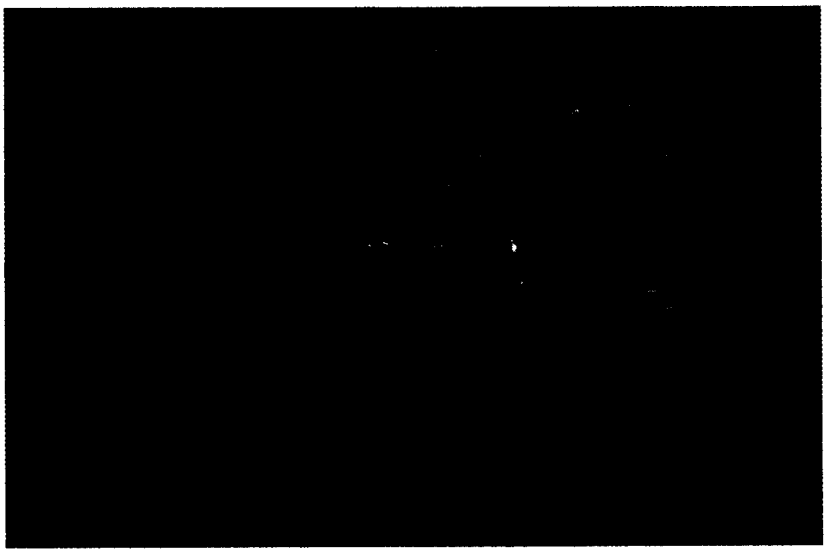
CULTURAL AFFAIRS PROGRAMME

THE LEGAL PROTECTION OF TRADITIONAL KNOWLEDGE AND EXPRESSIONS OF CULTURE



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CULTURAL AFFAIRS PROGRAMME
BACKGROUND PAPER

QUESTIONNAIRE CIRCULATED TO MEMBER COUNTRIES

REGIONAL GUIDELINES FOR THE PROTECTION OF TRADITIONAL KNOWLEDGE AND EXPRESSIONS OF CULTURE
(DRAFT)

MODEL LAW FOR THE PROTECTION OF TRADITIONAL KNOWLEDGE AND EXPRESSIONS OF CULTURE
(DRAFT)

PROPOSED ORGANISATIONAL STRUCTURE
(DRAFT)

SPC/ FORUM SECRETARIAT/ WORLD INTELLECTUAL PROPERTY ORGANIZATION (WIPO)
REGIONALLY FOCUSSED ACTION PLAN (RFAP)
(DRAFT)

IMPLEMENTATION ACTION PLAN (IAP)
(DRAFT)

BACKGROUND:

1. The SPC Legal Protection Project, initiated by the Cultural Affairs Programme at the request of the Council of the Pacific Arts, is aimed at promoting legislation in the Pacific Islands for the protection of Traditional Knowledge and Expressions of Culture. This project was initiated in 1997 and in 1999 the Symposium on the Protection of Traditional Knowledge and Expressions of Culture was held at SPC headquarters in Noumea in collaboration with UNESCO.

2. At the same time, the Forum Secretariat was mandated by the 1999 Trade Ministers meeting to work towards the development of national, regional and multilateral/international rules and legislation to protect the intellectual property rights of indigenous peoples for presentation to the Forum Trade Ministers meeting in 2001.

3. Following this Symposium and the mandate given by the Forum Trade Ministers, a collaborative approach was an obvious course for these three organisations, for the benefit of Pacific Island countries. Therefore after positive discussions at SPC Headquarters in New Caledonia in October 2000, the SPC, UNESCP, and the Forum Secretariat jointly engaged two legal consultants, Professor Kamal Puri from the University of Queensland, Australia, and Clark Peteru from Samoa to draft a suitable regional framework for the protection of traditional knowledge and expressions of culture.

Workshop for Legal Experts on the Protection of Traditional Knowledge and Expressions of Culture *(Noumea, New Caledonia , 26-28 February, 2001)*

4. The framework consisting of regional guidelines and a model law was presented to cultural policy officers and legal experts from the SPC/Forum member countries at a workshop jointly organised by SPC, Forum Secretariat and UNESCO. The workshop was also attended by a senior representative of WIPO.

5. The objective of the workshop was to discuss the proposed regional framework comprising of regional policy guidelines and model legislation to enable the consultants to finalise the framework after consulting with Pacific Island countries legal experts and members of the Executive Board of the Council of Pacific Arts.

6. The framework was finalised by the consultants at the end of the workshop prior to the presentation to the Forum Trade Ministers meeting in June 2001.

7. The outcome was to obtain the support of the Pacific Island countries for the regional framework on traditional knowledge and expressions of culture.

8. Following the workshop, the SPC, in cooperation with the Forum Secretariat and UNESCO as appropriate, was requested to promote the model law, provide assistance to countries in the region to adapt the model law, assist the countries in the region to further their intellectual property laws consistent with the model law and other international norms, and provide assistance with training, education, and awareness raising on the protection of traditional knowledge and expressions of culture.

World Intellectual Property Organisation (WIPO) Intergovernmental Committee (IGC) on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore *(Geneva, 30 April – 3 May 2001)*

9. A representative of the Forum Secretariat and the Cultural Affairs Adviser attended the first session of the WIPO IGC. This IGC was established by the twenty-sixth WIPO General Assembly in 2000 to discuss three primary themes being genetic resources, traditional knowledge and folklore. This was the first of five meetings for the purpose of further discussions on these subjects.

10. This initial meeting was to identify the scope of intellectual property relating to genetic resources, traditional knowledge and folklore. The meeting considered these three key issues in terms of conceptualising, prioritising tasks within each issue and identifying new issues for consideration at the future IGC meetings. It noted that the task of the Committee was to advance consensus on how these important issues should be addressed.

11. SPC and ForSec delivered their interventions as observers. A summary of our interventions is recorded in the IGC proceedings. There was a great deal of interest in the Pacific Regional Model Law. It is suggested that we continue to participate in this process of the protection of intellectual property of genetic resources, traditional knowledge and expressions of culture (folklore) to ensure that the identified objectives and needs, in terms of policy and technical assistance are reflected in the IGC outcomes and WIPO's mandate. Given our observer status, it would be an advantage for region if the Pacific WIPO members were to attend the next IGC meeting. SPC and ForSec would provide assistance for effective interventions and contribution to the IGC process and to obtain the desired outcomes for the region.

12. SPC and ForSec were invited to formally submit the Model Law, after endorsement at the Forum meetings, to WIPO for comments and to be included in their work programme in order to gain assistance from WIPO in awareness raising. It was stated that through this process by the next IGC meeting, the model law would have gained a degree of international acceptance. It was agreed that following the next IGC meeting, a three to four year program of technical assistance could be developed with WIPO.

The Forum Economic Ministers Meeting
(Rarotonga, Cook Islands 16-24 June 2001)

13. The Cultural Affairs Adviser attended the FEM meeting as SPC resource person on intellectual property which was one of the two major new issues brought to the Forum Economic Minister's attention this year (the other was *Land Issues in the Pacific*). I presented an overview of the collaborative and consultative processes that had resulted in the presentation of the Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture. Following this, the SPC/PIFS/UNESCO consultant, Professor Puri introduced the intellectual property paper. At the end of his presentation, a general discussion followed and the recommendations were adopted. The excerpt from the Forum Economic Action Plan follows:

14. Ministers agreed that an effective system of intellectual property rights is one element which contributes to a confident and secure business environment and can encourage the investment. Ministers:
noted the progress on the development of the draft regional framework for the protection of traditional knowledge and biological resources which need to be cleared by officials and will be presented at the next FEMM;
noted the draft regional framework (regional guidelines and model law) for the protection of traditional knowledge and cultural expressions as the basis for adapting, adopting and enacting national laws for the FICs, noting that further work would be required in this area taking into account the wider international context.
noted that the Secretariat of the Pacific Community, in co-operation with the Forum Secretariat and UNESCO, be the regional body responsible for assisting countries to enact the model law and carry out other functions; and
noted the Regionally Focussed Action Plan as the basis for collaborative work between the Forum Secretariat, the WIPO and IP Australia on improving the intellectual property systems of the FICs.

The Forum Trade Ministers Meeting *(Apia, Samoa 23 – 29 June 2001)*

15. The Cultural Affairs Adviser attended the FTM meeting as SPC resource person on intellectual property. Again, I presented an overview of the collaborative and consultative processes that had resulted in the presentation of the Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture. Following this, the SPC/PIFS/UNESCO consultant, Professor Puri introduced the intellectual property paper. At the end of his presentation, a general discussion followed and the following recommendations were adopted.

> a) the Ministers received the draft framework (regional guidelines and model law) for the protection of traditional knowledge and expressions of culture as an important contribution to addressing the concerns of Pacific peoples in relation to the subject and requested the Forum Secretariat in cooperation with the SPC, the UNESCO and WIPO to continue work on the 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.

b) The Trade Ministers also encouraged the Forum Secretariat in cooperation with the SPC, UNESCO and WIPO to assist Forum Island Countries wishing to proceed with the drafting and adoption of national legislation for the protection of traditional knowledge and cultural expressions, taking into account the work on the further development and application of the draft regional framework.

Further work and collaboration with the Forum Secretariat

16. In order to progress the project, and at the request of the Forum Trade Ministers, and by invitation from WIPO, SPC has formally submitted the regional framework to WIPO for comments in relation to the obligations of our member countries under existing intellectual property treaties, including the TRIPS Agreement. Once this activity has been completed, SPC and the Forum Secretariat will implement the activities as mandated by the workshop for cultural policy officers and legal experts and the Trade Ministers.

17. SPC and the Forum Secretariat will require funding and assistance in fulfilling their roles. To address this issue, SPC and the Forum Secretariat are collaborating to draft two proposals.

18. The first proposal being a **Regionally Focussed Action Plan (RFAP)** to be the basis of collaborative work between SPC, the Forum Secretariat and WIPO. The overall objective of the RFAP for the Pacific Island Countries is to establish a programme of action designed to assist them in their efforts to protect their traditional knowledge and expressions of culture. The programme of action involves a progressive implementation of a number of structured activities related to the development and improvement of a regional framework to protect traditional knowledge and expressions of culture and the implementation of the framework. The planned activities for the programme of action comprises the following main elements.

Legislative Reforms. The provision of technical assistance to:

further develop the *suis generis* regional model legislation to protect traditional knowledge and expressions of culture and in particular, to consider the relationship between the model law and existing international intellectual property instruments;
assist Pacific Island Countries to adapt the regional model law to suit their circumstances;
assist Pacific Island Countries to amend their existing national intellectual property laws to ensure consistency with the proposed new regime for the protection of traditional knowledge and expressions of culture. This assistance would include the provision of model amendments of existing intellectual property legislation, consequent on the adoption of the model law, which could be used by Pacific Islands Countries as a guide.

Capacity Building. The provision of training for the government officials and administrators that will be responsible for implementing and adjudicating the model law.

Education and Awareness Raising. The provision of public awareness programmes to the owners and potential users of traditional knowledge and expressions of culture, research institutions, private sector and the general community on the role, use and benefits of the new regime. An overall strategy would be prepared to give focus and coherence to awareness programmes in the region. Within the strategy, provision would be made for in-country seminars/workshops.

19. The second proposal presents a broader regional **Implementation Action Plan (IAP)** for Pacific Island Countries that are members of the Secretariat of the Pacific Community (SPC) and the Pacific Islands Forum to protect their traditional knowledge and expressions of culture. The Implementation Action Plan involves a progressive implementation of a number of structured activities related to the development of a regional framework to protect traditional knowledge and expressions of culture and the implementation of the framework. This Implementation Action Plan will be co-ordinated and implemented jointly by the Secretariat of the Pacific Community and the Pacific Islands Forum Secretariat (Forum Secretariat).

20. The Implementation Action Plan consists of five short to medium term components with the components being implemented over a three year period. The time line of activities envisaged in the action plan may be seen in chart form at Annex 1. The resource requirements for the Implementation Action Plan are in Annex 2. The budget estimates for each component are currently being drafted. Following this component being finalised, the Implementation Action Plan will be used to attract further financial and technical support from other international and regional organisations and donor countries.

Questionnaire on the Protection of Traditional Knowledge and Expressions of Culture

Your Name and Position:

_____

Organization:

_____

Address:

_____

Phone: _____ **Fax:** _____ **Email:**

_____

1. Is there an urgent need to make laws for the protection of traditional knowledge and expressions of culture? Please state reason/s.

2. Are there any customary rules or practices prevalent among your community for the protection of traditional knowledge and expressions of folklore?

3. State a number of alternatives that you would recommend for adoption to protect traditional knowledge and expressions of culture.

4. How could owners of traditional knowledge be recognized and rewarded?

5. Why do you think that the existing intellectual property laws do not adequately protect traditional knowledge and expressions of culture?

6. What obstacles, if any, exist for the commercialization of your traditional knowledge and expressions of culture?

7. In what ways developed nations should be asked to compensate indigenous people for the use of their traditional knowledge and expressions of culture?

8. What administrative system/procedures would you suggest for the protection of traditional knowledge and expressions of culture?

9. If the traditional knowledge and expressions of culture belong to more than one clan/group/community, how do you suggest that such knowledge and expressions of culture be used?

10. **Please give some examples of traditional/medicinal knowledge/expressions of culture, which to your knowledge has been commercially exploited?**

11. **Is there any traditional knowledge/expressions of culture that can be freely shared with non-indigenous people? Please give examples.**

12. **Would trade secret protection be a more adequate means of protecting traditional knowledge, rather than the patent system that has the public disclosure principle?**

13. **What sanctions need to be imposed on those who appropriate traditional knowledge and expressions of culture?**

14. **Is documentation important for the preservation of traditional knowledge and expressions of culture or could it threaten the "secrets" held by indigenous peoples?**

15. **Do you have any final comments for the protection of traditional knowledge and expressions of culture?**

Many thanks for your kind help. Please return the Questionnaire to Professor Kamal Puri, Law, University of Queensland, Brisbane, Australia 4072, Phone (+617) 3365 2588, Fax (+617) 3365 4857,
E-mail: **K. Puri@mailbox.uq.edu.au**

Guidelines/Policies for the Protection of Traditional Knowledge and Expressions of Culture for the Pacific Region

Background

Protection of traditional knowledge and expressions of culture is critical for maintaining cohesion among Pacific island peoples. The majority of Pacific islanders, given a choice, may still prefer to live in accordance with their time-honoured customary laws and practices, in the tranquil environment that the nature has given them. The Western values, obsessed with materialism and unrelenting preoccupation with individual rights, have, regrettably, made Pacific peoples' traditional knowledge and expressions of culture exceedingly vulnerable. Most of all, the recent technological revolution has triggered widespread appropriation of their cultural and social identity.

