

**Guidelines for developing national legislation for the protection
of traditional knowledge and expressions of culture based on the
Pacific Model Law 2002**

SECRETARIAT OF THE PACIFIC COMMUNITY

NOUMEA, NEW CALEDONIA

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Original text : English

Secretariat of the Pacific Community Cataloguing-in-publication data

Guidelines for developing national legislation for the protection of traditional knowledge and expressions of culture based on the Pacific Model Law 2002 / Secretariat of the Pacific Community

1. Cultural property – Protection – Law and legislation – Oceania
2. Intellectual property – Oceania
3. Copyright – Oceania

I. Title II. Secretariat of the Pacific Community

344.909
ISBN 978-982-00-0177-0

AACR2

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Published with financial assistance from the Government of France

Prepared for publication and printed at
Secretariat of the Pacific Community headquarters
Noumea, New Caledonia, 2006

FOREWORD

In September 2002, I was fortunate to attend the first Pacific Island Regional Meeting of Ministers of Culture, held in Noumea, New Caledonia. A key item on the agenda was the presentation and subsequent endorsement of a Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture (also known as the Pacific Model Law), which had been developed under the leadership of the Secretariat of the Pacific Community (SPC). As the New Zealand Government gives further consideration to traditional knowledge issues, I continue to be inspired by the enthusiasm of our discussions and the progress that is being made in terms of cultural heritage preservation and promotion in the Pacific Islands.

I am delighted that New Zealand has been given this opportunity to work with SPC on developing a set of guidelines designed to assist policy-makers in Pacific communities in the development of national legislation for the protection of traditional knowledge and expressions of culture. Based on the Pacific Model Law, the guidelines move Pacific communities one step closer towards the implementation of a regional framework for protecting traditional knowledge and expressions of culture. It is a resource that will help traditional knowledge holders identify potentially applicable protection mechanisms in the current intellectual property rights regime.

Internationally, issues relating to traditional knowledge have received increasing attention due to concerns such as the rapid loss of traditional knowledge and cultural diversity, illicit uses and misappropriation of traditional knowledge with little or no sharing of benefits with traditional communities, and interest in harnessing the potential of traditional knowledge for sustainable development.

Many countries and communities are considering how to best address these issues and concerns. The Pacific Model Law recognises that a 'one-size-fits-all' or 'universal' template to protect expressions of culture is not likely to be workable in terms of accommodating national priorities, the legal and cultural environment and the needs of traditional communities. Instead, a broad and holistic approach to issues relating to traditional knowledge is taken in order to find the best way to enable policy solutions to fit seamlessly together and work in a complementary manner.

The preservation, protection and promotion of traditional knowledge are of crucial importance for Pacific communities. Traditional knowledge forms an integral part of the lives of Pacific peoples and plays a critical role in their health, culture, identity, education, food security and natural resources management. It is therefore vital to the future well-being and sustainable development of Pacific communities.

Hon. Judith Tizard
Associate Minister for Arts, Culture and Heritage
Associate Minister of Commerce
Government of New Zealand

ACKNOWLEDGEMENTS

SPC would like to gratefully acknowledge the New Zealand Government for its ongoing support of the SPC Cultural Affairs Programme. We are particularly appreciative of the generous package of support from NZAID to assist the implementation of the Pacific Model Law in the Pacific region, including the development of the Guidelines.

We acknowledge the author of the Guidelines, Anne Haira, for her commitment to this project and traditional knowledge issues generally, particularly within the Pacific region.

Lastly, SPC would like to acknowledge the work of the World Intellectual Property Organization (WIPO), and in particular Wend Wendland for his continual support of this project. The Guidelines draw from documents, publications and other materials prepared for the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC), particularly WIPO documents WIPO/GRTKF/IC/7/3, WIPO/GRTKF/IC/7/4, WIPO/GRTKF/IC/8/4 and WIPO/GRTKF/IC/9/4. These documents, which summarise the key legal and policy issues and suggest draft objectives, guiding principles and substantive provisions for the protection of traditional cultural expressions and traditional knowledge, draw from national and regional experiences and are based directly on extensive deliberations within the WIPO Committee among the diverse range of stakeholders who participate in sessions of the Committee, as well as on comments submitted by them through open commenting processes. At the same time, these materials are informing national and regional developments in many parts of the world and are a useful resource for policy-makers, legislators, communities and others. For further information, see <http://www.wipo.int/tk/en/index.html>.

