

PROTECTING TRADITIONAL KNOWLEDGE: AN ANALYSIS OF THE PACIFIC REGIONAL FRAMEWORK FOR THE PROTECTION OF TRADITIONAL KNOWLEDGE AND EXPRESSIONS OF CULTURE

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This article will primarily focus on the Pacific Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture (the Model Law), analysing each clause and examining how it has been implemented in Pacific countries so far. While it is a model law, there are many factors that must be considered by enacting countries, such as consulting and engaging with communities at the beginning of the process, the role of the state as a facilitator rather than the primary regulator and more generally, adopting a "bottom-up" approach. This article will also briefly examine the Melanesian Spearhead Group Framework Treaty on the Protection of Traditional Knowledge and Expressions of Culture (the MSG Treaty). Although the MSG Treaty has not been ratified by any of the signatories, it nevertheless addresses some of the omissions seen in the Model Law. Recommendations are discussed at the end of the article, which should be considered if any country decides to adopt the Model Law or any legal instrument that protects traditional knowledge and expressions of culture.

I INTRODUCTION

Currently, there is no multilateral intellectual property (IP) instrument that protects traditional knowledge.¹ Although the World Intellectual Property Organization (WIPO) Intergovernmental

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1 Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore *The Protection Of Traditional Knowledge: Updated Draft Gap Analysis* WIPO/GRTKF/IC/37/6 (20 July 2018) at 20.

Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (WIPO-IGC) is working on an international instrument that protects traditional knowledge,² many countries are developing their own instruments to protect traditional knowledge and expressions of culture. Collaborative work amongst the Secretariat of the Pacific Community, Pacific Islands Forum Secretariat and Pacific Regional Programme resulted in the development of the Model Law for the Protection of Traditional Knowledge and Expressions of Culture (the Model Law).³ This article primarily focuses on the Model Law. The first section will briefly discuss traditional knowledge and expressions of culture, and why conventional IP legal frameworks fail to adequately protect traditional knowledge. The following section will discuss the rights that traditional owners' traditional knowledge and expressions of culture hold, and the issues around the definition of "customary use" and "non-customary use". This will be followed by an examination of the role of the Cultural Authority under the Model Law, its function in relation to traditional knowledge and the process for obtaining prior and informed consent from traditional owners. This article will also examine the offences and remedies imposed under the Model Law, followed by an analysis of the Traditional Knowledge Implementation Action Plan (Action Plan), developed to assist countries adopting the Model Law. This article will also discuss countries that have adopted the Model Law.

This article aims to analyse both the Model Law and the Action Plan. While the Model Law is a model, enacting countries must take considerable care during the policy development and implementation stage as there are potentially significant risks in adopting the Model Law in its current form. It will also briefly analyse the Melanesian Spearhead Group Framework Treaty on the Protection of Traditional Knowledge and Expressions of Culture (the MSG Treaty).⁴ Four countries signed the Treaty in 2012; however, none have ratified it. Although the MSG Treaty has not been ratified by any of the signatories, it nevertheless addresses some of the omissions seen in the Model Law. Nevertheless, adopting either the Model Law or the MSG Treaty should be treated with caution.

II TRADITIONAL KNOWLEDGE AND INTELLECTUAL PROPERTY

A Features of Traditional Knowledge

There are various versions of the definition of traditional knowledge as it can mean different things to different communities. There is no "one" accepted definition of the term at the international level.⁵ The WIPO-IGC is working towards developing instruments for the protection of traditional

2 Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore *The Protection of Traditional Knowledge: Draft Articles* WIPO/GTRKF/IC/37 (31 August 2018).

3 Samoa Law Reform Commission *Protection of Samoa's Traditional Knowledge Final Report* (2015) at 39.

4 Melanesian Spearhead Group Framework Treaty on the Protection of Traditional Knowledge and Expressions of Culture 2012 (signed 2 September 2011) [MSG Treaty].

5 At 14.

knowledge, expressions of culture and genetic resources. However, the many legal issues to be determined are difficult, which include identifying what is meant by "traditional" knowledge, who the right-holders and beneficiaries should be and what rights would be given the owners under a new law. The Model Law defines "traditional knowledge" as knowledge that:⁶

- (a) is or has been created, acquired or inspired for traditional economic, spiritual, ritual, narrative, decorative or recreational purposes; and
- (b) is or has been transmitted from generation to generation; and
- (c) is regarded as pertaining to a particular traditional group, clan or community of people ... ; and
- (d) is collectively originated and held

Any legal framework adopting this definition would provide a broad scope of protection. Unlike the MSG Treaty, the scope of protection is not as limited as it does not restrict traditional knowledge to those being held by a local community. Using only the term "local community" in the definition could mean that groups that constitute a sub-section of a community, such as a clan, will not be excluded. This is particularly important to Melanesia as clans are common.⁷

Traditional knowledge comprises expressions of culture – such as oral traditions, songs, stories, visual and performing art and ritual and cultural practices.⁸ Traditional knowledge can also be expressed through different means; the owner of traditional knowledge can be an individual or a whole tribe or village. As traditional knowledge is usually unwritten, it can be challenging to identify the owner of a particular traditional knowledge.⁹ The Model Law defines expression of culture as:¹⁰

... any way in which traditional knowledge appears or is manifested, irrespective of content, quality or purpose, whether tangible or intangible, and, without limiting the preceding words, includes:

- (a) names, stories, chants, riddles, histories and songs in oral narratives; and
- (b) art and craft, musical instruments, sculpture, painting, carving, pottery, terra-cotta mosaic, woodwork, metalware, painting, jewellery, weaving, needlework, shell work, rugs, costumes and textiles; and
- (c) music, dances, theatre, literature, ceremonies, ritual performances and cultural practices; and

6 Secretariat of the Pacific Community, Pacific Islands Forum Secretariat and UNESCO Pacific Regional Office *Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture* (2002) [Model Law], cl 4 definition of "traditional knowledge".

7 Miranda Forsyth "The traditional movement in the Pacific Island countries: the challenge of localism" (2011) 29 *Prometheus* 269 at 271.

8 Miranda Forsyth "How Can Traditional Knowledge Best Be Regulated? Comparing a Proprietary Rights Approach with a Regulatory Toolbox Approach" (2013) 25 *The Contemporary Pacific* 1 at 1.

9 Ping Xiong "Traditional Knowledge and Intellectual Property – The Endeavour of Niue" (2008) 14 *RJP* 123 at 124.

10 Model Law, cl 4 definition of "expressions of culture".

- (d) the delineated forms, parts and details of designs and visual compositions; and
- (e) architectural forms.

However, this definition from the Model Law is a non-exhaustive list and is intended to provide a basis for discussion. Countries seeking to adopt the Model Law would need to adapt as much as necessary, as not all of the above examples will be relevant or applicable to all Pacific Island countries, or any country seeking to adopt the Model Law. Some countries have a significant number of distinct traditional communities and would therefore need to determine whether the description sufficiently accommodates that diversity. While it will not be necessary to hold separate definitions for each traditional community, the collective scope of the subject matter must capture the various expressions.¹¹

B Conventional Intellectual Property Systems and Traditional Knowledge

There are many reasons why conventional IP systems and traditional knowledge are incompatible. IP laws such as copyright only protect the expression of an idea, rather than the idea itself. IP law protects rights to known individuals. IP rights are of limited duration and may be assigned or sold to other people. On the contrary, traditional knowledge and expressions of culture are communally owned by communities and are an essential part of cultural identity. Moreover, traditional knowledge and expressions of culture include both the knowledge and expression of that knowledge, and this knowledge is passed down from generation to generation.¹² The purpose of IP protection is to protect works of the human mind, which includes traditional knowledge and expressions of culture from being used or copied by third parties without going through the proper processes. However, the protection provided under IP frameworks is not directly concerned with the preservation of traditional knowledge and expression of culture.¹³

Another issue with IP systems is that they require the disclosure of information in order to receive protection. Even if the traditional owner(s) wish to register patents on traditional knowledge, it may be culturally inappropriate to record the knowledge in writing.¹⁴ Some traditional owners are sceptical of disclosing traditional knowledge for fear of access and abuse by those who are not entitled to the knowledge. Traditional owners may only disclose such valuable knowledge if they can be reassured that their rights and interests will be protected. Furthermore, over the past few decades, there has been

11 Secretariat of the Pacific Community *Guidelines for developing national legislation for the protection of traditional knowledge and expressions of culture based on the Pacific Model Law 2002* (2006) at 15.

12 Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore *Practical Workshop on Intellectual Property, Traditional Knowledge, Traditional Cultural Expressions and Genetic Resources* WIPO/IPTK/APA/15/REPORT (February 2016) at 16.

13 At 24.

14 Xiong, above n 9, at 125.

a decrease the use of traditional knowledge and practices due to neglect and disclination by younger generations to learn the "old ways". Any legal framework cannot assist much in this area. It is therefore up to indigenous communities to use traditional knowledge or seek ways to address this issue.¹⁵

Countries can turn to a sui generis framework to address the impediments of conventional IP legal frameworks. In this case, a sui generis approach refers to the development of a new national law or the establishment of international norms that will protect IP concerning traditional knowledge and expressions of culture, such as the Model Law.¹⁶ Sui generis systems are common in IP and have been used to deal with the IP protection of integrated circuits, plant breeders' rights and geographical indications.¹⁷ Theoretically, a sui generis approach can fill in the gaps that conventional IP systems have. However, as this article will demonstrate in its analysis of the Model Law, careful consideration must be taken during the planning and implementation of sui generis systems.

III THE MODEL LAW

Model laws are created to guide the development of national legislation. Any country that decides to adopt a model law is required to progress through the policy development process to expand on matters of detail and modify the law to their needs. This Part will analyse the Model Law for the Protection of Traditional Knowledge and Expressions of Culture. It will highlight the rights granted to holders of traditional knowledge, the process for obtaining informed and prior consent to use traditional knowledge or expressions of culture for non-customary purposes, as well as the role of the Cultural Authority. This article will also look into the offences the Model Law imposes, followed by a discussion of the countries that have adopted the Model Law (or are in the process of adopting it).