Traditional knowledge and expressions of culture are a rich and diverse source of creativity and innovation. They invigorate and provide a constantly renewed source of wealth, both economic and cultural, in most fields of technology, ranging from traditional medicinal and agricultural practices to music, design and the arts. As manifestations of intellectual creativity, traditional knowledge and expressions of culture deserve to be accorded legal protection as is provided to other forms of intellectual property. It is high time that robust measures are taken to guarantee the status of and economic support for clans, groups or communities that are the creators, repository, custodians and trustees of traditional knowledge and expressions of culture.

At present, there exists no regional or international regime for the legal protection of traditional knowledge and expressions of culture, although some Pacific Island Countries and Territories have recently made attempts to provide protection to expressions of folklore in their national laws. See, for example, Vanuatu's *Copyright and Related Rights Act 2000*, Papua New Guinea's *Copyright and Neighbouring Rights Act 2000*, Palau's *Copyright Act 2001* – Senate Bill No. 6-7, Samoa's *Copyright Act 1998*, and Fiji's *Copyright Act 2000*. It is submitted that the provisions in these enactments, which are almost identical since they are modelled on the draft law prepared by the World Intellectual Property Organisation (WIPO), are grossly inadequate for traditional knowledge and expressions of culture.

The status of legal protection

Please refer to the attached paper entitled, "Background Paper on Protection of Traditional Knowledge and Expressions of Culture". See further, two papers written by Professor Puri that have been published recently in the UNESCO's leading publication: "Preservation and Conservation of Expressions of Folklore" (1998) Vol. XXXII *Copyright Bulletin* at pp. 5-36, and "Protection of Expressions of Indigenous Cultures in the Pacific" (1999) Vol XXXIII *Copyright Bulletin* at pp. 6-34.

Consultant's brief

At the commencement of this project, the brief was to address basic conceptual issues and development of an effective regional regime for the protection of traditional knowledge and expressions of culture. Accordingly, the consultant devised a *sui generis* legislation which basically suggested the creation of a regional body with powers to regulate and adjudicate on any rights or disputes under the provisions of the model law. The consultant supported this approach for the following reasons:

- To avoid enactment of multifarious national laws to deal with issues that are in essence common to all the Pacific peoples in the region;
- In many instances, ownership of traditional knowledge and expressions of culture vests in more than one country in the region; and
- To avoid mushrooming of national organizations while facing serious scarcity of appropriate skills and financial constraints.

However, after much debate and discussion at the Workshop in Noumea (26-28 February 2001), the delegates from all the Pacific Island Countries and Territories, while acknowledging the practical benefits of having one regional structure, arrived at a consensus that the model law should in the first instance be enacted as domestic law for each country to suit its special needs and circumstances. In accordance with the revised brief, the consultant has now incorporated all the changes to the draft regional guidelines and model law that were suggested at the Workshop to make it suitable for adoption, adaptation, and enactment as national law for each Pacific island country.

Guidelines and directing principles or standards for a *sui generis* form of protection

1. Aims and objectives

1.1 The Pacific Islands Peoples (**PIPs**) value their traditional knowledge relating to the use of plants, animals and marine life as well as their expressions of culture (sometimes loosely referred to as "folklore"). In recent times, they have recognised the need to protect their traditional knowledge that is being exploited without permission by outsiders. For full definitions of "traditional knowledge" and "expressions of culture", reference should be made to the *Noumea Declaration* 1999. The contributions made by PIPs in this regard at the *Symposium on the Protection of Traditional Knowledge and Expressions of Indigenous Cultures in the Pacific Islands* (Noumea, 15-19 February 1999) are gratefully acknowledged.

1.2 Development of a legislative framework will stimulate traditional knowledge and increase opportunities for PIPs to exploit their knowledge.

1.3 It is of utmost importance that an adequate level of protection for traditional knowledge and expressions of culture is ensured, in particular when they are exploited commercially.

1.4 There is an urgent need to agree on new norms for the adequate legal protection of traditional knowledge and expressions of culture.

2. Inadequacies of the present system of protection

2.1 Existing legal regime in Pacific Island Countries and Territories (PICTs) does not provide adequate protection for intellectual property rights. In any case, the current intellectual property system, as a product of the Western world, is unsuitable for protection of traditional knowledge and expressions of culture. This system is incompatible with trans-generational, non-materialistic and communal nature of PIPs' way of life.

2.2 Multinational corporations are continually subjecting PIPs to exploitative and increasing biopiracy from particularly the medical and pharmaceutical, seed and agrochemical industries.

2.3 Measures should therefore be taken for the development of a *sui generis* (of its own kind) form of protection of PIPs' traditional knowledge, expressions of culture, values and resources against unauthorised or inappropriate use of their art and traditional knowledge.

2.4 Recent examples of a *sui generis* form of protection have dealt with protection for plant varieties, layout designs (topographies) of integrated circuits, computer software, databases and compilations of data.

3. Principles

3.1 PIPs have the right to self-determination and in exercising this right they must be recognised as the exclusive owners of their traditional knowledge and expressions of culture.

3.2 The new law should, inter alia, provide recognition of origin (i.e., geographical or location origin) and just compensation.

3.3 A code of ethics should be developed to ensure respect for traditional knowledge and expressions of culture and to regulate the recording/access to recording (visual, audio or written) by outsiders of PIPs' traditional knowledge and expressions of culture.

3.4 Until appropriate protection mechanisms have been developed, a moratorium should be declared on any new (unauthorised) commercialisation of PIPs' traditional knowledge of natural and genetic resources. PIPs, who have inherited such knowledge, should determine and manage commercialisation of any traditional plants and medicines.

3.5 In conformity with the customary law, the *sui generis* system should uphold and implement the principle of "community" or "collective" rights for protecting traditional knowledge and expressions of culture. However, these rights should exist without prejudice, in appropriate cases, to individual rights. The new law should be developed in close collaboration with PIPs through a broad-based consultative process that reflects a country's cultural diversity.

3.6 The model law provisions should be consistent with and reinforce customary laws and practices of PIPs.

3.7 In parallel with the *Convention on Biological Diversity 1992*, the model law should develop norms pertaining to access to biological resources, community knowledge and technologies and their implications for intellectual and cultural property rights.

3.8 The model law should, to the extent necessary, contain specific provisions to protect local biodiversity and knowledge from misappropriation by non-PIPs such as through patenting of modified products, processes and biological resources.

4. Dispute settlement

4.1 For resolving disputes or conflicts among PIPs, fair procedures such as negotiation, mediation, arbitration, and regional human rights reviews should be initiated with full participation of PIPs.

5. Administrative structure

5.1 A national body called, "**Cultural & Intellectual Property Organisation**" (**CIPO**) should be formed specially designed for protecting and promoting PIPs' culture at the national level and, in time, at the regional level. However, as a matter of priority, consideration should be given to the viability of using an existing body, such as SPC or Forum Secretariat to provide for administrative/management assistance. Furthermore, each country should also evaluate whether any existing national body or bodies could be drawn on to implement the model law at the national level.

5.2 CIPO should continually discuss among a wide range of collaborators, including government officials, non-government organizations, local community representatives, independent scientists and academics, and others. Each PICTs' government should be required to consider the deliberations of CIPO while developing policies and programs in the field of intellectual and cultural property rights.

6. Registration system

6.1 CIPO should establish a database or registry comprising of an inventory of all the traditional knowledge resources, a documentation and evaluation of the uses of these resources, and details of ownership. PIPs should be given free access to the database upon payment of a reasonable administration fee. However, it should be recognized that any registration system of traditional knowledge will have limited effect because of the reluctance of indigenous peoples to make their traditional knowledge publicly available.

6.2 Similarly, CIPO should serve as a documentation centre, archives and a museum to record PIPs' expressions of culture comprising oral, written and visual traditions. PIPs should be given access to all the relevant information upon payment of a reasonable administration fee.

6.3 PIPs, through their community representatives, should retain effective control of their knowledge, including developing mechanisms that ensure effective and equitable sharing of benefits with and within communities. Communities should have the right to define the terms by which they control access and require benefit sharing – these terms should be transparent.

7. Right to control access and use

7.1 CIPO should revitalise and strengthen local systems of governance to ensure the control of PIPs over their traditional knowledge and expressions of culture.

8. Fellowship Program

8.1 CIPO should also create a Fellowship Program to assist those PIPs wishing to gain postgraduate and doctoral qualifications in the relevant areas. Furthermore, steps should be taken to establish and support schools and a tertiary institution explicitly to cater to the needs of PIPs. School texts and educational curricula should be revised to eliminate discriminatory content and promote the development of PIPs' cultures and, where appropriate, PIPs languages and scripts.

9. Pacific Culture Awareness Campaign

9.1 CIPO should initiate youth programs and sponsor festivals that could be used to inform and educate non-PIPs of PIPs' cultural beliefs, customary laws and practices.

9.2 CIPO should enhance PIPs' capacity to deal with intellectual and cultural property issues by instigating appropriate educational and training programs that are culturally sensitive.

9.3 CIPO should also establish and promote networks of local journalists and launch PIPs' periodicals at the national and regional levels. Similarly, radio and television centres should be encouraged to promote information on the problems and proposals of PIPs and to improve communications among PICTs' peoples.

9.4 The model law should establish a statutory body with full participation of PIPs for the purpose of providing financial assistance to representatives of PIPs to take part in national, regional and international meetings on protection of traditional knowledge and expressions of culture.

10. Pacific Culture Day

10.1 CIPO should name one specific day in a calendar year to raise national, regional and international awareness of PIPs' situation and to strengthen regional and international cooperation for the solution of problems facing protection of traditional knowledge and expressions of culture.

11. Communal ownership

11.1 Legislative measures to protect traditional knowledge and expressions of culture require a consideration of the concept of community ownership to ensure greater PIPs' control. In particular, provisions should be made to require prior free and informed written consent of the relevant group, clan or community before dealing with their traditional knowledge and expressions of culture. This would also make certain that commercialisation does not take place in the wrong context by treating PIPs' knowledge and creativity as a commodity.

11.2 In special circumstances, an individual should be entitled to hold ownership rights as custodian or trustee of a clan, group or community.

11.3 Countries, which do not yet have effective intellectual property legislation, could create *sui generis* form of protection, which is in accordance with and offers protection for community rights.

12. Moral rights

12.1 The model law should also introduce a "communal moral rights" section to protect expressions of culture from distortion, debasement and loss of cultural integrity due to inappropriate use.

12.2 Moral rights can protect expressions of culture in four ways: the right to have the traditional owners' name associated with the work, the right not to have ownership falsely attributed to them, the right to control its publication or dissemination, and the right to prevent its mutilation, misuse or distortion.

12.3 Consequently, the model law should prevent registration of sacred symbols and words as trade marks, except where it is authorised by PIPs.

13. Patents

13.1 All patent applicants who use traditional knowledge of plants, including terrestrial, fresh water and marine plants, animals and micro-organisms should sign a sworn document that they had obtained consent from the peoples concerned and will face financial penalties if the statement was false.

14. Domaine publique payant

14.1 The model law should introduce economic rights called *domaine publique payant* (involving payment of royalties for the use of literary and musical works in the public domain) and *droit de suite* (involving a resale royalty under which an artist receives a share of the price paid for his or her original work from all sales subsequent to the initial one) systems to protect and recompense the rights of owners of traditional knowledge and expressions of culture.

15. Definitions

15.1 "Traditional Knowledge" refers to tradition-based literary, artistic or scientific works; performances; inventions; scientific discoveries; designs; marks, names and symbols; undisclosed information; and all other tradition-based innovations and creations resulting from intellectual activity in the industrial, scientific, literary or artistic fields. Categories of traditional knowledge include agricultural, scientific, technical, ecological, medicinal and biodiversity knowledge.

15.2 "Expressions of culture" generally include traditional knowledge, practices, designs, art, craft, music, dances, scientific beliefs, architecture, agriculture, medicine, and conservation of natural resources.

15.3 "Tradition-based" refers to knowledge systems, creations, innovations and cultural expressions which have generally been transmitted from generation to generation, are generally regarded as pertaining to a particular people or its territory, have generally been developed in a non-systematic way, and, are constantly evolving in response to a changing environment.

References

- WIPO-UNESCO Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and other Prejudicial Actions 1982;
- WIPO Draft Report on Fact-finding Missions on Intellectual Property and Traditional Knowledge (1998-1999), July 2000;
- Convention on Biological Diversity 1992;
- Convention Concerning Indigenous Peoples in Independent Countries 1989 (ILO Convention no. 169);
- Agreement on Trade-Related Aspects of Intellectual Property Rights 1994 (TRIPS);
- Professor K. Puri, "Background Paper on Protection of Traditional Knowledge and Expressions of Culture" (attached);
- Professor K. Puri, "Preservation and Conservation of Expressions of Folklore" (1998) Vol. XXXII *Copyright Bulletin* at pp. 5-36;
- Professor K. Puri, "Protection of Expressions of Indigenous Cultures in the Pacific" (1999) Vol XXXIII *Copyright Bulletin* at pp. 6-34; and
- Other source materials cited in the Background and Research Papers.

THE PROTECTION OF TRADITIONAL KNOWLEDGE AND EXPRESSIONS OF CULTURE ACT 2001

TABLE OF PROVISIONS

THE PROTECTION OF TRADITIONAL KNOWLEDGE AND EXPRESSIONS OF CULTURE ACT 2001

Preamble

An Act to establish a *sui generis* system to protect traditional knowledge and expressions of culture of the indigenous peoples of [*Name of the country*].

PART I - General

1. Short title

This Act may be cited as *The Protection of Traditional Knowledge and Expressions of Culture Act 2001.*

2. Commencement

The Act shall commence on [*the day on which it receives the head of Government's consent*].

NOTES
The relevant date is the date this law comes into effect in the country adopting it, not the date on which it is approved for the region.

3. Application

The Act applies to traditional knowledge and expressions of culture that

(a) are created on or after the commencement of this Act; or

(b) were in existence before that commencement.

4. Definitions

In this Act, unless the contrary intention appears:

(a) ***customary user*** is a person or a group of persons living subject to the customary law of a particular culture and entitled by that law to create works derived from the items of expressions of that culture.

(b) ***derogatory treatment*** means

(i) the doing, in relation to traditional knowledge and expressions of culture that results in a material distortion of, the mutilation of, or a material alteration to, the work that is prejudicial to the traditional owners' honour or reputation; or

(ii) the doing of anything else in relation to the work that is prejudicial to the traditional owners' honour or reputation.

(c) ***expressions of culture*** cover all forms of artistic expressions, whether or not reduced to a material form, based on custom and tradition derived from continually evolving communities. They include the body of Pacific Island peoples' knowledge, traditions, observances, customs, beliefs and innovations as articulated in their

(i) material or tangible objects;

(ii) names, stories, chants, riddles, histories and songs in oral narratives;

(iii) arts and crafts, musical instruments, sculptures, paintings, carvings, pottery, terra-cotta, mosaic, woodwork, metalware, jewellery, weaving, needlework, shell work, carpets, rugs, costumes and textiles;

(iv) music, dance, theatre, literature, ceremonies and ritual performances and cultural practices;

(v) delineated forms, parts and details of designs and visual compositions; and

(vi) architecture.

