

127. Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299.

128. Mark Ritchie, Kristin Dawkins & Mark Vallianatos, *Intellectual Property Rights and Biodiversity: The Industrialization of Natural Resources and Traditional Knowledge*, 11 ST. JOHN'S J. LEGAL COMMENT. 431, 432 (1996).

129. Shubha Ghosh, *Globalization, Patents, and Traditional Knowledge*, 17 COLUM. J. ASIAN L. 73, 82 (2003).

130. PETER DRAHOS & JOHN BRAITHWAITE, INFORMATION FEUDALISM: WHO OWNS THE KNOWLEDGE ECONOMY? 10 (2002).

131. *Id.* at 39.

132. 1993 Rockefeller Conference, Statement of the Bellagio Conference, *The Bellagio Declaration: "Cultural Agency/Cultural Authority: Politics and Poetics of Intellectual Property in the Post-Colonial Era"* (March 11, 1993), <https://case.edu/affil/sce/BellagioDec.html> [<https://perma.cc/287T-ZZR5>] (archived Nov. 3, 2020).

shamans' 'black bag,' they yield a high percentage of valuable drugs."¹³³

Patents are by no means the only way to protect Traditional Knowledge.¹³⁴ The legislative purpose of patent law is mainly to provide inventors with a limited monopoly and sufficient incentives to engage in creating or inventing new technologies benefiting people around the country.¹³⁵ But TK may not fit into this Western-based framework.

Likewise, copyright protection for TK has a number of challenges: "In general, the main obstacles to copyright protection of folklore are grounded in the fact that copyright protection is based on an individualistic concept as opposed to a collective one."¹³⁶ Some attention has been paid to the tension between these two diametrically opposed concepts in ownership.¹³⁷

Forcing the prevailing Western IP rights upon developing countries without respecting the rights in TK may have counterproductive results.¹³⁸ Silke von Lewinski has explained:

Another obstacle to the application of copyright is often considered to be the lack of originality of folklore. Starting from the hypothesis that existing folklore, even if it had been protected at some point, has fallen into the public domain, the question of originality can then refer only to the continuous small changes which folklore, as living heritage, is submitted throughout time. Most likely, such small and communal changes would not be recognized as fulfilling the requirements of protectability in countries adhering to the *droit d'auteur* system.¹³⁹

Sui generis protection systems or remedies outside of traditional IP rights, such as contract law and the law of misappropriation, may be more effective means of protecting TK.¹⁴⁰ Efforts should be focused on preventing misappropriation and misuse, enforcing prior informed consent and benefit-sharing mechanisms, and permitting TK holders to enjoy the benefits of exclusive patent rights.

Article 8(j) of the CBD provides that each Contracting Party shall:

Subject to 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

133. JAMES BOYLE, SHAMAN, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY 128, 135 (1997).

134. See generally Ghosh, *supra* note 129.

135. See Shen, *supra* note 126, at 177.

136. von Lewinski, *supra* note 45, at 757.

137. See Paul Kuruk, *Protecting Folklore Under Modern Intellectual Property Regimes: A Reappraisal of the Tensions Between Individual and Communal Rights in Africa and the United States*, 48 AM. U. L. REV. 769, 796 (1999).

138. See Srividhya Ragavan, *Protection of Traditional Knowledge*, 2 MINN. INTELL. PROP. REV. 1, 3 (2001).

139. von Lewinski, *supra* note 45, at 758–59.

140. David R. Downes, *How Intellectual Property Could Be a Tool to Protect Traditional Knowledge*, 25 COLUM. J. ENV'T L. 253, 256 (2000).

encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.¹⁴¹

The Nagoya Protocol to the CBD contributes to the effective implementation of the fair and equitable sharing of benefits arising out of the utilization of genetic resources. The Nagoya Protocol is critical in building the global framework for sustainable development. The Protocol provides a clear structure to ensure that access to genetic resources and/or associated TK is granted on the basis of prior informed consent and that any benefits derived from the use of these resources or knowledge is shared fairly and equitably with the provider country and its Indigenous peoples and local communities, as appropriate. “Environmental groups and groups devoted to the preservation of indigenous peoples have criticized the way that tribal lore and biological largesse find no place in the language of intellectual property.”¹⁴²

Global IP laws are inherently stacked against the interests of Indigenous Peoples. Indigenous rights are expressed in a collective way. IP rights in the international legal regime are based on Western, northern-industrialized ideas of property law which are inherently individualistic.¹⁴³ This has long been the case.

The 1883 Paris Convention for the Protection of Industrial Property and the 1886 Berne Convention for the Protection of Literary and Artistic Works, including their respective revisions and related agreements, have for the past one hundred years established the international protection of innovation and creativity with their clearly defined sets of rules and standards.¹⁴⁴ Those rules and standards have been adopted and reinforced by the TRIPs Agreement.¹⁴⁵ However, they have been increasingly perceived as being unresponsive to the growing demand, especially in the developing world.¹⁴⁶

An extremely common criticism is that the current intellectual and patent law system does little to protect the rights of Indigenous Peoples.¹⁴⁷ Cultures rich in TK do not transmit IP rights in the same

141. Convention on Biological Diversity, *supra* note 48, art. 8(j).

142. Boyle, *supra* 133, at 129.

143. Jens Schovsbo, *The Necessity to Collectivize Copyright—and Dangers Thereof*, in *INDIVIDUALISM AND COLLECTIVENESS IN INTELLECTUAL PROPERTY LAW* 166, 167–68 (Jan Rosén ed., 2012).

144. See Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, as last revised at the Stockholm Revision Conference, July 14, 1967, 21 U.S.T. 1583, 828 U.N.T.S. 305; Berne Convention for the Protection of Literary and Artistic Works, September 9, 1886, as revised at Paris on July 24, 1971 and amended in 1979, S. TREATY DOC. NO. 99-27 (1986).

145. See Kapczynski, *supra* note 104, at 825.

146. See Weerawit Weeraworawit, *International Legal Protection for Genetic Resources, Traditional Knowledge and Folklore: Challenges for the Intellectual Property System*, in *TRADING IN KNOWLEDGE: DEVELOPMENT PERSPECTIVES ON TRIPS, TRADE AND SUSTAINABILITY* 157, 157 (Christophe Bellmann, Graham Dutfield & Ricardo Meléndez-Ortiz eds., 2003).

147. See, e.g., *Traditional Knowledge and Intellectual Property – Background Brief*, World Intellectual Property Organization, https://www.wipo.int/pressroom/en/briefs/tk_ip.html (last visited Nov. 3, 2020) [<https://perma.cc/9ERN-NGFX>] (archived

manner as developed countries. Individuality and concepts of “rights” to anything are secondary to the value of culture, tradition, and the community.¹⁴⁸ The TK of Indigenous peoples cannot be protected by traditional IP law, but rather it requires the expansion of IP law and involvement from proactive governments within international law.¹⁴⁹

International organizations have mostly been ineffective at protecting Traditional Knowledge.¹⁵⁰ However, not all hope is lost. Looking for success in other areas of international law involving Indigenous peoples and applying the same strategy to TK is likely the solution.¹⁵¹ A success in an international forum can be instructive. In 2015, the Indigenous peoples of Suriname prevailed using Secretariat of the CBD guidelines in the case of *Kaliña and Lokono Peoples v. Suriname*.¹⁵² Suriname, on the northeastern coast of South America, borders Guyana, French Guiana, and Brazil. Although a small country, it is one of the most culturally diverse in South America in terms of different ethnic groups.¹⁵³ The Inter-American Court of Human Rights held that the state of Suriname had violated the rights of the Indigenous Kaliña and Lokono Peoples “by denying recognition of their juridical personality and their entitlement to collective property and judicial protection.”¹⁵⁴ This was an extremely important victory for the Indigenous peoples of Suriname because

by asserting that under the American Convention on Human Rights, indigenous peoples are entitled, as collective entities, to recognition of their legal personality. In so doing, the Court challenged ordinary assumptions about the individualized character of most adjudication regarding international human rights and made the possibility of enforcing collective rights more palpable.¹⁵⁵

Using the Practical Principles from the CBD Guidelines, within the Addis Ababa Principles and Guidelines, the court highlighted that

Nov. 3, 2020) (“Traditional knowledge is not so-called because of its antiquity. It is a living body of knowledge that is developed, sustained and passed on from generation to generation within a community, often forming part of its cultural or spiritual identity. As such, it is not easily protected by the current intellectual property system, which typically grants protection for a limited period to inventions and original works by named individuals or companies. Its living nature also means that “traditional” knowledge is not easy to define.”).

148. See Downes, *supra* note 140, at 258.

149. See Julie Yassine, *IP Rights and Indigenous Rights: Between Commercialization and Humanization of Traditional Knowledge*, 20 SAN DIEGO INT’L L.J. 71, 86 (2018).

150. “Traditional knowledge as such - knowledge that has ancient roots and is often oral - is not protected by conventional intellectual property (IP) systems.” *Traditional Knowledge*, WIPO (2020), <https://www.wipo.int/tk/en/tk> (last visited Sept. 13, 2020) [<https://perma.cc/SKM9-FBHB>] (archived Sept. 13, 2020).

151. See Yassine, *supra* note 149, at 92.

152. See *Kaliña and Lokono Peoples v. Suriname*, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 309 (Nov. 25, 2015).

153. Henk E. Chin, *Suriname*, BRITANNICA (Nov. 8, 2019), <https://www.britannica.com/place/Suriname> [<https://perma.cc/XB86-YWFX>] (archived Sept. 5, 2020).

154. Lucas Lixinski, *Case of the Kaliña and Lokono Peoples v. Suriname*, 111 AM. J. INT’L L. 147, 147 (2017).

155. *Id.* at 147–48.

Indigenous peoples were entitled to their land due to the sustainable use of biodiversity and the environment.¹⁵⁶ Using international environmental law, the Court was able to give collective property and judicial protection to Indigenous Peoples.¹⁵⁷ Additionally, the Indigenous peoples were able to prove their value to the state and prove the benefit of their practices on the environment.¹⁵⁸ If applied to TK, this creative use of international law regarding the environment and human rights could provide a large group of people collective rights over TK. Eliminating the issue of sole ownership provides a strong argument for the rights the Indigenous peoples to land.¹⁵⁹

IV. THE NEED FOR AN INTERNATIONAL TREATY AND TAIWAN'S NEED FOR RECOGNITION

Rather than having a piecemeal approach to regulating the use of TK, the international community needs to create a meaningful international protection system for TK so it can fully respect the needs of TK holders. As Silke von Lewinski has written: "The protection of folklore has already been an object of intensive discussion and projects at the international level, in particular, in the 1970s and 1980s, without lasting success."¹⁶⁰

There is an economic value to this as well. This is clearly a growth market globally. According to the WHO, T&CM¹⁶¹ is widely used around the world and valued for a number of reasons. At the International Conference on Traditional Medicine for South-East Asian Countries in February 2013, the WHO Director-General, Dr. Margaret Chan, stated that:

[T]raditional medicines, of proven quality, safety, and efficacy, contribute to the goal of ensuring that all people have access to care. For many millions of people, herbal medicines, traditional treatments, and traditional practitioners are the main source of health care, and sometimes the only source of care. This is care that is close to homes, accessible and affordable. It is also culturally acceptable and trusted by large numbers of people. The affordability of most traditional medicines makes them all the more attractive at a time of soaring health-care costs and nearly universal austerity. Traditional medicine also stands out as a way of coping with the relentless rise of chronic non-communicable diseases.¹⁶²

156. See SECRETARIAT OF THE CONVENTION ON BIOLOGICAL DIVERSITY, ADDIS ABABA PRINCIPLES AND GUIDELINES FOR THE SUSTAINABLE USE OF BIODIVERSITY (2004), <https://www.cbd.int/doc/publications/addis-gdl-en.pdf> (last visited Aug. 30, 2020) [<https://perma.cc/G2DH-GJ3R>] (archived Sept. 6, 2020).

157. See Fergus MacKay, *The Case of the Kaliña and Lokono Peoples v. Suriname and the UN Declaration on the Rights of Indigenous Peoples: Convergence, Divergence and Mutual Reinforcement*, 11 EURASMUS L.R. 31, 37 (2018).

158. See *id.* at 36.

159. See Yassine, *supra* note 149, at 80–81.

160. von Lewinski, *supra* note 45, at 747–48.

161. See WORLD HEALTH ORG., WHO TRADITIONAL MEDICINE STRATEGY 2014-2023 7 (2013), https://www.who.int/medicines/publications/traditional/trm_strategy14_23/en/ (last visited Aug. 30, 2020) [<https://perma.cc/95P7-JMU3>] (archived Sept. 5, 2020). T&CM refers to traditional and complementary medicine.

162. *Id.* at 16.

Regardless of reasons for seeking out T&CM, there is little doubt that interest has grown, and will almost certainly continue to grow, around the world.¹⁶³

In 2015, after a delay of close to two years, the WIPO General Assembly finally acted on renewing the mandate of WIPO's IGC and resumed negotiations on an international instrument for the protection of Traditional Knowledge. At the Thirty-First Session of the IGC in Geneva in September of 2016, the Secretariat at the WIPO put forth a new set of draft articles for the Protection of Traditional Knowledge.¹⁶⁴ A revised draft of The Protection of Traditional Knowledge, released March 22, 2019, is the current foundation for a future treaty.¹⁶⁵ The Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore of WIPO was scheduled to meet in March 2020 but was postponed due to COVID-19 and remains delayed.

Taiwan should influence policy and use the opportunity to extend its diplomatic activities. While not a member of the WIPO or the WHO,¹⁶⁶ Taiwan could still work within the multilateral system to affect leadership and act as a change agent to promote Indigenous rights. It is an island that understands compromise and legal nuance. In the WTO, Taiwan is a member, known as "Chinese Taipei" or "Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu."¹⁶⁷ The island can use its economic weight, success in biotechnology and other high technology industries, and commitment to Indigenous rights to gain friends and fans in the WTO and throughout the biotechnology and Genetic Resources rights space. In the meantime, "Taiwan should dedicate itself to applying for the membership of World Intellectual Property Organization (WIPO),

163. *See id.*

164. WIPO, INTERGOVERNMENTAL COMM. ON INTELLECTUAL PROP. AND GENETIC RES., TRADITIONAL KNOWLEDGE AND FOLKLORE, THE PROTECTION OF TRADITIONAL KNOWLEDGE: DRAFT ARTICLES 1 (May 13, 2016), http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_31/wipo_grtkf_ic_31_4.pdf (last visited Sept. 5, 2020) [<https://perma.cc/S7XZ-KHPN>] (archived Sept. 5, 2020).