In 1999 the United Nations Educational, Scientific and Cultural Organization (UNESCO) held a symposium entitled "Symposium on the Protection of Traditional Knowledge and Expressions of Indigenous Cultures in the Pacific Islands". This led to a declaration that "recommended technical assistance and support for 'a homogeneous system of legal protection, identification, conservation and control of exploitation, of indigenous culture'".¹⁸ The Model Law was developed under WIPO

15 Don Marahare "Towards an Equitable Future in Vanuatu: The Legal Protection of Cultural Property" (2004) 8(2) JSPL 20.

16 See Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore *Elements of a Sui Generis System for the Protection of Traditional Knowledge* WIPO/GRTKF/IC/4/8 (30 September 2002).

17 See Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore *Glossary of Key Terms Related to Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions* WIPO/GRTKF/IC/22/INF/8 (27 April 2012).

18 United Nations Educational, Scientific and Cultural Organization *Symposium on the Protection of Traditional Knowledge and Expressions of Indigenous Cultures in the Pacific Islands* (1999), as cited in Miranda Forsyth "Do You Want it Gift Wrapped?: Protecting Traditional Knowledge in the Pacific Island Countries" in Susy

auspices Professor Kanwal Puri and Dr Clark Peteru in 2002. It was received by the Pacific Islands Forum ministers and adopted in 2003.¹⁹ The objective of the Model Law is to protect the rights of traditional owners over their traditional knowledge and expressions of culture. The Model Law allows the commercialisation of traditional knowledge and expressions of culture, subject to informed and prior consent from the owners of the traditional knowledge and expressions of culture, as well as benefit-sharing. Unfortunately, the Model Law does not extend to other dimensions of traditional knowledge, such as knowledge connected to biological resources. The scope and nature of protection and exceptions it offers are based most directly upon copyright principles and are therefore most applicable to artistic, musical and literary expressions of culture. The Model Law also implements a policy position that it cannot be applied retrospectively. It is, however, ultimately a matter for the enacting country to decide whether the Model Law should be applied retrospectively.²⁰

A Formalities

The Model Law does not contain a requirement for registration; automatic protection is provided without formalities. The policy rationale for this is that traditional knowledge holders perceive formalities as a significant bearing on the accessibility of protection. Therefore, protection of traditional knowledge and expressions of culture is available the moment an expression is created, similar to copyright.²¹

Some enacting countries may decide not to provide automatic protection without formalities. Enacting states could establish a system allowing owners of traditional knowledge to register their traditional knowledge and expressions of culture. Providing a registration system would increase certainty and transparency, and it can address potential conflicts when determining the correct owner of the traditional knowledge or expression of culture.²²

Another alternative would be a hybrid approach consisting of automatic protection and registration. This method highlights the general principle that traditional knowledge and expressions of culture should be protected without formality and in an attempt to make protection as readily available as possible. However requiring notification or registration for those expressions would provide them with strong protection (for example, sacred-secret expressions) for which strong prior

Frankel and Peter Drahos (eds) *Indigenous People's Innovation: Intellectual Property Pathways to Development* (ANU Press, Canberra, 2012) 189 at 191.

19 Xiong, above n 9, at 128.

20 Model Law, cl 3(2).

21 IGC, above n 12, at 49.

22 At 49.

and informed consent-based protection would be applicable.²³ This method would also provide different treatment for the various layers of traditional knowledge and expressions of culture.²⁴

B Rights Granted under the Model Law

1 Traditional cultural rights

The Model Law provides traditional owners (owners of traditional knowledge or expressions of culture) with traditional cultural rights and moral rights. The Model Law defines "traditional owners of traditional knowledge or expressions of culture" as:²⁵

- (a) the group, clan or community of people; or
- (b) the individual who is recognised by a group, clan or community of people as the individual;

in whom the custody or protection of the traditional knowledge or expressions of culture are entrusted in accordance with the customary law and practices of that group, clan or community.

This article will discuss the issues regarding the definition of "ownership" in a later section.

Traditional owners are granted traditional cultural rights and moral rights under the Model Law.²⁶ The traditional cultural rights are exclusive rights in relation to a variety of uses of traditional knowledge and expressions of culture that are non-customary. This is regardless of whether they are for non-commercial or commercial purposes. This includes derivative works, where traditional knowledge and expressions of culture are used to form new creations and innovations.²⁷

Clause 8 of the Model Law provides that traditional cultural rights exist in traditional knowledge and expressions of culture, regardless of whether that traditional knowledge or those expressions of traditional culture are in material form. For example, a community may hold traditional cultural rights in a song detailing a significant event in their village. This would exist regardless of whether the song has been recorded or written down. Traditional cultural rights provided under the Model Law continue in force in perpetuity and cannot be waived or transferred.²⁸

2 Moral rights

The Model Law also provides moral rights to traditional owners of traditional knowledge and expressions of culture. Moral rights relate to the protection of the integrity of the work, the personality

23 At 49.

24 At 49.

25 Model Law, cl 4 definition of "traditional owners".

26 Clauses 6–13.

27 Samoa Law Reform Commission, above n 3, at 35.

28 Model Law, cls 9 and 13(4).

of the author or creator and similar matters. While the scope of moral rights differs between different jurisdictions, certain features are relatively common. The moral rights provided under the Model Law include:²⁹

- (a) the right of attribution of ownership in relation to their knowledge and expressions of culture; and
- (b) the right not to have ownership of traditional knowledge or expressions of culture falsely attributed to them; and
- (c) the right not to have their traditional knowledge and expressions of culture subject to derogatory treatment.

Like traditional cultural rights, moral rights continue in force in perpetuity. There are also other rights that enacting countries can decide whether to incorporate it into the Model Law. These include a retraction right (the right of a creator or author to withdraw a work from publication due to a change of opinion) and a divulgation right (where the traditional owners have the right to decide where, when and what form the work will be divulged to any other person). However, these do not commonly appear in national laws for the protection of expressions of culture.³⁰

Although moral rights are derived from copyright law, one may ask why copyright law cannot be used to protect traditional knowledge. Copyright law, while it may differ in scope in different jurisdictions, often provides minimal moral rights to traditional owners. Under the Model Law, the source of communications and publications to the public of any expression of culture must be indicated in an appropriate manner and conform to fair practice by acknowledging the place or community from where the expression of culture was derived. What amounts to the appropriate manner that conforms with fair practice is unclear in some jurisdictions and in others, the methods of identifying the place or community where an expression was derived is not considered at all.³¹

The rights of a member of a community in relation to traditional knowledge and expressions of culture are unclear under the Model Law. A member of a traditional knowledge-holding community would be required to gain the prior and informed consent of the other members of their community if that person decides to use the traditional knowledge in a non-customary way. Therefore, if a group of Sunday school kids wished to perform a custom story or dance from their village with a modern twist (for example jazz, hip hop, or rap), then the children would need to go through the process of obtaining prior and informed consent – a process that is overly bureaucratic and disenfranchising to village councils and/or local customary authorities.

29 Clause 13(2).

30 Secretariat of the Pacific Community, above n 11, at 33.

31 For example the Copyright Act 1998 (Samoa).

3 *Exceptions*

There are, however, situations where traditional cultural rights do not apply to specific non-customary uses of traditional knowledge and expressions of culture. These situations are:³²

- (i) criticism of review;
- (ii) face to face teaching;
- (iii) incidental use;
- (iv) reporting news or current events; and
- (v) judicial proceedings

One example of incidental use of traditional knowledge or an expression of culture is where a person takes a photo of a person which incidentally includes in the background an item that is an expression of culture. If a person or group uses traditional knowledge or an expression of culture in the exceptions mentioned above, that person or group must acknowledge the traditional owners by mentioning them or the geographical place from which the traditional knowledge or expression of culture originated.³³ A judge, for example, can discuss a sculpture which is an expression of culture in relation to a particular case. It will not be necessary for the judge to seek prior and informed consent from the traditional owners. However, the judge must acknowledge the traditional owners. The exceptions listed in the Model Law are an example of activities which can be exempted from the use of traditional cultural rights. These exceptions can be added to, varied, or deleted; the enacting country can determine what areas of activity are suitable for an exception.

The listed examples of exceptions are drawn from copyright exceptions. However, not all typical copyright exceptions are appropriate as they may undermine customary rights and practices. For example, an exception may be granted allowing a sculpture permanently displayed in a public gallery to be reproduced in drawings and photos without permission of the traditional owners. Furthermore, national copyright laws tend to enable libraries and public archives to reproduce works to keep them available for the public. However, spiritual and cultural issues may arise if such practice is permitted on copyrighted cultural expressions.³⁴

4 *Death of traditional knowledge owners*

Unfortunately, the Model Law does not direct enacting countries on how traditional cultural rights and moral rights should be dealt with when a traditional owner dies. As previously mentioned, the rights cannot be waived or transferred, and are in force in perpetuity. The authors of the Model Law omitted a provision pertaining to this issue as it was assumed that the death of a traditional owner would not affect the existence of customary rights related to the traditional knowledge or expressions

32 Model Law, cl 7(4).

33 Model Law, cl 7(4).

34 Secretariat of the Pacific Community, above n 11, at 38.

of culture. Nevertheless, an enacting country can determine what happens to moral rights and traditional cultural rights following the death of a traditional owner. This, of course, would depend on particular customary practices in each village and country.³⁵ A provision, for example, could be inserted into the Model Law providing that moral rights and traditional cultural rights of a traditional owner who has died should be dealt with under customary practices and laws of the traditional owners.