NOTES

1. The term "**expressions of culture**" is a compendious concept and is used in this Act in preference to the term "folklore." It is used to describe the traditional societies' culture and heritage.

2. The term should therefore not be construed narrowly to refer to oral literature only. Nor should it be assumed that Pacific Island peoples' artistic traditions are static or dead, when in fact they are constantly transformed.

(d) ***moral right*** **means**

(i) a right of attribution of authorship; or

(ii) a right not to have authorship falsely attributed; or

(iii) a right of integrity of the work.

(e) ***traditional knowledge*** includes any knowledge

(i) created, acquired or inspired for economic, spiritual, ritual, narrative, decorative or recreational purposes;

(ii) developed over a long period of time;

(iii) transmitted down through generations; and

(iv) regarded as pertaining to a particular traditional group, clan or community of people in [*Name of the country*].

(f) ***sacred-secret*** in relation to traditional knowledge or expressions of culture refers to an item which has a secret or sacred significance according to customs and cultural practices of the traditional owners concerned and the acceptable use of which is restricted by those customs and cultural practices.

(g) ***traditional owners*** are a group of persons in whom the custody or protection of the item is entrusted by and in accordance with their customs or traditions. Traditional owners may or may not be customary users of a particular item of an expression of culture or traditional knowledge.

(h) ***use*** in relation to traditional knowledge or expressions of culture includes the copying, reproduction, distribution, public recitation or performance, publication or fixation of an item through any process, such as making of a picture, film or sound recording, and also includes ephemeral uses such as broadcasting and display or exhibition.

PART II – Rights of Traditional Owners

5. Collective property rights

(1) Subject to subsection (3) of this section, property rights in traditional knowledge and expressions of culture can vest only in a group, clan or community of Pacific Island peoples in [*Name of the country*].

(2) Subject to section 8(1) of this Act, owners of traditional knowledge and expressions of culture have the exclusive right to control reproduction, dissemination and exploitation of the products drawn from their traditional knowledge and expressions of culture.

(3) In special circumstances, the property rights provided in subsections (1) and (2) of this section may be exercised by an individual as sole custodian or trustee of a communal or collective right in accordance with the relevant customary law and practice prevalent among people in that particular group, clan or community.

NOTES

1. There is a fundamental difference in the nature of "ownership" in Western and traditional societies. While in the former, ownership of a work of art may usually be transferred from one person or entity to another by a commercial transaction, in traditional societies rights over a work of art are generally distributed over several individuals or groups of individuals.
2. Furthermore, the Western system, which is wedded to the concept of private ownership and individual invention, is intrinsically at odds with Pacific cultures, which celebrate collective creation and ownership of knowledge and expressions of culture. In reality, the Western intellectual property system encourages the erosion of indigenous traditional knowledge and expressions of culture by facilitating commercial use without the fair sharing of benefits, and by encouraging the commodification of indigenous culture.
3. On the other hand non-exclusive rights are a singular feature of Pacific Island peoples' customary laws and practices. Consequently, ownership and control over the reproduction of works are vested in the group, clan or community.
4. The Model Act recognises that there are circumstances when an individual can be the sole custodian of a communal or collective right. This principle is reflected in subsection (3) of this section.
5. The *Model Act* confers a **property right** upon those who own traditional knowledge and expressions of culture in accordance with their customary laws and cultural practices. The new property right in traditional knowledge and expressions of culture includes the right to control reproduction of the items of expressions of culture or unauthorised dissemination and commercial exploitation of traditional knowledge.

6. Material form not required

To be protectable under this Act, traditional knowledge and expressions of culture do not need to be in a material form.

NOTES

A great deal of Pacific Island peoples' traditional knowledge and expressions of culture are not in a material form. As a result, an anomalous situation can arise - the first person who reduces the expressions of culture or traditional knowledge to a material form may be entitled to claim intellectual property rights in the work.

7. Rights to be additional to intellectual property rights

(1) The rights under this Act are in addition to any other rights that may be available under any existing intellectual property legislation, including copyright, patents, trade marks and designs.

(2) Any intellectual property arising from the use of traditional knowledge and expressions of culture shall vest in the owners of traditional knowledge and expressions of culture

(3) Customary users owe a fiduciary duty to the traditional owners to preserve the traditional knowledge and expressions of culture by guarding against infringements of the latter's intellectual property rights.

NOTES

1. The *Model Act* will not affect rights accruing under the prevalent intellectual property laws, if already enacted. However, the intellectual property laws should not be permitted to interfere with the owners rights in traditional knowledge and expressions of culture recognised under the *Model Act.*
2. The *Model Act* therefore recommends that the intellectual property laws be amended to ensure the continuing freedom of customary users to exercise their traditional rights in the use of traditional knowledge and expressions of culture.

8. Uses giving rise to an actionable claim

(1) Traditional knowledge and expressions of culture are protected against:

(a) use of traditional knowledge or reproduction of expressions of culture in a material form;

(b) publication;

(c) communication to the public by performance, broadcasting, distribution by cable or other means;

(d) transmission;

(e) adaptation, translation and other transformation;

(f) exhibition of the work to the public;

when such knowledge and expressions are made for commercial purposes or outside their traditional or customary context.

(2) Permission of the Clearing House may be required for any non-customary use of traditional knowledge and expressions of culture, i.e. use outside their traditional or customary context.

(3) The right to authorise acts referred to in subsection (1) of this section shall vest in the Director of the Clearing House.

NOTES

1. The *Model Act* proscribes all unauthorised non-customary use of traditional knowledge and expressions of culture.
2. It is immaterial whether the user is an indigenous person or not.
3. Nor does it matter whether the use is a commercial use or not.
4. In this way, it prevents misrepresentations of the source and prohibits wilful distortion in a way that can be prejudicial to the interests of the relevant traditional owners.

9. Identification of traditional owners

(1) Owners of traditional knowledge and expressions of culture may be identified by the Resource Centre, a division of the office of the Cultural & Intellectual Property Organisation (CIPO) by any reasonable form of identification;

(2) CIPO should, whenever necessary, at the request of the Resource centre, seek advice from Traditional Knowledge & Expressions of Culture Board (TKEC Board) to identify the traditional owners; and

(3) Any disputes regarding the true traditional owners should be referred to the Director of Dispute Resolution Tribunal, whose decision shall be final and binding.

10. Scope and duration of traditional owners' rights

(1) Traditional property rights are inalienable and non-transferable.

(2) Ownership of traditional knowledge and expressions of culture shall continue in force in perpetuity.

(3) If one or more of the traditional owners die, their rights may be exercised and enforced by their representatives or successors in accordance customary law and cultural practice.

NOTES

1. The *Model Act* provides that the rights in traditional knowledge and expressions of culture last indefinitely.
2. The protection is for a community whose existence is not limited in time.
3. This is in contrast to copyright that lasts for the life of the author plus 50 years and patents, which have a finite period of 20 years' protection.

11. Export

(1) Subject to subsection (2) of this section, export of any items relating to traditional knowledge and expressions of culture without the written consent of the Director of the Clearing House is prohibited.

(2) No action shall be taken by the Director of the Clearing House without first obtaining the owners' free and prior informed consent.

NOTES

The *Model Act* prohibits the export of any items originating from traditional knowledge and expressions of culture unless a clearance is obtained from the Director of the Clearing House.

PART III – Administrative Structure

12. Traditional Knowledge & Expressions of Culture Board (TKEC Board)

There shall be established a part-time advisory body called the "Traditional Knowledge & Expressions of Culture Board" (TKEC Board) under this Act.

13. Composition and functions of the TKEC Board

(1) The Board is to consist of five part-time members, comprising entirely of indigenous peoples permanently residing in the (name of country)

(2) The Board members are elected by and from holders of traditional knowledge and expressions of culture for a two-year term.

(3) The Board is to advise Cultural & Intellectual Property Organisation (CIPO) on the protection and promotion of traditional knowledge and expressions of culture.

(4) The Board has a number of functions including appointment of members on CIPO's Executive, provision of expert advice on matters of traditional knowledge and expressions of culture, and overseeing the operation of this Act.

14. Establishment of Cultural & Intellectual Property Organisation (CIPO)

(1) A national body called, "Cultural & Intellectual Property Organisation" (CIPO) is to be formed specially designed for protecting and promoting indigenous peoples' culture in (name of country) at the provincial, national and regional levels.

(2) When developing policies and programs in the field of intellectual and cultural property rights, the national government is to consider the deliberations of CIPO.

15. Organisational Structure of CIPO

(1) CIPO is to consist of three divisions –**Resource Centre, Clearing House** and **Dispute Resolution Tribunal.**

(2) A Director-General heads CIPO.

(3) Each of the three Divisions is to be headed by a Director.

(4) The Director-General is assisted by a Deputy Director-General, whose responsibilities include coordination of the functions of the three Divisions and liaising with each of the provinces of the country.

(5) The Director-General is answerable to the TKEC Board.

16. CIPO's Executive

The Executive of CIPO is to consist of the following:

(a) Director-General (Chair);
(b) Deputy Director-General (Deputy Chair);
(c) Director of the Resource Centre;
(d) Director of the Clearing House; and
(e) Director of the Dispute Resolution Tribunal.

NOTES

1. Presumably, most Pacific communities are capable of administering a scheme to control unauthorised exploitation of their traditional knowledge and expressions of culture without any outside help.

2. Previous attempts hitherto to develop model laws (e.g., *Tunis Model Law on Copyright for Developing Countries 1976*, UNESCO/WIPO's *Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and other Prejudicial Actions 1982* and the *Aboriginal Folklore Act* (a Model devised by the Working Party into Protection of Aboriginal Folklore 1981) have suggested formation of some sort of "Competent Authority".
3. This concept is **not** supported by the *Model Act* to avoid creation of **an unrepresentative bureaucratic organ of the State** that may turn out to be at best paternalistic and at worst duplicitous. It should be remembered that in some Pacific Island countries and territories (e.g., Marshall Islands), the traditional leaders are very proud of their paramount authority in almost all matters concerning traditional and customary practices. In all likelihood, they would not welcome creation of a bureaucratic body under the model Act that may usurp their supreme powers.
4. The *Model Act* establishes a part-time advisory body – "Traditional Knowledge & Expressions of Culture Board" (TKEC Board) and a full-time Executive under a new structure of "Cultural & Intellectual Property Organisation" (CIPO). The TKEC Board is responsible for overseeing the operations of CIPO and gives expert advice upon request. The Executive of CIPO is responsible to administer the *Model Act*.
5. A small administrative staff would be necessary.

17. Pacific Culture Day

The Director-General of CIPO is to name one specific day in a calendar year to raise national awareness of Pacific culture and to strengthen national, regional and international cooperation for the protection of traditional knowledge and expressions of culture.

18. Fellowship Program

CIPO is to set up a Fellowship Program to assist Pacific Island peoples in (name of country) to gain tertiary education, particularly postgraduate and doctoral qualifications in the relevant areas.

19. Development of Educational and Training Programs

CIPO is to enhance Pacific Island peoples' capacity to deal with intellectual and cultural property issues by instigating appropriate educational and training programs in (name of country) that are culturally sensitive, including the following:

(a) Youth programs;
(b) Sponsorship of festivals, inter alia, to inform and educate the wider community of Pacific Island peoples' cultural beliefs, customary laws and practices;
(c) Establishment and support of schools and a tertiary institution explicitly to cater to the needs of Pacific Island peoples;
(d) Revision of school texts and educational curricula to eliminate discriminatory content and promote the development of Pacific Island peoples' cultures and, where appropriate, their languages and scripts;
(e) Establishment and promotion of networks of local journalists;
(f) Launch of Pacific Island peoples' periodicals at the national and regional levels; and
(g) Encouragement to radio and television centres to promote information on the problems and proposals of Pacific Island peoples and to improve communications among Pacific countries and territories' peoples.

Notes :

1. The primary thrust of the *Model Act* is to provide appropriate protection for owners' legitimate rights in their traditional knowledge and expressions of culture.
2. In addition, there are other worthy functions (viz., naming a Pacific Culture Day, setting up a Fellowship Program, and developing an educational and training program) that are assigned to the CIPO to raise the profile of this momentous *sui generis* initiative.

PART IV – Resource Centre

20. Establishment of a Resource Centre

(1) CIPO is to establish a database or resource centre comprising of an inventory of all the traditional knowledge resources in the country, documentation and evaluation of the uses of these resources, and details of traditional ownership.

(2) The Resource Centre has a number of functions including the following:

(a) identification of owners of traditional knowledge and expressions of culture;

(b) monitoring compliance with statutory and contractual arrangements by the authorised users and to inform owners of any breaches;

(c) formulation of standard terms and conditions for authorised users agreements;

(d) provision of training and education programs for traditional owners and users of traditional knowledge and expressions of culture; and

(e) such other functions as are conferred on by this Act.

(3) Pacific Island peoples, who are residents of [*Name of the country*] will have free access to the database upon payment of a nominal administration fee.

(4) The Resource Centre is to also serve as a documentation centre, archives and a museum to record local Pacific Island peoples' traditional knowledge and expressions of culture comprising oral, written and visual traditions.

(5) The Resource Centre is to observe strict obligations of confidentiality.

(6) The Resource Centre is not to initiate a registration system as such.

Notes

1. The *Model Act* does not aim to establish a registration system.
2. The purpose of the Resource Centre is merely to document resources of traditional knowledge and expressions of culture (as opposed to documenting the traditional knowledge and expressions of culture themselves).

21. Recording by outsiders

(1) The Resource Centre is to actively consult with holders of traditional knowledge and expressions of culture for developing a code of ethics to ensure respect for traditional knowledge and expressions of culture and to regulate recording/access to recording (visual, audio or written) by outsiders of their traditional knowledge and expressions of culture.