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ACRONYMS AND ABBREVIATIONS

ADR	alternative/appropriate dispute resolution
IP	intellectual property
IPRs	intellectual property rights
NZAID	New Zealand International Aid & Development Agency
PIC	prior and informed consent
PICTs	Pacific Island countries and territories
SPC	Secretariat of the Pacific Community
SPREP	Pacific Regional Environment Programme
TKECs	traditional knowledge and expressions of culture
TRIPS	Trade-Related Aspects of Intellectual Property Rights
UNCTAD	United Nations Conference on Trade and Development
UNESCO	United Nations Educational, Cultural and Scientific Organization
WIPO	World Intellectual Property Organization
WIPO IGC	WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore
WPPT	WIPO Performances and Phonograms Treaty
WTO	World Trade Organization

PREFACE

Traditional knowledge and expressions of culture are the foundation of Pacific Island societies. Values and practices strengthen identities and build cohesion among communities, as well as being a rich, diverse source of creativity and innovation. Strong identities, social cohesion and the opportunity to be innovative and creative are essential in the face of rapid changes taking place in the Pacific Community, including increasing migration and urbanisation, commercial and media exploitation, and growing material aspirations. Culture is the key to a successful future for Pacific Islanders.

The heightened global competition for new products, processes and services brought about by the globalisation of trade and advances in information technology has unfortunately triggered widespread appropriation of the cultural and social identity of Pacific Island peoples. In many Pacific Island countries and territories, handicrafts and souvenirs have been replicated and imported for sale to an unknowing tourism industry. Music and images are recorded for publication without the permission of traditional owners. Medicines and plants have been patented with few benefits being returned to communities.

As manifestations of intellectual creativity, traditional knowledge and expressions of culture deserve to be accorded the same legal protection that is provided to other forms of intellectual property. Robust measures need to be taken to guarantee the status of and economic support for the clans, groups or communities that are the creators, repository, custodians and trustees of traditional knowledge and expressions of culture, which have collective ownership, are held in perpetuity from generation to generation, are incremental and informal, and change over time.

The Secretariat of the Pacific Community, in partnership with the Pacific Islands Forum Secretariat and UNESCO and through extensive consultations with stakeholders, has been working to establish the legal protection of traditional knowledge and expressions of culture through the Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture (the Pacific Model Law). Designed to ensure that legitimate forms of commercialisation take place, where Pacific Island peoples consent to and profit from any commercialisation of their traditional knowledge and expressions of culture, the Model Law was endorsed at the first Pacific Island Regional Meeting of Ministers of Culture.

SPC is the lead regional agency in efforts to develop a legal protection regime for Pacific Island traditional knowledge and expressions of culture. It works with and values the contributions of its stakeholders and partners in achieving its goal. Working together is essential to success of our vision for the region: a secure and prosperous Pacific Community, whose people are healthy and manage their resources in an economically, environmentally and socially sustainable way.

Dr Jimmie Rodgers
Director-General
Secretariat of the Pacific Community

ABOUT THE GUIDELINES

Objective

The Guidelines are intended to provide technical assistance to policy-makers in Pacific Island countries and territories (PICTs) in the development of national legislation for the protection of traditional knowledge and expressions of culture (TKECs) based on the Model Law for the Protection of Traditional Knowledge and Expressions of Culture (the 'Pacific Model Law').

The Guidelines have been designed to align with the areas in which PICTs have indicated they require assistance:

- guidance on an effective policy process that could be followed when using the Pacific Model Law as the basis for developing national legislation;
- guidance on the policy questions that need to be considered when developing the legal elements of protection in the legislation; and
- guidance on implementation options when using the Pacific Model Law as the basis for developing national legislation.

Scope

The Guidelines cover only the policy development portion of developing legislation for the protection of TKECs. The Guidelines do not extend to the parliamentary process, as this will differ between countries and has not been a matter on which PICTs have indicated that they require technical assistance.

Additionally, as is the case with the Pacific Model Law, the Guidelines cover only the legal protection of TKECs. 'Protection' in these Guidelines refers to protection of the creativity, innovation and distinctiveness embodied in TKECs against their unauthorised, unfair and derogatory use – in short, their misappropriation and misuse. This is distinct from, but complementary to, 'preservation', 'conservation' and 'safeguarding' of TKECs (see next paragraph). Comprehensive protection is likely to require going beyond legislation to a range of proprietary and non-proprietary tools such as customary and Indigenous laws and protocols, trade practices and marketing laws, contracts and licences, and cultural heritage registers and databases. These measures are not mutually exclusive options, and each may have a role to play in a comprehensive approach to protection. A *sui generis* system should not replace the need for such measures and programmes.

