

**UNCTAD-COMMONWEALTH SECRETARIAT WORKSHOP ON ELEMENTS OF
NATIONAL SUI GENERIS SYSTEMS FOR THE PRESERVATION, PROTECTION
AND PROMOTION OF TRADITIONAL KNOWLEDGE, INNOVATIONS AND
PRACTICES AND OPTIONS FOR AN INTERNATIONAL FRAMEWORK
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Introduction

Three organisations have responsibilities for Intellectual Property Right (IPR) issues in the Pacific Islands region:

- The Secretariat for the Pacific Communities (SPC) – the regional intergovernmental development agency responsible for developing the technical, professional, scientific, research, planning and management capabilities of Pacific Island peoples and for directly providing information and advice to enable them to make informed choices about their future development and well-being;
- The South Pacific Regional Environment Programme (SPREP) – the intergovernmental agency responsible for providing advice and assistance to Pacific Island Countries and Territories (PICTs) and co-ordinating the region's approach to a wide range of regional and international environmental issues; and
- The Pacific Islands Forum Secretariat (PIFS) - the intergovernmental organisation responsible for providing policy advice to the regional Heads of State and Government and members on political, international relations, legal, security, economic and trade issues. This mandate includes advice on IPR protection, covering two main aspects:
 - 1) core IPR issues (relating to patents, trademarks, copyright etc) and
 - 2) indigenous IPR or traditional knowledge.

The PIFS co-operates closely with the SPC on issues relating to traditional knowledge (TK) and expressions of culture (EC), and with SPREP on issues relating to traditional biological knowledge, innovations and practices. At the same time, it must be said that, because of serious resource constraints within each of those organisations, only one or two officers in each have been formally charged with IPR responsibilities, and those are often, if not always, carried out along with other duties.

Several important factors impact on how the region and its institutions deal with issues likely to arise during the Workshop:

- whereas the Pacific Islands Forum comprises the 16 independent governments of the Pacific (14 Forum Island Countries (FICs), along with Australia and New Zealand), the SPC and SPREP both include as part of their membership not only all Forum members but also France, the United Kingdom and the United States with their seven regional territories, the individual territorial governments having varying capacities to act on the international level and to enact domestic, territorial legislation);
- of the Pacific Island Countries and Territories, many are very small in land area, population and size of their governments. The smallest, for example, have populations of under 10,000, with the size of their overall administrations just a few thousand;

- a number of the PICTs have only rudimentary and in some cases outdated IPR legislation in any form, if that. Much of what they do have dates back to the colonial period. In many PICTs, there is little, if any, legal and other expertise to deal with detailed IPR issues, especially those relating to TK. A Regionally Focused Action Plan (FRAP), run by IP Australia, WIPO and the PIFS is assisting the 14 FICs to update their IPR legislation and administrative and enforcement capabilities in the core IPR areas referred to above; and
- of the 14 FICs, only three are WTO Members (Fiji, Papua New Guinea and Solomon Islands) and three others have applied for Membership (Samoa, Tonga and Vanuatu). Membership for the other eight FICs is probably some time off. Only a very few are WIPO members, although most are parties to the Convention on Biological Diversity (CBD).

Activities to Date

In light of the above constraints, PICTs have found it highly beneficial to co-operate in addressing a wide range of regional and international issues, the TK aspects of IPRs being one.

In fact, regional TK activities date back to at least 1999 to the WIPO Seventh High Level Meeting of FIC Officials in Vanuatu and the Meeting of Forum Trade Ministers.

That same year, the SPC, in conjunction with UNESCO, organised a Symposium on the Protection of Traditional Knowledge and Expressions of Indigenous Cultures in the Pacific Islands. The Symposium found that existing legal systems in the region did not address the crucial issue of protection against improper use of Pacific Island peoples' traditional living heritage and there were strong appeals for specific legislation in that regard.

In 2000, Forum Economic Ministers

“[a]greed that an effective system of intellectual property rights [was] one element which contributes to a confident and secure business environment and can lead to increased investment. To promote this, Ministers:

“(a) supported the Forum Secretariat in its work with SPREP and SPC in developing an integrated regional policy framework and model legislation for the protection of traditional knowledge related to biodiversity, agriculture, ecological, medicinal and fragrances uses, and folklore; [and]

“(b) encouraged the early adoption by members of the policy framework, guidelines and model legislation.”