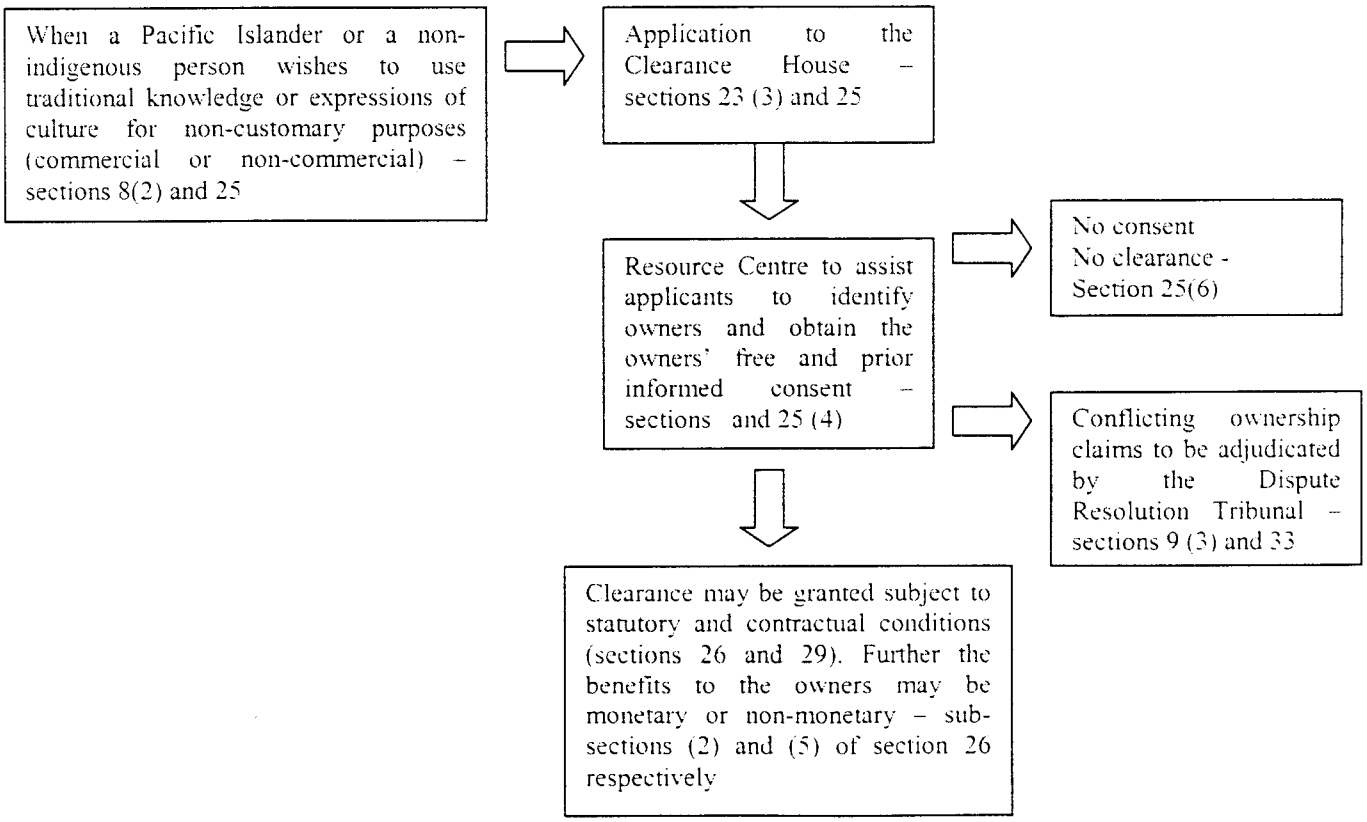
(2) The code of ethics is to be approved by the TKEC Board.

(3) The Resource Centre is responsible for administering the code of ethics.

PART V – Clearing House

22. Typical steps in obtaining a clearance

The following flow chart shows the expected steps involved ingetting a clearance by an applicant seeking to use items of traditional knowledge and expressions of culture outside their traditional or customary context for commercial or non-commercial purposes. The chart is intended for use as a general illustration and is not meant to have any other effect. If there is any inconsistency between the chart and a provision of this Act or the regulations, the provisions shall prevail.



Notes

1. No clearance is required where a Pacific Islander, who is a customary user, wishes to use traditional knowledge or expressions of culture for customary purposes (see section 47 and the accompanying notes).
2. The *Model Act* makes no distinction between indigenous and non-indigenous applicants, except that in the case of indigenous applicants wanting to use traditional knowledge and expressions of culture for non-commercial, albeit non-customary purposes, no monetary payment may be required (see section 26(5)).

23. Prior authorisation by Clearing House

(1) A **Clearing House** with the primary function of giving permission to use traditional knowledge and expressions of culture is established.

(2) The Clearing House's activities are analogous to a Collecting Society.

(3) Subject to sections 25(6) and 26(2), Prior authorisation of Clearing House is required for any commercial use of traditional knowledge and expressions of culture.

(4) Unauthorised (commercial and non-commercial) use would take place when traditional knowledge and expressions of culture are not used in their proper or intended customary framework as a continuing expression of culture by a particular clan, group or community.

24. Moratorium on new commercialisation

(1) A moratorium is to apply on all new commercialisation of traditional knowledge and expressions of culture, including medicinal plants and human genetic materials.

(2) All existing users are given six months from the date of the Act coming into force to obtain a Clearance in accordance with the new procedures.

(3) At the expiry of the said six months, all unauthorised use of traditional knowledge and expressions of culture will be unlawful, unless a clearance has been duly obtained from the Clearing-House.

25. Procedure for obtaining permission to use traditional knowledge and expressions of culture

(1) Prospective users may lodge an application on a prescribed form stating their wish to use traditional knowledge and expressions of culture.

(2) Each application is to be accompanied by the prescribed fee to cover the administration costs.

(3) The applicant is required to state explicitly the purpose and the extent to which the use is intended.

(4) Subject to section 9 of this Act, it is the responsibility of every applicant who wishes to use or incorporate elements of traditional knowledge and expressions of culture to seek the Resource Centre's assistance to clearly identify the relevant traditional owners and to obtain their free and prior informed consent.

(5) Upon receipt of an application, the Director of Clearing-House should provide them with a copy of the application form and confirm or seek, as appropriate, their free and prior informed written consent.

(6) The clearance application must not proceed unless the owners have given their free and prior informed written consent.

(7) Where necessary, the Director may use popular media to make contact with the prospective owners of traditional knowledge and expressions of culture.

NOTES

1. The *Model Act* puts the onus on the user. Thus, it stipulates that it is the responsibility of those seeking to use the traditional knowledge and cultural expressions to obtain the traditional owners' free and prior written consent.
2. It is likely that prospective applicant's would seek the Resource Centre's expert assistance in this regard.
3. It is noteworthy that the Clearing-House is not empowered to grant permission unless the owners have consented.
4. However, the Clearing-House can assist traditional owners with negotiations of user agreements, terms and conditions, etc., but it is not authorized to grant permission except where owners cannot be identified or there are conflicting claims for ownership.
5. The above aside, the Model Act, contains measures to require a consideration of the concept of community ownership to ensure greater control by holders of traditional knowledge and expressions of culture. In particular, provisions are enacted to ensure that commercialisation does not take place in the wrong context by treating traditional knowledge and creativity as a commodity.
6. If and when necessary, advice should be sought from the TKEC Board as to the significance of items in question.

26. Determination of clearance applications

(1) The Clearing-House is to process clearance applications promptly in close consultations with the owners of traditional knowledge and expressions of culture.

(2) Upon being satisfied that the proposed use conforms to the provisions of this Act, the Director of the Clearing House is to obtain free and prior informed consent of traditional owners regarding the fees acceptable to them for use of their traditional knowledge and expressions of culture

(3) If the amount suggested by traditional owners is not acceptable to the applicant, the Director of the Clearing-House is to endeavour to negotiate payment of a fair monetary sum by the applicant on behalf of the traditional owners.

(4) If the traditional owners are not completely satisfied with the fee arrangement, the Director of the Clearing-House should allow the clearance application to lapse.

(5) Where the application is for a non commercial use, owners of traditional knowledge and expressions of culture may at their discretion give free and prior informed consent to an applicant on non-monetary conditions, such as capacity building for the relevant clan, group or community, information exchange and transfer of know-how, and training.

(6) No clearance shall be issued without first obtaining explicit undertakings by each applicant:
   (a) not to make any further or other use of traditional knowledge and expressions of culture other than that for which permission has been sought and given by the owners of traditional knowledge and expressions of culture; and
   (b) to pay the agreed fees in the prescribed manner.

(7) Where an extraneous use is intended, the applicant must reapply for permission to use the traditional knowledge and expressions of culture for that specific purpose.

(8) Every applicant shall abide by the terms and conditions enumerated in the clearance certificate, which may include conditions such as the following:
   (a) apportionment of monetary and other benefits arising from the use of the traditional knowledge and expressions of culture;
   (b) whether the permitted use will be exclusive or non-exclusive;
   (c) duration of the use and conditions for renewal;
   (d) full and complete disclosure requirements in relation to the use;
   (e) the rights of the owners of traditional knowledge and expressions of culture upon emergence of any intellectual property rights resulting from the permitted use;
   (f) whether the rights arising under the contract are declared by the contract to be incapable of assignment;
   (g) choice of law.
   (h) any such condition that may be considered appropriate in particular circumstances.

Notes

1. A customary user cannot exploit intellectual property rights arising from the use of traditional knowledge and expressions of culture because the former holds a fiduciary position vis-à-vis the traditional owners, who hold collective rights recognised under the *Model Act.*

2. If a user, who currently holds permission to use traditional knowledge and expressions of culture, intends to make an extraneous use, then heor she must re-apply to seek permission for the different purpose. This would avoid the possibility for a user undermining the protection granted under the Model Act by making a derivative use under the intellectual property regime.

3. A contract may be connectec with several territorial jurisdictions because the parties to it live in different countries. It is therefore important to expressly state which legal system is to govern the parties' relationship, i.e., to determine what is the law applicable to the contract. Typically, the condition could read as follows: "The relationship between the parties shall be governed by the law of (name of Country)."

27. Grant of Clearances

(1) Declarations relating to clearances are final and not subject to review.

(2) The Director of Clearing House must inform the applicant and holders of traditional knowledge and expressions of culture of his or her decision within ninety days.

(3) Clearances are to be given or refused with reasons.

28. Disbursement of fees to traditional owners

(1) The Clearing-House is to distribute the fees among the traditional owners within 30 days of its receipt from the prospective user or users.

(2) The Clearing-House is authorised to deduct an administration fee, which should not exceed 10% of the total sum received.

(3) Subject to subsection (4) of this section, any monetary sum received is to be distributed to traditional owners in a manner, which the Director of the Clearing- House considers to be equitable and most likely to produce consensus among the parties.

(4) The decision of the Director of the Clearing House is reviewable by the Director of Dispute Resolution Tribunal, whose decision shall be final.

29. Users' rights after obtaining clearance

(1) Subject to the provisions of this Act, where an agreement is reached between the Director of Clearing-House and the prospective user:

(a) the user is thereafter entitled to engage in the permitted use free from any claims by traditional owners; and

(b) the amount agreed to be paid would be recoverable by the traditional owners by filing an action before the Dispute Resolution Tribunal.

(2) Subject to subsection (3) of this section, grant of a clearance by the Director of Clearing-House renders a user immune from prosecution.

(3) No clearance should be deemed to permit use of sacred-secret material or use that might cause mutilation, destruction or debasement of traditional knowledge and cultural expressions.

Notes :

1. Subsections (1) and (2) of this section are intended toprovide « peace of mind » to the user who has been duly authorised to use traditional knowledge and expressions of culture for stated purposes and subject to statutory and contractual conditions.
2. Subsection (3) is designed to remind (authorised) users of their paramount obligation to respect indigenous peoples' cultural heritage.

30. Uses not subject to clearance procedure

(1) Subject to subsection (2) of this section, this Act does not apply to fair dealing with traditional knowledge and expressions of culture for the purposes of

(a) research or study;
(b) personal use;
(c) face to face teaching;
(d) criticism or review;
(e) using short excerpts for reporting current news;
(f) judicial proceedings;

provided that a sufficient acknowledgment of the source is made in an appropriate manner by referring to the community and/or place from where traditional knowledge and expressions of culture have been derived from.

(2) The fair dealing exemptions provided for in subsection (1) of this section shall not apply to sacred-secret material

PART VI – Non-Customary Use of Sacred-Secret Material

31. Prohibition of Sacred-Secret Material

Any person who uses sacred-secret material outside its traditional or customary context commits an offence.

32. Mutilation, destruction or debasement of material

Any person who uses traditional knowledge or an expression of culture in a way that debases, destroys or mutilates it, commits an offence.

NOTES:

1. If certain expressions of Pacific Island peoples' culture are sacred-secret, then their use otherwise than in accordance with custom and practice will cause genuine offence. For this reason, the *Model Act* proposes that non-customary uses of sacred-secret expressions of culture should be prohibited by creation of an appropriate criminal offence.
2. Similarly, mutilation, destruction, debasement or export of expressions of culture result in a permanent loss of Pacific Island peoples' cultural heritage. Such expressions, if not sacred-secret, are a cultural resource for all Pacific Island peoples, which money cannot replace. Therefore, the Model Act also prohibits mutilation, destruction or debasement of items of Pacific Island peoples' culture by creation of an appropriate criminal offence.
3. Specific provisions should also be enacted to control export, e.g., under the Customs (Prohibited Exports) Regulations or by specific new legislative provisions.
4. It should be remembered that under section 29(3) of this Act, grant of a clearance would not exonerate a user from using sacred-secret material or for causing mutilation, destruction or debasement of traditional knowledge and expressions of culture.

PART VII – Dispute Resolution Tribunal

33. Composition of Dispute Resolution Tribunal

(1) A tribunal called, "Dispute Resolution Tribunal" is to be set up to settle disputes among traditional owners themselves and between traditional owners and the wider community.

(2) The Disputes Resolution Tribunal has jurisdiction in respect of all matters arising under this Act.

(3) The Tribunal is to consist of a Director and three indigenous persons: a member of legal profession and two members nominated and elected by the TKEC Board.

(4) The Tribunal is a decision-making body, similar to a normal court, with authority to apply customary law and practices for the protection of traditional knowledge and expressions of culture.

(5) The Tribunal has powers to award damages, including allowing claims for cultural damages, and imposing criminal sanctions such as fines and imprisonment.

(6) The Tribunal could also make use of arbitration, mediation and alternative dispute resolution procedures.

34. Enforcement of Rights

(1) The Dispute Resolution Tribunal shall have the authority to enforce rights under its civil and criminal jurisdiction, and on such terms, as it may deem reasonable.

(2) The owners of traditional knowledge and expressions of culture protected under this Act shall be entitled to payment of damages by the defendant for the harm suffered as a consequence of the contravention including such expenses directly caused by the contravention.

(3) Owners of traditional knowledge and expressions of culture are entitled to initiate representative proceedings to enforce rights conferred under this Act.

35. Development of dispute resolution mechanisms

The Dispute Resolution Tribunal is to initiate fair procedures such as negotiation, mediation, arbitration, and regional human rights reviews with full participation of indigenous peoples, for resolving disputes or conflicts among owners of traditional knowledge and expressions of culture *inter se* and between indigenous persons and the wider community.

NOTES

1. The *Model Act* sets up a tribunal system to settle any disputes.
2. The decisions of the Tribunal are legally enforceable.
3. The aim of the Tribunal is to provide fast track, low-cost quasi-legal remedies.
4. The Tribunal could consist of only Pacific Island peoples.

PART VIII – Moral Rights of Traditional Owners

36. Right of attribution of ownership

(1) Owners of traditional knowledge and expressions of culture have a right of attribution of their ownership rights.

(2) Owners of traditional knowledge and expressions of culture may be identified by any reasonable form of identification.

(3) An identification of the owners must be clear and reasonably prominent.

(4) An identification of the owners is taken to be reasonably prominent if it is included on each reproduction or adaptation of the traditional knowledge or expressions of culture in such as way that a person acquiring it will have notice of the owners identity.

37. Acts of false attribution of ownership

(1) Owners of traditional knowledge and expressions of culture have a right not to have ownership falsely attributed to them.