The Guidelines also do not cover the important and closely related themes of safeguarding and preservation of cultural heritage and expressions. These would need to be addressed through complementary policy measures, such as cultural heritage preservation laws and programmes and handicrafts promotion and development programmes.

Structure

The Guidelines are structured according to the broad stages of policy development when developing legislation of this nature. In respect of the legal elements of protection, the Guidelines group this process into thematic areas rather than follow the structure of the Pacific Model Law itself.

Approach

The Guidelines:

- are voluntary and should not be interpreted as affecting the sovereign rights of countries;
- do not seek to promote any particular outcome nor to express any preference, but simply aim to catalogue and describe the available options to address issues;
- acknowledge that the forms of traditional expression and customary means of regulating their use, transmission, protection and preservation are diverse;
- reflect the understanding that different countries have varied interests and concerns in respect of TKECs and also that countries' positions may be based on different assumptions and ideological standpoints;
- recognise that a 'one size fits all' or universal template to protect TKECs is not likely to be workable in terms of accommodating national priorities, the legal and cultural environment and the needs of traditional communities;
- acknowledge that complementary measures, such as intellectual property (IP) laws, contracts and customary laws, will also be needed to provide comprehensive legal protection; and
- are intended to be reviewed and accordingly revised and improved as experience is gained in the legal protection of TKECs.

Use of terms

For the purposes of the Guidelines, the use of the following terms should be interpreted as follows:

- the legislation: refers to legislation that is being developed by policy-makers in PICTs for the protection of TKECs based on the Pacific Model Law with reference to the Guidelines;
- protection: means that protection typically provided by IP laws to provide legal means to restrain third parties from undertaking certain unauthorised acts that involve the use of protected material. Protection refers to all matters affecting the availability, acquisition, scope, management and enforcement of rights and interests relating to TKECs, and is distinguished from the concepts of 'conservation' and 'preservation' but should not be construed as suggesting these are less important;
- traditional communities: encompasses both Indigenous and local communities and cultural communities;
- traditional knowledge holders: encompasses those who hold traditional knowledge from traditional communities in accordance with traditional or customary law and practices. The term 'holders' is intended to convey the relationship between a community and its traditional knowledge, often seen as custodianship or responsibility, and is considered more appropriate than the term 'owners';
- traditional knowledge and expressions of culture: means expressions of culture of traditional communities and the traditional knowledge underpinning those expressions.

Presumptions

The focus of the Guidelines on the development of national legislation based on the Pacific Model Law presupposes the following:

- i. PICTs have reached a stage in the policy development process where the lack of legal protection for TKECs has been identified as a problem;
- ii. *sui generis* approaches have been identified as necessary, as existing mechanisms (legal and non-legal) are not sufficient to meet the objectives of protection; and
- iii. of the possible *sui generis* approaches, new *sui generis* legislation has been identified as necessary (most likely as one of many tools needed) to achieve some or all of the identified objectives of protection for TKECs.

It is beyond the scope of the Guidelines to provide a comprehensive discussion of the work that would precede this point. However, the Traditional Knowledge Toolkit being compiled by SPC includes a 'Policy Map' that has been prepared as a complementary measure to the Guidelines. It is designed to assist policy-makers in PICTs to progress through the process of developing a broad legal and policy framework for the preservation, protection and promotion of traditional knowledge, of which legislation would form part.

THE POLICY DEVELOPMENT PROCESS

Some PICTs have expressed process-related difficulties with using the Pacific Model Law as the basis for developing national legislation. For the most part, this can be attributed to the Pacific Model Law being a type of 'end product'. As it is a high-level framework to guide the development of national legislation, countries will need to progress through the standard policy development process to 'flesh out' matters of detail and determine which aspects of the Pacific Model Law are appropriate to their circumstances. This can be challenging, however, as it involves policy-makers proceeding backwards through the policy development cycle.

With this in mind, this section outlines a possible process for developing the policy component of legislation for the protection of TKECs. It is recognised that countries may redefine these steps in order to meet their own needs and requirements. In addition, process principles to guide the policy development process are discussed.

Organisation of work

The following suggested policy process would ideally form part of a broader process of developing a legal and policy framework for traditional knowledge generally. This could include workstreams such as preservation initiatives and the development of core IP legislation, as appropriate.