Following the 2000 Forum Economic Ministers Meeting, the PIFS has worked with both the SPC on issues relating to TK and EC and with SPREP on traditional biological knowledge, innovations and practices.

A consultancy was commissioned by the SPC, the PIFS and UNESCO to develop a regional framework to protect TK and EC. The framework consisted of regional guidelines and a model law, which was presented to cultural policy officers and legal experts from the regional countries at a workshop in early 2001, which was attended by a representative of WIPO.

At their meeting in 2001, Forum Trade Ministers:

“(a) noted the progress on the development of the draft regional framework for the protection of traditional knowledge and biological resources...;

“(b) received the draft framework (regional guidelines and model law) for the protection of traditional knowledge and cultural expressions...as an important contribution to addressing the concerns of Pacific peoples in relation to the subject; request[ed] the Forum Secretariat in cooperation with the [SPC], UNESCO and WIPO to continue work on further development and application as appropriate of the draft regional framework at both the national and regional levels, taking into account the wider international context ...; [and]

“(c) encouraged the Forum Secretariat in cooperation with the [SPC], UNESCO and WIPO to assist FICs wishing to proceed with drafting and adoption of national legislation for the protection of traditional knowledge and cultural expressions, taking into account the work referred to in paragraph b) above.”

Following that meeting, the model law was sent to WIPO for comments and was subsequently revised to take account of those comments. In June 2002, the SPC and the PIFS jointly organised the Working Group for Legal Experts on the Protection of Traditional Knowledge and Expressions of Culture, which reviewed the Model Law and the elements that a sui generis system must contain in order effectively to protect TK and EC.

The revised model law was presented and endorsed by SPC Ministers of Culture at their meeting in September 2002. Also endorsed by the Ministers was a Regional Implementation Action Plan (RIAP) involving a progressive implementation of a number of structured activities related to the development of a regional framework to protect TK and EC and the implementation of the framework.

Towards the end of 2003, legal experts from throughout the region met for a second time to review once more the draft Model Law for the Protection of Traditional Knowledge and Expressions of Culture with a view to it becoming a more useful tool for each PICT to implement at the national level, as appropriate, and to consider means of protecting EC at the international level.

With respect to the regional framework for the protection of traditional biological knowledge, innovations and practices, the PIFS, through a consultant, developed a model law, which was revised after being presented to Forum members at a biosafety meeting in 2001. It was revised further the following year based on comments from regional countries and, in its present draft form, is entitled the Traditional Biological Knowledge, Innovations and Practices Act. However, a different approach, using model provisions based on Access and Benefit Sharing Arrangements, is also being given some consideration by SPREP which has assumed the lead role in pursuing this aspect of TK protection and consultations are continuing on finalising, hopefully this year, a regional approach and a detailed framework for action.

As in other parts of the world, protection of traditional biological knowledge is of importance in the Pacific Islands region. Recently, for example, it has been reported (‘Biodiversity Mystery Theatre’, downloaded from www.edmonds-institute.org/mystery.html#378784, on 31 January 2004) that a national from one of the large regional metropolitan countries has been granted a patent on Canarium nut oil (called ngali nut oil in Solomon Islands where the individual had lived for a period) as a cure for

arthritis pain. The ngali nut has long been used by traditional communities in Solomon Islands and elsewhere for food and medicine.

Following are comments on the model laws referred to above and the RIAP in relation to the preservation, protection and promotion of TK and EC as well as relevant international dimensions.

Preserve TK

Although both draft model laws (on traditional biological knowledge and on TK and EC) emphasise 'protection' of TK, each also recognises the importance of preserving TK. The model law on TK and EC provides for the establishment of what is called a "Cultural Authority" to carry out a wide range of functions in relation to administration of the law, especially in dealing with applications for, processing and approval of agreements to be concluded between owners of TK and EC and potential users. One of the Authority's proposed general functions is to "maintain a record of traditional owners and/or knowledge and expressions of culture".

Towards that end, activities to be undertaken as part of the RIAP include the development of appropriate resource material for public awareness, including brochures, pamphlets, multi-media products and modules for distance learning.