(2) Acts of false attribution will occur by performing in public, transmitting, inserting or affixing traditional owners' names in such a way as to falsely imply ownerships where the attributor knows that the persons are not the traditional owners.

38. Right of integrity of ownership of a work

(1) The owners of traditional knowledge and expressions of culture have a right of integrity of ownership in respect of the work.

(2) The traditional owners' right is the right not have their work subjected to derogatory treatment.

(3) Moral rights can neither be transferred nor waived because of the communal nature of the traditional ownership rights.

NOTES

1. Moral right is the right to be acknowledged as the source of a work and to protect its integrity. The Model Act introduces "communal moral rights" provisions to protect expressions of culture from distortion, debasement and loss of cultural integrity due to inappropriate use.
2. Moral rights will help Pacific Island peoples to prevent debasement, mutilation and destruction of their expressions of culture, particularly works of art and craft.
3. Moral rights can protect expressions of culture in four ways: the right to have the traditional owners' name associated with the work, the right not to have ownership falsely attributed to them, the right to control its publication or dissemination, and the right to prevent its mutilation, misuse or distortion.
4. Moral rights are personal in nature and cannot be transferred, unlike the exploitative rights in a copyright work. Moral rights are therefore potentially capable of giving greater control to Pacific Island peoples over the use of their traditional knowledge and expressions of culture. Thus, it would be possible for traditional owners to stop use of their knowledge and expressions of culture in a manner that is offensive or prejudicial to the group, clan or community's honour or reputation, including preventing damage or alterations to their works.

PART IX – Contravention of Traditional Owners' Rights

39. Contraventions of traditional owners' rights

Any person who, without the prior written consent of the Director of Clearing House referred to in Part V of this Act, uses traditional knowledge or expressions of culture in a manner not permitted by section 8(1) of this Act, shall be liable to a civil action before the Disputed Resolution Tribunal under section 41 of this Act.

40. Contravention by importation for sale or other dealing

(1) Owners' rights in traditional knowledge and expressions of culture will be contravened by a person who imports an article into the country for the purpose of dealing with the article if the importer knew, or ought reasonably to have known, that, if the article had been made in the country, it would have contravened the traditional owners' rights under this Act.

(2) In subsection (1), "dealing with" does not include distributing except where the proposed distribution is for the purposes of sale.

PART X – Remedies for Contravention of Traditional Owners' Rights

41. Remedies for contravention of traditional owners' rights

(1) The Dispute Resolution Tribunal has jurisdiction in respect of all disputes arising under this Act.

(2) Owners of traditional knowledge and expressions of culture may bring an action in respect of a contravention before the Dispute Resolution Tribunal.

(3) The relief granted by the Tribunal may include any one or more of the following:

(a) an injunction;
(b) compensation for loss resulting from the contravention;
(c) a declaration that the owners' rights in traditional knowledge and expressions of culture have been contravened;
(d) an order that the defendant make a public apology for the contravention;
(e) an order that any false attribution of ownership, or derogatory treatment, of the work be removed or reversed;
(f) seizure of any object made or imported in violation of the provisions of this law and recovery of any profits made by the offending party; and
(g) such other order that the Tribunal considers it appropriate in the circumstances.

(4) In exercising his or her discretion as to the appropriate relief to be granted, the Director of the Dispute Resolution Tribunal may take into account any of the following:

(a) whether the defendant was aware, or ought reasonably to have been aware, of the owners' rights in traditional knowledge and expressions of culture;
(b) the effect on the traditional owners' honour or reputation resulting from any damage to the work;
(c) the number, and categories of people who have seen or heard the work;
(d) anything done by the defendant to mitigate the effects of the contravention;
(e) any cost or difficulty that may have been associated with identifying the traditional owners;
(f) any cost or difficulty in removing or reversing any false attribution of ownership, or derogatory treatment, of the work.

(5) In deciding whether to grant an injunction, the Tribunal must also take into account whether the parties have undertaken negotiation or mediation in order to resolve their dispute.

NOTES

1. The *Model Act* sets out the relief that the Dispute Resolution Tribunal may grant in the case of contravention of traditional owners' rights in traditional knowledge and expressions of culture.
2. The remedies include an injunction, damages, a declaration, an order that the defendant make a public apology for the contravention, and an order that any false attribution of ownership, or derogatory treatment, of the work be removed or reversed.

42. Disputes about ownership

(1) If it is not possible to identify the traditional owners or where there are conflicting ownership claims under section 9 of this Act, the Director of Resource Centre may institute proceedings against unauthorised users of traditional knowledge and expressions of culture before the Dispute Resolution Tribunal.

(2) Where possible, monies received by the Resource Centre on behalf of unidentified owners should be used for the benefit of the appropriate clan, group or community from where the traditional knowledge or expressions of culture might have originated.

(3) If the traditional knowledge and expressions of culture belong to more than one clan, group or community, the Resource Centre should distribute the payment received by it from the users in an equitable manner. However, no clan, group or community should claim protection to the exclusion of the others.

NOTES

1. Where it is not possible to identify the traditional owners or there is difficulty in resolving conflicting ownership claims, the Director of Resource Centre may institute proceedings as if he or she were the holder of the rights.
2. Any damages awarded to the Central Registry should be used for the cultural development of the relevant clan, group or community.

43. Default in making payment

(1) Once the Clearing-House has made a declaration, owners of traditional knowledge and expressions of culture are able to enforce their rights in the Dispute Resolution Tribunal.

(2) The decision of the Director of the Dispute Resolution Tribunal shall be enforceable in the ordinary way in the courts.

44. Injunctions

The Director of Dispute Resolution Tribunal may issue an injunction in respect of any unauthorised use or for an order for delivery up of any tangible moveable material of indigenous peoples' traditional knowledge and expressions of culture.

PART XI – Offences

45. Offences

(1) The Dispute Resolution Tribunal has jurisdiction in respect of criminal matters under this Act.

(2) Subject to the defences set out in this Act, the following acts amount to a criminal offence:

(a) any improper use of sacred-secret material in contravention of the section 31 of this Act;

(b) a wrongful use that debases, destroys or mutilates traditional knowledge or expressions of culture in contravention of section 32 of this Act;

(c) export of traditional knowledge and expressions of culture prohibited by section 11 of this Act; and

(d) importation of traditional knowledge and expressions of in contravention of section 40 of this Act.

(3) If a person does an act of a kind stated in subsection (2) of this section in relation to traditional knowledge and expressions of culture, that person is guilty of an offence punishable on conviction by a fine not

exceeding an amount equivalent to US$50,000 or a term of imprisonment not exceeding one year, or both.

NOTES

1. The Model Act treats commercial exploitation of traditional knowledge and expressions of culture differently from other unauthorised uses.
2. Thus, for uses resulting in commercial expolitation, it provides for civil remedies, e.g., payment of remuneration.
3. However, criminal remedies, e.g., fine and/or imprisonment are considered more appropriate for other unauthorised uses, e.g., use of sacred-secret material for non-customary purposes

PART XII – Defences

46. Defences

(1) A person charged with an offence under this Act, is not liable if he or she proves that he or she honestly and reasonably believed that the material did not belong to the traditional knowledge and expressions of culture.

(2) A person is not liable for an offence if he or she uses the material with the full knowledge and free and prior informed written consent of those persons whom he or she honestly believes are the traditional owners.

(3) It is irrelevant for an action for contravention

(a) whether or not the defendant's use was for profit making purposes; or

(b) when the traditional knowledge and expressions of culture had first come into existence.

47. Customary users

(1) This Act is to be construed so as not to prevent customary users from exercising their traditional rights in the bounds of their traditional or customary context; and

(2) A customary user exercising those rights is immune from prosecution.

NOTES

1. The procedures established by the Model Act are not applicable to customary users.
2. Indigenous peoples living traditionally and producing their own traditional works are not bound by the proposed restrictions.
3. The work of such customary users would presumably be based on specific traditional knowledge and expressions of culture for which they are the rightful reproducers or communicators under the customary law.

PART XIII – Amendments to Intellectual Property Laws

48. Amendments to the national copyright legislation

(1) Copyright legislation should be amended to ensure the continuing freedom of customary users to exercise their customary rights in the use of traditional knowledge and expressions of culture.

(2) Provisions are to be introduced in copyright legislation to impart the following two economic rights:

(a) *Domaine public payant*, involving payment of royalties for the use of traditional knowledge and expressions of culture in the public domain; and

(b) *Droit de suite*, involving a resale royalty under which an artist receives a share of the price paid for his or her original work from all sales subsequent to the initial one.

NOTES

1. *Domaine public payant* refers to a revenue-raising scheme under which users of expressions of culture pay a percentage of the receipts from the use of the works or their adaptation, to a nominated authority. The rate of actual percentage is left to individual national copyright legislation.

2. *Droit de suite* (resale royalty) provides the author of a work with an inalienable right to a share in the proceeds of any sale of that work by public auction or through a dealer. This concept takes account of the fact that at the beginning of their careers authors often dispose of their works at ridiculously low prices. These works may subsequently assume considerable value, and it therefore seems equitable that the author should share in the fortunes of his or her work and collect a percentage of the sale price for the work each time it changes hands.

49. Amendments to the national Patents legislation

(1) Patent legislation is to be amended to require applicants to give an undertaking that the patent they are seeking is not based on traditional knowledge.

(2) Every patent applicant who uses elements of traditional knowledge and expressions of culture must submit clear evidence of free and prior informed written consent of the clan, group or community as well as clear evidence of an arrangement for the equitable sharing of ownership, control, use and benefits.

(3) Non-submission of such documents should lead to an outright rejection of the application.

(4) All patent applicants who use traditional knowledge of plants, including terrestrial, fresh water and marine plants, animals and micro-organisms should sign a sworn document that they have obtained free and prior informed written consent from the relevant traditional owners.

(5) A patent shall be open to revocation where an undertaking or a disclosure, as the case may be, was proved to be false.

NOTES

1. Currently, an applicant for a patent is not required to make full disclosure of the source of information acquired from traditional owners, which may be secret or confidential. There are recent instances in the international arena involving grant of patents that have used knowledge obtained from traditional medicines – knowledge that is (erroneously) considered to be in the public domain.

2. The *Model Act* recommends inclusion of specific provisions to protect local biodiversity and knowledge from misappropriation by non-indigenous peoples such as through patenting of modified products, processes and biological resources.

50. Amendments to geographical indications, appellations of origin and trade marks legislation

The legislation relating to geographical indications, appellations of origin and trade marks should be amended

(a) to disallow applications for registration of geographical indications, appellations of origin and trade marks for products of a clan, group or community which manifest goodwill and reputation created or built up by them by using traditional methods over a long period, unless there is clear evidence of free and prior informed written consent of the clan, group or community to that application;

(b) to prohibit registration of indigenous words, designs, sounds, scents and symbols as trade marks unless the applicant were to provide clear evidence of the source of the trade mark and the free and prior informed written consent of the clan, group or community from where the word, design, sound, scent or symbol had been obtained;

(c) to empower the Trade Marks Office to refuse registration of trade marks which might be culturally insensitive; and

(d) to allow indigenous peoples who are "culturally aggrieved" to oppose a trade mark application and to have *locus standi* to petition for removal of an existing trade mark from the register.

NOTES

1. Indicators of geographical origin refer to the place where a product is obtained or produced. They are of great significance to indigenous communities. They involve a consensual process and are based upon collective traditions.
2. Pacific peoples are heavily reliant on their traditional ways of life, including their proximity to ancestral lands, waters and living ecosystems.
3. Appellations of origin go much further. They refer to further effects produced on a product by natural factors specific to the locality, such as micro-climate, soil formation, and also by specific human factors that pertain to the product.

51. Amendments to the national designs legislation

The national designs legislation should be amended to empower the Designs Office to refuse registration of cultural designs unless the applicant were to provide clear evidence of the source of the design and the free and prior informed written consent of the clan, group or community to whom the design has traditionally belonged.

PART XIV – Miscellaneous

52. Jurisdictional matters

(1) Subject to subsection (2) of this section, the decision of Director of Dispute Resolution Tribunal is final and binding.

(2) In exceptional circumstances, an appeal may lie by special leave to the Director-General of CIPO.

53. Reporting Responsibility

(1) The Director-General of CIPO shall, through the TKEC Board, provide an annual report to the Minister responsible for the protection of traditional knowledge and expressions of culture.

(2) Each of the Directors of the Resource Centre, Clearing House and Dispute Resolution Tribunal shall provide a six-monthly report to the Director-General of CIPO giving a detailed account of the activities of each Division for the reporting period.

(3) The Director-General of CIPO shall attach copies of these reports to his or her annual report to the responsible Minister.

54. Transitional Provisions

Current users of traditional knowledge and expressions of culture are to comply with the requirements of this Act within six months of this Act coming into force.

55. Regulations

The Minister responsible for the protection of traditional knowledge and expressions of culture may, in consultation with CIPO, make regulations prescribing all matters:

(a) required or permitted by this Act to be prescribed; or

(b) necessary to uphold the protection of traditional knowledge and expressions of culture

56. Savings of other rights and remedies

(1) Nothing in this Act shall be construed to preclude holders of traditional knowledge and expressions of culture to enter into any contractual or licensing arrangements on their own benefit-sharing arrangements for dealing with their traditional knowledge and expressions of culture;

(2) This Act does not affect any rights of action or other remedies, whether civil or criminal, in proceedings brought otherwise than under this Act;

(3) Contractual or other arrangements relating to use of traditional knowledge and expressions of culture concluded before the commencement of this Act are not affected by this legislation.

NOTES

At present, traditional knowledge and expressions of culture are not protected against unauthorised commercial exploitation, except by private contractual arrangements.