165. WIPO, INTERGOVERNMENTAL COMM. ON INTELLECTUAL PROP. AND GENETIC RES., TRADITIONAL KNOWLEDGE AND FOLKLORE, THE PROTECTION OF TRADITIONAL KNOWLEDGE: DRAFT ARTICLES REV. 2, 4 (Mar. 22, 2019), https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_39/wipo_grtkf_ic_39_facilitators_text_tk_rev_2.pdf (last visited Sept. 5, 2020) [<https://perma.cc/G976-TXES>] (archived Sept. 5, 2020).

166. For an examination of the mechanism by which Taiwan could join an international agency, see Chun Hung Lin, *The International Telecommunications Union and the Republic of China (Taiwan): Prospect of Taiwan's Participation*, 10 ANN. SURV. INT'L & COMP. L. 133, 156–60 (2004). For a critique of the ways in which international environmental law suffers due to the inability of Taiwan to participate in international fora, see Daniel C.K. Chow, *Recognizing the Environmental Costs of the Recognition Problem: The Advantages of Taiwan's Direct Participation in International Environmental Law Treaties*, 14 STAN. ENVTL. L.J. 256, 275–76 (1995).

167. *Chinese Taipei*, WTO, https://www.wto.org/english/thewto_e/acc_e/a1_taipei_chinois_e.htm (last visited Sept. 6, 2020) [<https://perma.cc/X5CF-DKWL>] (archived Sept. 6, 2020) ("Chinese Taipei became the 144th WTO Member on Jan. 1, 2002.").

Convention on Biological Diversity and International Union for the Protection of New Varieties of Plants (UPOV), so as to get involved in the international schemes on traditional medicine.”¹⁶⁸

The leadership of Taiwan could help spark interest in many of the 14 countries which recognize it. In the Pacific, island states like Nauru, Palau, and Tuvalu all have a stake in these discussions. In Paraguay, the Guaraní make up a sizeable percentage of the landlocked country’s population.¹⁶⁹ In the Caribbean, Haiti has more traditional healing methods that could be recognized and commercialized (Saint Kitts and Nevis, Saint Lucia, and Saint Vincent and the Grenadines less so). In Africa, Swaziland has tribal methods of medicine. In Central America, Belize, Guatemala, Honduras, and Nicaragua all have Indigenous peoples who stand to benefit from such activities. A trade deal with New Zealand, signed in July 2013,¹⁷⁰ is also an opportunity to leverage given New Zealand’s attempts to make good on its relations with its own Indigenous Peoples—the Maori.

The United States Congress passed into law the Taiwan Allies International Protection and Enforcement Initiative (Taipei) Act of 2019¹⁷¹ on March 26, 2020 to express United States’ support for the diplomatic alliances that Taiwan enjoys around the world.¹⁷² Although the United States does not officially recognize Taiwan, it is pressing Taiwan’s allies not to abandon the island nation.¹⁷³ This Act requires the Department of State to report annually to Congress on steps it has taken to help strengthen Taiwan’s diplomatic relationships and partnerships around the world.¹⁷⁴ Likely this was a retaliation for interference in Taiwan’s diplomatic relations by mainland China, although rather moot in the current political climate with COVID-19.

The coronavirus pandemic of 2020 is clearly an opportunity for Taiwan to improve its international standing. With only 500 confirmed cases and seven virus-related deaths, it is the model of

168. See Guo, Pan, Chen, Wang & Wang, *supra* note 3, at 953.

169. See *The World Factbook: South America: Paraguay*, CENT. INTELLIGENCE AGENCY (Aug. 4, 2020), <https://www.cia.gov/library/publications/the-world-factbook/geos/pa.html> [<https://perma.cc/DB8S-EYH8>] (archived Sept. 6, 2020).

170. See AGREEMENT BETWEEN NEW ZEALAND AND THE SEPARATE CUSTOMS TERRITORY OF TAIWAN, PENGHU, KINMEN AND MATSU ON ECONOMIC COOPERATION (July 10, 2013); see also Lucy Craymer & Fanny Liu, *Taiwan and New Zealand Sign Free-Trade Agreement*, WALL ST. J. (July 10, 2013), <https://www.wsj.com/articles/SB10001424127887324425204578597022344060966> [<https://perma.cc/6XZE-JC4T>] (archived Sept. 6, 2020).

171. Taiwan Allies International Protection and Enforcement Initiative (TAIPEI) Act of 2019, Pub. L. No. 116-135, § 2, 134 Stat. 278 (2020).

172. See *id.*

173. See Ben Blanchard & Yew Lun Tian, *U.S. Increases Support for Taiwan, China Threatens to Strike Back*, REUTERS (Mar. 26, 2020), <https://www.reuters.com/article/us-taiwan-usa-idUSKBN21E0B7> [<https://perma.cc/ZD8M-W7FT>] (archived Sept. 6, 2020).

174. Stanley Kao, *From Taiwan Relations Act to TAIPEI Act: A Robust Global Partnership Amid Crisis*, HILL (Apr. 15, 2020), <https://thehill.com/blogs/congress-blog/foreign-policy/492867-from-taiwan-relations-act-to-taipei-act-a-robust-global> [<https://perma.cc/S6BF-BMA7>] (archived Sept. 6, 2020).

successful national responses.¹⁷⁵ Taiwan has won praise around the world for its success in stemming the spread of the coronavirus, unlike neighboring China, ground zero of the pandemic.¹⁷⁶ Taiwan acted as a model global citizen when the island's government alerted the World Health Organization about the coming pandemic on December 31, 2019, far earlier than the PRC acted.¹⁷⁷ The politics of Cross-Strait relations, as expected, interfered with meaningful global action by that global body.¹⁷⁸ Despite its success, Taiwan was prevented from participating in the World Health Assembly in May 2020. U.S. Secretary of State Mike Pompeo roundly criticized China for keeping Taiwan out of the body.¹⁷⁹ As Taiwan is not a Member State, it requires an invitation to attend the assembly as an observer, something that the PRC has resisted, despite pressure from the United States, Japan, and New Zealand.¹⁸⁰ From 2009 to 2016, Taiwan attended the World Health Assembly as an observer.¹⁸¹ The ongoing geopolitics of the Taiwan Strait will clearly affect any international cooperation in which Taiwan may engage. Taiwan can both protect TK on the island and develop new ways for diplomatic engagement on transnational health issues.

175. Paula Hancocks, *Taiwan Led the World in Closing Down for COVID-19, Now It Wants To Do the Same with Opening Back Up*, CNN (Sept. 22, 2020), <https://www.cnn.com/2020/09/21/asia/taiwan-model-coronavirus-hnk-intl/index.html> [<https://perma.cc/Q6L3-PELH>] (archived Nov. 3, 2020).

176. Kinling Lo, *Taiwan's Coronavirus Response Wins Rare Praise from World Health Organization*, S. CHINA MORNING POST (Apr. 18, 2020), <https://www.scmp.com/news/china/diplomacy/article/3080547/taiwans-coronavirus-response-wins-rare-praise-world-health> [<https://perma.cc/3YB6-H7ZD>] (archived Sept. 6, 2020); see also Steve Sternberg, *What the U.S. Can Learn From Taiwan's Response to Coronavirus*, U.S. NEWS & WORLD REP. (Mar. 10, 2020), <https://www.usnews.com/news/best-countries/articles/2020-03-10/lessons-learned-from-taiwans-response-to-coronavirus>.

177. Cf. Louise Watt, *Taiwan Says It Tried to Warn the World About Coronavirus. Here's What It Really Knew and When*, TIME, (May 19, 2020, 1:00 AM), <https://time.com/5826025/taiwan-who-trump-coronavirus-covid19/> [<https://perma.cc/9HBU-456F>] (archived Aug. 20, 2020) (discussing Taiwan's reaction at the beginning of the COVID-19 outbreak and evaluating comparable and resulting action by China and the World Health Organization).

178. See *id.*

179. John Ruwitch, *Pompeo Blasts WHO and China for Excluding Taiwan From This Week's Health Assembly*, NPR (May 18, 2020, 3:51 PM), <https://www.npr.org/sections/coronavirus-live-updates/2020/05/18/858087854/pompeo-blasts-who-and-china-for-excluding-taiwan-from-this-weeks-health-assembly> [<https://perma.cc/2DEU-FR23>] (archived Aug. 20, 2020).

180. *China Berates New Zealand Over Support for Taiwan at WHO*, CHANNEL NEWS ASIA (May 11, 2020, 5:51 PM), <https://www.channelnewsasia.com/news/asia/covid-19-world-health-organization-china-taiwan-new-zealand-12721646> [<https://perma.cc/3RPW-429G>] (archived Aug. 20, 2020); Nike Chung, *US Condemns WHO for Excluding Taiwan*, VOICE OF AM. (May 18, 2020, 3:48 PM), <https://www.voanews.com/covid-19-pandemic/us-condemns-who-excluding-taiwan> [<https://perma.cc/8TDE-MSBW>] (archived Aug. 20, 2020).

181. *China Berates New Zealand over Support for Taiwan at WHO*, *supra* note 180.

V. NATIONAL LEGISLATION IN TAIWAN

Taiwan has an opportunity to lead the world on national legislation concerning TCM, which is also called Chinese Herbal Medicine (CHM), an industry/tradition that represents a particularly interesting, and somewhat unusual, example of TK.¹⁸² It is a good test site for pioneering new forms of stakeholder participation, big pharma and biotechnology interests, the medical profession, and the health care industry. “Taiwan’s ethnopharmacology, as part of the knowledge system of traditional Chinese medicine with a three-thousand-year history, has progressed tremendously in the last century.”¹⁸³ Moreover, there is a government-run, single-payer, state-funded universal health coverage scheme, called National Health Insurance, with great patient care and medical outcomes.¹⁸⁴ Taiwan has also been successful in reducing the costs of healthcare, compared to developed countries.¹⁸⁵

Although TK products have traditionally not been the subject of market exchange, there are new legal ways to create property forms that are readily subject to market exchange.¹⁸⁶ Even though it is thriving by some measures,¹⁸⁷ the personalized, mixed botanical approach of TCM has not easily fit the analytical scientific approach typically taken in Western patent property rights recognition.¹⁸⁸

Nano TCM arose when researchers found out that the effectiveness of Chinese medicine can be increased by narrowing down the effective particles in the medicine from 10nm to 1000nm.¹⁸⁹ Nano

182. See Jerry I-H Hsiao, *Nanotechnology Meets Chinese Herbal Medicine: An Introduction to the Patenting of Nano-Based Chinese Herbal Medicines in Taiwan*, 7 NANOTECH. L. & BUS. 80, 80–82 (2010) [hereinafter Hsiao, *Nanotech*]; cf. Jerry I-H Hsiao, *Nano Chinese Herbal Medicine Patenting in China: Industrial Applicability as the Benchmark in Assessing Patentability*, 8 NANOTECH. L. & BUS. 106, 112–13 (2011) [hereinafter Hsiao, *Nano Chinese*]; Chidi Oguamanam, *Patents and Traditional Medicine: Digital Capture, Creative Legal Interventions, and the Dialectics of Knowledge Transformation*, 15 IND. J. GLOBAL LEGAL STUD. 489, 506, 511 (2008) [hereinafter Oguamanam, *Patents and Traditional Medicine*].

183. Guo, Pan, Chen, Wang & Wang, *supra* note 3, at 949.

184. Tsung-Mei Cheng, *Taiwan’s Healthcare System: The Next 20 Years*, BROOKINGS INST. (May 14, 2015), <https://www.brookings.edu/opinions/taiwans-healthcare-system-the-next-20-years/> [<https://perma.cc/L7H9-X5H2>] (archived Aug. 20, 2020).

185. See Aaron E. Carroll & Austin Frakt, *The Leap to Single-Payer: What Taiwan Can Teach*, N.Y. TIMES (Dec. 26, 2017), <https://www.nytimes.com/2017/12/26/upshot/the-leap-to-single-payer-what-taiwan-can-teach.html> [<https://perma.cc/38QD-LDLZ>] (archived Aug. 20, 2020); see also Jonathan Adams, *Special Report: Health Care in Taiwan*, WORLD (Oct. 9, 2009, 2:05 AM), <https://www.pri.org/stories/2009-10-09/special-report-health-care-taiwan> [<https://perma.cc/CE5Y-B7UC>] (archived Aug. 20, 2020).

186. See generally Jay Erstling, *Using Patents to Protect Traditional Knowledge*, 15 TEX. WESLEYAN L. REV. 295 (2009) (reviewing the use of patents in protecting traditional knowledge and suggesting the need of international protections).

187. Oguamanam, *Patents and Traditional Medicine*, *supra* note 182, at 508–09.

188. *Id.*

189. Oguamanam, *Genetic Resources*, *supra* note 10, at 110. See also Songqing Liu, Yi Huang, Fang Liu & Yinglan Zhao, *Nano Traditional Chinese Medicine: Current Progress and Future Challenges*, 16 CURRENT DRUG TARGETS 1, 2, (2015).

CHM concentrates on reducing the size of the raw materials and testing any possible new properties or efficacy with the nano-sized particles.¹⁹⁰

The concerns coming along are the possible reactive, catalytic, and even toxic reaction of the medicine due to the condensed surface to volume ratio and the interaction among the nanoparticles.¹⁹¹ Nanotechnology producers can suffer legal consequences under tort statutes if the technology harms a person.¹⁹² Challenges also occur in patenting nano CHM: an atomic or molecular structure does not have patentability; the pre-nano patents may not be guaranteed to cover the nano counterparts; and there are challenges in examining, analyzing, and classifying the patents.¹⁹³

There are patents being filed in the People's Republic of China registered with the combination of nano, name of traditional CHM formulation, and its preparation process, such as Yang mengjun's patent.¹⁹⁴ The difference between his nano patent and the TCM is the mere repetition of scaling down the particle size while the medicine and the formulation of the medicine stay unchanged; he did not provide any evidence for his alleged increased effectiveness in the nano medicine.¹⁹⁵ But with the twice transformation of the herbs, from natural herb to herbs to nano herbs, the nano CHM is "far removed from the traditional formulas."¹⁹⁶ Microdosing and tailored medicines are future industries in which Taiwan has strategic advantages to dominate.