The model law on traditional biological knowledge provides for the establishment of a "Competent National Authority" to carry out a range of functions under the legislation. One of its tasks would be to establish and maintain a database of traditional biological knowledge, innovations and practices, entering into it such information as it receives or collects. Access to the database would be permitted by the Authority under such terms as it may decide, including restricting it to owners of the knowledge as the situation may warrant.

A database was chosen for the model law rather than a register for several reasons:

- * a register was formal. Owners who had reservations about disclosing their knowledge might be totally discouraged if there were too many requirements to be complied with. It might well be that certain knowledge had become fragmented and different people would come forward with different pieces of the puzzle and a formal system might not cope well with such a piece-meal situation;
- * a register would be open. Owners might not wish to reveal their information but merely to record it for their descendants.
- * a register imparted legitimacy. An adversarial ownership process at the outset would again discourage owners from coming forward with their information.

On the other hand, a database records information and there was a need to record as much TK before it became unobtainable. This meant few formal requirements and an assurance of confidentiality. A detailed examination as to the veracity of ownership could be raised later but only when a challenge was brought or an enquiry made by a prospective user.

In sum, it was felt in drafting the model law on traditional biological knowledge that the urgent need to record the information overrode the possibility of a flood of spurious claims being made because of the initial lack of formal requirements. The task of sorting out what was described in the model law's explanatory notes as "the wheat from the chaff" would be made later.

A couple of brief comments might be made on this aspect of a holistic approach to a sui generis TK system in the Pacific region:

- as has been observed in one of the resource papers prepared for the meeting, although much has been said about the need for capacity-building in relation to TK, capacity-building in this area covers a wide range of activities and responsibilities. It would include, in relation to what has been referred to above, capacity-building in the design and maintenance of appropriate databases as well as in the provision of data for the databases;
- the objective in designing and maintaining databases or other compilations of TK must not only be to enable the preservation, protection and promotion of the rights of owners of TK within the country but also at the international level. As indicated in material prepared for this Workshop, it would not be to the interest of the owners of TK if such sources of information were simply used as clues or leads by potential users of that knowledge to secure for themselves IPRs in the form of patents etc without appropriate recognition of the owners of the TK itself;
- any arrangements or programmes devised for the preservation of TK in the Pacific region must reflect not only the very small size of public administrations (and hence the number of people and the amount of resources available to design and maintain databases etc) but also the fact that many of the owners of TK are often situated in very small, isolated communities far from capitals who would need to be convinced of the benefits accruing to them from co-operating with officials in such activities as providing data for databases etc; and
- financial and technical assistance will be important if our region is to be able to preserve its TK and the PIFS, the SPC and SPREP would welcome such assistance towards the implementation of the TK programmes of action from the Commonwealth Secretariat, UNCTAD, WIPO and other multilateral institutions as well as interested bilateral donors.

Protect TK

The fundamental purpose of both the model law on traditional biological knowledge and the model law on TK and EC is to protect the rights of owners of that knowledge.

The model law on traditional biological knowledge refers to both economic and moral rights and establishes a system for obtaining the prior informed consent of owners of TK for the use of that TK and the conclusion of access and benefit sharing agreements setting out the terms and conditions for that use. In both regards, the Competent National Authority has key roles to play.

The model law on TK and EC identifies a wide range of traditional cultural rights (e.g. to reproduce the TK or EC) as well as moral rights. Towards that end, the Cultural Authority has a number of important functions to carry out, including:

- to monitor compliance with authorised user agreements and to advise traditional owners of any breaches of such agreements;
- to develop standard terms and conditions for authorised user agreements;
- to provide training and education programmes for traditional owners and users of TK or EC; and
- to develop a Code of Ethics in relation to use of TK and EC.

Reflecting the above responsibilities, the RIAP contains a number of activities to be carried out, including:

- Legal drafter(s) to assist the PICTs to adapt the regional model law to their own national circumstances;
- In-country seminars/workshops on administering the model law/national legislation;
- In-country seminars/outreach programmes for traditional owners and potential users of TK and EC; and
- The preparation of resource material as referred to above.