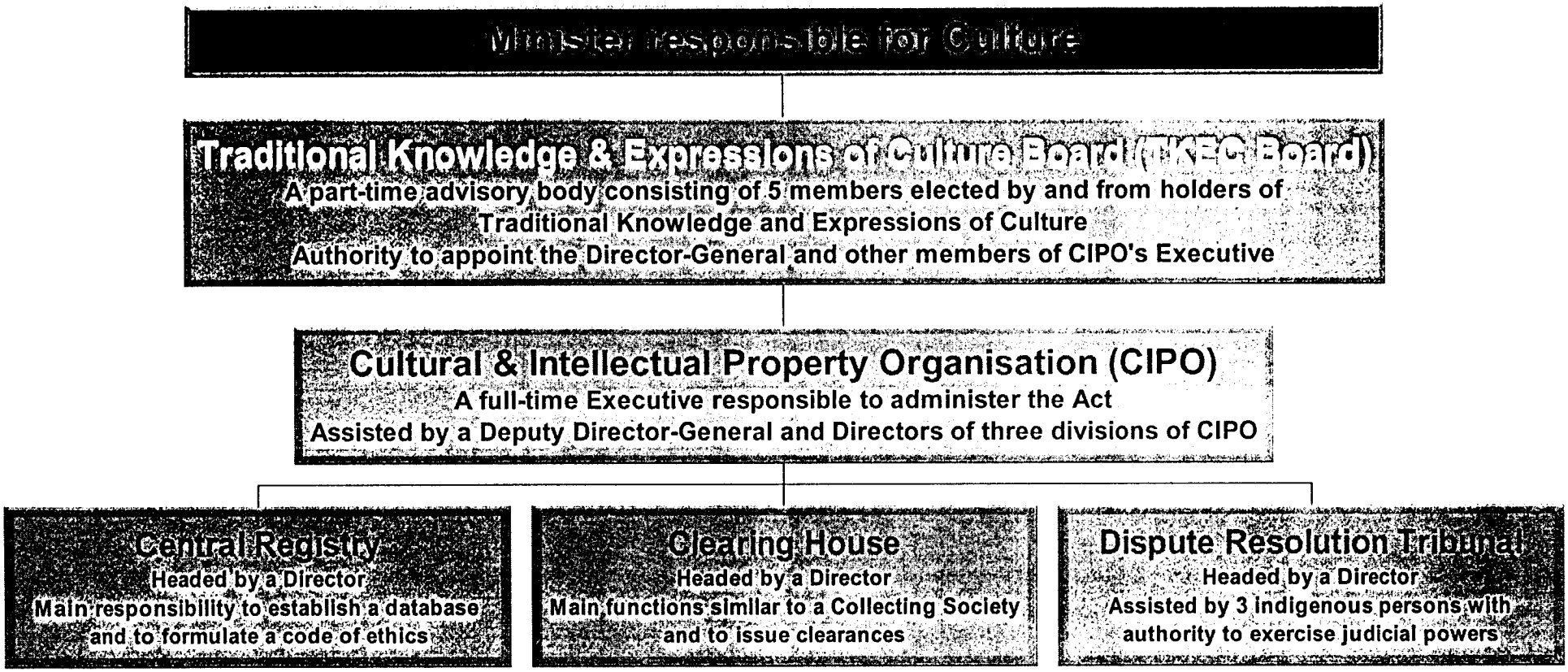
57. Regional protection

Subject to the creation of reciprocal arrangements, the provisions of this Act shall accord the same protection to traditional knowledge and expressions of culture originating in other Pacific island countries and territories as is provided to traditional knowledge and expressions of culture originating in Name of the country)

NOTES

1. This Act provides for regional extension of protection based on reciprocity, giving support to the principle of national treatment.
2. Funding matters: The questions of cost and administrative support and the location of the office and operations of the TKEC Board and CIPO have not been considered in detail here to avoid unnecessary debate in terms of existing national organisations. I would be happy to advise on these matters once the concept of a robust *sui generis* legislation is accepted in principle.
3. However, two observations may be made. (I) it is anticipated that the administrative structure envisaged by the Model Law would be able to generate adequate income to be self-sufficient within five years once initial infrastructure costs have been met and (ii), it is suggested, echoing the consensus at the Noumea Workshop (26-28 February 2001), that there is a role for an existing regional body, such as SPC, with the assistance of the Forum Secretariat and UNESCO, to take on the responsibility of promoting the model law and to provide assistance to the countries in the region to adopt, adapt and enact the model law and to provide help with training, education and awareness-raising on the protection of traditional knowledge and expressions of culture.

ORGANISATIONAL STRUCTURE



DRAFT ONLY

REGIONALLY FOCUSED ACTION PLAN (RFAP)

PART 1

Summary Sheet

Beneficiary Countries:	Pacific Community Countries and Territories and Pacific Islands Forum Countries (22): American Samoa, Cook Islands, Federated States of Micronesia, Fiji, French Polynesia, Guam, Kiribati, Marshall Islands, Nauru, New Caledonia, Niue, Commonwealth and Northern Mariana Islands, Palau, Papua New Guinea, Pitcairn Islands, Samoa, Solomon Islands, Tokelau, Tonga, Tuvalu, Vanuatu and Wallis and Futuna.
RFAP Project Number:	
RFAP Project Title:	Pacific Islands Protection of Traditional Knowledge and Expressions of Culture Development Plan
Field:	Regional Collaboration in Intellectual Property
Estimated Cost:	WIPO:
Estimated Duration:	
Regional Counterpart Institution:	Secretariat of the Pacific Community, Noumea, New Caledonia (SPC) Pacific Islands Forum Secretariat, Suva, Fiji (Forum Secretariat)
Contact Person:	Rhonda Griffiths Cultural Affairs Adviser Secretariat for the Pacific Community Tel: (687) 262 000 E mail: RhondaG@spc.int Mere Falemaka Trade Policy Adviser Trade and Investment Division Forum Secretariat Tel: (679) 220 286 Email: meref@forumsec.org.fj

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PART II

OVERVIEW: BACKGROUND, OBJECTIVE, JUSTIFICATION, PLANNED ACTIVITIES AND OUTPUTS

BACKGROUND

1. The Secretariat of the Pacific Community has 27 members and the Pacific Islands Forum 16 members. Together, they have 22 Island Countries and Territories in the Pacific namely, American Samoa, Cook Islands, Federated States of Micronesia, Fiji, French Polynesia, Guam, Kiribati, Marshall Islands, Nauru, New Caledonia, Niue, Commonwealth and Northern Mariana Islands, Palau, Papua New Guinea, Pitcairn Islands, Samoa, Solomon Islands, Tokelau, Tonga, Tuvalu, Vanuatu and Wallis and Futuna.

2. The Secretariat of the Pacific Community is the regional intergovernmental development agency responsible for developing the technical, professional, scientific, research, planning and management capability of Pacific Island people and for directly providing information and advice, to enable them to make informed decisions about their future development and wellbeing. The mission of the SPC Cultural Affairs Programme is to preserve and promote Pacific Island heritage for future generations.

3. The Forum Secretariat is the intergovernmental organisation responsible for providing policy advice to the Pacific Forum Leaders and members on political, international relations, legal, security, economic and trade issues. This mandate includes advice on intellectual property rights protection.

4. There are two distinct aspects of the Intellectual Property Protection for the Pacific Island Countries and Territories.

(a) *Core (traditional) IP Issues*: This relates to the improvement of traditional intellectual property issues, and

(b) *Traditional Knowledge*: This relates to the protection of traditional knowledge and expressions of culture that is exploited for commercial benefit. The definition of traditional knowledge used by the World Intellectual Property Office (WIPO) includes indigenous knowledge relating to categories such as agricultural knowledge, medicinal knowledge, biodiversity-related knowledge, and expressions of folklore in the form of music, dance, song, handicraft, designs, stories and artwork.

5. Traditional knowledge is not protected under any of the international agreements and in recent years has been the subject of increased exploitation as competition for developing new products intensifies. The current IPR system cannot protect traditional knowledge for three reasons. First, the current system

seeks to privatise ownership and is designed to be held by individuals or corporations, whereas traditional knowledge has collective ownership. Second, this protection is time-bound, whereas traditional knowledge is held in perpetuity from generation to generation. Third, it adopts a restricted interpretation of invention that should satisfy the criteria of novelty and be capable of industrial application, whereas traditional innovation is incremental, informal and occurs over time. Due to the shortcomings in the current IPR systems, Pacific Island Countries and Territories have identified that a *sui generis* or alternative law is necessary to protect their traditional knowledge and expressions of culture.

6. Under the *suis generis* regional model law developed by Pacific Island Countries and Territories:

(a) Traditional knowledge includes any knowledge created, acquired or inspired for economic, spiritual, ritual, narrative, decorative or recreational purposes; developed over a long period of time; transmitted down through generations; and regarded as pertaining to a particular traditional group, clan or community of people.

(b) Expressions of culture cover all forms of artistic expressions, whether or not reduced to a material form, based on custom and tradition derived from continually evolving communities. They include the body of Pacific Island peoples' knowledge, traditions, observances, customs, beliefs and innovations as articulated in their material or tangible objects; names, stories, chants, riddles, histories and songs in oral narratives; arts and crafts, musical instruments, sculptures, paintings, carvings, pottery, terra-cotta mosaic, woodwork, metalware, jewellery, weaving, needlework, shell work, carpets, rugs, costumes and textiles; music, dance, theatre, literature, ceremonies and ritual performances and cultural practices; delineated forms, parts and details of designs and visual compositions; and architecture.

(c) Traditional owners are a group of persons in whom the custody or protection of the item is entrusted by and in accordance with their customs or traditions. Traditional owners may or may not be customary users of a particular item of an expression of culture or traditional knowledge.

OBJECTIVE

7. The overall objective of the RFAP for the Pacific Island Countries and Territories is to establish a programme of action designed to assist them in their efforts to protect their traditional knowledge and expressions of culture. The need for the protection of traditional knowledge and cultural expressions has surfaced due to increasing exploitation of knowledge (traditional medicinal and agricultural practices) and folklore expressions (dances, music, songs, designs, handicraft and artwork) that belong to the Pacific communities and for which

no redress could be made due to the absence of legislation. The Pacific communities have very rich and diverse cultures, tastes, traditions and talents, which encourage creativity. These must be protected and legitimate forms of commercialisation encouraged to assure that communities also derive financial gains.

8. This programme of action will involve assistance to Pacific Island Countries and Territories in the further development and implementation of a *suis generis* system to ensure that traditional owners have exclusive right to control reproduction, dissemination and exploitation of the products drawn from their traditional knowledge and expressions of culture.

9. The programme of action will greatly assist in ensuring that the collective creation and communal ownership of traditional knowledge and expressions of culture are not eroded and that any non-customary use of traditional knowledge and expressions of culture (commercial and non-commercial) is with the consent of the traditional owners and benefits the owners.

10. The programme of action will be gender sensitive and will acknowledge the differential roles, responsibilities and relationship of women and men to traditional knowledge and expressions of culture to ensure equitable access to the resource and receipt of the benefits of their contributions. It involves their active involvement in the consultation and decision making and capacity building opportunities to ensure men and women's differential interests are fully and fairly represented.

JUSTIFICATION

11. The justifications for the programme of action are as follows:

- The protection of traditional knowledge and expressions of culture is critical for maintaining cohesion among Pacific Island peoples.

- The heightened global competition for new products, processes and services brought about by the globalisation of trade and advances in information technology has unfortunately triggered widespread appropriation of the cultural and social identity of Pacific Island peoples.

- Traditional knowledge and expressions of culture are a rich and diverse source of creativity and innovation. They invigorate and provide a constantly renewed source of wealth, both economic and cultural, in most fields of technology, ranging from traditional medicinal and agricultural practices to music, design and the arts. As manifestations of intellectual creativity, traditional knowledge and expressions of culture deserve to be accorded legal protection as is provided to other forms of intellectual property. Robust measures need to be taken to guarantee the status of and economic

support for clans, groups or communities that are the creators, repository, custodians and trustees of traditional knowledge and expressions of culture.

- 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.

- At present, there exists no clear, specific international intellectual property standards for protecting traditional knowledge and expressions of culture. The regional framework will take account of the trans-generational, intangible and communal nature of Pacific Island peoples' traditional knowledge.

PRIOR OR ONGOING ASSISTANCE

12. The SPC Legal Protection Project, initiated by the Cultural Affairs Programme at the request of the Council of the Pacific Arts, is aimed at promoting legislation in the Pacific Islands for the protection of Traditional Knowledge and Expressions of Culture.

13. The first stage of this project consisted of a Symposium jointly organised by SPC and the United Nations Educational, Scientific and Cultural Organization (UNESCO) entitled: *Symposium on the Protection of Traditional Knowledge and Expressions of Indigenous Cultures in the Pacific Islands.* The Symposium, which was held from 15-19 February 1999, was the first opportunity for the region to assess the level of awareness within Pacific Island Countries and Territories of the importance of intellectual property issues and the mechanisms that had been put in place in the countries and territories to ensure, through legal and other means, the safeguarding for future generations of the intangible heritage.

14. Although vast differences were revealed in the existing levels of protection, the Symposium successfully found a common definition of heritage to be protected. Existing legal systems in the region were found not to address the crucial issue of protection against improper use of Pacific Island peoples' traditional living heritage. Appeals for specific legislation were strongly voiced.

15. A consultantcy to develop a regional framework to protect traditional knowledge and expressions of culture was commissioned jointly by the SPC, the Forum Secretariat and UNESCO in November 2000. The framework consisting of regional guidelines and a model law was presented to cultural policy officers and legal experts from the SPC/Forum member countries at a workshop in February 2001 (jointly organised by SPC, Forum Secretariat and UNESCO). The workshop was also attended by a senior representative of WIPO.

16. At the Workshop, the SPC in cooperation with the Forum Secretariat and UNESCO as appropriate, was requested to promote the model law, provide assistance to countries in the region to adapt the model law, assist the countries in the region to further their intellectual property laws consistent with the model law and other international norms, and provide assistance with training, education, and awareness raising on the protection of traditional knowledge and expressions of culture.

17. At the Forum Trade Ministers Meeting in June 2001, the Ministers received the draft framework (regional guidelines and model law) for the protection of traditional knowledge and expressions of culture as an important contribution to addressing the concerns of Pacific peoples in relation to the subject and requested the Forum Secretariat in cooperation with the SPC, the UNESCO and WIPO to continue work on the 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.

18. The Trade Ministers also encouraged the Forum Secretariat in cooperation with the SPC, UNESCO and WIPO to assist Forum Island Countries wishing to proceed with the drafting and adoption of national legislation for the protection of traditional knowledge and cultural expressions, taking into account the work on the further development and application of the draft regional framework.

19. SPC and the Forum Secretariat will require assistance in fulfilling their roles as mandated by the workshop for cultural policy officers and legal experts and the Trade Ministers.

20. While the regional guidelines and national laws are important in protecting the Pacific Island peoples from unfair exploitation of their traditional knowledge, there would still be a need for international protection treaties to allow the Pacific Island Countries and Territories to take legal action in other jurisdictions. The SPC and the Forum Secretariat are participating in the WIPO Intergovernmental Committee meetings on Genetic Resources, Traditional Knowledge and Folklore, a series of five meetings that are discussing the initiation of international protection treaties.

PLANNED ACTIVITIES

21. The programme of action involves a progressive implementation of a number of structured activities related to the development and improvement of a regional framework to protect traditional knowledge and expressions of culture and the implementation of the framework. The planned activities for the programme of action comprises the following main elements.

22. *Legislative Reforms.* The provision of technical assistance to:

(a) further develop the *suis generis* regional model legislation to protect traditional knowledge and expressions of culture and in particular, to consider the relationship between the model law and existing international intellectual property instruments;
(b) assist Pacific Island Countries and Territories to adapt the regional model law to suit their circumstances;
(c) assist Pacific Island Countries and Territories to amend their existing national intellectual property laws to ensure consistency with the proposed new regime for the protection of traditional knowledge and expressions of culture. This assistance would include the provision of model amendments of existing intellectual property legislation, consequent on the adoption of the model law, which could be used by Pacific Island Countries and Territories as a guide.

23. *Capacity Building.* The provision of training for the government officials and administrators that will be responsible for implementing and adjudicating the model law.