In developing new herbal remedies, however, and increasing its market for traditional drugs, CHM could likely benefit from stronger legal and administrative treatment. Taiwan is addressing this through its Examination Guidelines for Chinese Herbal Medicine Related Patents initiative,¹⁹⁷ as is the United States in greater recognition of botanical herbs at the U.S. Food and Drug Administration.¹⁹⁸ Both the Taiwan initiative and similar PRC efforts

190. Hsiao, *Nanotech*, *supra* note 182, at 84.

191. Hsiao, *Nano Chinese*, *supra* note 182, at 111.

192. G. Nagesh Rao, *Nanotechnology: A Look into the Future of Arising Legal Dilemmas*, 17 ALB. L.J. SCI. & TECH. 835, 838 (2007).

193. Hsiao, *Nano Chinese*, *supra* note 182, at 112.

194. *Id.* at 113.

195. *Id.*

196. *Id.* at 114.

197. See generally Jerry I-H Hsiao, *Patent Protection for Chinese Herbal Medicine Product Invention in Taiwan*, 10 J. WORLD INTELL. PROP. 1 (2007).

198. See generally Ryan Abbott, *Treating the Health Care Crisis: Complementary and Alternative Medicine for PPACA*, 14 DEPAUL J. HEALTH CARE L. 35, 71–72 (2011) ("Recently, the line between conventional drug and CAM-product [Complementary and Alternative Medicine] approval has blurred with the advent of botanicals approved as drugs. In 2004, the FDA eased regulations on herbal mixtures, allowing the approval of substances that have adequate evidence of safety and efficacy even if individual constituents are unknown. In October 2006, the first topical medicine, Veregen™, was approved under these rules. This topical herbal preparation is a purified green tea extract for the treatment of warts. Veregen was supported by extensive clinical research and approved in the standard NDA. This botanical preparation is now approved as a pharmaceutical drug and prescribed by physicians.").

are strongly underway to collect data on traditional formulations,¹⁹⁹ which then can identify prior art to ward off possible attempts to privatize centuries-old remedies.²⁰⁰

Legislation is a necessary start. Article 13 of Taiwan's Indigenous Peoples Basic Law provides:

The government shall protect indigenous peoples' traditional biological diversity knowledge and intellectual creations, and promote the development thereof. The related issues shall be provided for by the laws.²⁰¹

But for years, these laws have not been enforced.²⁰²

Some legislative efforts have protected TK in Taiwan. On November 26, 2015, the Executive Yuan (Cabinet) of Taiwan approved a draft law on the promotion of indigenous languages.²⁰³ On June 14, 2017, the Indigenous Languages Development Act (the Languages Act) was promulgated.²⁰⁴ The Languages Act is designed to "achieve historical justice, further preserve and promote the indigenous languages, and guarantee that the languages are used and passed down."²⁰⁵

In July of 2016, Taiwan's Legislative Yuan passed the Act for the Establishment of the Indigenous Peoples Cultural Foundation.²⁰⁶

There are sixteen officially recognized indigenous tribes in Taiwan: Amis, Atayal, Paiwan, Bunun, Puyuma, Rukai, Tsou, Saisiyat, Yami, Thao, Kavalan, Truku, Sakizaya, Sediq, Hla'alua, and Kanakanavu. Every tribe has its own

199. *Traditional Knowledge*, *supra* note 150.

200. See generally Maxim V. Gubarev, *Misappropriation and Patenting of Traditional Ethnobotanical Knowledge and Genetic Resources*, 8 J. FOOD L. & POL'Y 65, 95 (2012) ("As a 'defensive protection,' the worldwide [traditional knowledge] databases 'prevent the misappropriation of genetic resources by defeating the alleged novelty and inventiveness claims in patent application.' The crucial point in this system is to 'recognize the existence of certain traditional knowledge as "prior art" and are, therefore, considered knowledge already in the public domain."").

201. Taiwan Indigenous Peoples Basic Law, Council of Indigenous Peoples (原住民族基本法) art. 13 (2005) (amended 2018), <https://law.moj.gov.tw/Eng/LawClass/LawAll.aspx?media=print&pcode=D0130003> (last visited Nov. 4, 2020) [<https://perma.cc/8BAY-GXE8>] (archived Nov. 4, 2020).

202. J.L. Chanda, *Government Urged to Enforce Indigenous Peoples Basic Law*, CHINA POST (Sept. 5, 2016), <https://www.eyentaiwan.com/government-urged-to-enforce-indigenous-peoples-basic-law> [<https://perma.cc/M5X4-AJRV>] (archived Nov. 4, 2020).

203. Wendy Zeldin, *Taiwan: Draft Legislation on Indigenous Language Protection*, LIBRARY OF CONG.: GLOB. LEGAL MONITOR (Dec. 3, 2015), <http://www.loc.gov/law/foreign-news/article/taiwan-draft-legislation-on-indigenous-language-protection/> [<https://perma.cc/JP3H-TTF2>] (archived Sept. 5, 2020).

204. Wendy Zeldin, *Taiwan: New Indigenous Languages Act*, LIBRARY OF CONG.: GLOB. LEGAL MONITOR (June 21, 2017), <http://www.loc.gov/law/foreign-news/article/taiwan-new-indigenous-languages-act/> [<https://perma.cc/9UZS-CVWM>] (archived Sept. 5, 2020).

205. *Id.*

206. See generally Act for the Establishment of the Indigenous Peoples Cultural Foundation, Council of Indigenous Peoples (原住民族基本法) (June 8, 2016), FAWUBU FAGUI ZILIAOKU (全國法規資料庫) [Ministry of Justice Laws and Regulations Database], <https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=D0130022> [<https://perma.cc/7R4W-7DHM>] (archived Nov. 4, 2020).

distinct culture, language, customs, and social structure. Six of them call Hualien County home, including the most populous Amis, Truku, Sakizaya, Kavalan, Bunun, and Sediq.²⁰⁷

The Taiwanese government and its agencies will need to breathe more life into the island's Indigenous Peoples Basic Law. Then it will provide a model to the world on how to best promote TK through progressive legislation.²⁰⁸ One opportunity came from Kawlo Lyun Pacidal, a member of an Indigenous tribe and Legislator at Large for the New Power Party (NPP), who drafted and introduced the Taiwan Traditional Knowledge Bill ("Taiwan TK Bill"), a copy that is appended to this Article. This legislative project would have provided oversight over the use of TK in Taiwan to the Aborigines of Taiwan and provided mandatory authority over and profit-sharing possibilities in TK innovations. The Taiwan TK Bill languished in Committee for years without being sent to the Legislative Yuan for a vote. On August 8, 2019, the NPP announced its decision to expel Kawlo Lyun Pacidal from the party for a corruption scandal.²⁰⁹ Chen Enze, the head of the two associations funded by the government, also served as an assistant to the Kawlo Lyun Pacidal's Congress Office, creating a conflict of interest and corruption scandal.²¹⁰

The impropriety of these affairs brought down the Congresswoman. The NPP Press Release confirmed that the Disciplinary Committee expelled Kawlo Lyun Pacidal on September 3, 2019 for her violation of social expectations and her behavior which have severely hampered the political image and reputation of the New Power Party.²¹¹ The spokesperson of the NPP confirmed that once Kawlo Lyun Pacidal lost her party membership she also lost her seat in the Legislative Yuan. The TK bill, while still pending at the writing of this Article,²¹² will likely expire in committee. A new legislative session began in spring 2020 after the elections in January saw President Tsai reelected. But with that resignation of Kawlo Lyun Pacidal from the Legislative Yuan and the shrinking diplomatic

207. *Introduction to the Tribes*, HUALIEN INDIGENOUS PEOPLES DEPT., http://ab.hl.gov.tw/en-us/Explore/Ethnic_GroupIntro (last visited Aug. 8, 2020) [<https://perma.cc/QKK7-55UL>] (archived Aug. 20, 2020) (last updated Aug. 8, 2020).

208. See Guo, Pan, Chen, Wang & Wang, *supra* note 3, at 953.

209. Wang Yangyu (王揚宇), *New Power Party Disciplinary Committee Officially Expel Kawlo* (時代力量紀律委員會開錮 正式將高潞除名), CNA (Aug. 9, 2019), <https://www.cna.com.tw/news/firstnews/201908080358.aspx> [<https://perma.cc/3GMX-3NNZ>] (archived Sept. 5, 2020).

210. *Id.*

211. Chen Jun (陳昀), *Kawlo Was Expelled Yesterday* (高潞以用昨被開除黨籍 今會晤王金平半小時), LIBERTY TIMES (自由時報) (Sept. 4, 2019), <https://news.ltn.com.tw/amp/news/politics/breakingnews/2905359> [<https://perma.cc/4S9E-AJ4U>] (archived Sept 5, 2020).

212. *Review Progress of Indigenous People Traditional Bio-Diversity Knowledge Protection Bill*, TAIWAN CONG. LIBRARY, <https://lis.ly.gov.tw/lylgmeet/dispprog?3:00030DDC0002010100000000000000C800100003D000000000:0031053:lgmeetkm> (last visited Sept. 5, 2020) [<https://perma.cc/3TLH-H4BQ>] (archived Sept. 5, 2020).

recognition of Taiwan²¹³ progressive legislation concerning TK may be even more difficult to negotiate for the island nation.

VI. CONCLUSION

In the last few years, there has been a proliferation of national legislation for the protection of GR, TK, and Folklore in developing countries, protection modeled on the draft text of Treaty on the Protection of Traditional Knowledge proposed by the IGC at the World Intellectual Property Organization. But Australia, Canada, and the United States, all developed countries with significant stakeholders with an interest in such protection of TK, GR, and Folklore, have yet to promulgate legislation to institute such protection. The hopes of Native American Tribes, Australian Aboriginals, and Canadian First Nations have all been put on the backburner. The rigid nature and history of IP protection in these developed economies make it much more difficult to graft new *sui generis* forms of protection onto the existing IP rights system. The academy has been largely absent to provide the theoretical framework to justify such protection.

A more robust discussion of the draft IGC Treaty on the Protection of Traditional Knowledge, particularly among developed countries, is needed. Moreover, a new generation of IP rights to benefit all stakeholders must be created.²¹⁴ IP rights have traditionally been a product of Western civilization and the individualistic approach has dominated the global IP legal regime. Increasingly, these rights have to be considered with regard to innovations and materials originating in developing countries, much of it through collective efforts and community approaches to ownership. A major factor fueling the increase of patentable discoveries flowing from developing countries is the increasing tendency of patentability to extend to biological material and innovation.²¹⁵

In addition, there are a number of concerns and complications to codify or enforce respect for Traditional Knowledge. Market solutions, based on capitalist economics, are often not acceptable to Indigenous Peoples. Indeed, profit is not a priority in their worldview. In addition, the disparity between the market power of corporations from the northern industrialized countries and their governments and Indigenous peoples tilts in favor of the former in negotiations. International legal precepts do not always translate into domestic

213. Steven L. Myers & Chris Horton, *As Taiwan Loses Influence, China Gains Ground in Race with U.S.*, N.Y. TIMES (Sept. 20, 2019), <https://www.nytimes.com/2019/09/20/world/asia/taiwan-kiribati-china.html> [https://perma.cc/4S9H-NQ4N] (archived Aug. 30, 2020) (discussing how more countries in the Pacific are siding with China rather than the U.S. in their recognition of Taiwan, ending seven countries' recognition of Taiwan's independence since 2016).

214. Benefit sharing was used in the UN Convention on the Law of the Sea (UNCLOS), ILO's Convention No. 169 Concerning Indigenous and Tribal Peoples, the Nagoya Protocol, and the International Treaty on Plant, Genetic Resource for Food and Agriculture. See Elisa Morgera, *The Need for an International Legal Concept of Fair and Equitable Benefit Sharing*, 27 EUR. J. INT'L L. 353, 359 (2016).

215. CURCI, *supra* note 54, at 4–7.

policy action and enlightened national legislation. And with Taiwan's limited role in international relations and organizations—it is only a Member of the WTO but not any other major international organization—official and meaningful engagement will be difficult. And that makes the domestic front—to lead by example—all the more pressing.

For Taiwan, these issues are particularly difficult. The island nation needs to find a legislative solution to live up to the promises of President Tsai so as to provide ways to assist the Aborigines of Taiwan with benefit sharing and other arrangements. Such efforts will also aid Taiwan to better its international standing while increasing its economic growth.