A couple of brief comments might be made on the protection of TK, what is contained in the model laws, and what activities have been proposed for the region:

- Although the Pacific Islands region may be considered homogenous in certain respects, and it is, each of the more than 20 PICTs has its own unique culture and ways of dealing with TK. Each also has its own legal traditions and systems which would need to be considered in the refining of the model laws for submission to their appropriate legislative bodies;
- It may well be the case that community-based activities such as those proposed in the RIAP would be required prior to any legislation being drafted to ensure not only that it met fundamental objectives with respect to TK but also reflected the wishes of the owners of TK on the balance of rights and responsibilities between themselves and the implementing/administering institutions to be established under the laws to be enacted;
- Again, in many PICTs, there is a shortage of skilled legal draftspersons and many local lawyers, especially those working for the Government, are often very busy attending to a wide range of national legal requirements. Therefore, technical assistance will often be required; and
- In the case of the non-self-governing Territories of the Pacific which may not have the authority to enact TK legislation themselves, the views of the States having international responsibility for those Territories will be important considerations.

Promote TK for Development

While both model laws emphasise the need to protect the rights of owners of TK, they each also establish institutional arrangements for the utilisation of TK for the benefit of those owners. Access and benefit sharing agreements to be concluded under the model law on traditional biological knowledge, for example, must provide for both "fees or compensation for using the knowledge, innovation or practice" and "benefit sharing, monetary and non-monetary, on the successful commercialisation of any aspect of the knowledge, innovation or practice".

Similarly, the model law on TK and EC provides that authorised user agreements concluded under the model law should include terms and conditions about, *inter alia*, "sharing of financial and other benefits arising from the use of the traditional knowledge or expressions of culture" and "compensation, fees, royalties or other payments for the use".

Both model laws contain provisions allowing their respective authorities established under the laws to assert ownership of the TK in question when specific owners had not been identified, with benefits either to be held until owners had been identified or else used for traditional cultural development purposes.

One of the primary justifications for the RIAP for the model law on TK and EC is that “[a] legislative framework that protects traditional knowledge and expressions of culture will stimulate traditional knowledge and increase opportunities for Pacific Island peoples to exploit their knowledge”.

The RIAP activities to which I referred earlier (e.g. in-country seminars/workshops on administering the model law/national legislation) have as one of their objectives the promotion of TK for development.

As indicated earlier, approaches to TK matters may vary from country to country within the region. Although the general thrust of the model laws is aimed at empowering owners to TK to negotiate with perspective users, at least one regional country (Palau) is considering establishing a trusteeship in TK matters. Because land issues in that country were still not resolved after 50 years, a recommendation had been put to the Government by one of its senior advisors that the national Government act as trustee for owners of TK, with the power to enter into negotiations with prospective users. Identification of traditional owners would be a separate process. Revenues generated by the use of TK or EC would be held by the Government; when traditional owners were identified, funds could then be paid over to them. Such an approach would avoid delays in securing agreements with prospective users should traditional owners not be immediately identifiable.

Other Governments might be considering the adoption of at least a variation on that approach.

International Dimensions

The PICTs recognise that it is clearly insufficient for the fullest protection and promotion of the rights of TK owners only to enact domestic legislation towards that purpose, a point emphasised in the various papers prepared for this Workshop,. The greatest possible international recognition of those rights must also be secured.

Towards that end, the model law on traditional biological knowledge provides that:

“[i]n accordance with reciprocal agreements entered into with other countries or territories, this Act may provide the same protection for knowledge, innovations and practices originating in those countries or territories as it provides for knowledge, innovations and practices originating in [the enacting country]”.

A similar provision is found in the model law on TK and EC.

As explained in the RIAP,

“[w]hile national laws are important in protecting the Pacific Island peoples from unfair exploitation of their traditional knowledge, there will still be a need for extra-territorial protection. For this reasons, SPC and the Forum Secretariat will be examining existing and future possibilities on the extra-territorial application of the Model Law.”