Another option is that the rights are conferred on the state when the traditional owner dies. The enacting state would then be responsible for the protection of the traditional knowledge and expression of culture and engage in negotiations with people who wish to use the traditional knowledge or expression of culture in a non-customary way. All proceeds, whether monetary or non-monetary, should be used for the purpose of protecting, preserving, and promoting the use of traditional knowledge and expression of culture. However, many traditional knowledge owners may contest this method, believing that the state is attempting to take the traditional knowledge away from the owners, commercialise it and use it to its benefit.³⁶

5 *Should traditional knowledge and expressions of culture be treated equally?*

In several traditional communities, some expressions are sacred-secret, whereby use and access to the expressions are highly restricted. As some traditional knowledge and expressions of culture hold greater spiritual or cultural significance than others, enacting countries may seek to distinguish different layers of traditional knowledge and expressions of culture.³⁷ From a protection perspective, acknowledging these distinctions is vital, particularly in respect of the scope of protection, term of protection and formalities. Multiple and varying layers and forms of treatment may be suitable for various kinds of expressions. One example is where expressions of certain spiritual or cultural significance may hold strong forms of protection, while other types of expressions, especially those that are publicly accessible or available, regulation of their use would be the focus.³⁸

Traditional knowledge and expressions of culture are treated as two layers under the Model Law, whereby sacred-secret material is provided with a stronger degree of protection. Below this layer are all other traditional knowledge and expressions of culture, which are to be treated equally. This approach is similar to that taken by the WIPO-IGC. The WIPO-IGC has outlined three groupings of expressions: (i) expressions of particular spiritual or cultural value to a community; (ii) confidential, secret or undisclosed expressions; and (iii) other expressions.

35 Model Law, cl 9.

36 Samoa Law Reform Commission *Protection of Samoa's Traditional Knowledge and Expression of Culture* (IP 08/10, June 2010) at 7.

37 Secretariat of the Pacific Community, above n 11, at 18.

38 At 18.

It is essential that enacting countries consider whether treatment of expressions of culture should reflect differences where they exist, or whether all expressions should be treated the same. Where an enacting country decides the former, that country must take careful consideration into which traditional knowledge and expressions of culture would fall into the various levels or layers.³⁹ This would require robust and open conversations with the owners of traditional knowledge and expressions of culture.

C "Customary Use" Versus "Non-customary Use"

The Model Law regulates the non-customary use of traditional knowledge and expressions of culture; customary use of traditional knowledge and expressions of culture is permitted in the Model Law.⁴⁰ "Customary use" is defined as "the use of traditional knowledge or expressions of culture in accordance with the customary laws and practices of the traditional owners".⁴¹ This definition is problematic as it not only provides a static view of custom, it also equates "traditional" with "custom". Customs are dynamic; they change as they engage with outside influences and respond to new circumstances.⁴² The Model Law is effectively putting the evolution of traditional knowledge and expression of culture into the hands of the state, allowing the state to decide what is customary and what is not. The Model Law may also undermine customary institutions. It does so by requiring state involvement in all non-customary use of traditional knowledge and expressions of culture. This includes the traditional owners itself under the Model Law, thereby cutting across the authority of local institutions, which are fragile in the Pacific region.⁴³ The worst possible result would be if state institutions assisted in the removal of existing regulatory structures, but because of the weaknesses of state institutions could not create an effective replacement.⁴⁴

While the Model Law provides definitions, there is not always a clear distinction between customary and non-customary use, as seen in the case of *Re the Nagol Jump, Assal and Vatu v the Council of Chiefs of Santo*.⁴⁵ Pentecost Island has become world-famous for the Nagol jump, an important tradition in several villages on South Pentecost. The Nagol jump involves men jumping from a specially constructed tower. The men are tethered by vines tied to their ankles. The vines are long enough to avoid the men being jerked back violently into the tower or falling to their death. In 1992, a group of men from South Pentecost wanted to move the Nagol jump onto another island,

39 At 18.

40 Model Law, cl 5.

41 Clause 4 definition of "customary use".

42 Forsyth, above n 7, at 273.

43 Forsyth, above n 8.

44 Forsyth, above n 7, at 277.

45 *Re the Nagol Jump, Assal v the Council of Chiefs of Santo* [1992] Van LR 545 (VUSC).

Santo, to increase profits from tourism. Negotiations were initiated with the relevant chief council. The council agreed to permit the use of the Nagol jump on Santo, subject to approval by the National Council of Chiefs (NCC). The head of the chief council went to discuss the matter with the NCC. Before the head of the chief council returned, the group requesting the move decided to move the jump without approval. Despite warnings from customary leaders, the group initiated plans to move to Santo. Once they arrived in Santo, the chiefs in Santo declined permission to perform the Nagol jump and demanded that the group return to Pentecost and pay a fine. The group then turned to the Vanuatu Supreme Court arguing that their constitutional rights had been breached and demanded a declaration of the breach.⁴⁶

In determining whether taking the jump to Santo was customary use, it was discovered that the Nagol had previously been performed outside Pentecost on two separate occasions for specific reasons. Therefore, taking the Nagol to Santo could still be considered as a customary use. It could be argued that it was non-customary use as the procedures for applying for the Nagol to be taken to Santo were not adhered to. This example portrays the difficulty in establishing a clear distinction between customary and non-customary use. This case also shows that customary institutions are capable of dealing fairly and innovatively with new uses of traditional knowledge. The case also highlights the need to take caution when transferring jurisdiction to the state; this new method for appealing such decisions risks undermining the customary institutions and their decisions.⁴⁷

D Cultural Authority

1 Functions

The Model Law requires the establishment of a "Cultural Authority". Clauses 36 and 37 outline the designation and functions of the Cultural Authority, which include receiving applications from prospective users of traditional knowledge and expressions of culture for non-customary use, identifying the traditional owners, monitoring compliance of user agreements, advising traditional owners of any breaches to an agreement, training and educating traditional owners and users of traditional knowledge and maintaining a record of traditional owners of knowledge and expressions of culture. Enacting countries can decide whether to create an entirely new body to act as the Cultural Authority or to assign the functions of the Cultural Authority to an existing body.

2 Alternatives to the Cultural Authority

Countries enacting the Model Law can adopt, adapt, or amend the list of functions provided under cl 37 to suit their particular needs. The Model Law does not include provisions for creating a new statutory body as countries can establish a regulatory body through existing legislation or assign the

⁴⁶ Forsyth, above n 18, at 200.

⁴⁷ See Forsyth, above n 18.

functions of the Cultural Authority to an existing body.⁴⁸ The enacting country may decide that instead of a Cultural Authority, prospective users can apply to the relevant traditional community. This method could be viewed as a preferable arrangement as communities themselves would decide whether to grant authorisation. This highlights the principle that traditional communities not only own their traditional knowledge and expressions of culture but are also the primary decision-makers.

This approach comes with several practical limitations. One is regarding capacity within communities, which will have an impact on the negotiation of an equitable and fair agreement. Furthermore, resourcing constraints in some communities can impact their ability to receive external advice on the proposed use and the terms and conditions of any agreement.⁴⁹

Another alternative is a combination of a state body and the relevant traditional community. Here, the state body would play an administrative role and may decide to grant authorisation in certain situations. The relevant traditional community and enacting country would hold specified positions in the authorisation process. The state body would receive applications for authorisation to use traditional knowledge and expressions of culture. The applications would then be sent to the relevant traditional community. The state body would act as a "watchdog" by protecting the interests of the relevant community and, if necessary, mediating between the prospective user and relevant community.⁵⁰ Whichever method enacting countries decide, again careful consideration must be taken to avoid undermining existing customary institutions.

E Prior and Informed Consent

Prospective users of traditional knowledge and expressions of culture for non-customary use can obtain the prior and informed consent of the traditional owners through one of two avenues: by applying to the Cultural Authority or dealing directly with the traditional owners. Examples of using traditional knowledge and expressions of culture in a non-customary way include copying a motif onto an *ie lavalava*,⁵¹ transcribing a story in an information pamphlet for distribution to the public and broadcasting a live performance of a customary ceremony.

Applications to use traditional knowledge must be in the prescribed form, specify how the applicant proposes to use the traditional knowledge or expressions of culture, clearly state the purpose for which that use is intended and be accompanied by the prescribed fee.⁵² Clause 15(3) of the Model Law requires the Cultural Authority to finalise the application within a specific time period as set by

48 Clause 36, explanatory memorandum.

49 Secretariat of the Pacific Community, above n 11, at 4.

50 At 44.

51 A lavalava, also known as an *'ie*, short for *'ie lavalava*, is a single rectangular cloth worn as a skirt worn by Polynesians.

52 Model Law, cl 15(2).

the enacting country. Once these steps are completed, the Cultural Authority must give one copy of the application to whoever the traditional owners are. One copy must appear in a newspaper having national circulation, and if appropriate, details of the application must be broadcasted on radio or television.⁵³

The traditional owners must either reject or accept the application and enter into negotiations with the prospective user for a written, authorised user agreement. The traditional owners are required to advise the Cultural Authority of their decision either orally or in writing, and the Cultural Authority will inform the prospective user of the decision in writing.⁵⁴

Prospective users are required to refer proposed authorised user agreements to the Cultural Authority for its comments on the proposed terms and conditions before entering into an authorised user agreement.⁵⁵ This is to ensure that the traditional owners have enough information to make a full and informed decision on the proposed terms and conditions and that the terms and conditions protect the traditional knowledge and expressions of culture. If neither of these requirements are satisfied, then a meeting will be arranged between the traditional owners, the prospective user and the Cultural Authority to discuss the proposed agreement. Any comments made by the Cultural Authority may be accepted, rejected or modified by the traditional owners.⁵⁶

Should the prospective users deal with the traditional owners directly, they must inform the Cultural Authority that prior and informed consent of the traditional owners has been sought.⁵⁷ The potential users must also provide the Cultural Authority with a copy of the proposed authorised user agreement. Any signed authorised user agreement must be entered in the Cultural Authority register within 28 days after the agreement comes into force.⁵⁸ The parties cannot contract out of this requirement.⁵⁹ Failure to register will render the agreement null and void. If a traditional owner and prospective user enter into an authorised user agreement, it will be assumed that the traditional owners provided their prior and informed consent to the proposed use.⁶⁰ These requirements are put in place to ensure that the Cultural Authority is informed of all proposals for the use of traditional knowledge and expressions of culture and provide particular safeguards for traditional owners.