ANNEX 1: (Bill Number: 1722 委 22236, Indigenous Peoples
Traditional Bio-diversity Knowledge Protection Bill)

立法院議案關係文書 (中華民國41年9月起編號)
中華民國107年5月23日印發

院總第 1722 號 委員提案第 22236 號

案由：本院時代力量黨團，有鑑於「原住民族基本法」第十三條：「政府對原住民族傳統之生物多樣性知識及智慧創作，應予保護，並促進其發展；其相關事項，另以法律定之。」就原住民族傳統生物多樣性知識目前尚無相關法規給予保護，爰擬具「原住民族傳統生物多樣性知識保護法」草案。是否有當？敬請公決。

提案人：時代力量立法院黨團

高潞·以用·巴鱧刺 Kawlo · Iyun · Pacidal

原住民族傳統生物多樣性知識保護法草案總說明

公布施行於 2005 年之原住民族基本法第十三條明文規定：「政府對原住民族傳統之生物多樣性知識及智慧創作，應予保護，並促進其發展；其相關事項另以法律定之」，據此，特制訂本法。

原住民廣義之「傳統知識」，係指基於傳統而產生之文學的、藝術的或科學的作品、表演、發明、科學發現、外觀設計、標記；名稱或符號、未公開之資訊，以及其他一切基於傳統在工業、科學、文學或藝術領域內智能活動所生之發明與創作之統稱。基於原住民知識整體性的特質，上述各類知識原本不宜強制切割分類，但由於外觀設計、標記、名稱或符號等文學的、藝術的創作，已規範在「原住民族傳統智慧創作保護法」草案之內，

因此本草案暫時專就生物多樣性相關原住民傳統知識（以下簡稱傳統知識）之保護予以研擬。

傳統知識乃原住民歷代在其傳統領域內，與環境互動下的長期生活過程所產生、累積，對於環境之認識、保育與利用的相關知識。原住民因傳統知識而能永續地與環境共存，因此一般認為原住民族乃生物多樣性保育最重要之關係者。由於過去與外界的接觸、交流、雖然引入主流社會大量的知識與工具，然而經由調查與研究，原住民傳統知識亦不斷地為外界瞭解，更進一步經由科學研發而獲得商業利益，卻未能適當地回饋原住民，甚至於遭受直接剝竊傳統知識，申請專利，將之轉化為其私有財產，不僅有害於傳統知識之保存及維護，亦有損原住民之權益。

除了損及原住民傳統知識權益外，外來文明之衝擊亦導致原住民族傳統生活習慣以及既有社會體制之變遷，而傳統知識維持與創新所仰賴之機制，已經受到相當大之戮傷，對於原住民族之衝擊，更非傳統知識權受到侵害之能比擬。因此原住民傳統知識之保護，應兼顧知識權益之保障，以及知識創新與傳承機制之維持，兩者不可偏廢。

本「原住民族傳統生物多樣性知識保護法」草案，主要乃基於「生物多樣性公約」第八條 j 項，尊重、保存及促進永續利用原住民族傳統生物多樣性知識之精神、事先告知同意與利益分享等原則，以及締約方大會針對第八條 j 項所採納的 Akwe : Kon 準則而擬定。本草案共分七章三十九

條，除規定政府應成立專責機關外，並分別就權利之歸屬與內容、原住民

族傳統知識資料庫、未公開傳統知識之調查與使用、傳統知識與智慧財產權之關係、傳統知識之延續與創新，以及侵害之救濟等加以規定。

第一章「總則」首先陳述本法之立法目的（第一條），其次針對傳統生物多樣性知識、已公開知識、部落會議等加以定義（第三條）。此外，本法明定行政院原住民族委員會為本法之主管機關（第二條），並就主管機關調查、整理、保存，及協助原住民族或部落開發利用其傳統知識之相關權責予以明文規定之（第四條）；並且就傳統知識歸屬之認定、權利金及涉及原住民族或部落間關於傳統知識等爭議事項，乃明定應有審議、調解之紛爭解決機制（第五條），亦就其審議、調解之效力（第七、八、九條）與其效力正當化之程序（第六條）予以規定之，以期有效協助原住民族各部落進行傳統知識保護之工作。

第二章「權利之歸屬及內容」規定傳統知識權利之歸屬主體，係產生或發展該傳統知識之原住民族或其部落，而權利行使之決定權在原住民族或部落會議〈第十條〉；第十四條則規定傳統知識權利所不及之三種情形。至於權利內容，第十一條旨在防止他人非經同意取得或主張權利，或者以不正當方式使用傳統知識。而第十二與第十三條則將傳統知識區分為已公開與未公開兩大類，兩類知識之權利內容有所不同。已公開之傳統知識依照智慧財產權之原則，允許他人使用，然而若因商業之需要，而欲表彰該傳統知識係源自於原住民族或部落者，原住民有權要求給付權利金〈第十二條〉。對於未公開之傳統知識，他人須先經同意並簽訂契約，方得使用或揭露，並就相關傳統知識之揭露或使用行為，有主張表彰來源之權利〈第十三條〉。

第四章「未公開傳統知識之調查與使用」進一步針對原住民族或部落如何受理、如何同意外人調查與使用未公開之傳統知識，加以規定；本章分為調查與使用之同意、監督機制與民事救濟等兩小節。第十七條為申請使用未公開傳統知識之基本原則；第十八至第二十二條規定外人提出申請之程序、文件；第二十一條則設定契約內容以及如何達成契約協定；第二十

二、二十三條進一步規範契約內容之影響評估以及利益公平分享之原則。

達成契約協定後如何確保申請者遵行之監督機制則包括按期提交調查報告與報告之內容〈第二十四、二十五條〉、傳統知識之使用權如何轉移至第三者〈第二十六條〉，以及如何防止未公開知識之擁有者或管理者外洩之〈第二十七條〉。為貫徹本法所賦予原住民族或部落對其傳統知識之權利，於侵害原住民族或部落之權益者，設置侵害排除、救濟方法與請求損害賠償等民事救濟之規定〈第二十九條〉

已公開之傳統知識，由於他人得使用，一般建議採用「消極性之保護」，以防止他人惡意逕行申請智慧財產權，竊為己有，例如逕行申請專利。因此需要製作資料庫，以方便各國專利局之篩檢，避免誤予以通過他人之專利申請。第三章第十五、十六條乃針對原住民族傳統知識資料庫加以規範。第十五條責成主管機關成立國家資料庫，用以整理已公開或未公開但欲公開之知識；而未公開知識經同意後，或原住民仍不擬公開者，則可以存放於部落自行管理之資料庫中加以保密。第十六條要求主管機關針對資

料庫之運作等事宜訂定辦法。至於未公開傳統知識之智慧財產權課題，由於傳統知識能否申請智慧財產權，其權責在智慧財產權主管機關，因此本草案不予以處理；但本法案處理傳統知識或其衍生知識申請智慧財產權時之來源揭露事宜（第四章第二十八條）。

相對於第二至第四章之處理傳統知識權利課題，第五章「延續及創新傳統知識之方法」旨在建立法制，以期維持知識創新與傳承之機制。第三十條明訂主管機關應提供適當之教育與培訓，提供「身教」課程與適當之「言教」教材，以提供學習傳統知識之機會。基於尊重各民族或部落之基本人權，因此本法不擬要求原住民族恢復傳統生活慣俗，但於第三十一條要求政府鼓勵之。

第六章「罰則」乃為貫徹本法所賦予原住民族或部落對其傳統知識之權利，對於違反本法規定，侵害原住民族或部落之權益者，於第三十二條至第三十六條設置各項罰則，用以處分違反本法各項規定之行為者。並於第七章「附則」中明定提撥罰鍰納入原住民族發展基金（第三十七條）。

原住民族傳統生物多樣性知識保護法草案

| 條文 | 說明 |
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| 第一章 總 則 | |
| 第一條 （立法目的） 為保護原住民族之傳統生物多樣性知識，及維護原住民族對該知識之權益，以促進傳統生物多樣性知識之永續利用及創新，特制定本法。 | 本法目的乃是根據憲法增修條文第十條第十一項：「國家肯定多元文化，並積極維護發展原住民族語言及文化」及原住民族基本法第十三條，並參考生物多樣性公約（Convention on Biological Diversity）第八條j款之規定及世界智慧財產權組織（World Intellectual Property Organization, WIPO）之討論，以保護傳統生物多樣性知識為出發點，並維護原住民族對其傳統知識之權益，進而達成傳統生物多樣性知識永續利用與開發之目的，而加以制定。 |
| 第二條 （本法之主管機關） 本法所稱主管機關為原住民族委員會。 | 本會主管全國原住民族事務，且綜合管理原住民族或部落之傳統生物多樣性知識，爰明定本會為本法之主管機關。 |
| 第三條 （用詞定義） 本法用詞定義如下： 一、傳統生物多樣性知識（以下簡稱傳統知識）：係指原住民族為永續生存所產生而經世代相傳，與生物或自然環境有關之知 | 一、由於本法之用詞有其特殊內涵及用法，故先行定義以求解釋上之一致。 二、第一項第一款有關傳統生物多樣性知識之定義，係參考太平洋區域保護傳統生態知識、創新及實施模範法（Model Law For The Protection of Traditional Ecological |

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| <p>識。包括人類適應環境，與取得、利用自然資源之知識。</p> <p>二、已公開：係指於所屬原住民族或部落外，已公開發表、已公開使用或已為公眾所知悉者。</p> <p>三、原住民族會議：為原住民族集體意思之形成機關。</p> <p>四、部落會議：為部落集體意思之形成機關。</p> <p>前項原住民族會議及部落會議之組成與議事規則，由主管機關另以辦法訂之。</p> | <p>Knowledge, Innovations and Practices) 中對於傳統生態知識之規定，並參考 WIPO 文件 WIPO/GRTKF/IC/7/9、WIPO/GRTKF/IC/9/5、WIPO/GRTKF/IC/9/6、WIPO/GRTKF/IC/9/INF/5 及巴拿馬第 20 號法律 (Regimen Especial de Propiedad Intelectual sobre los Derechos Colectivos de los Pueblos Indigenas) 等立法例。以狩獵為例，傳統知識包括(一)原住民對動物生理與生態行為之認識，(二)對動物出沒環境之認識，(三)決定獵區、獵季以及獵捕方法，以及(四)對陷阱製作所用植物及方法之認識等。</p> <p>三、第一項第二款有關已公開之定義，係參考專利法第二十二條第一項之規定。</p> <p>四、為凝聚原住民族之集體意思，以確保原住民族或部落之權益，爰於第一項第三款與第四款規定原住民族會議與部落會議為原住民族或部落之集體意思之形成機關。</p> <p>五、至於本法中原住民族或部落之定義參見原住民族基本法第二條之規定。</p> <p>六、關於原住民族會議及部落會議之設置問題，研究單位認為，在現今關於原住民族自治之組織問題尚未確立之前，本法案採同時並存方式較為周延。</p> |
| <p>第四條 (主管機關之職掌)</p> <p>主管機關應調查、整理、保存原住民族傳統知識，並協助原住民族或部落開發利用其傳統知識。</p> <p>主管機關於原住民族或部落依本法所保障之權益受侵害時，應協助其維護之。</p> | <p>一、有鑑於原住民族或部落之傳統知識逐漸流失與散佚，故明訂主管機關之權責在於應協助調查、整理、保存及開發利用相關傳統知識。</p> <p>二、為避免原住民族或部落於依本法所賦予之權益受侵害時，無法負擔龐大訴訟費用，致使相關權益無法主張，形同虛設，故明訂主管機關具協助維護之義務。</p> |
| <p>第五條 (審議及調解)</p> <p>主管機關應遴聘(派)學者、專家、公正人士及原住民族之代表，以合議制方式辦理下列事項：</p> <p>一、傳統知識歸屬之審議與爭議之調解。</p> <p>二、第八條規定權利金爭議之調解。</p> | <p>一、傳統知識歸屬之認定、權利金及涉及原住民族或部落間關於傳統知識等爭議事項，宜由主管機關所應遴聘(派)學者、專家、公正人士及原住民族之代表，以合議制方式之進行審議或調解，以臻客觀公正，貫徹原住民族自主發展之保障。</p> <p>二、原住民族傳統知識紛爭事件，乃涉及原住民族族內傳統與其習慣。調解工</p> |

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| <p>三、其他涉及原住民族或部落間關於傳統知識爭議事項之審議與調解。</p> <p>前項原住民族代表之比例、審議及調解之程序及其他應遵行事項之辦法，由主管機關定之。</p> | <p>作應指向客觀公正，並符合原住民族之習慣法理，以貫徹原住民族實行自治之理念。惟原住民族傳統知識紛爭事件或有涉及不同部落、原住民族之情形，非可一概論之。故第二項規定主管機關應視相關紛爭事件之類型與所涉之紛爭當事人，訂定相關審議及調解之程序及其他應遵行事項之辦法，並依此遴聘（派）一定比例之原住民族代表，以符需要。</p> |
| <p>第六條（調解書之送請審核）</p> <p>主管機關應於調解成立後七日內，將調解書送請管轄法院審核。</p> <p>前項調解書，法院應尊重原住民族之習慣法，儘速審核，除有違反法令或不能強制執行者外，應由法官簽名並蓋法院印信，除抽存一份外，發還主管機關送達當事人。</p> <p>法院未予核定之事件，應將其理由通知主管機關。</p> | <p>一、參考著作權法第八十二條之一第一項，於本條第一項規定主管機關於調解成立後，應於七日內將調解書送請管轄法院審核。</p> <p>二、依原住民基本法之立法意旨，保障原住民族自主發展，實行原住民族自治，原住民族傳統知識紛爭事件之處理應就原住民族之習慣法理與以高度尊重，爰參考著作權法第八十二條之一，於本條第二項規定法院就與法令、無牴觸及非不能強制執行之調解書之審核。</p> <p>三、第三項規定法院就調解內容未予核定時之處理。</p> |
| <p>第七條（調解書核定之效力）</p> <p>調解經法院核定後，當事人就該事件不得再行起訴。</p> <p>前項經法院核定之民事調解，與民事確定判決有同一之效力，並暫免徵收執行費。</p> | <p>一、按原住民族傳統知識紛爭事件具專業性、社會性與原住民族高度習慣性特徵，主管機關依本法第五條所遴聘（派）之審議及調解團體均為專業人員、原住民族代表所組成，其調解除可免除雙方當事人訴訟程序之勞費，並可紓減司法機關案件負荷。爰參考著作權法第八十二條之二、耕地三七五減租條例部分條文修正草案第二十六條，於第一項規定，調解經法院核定後，當事人就該事件不得再行起訴、告訴或自訴，並於第二項規定經法院核定之調解與確定判決有同一之效力，其調解書並具有執行名義。</p> <p>二、強制執行事件的執行費可能係由債務人負擔，為避免造成侵害傳統知識者，或是違反本法規定之行為人因而獲利之虞，且為減輕原住民族或部落之負擔，故本條第二項規定當事人於聲請強制執行時暫免徵收執行費，逕先執行以優先受償，待執行債務人有賸餘財產者，再行收取。</p> |