While much of the next two days will be spent in detailed discussions on the international protection of TK, for present purposes a few brief comments might be offered on this general topic:

- Broadly speaking, there is a definite shortage in PICTs of persons skilled in international law, especially in the relatively narrow field of IPRs and the even narrower topic of TK in relation to IPRs;

- That is why the RIAP has as one of its activities the recruitment of a consultant “to draft regional convention or model treaty to ensure reciprocity of traditional knowledge and expressions of culture”;
- There has been much food for thought served up in the various papers prepared for this Workshop and it is necessary to digest them slowly. Nevertheless, subject to further discussion, there seems to be considerable merit, in particular, in pursuing a dual-track approach to the development of TK protection at the international level:
 - 1) Continuing to work through relevant multilateral organisations (e.g. the Commonwealth Secretariat, UNCTAD, WIPO and the WTO), in their on-going TK-related activities; and
 - 2) thinking ‘outside the box, giving very serious consideration to the negotiation of separate, multilateral, legally-binding arrangements among States wishing to protect TK in ways not already provided for in existing IPR instruments but in ways they found acceptable.
- The negotiation of such arrangements might combine approaches or various modalities, both ‘hard’ and ‘soft’, in a unified framework that could serve, over time, to steadily increase protection of the legitimate rights of TK owners. While we would all like universal protection for TK owners, the papers before this workshop clearly reveal that such an aspiration is not likely to be satisfied for some time to come. Nevertheless, the resources material for this Workshop notes that some IPR instruments took 100 years to develop fully. TK owners can’t wait that long. All TK would either be lost or many years before then. Concrete steps need to be taken now;
- In my view, there would be great merit in clearly identifying what protection should be sought; for what rights; over what period of time; what modalities are presently available to achieve that protection; and, where such modalities were not available or not likely to achieve the objectives sought, what were the options available. The papers before this Workshop constitute a major contribution towards answering such questions. Other regions may have already addressed such issues and have a clear roadmap showing how to get there. To the best of my knowledge, such a roadmap does not exist in our own region. We know where we are and, generally speaking, where we want to go, but, just like entering the calm waters of a lagoon from the open sea, it is sometimes necessary to take a circuitous route around threatening reefs to get there;
- In considering any possible approach to be taken, it is important for our region also to bear in mind that except for a few Pacific Island States (and none of the Territories) most are not members of the WTO nor are they likely to become members in the near future. They are thus unable to participate directly in WTO negotiations, nor are they bound by the TRIPS or other relevant disciplines. That being said, of course, WTO members apply WTO disciplines to all Pacific Island States in their bilateral trade so pursuing TK objectives in the WTO will remain an important part of an overall strategy. Similarly, most Pacific Island States are not members of WIPO, although WIPO has engaged in valuable co-operative ventures in capacity-building with regional countries in recent years. That being said, most if not all Pacific Island States are now members of the FAO and parties to the CBD. Against that background, exploration of the possibility proposed by Professor Drahos of key organisations such as WIPO, the FAO and the CBD (dare I add UNCTAD?) being able to establish a Global Bio-Collecting Society (or another global co-operation/enforcement institution) as a joint initiative might be considered. Although there are obvious differences, the WHO and the FAO have long

had as a joint initiative in trade and health matters, the Codex Alimentarius. The possibility of two or more multilateral institutions combining forces in an area of mutual interest would thus, on the face of it at least, seem possible. The question arises, of course: if such an initiative was useful, could it be extended (through UNESCO perhaps) to include other aspects of TK and EC?

- On the latter point, our own region has been dealing in two parallel streams with traditional biological knowledge and TK and EC. It would be useful to learn of experiences in other regions, particularly in possibly combining all TK issues into the same model law or model convention.
- And finally, our region has yet to deal with TK shared between countries (e.g. legends of ancient Oceania, including those relating to Avaiki, the traditional homeland of many Pacific Islands peoples). How potential differences of views on TK ownership in such cases might be settled would be interesting to consider.

Conclusion

At the present time, it is understood that Fiji is in the process of enacting the model law on TK and EC and Palau is looking to do the same, the latter before the Festival of Pacific Arts to be held in that country. Papua New Guinea may also be doing so. It is also understood that all three States will be doing so with amendments to the model law to reflect local circumstances. Other PICTs are likely to be in need of assistance before they felt able to act refine and enact their own TK legislation.

The above notes are, of course, my own and should not be interpreted as the official views of the PIFS or any of the other regional organisations.

That being said, on behalf of the PIFS, the SPC and SPREP, may I express appreciation for assistance rendered by the Commonwealth Secretariat, UNCTAD, WIPO, the WTO and other multilateral organisations and donor governments for their assistance to the region in TK and other matters over the years. All three organisations and the region as a whole would welcome and place great value in increased collaboration and co-operation between the region and those organisations and governments on TK issues in the months ahead.