53 Model Law, cl 16(1)(a)–(c).

54 Model Law, cl 20.

55 Model Law, cl 21(1)–(3).

56 Model Law, cl 21(1)–(3).

57 Model Law, cl 25(2).

58 Model Law, cl 25(4).

59 Model Law, cl 25(6).

60 Model Law, cl 25(5).

F Ownership

Anyone claiming to be the traditional owner of the traditional knowledge or expression of culture in relation to the application must notify the Cultural Authority within 28 days after the application is published or broadcasted. Once the Cultural Authority is satisfied that all the traditional owners have been identified, it must publish a copy of the determination in a newspaper having national circulation, and if appropriate, broadcast details of the decision on television or radio.⁶¹ The Model Law does not provide criteria for what amounts to satisfying the Cultural Authority. Once the Cultural Authority makes the determination, it gives a defence for any user of traditional knowledge or expression of culture if the traditional owners specified in the determination have given their prior and informed consent. Therefore, there is no effective way for contesting the Cultural Authority's ownership decision.⁶²

By introducing "ownership" of traditional knowledge to a limited group of people whose rights are supported by the state, the Model Law creates a problem for traditional knowledge. Although it recognises that there may be individual or communal ownership of traditional knowledge and expressions of culture, it does not necessarily prevent the difficulties that will arise when determining the membership of the ownership group.⁶³

The practice of *tatau* (tattooing) in Samoa, performed by *tufuga* (tattooists), is illustrative. The *tufuga* are associated with two main *aiga* (extended families). The organisation of these families is similar to artisan guilds in other societies. The families follow a system in which master craftsmen teach their apprentices the skill. The tattooing "families" are structured in a hierarchical fashion, with particular standards, rules and distinctive trade marks.⁶⁴ Historically, *tatau* was performed as a rite of passage to adulthood and would take place over several days, followed by feasts and celebrations.⁶⁵ The tattooing combs used by *tufuga* were made from boar tusks, and the ink was made from candlenut soot mixed with water. Today, *tatau* has become a statement of Samoan heritage and identity. It is now regularly performed on non-Samoans.⁶⁶

The *tufuga*, the state and the general public claim stewardship over the *tatau*. The *tufuga* are active agents in teaching people how to perform the art and disseminating the tradition. Based on their historical connections, some *tufuga* families would argue for exclusive rights over the practice of *tatau*. However, other *tufuga* would challenge this claim. All *tufuga* do not wish to relinquish their

61 Model Law, cl 17(1)–(2).

62 Forsyth, above n 18, at 202.

63 At 202.

64 United Nations Educational, Scientific and Cultural Organization *Case Study 38: Tatau* at 1.

65 At 1.

66 At 1.

right to make decisions regarding *tatau* and to benefit from the practices financially. The state considers that it has a claim to the *tatau* due to its significance as a national symbol and use to differentiate Samoa as a tourism destination. The state promotes *tatau* as a national marker of its heritage and culture through international sporting events, its tourism office and in other international forums. The general public (Samoans living in Samoa and overseas) would also claim stewardship of *tatau* as part of their identity, and some have expressed their concern about the new directions in which *tufuga* are taking *tatau*, with some believing that the new directions are commercially motivated.⁶⁷

If Samoa decides to adopt the Model Law in its current form, then the *tufuga* would claim to be the traditional owners as the existing "knowledge holders". If *tufuga* are granted traditional cultural rights and moral rights, they would be able to decide who is allowed to use *tatau* motifs, who is allowed to practice *tatau* and determine how it is used. The difficulty lies in identifying who the traditional knowledge owners are. The possible claimants include the *tufuga* within the two main families, all members of these families,⁶⁸ and quite possibly, many other families who have put their claims to practice *tatau* as well. Samoan *tufuga* residing overseas may also claim rights. The Model Law in its current state would treat the practitioners as a single group. Therefore, any time anyone (including one of the *tufuga*) wanted to use *tatau* in a non-customary manner or purpose, consent would be required from all *tufuga*. Currently, independent *tufuga* have been able to undertake new initiatives. Under the Model Law, any changes to the practice of *tatau* would be dependent on the most conservative *tufuga*.

If the Cultural Authority believes that no traditional owners can be identified, or no agreement has been reached on ownership within a specified period, then the Cultural Authority, after consultation with the responsible minister, can be determined as the traditional owner of the traditional knowledge or expression of culture.⁶⁹ Should the Cultural Authority enter into an authorised user agreement, all benefits, either monetary or non-monetary, must be used for traditional cultural development purposes.⁷⁰ However cl 19 is only a suggestion and it is therefore a matter for enacting countries to decide the appropriate process to deal with applications when there is difficulty in identifying the traditional owners.

⁶⁷ UNESCO, above n 64, at 2.

⁶⁸ This is complicated by the fact that membership in these families is not strictly hereditary.

⁶⁹ Model Law, cl 19(1).

⁷⁰ Model Law, cl 19(2).

Unfortunately, the MSG Treaty and the Model Law fail to address traditional knowledge that may already be in the public domain: knowledge and expressions of culture that may have left its location of origin and reached other communities.⁷¹

G Dispute Resolution

If the Cultural Authority is not satisfied that all of the traditional owners have been identified or if there is a dispute about ownership of the traditional knowledge or expression of culture, the Model Law requires the Cultural Authority to refer the matter for resolution by the persons concerned.⁷² The Model Law suggests mechanisms that can be used to assist in resolving related disputes, which include mediation, customary law and alternative dispute resolution procedure.⁷³ However, it does not provide suggestions as to any related customary land issues, which could be difficult given that customary land tenure exists in most of the members of the Pacific Island Forum.

In the *tatau* example above, the state and general public would claim stewardship over *tatau*, and the state may challenge the *tufuga*'s claim as traditional owners. The Cultural Authority could direct the state and *tufuga* (as well as any other stakeholders claiming ownership of the traditional knowledge) to the use of customary law and practice, or other such means as agreed by the parties. The general public may agree with the state being the traditional owners as the *tatau* is collectively held and is part of their cultural identity. However, others may view this as a case of the state attempting to claim ownership purely for commercial benefit. This may deter other traditional owners from registering their traditional knowledge or expressions.⁷⁴

One thing that is noticeable is the Model Law's failure to deal with the issue concerning the indivisibility of traditional knowledge and any of its various forms of manifestation from customary law. When a dispute arises concerning the ownership of traditional knowledge questions, about its origin may arise when it is linked to customary land (and in Samoa, *matai* titles).⁷⁵ In this case, any dispute relating to customary land and *matai* titles would then be determined by the relevant authority or court, such as the Land and Titles Court in Samoa.⁷⁶

While customary law and practice can be used to resolve disputes, it is not the primary means. Therefore, customary institutions do not hold state enforcement power. This means that customary law and practices are less likely to be used in highly contested cases, as disputes about the forum can

71 Forsyth, above n 7, at 279.

72 Clause 18.

73 Clause 33.

74 UNESCO, above n 64.

75 *Matai* is a Samoan word referred to holders of family chief titles.

76 Samoa Law Reform Commission, above n 36, at 37.

undermine its authority.⁷⁷ This is certainly the case given the importance for the parties of meeting the statutory timeframe or else risking losing all to the Cultural Authority.⁷⁸

H Offences, Defences and Remedies

The Model Law provides all forms of protection – positive and defensive protection and facilitates the regulation of access. Defensive protection involves publishing traditional knowledge as a defensive measure to block third parties from patenting it. However, that can make it easier for third parties to use the knowledge contrary to the wishes of the traditional knowledge owners.⁷⁹ Positive protection is the recognition of traditional knowledge and expressions of culture and the need to acquire prior and informed consent of traditional owners before third parties use traditional knowledge and expressions of culture.⁸⁰

The Model Law suggests several offences for contraventions of traditional cultural rights and moral rights. One thing to note is that members of the WIPO-IGC would find it difficult to agree upon these offences. The offences imposed are more severe than the only existing multilateral agreement on point, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement).⁸¹

The first offence suggested is that a person is liable upon conviction for a fine or imprisonment term or both if that person makes a non-customary use of traditional knowledge or an expression of culture without the prior and informed consent of the traditional owners.⁸² For example, it would be an offence for a person to record and broadcast a traditional dance, which is considered an expression of culture, without the prior and informed consent of the traditional owners.

The second possible offence is the infringement of traditional owners' moral rights. Under cl 27, a person is liable upon conviction for a fine or imprisonment term or both if that person acts or omits to do any act that would lead to the infringement of the moral rights of traditional owners without

77 Miranda Forsyth "Cargo Cults and Intellectual Property in the South Pacific" (2003) 14 AIPJ 193; and Forsyth, above n 18, at 204.

78 Forsyth, above n 18, at 204.

79 Samoa Law Reform Commission, above n 36, at 42.

80 At 42.

81 Marrakesh Agreement Establishing the World Trade Organization 1867 UNTS 3 (opened for signature 15 April 1994, entered into force 1 January 1995), Annex 1C (Agreement on Trade-Related Aspects of Intellectual Property Rights) [TRIPS Agreement].

82 Model Law, cl 26.

their prior and informed consent to such act or omission. For example, it is an offence for a person to falsely claim ownership of a motif, dance or *siapo*.⁸³

The third offence is using sacred-secret traditional knowledge or any expression of culture other than a customary use. "Sacred-secret" means any traditional knowledge or expression of culture that holds a sacred or secret significance based on customary practices and law of the traditional owners concerned.⁸⁴ The penalty for the offence is a fine or imprisonment or both.⁸⁵ The provision allows any party to use sacred-secret traditional knowledge or any expression of culture for customary use, but the Model Law does not restrict the use of sacred-secret traditional knowledge or any expression of culture to traditional owners only.