24. *Education and Awareness Raising.* The provision of public awareness programmes to the owners and potential users of traditional knowledge and expressions of culture, research institutions, private sector and the general community on the role, use and benefits of the new regime. An overall strategy would be prepared to give focus and coherence to awareness programmes in the region. Within the strategy, provision would be made for in-country seminars/workshops.

IMPLEMENTATION PROGRAMME

25. The programme would be implemented over a three year period as follows.

Year 1 — Finalisation of the Regional Framework. Finalise the regional model law and the drafting of model amendments to existing intellectual property legislation, consequent on the adoption of the model law, that could be used by Pacific Island Countries and Territories as a guide. A technical group of national experts and advisors (including legislative drafting, trade and economic policy and international law) could be charged with this task. Appropriate consultation should be undertaken with key stakeholders such as owners and potential users of the traditional knowledge and expressions of culture and governments in the finalisation of the model law.

Years 2 & 3 Assistance in Adaptation and Adoption of the Model Law. The provision of legal drafting assistance to Pacific Island Countries and Territories to adapt the regional model law. Due to the lack of legal drafting and technical expertise, and resource constraints, some Pacific Island Countries and Territories will require drafting assistance to adapt the model law to their circumstances. This will necessitate the appointment of a legal drafter(s) as a consultant to provide the drafting assistance.

Years 1 - 3 Capacity Building. Once the model laws have been enacted, the government officials and administrators responsible for administering, implementing and adjudicating the model law will require training on its implementation. This will be necessary given that the model law is a *suis generis* system.

In year 1, a needs-assessment exercise would be undertaken on the basis of a questionnaire to be developed by the SPC in consultation with the Forum Secretariat and UNESCO on the existing level of expertise and associated human resource skills. Following this an appropriate training programme will be prepared.

The method of training could include capacity building workshops, for example, on administrative procedures under the new legislation.

Years 1 - 3 Education and Awareness Building. Creating wider awareness of the existence and benefits of the new system to protect traditional knowledge and expressions of culture among owners and potential users of traditional knowledge and expressions of culture, research institutions, private sector and the general community.

In year 1, an overall strategy would be developed by SPC, in consultation with the Forum Secretariat and UNESCO, for education and awareness building programmes in the region.

Methods of delivery could include workshops/seminars targeting traditional owners, potential users, research institutions and representatives of business groups; and multi-media products providing relevant information for the general community.

The time line of activities envisaged in the action plan may be seen in chart form at Annex 1.

EXPECTED RESULTS AND BENEFICIARIES

26. The expected overall output of the programme of action is a regime that protects the rights of owners of traditional knowledge and expressions of culture and facilitates the use of the traditional knowledge and expressions of culture with benefits to traditional owners. Specifically, the programme of action would result in:

(i) The enactment of legislation that will protect the rights of traditional owners and facilitate the use of traditional knowledge and expressions of culture to the benefit of traditional owners;
(ii) the development of human resources in government offices for the protection of traditional knowledge and expressions of culture;
(iii) the development of human resources in owners to protect their traditional knowledge and expressions of culture.
(iv) enhanced public awareness in the region of the role and importance of traditional knowledge and expressions of culture.

PART III

RESOURCE REQUIREMENTS

27. The overall resource requirement for the programme of action is estimated at .....plus staff costs.

A. WIPO INPUTS

WIPO would provide assistance in the amount of approximately .... for the three-year programme of action. This amount would be used to finance the following activities:

- 2 meetings of the technical group of national experts and advisors;
- 1 regional seminar of representatives Pacific Community Countries and Territories and Forum Island Countries to endorse the final regional model law;
- legal drafter(s) to assist Pacific Island Countries and Territories to adapt the regional model law;
- in-country seminars/workshops on administering the model law/national legislation;
- in-country seminars/outreach programmes for owners and potential users of traditional knowledge and expressions of culture;
- development of appropriate resource material for public awareness, including brochures, pamphlets and multimedia products.

B INPUTS BY THE SECRETARIAT OF THE PACIFIC COMMUNITY

- Will nominate an official to coordinate the implementation of the RFAP;
- Will assist in the work of the technical group of national experts and advisors;
- Will monitor and follow-up the enactment of the model law by the Pacific Community Countries and Territories;
- Will identify training requirements and coordinate the training sessions;
- Will coordinate the necessary inputs from Pacific Community Countries and Territories regarding the formulation of a public awareness strategy;
- Will organise regional meetings and will bear the local costs involved in such support.

C. INPUTS BY THE FORUM SECRETARIAT

The Forum Secretariat:

- Will nominate an official to coordinate the implementation of the RFAP;
- Will assist in the work of the technical group of national experts and advisors;
- Will assist in monitoring and in follow-up of the enactment of the model law by the Forum Island Countries;
- Will assist in identifying training requirements and in the coordination of the training sessions;
- Will coordinate the necessary inputs from the Forum Island Countries regarding the formulation of a public awareness strategy;
- Will assist in the administrative and logistical support for regional meetings and will bear the local costs involved in such support.

The inputs required to implement the programme of action and the parties supplying such inputs are reflected in Annex II.

ANNEX 1

PACIFIC ISLAND COUNTRIES AND TERRITORIES INDICATIVE PLAN OF ACTIVITIES

ACTIVITIES	**Year 1**				Year 2				Year 3			
	QUARTER											
	1	2	3	4	1	2	3	4	1	2	3	4
1. Legislative Reform												
• Further develop the suis generis regional model law	x											
• Adoption of model law by Forum Trade Ministers				x								
• Assist in adapting the draft model law					x							
• Provide model amendments on existing IP legislation			x									
2. Capacity Building												
• Identification of Training Needs		x										
• Training on the administration of the model law									x			
3. Awareness												
• Develop strategy for awareness building programme		x										
• In-county workshops on awareness building										x		
• Development and provision of generic/customised resources										x		

IMPLEMENTATION ACTION PLAN (IAP)

PACIFIC ISLANDS PROTECTION OF TRADITIONAL KNOWLEDGE AND EXPRESSIONS OF CULTURE DEVELOPMENT PROGRAMME

SECRETARIAT OF THE PACIFIC COMMUNITY

PACIFIC ISLANDS FORUM SECRETARIAT

SUMMARY:

This proposal presents a regional Implementation Action Plan for Pacific Island Countries and Territories that are members of the Secretariat of the Pacific Community (SPC) and the Pacific Islands Forum to protect their traditional knowledge and expressions of culture. The proposed Implementation Action Plan consists of five short to medium term components with the components being implemented over a three year period. The time line of activities envisaged in the action plan may be seen in chart form at Annex 1. The resource requirements for the Implementation Action Plan are in Annex 2. The budget estimates for each component are indicated in Part

The Implementation Action Plan involves a progressive implementation of a number of structured activities related to the development of a regional framework to protect traditional knowledge and expressions of culture and the implementation of the framework. This Implementation Action Plan will be co-ordinated and implemented jointly by the Secretariat of the Pacific Community and the Pacific Islands Forum Secretariat (Forum Secretariat).

Pacific Community Countries and Territories and Pacific Islands Forum Countries are the following: American Samoa, Cook Islands, Federated States of Micronesia, Fiji, French Polynesia, Guam, Kiribati, Marshall Islands, Nauru, New Caledonia, Niue, Commonwealth and Northern Mariana Islands, Palau, Papua New Guinea, Pitcairn Islands, Samoa, Solomon Islands, Tokelau, Tonga, Tuvalu, Vanuatu and Wallis and Futuna.

GOALS AND OBJECTIVES:

The overall goals of the Implementation Action Plan for the Pacific Island Countries and Territories are to:

- Ensure that the collective creation and communal ownership of traditional knowledge and expressions of culture are not eroded;
- Ensure that any non-customary use of traditional knowledge and expressions of culture (commercial and non-commercial) is with the consent of the traditional owners and benefits the owners;
- Ensure that traditional owners have exclusive right to control reproduction, dissemination and exploitation of the products drawn from their traditional knowledge and expressions of culture;
- Ensure the regional harmonisation through administrative bodies and reciprocal arrangements of the protection of traditional knowledge and expressions of culture.

The objectives of the Implementation Action Plan are to:

- Assist Pacific Island Countries and Territories in their efforts to protect their traditional knowledge and expressions of culture through the further development and implementation of a *suis generis* system;
- Assist Pacific Island Countries and Territories to effectively administer the new regime;

- Conduct training for government officials and administrators who would be responsible administering, implementing and adjudicating the model law;
- Provide public awareness programmes on the role, use and benefits of the new regime;
- Assist Pacific Island Countries and Territories to develop a framework to ensure the application and enforcement of the new regime on a regional basis.

The Implementation Action Plan will be gender sensitive and will acknowledge the differential roles, responsibilities and relationship of women and men to traditional knowledge and expressions of culture to ensure equitable access to the resource and receipt of the benefits of their contributions. It involves their active involvement in the consultation and decision making and capacity building opportunities to ensure men and women's differential interests are fully and fairly represented.

BACKGROUND

The Secretariat of the Pacific Community has 27 members including the metropolitan countries of France, United States, United Kingdom, Australia and New Zealand, and the Pacific Islands Forum has 16 members. Together the SPC and the Forum have 22 Island Countries and Territories in the Pacific namely, American Samoa, Cook Islands, Federated States of Micronesia, Fiji Islands, French Polynesia, Guam, Kiribati, Marshall Islands, Nauru, New Caledonia, Niue, Commonwealth of the Northern Mariana Islands, Palau, Papua New Guinea, Pitcairn Islands, Samoa, Solomon Islands, Tokelau, Tonga, Tuvalu, Vanuatu and Wallis and Futuna.

The Secretariat of the Pacific Community is the regional intergovernmental development agency responsible for developing the technical, professional, scientific, research, planning and management capability of Pacific Island peoples and for directly providing information and advice, to enable them to make informed decisions about their future development and wellbeing. The mission of the SPC Cultural Affairs Programme is to preserve and promote Pacific Island heritage for future generations.

The Forum Secretariat is the intergovernmental organisation responsible for providing policy advice to the Pacific Forum Leaders and members on political, international relations, legal, security, economic and trade issues. This mandate includes advice on intellectual property rights protection.

The SPC and the Forum Secretariat have been collaborating on the Intellectual Property Protection for Pacific Island Countries and Territories.

There are two distinct aspects of the Intellectual Property Protection for the Pacific Island Countries and Territories.

> *Core (traditional) IP Issues*: This relates to the improvement of traditional intellectual property issues, and

Traditional Knowledge: This relates to the protection of traditional knowledge and expressions of culture that is exploited for commercial benefit. The definition of traditional knowledge used by the World Intellectual Property Office (WIPO) includes indigenous knowledge relating to categories such as agricultural knowledge, medicinal knowledge, biodiversity-related knowledge, and expressions of folklore in the form of music, dance, song, handicraft, designs, stories and artwork.

This Implementation Action Plan focuses on the protection of traditional knowledge and expressions of culture through the implementation of a *suis generis* regional model law developed by Pacific Island Countries and Territories.

Under the regional model law, traditional knowledge and expressions of culture are defined as:

(a) Traditional knowledge includes any knowledge created, acquired or inspired for economic, spiritual, ritual, narrative, decorative or recreational purposes; developed over a long period of time; transmitted down through generations; and regarded as pertaining to a particular traditional group, clan or community of people.

(b) Expressions of culture cover all forms of artistic expressions, whether or not reduced to a material form, based on custom and tradition derived from continually evolving communities. They include the body of Pacific Island peoples' knowledge, traditions, observances, customs, beliefs and innovations as articulated in their material or tangible objects; names, stories, chants, riddles, histories and songs in oral narratives; arts and crafts, musical instruments, sculptures, paintings, carvings, pottery, terra-cotta mosaic, woodwork, metalware, jewellery, weaving, needlework, shell work, carpets, rugs, costumes and textiles; music, dance, theatre, literature, ceremonies and ritual performances and cultural practices; delineated forms, parts and details of designs and visual compositions; and architecture.

Traditional owners are defined as a group of persons in whom the custody or protection of the item is entrusted by and in accordance with their customs or traditions. Traditional owners may or may not be customary users of a particular item of an expression of culture or traditional knowledge.

ISSUES:

Traditional knowledge is not protected under any of the international agreements but in recent years the need for the protection of traditional knowledge and cultural expressions has surfaced due to increasing exploitation of knowledge (traditional medicinal and agricultural practices) and folklore expressions (dances, music, songs, designs, handicraft and artwork) that belong to the Pacific communities and for which no redress could be made due to the absence of legislation.

The Pacific communities have very rich and diverse cultures, tastes, traditions and talents, which encourage creativity. These must be protected and legitimate forms of commercialisation encouraged to assure that communities also derive financial gains as competition for developing new products intensifies.

The current IPR system cannot protect traditional knowledge for three reasons. First, the current system seeks to privatise ownership and is designed to be held by individuals or corporations, whereas traditional knowledge has collective ownership. Second, this protection is time-bound, whereas traditional knowledge is held in perpetuity from generation to generation. Third, it adopts a restricted interpretation of invention that should satisfy the criteria of novelty and be capable of industrial application, whereas traditional innovation is incremental, informal and occurs over time. Due to the shortcomings in the current IPR systems, Pacific Island Countries and Territories have identified that a *suis generis* or alternative law is necessary to protect their traditional knowledge and expressions of culture.

JUSTIFICATION

The justifications for the Implementation Action Plan are as follows:

- The heightened global competition for new products, processes and services brought about by the globalisation of trade and advances in information technology has unfortunately triggered widespread appropriation of the cultural and social identity of Pacific Island peoples.

- The protection of traditional knowledge and expressions of culture is critical for maintaining cohesion among Pacific Island peoples.

- Traditional knowledge and expressions of culture are a rich and diverse source of creativity and innovation. They invigorate and provide a constantly renewed source of wealth, both economic and cultural, in most fields of technology, ranging from traditional medicinal and agricultural practices to music, design and the arts. As manifestations of intellectual creativity, traditional knowledge and expressions of culture deserve to be accorded legal protection as is provided to other forms of intellectual property. Robust measures need to be taken to guarantee the status of and economic support for clans, groups or communities that are the creators, repository, custodians and trustees of traditional knowledge and expressions of culture.

- 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.

REGIONAL APPROACH

The SPC Legal Protection Project, initiated in response to a request by the Council of Pacific Arts, is aimed at promoting legislation in the Pacific Islands for the protection of traditional knowledge and expressions of culture.

The Pacific Islands Forum Trade Ministers have agreed that the Forum Secretariat, in conjunction with appropriate regional agencies, should undertake work on the necessary changes in national legislation to ensure the protection of indigenous intellectual property rights.