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| <p>第八條 (調解成立之效力) 民事事件已繫屬於法院，在判決確定前，調解成立並經法院核定者，視為於調解成立時撤回起訴。</p> | <p>參考著作權法第八十二條之三，於本條規定民事訴訟判決確定前，經法院核定之調解，具有視為於調解成立時撤回起訴之效力。</p> |
| <p>第九條 (提起宣告調解無效或撤銷調解之訴) 民事調解經法院核定後，有無效或得撤銷之原因者，當事人得向原核定法院提起宣告調解無效或撤銷調解之訴。 前項訴訟，當事人應於法院核定之調解書送達後三十日內提起之。</p> | <p>一、參考著作權法第八十二條之四第一項，於第一項規定經法院核定之民事調解有無效或得撤銷之原因之處理。 二、參考著作權法第八十二條之四第二項，第二項規定提起宣告調解無效或撤銷調解之訴之期間。</p> |
| <p>第二章 權利之歸屬及內容</p> | |
| <p>第十條 (傳統知識之權利歸屬) 與傳統知識有關之權利，歸屬於產生或發展該傳統知識之原住民族或部落。 依本法之規定，應經原住民族或部落同意者，由原住民族會議或部落會議行使之。</p> | <p>一、傳統知識之權利，屬於產生或發展該傳統知識之原住民族或其部落所有，爰參考秘魯第 27811 號法律第一條、第十條，巴西第 2186-16 暫行條例第八條、第九條規定之。 二、原住民族或部落之同意權，應由代表原住民族或部落集體意思形成機關之原住民會議或部落會議行使之。</p> |
| <p>第十一條 (防止他人取得或主張權利及以不正當方式使用傳統知識) 傳統知識所屬之原住民族或部落以外之人，欲就該傳統知識取得或主張任何權利者，應先徵得該傳統知識所屬之原住民族或部落之同意。 傳統知識所屬之原住民族或部落以外之人，不得以扭曲、污衊或其他不正當方式使用該傳統知識，而損害原住民族或部落之聲譽尊嚴。</p> | <p>一、基於憲法增修條文第十條第十一項規定國家肯定多元文化，並積極維護發展原住民族文化，故應對原住民族擁有之傳統知識予以保障，以彰顯原住民族之文化權。 二、為尊重原住民族或部落，賦予傳統知識所屬之原住民族或部落權利，以防止他人未經原住民族或部落之同意對傳統知識取得或主張任何權利。 三、本法允許他人對原住民族傳統知識為合理方式之使用，但若該使用方式足以損害原住民族或部落之聲譽或尊嚴者，應予以禁止。</p> |
| <p>第十二條 (已公開傳統知識之來源表彰權及權利金請求權) 就已公開之傳統知識，欲於商業使用上表彰該傳統知識係源自於原住民族或部落者，應事先徵得原住民族或部落之同意，並給付適當之權利金。</p> | <p>一、本法將傳統知識區分為已公開及未公開之傳統知識，並分別賦予不同程度之保護。 二、已公開之傳統知識屬公共領域之知識，原則上任何人均得使用，惟使用之際若表彰該知識所屬之原住民族或部落之名稱，以獲取商業上之利益者，應事先徵得該原住民族或部落之同意，並給付適當之權利金，以示尊重。</p> |

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| | <p>三、權利金之金額，原則上由原住民族或部落與傳統知識之使用人自行協議，如有協議不成之情事，則由主管機關調解之。</p> |
| <p>第十三條（未公開傳統知識之揭露、取得與使用） 未公開之傳統知識，非事先徵得所屬原住民族或部落之同意並簽訂契約，他人不得揭露、取得或使用之。 未公開傳統知識所屬之原住民族或部落，對於相關傳統知識之揭露或使用行為，有主張表彰來源之權利。</p> | <p>一、傳統知識屬於原住民族或其部落所有，為保障原住民族之傳統知識及促進其永續發展，故參考 WIPO/GRTKF/IC/7/6、WIPO/GRTKF/IC/9/INF/5 文件，及秘魯第 27811 號法律第四十二條、巴西第 2186-16 暫行條例第九條之規定，欲揭露、取得、使用未公開之傳統知識，必須經由該傳統知識所屬原住民族或部落之同意及簽訂契約始得為之。 二、針對未公開之傳統知識，賦予其得請求表彰來源之權利。參考巴西第 2186-16 暫行條例第九條之規定予以定之。</p> |
| <p>第十四條（權利內容之例外） 原住民族或部落對其傳統知識之權利，不及於下列各款情事： 一、各原住民族或部落間之傳統交換行為。 二、為保存、發展傳統知識及促進傳統創新之必要措施。 三、國家為因應緊急情況或增進公共利益之非營利使用行為。</p> | <p>一、傳統知識之權利範圍，應考量相關因素予以限縮。 二、為尊重原住民族或部落間關於傳統知識之傳統交換行為，參酌 WIPO/GRTKF/IC/7/6、 WIPO/GRTKF/IC/9/INF/5 文件，及巴拿馬第十二號行政命令第十一條、秘魯第 27811 號法律第四條、巴西第 2186-16 暫行條例第四條等規定，將其排除於權利範圍之外。 三、為促進傳統知識之永續利用及創新，故為保存、發展傳統知識及促進傳統創新所採取之必要措施，參酌 WIPO/GRTKF/IC/7/6、WIPO/GRTKF/IC/9/INF/5 文件，予以排除於權利範圍之外。 四、將涉及公共利益之非營利使用行為排除於權利範圍之外，參酌 WIPO/GRTKF/IC/7/6、 WIPO/GRTKF/IC/9/INF/5 文件予以定之。</p> |
| <p>第三章 原住民族傳統知識資料庫</p> | |
| <p>第十五條（登記機關及登記申請人） 傳統知識所屬之原住民族或部落，得將其傳統知識中已公開，及未公開但欲公開之部分，登記於原住民族傳統知識國家資料</p> | <p>一、為維護及保存傳統知識，故參考生物多樣性公約（Convention on Biological Diversity）及太平洋區域傳統生態知識、創新及實施之保護模範法（Model Law For The Protection of Traditional Ecological Knowledge, Innovations and</p> |

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| <p>庫；其未公開之部分，得登記於原住民族傳統知識部落資料庫。前項之原住民族傳統知識國家資料庫，由主管機關成立之。原住民族傳統知識部落資料庫由主管機關協助部落會議成立之。未公開且不欲公開之傳統知識內容應予以保密。</p> | <p>Practices) 之規定，建立國家與地方部落兩級制資料庫。 二、由傳統知識所屬之原住民族或部落主動登記。原住民族傳統知識可分為已公開、未公開而可公開、以及未公開而不擬公開等三類，前兩類可由主管機關設置國家資料庫加以蒐集紀錄；而部落資料庫由主管機關協助部落會議成立。 三、登記於部落資料庫之傳統知識並不公開，並應予以保密，但可以將其條目列於國家資料庫，以供搜尋。</p> |
| <p>第十六條 (資料庫之設置) 原住民族傳統知識資料庫之建置、運作、管理、取得及保密辦法，由主管機關訂定之。</p> | <p>授權主管機關另以辦法規範原住民族傳統知識資料庫之建置及運作、管理、取得及保密原則。</p> |
| <p>第四章 未公開傳統知識之調查與使用</p> | |
| <p>第一節 調查與使用之同意</p> | |
| <p>第十七條 (使用未公開傳統知識之基本原則) 就未公開之傳統知識之調查或使用，應符合原住民族權益、公共利益及永續發展等原則。</p> | <p>調查或使用應符合原住民權益，公共利益及永續發展，為傳統知識調查或使用之最高原則。參酌生物多樣性公約第十四條。</p> |
| <p>第十八條 (申請調查或使用) 調查或使用未公開之傳統知識者，應事先向原住民族或部落提出申請，徵得其同意，並簽訂調查或使用契約後，始得為之。</p> | <p>一、為徵得原住民族或部落的事先同意，應提出申請並訂定契約，參照生物多樣性公約 UNEP/CBD/ WG8J/4/6 與原住民族和部落參與決策的過程以及交流機制的建設。 二、原住民族會議與部落會議為原住民族與部落之集體意思形成機關，故欲調查或使用未公開之傳統知識，應向原住民族會議或部落會議提出申請，並經原住民族會議或部落會議之同意。</p> |
| <p>第十九條 (調查申請文件) 申請調查傳統知識，應備具申請書及調查計畫書。 申請書之格式與應記載事項，由主管機關定之。 第一項之調查計畫書應記載下列事項： 一、調查目的。 二、調查地、調查之對象、調查進行之期間與方式。 三、擬蒐集之生物或非生物材料。 四、預期調查成果及其用途。</p> | <p>一、關於申請調查所需要之文件，參考安地斯組織第 391 號決議、哥斯大黎加「生物多樣性法」等立法例。本法參照上述規定，僅明文要求申請人出具申請書表明申請之意願，並以調查計畫書說明其所欲從事之調查活動相關內容細節，以做為原住民族或部落審核之依據。 二、申請書之格式與應記載事項，純屬主管機關作業上考量，故於第二項明文授權由主管機關定之。 三、調查計畫書乃原住民族或部落審核之重要依據，應揭露關於調查活動之各種細節。本法列舉四款較為重要之項目</p> |

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| 五、定期報告及結案報告之日期。 | 作為調查計畫書之應記載事項。爰規定於第三項。 |
| <p>第二十條（使用申請文件） 申請使用傳統知識，應備具申請書及使用計畫書。 申請書之格式與應記載事項，由主管機關定之。 第一項之使用計畫書應記載下列事項： 一、使用之傳統知識。 二、使用目的。 三、使用地、使用進行之期間與方式。 四、預期使用成果及其用途。 五、定期報告及結案報告之日期。 具商業目的之使用計畫，除提出第一項之文件外，並應備具商業使用說明書及利益分享方式。</p> | <p>一、關於申請使用所需要之文件，本法明文要求申請人出具申請書表明申請之意願，並以使用計畫書說明其所欲從事之使用傳統知識相關內容細節，以做為原住民族或部落審核之依據。 二、申請書之格式與應記載事項，純屬主管機關作業上考量，故於第二項明文授權由主管機關定之。 三、使用計畫書乃原住民族或部落審核之重要依據，應揭露關於使用活動之各種細節。本法列舉五款較為重要之項目作為調查計畫書之應記載事項。爰規定於第三項。 四、於具商業目的之使用計畫，配合利益分享之原則，宜於申請時提出商業使用說明書以及利益分享方式。爰規定於第四項。參考祕魯 27811 號法律第七條。</p> |
| <p>第二十一條（調查或使用契約內容之協議） 調查或使用契約之內容，由原住民族或部落與申請人協議決定之。 主管機關應協助原住民族或部落進行前項之協議。 具商業目的之使用，其契約內容應包含利益分享條款。 原住民族或部落得遴選代表協商契約之內容。</p> | <p>一、根據契約自由原則，原住民族會議與申請人應經由充分協議以達成契約內容之共識。爰規定第一項。 二、原住民族或部落會議與申請人協議之進行，於訂立契約之技術事項主管機關應主動協助進行。參考生物多樣性公約之 UNEP/CBD/WG8J/4/7 文件。參照巴拿馬第二十條及行政命令第二條第十三項、行政命令第十七條；菲律賓 Community Intellectual Rights Protection Act 第六條。爰規定第二項。 三、具有商業目的之使用，在相關契約內容應包含利益分享條款，以期能保障原住民族或部落的權益。參考祕魯 27811 號法律第七條。爰規定於第三項。 四、原住民族或部落得自治，經由部落會議遴選適任代表參與協商契約之內容，原住民族或部落之最後決定權，仍歸於原住民族會議或部落會議。爰規定第四項。</p> |
| 第二十二條（訂約時應考慮之原則） | 一、原住民生活相關開發活動進行時應該評估文化、環境和社會影響。參考生物多樣性公約中 |

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| <p>原住民族或部落於訂立契約時，應評估所申請之調查或使用計畫對原住民傳統生活、文化、社會、環境，以及其他對部落權益可能之影響。 主管機關應協助原住民族或部落進行前項之影響評估。</p> | <p>UNEP/CBD/WG8J/4/5, 2004 年生物多樣性公約第七次會員大會所訂定之「Akwe : Kon 自願性準則」。 二、主管機關具有較充裕的資源，應主動提供協助以進行前項評估。</p> |
| <p>第二十三條 (利益分享之原則) 未公開之傳統知識經商業使用所得之直接或間接利益，應以合理公平之方式，由所屬之部落共同分享之。 前項利益之分享，得約定以金錢或非金錢之方式給付之。 以金錢方式給付利益者，得一次或分次給付之。 以非金錢方式給付利益者，得以提供資訊、技術、培訓或其他方式為之。</p> | <p>一、參考生物多樣性公約第十五條第八款，開發所獲得的利益，應與提供遺傳資源的締約國公平分享，爰作本條之規定。 二、利益分享可以包括：分享利潤、給付使用費、技術移轉、提供產品，以及進行人力資源能力建設等。參考巴西 2001 年 8 月 23 日第 N.2186-16 號臨時措施第 25 條。 三、從生物資源和相關傳統知識的獲得中預期可得利益的性質，大致可以分為兩類：金錢利益和非金錢利益。《波昂準則》附錄 II 中載有這兩者的提示性清單。由於在某些情況下直接向原住民族/部落給付金錢利益可能有所不便或不妥，因此可以考慮其他形式的利益。 CBD 8 (j) 第 4-7 會議中提到：獲得與利益分享安排應該考慮非金錢利益。這一類利益可以採取能力建設的形式，包括提供資訊、技術和培訓等，以扶植當地新行業的發展，並進而實現可持續經濟增長。</p> |
| <p>第二節 監督機制與民事救濟</p> | |
| <p>第二十四條 (傳統知識調查者之義務) 依本法申請調查傳統知識者，應依計畫內容按期向原住民族或部落提交調查報告。 前項調查報告應包含調查過程，與所調查結果之完整書面及影音記錄資料。</p> | <p>一、為使原住民族或部落得定期知悉調查之進度，申請調查者應定期提交報告，爰規定本條。 二、調查結果應記錄原住民或部落的意見。除了用書面表達，還應將調查結果透過錄影或錄音記錄下來以除去語言障礙的因素。參考生物多樣性公約 UNEP/CBD/WG8J/4/5, 「Akwe : Kon 自願性準則」規定。</p> |
| <p>第二十五條 (傳統知識使用者之義務) 依本法申請使用傳統知識者，應依計畫內容按期向原住民族或部落提交使用報告。 前項使用報告應包括傳統知識發表、出版或其他商業使用之完整資料。</p> | <p>一、為使原住民族或部落得定期知悉申請者之使用進度，申請使用者應定期提交報告，爰規定本條。 二、若使用的方式為發表或出版的形式，應該要有完整的資料，以供原住民或部落確保其傳統知識之正確被使用。</p> |