The last offence concerns the import or export of anything that relates to traditional knowledge or an expression of culture. Under cl 29(1), the offence captures people who import materials that relate to traditional knowledge and expressions of culture despite knowing that those articles would infringe the moral and traditional rights of the traditional owners. Any person convicted under this clause would be fined, face an imprisonment term, or both. For example, it would be an offence for a person from Country B to import into Country A *ie lavalava* bearing a motif, which is an expression of culture, from Country A, if the person knew or ought to have known that, had the *ie lavalava* was made in Country A. The reproduction of the motif would have required the prior and informed consent of the traditional owners.

Traditional owners may initiate civil proceedings against a person who makes a non-customary use of their traditional knowledge or expression of culture where they have not given prior informed consent to that use.⁸⁶ They may also bring proceedings against anyone who omits or does an act in regards to traditional knowledge or an expression of culture that is contrary to the traditional owners' moral rights and is without their prior informed consent.⁸⁷

The Model Law includes a range of remedies for traditional owners in these circumstances, such as damages for loss, an injunction, a public apology, an order to cease or reverse false attribution of ownership or derogatory treatment, seizure of objects and an order for an account of profits.⁸⁸ The appropriate remedy will vary. If moral rights are breached, for example, ordering a public apology to

83 A *siapo* is a Samoan tapa cloth usually made from the inner bark of the u'a (paper mulberry tree), and decorated with natural dyes from a range of trees, plants and clays.

84 Model Law, cl 4.

85 Model Law, cl 28.

86 Model Law, cl 30(1).

87 Model Law, cl 30(2), explanatory memorandum.

88 Clause 31.

the traditional owners will likely be the most appropriate remedy in addition to damages.⁸⁹ The purpose of paying damages is to put the traditional owners, back into the position they would have been had the use not happened.⁹⁰ Paying a price may not be an issue for some offenders, especially for those who are financially well off. In some instances, paying damages may be offensive as it places a monetary value on traditional knowledge or expressions of culture, especially those that are sacred or secret. Ordering a public apology forces the offender(s) to acknowledge who the traditional owners are, the wrongful act(s), and can restore the mana of the traditional owners or community, which is something that monetary redress on its own may not achieve.⁹¹

There are defences to criminal offences and civil actions if a determination has been published under cl 17 of the Model Law, and the traditional owners identified in the determination have provided their prior informed consent to the use in question.⁹² Enacting countries may wish to consider whether additional defences are necessary or whether this defence is sufficient.

There may be instances where a person or group of people unknowingly infringe on the traditional cultural rights or moral rights of a traditional owner. For example, Filippo, a farmer from the Siaki tribe, believes he has developed a new method to grow his crops. His crops are now three times larger than average and can be grown all year round. Filippo sells his crops and makes a windfall. However, unbeknown to him, his method is a method (traditional knowledge) developed by the Sali tribe, and they have been using the technique for over a century. These types of situations are not covered under the Model Law as it can be challenging to prove that the person infringing on the rights knew that the traditional knowledge or expression of culture was held by a traditional owner(s).

Nevertheless, these situations can happen. Some form of process could be established. For example, the first step could be that the Cultural Authority, on behalf of the Sali tribe, provides Filippo with a formal notification regarding the use of the traditional knowledge and potential breach of the Model Law. Filippo could be given 30 days as a "grace period" to stop production and negotiate an authorised user agreement with the Sali tribe. The agreement could include payments for the use of the method before notification. If an agreement cannot be reached, it could be deemed that the Sali tribe has declined Filippo's request to use the traditional knowledge. If Filippo knew or ought to have known that the method he was using was owned by the Sali tribe, and continued to use the traditional knowledge, he should not be allowed the grace period and should be charged accordingly.

89 Clause 31, explanatory memorandum.

90 *Robinson v Harman* (1848) 1 Exch 850, 154 ER 363.

91 "Mana" is a Māori word, which can be translated to authority, control, prestige, influence or power. It is also honour.

92 Model Law, cls 32 and 30(1)–(2).

The offences and remedies affect the people in the enacting country more than the actual perpetrators if they are foreigners. While the Model Law does impose harsh penalties on perpetrators residing in the enacting country, the domestic effect of the Model Law limits its scope of protection, failing to capture the perpetrators outside of the enacting country. A possible solution to this could involve the Pacific countries adopting the Model Law and developing some form of regional agreement or treaty to give the Model Law some "teeth". However, even if a regional agreement is signed, offenders residing outside of the signatory countries may still not be prosecuted. It is hoped that the multilateral instrument developed by the WIPO-IGC will be able to fill in this gap.

I Implementation: The Traditional Knowledge Implementation Action Plan

In a meeting between the executives of the Pacific Islands Forum Secretariat (PIFS) and the Secretariat of the Pacific Community (SPC), it was decided that the lead agency responsibility in relation to the Model Law would move from the SPC to the PIFS.⁹³ In June 2007, the PIFS organised a workshop to determine the technical assistance needs of member countries in regard to the development and implementation of the Model Law at the national level. The recommendations and conclusions of that workshop were endorsed by the Forum's trade ministers in August 2007.⁹⁴

A Traditional Knowledge Implementation Action Plan (Action Plan) was developed in response to the member countries' request for technical assistance. The overall objective was to assist the Forum island countries in their efforts to create a regional infrastructure for traditional knowledge that would consist of both an enforcement regime and mutual recognition founded on uniform national legal systems of protection. As a first step, the Action Plan would assist countries in developing policy and draft legislation based on the Model Law. Once completed, a regional system of traditional knowledge protection would be developed.⁹⁵ The Action Plan was developed with the technical assistance of the TradeCom Facility of the European Union. Two EU projects were implemented as part of a broad programme of technical assistance. In the first project, technical assistance was provided for the establishment of national systems of protection for traditional knowledge in Vanuatu, the Cook Islands, Fiji, Palau, Kiribati and Papua New Guinea.⁹⁶ The second project was concerned with the

93 Secretariat of the Pacific Regional Environment Programme *Traditional Knowledge Implementation Action Plan: Part I* (2009) at 2.

94 At 2.

95 Michael Blakeney "The Pacific Solution: The European Union's Intellectual Property Rights Activism in Australia's and New Zealand's Sphere of Influence" in Susy Frankel and Peter Drahos (eds) *Indigenous People's Innovation: Intellectual Property Pathways to Development* (ANU Press, Canberra, 2012) 165 at 172.

96 At 173.

creation of a treaty for the reciprocal recognition of traditional knowledge among the Melanesian Spearhead Group (MSG).⁹⁷

Due to the "top down" processes by which the Model Law was created, an opportunity to explore how Pacific Islanders' unique conceptions of knowledge can shape a new IP regulatory structure was largely missed. There was a lack of research into the adequacy of existing systems of regulation and a lack of a detailed investigation into the needs of traditional knowledge holders.⁹⁸ WIPO conducted a fact-finding mission in the South Pacific in 1998.⁹⁹ However, only four days were actually spent in the Pacific Island countries, and discussions were held with state leaders rather than traditional knowledge holders.¹⁰⁰ This top down approach is made clear in the Action Plan, which rather than engaging in community consultation as the initial step, emphasises first drafting the legislation and recommends engaging in community consultation later on. Under the Action Plan, community consultation is seen as an opportunity for traditional knowledge owners to understand the implications of the Model Law, rather than as a way of developing the framework together with the community leaders.¹⁰¹

The Action Plan also promotes a "bottom up" approach through the development of a regional and national system of protection while work is continuing on the development of international instruments for the protection of traditional knowledge.¹⁰² The ongoing exposure of Pacific traditional knowledge to misappropriation and improper exploitation without compensation requires that a regional approach be adopted as a matter of urgency while an international instrument is being finalised. While activities will be undertaken at regional and national levels, the Action Plan also provides for activities promoting the positive engagement of regional partners and Forum island countries in the work of international forums on traditional knowledge such as the WIPO-IGC.¹⁰³

There is a risk that the Model Law and initiatives suggested under the Action Plan may cause conflict between communities, something to which the Pacific region, especially Melanesia, is susceptible to. Claims and challenges over ownership of certain traditional knowledge and practices,

97 The Melanesian Spearhead Group of countries include Papua New Guinea, Fiji, Vanuatu and the Solomon Islands.

98 Forsyth, above n 7, at 274.

99 See World Intellectual Property Organization *Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-finding Missions on Intellectual Property and Traditional Knowledge (1998-1999)* (April 2001).

100 Forsyth, above n 7, at 274.

101 At 274.

102 Secretariat of the Pacific Regional Environment Programme, above n 93, at 3.

103 At 3.

especially where there is the hope of a significant windfall, have the likelihood to cause considerable tension between communities.¹⁰⁴

1 *The Cooks Islands*

The Cook Islands has enacted legislation for the protection of traditional knowledge. The Model Law, although not adopted in its current form, shares some characteristics with the Traditional Knowledge Act 2013. Under the Traditional Knowledge Act (the TKA), traditional knowledge is defined as:¹⁰⁵

- (a) ... knowledge (whether manifested in tangible or intangible form) that is, or is or was intended by its creator to be, transmitted from generation to generation and—
 - (i) originates from a traditional community; or
 - (ii) is or was created, developed, acquired, or inspired for traditional purposes; and
- (b) includes any way in which that knowledge appears or is manifested ...