It has been necessary for the SPC and the Forum Secretariat to undertake their mandates on a regional basis because:

- at present, there exists no clear, specific international intellectual property standards for protecting traditional knowledge and expressions of culture.
- Pacific Island peoples' traditional knowledge and expressions of culture is trans-national;
- many Pacific Island Countries and Territories lack the necessary resources and capacity to develop and implement an effective national regime for the protection of traditional knowledge and expressions of culture

EXPECTED RESULTS AND BENEFICIARIES

The expected overall output of the Implementation Action Plan is a regime that protects the rights of owners of traditional knowledge and expressions of culture and facilitates the use of the traditional knowledge and expressions of culture with benefits to traditional owners. Specifically, the Implementation Action Plan would result in:

- enactment of legislation that will protect the rights of traditional owners and facilitate the use of traditional knowledge and expressions of culture for the benefit of traditional owners;
- development of a framework to ensure the application and enforcement of the new regime on a regional basis;
- development of human resources in government offices for the protection of traditional knowledge and expressions of culture;
- development of human resources in traditional owners to protect their traditional knowledge and expressions of culture.
- enhanced public awareness in the region of the role and importance of traditional knowledge and expressions of culture.

PROGRAMME IMPLEMENTATION

PRIOR AND ONGOING ASSISTANCE

The SPC Legal Protection Project, initiated by the Cultural Affairs Programme at the request of the Council of the Pacific Arts, is aimed at promoting legislation in the Pacific Islands for the protection of traditional knowledge and expressions of culture.

The first stage of this project consisted of a Symposium jointly organised by SPC and the United Nations Educational, Scientific and Cultural Organisation (UNESCO) entitled: *Symposium on the Protection of Traditional Knowledge and Expressions of Indigenous Cultures in the Pacific Islands.* The Symposium, which was held from 15-19 February 1999, was the first opportunity for the region to assess the level of awareness within Pacific Island Countries and Territories of the importance of intellectual property issues and the mechanisms that had been put in place in the countries and territories to ensure, through legal and other means, the safeguarding for future generations of the intangible heritage.

Although vast differences were revealed in the existing levels of protection, the Symposium successfully found a common definition of heritage to be protected. Existing legal systems in the region were found not to address the crucial issue of protection against improper use of Pacific Island peoples' traditional living heritage. Appeals for specific legislation were strongly voiced.

At the same time, the Forum Secretariat was mandated by the 1999 Trade Ministers meeting to work towards the development of national, regional and multilateral/international rules and legislation to protect the intellectual property rights of indigenous peoples for presentation to the Forum Trade Ministers meeting in 2001.

A consultancy to develop a regional framework to protect traditional knowledge and expressions of culture was commissioned jointly by the SPC, the Forum Secretariat and UNESCO in November 2000. The framework consisting of regional guidelines and a model law was presented to cultural policy officers and legal experts from the SPC/Forum member countries at a workshop in February 2001 (jointly organised by SPC, Forum Secretariat and UNESCO). The workshop was also attended by a senior representative of WIPO.

At the workshop, the SPC, in cooperation with the Forum Secretariat and UNESCO as appropriate, was requested to promote the model law, provide assistance to countries in the region to adapt the model law, assist the countries in the region to further their intellectual property laws consistent with the model law and other international norms, and provide assistance with training, education, and awareness raising on the protection of traditional knowledge and expressions of culture.

At the Forum Trade Ministers Meeting in June 2001, the Ministers received the draft framework (regional guidelines and model law) for the protection of traditional knowledge and expressions of culture as an important contribution to addressing the concerns of Pacific peoples in relation to the subject and requested the Forum Secretariat in cooperation with the SPC, the UNESCO and WIPO to continue work on the 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.

The Trade Ministers also encouraged the Forum Secretariat in cooperation with the SPC, UNESCO and WIPO to assist Forum Island Countries wishing to proceed with the drafting and adoption of national legislation for the protection of traditional knowledge and cultural expressions, taking into account the work on the further development and application of the draft regional framework.

SPC and the Forum Secretariat will require assistance in fulfilling their roles as mandated by the workshop for cultural policy officers and legal experts and the Trade Ministers.

While the regional guidelines and national laws are important in protecting the Pacific Island peoples from unfair exploitation of their traditional knowledge, there would still be a need for international protection treaties to allow the Pacific Island Countries and Territories to take legal action in other jurisdictions. For this reason, the SPC and the Forum Secretariat are participating in the WIPO Intergovernmental Committee meetings on Genetic Resources, Traditional Knowledge and Folklore, a series of five meetings that are discussing the initiation of international protection treaties.

PLANNED ACTIVITIES

The Implementation Action Plan involves a progressive implementation of a number of structured activities related to the development and improvement of a regional framework to protect traditional knowledge and expressions of culture and the implementation of the framework. The planned activities for the Implementation Action Plan comprises the following main elements.

Legislative Reforms. The provision of technical assistance to:

- further develop the *suis generis* regional model legislation to protect traditional knowledge and expressions of culture and in particular, to consider the relationship between the model law and existing international intellectual property instruments;
- assist Pacific Island Countries and Territories to adapt the regional model law to suit their circumstances;
- assist Pacific Island Countries and Territories to amend their existing national intellectual property laws to ensure consistency with the proposed new regime for the protection of traditional knowledge and expressions of culture. This assistance would include the provision of model amendments of existing intellectual property legislation, consequent on the adoption of the model law, which could be used by Pacific Island Countries and Territories as a guide.

Reciprocal arrangements. The provision of technical assistance to develop a framework to ensure the application and enforcement of the new regime on a regional basis.

Capacity Building. The provision of training for the government officials and administrators that will be responsible for implementing and adjudicating the model law.

Education and Awareness Raising. The provision of public awareness programmes to the traditional owners and potential users of traditional knowledge and expressions of culture, research institutions, private sector and the general community on the role, use and benefits of the new regime. An overall strategy would be prepared to give focus and coherence to awareness programmes in the region. Within the strategy, provision would be made for in-country seminars/workshops.

IMPLEMENTATION PROGRAMME

The plan would be implemented over a three year period as follows.

Year 1 Finalisation of the Regional Framework. Finalise the regional model law and the drafting of model amendments to existing intellectual property rights that could be used by Pacific Island Countries and Territories as a guide. A technical group of national experts and advisors (including legislative drafting, trade and economic policy and international law) could be charged with this task. Appropriate consultation should be undertaken with key stakeholders such as traditional owners and potential users of the traditional knowledge and expressions of culture and governments in the finalisation of the model law.

Years 2 & 3 Assistance in Adaptation and Adoption of the Model Law. The provision of legal drafting assistance to Pacific Island Countries and Territories to adapt the regional model law. Due to the lack of legal drafting and technical expertise, and resource constraints, some Pacific Island Countries and Territories will require drafting assistance to adapt the model law to their circumstances. This will necessitate the appointment of a legal drafter(s) as a consultant to provide the drafting assistance.

Year 2 & 3 Reciprocal Arrangements. Pacific Island Countries and Territories will need to enter into reciprocal arrangements in order to ensure effective protection of traditional knowledge and expressions of culture on a regional basis. The Forum Secretariat and SPC will assist the countries and territories to consider and assess the best option for achieving this.

Years 1 - 3 Capacity Building. Once the model laws have been enacted, the government officials and administrators responsible for implementing and adjudicating the model law will require training on its implementation. This will be necessary given that the model law is a *suis generis* system.

In year 1 a needs-assessment exercise would be undertaken on the basis of a questionnaire to be developed by the SPC in consultation with the Forum Secretariat and UNESCO on the existing level of expertise and associated human resource skills. Following this an appropriate training programme will be prepared.

The method of training could include capacity building workshops, for example, on administrative procedures under the new legislation.

Years 1 - 3 Education and Awareness Raising. Creating wider awareness of the existence and benefits of the new system to protect traditional knowledge and expressions of culture among traditional owners and potential users of traditional knowledge and expressions of culture, research institutions, private sector and the general community.

In year 1, an overall strategy would be developed by SPC, in consultation with the Forum Secretariat and UNESCO, for awareness building programmes in the region.

Methods of delivery could include workshops/seminars targeting traditional owners, potential users, research institutions and representatives of business groups; and multi-media products providing relevant information for the general community.

RESOURCE REQUIREMENTS

The overall resource requirement for the Implementation Action Plan is estimated at .....plus staff costs.

This amount would be used to finance the following activities:

- 2 meetings of the technical group of national experts and advisors;
- 1 regional seminar of representatives of Pacific Community Countries and Territories and Forum Island Countries to endorse the final regional model law;
- legal drafter(s) to assist Pacific Island Countries and Territories to adapt the regional model law;
- in-country seminars/workshops on administering the model law/national legislation;
- in-country seminars/outreach programmes for traditional owners and potential users of traditional knowledge and expressions of culture;
- development of appropriate resource material for public awareness, including brochures, pamphlets, multimedia products, and modules for distance learning;
- regional meetings to endorse and develop the options to ensure effective protection of traditional knowledge and expressions of culture on a regional basis.
- Consultant to draft regional convention or model treaty to ensure reciprocity of traditional knowledge and expressions of culture.

INPUTS BY THE SECRETARIAT OF THE PACIFIC COMMUNITY

The SPC:

Will nominate an official to coordinate the implementation of the IAP;
Will assist in the work of the technical group of national experts and advisors;
Will assist in providing logical support to consultants;
Will monitor and follow-up the enactment of the model law by the Pacific Island Countries and Territories;
Will identify training requirements and coordinate the training sessions;
Will coordinate the necessary inputs from Pacific Island Countries and Territories regarding the formulation of a public awareness strategy;
Will organise regional meetings and will bear the local costs involved in such support.

INPUTS BY THE FORUM SECRETARIAT

The Forum Secretariat:

Will nominate an official to coordinate the implementation of the IAP;
Will assist in the work of the technical group of national experts and advisors;
Will assist in providing logical support to consultants;
Will assist in monitoring and in follow-up of the enactment of the model law by the Forum Island Countries;
Will assist in identifying training requirements and in the coordination of the training sessions;
Will coordinate the necessary inputs from the Forum Island Countries regarding the formulation of a public awareness strategy;
Will assist in the administrative and logistical support for regional meetings and will bear the local costs involved in such support.

ANNEX 1

PACIFIC ISLAND COUNTRIES AND TERRITORIES INDICATIVE PLAN OF ACTIVITIES

ACTIVITIES	Year 1				Year 2				Year 3			
	QUARTER											
	1	2	3	4	1	2	3	4	1	2	3	4
1. Legislative Reform												
• Further develop the suis generis regional model law	x											
• Adoption of model law by Forum Trade Ministers				x								
• Assist in adapting the draft model law					x							
• Provide model amendments on existing IP legislation			x									
2. Capacity Building												
• Identification of Training Needs		x										
• Training on the administration of the model law									x			
3. Awareness												
• Develop strategy for awareness building programme		x										
• In-county workshops on awareness building										x		
• Development and provision of generic/customised resources										x		
4. Reciprocal Arrangements												
• Develop an options paper			x									
• Consideration and endorsement of option(s) by regional meeting					x							
• Follow-up of option e.g. drafting and negotiation of regional convention or drafting of model treaty							x					
• Implementation of option (3-5 years)												

ANNEX 2

RESOURCE REQUIREMENTS

Potential Resources Required for Project	Resources that Potential Partners Could Provide	Resources that SPC Could Provide	Resources that Forum Secretariat Could Provide
Legislative Reforms			
Advice on international IPR regimes and their effect on the model law	Provide advice on international IPR regimes and their effect on the model law	Assist in the facilitating of the provision of the advice	Assist in the facilitating of the provision of the advice
2 meetings of the technical group of national experts and advisors to further develop the model law and draft model consequential amendments to existing IPR legislation	Sponsor meetings and attend meetings as technical adviser	➢ Provide Secretariat support for meetings. ➢ Undertake organisation requirements for meetings.	➢ Assist SPC in providing Secretariat support for meetings. ➢ Assist SPC in organisation requirements for meetings.
1 regional seminar of representatives of Pacific Community Countries and Territories and Forum Island Countries to endorse the final regional model law	Sponsor seminar to assist Pacific Community Countries and Territories and Forum Island Countries to endorse the final regional model law	➢ Undertake organisation requirements for seminar. ➢ Provide Secretariat support for meetings.	➢ Assist SPC in organisation requirements for seminar. ➢ Assist SPC in providing secretariat support for meetings.
Adaptation of model law	Sponsor the costs of legal drafter(s)	Facilitate the provision of legal drafting assistance to Pacific Community Territories and Countries to adapt the model law	Facilitate the provision of legal drafting assistance to Forum Island Countries to adapt the model law
Capacity Building			
Identification of Training Requirements	Assist in the development of the questionnaire	➢ Develop the questionnaire in consultation with the Forum Secretariat and UNESCO ➢ Distribute questionnaire to Pacific Community Countries and Territories and obtain responses ➢ Based on questionnaire, prepare appropriate training programme	➢ Assist SPC in the development of the questionnaire ➢ Distribute questionnaire to Forum Island Countries and obtain responses
Training of government officials and administrators responsible for administering, implementing and adjudicating the new legislation ➢ In-country workshops	Sponsor in-country capacity building workshops	➢ Provide identified training requirements ➢ Identify suitable trainers to develop and deliver the training programme ➢ Coordinate the running of the training sessions (in-country workshops)	➢ Assist SPC in providing identified training requirements ➢ Assist in SPC in identifying suitable trainers to develop and deliver the training programme ➢ Assist SPC in the coordination of the training sessions (in-country workshops)

Education and Awareness Raising			
Creating wider awareness of the benefits of the model legislation ➢ Identify needs		➢ Develop proposed strategy for education and awareness building programmes in consultation with the Forum Secretariat and UNESCO ➢ Discuss proposed strategy with Pacific Community Countries and Territories and collate responses	➢ Provide inputs to SPC on the development of the proposed strategy for education and awareness building programmes ➢ Discuss proposed strategy with Forum Island Countries, collate and convey responses to SPC
In-country workshops/seminars targeting traditional owners, potential users, research institutions, and representatives of business groups ➢ Costs associated with conduct of in-country workshops/seminars	Sponsor in-country workshops/seminars	➢ Identify and provide suitable presenters ➢ Coordinate the running of the workshops	➢ Assist SPC in identifying suitable presenters ➢ Assist SPC in the coordination of the running of the workshops
Provide customised resources to the countries and territories or generic materials that the countries and territories can adapt to their language	Fund costs associated with the development of generic education and awareness programmes including the development of resource materials	➢ Develop generic resource materials for the countries and territories ➢ Identify Pacific Community Countries and Territories' specific requirements	➢ Assist SPC in the development of the generic resource materials for the countries and territories ➢ Identify Forum Island Countries' specific requirements
Reciprocity			
Develop an options paper	Sponsor consultant to develop options paper	Provide logistical support to consultant	Assist SPC in the provision of logistical support to consultant
Consideration, endorsement and development of option(s) by regional meetings	Sponsor meetings and attend meetings as technical adviser(s)	➢ Undertake organisation requirements for meetings. ➢ Provide secretariat support for meetings.	➢ Assist SPC in organisation requirements for meetings ➢ Assist SPC in providing secretariat support for meetings
Follow-up of option e.g. drafting and negotiation of regional convention or drafting of model treaty	Sponsor consultant to draft convention or model treaty	Provision of logistical support to consultant	Assist SPC in provision of logistical support to consultant
Implementation of option (3-5 years)			