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| <p>第二十六條 (未經事先同意之再授權限制) 依本法申請使用傳統知識者，非經傳統知識所屬之原住民族或部落之同意，不得將其使用權讓與第三人。 違反前項規定之讓與行為，無效。</p> | <p>為保障傳統知識所屬之原住民族或部落，申請並得同意之傳統知識使用者，不得再將其使用權利轉讓予第三人。參照巴拿馬行政命令第二十二條、秘魯第三十三條、太平洋模範法第十一條。</p> |
| <p>第二十七條 (秘密性之維護) 原住民族或部落之成員，非經原住民族或部落同意，不得將未公開之傳統知識洩露或交付予該知識所屬之原住民族或部落以外之人。 違反前項規定者，應優先依原住民族或部落之規範或民事習慣處理之。 前項規範或民事習慣應由原住民族或部落送經主管機關核定之。 因職務或業務知悉未公開之傳統知識者，不得將之洩露或交付他人。</p> | <p>一、原住民族或部落之成員應認識到他人擬調查或使用皆須經過申請，由原住民族會議或部落會議同意、簽訂契約等步驟，才得以調查或使用其傳統知識，爰規定第一項。 二、原住民族或部落之成員違反第一項規定，致侵害原住民族或部落之權利者，依第二十九條規定應負民事責任。惟鑑於原住民族自律乃實施原住民族自治之基礎，法律規範應以扶持原住民族自律文化之延續與發展，故應以明文承認其自律規範之效力；此外，其成員是否將傳統知識洩漏或交付予部落以外之人，及其造成之影響或補救方式，原住民族或部落最為清楚，不宜逕由法院介入處理，故優先適用原住民族或部落之自律規範。若原住民族或部落尚未形成規範或民事習慣時，則可依第二十九條之規定尋求救濟。但為避免規範或民事習慣認定上之疑義，應先經主管機關核定。 三、因資料庫或因辦理申請業務而知悉未公開之傳統知識者，應該謹慎遵守第一項，不得將傳統知識未經同意而洩漏或交付於他人，參考太平洋區域保護傳統生態知識、創新及實施模範法第十一條。爰規定第三項。 四、因資料庫或因辦理申請業務而知悉未公開之傳統知識者，應該謹慎遵守第一項，不得將傳統知識未經同意而洩漏或交付於他人，參考太平洋區域保護傳統生態知識、創新及實施模範法第十一條。爰規定第四項。</p> |
| <p>第二十八條 (載明來源地) 依本法申請使用傳統知識並經開發者，於申請智慧財產權時，應事先經該傳統知識所屬原住民族或部落之同意，且於其申請書載明所使用傳統知識之來源地，並</p> | <p>一、為貫徹本法尊重原住民族之權益，防止傳統知識被剽竊之原意，本條要求智財權申請時，應為揭露傳統知識來源地與合法取得證明，以遏止非法取得傳統知識之行為，此乃是傳統知識有效管理之必要措施。</p> |

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| 提出與該原住民族或部落訂定之契約。 | 二、本條所謂智慧財產權，包括植物品種權、專利、商標等，其權利之申請各有其要件，已依法為各主管機關審核申請時之所依據，本條並未加以涉及。各主管機關審核時，自不必就本條加以處理。 |
| 第二十九條（民事救濟） 違反本法第十一條、第十二條、第十三條、第十八條、第二十三條及第二十七條之規定，致侵害原住民族或部落之權利者，原住民族或部落得請求損害賠償，並得請求排除其侵害；有侵害之虞者，得請求防止之。 | 基於傳統知識之抽象特性，及傳統知識之權利歸屬於原住民族或部落，因此違反本法第十一條、第十二條、第十三條、第十八條、第二十三條及第二十七條之規定而侵害該原住民族或部落之傳統知識權利者，應賦予該原住民族或部落有向侵害人請求損害賠償、排除侵害與請求防止侵害之權利，爰制訂本條規定。 |
| 第五章 延續及創新傳統知識之方法 | |
| 第三十條（傳統知識之教育） 主管機關應提供適當之教育與培訓，促進原住民對傳統知識及其保護制度重要性之瞭解，以達成傳統知識保護、永續利用及創新之目的。 各級各類學校相關課程及教材之設計，應提供學生學習傳統知識之機會。在原住民族地區之課程內容應與部落生活相結合，並應包括校外教學。 前項課程屬於原住民族教育法第三條第三項所稱之民族教育事項，其規劃應符合部落自主之精神。 原住民族之各級各類學校或其他推廣教育機構為實施前二項傳統知識之教學或培訓，得由部落會議推薦原住民族耆老或具相關專長人士教導之。 主管機關應訂定辦法獎勵前項之耆老或具相關專長人士。 | 一、傳統知識之保護，首重其傳承，因此適當之教育及培訓相關人才乃為必要，故課與主管機關提供適當教育與培訓之義務。爰參考「Akwe : Kon 自願性準則」，規定於第一項。 二、為加強一般國民對傳統知識之認識，因此參酌生物多樣性公約會議 UNEP/CBD/ COP/8/14 文件，要求學校相關之課程及教材應酌情納入傳統知識，以提供學生學習傳統知識之機會。 三、有鑑於傳統知識無法全部以文字傳遞，且考慮傳統知識與環境共生共榮之本質，因此在原住民地區，特別引用原住民族教育法第三條之精神，強調部落應主導傳統知識相關課程之設計，並加強校外之生活教育。 四、傳統知識的傳承仰賴口耳相傳，耆老或具相關專長原住民之教導，較諸課本更為有效。爰於第四項規定由部落會議推薦適當之傳統知識傳承師；為表示對傳承師之尊重，第五項規定主管機關訂立相關之獎勵辦法。 |
| 第三十一條（輔導、獎勵與補助） 主管機關應輔導、獎勵與補助原住民維持其基於生物多樣性知識之傳統生活。 前項輔導、獎勵與補助之措施，由主管機關另以辦法訂之。 | 保護傳統知識，除在教育上設計傳承機制，使之得以相傳以外，原住民維持慣習生活方式，使生活與環境之互動得以繼續，更是傳統知識創新知之所賴。然而現今依慣習之生活方式，已無法維持生計，因此本條明訂主管機關輔導、獎勵與補助之義務。 |
| 第六章 罰 則 | |

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| <p>第三十二條 (未經同意而取得或主張權利及以不正當方式使用傳統知識之處罰)</p> <p>違反第十一條規定，未徵得傳統知識所屬之原住民族或部落之同意，就該傳統知識取得或主張任何權利，或以扭曲、污衊或其他不正當方式使用傳統知識，而損害原住民族或部落之聲譽或尊嚴者，處新臺幣二十萬元以上一百萬元以下罰鍰。</p> | <p>基於原住民族或部落對其傳統知識發展與使用之關係，以及為維護原住民族或部落之聲譽及尊嚴，爰制定違反本法第十一條規定者，應予處罰。</p> |
| <p>第三十三條 (未經同意而調查或使用之處罰)</p> <p>違反第十三條或第十八條規定未事先徵得原住民族或部落之同意而調查、取得、揭露或使用未公開之傳統知識者，得限期命其停止，並得處新臺幣二十萬元以上一百萬元以下罰鍰；屆期仍不停止者，得按次處罰。</p> | <p>傳統知識之權利歸屬於發展該知識之原住民族或部落，為保障原住民族或部落之權益，故未徵得原住民族或部落之同意訂定契約而擅自對傳統知識進行調查、取得、揭露或使用者，得限期命其停止，並得處以罰鍰。屆期仍不停止者，得按次處罰。</p> |
| <p>第三十四條 (逾期未改正之處罰)</p> <p>違反第二十四條或第二十五條之規定，未於期限內提交調查或使用報告者，主管機關應限期命其繳交，屆期未繳交者，處新臺幣六萬元以上三十萬元以下之罰鍰。</p> | <p>違反本法第二十四條或第二十五條未為報告之規定，可能使該原住民族或部落處於資訊不對等之地位，不利其對傳統知識之管理與保存，爰規定本條規範其處罰。</p> |
| <p>第三十五條 (違反職務上保密義務之處罰)</p> <p>違反第二十七條第四項規定，因職務或業務知悉未公開之傳統知識而洩露或交付之者，處新臺幣六十萬元以上三百萬元以下罰鍰。</p> <p>前項行為人為原住民族或部落之成員時，除前項處罰外，並依第二十七條第二項之規定處理之。</p> | <p>一、為避免原住民族或部落未公開之傳統知識被不當洩露，故規定違反者應予處罰。</p> <p>二、原住民族或部落之成員，因職務或業務知悉未公開之傳統知識而洩漏或交付他人者，為尊重原住民族及部落自治，除依本條第一項規定處罰外，並得依第二十七條第二項之規定處理。</p> |
| <p>第三十六條 (違反載明來源地規定之處罰)</p> <p>違反第二十八條規定，未於智慧財產權申請時載明傳統知識之來源地者，處新臺幣十萬元以上五十萬元以下罰鍰。</p> | <p>為維護傳統知識之完整、避免被盜用，以及便於專利審查機關審查相關專利，乃課予專利申請人有說明其所使用相關傳統知識來源地之義務，若有違反應予處罰。</p> |
| <p>第七章 附 則</p> | |
| <p>第三十七條 (提撥罰鍰納入原住民族發展基金)</p> | <p>為維護原住民族對傳統知識之權益，故參酌原住民族基本法第十八條、第二十</p> |

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| 依本章所得之罰鍰，應提撥百分之五十納入原住民族綜合發展基金，作為協助原住民族或部落維護其傳統知識之經費。 | 一條之意旨，依本章所得之罰鍰，應提撥一定金額納入原住民族綜合發展基金，作為協助原住民族或部落維護其傳統知識之經費，以促進傳統生物多樣性知識之永續利用與創新。 |
| 第三十八條（施行細則） 本法施行細則，由主管機關定之。 | 明定本法施行細則，由主管機關定之。 |
| 第三十九條（施行日） 本法自公布日施行。 | 明定本法之施行日期。 |

ANNEX 2: Summary of the Traditional Knowledge Bill

This bill concerns the protection of traditional biodiverse knowledge of Indigenous Peoples. In 2005, the Basic Law of Indigenous Peoples Article 13 clearly stated: the government shall protect the traditional biodiversity knowledge and intellectual property and promote its development. This bill is based on the Basic Law from 2005.

The Traditional Knowledge for Indigenous Peoples is based on the Aborigines literature, art, science, performance, invention, scientific discovery, trademark, and design. It is a collective term for invention and creation based on traditional intellectual activities in the field of industry, science, literature, or art. Based on the traits of Aboriginal knowledge, the above-mentioned various types of knowledge should not be forced into classification. However, because of the literary and artistic creations such as design, marks, name, or symbol, it has been regulated in “The Law of Aboriginal Traditional Knowledge Creation Protection,” this draft law is therefore developed for the protection of traditional biodiversity-related knowledge of Aborigines (hereinafter referred to as Traditional Knowledge).

This bill is divided into seven chapters and thirty-nine articles. In addition to the governmental-established agencies, this draft imposes regulation over the rights and content of the rights, the Traditional Knowledge base of the Indigenous peoples, the investigation and use of undisclosed Traditional Knowledge, the relationship between Traditional Knowledge and intellectual property rights, the continuation and innovation of Traditional Knowledge, and the relief of infringement.

The first chapter states the legislative purpose of this law (Article 1), and then defines traditional biodiversity knowledge, public knowledge, tribal meetings, etc. (Article 3) In addition, this law stipulates the Council of Indigenous People to be the authority of the law, (Article 2), and it shall investigate and administer, organize, preserve, and assist the Indigenous Peoples or tribes in developing and utilizing their Traditional Knowledge. (Article 4) And, on the identification where the Traditional Knowledge belongs, rights and disputes over Traditional Knowledge between Aboriginal residences, such as ethnic or tribal matters, are clearly regulated under dispute

resolution mechanisms for mediation (Article 5), as well as the validity of the mediation (Articles 7, 8, and 9) and their effectiveness. The due process procedure (Article 6) shall be prescribed to effectively assist the tribes of the Indigenous Peoples in the protection of Traditional Knowledge.

The second chapter stipulates that the subject of Traditional Knowledge rights belongs to the Indigenous peoples or their tribes that generate or develop the Traditional Knowledge, and the right to exercise is in the Aboriginal or tribal meeting (Article 10). Article 14 provides for three situations in which traditional intellectual rights are not available. As for the content of rights, Article 11 is intended to prevent others from obtaining or claiming rights without consent, or to use Traditional Knowledge in an improper manner. Articles 12 and 13 distinguish Traditional Knowledge into two categories—public and unpublished. The rights of the two types of knowledge are different. The published Traditional Knowledge is allowed to be used by others according to the principle of intellectual property rights. However, if it is for a business purpose, and the Traditional Knowledge is derived from the Indigenous Peoples or tribes, the aborigines have the right to demand payment (Article 12). For unpublished Traditional Knowledge, others must first agree and sign a contract before they can use or expose it and have the right to claim the source of the relevant Traditional Knowledge (Article 13).

The fourth chapter discusses how to process and regulate outside people to investigate and use unpublished (undisclosed) Traditional Knowledge. This chapter is divided between the consent of investigation and use of unpublished Traditional Knowledge, and the supervision mechanism of investigation and use and the civil relief. Article 17 is the basic principle of applying for the use of unpublished Traditional Knowledge; Articles 18 to 22 regulate the process of how outside people can apply and the document needed; Article 21 sets the guideline of the content of contract and how to reach a contractual agreement; Articles 22 and 23 further regulate the principle of the impact of influence of the content of the contract and the equal share of profit. Articles 24 and ensure the applicant's compliance with the procedure/mechanism after they reach an agreement; (Article 26) provides the right of use of Traditional Knowledge and how to transfer it to a third party; Article 27 identifies how to prevent to leakage of the owner of unpublished/undisclosed knowledge. Article 29 provides for civil remedies and claims for damages for the infringement of the rights of the Indigenous Peoples or tribes.

The published/disclosed Traditional Knowledge, because of the usage of other people, is generally recommended to use “negative protection,” obliging others not to act without prior consent. This prevents others from maliciously applying for intellectual property and stealing, such as applying for a patent. Therefore, it is necessary to establish a database to facilitate screening and to avoid accidentally passing patent applications of malicious stealing. Articles 15 and 16 of Chapter 3 regulate the database. Article 15 instruct the competent authority to set up a national database to organize knowledge that has been made public or undisclosed but is intended to be disclosed; and if approved, or if the indigenous people

still do not intend to disclose it, they may be deposited the knowledge in the tribe's self-managed database. Article 16 requires the competent authority to establish regulations for matters such as the operation of the database. This Act deals with the disclosure of Traditional Knowledge or its derivative knowledge when applying for intellectual property rights. (Chapter 4, Article 28).

Comparing Chapters 2 to 4, Chapter 5 aims to establish a legal system to maintain the knowledge innovation and inheritance. Article 13 requires the administration to provide appropriate education and training to provide opportunities to learn Traditional Knowledge. To respect the basic human rights of all ethnic groups and tribes, this draft law does not intend to require the Indigenous Peoples to restore traditional living custom, and Article 31 encourages people to do so.