The TKA, like the Model Law, establishes a register where traditional owners can register their traditional knowledge. The owners are granted various exclusive rights, which include the use, documentation, transmission, or the development of the knowledge in any way, regardless of whether it is used commercially or not.¹⁰⁶ The right-holders of the knowledge are either the creator of the knowledge or the customary successor of the knowledge. The register is maintained by the Secretary of Cultural Development and contains a general description of traditional knowledge and expressions of culture. The register is made available for inspection at the offices of the Ministry of Cultural Development unless it is not practical to provide access.¹⁰⁷

The TKA aims to include customary authorities into the regulatory framework by empowering local institutions called the *Are Korero* by deciding who the correct right-holders are. The *Are Korero*, which can be translated to the "House of Knowledge", was an institution that facilitated knowledge sharing of various experts in chanting, fishing, healing, navigating, dancing, weaving and much more. The TKA aims to reinvigorate *Are Korero*. Paramount chiefs decide on who constitutes the *Are Korero* for their particular area or island. Unfortunately, there are issues of both authenticity and the practical challenges of creating and resourcing these institutions. There are also challenges to the legitimacy of the chiefs who appoint them as disputes over chiefly title is common throughout the

104 Forsyth, above n 18, at 207.

105 Traditional Knowledge Act 2013 (Cook Islands) [TKA], s 4(1).

106 Section 7(1)(a).

107 Section 7(1)(a).

Cook Islands.¹⁰⁸ The House of Ariki, a parliamentary body composed of the Cook Islands high chiefs, is responsible for cultivation, support and promotion of traditional knowledge. Therefore, some have argued that the final decision about how traditional knowledge is used should fall on the House of Ariki rather than *Are Korero*.¹⁰⁹

The rights accorded to Cook Islanders living overseas are also addressed in the TKA. Previously, Cook Islanders living overseas were not able to register their rights over their traditional knowledge. The TKA now allows for registration from Cook Islanders living overseas, but the applicant who wishes to register their rights must register through the *Are Korero* of their home island. However, those living overseas are disadvantaged as the TKA requires information about an application to be placed on the noticeboard on the island. Unless the applicant is able to travel to the Cook Island or ask someone from the island to place the notice for them, registering rights can be difficult. Arguably people who leave the Cook Islands should not require those who remain to preserve traditional knowledge and expressions of culture that is not theirs. The potential conflict if the law is used by those who remain in the Cook Islands against those outside of the country is clearly present.¹¹⁰

2 Niue

The definition of traditional knowledge that Niue adopted in the Tāoga Niue Act 2012 is identical to the definition provided under the Model Law.¹¹¹ The Tāoga Niue Act protects a wide range of matters, including:

- (i) antiquities;
- (ii) objects of national cultural or historical significance to Niue;
- (iii) traditional knowledge;
- (iv) expressions of culture;
- (v) customs, traditions and history of Niue;
- (vi) Vagahau Niue (Niuean Language); and
- (vii) traditional food

The majority of the Tāoga Niue Act is almost identical to the Model Law which suggests a lack of capacity to develop the law to meet local needs. The requirements for obtaining prior and informed consent from traditional owners under the Act do not differ from the Model Law. Tāoga Niue (Niue's Department of Cultural Affairs) extended its role to include the functions of the "Cultural Authority" referred to in the Model Law. The prior and informed consent system vests in Tāoga Niue the power to publish, supervise and take control of applications for the use of traditional knowledge. This

108 Miranda Forsyth and Kalissa Alexeyeff "Regulating Cultural Performances in Oceania: Relationships between Law, Creativity and Cultural Property" (2016) *Journal de la Société des Océanistes* 117 at 125.

109 At 125.

110 At 126.

111 Model Law, cl 4; and Tāoga Niue Act 2012 (Niue), s 3.

administrative examination and approval procedure can manage the proper use of traditional knowledge for non-customary use.¹¹² Under its supervision, Tāoga Niue can ensure that non-customary use of traditional knowledge will not be offensive to the custom and culture of Niue. Tāoga Niue can also ensure the proper use of traditional knowledge to encourage biodiversity for sustainable development of the environment. The recording of the applications serves as formal evidence in case of dispute between users and traditional owners.¹¹³

One noticeable difference from the Model Law is around uncertainty or disputes about ownership. The Model Law, cl 18(1) states:¹¹⁴

If the Cultural Authority is not satisfied that it has identified all of the traditional owners or that there is a dispute about ownership, the Cultural Authority must refer the matter to the *persons concerned* to be resolved according to customary law and practice or such other means as are agreed to by the parties.

As previously stated, this implies a more "hands-off" approach when dealing with disputes. The Tāoga Niue Act empowers Tāoga Niue's Advisory Council, which consists of representatives from various groups in the public sector,¹¹⁵ to have more of a "hands-on" approach:¹¹⁶

If the Director is not satisfied that all of the traditional owners have been identified, or if there is a dispute about ownership, the Director must refer the matter to the Council to be resolved according to customary law and practice.

Here, the Government has a more active role in disputes around ownership of traditional knowledge and expressions of culture. While the Model Law suggests methods like mediation to deal with disputes, Tāoga Niue only allows for the use of customary law and practices which must be used, including in highly contested cases. The Niuean population is very small, so the proposed dispute resolution is ideal for its circumstances.¹¹⁷

3 Vanuatu

Currently, expressions of culture are protected through the Vanuatu Copyright and Related Rights Act 2000 (CRRA). The CRRA contains specific provisions for the protection of expressions of indigenous culture. Under the CRRA, expressions of indigenous culture are defined as "any way in which indigenous knowledge may appear or be manifested", and includes, for example, stories,

112 Xiong, above n 9, at 131.

113 At 131.

114 Emphasis added.

115 Tāoga Niue Act, s 14.

116 Tāoga Niue Act, s 38(1) (emphasis added). The Taoga Niue Advisory Council is referred to as the "Council" in the Act: s 3 definition of "Council".

117 Xiong, above n 9, at 131.

histories, dances, material objects and songs in oral narratives.¹¹⁸ While it is possible for these expressions to fall within the copyright meaning of "work", classification as a "work" is not imperative and therefore originality, which could be challenging for a group or person to establish in regards to ancient indigenous cultural expressions, is not a prerequisite to protection.¹¹⁹

The CRRA also recognises the collective right of ownership of expressions of indigenous culture as well as the collective right of enforcement by knowledge owners, either by themselves or with either the National Council of Chiefs or the National Cultural Council representing them on their behalf.¹²⁰

In 2018, the Bill for the Protection of Traditional Knowledge and Expressions of Culture was introduced by the Deputy Prime Minister and Minister of Trade, Commerce, Industry and Tourism.¹²¹ The Bill aims to protect traditional knowledge and expressions of culture as tangible and intangible IP associated with the use of genetic resources.¹²² The Bill is part of Vanuatu's commitment to not only protect traditional knowledge but also provide for fair sharing of benefits which may arise from the use of traditional knowledge stated in the Convention on Biological Diversity (CBD) and Nagoya Protocol.¹²³

The Bill mirrors the Model Law in various clauses. The definitions of "traditional knowledge" and "traditional owners" are identical to the Model Law. The Bill also mirrors the moral rights given under the Model Law, but it also adds additional moral rights, namely, the right to decide when, where and in what form their work will be disclosed to any other person,¹²⁴ and the right to withdraw a work

118 Copyright and Related Rights Act 2000 (Vanuatu) [CRRA], s 1.

119 Lucille Schnierer "Australia: New Copyright Laws Commence in Vanuatu" (31 March 2011) Pacific Legal Network <www.mondaq.com/australia>.

120 Protection of Traditional Knowledge and Expressions of Culture Bill 2018 (Vanuatu), explanatory note.

121 Protection of Traditional Knowledge and Expressions of Culture Bill, explanatory note.

122 Clause 5.

123 Protection of Traditional Knowledge and Expressions of Culture Bill 2018 (Vanuatu), explanatory note. See also Convention on Biological Diversity 1760 UNTS 79 (opened for signature 5 June 1992, entered into force 29 December 1993) [CBD]; and Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity UNEP/CBD/COP/DEC/X/1 (opened for signature 2 February 2011, entered into force 12 October 2014).

124 Clause 10(2)(d).

from publication because of change of opinion.¹²⁵ Moral rights and traditional cultural rights also continue in perpetuity,¹²⁶ are inalienable, and cannot be waived or transferred.¹²⁷

The Bill also provides for the establishment of the "Traditional Knowledge and Expressions of Culture Authority" (the TKEC Authority). However, unlike the Model Law, the TKEC Authority plays more of a facilitator and adviser role rather than the primary regulator. The process of identifying traditional owners is different from the Model Law. Power is bestowed on the Malvatumauri Council of Chiefs. Clause 23 requires the Council and the TKEC Authority to develop written guidelines for the identification of traditional owners. The Council should inform the TKEC Authority if it feels that all the traditional owners have been identified in accordance with customary law and the guidelines established by the TKEC Authority and the Council. If the Council is not satisfied that it has identified all the traditional owners or is satisfied that there is a dispute about ownership, the Council would be required to make a recommendation to the responsible Minister to appoint a board of arbitration to deal with the dispute.¹²⁸

In relation to user agreements for non-customary uses of traditional knowledge and expressions of culture, the Bill requires the TKEC Authority to work with the Malvatumauri Council of Chiefs, Vanuatu Cultural Centre and the Development of Environmental Protection and Conservation to develop a standardised template for user agreements.¹²⁹ All user agreements must be facilitated by the Authority. Failing to do so would deem the user agreement null and void.¹³⁰ The Bill also covers existing user agreements prior to the Bill, and the traditional owner(s) will be deemed to have provided their prior and informed consent to the use to which the agreement relates. However, the parties must provide the Authority with the agreed compensation terms in force before the Bill, and the TKEC Authority may request that parties make amendments to any terms and conditions of the existing agreement.¹³¹

Where the Bill differs from the Model Law is the establishment of the "Traditional Knowledge and Expression of Culture Fund".¹³² The funds consist of amounts appropriated by Parliament, grants and donations and any other income derived from the Bill. The purposes of the Fund is to provide funding to develop and promote traditional knowledge and expressions of culture creativity and

125 Clause 10(2)(e).

126 Clauses 12 and 10(4).

127 Clause 10(4).

128 Clause 24(1).

129 Clause 28(1).

130 Clause 28(2)–(3).

131 Clause 30.

132 Clause 26.

innovation, to implement the protection regime and public awareness-raising activities.¹³³ The Fund can also be used to develop research, management, leadership and entrepreneurial skills for traditional owners,¹³⁴ promote research for safeguarding indigenous Vanuatu heritage including art, language, traditional knowledge, expression of culture and associated genetic or biological materials¹³⁵ and any other purposes deemed appropriate by TKEC Authority.¹³⁶ Not only does the Bill aim to protect traditional knowledge, it also aims to preserve traditional knowledge – an example of one of the omissions of the Model Law.

Like the Model Law, the Bill protects traditional cultural rights and moral rights differently. The Bill prohibits the access, acquisition, or use of traditional cultural rights without the consent of traditional owners. This includes situations where a third party claims legitimate use or access to associated genetic or biological materials with traditional knowledge and expressions of culture without the consent of traditional owners.¹³⁷ It is also an offence for anyone to engage in any unauthorised dealing or activity with traditional knowledge or expressions of culture affecting the preservation, promotion, or protection of traditional knowledge or expressions of culture. Committing either offence can lead to a fine not exceeding VT 5,000,000 or imprisonment for a term not exceeding two years, or both for individuals. In the case of a body corporate, a fine of up to VT 10,000,000 can be imposed.¹³⁸

Moral rights, however, can be viewed as receiving a different "layer" of protection. If the moral rights of a traditional owner are contravened without the prior informed consent of the traditional owner, an individual will receive a fine of up to VT 2,000,000 or imprisonment for a term up to 12 months or both, while a fine not exceeding VT 2,000,000 would be imposed on a body corporate.¹³⁹ However, as discussed earlier in this article, enacting countries of the Model Law may decide whether to treat all traditional knowledge and expressions of culture uniformly, or whether to provide stronger protections to specific traditional knowledge or expressions of culture. The Bill adopts the former, imposing the same level of protection upon all kinds of traditional knowledge and expressions of culture, including those that are sacred-secret.

133 Clause 27(a).

134 Clause 27(b).

135 Clause 27(c).

136 Clause 27(d).

137 Clause 39.

138 As of 13 October 2019, the exchange rate for 1 VUV = 0.0136003 NZD. To put things into perspective, VT 5,000,000 converts to approximately NZD 68,000 and VT 10,000,000 converts to approximately NZD 136,000.

139 Protection of Traditional Knowledge and Expressions of Culture Bill, cl 10(5).

4 Samoa

The Samoa Law Reform Commission conducted a review of its current IP laws and their effectiveness in protecting traditional knowledge. The Commission recommended that a new *sui generis* law for the protection of Samoa's traditional knowledge should be established. The Commission recommended the adoption of either the Model Law and the SPREP Model law as the initial step. Further recommendations such as the role of the Cultural Authority were also discussed in its report. A total of 58 recommendations were made, essentially "fleshing out" the model laws.¹⁴⁰ The Commission recommended that the protection of traditional biological knowledge and traditional cultural expressions should be dealt with separately within the new legal framework; the Model Law itself does not provide provisions for the protection of traditional biological knowledge.

Countries that are currently working towards implementing the model laws are Fiji, Kiribati, Palau and Papua New Guinea.¹⁴¹ Each country is at different stages of addressing the issues around drafting the legislation based on the model laws in a way that suits their needs.

IV MELANESIAN SPEARHEAD GROUP FRAMEWORK TREATY ON THE PROTECTION OF TRADITIONAL KNOWLEDGE AND EXPRESSIONS OF CULTURE

There are various similarities between the MSG Treaty and the Model Law. The MSG Treaty encompasses access and benefit-sharing provisions from the CBD and elements from the Model Law. While the MSG Treaty was developed for MSG members, it can be extended to other states. The language of the MSG Treaty takes account of the many national approaches to the protection of traditional knowledge and expressions of culture adopted by MSG members, as well as certain documents prepared for the 17th session of the WIPO-IGC. The language of the Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore is also taken into account.¹⁴² Like the Model Law, there was a lack of community engagement during the development of the MSG Treaty. This is evident in the fact that the majority of the Treaty is a "copy and paste" from the African Regional Intellectual Property Organization's Swakopmund Protocol and 20 per cent from the Model Law.¹⁴³ The MSG Treaty was signed in 2011, but as of October 2019, no country has ratified it.¹⁴⁴ This section will provide a brief overview of the Treaty rather than an in depth analysis.

140 Samoa Law Reform Commission, above n 3, at 5–12.

141 IGC, above n 12.

142 Michael Blakeney "Protecting traditional knowledge and expressions of culture in the Pacific" (2011) 1 QMJIP 80 at 82.

143 At 82.

144 Melanesian Spearhead Group Secretariat "Treaties" <www.msgsec.info/treaties>.

A Defining Traditional Knowledge

The MSG Treaty defines traditional knowledge as requiring it to have been transmitted in an intergenerational context and to be "distinctively associated with" a particular traditional, indigenous or local community. Protection under the MSG Treaty is narrowed by limiting traditional knowledge and expression of culture that is:¹⁴⁵

... integral to the cultural identity of a traditional, indigenous or local community that is recognized as holding the knowledge through a form of collective and cultural ownership or responsibility.

This potentially limits the scope of the protection to knowledge that is held and shared by a group or local community. This may exclude knowledge held by a clan, or a group that is a sub-section of a community, which is common in Melanesia.¹⁴⁶ In comparison to the Model Law, it protects knowledge "pertaining to a particular traditional group, clan or community of people".¹⁴⁷

B Traditional Owner Rights

The MSG Treaty does not empower traditional owners the right to exploit their own traditional knowledge. Rather, it provides that the protection will not be prejudicial "to the continued availability of traditional knowledge and expressions of culture for the practice, exchange, use and transmission of the knowledge and expressions of culture by its owners and holders".¹⁴⁸ Owners of traditional knowledge can initiate proceedings where their traditional knowledge has been exploited without their prior and informed consent.¹⁴⁹ Traditional knowledge owners and holders also hold the right to enter into benefit-sharing agreements and the right to share benefits.¹⁵⁰

The MSG Treaty grants right-holders and right-owners the exclusive right to permit the exploitation of their traditional knowledge and expressions of culture and the right to exclude any person or group from exploiting them without their prior informed consent.¹⁵¹ This incorporates the access principle from the CBD. "Exploitation", in regard to traditional knowledge, is used to envisage its embodiment in a product of making use of it is a process.¹⁵² This highlights the approach taken in the Swakopmund Protocol, which defines "exploitation" to include the acts of (i) exporting, importing,

145 MSG Treaty, above n 4, art 5.

146 Forsyth, above n 7.

147 Model Law, cl 4.

148 MSG Treaty, above n 4, art 12.

149 Article 8.6

150 Articles 9–10.

151 Article 8.

152 Blakeney, above n 142, at 85.

manufacturing, offering for sale, resale, selling or using the product; (ii) possessing a product for the purposes of offering it for sale, resale, using it or selling it; and (iii) using the process beyond the traditional context.¹⁵³

The term "exploitation" in regard to expression of culture is defined along the lines of the Model Law in a copyright sense to include:

- (i) publication;
- (ii) broadcasting to the public by satellite, television, radio, cable or any other methods of communication;
- (iii) display or performance in public;
- (iv) reproduction;
- (v) creation of derivative works;
- (vi) translation, adaptation, arrangement, transformation or modification;
- (vii) making available online or electronically transmitting to the public (whether over a path or a combination of paths, or both);
- (viii) making, using offering for sale or resale, selling, importing or exporting expressions of culture or products derived therefrom;
- (ix) using in any other material form, if such use is a non-customary use (whether or not of a commercial nature); and
- (x) fixation through any process such as taking a photograph, film or sound recording.

Mirroring the approach taken by the Model Law, the MSG Treaty proposes exceptions to use traditional knowledge and expression of culture without the prior informed consent of traditional owners in certain situations, including:

- (i) criticism or review;
- (ii) face to face teaching;
- (iii) judicial proceedings;
- (iv) reporting news or current events; and
- (v) incident use.

In addition to the rights, remedies and action available under the MSG Treaty, traditional knowledge owners are also granted the moral right of paternity under art 11. It requires any person using an expression of culture or traditional knowledge to acknowledge the owners and holders, identify the source and origin and use the traditional knowledge or expression of culture in a respectful manner towards the cultural values of the traditional owners.¹⁵⁴

153 Section 7.3.

154 MSG Treaty, above n 4, art 11.

C National Competent Authority

Signatories are encouraged to use the Action Plan to assist them in establishing or designating a national authority with responsibility for traditional knowledge and expressions of culture.¹⁵⁵ Similar to the Cultural Authority referred to in the Model Law, the national competent authorities maintain registers or other records of traditional knowledge and expressions of culture.¹⁵⁶ Where two or more communities in the same or different countries share the same traditional knowledge or expression of culture, the relevant National Competent Authority of the signatory and the MSG Secretariat are required to register the holders and owners of the traditional knowledge and expressions of culture and maintain relevant records.¹⁵⁷ This is another example of how the Model Law could address the Sali and Filipino issue discussed earlier.

D Benefit-sharing

The MSG Treaty is unclear about what control traditional communities retain to ensure equitable and fair benefit-sharing where their traditional knowledge is used for commercial purposes. The MSG Treaty provides for the protection of traditional knowledge to include equitable and fair benefit-sharing for the owners of traditional knowledge¹⁵⁸ and it suggests that the benefits shared (including both monetary and non-monetary benefits) reflect the preferences and needs of the communities concerned.¹⁵⁹ The MSG Treaty also requires fair and equitable benefit-sharing "to be determined by mutual understanding between the signatories".¹⁶⁰ Furthermore, the National Competent Authority is required to assist the owners of the traditional knowledge or expression of culture and prospective users to ensure equitable and fair benefit-sharing where mutual understanding does not exist.¹⁶¹ It also seems that state intervention is only appropriate if sought by the traditional community, however the MSG Treaty can be interpreted as allowing signatories to develop a mutual understanding for fair and equitable benefit-sharing despite being bound to satisfy the preferences and needs of the owners of traditional knowledge.¹⁶²

155 Article 4.

156 Article 6.

157 Article 6.4.

158 Article 10.1.

159 Article 10.3.

160 Article 10.1.

161 Article 10.2.

162 Yuri Suzuki "Melanesian Spearhead Group Framework Treaty on the Protection of Traditional Knowledge, Traditional Cultural Expressions: Emerging Challenges for Pacific Island Countries" (2013) 15 APJEL 177 at 186.