Chapter 6 provides for the implementation of the rights that are granted to the Indigenous Peoples to their Traditional Knowledge. For violations of the provisions of this draft law, infringement of the rights of the Indigenous Peoples or tribes, Articles 32 to 34. Article 36 sets penalties for the punishment of those who violate the provisions of this draft law. And in Chapter 7 "Supplementary Provisions," it is clearly stated that the penalty will be included in the Indigenous Peoples Development Fund (Article 37).

The Protection of Traditional Biodiverse Knowledge of Indigenous Peoples Act

| 條文 | 說明 |
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| Chapter 1 | |
| Article 1 provides purpose of the law. | 本法目的乃是根據憲法增修條文第十條第十一項：「國家肯定多元文化，並積極維護發展原住民族語言及文化」及原住民族基本法第十三條，並參考生物多樣性公約（Convention on Biological Diversity）第八條j款之規定及世界智慧財產權組織（World Intellectual Property Organization, WIPO）之討論，以保護傳統生物多樣性知識為出發點，並維護原住民族對其傳統知識之權益，進而達成傳統生物多樣性知識永續利用與開發之目的，而加以制定。 |
| Article 2 provides that the authority is the Council of Indigenous Peoples. | 本會主管全國原住民族事務，且綜合管理原住民族或部落之傳統生物多樣性知識，爰明定本會為本法之主管機關。 |
| Article 3 provides the definitions of terms. | 一、由於本法之用詞有其特殊內涵及用法，故先行定義以求解釋上之一致。 |

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| | <p>二、第一項第一款有關傳統生物多樣性知識之定義，係參考太平洋區域保護傳統生態知識、創新及實施模範法（Model Law For The Protection of Traditional Ecological Knowledge, Innovations and Practices）中對於傳統生態知識之規定，並參考 WIPO 文件 WIPO/GRTKF/IC/7/9、WIPO/GRTKF/IC/9/5、WIPO/GRTKF/IC/9/6、WIPO/GRTKF/IC/9/INF/5 及巴拿馬第 20 號法律（Regimen Especial de Propiedad Intelectual sobre los Derechos Colectivos de los Pueblos Indigenas）等立法例。以狩獵為例，傳統知識包括(一)原住民對動物生理與生態行為之認識，(二)對動物出沒環境之認識，(三)決定獵區、獵季以及獵捕方法，以及(四)對陷阱製作所用植物及方法之認識等。</p> <p>三、第一項第二款有關已公開之定義，係參考專利法第二十二條第一項之規定。</p> <p>四、為凝聚原住民族之集體意思，以確保原住民族或部落之權益，爰於第一項第三款與第四款規定原住民族會議與部落會議為原住民族或部落之集體意思之形成機關。</p> <p>五、至於本法中原住民族或部落之定義參見原住民族基本法第二條之規定。</p> <p>六、關於原住民族會議及部落會議之設置問題，研究單位認為，在現今關於原住民族自治之組織問題尚未確立之前，本法案採同時並存方式較為周延。</p> |
| <p>Article 4 details the responsibility of authority.</p> | <p>一、有鑑於原住民族或部落之傳統知識逐漸流失與散佚，故明訂主管機關之權責在於應協助調查、整理、保存及開發利用相關傳統知識。</p> <p>二、為避免原住民族或部落於依本法所賦予之權益受侵害時，無法負擔龐大訴訟費用，致使相關權益無法主張，形同虛設，故明訂主管機關具協助維護之義務。</p> |

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| <p>Article 5 provides for mediation.</p> | <p>一、傳統知識歸屬之認定、權利金及涉及原住民族或部落間關於傳統知識等爭議事項，宜由主管機關所應遴聘（派）學者、專家、公正人士及原住民族之代表，以合議制方式之進行審議或調解，以臻客觀公正，貫徹原住民族自主發展之保障。</p> <p>二、原住民族傳統知識紛爭事件，乃涉及原住民族族內傳統與其習慣。調解工作應指向客觀公正，並符合原住民族之習慣法理，以貫徹原住民族實行自治之理念。惟原住民族傳統知識紛爭事件或有涉及不同部落、原住民族之情形，非可一概論之。故第二項規定主管機關應視相關紛爭事件之類型與所涉之紛爭當事人，訂定相關審議及調解之程序及其他應遵行事項之辦法，並依此遴聘（派）一定比例之原住民族代表，以符需要。</p> |
| <p>Article 6 deals with the review of mediation. The competent authority shall, within seven days after the establishment of the mediation, send the mediation book to the competent court for review.</p> | <p>一、參考著作權法第八十二條之一第一項，於本條第一項規定主管機關於調解成立後，應於七日內將調解書送請管轄法院審核。</p> <p>二、依原住民基本法之立法意旨，保障原住民族自主發展，實行原住民族自治，原住民族傳統知識紛爭事件之處理應就原住民族之習慣法理與以高度尊重，爰參考著作權法第八十二條之一，於本條第二項規定法院就與法令、無牴觸及非不能強制執行之調解書之審核。</p> <p>三、第三項規定法院就調解內容未予核定時之處理。</p> |
| <p>Article 7 deals with the effect of mediation. After the mediation has been approved by the court, the parties may not sue for the same matter. The civil mediation approved by the court in the preceding paragraph has the same effect as the civil judgment, and the execution fee is temporarily waived.</p> | <p>一、按原住民族傳統知識紛爭事件具專業性、社會性與原住民族高度習慣性特徵，主管機關依本法第五條所遴聘（派）之審議及調解團體均為專業人員、原住民族代表所組成，其調解除可免除雙方當事人訴訟程序之勞費，並可紓減司法機關案件負荷。爰參考著作權法第八十二條之二、耕地三七五減租條例部分條文修正草案第二十六條，於第一項規定，調解經法院核定後，當事人就該事件不得再行起訴、告訴或自訴，並於第二項規定經法院核定之調解與確定判決有同一之效力，其調解書並具有執行名義。</p> |

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| | <p>二、強制執行事件的執行費可能係由債務人負擔，為避免造成侵害傳統知識者，或是違反本法規定之行為人因而獲利之虞，且為減輕原住民族或部落之負擔，故本條第二項規定當事人於聲請強制執行時暫免徵收執行費，逕先執行以優先受償，待執行債務人有賸餘財產者，再行收取。</p> |
| <p>Article 8 deals with the effect of the establishment of mediation. If the mediation is established and approved by the court before the judgment is determined, it is deemed to be withdrawn when the mediation is established.</p> | <p>參考著作權法第八十二條之三，於本條規定民事訴訟判決確定前，經法院核定之調解，具有視為於調解成立時撤回起訴之效力。</p> |
| <p>Article 9 provides for prosecution of revocation of mediation. The party concerned shall file it within 30 days after the service of the mediation approved by the court.</p> | <p>一、參考著作權法第八十二條之四第一項，於第一項規定經法院核定之民事調解有無效或得撤銷之原因之處 理。 二、參考著作權法第八十二條之四第二項，第二項規定提起宣告調解無效或撤銷調解之訴之期間。</p> |
| <p>Chapter 2 deals with rights and its content.</p> | |
| <p>Article 10 provides where the right of Traditional Knowledge belongs.</p> | <p>一、傳統知識之權利，屬於產生或發展該傳統知識之原住民族或其部落所有，爰參考秘魯第 27811 號法律第一條、第十條，巴西第 2186-16 暫行條例第八條、第九條規定之。 二、原住民族或部落之同意權，應由代表原住民族或部落集體意思形成機關之原住民會議或部落會議行使之。</p> |
| <p>Article 11 prevents other people from acquiring or claiming the right of Traditional Knowledge in an improper way. Consent must be first obtained, and Traditional Knowledge cannot be used in an improper way that damage the reputation of the tribes.</p> | <p>一、基於憲法增修條文第十條第十一項規定國家肯定多元文化，並積極維護發展原住民族文化，故應對原住民族擁有之傳統知識予以保障，以彰顯原住民族之文化權。 二、為尊重原住民族或部落，賦予傳統知識所屬之原住民族或部落權利，以防止他人未經原住民族或部落之同意對傳統知識取得或主張任何權利。 三、本法允許他人對原住民族傳統知識為合理方式之使用，但若該使用方式足以損害原住民族或部落之聲譽或尊嚴者，應予以禁止。</p> |

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| <p>Article 12 (已公開傳統知識之來源表彰權及權利金請求權) In the case of published Traditional Knowledge, in order to recognize in commercial use that the Traditional Knowledge originated from an Aboriginal or tribal person, the consent of the Indigenous or tribe should be obtained in advance and appropriate royalties should be paid.</p> | <p>一、本法將傳統知識區分為已公開及未公開之傳統知識，並分別賦予不同程度之保護。 二、已公開之傳統知識屬公共領域之知識，原則上任何人均得使用，惟使用之際若表彰該知識所屬之原住民族或部落之名稱，以獲取商業上之利益者，應事先徵得該原住民族或部落之同意，並給付適當之權利金，以示尊重。 三、權利金之金額，原則上由原住民族或部落與傳統知識之使用人自行協議，如有協議不成之情事，則由主管機關調解之。</p> |
| <p>Article 13 deals with the leakage, acquisition and usage of unpublished Traditional Knowledge is controlled. Traditional Knowledge cannot be used without consent.</p> | <p>一、傳統知識屬於原住民族或其部落所有，為保障原住民族之傳統知識及促進其永續發展，故參考 WIPO/GRTKF/IC/7/6、WIPO/GRTKF/IC/9/INF/5 文件，及秘魯第 27811 號法律第四十二條、巴西第 2186-16 暫行條例第九條之規定，欲揭露、取得、使用未公開之傳統知識，必須經由該傳統知識所屬原住民族或部落之同意及簽訂契約始得為之。 二、針對未公開之傳統知識，賦予其得請求表彰來源之權利。參考巴西第 2186-16 暫行條例第九條之規定予以定之。</p> |
| <p>Article 14 provides exceptions. Indigenous Peoples have right to the Traditional Knowledge, excluding: the exchange of Traditional Knowledge between different tribes in order to preserve and promote Traditional Knowledge and traditional innovation the nation uses it for nonprofit purpose under emergency circumstances or for public welfare.</p> | <p>一、傳統知識之權利範圍，應考量相關因素予以限縮。 二、為尊重原住民族或部落間關於傳統知識之傳統交換行為，參酌 WIPO/GRTKF/IC/7/6、WIPO/GRTKF/IC/9/INF/5 文件，及巴拿馬第十二號行政命令第十一條、秘魯第 27811 號法律第四條、巴西第 2186-16 暫行條例第四條等規定，將其排除於權利範圍之外。 三、為促進傳統知識之永續利用及創新，故為保存、發展傳統知識及促進傳統創新所採取之必要措施，參酌 WIPO/GRTKF/IC/7/6、WIPO/GRTKF/IC/9/INF/5 文件，予以排除於權利範圍之外。 四、將涉及公共利益之非營利使用行為排除於權利範圍之外，參酌 WIPO/GRTKF/IC/7/6、</p> |

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| | WIPO/GRTKF/IC/9/INF/5 文件予以定之。 |
| Chapter 3 deals with the database of Traditional Knowledge of Indigenous peoples | |
| Article 15 deals with applicants. The Indigenous People or tribes to which Traditional Knowledge belongs may be registered in the national database of Traditional Knowledge, including those that are not publicly disclosed but intended to be published. the unpublished parts may be registered in the Traditional Knowledge tribal database. | <p>一、為維護及保存傳統知識，故參考生物多樣性公約（Convention on Biological Diversity）及太平洋區域傳統生態知識、創新及實施之保護模範法（Model Law For The Protection of Traditional Ecological Knowledge, Innovations and Practices）之規定，建立國家與地方部落兩級制資料庫。</p> <p>二、由傳統知識所屬之原住民族或部落主動登記。原住民族傳統知識可分為已公開、未公開而可公開、以及未公開而不擬公開等三類，前兩類可由主管機關設置國家資料庫加以蒐集紀錄；而部落資料庫由主管機關協助部落會議成立。</p> <p>三、登記於部落資料庫之傳統知識並不公開，並應予以保密，但可以將其條目列於國家資料庫，以供搜尋。</p> |
| Article 16 provides for the establishment of a database. The establishment, operation, management, acquisition, and confidentiality of the Traditional Knowledge database of Indigenous peoples shall be determined by the competent authority. | 授權主管機關另以辦法規範原住民族傳統知識資料庫之建置及運作、管理、取得及保密原則。 |
| Chapter 4 provides for the investigation and usage of unpublished Traditional Knowledge | |
| Section 1 mandates consent of investigation and use. | |
| Article 17 provides for the basic principle of using unpublished/undisclosed Traditional Knowledge. The investigation or use of unpublished Traditional Knowledge shall be in accordance with the principles of the rights of indigenous peoples, the public | 調查或使用應符合原住民權益，公共利益及永續發展，為傳統知識調查或使用之最高原則。參酌生物多樣性公約第十四條。 |

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| interest and sustainable development. | |
| Article 18 deals with the application for investigating and using unpublished Traditional Knowledge. If anyone needs to use or investigate unpublished Traditional Knowledge, acquiring consent from the tribe is required. | 一、為徵得原住民族或部落的事先同意，應提出申請並訂定契約，參照生物多樣性公約 UNEP/CBD/WG8J/4/6 與原住民族和部落參與決策的過程以及交流機制的建設。 二、原住民族會議與部落會議為原住民族與部落之集體意思形成機關，故欲調查或使用未公開之傳統知識，應向原住民族會議或部落會議提出申請，並經原住民會議或部落會議之同意。 |
| Article 19 provides for the investigative document. The requirement for investigating purpose of investigating the location, object, and mode of investigating biological or non-biological materials to be collected. expected survey results and their uses. the date of the periodic report and the closing report. | 一、關於申請調查所需要之文件，參考安地斯組織第 391 號決議、哥斯大黎加「生物多樣性法」等立法例。本法參照上述規定，僅明文要求申請人出具申請書表明申請之意願，並以調查計畫書說明其所欲從事之調查活動相關內容細節，以做為原住民族或部落審核之依據。 二、申請書之格式與應記載事項，純屬主管機關作業上考量，故於第二項明文授權由主管機關定之。 三、調查計畫書乃原住民族或部落審核之重要依據，應揭露關於調查活動之各種細節。本法列舉四款較為重要之項目作為調查計畫書之應記載事項。爰規定於第三項。 |
| Article 20 stipulates the manner by which to use the document. Following items needed to be noted: the Traditional Knowledge that is being used the purpose of using it, the location, object and way to using it the expected use results. 5. The date of the periodic report and the closing report. If it was used for business purpose, additional business instruction and profit-sharing instruction is needed. | 一、關於申請使用所需要之文件，本法明文要求申請人出具申請書表明申請之意願，並以使用計畫書說明其所欲從事之使用傳統知識相關內容細節，以做為原住民族或部落審核之依據。 二、申請書之格式與應記載事項，純屬主管機關作業上考量，故於第二項明文授權由主管機關定之。 三、使用計畫書乃原住民族或部落審核之重要依據，應揭露關於使用活動之各種細節。本法列舉五款較為重要之項目作為調查計畫書之應記載事項。爰規定於第三項。 四、於具商業目的之使用計畫，配合利益分享之原則，宜於申請時提出商 |