E Compliance

Article 15 imposes a duty of collaboration and cooperation among the signatories to address protection, enforcement and management of the rights of owners of traditional knowledge. The extent of cooperation and collaboration encompasses cross-border measures and the networking of judicial authorities and enforcement agencies to protect and enforce rights related to traditional knowledge.¹⁶³ While this would certainly help the region, where the MSG Treaty falls short is where someone beyond the jurisdiction of the enacting country commits an offence by using traditional knowledge without the consent of the traditional owners. Article 18.2 of the MSG Treaty provides for the extension of reciprocal protection beyond the MSG. Here, measures should be put in place by the MSG Secretariat and by the National Competent Authority to facilitate and enable protection for the benefit of the traditional knowledge and expression of culture holders from non-MSG members.¹⁶⁴

Article 17 of the MSG Treaty addresses compliance in jurisdictions where traditional knowledge and owners of that knowledge are located. It imposes a duty on signatories to make available appropriate and accessible mechanisms for dispute resolution and enforcement, remedies, as well as sanctions when addressing exploitation and non-compliance with the provisions. The National Competent Authority also has a duty to assist and advise indigenous and local communities to enforce and protect their rights and to institute criminal and civil proceedings when necessary.¹⁶⁵ The Treaty is sympathetic to an approach based on community rights, since it uses "appropriate" and "when requested" by the owners of traditional knowledge, and it can be viewed that the communities concerned have the discretion to decide if they want to seek remedies through the state-based mechanism.¹⁶⁶

V RECOMMENDATIONS

Traditional knowledge is knowledge that is collectively held. This article agrees with Miranda Forsyth's proposition that a pluralist approach to protecting traditional knowledge is essential. A pluralist approach would require a bottom-up process. Widespread consultations with customary leaders and the community should be the first step; it should not be considered later in the implementation process, nor should it be seen as an opportunity to inform communities of the implications of the new legal framework. This section will discuss a few recommendations, in addition to those that have mentioned earlier in the article, which enacting states should consider prior to developing and implementing the Model Law or any other legal framework that aims to protect traditional knowledge and expressions of culture.

163 MSG Treaty, above n 4, art 15.2.

164 Blakeney, above n 142, at 88.

165 MSG Treaty, above n 4, art 17.2.

166 Suzuki, above n 162, at 186.

A Supporting Customary Institutions

Empowering customary leaders and institutions to develop norms and processes for regulating the use of traditional knowledge and expressions of culture should be the core of any new protection system. The first priority must be given to protecting and solidifying customary law systems because the values embedded in those systems are essential for the maintenance of the cultures concerned.¹⁶⁷ The most effective way for communities to protect their resources and knowledge is at local level. Secure land tenure, coupled with community-based natural resource management, can solidify community control of natural resources and traditional knowledge, conserve biodiversity, maintain traditional knowledge and improve livelihoods.¹⁶⁸ Furthermore, customs that develop customary law systems are crucial to achieving viable social systems.¹⁶⁹ It is essential to provide a platform for discussions with customary leaders from each community to discuss competing aims of commercialisation and conservation, and developing procedures that allow the mediation between different demands while at the same time, maintaining key cultural principles. This can be achieved by forming a dialogue that aims to facilitate an enforcement engagement with issues that avoids the use of the words "ownership" and "theft".¹⁷⁰ While Pacific Islanders are innovative, many of their customary leaders are wise and informed by deep understandings of their people and the forces at play within them. Therefore, there is every chance that, with the opportunity of a bottom up approach, they will come up with resolutions that will work for their people but might also be unanticipated to foreigners.¹⁷¹

B State Intervention: Facilitator Rather Than a Regulator

Enacting countries have a vital role in acting as a facilitator and adviser, rather than as a primary regulator if a pluralistic protection approach is adopted. Enacting countries may assist in various ways, including the mediation between traditional owners and prospective users both inside and outside of the enacting country. They may also work on initiatives, for example, developing systems of certification marks for different communities.¹⁷² Furthermore, processes may also need to be developed by enacting countries to assist customary institutions in enforcing decisions made regarding traditional knowledge or expressions of culture. Enacting states should ensure that importation rules prohibit the import of items that exemplify the traditional knowledge of the country, therefore guaranteeing that only the traditional owners from that country can obtain monetary and non-monetary

167 Forsyth, above n 18, at 211.

168 At 212.

169 At 212.

170 At 212.

171 At 212.

172 At 212.

benefits from making such objects. Finally, enacting countries should also act as the gatekeeper, especially for small island states, to ensure that research and other activities of developers and researchers are monitored and opportunities for exploitation are diminished. This could be in the form of granting research permits, as countries like Fiji and Vanuatu have adopted.¹⁷³

C Increasing Awareness and Promotion of the Use of Traditional Knowledge by Local Communities

The purpose of adopting a pluralistic protection approach is to enable access by local communities to their own traditional knowledge, and to the traditional knowledge of their neighbouring communities, in accordance with reciprocal customary obligations.¹⁷⁴ Therefore, any bureaucratic or expensive process that may hinder this should be minimised or avoided altogether. Traditional knowledge should be used to improve and enhance the lives of traditional knowledge holders by contributing to ecologically sound agricultural practices, rich cultural life and primary health care.¹⁷⁵

In 2015, WIPO collaborated with the Samoan Government, the SPC and the PIFS in hosting a practical workshop on IP, traditional knowledge, traditional cultural expressions and genetic resources.¹⁷⁶ The purpose of the workshop was to bring together indigenous peoples, local communities and government representatives from 14 Pacific Island countries. The workshop imparted basic concepts of IP, fostered cooperation, identified needs and facilitated discussion. The workshop aimed to increase awareness on how IP systems and principles can assist with protecting and sustainably use traditional knowledge, expressions of culture and genetic resources.¹⁷⁷

All groups who attended the workshop considered that lack of awareness was a key challenge to protecting and promoting traditional knowledge, expressions of culture and genetic resources. Many people, including producers and artists in communities, were not aware of the economic value of traditional knowledge, their IP rights with respect to the traditional knowledge and expressions of culture, nor how to protect them. Other groups expressed how they were not entirely aware of the national policy and legal frameworks put in place for genetic resources, traditional knowledge and expressions of culture, nor were they aware of the relevant government agencies responsible for administering these frameworks in their countries.¹⁷⁸

173 At 212.

174 At 212.

175 At 213.

176 IGC, above n 12.

177 At 3.

178 At 10.

Groups also noted difficulties in communication between and within communities and governments, which may contribute towards the lack of awareness.¹⁷⁹ Communication is also challenging where the costs of translation, transportation and other logistics are high, and where communities are spread across a vast area. Therefore, the groups who attended the workshop felt marginalised if they resided outside urban centres, despite the fact that artists of expressions of culture and holders of traditional knowledge are predominately found in these communities.¹⁸⁰ Many people in the region regarded IP as a foreign concept that would likely lead to conflict between communal and individual interests.¹⁸¹

It is essential for enacting countries (whether the Model Law or the MSG Treaty) to fully inform the local community of what legal protections are provided or better still involve those communities in the law's development. Education workshops and campaigns on the importance of IP protection for traditional knowledge and expressions of culture should be provided, targeting communities, children and government agencies. This could be done through the collaboration of government agencies, WIPO, the SPC and the PIFS. Increasing awareness involves disseminating policies and laws, using social media to inform and educate the community and establishing a regional IP and traditional knowledge, expressions of culture and genetic resources network of government officials, practitioners and other stakeholders.

VI FINAL COMMENTS

One of the great questions of our time is how to preserve local biological and cultural diversity, while simultaneously promoting economic development. The creation of the traditional knowledge protection system and work done in the Pacific is a good example of an attempt to protect traditional knowledge. The Model Law is a starting point, and this article recommends that enacting countries should take caution during the policy development and implementation stage, to ensure that the new law not only protects, but also preserves traditional knowledge and expression of culture. With any law aimed to protect traditional knowledge and expressions of culture, a pluralist approach is essential. Traditional knowledge has been protected by customary institutions through customary law. Therefore, countries adopting the Model Law or creating any legal framework must take caution not to undermine or conflict with customary institutions. Doing so will cause a range of issues and can result in the sense of mistrust and conflict between indigenous communities and the state.

Pacific countries should take steps to preserve (in addition to protect) traditional knowledge, expression of culture and genetic resources before they are commercially used so that they become available to future generations. This would involve passing down traditional knowledge and

179 At 10.

180 At 10.

181 At 10.

expressions of culture to new generations in communities and families, documenting traditional knowledge and expression of culture (where appropriate) and protecting writers, producers, artists and orators and consulting with them in relation to new policies and laws.

The MSG Treaty addresses some of the omissions found in the Model Law, such as the requirement of countries to not only protect but also preserve traditional knowledge and expressions of culture. However, MSG countries are working slowly towards ratifying the Treaty.¹⁸² A treaty protecting traditional knowledge and expression of culture should be negotiated between all Pacific countries, similar to the MSG as it would provide stronger protection. Cross-border measures and networking of judicial and enforcement agencies will strengthen the protection of traditional knowledge and expression of culture. Protection of traditional knowledge at the international level will depend on the efforts of each country, community and indigenous group to find its own way to protect traditional knowledge and expressions of culture.

¹⁸² Melanesian Spearhead Group Secretariat, above n 144. Vanuatu currently has the Protection of Traditional Knowledge and Expressions of Culture Bill 2018. When two MSG members pass legislation aimed at protecting traditional knowledge and expressions of culture and have deposited their instruments of ratification with the MSG Secretariat, the MSG Treaty will come into force three months later.