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| | 業使用說明書以及利益分享方式。爰規定於第四項。參考祕魯 27811 號法律第七條。 |
| <p>Article 21 provides for the agreement to investigate and use Traditional Knowledge. Authority should aid Indigenous peoples to prenegotiate the agreement. If it is used for business purpose, the agreement should include profit sharing sections. Indigenous peoples and tribes select their representatives to negotiate the content of the agreement.</p> | <p>一、根據契約自由原則，原住民族會議與申請人應經由充分協議以達成契約內容之共識。爰規定第一項。</p> <p>二、原住民族或部落會議與申請人協議之進行，於訂立契約之技術事項主管機關應主動協助進行。參考生物多樣性公約之 UNEP/CBD/WG8J/4/7 文件。參照巴拿馬第二十條及行政命令第二條第十三項、行政命令第十七條；菲律賓 Community Intellectual Rights Protection Act 第六條。爰規定第二項。</p> <p>三、具有商業目的之使用，在相關契約內容應包含利益分享條款，以期能保障原住民族或部落的權益。參考祕魯 27811 號法律第七條。爰規定於第三項。</p> <p>四、原住民族或部落得自治，經由部落會議遴選適任代表參與協商契約之內容，原住民族或部落之最後決定權，仍歸於原住民族會議或部落會議。爰規定第四項。</p> |
| <p>Article 22 provides the principle to consider when to enter into an agreement. The authorities should help Indigenous peoples and tribes to evaluate the impact on their life, cultural, environment, and society before entering into agreement.</p> | <p>一、原住民生活相關開發活動進行時應該評估文化、環境和社會影響。參考生物多樣性公約中 UNEP/CBD/WG8J/4/5, 2004 年生物多樣性公約第七次會員大會所訂定之「Akwé : Kon 自願性準則」。</p> <p>二、主管機關具有較充裕的資源，應主動提供協助以進行前項評估。</p> |
| <p>Article 23 provides a profit-sharing principle. The profit from using unpublished Traditional Knowledge should be distributed equally within the tribes who own the Traditional Knowledge.</p> | <p>一、參考生物多樣性公約第十五條第八款，開發所獲得的利益，應與提供遺傳資源的締約國公平分享，爰作本條之規定。</p> <p>二、利益分享可以包括：分享利潤、給付使用費、技術移轉、提供產品，以及進行人力資源能力建設等。參考巴西 2001 年 8 月 23 日第 N.2186-16 號臨時措施第 25 條。</p> <p>三、從生物資源和相關傳統知識的獲得中預期可得利益的性質，大致可以分為兩類：金錢利益和非金錢利益。《波昂準則》附錄 II 中載有這兩者</p> |

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| | <p>的提示性清單。由於在某些情況下直接向原住民族/部落給付金錢利益可能有所不便或不妥，因此可以考慮其他形式的利益。CBD 8 (j) 第 4-7 會議中提到：獲得與利益分享安排應該考慮非金錢利益。這一類利益可以採取能力建設的形式，包括提供資訊、技術和培訓等，以扶植當地新行業的發展，並進而實現可持續經濟增長。</p> |
| Section 2 provides Supervision Mechanism and Civil Relief | |
| <p>Article 24 enshrines the duty of the investigator of Traditional Knowledge. The applicant who use Traditional Knowledge in accordance with this law shall file report of investigation to the tribes where the Traditional Knowledge belongs.</p> | <p>一、為使原住民族或部落得定期知悉調查之進度，申請調查者應定期提交報告，爰規定本條。 二、調查結果應記錄原住民或部落的意見。除了用書面表達，還應將調查結果透過錄影或錄音記錄下來以除去語言障礙的因素。參考生物多樣性公約 UNEP/ CBD/WG8J/4 /5, 「Akwe : Kon 自願性準則」規定。</p> |
| <p>Article 25 provides the duty of using Traditional Knowledge. The applicant who use Traditional Knowledge in accordance with this law shall file report to the tribes where the Traditional Knowledge belongs.</p> | <p>一、為使原住民族或部落得定期知悉申請者之使用進度，申請使用者應定期提交報告，爰規定本條。 二、若使用的方式為發表或出版的形式，應該要有完整的資料，以供原住民或部落確保其傳統知識之正確被使用。</p> |
| <p>Article 26 deals with the use of TK without prior consent. The person who acquire the Traditional Knowledge based on this law cannot transfer the right to use to any third party.</p> | <p>為保障傳統知識所屬之原住民族或部落，申請並得同意之傳統知識使用者，不得再將其使用權利轉讓予第三人。參照巴拿馬行政命令第二十二條、秘魯第三十三條、太平洋模範法第十一條。</p> |
| <p>Article 27 provides for confidentiality. The member of the Indigenous people and tribe cannot leak the Traditional Knowledge to any people outside the tribe without the tribe's consent. Any person violates this rule shall be treated preferentially according to the norms or civil customs of the Indigenous peoples or tribes.</p> | <p>一、原住民族或部落之成員應認識到他人擬調查或使用皆須經過申請，由原住民族會議或部落會議同意、簽訂契約等步驟，才得以調查或使用其傳統知識，爰規定第一項。 二、原住民族或部落之成員違反第一項規定，致侵害原住民族或部落之權利者，依第二十九條規定應負民事責任。惟鑑於原住民族自律乃實施原住民族自治之基礎，法律規範應以扶持</p> |

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| | <p>原住民族自律文化之延續與發展，故應以明文承認其自律規範之效力；此外，其成員是否將傳統知識洩漏或交付予部落以外之人，及其造成之影響或補救方式，原住民族或部落最為清楚，不宜逕由法院介入處理，故優先適用原住民族或部落之自律規範。若原住民族或部落尚未形成規範或民事習慣時，則可依第二十九條之規定尋求救濟。但為避免規範或民事習慣認定上之疑義，應先經主管機關核定。</p> <p>三、因資料庫或因辦理申請業務而知悉未公開之傳統知識者，應該謹慎遵守第一項，不得將傳統知識未經同意而洩漏或交付於他人，參考太平洋區域保護傳統生態知識、創新及實施模範法第十一條。爰規定第三項。</p> <p>四、因資料庫或因辦理申請業務而知悉未公開之傳統知識者，應該謹慎遵守第一項，不得將傳統知識未經同意而洩漏或交付於他人，參考太平洋區域保護傳統生態知識、創新及實施模範法第十一條。爰規定第四項。</p> |
| <p>Article 28 identifies the sources. Applicants applying for the use of traditional knowledge in accordance with this Law and applying for intellectual property rights shall, prior to the application for intellectual property rights, obtain the consent of the indigenous nationality or tribe to which the Traditional Knowledge belongs, and indicate in their application the source of the Traditional Knowledge used</p> | <p>一、為貫徹本法尊重原住民族之權益，防止傳統知識被剽竊之原意，本條要求智財權申請時，應為揭露傳統知識來源地與合法取得證明，以遏止非法取得傳統知識之行為，此乃是傳統知識有效管理之必要措施。</p> <p>二、本條所謂智慧財產權，包括植物品種權、專利、商標等，其權利之申請各有其要件，已依法為各主管機關審核申請時之所依據，本條並未加以涉及。各主管機關審核時，自不必就本條加以處理。</p> |
| <p>Article 29 provides for civil remedies. Violation of the provisions of Articles 11, 12, 13, 18, 23, and 27 of this Law, resulting in violation of the rights of the indigenous people or tribes, the tribe may request damages and may request to remedy the infringement.</p> | <p>基於傳統知識之抽象特性，及傳統知識之權利歸屬於原住民族或部落，因此違反本法第十一條、第十二條、第十三條、第十八條、第二十三條及第二十七條之規定而侵害該原住民族或部落之傳統知識權利者，應賦予該原住民族或部落有向侵害人請求損害賠償、排除侵害與請求防止侵害之權利，爰制訂本條規定。</p> |
| <p>Chapter 5 deals with Traditional Knowledge Innovation</p> | |

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| <p>Article 30 provides for the education of Traditional Knowledge. The competent authorities should provide appropriate education and training to promote Aboriginal understanding of the importance of Traditional Knowledge and its protection systems in order to achieve the protection, sustainable use and innovation of Traditional Knowledge.</p> | <p>一、傳統知識之保護，首重其傳承，因此適當之教育及培訓相關人才乃為必要，故課與主管機關提供適當教育與培訓之義務。爰參考「Akwe : Kon 自願性準則」，規定於第一項。</p> <p>二、為加強一般國民對傳統知識之認識，因此參酌生物多樣性公約會議 UNEP/CBD/ COP/8/14 文件，要求學校相關之課程及教材應酌情納入傳統知識，以提供學生學習傳統知識之機會。</p> <p>三、有鑑於傳統知識無法全部以文字傳遞，且考慮傳統知識與環境共生共榮之本質，因此在原住民地區，特別引用原住民族教育法第三條之精神，強調部落應主導傳統知識相關課程之設計，並加強校外之生活教育。</p> <p>四、傳統知識的傳承仰賴口耳相傳，耆老或具相關專長原住民之教導，較諸課本更為有效。爰於第四項規定由部落會議推薦適當之傳統知識傳承師；為表示對傳承師之尊重，第五項規定主管機關訂立相關之獎勵辦法。</p> |
| <p>Article 31 relates to rewards, subsidies, and aid. The competent authority should counsel, reward and subsidize Aboriginal people to maintain their traditional life based on biodiversity knowledge.</p> | <p>保護傳統知識，除在教育上設計傳承機制，使之得以相傳以外，原住民維持慣習生活方式，使生活與環境之互動得以繼續，更是傳統知識創新知之所賴。然而現今依慣習之生活方式，已無法維持生計，因此本條明訂主管機關輔導、獎勵與補助之義務。</p> |
| <p>Chapter 6 deals with punishment</p> | |
| <p>Article 32 deals with the use of TK without consent. In violation of the provisions of Article 11, without the consent of the Indigenous peoples or tribes to which the Traditional Knowledge belongs, claims any rights over Traditional Knowledge acquires or uses Traditional Knowledge in a distorted, filthy or other improper manner, and damages the reputation of Aboriginal tribes shall be fined NT\$200,000 to NT\$1 million.</p> | <p>基於原住民族或部落對其傳統知識發展與使用之關係，以及為維護原住民族或部落之聲譽及尊嚴，爰制定違反本法第十一條規定者，應予處罰。</p> |

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| <p>Article 33 provides for investigation of use without consent.</p> <p>Those who violate the provisions of Article 13 or Article 18 without prior consent of the indigenous people or tribes to investigate, acquire, expose, or use undisclosed Traditional Knowledge may stop it for a limited period of time and obtain a fine between NT\$200,000 to NT\$1 million.</p> | <p>傳統知識之權利歸屬於發展該知識之原住民族或部落，為保障原住民族或部落之權益，故未徵得原住民族或部落之同意訂定契約而擅自對傳統知識進行調查、取得、揭露或使用，得限期命其停止，並得處以罰鍰。屆期仍不停止者，得按次處罰。</p> |
| <p>Article 34 provides for the correction of wrongdoing immediately.</p> <p>In case of violation of the provisions of Article 24 or Article 25, if the investigation or report is not submitted within the time limit, the competent authority shall, within a time limit, pay it, and if it is not paid within the time limit, it shall be fined between NT\$60,000 and NT\$300,000.</p> | <p>違反本法第二十四條或第二十五條未為報告之規定，可能使該原住民族或部落處於資訊不對等之地位，不利其對傳統知識之管理與保存，爰規定本條規範其處罰。</p> |
| <p>Article 35 provides that if there is a violation of confidentiality, those who violate the provisions of Paragraph 4 of Article 27 and who disclose or deliver the undisclosed traditional knowledge due to their duties or business shall be fined between NT\$600,000 and NT\$3 million. When the actor of the preceding paragraph is a member of the Aboriginal or tribe, in addition to the punishment in the preceding paragraph, it shall be dealt with in accordance with the provisions of Paragraph 2 of Article 27.</p> | <p>一、為避免原住民族或部落未公開之傳統知識被不當洩露，故規定違反者應予處罰。</p> <p>二、原住民族或部落之成員，因職務或業務知悉未公開之傳統知識而洩漏或交付他人者，為尊重原住民族及部落自治，除依本條第一項規定處罰外，並得依第二十七條第二項之規定處理。</p> |
| <p>Article 36 details if there is a violation of identifying sources. In violation of the provisions of Article 28, those who do not specify the source of Traditional Knowledge when applying for Intellectual Property rights shall be fined between NT\$100,000 to NT\$500,000.</p> | <p>為維護傳統知識之完整、避免被盜用，以及便於專利審查機關審查相關專利，乃課予專利申請人有說明其所使用相關傳統知識來源地之義務，若有違反應予處罰。</p> |

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| Chapter 7 provides a supplement | |
| Article 37 provides for fines to be allocated to a fund. According to the fines obtained in this chapter, 50 percent should be allocated to the Indigenous Peoples Comprehensive Development Fund as a means of assisting the Indigenous peoples or tribes in maintaining their Traditional Knowledge. | 為維護原住民族對傳統知識之權益，故參酌原住民族基本法第十八條、第二十一條之意旨，依本章所得之罰鍰，應提撥一定金額納入原住民族綜合發展基金，作為協助原住民族或部落維護其傳統知識之經費，以促進傳統生物多樣性知識之永續利用與創新。 |
| 第三十八條 (施行細則) 本法施行細則，由主管機關定之。 | 明定本法施行細則，由主管機關定之。 |
| 第三十九條 (施行日) 本法自公布日施行。 | 明定本法之施行日期。 |