A possible policy development process

- Part I: Review the approach of the Pacific Model Law and determine whether or not it is an appropriate means to address some or all of the problems identified and/or the objectives of protection. Seek appropriate ministerial approval for this approach to form the basis of the new legislation.
- Part II: Develop the overarching policy framework of the legislation, that is, the policy objectives and guiding principles. Determining objectives is a key early step. Seek appropriate ministerial approval.
- Part III: Determine the content or scope of the legal elements of protection and seek appropriate ministerial approval.
- What is the subject matter of protection?
 - What are the criteria for protection?
 - Who are the beneficiaries of protection?
 - What is the scope of protection?
 - What are the exceptions and limitations regarding rights?
 - How will rights be managed?
 - What is the term of protection?
 - What are the formalities for protection?
 - What are the legal proceedings for taking action (including remedies and penalties)?
 - How will rights be enforced?
 - What processes can be used for dispute resolution?
 - What is the relationship with IP protection?
 - How will international and regional protection be addressed?
- Part IV: Translate the legal elements of protection into legislative language.
- Part V: Develop additional legislative features such as transitional measures and regulatory making powers.
- Part VI: Develop secondary legislation (regulations).

Process principles

Prior to commencing policy development, policy-makers may wish to consider whether it would be useful to develop process principles to guide the process. These are sometimes referred to as 'behavioural principles' and can be a useful means of ensuring that policy-makers exhibit a specified level of behaviour. They can also serve as a benchmark for all decisions taken by policy-makers, where appropriate, during the policy development process.

It is important to note that in the context of developing legislation for the protection of TKECs, the relationship between policy-makers and traditional communities is critical. It is, therefore, essential that policy-makers operate to a high standard in their engagement with traditional communities.

If countries wish to establish behavioural principles, policy-makers may wish to draw on the following points that are commonly emphasised.

- Recognise that the broad and active participation of traditional communities throughout the process is critical in order to ensure that their rights as traditional knowledge holders are fully and effectively protected.
- Acknowledge that policy development should be guided by aspirations and expectations expressed directly by traditional communities as well as by the nature, specific characteristics and forms of traditional cultures, expression and creativity.
- Respect the rights of traditional communities, including Indigenous peoples, under national and international law.

PART 1. ASSESSING THE PACIFIC MODEL LAW APPROACH

The Pacific Model Law is a tool for PICTs that have determined that new, *sui generis* legislation is necessary and that require assistance with developing such legislation. From the outset, it should be noted that the Pacific Model Law is only one approach that can be used. There are, of course, others.

It is not the intention of the Guidelines to advocate that the Pacific Model Law will meet some or all of a country's objectives of protection. Countries will need to individually assess the approach of the Pacific Model Law as to whether it is a suitable means for doing so. To assist countries in this regard, this section explains the various dimensions of the Pacific Model Law approach. These dimensions can be broadly characterised by nature, subject matter, and legal form of protection. An additional dimension is the application of the *sui generis* system: countries can elect to develop a national system shaped according to their particular circumstances or opt to implement a regional approach (such as the Pacific Model Law) or an international approach.

If a country is to use the Pacific Model Law as the basis for national legislation, it will need to firstly adopt the approach of the Pacific Model Law as this sets the framework for the legal elements of protection (discussed in Part 3). It is fully recognised that a country may elect to take a different approach from that of the Pacific Model Law. If so, the Guidelines may be of limited assistance, although policy-makers may obtain useful guidance on generic matters.

1.1 Nature of the *sui generis* system

Existing *sui generis* systems for the protection of TKECs against misappropriation and misuse can be loosely grouped by nature into two areas. They both provide protection of an IP nature (the focus of these Guidelines).

- i. *Sui generis* systems with an explicit IP focus that contain new IP, or IP-like, rights – often referred to as *sui generis* IP protection. The WIPO–UNESCO Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions 1982 (the 'Model Provisions 1982') provide *sui generis* IP protection for expressions of folklore/traditional cultural expressions. Other examples are the Tunis Model Law on Copyright for Developing Countries 1976 (the 'Tunis Model Law 1976') and the Special Intellectual Property Regime Governing the Collective Rights of Indigenous Peoples for the Protection and Defence of Their Cultural Identity and Their Traditional Knowledge of Panama 2000 and the related Executive Decree of 2001 (the 'Panama Law 2000'). Further examples are found in several national copyright laws that contain *sui generis* provisions for the protection of traditional cultural expressions (sometimes referred to in such laws as 'expressions of folklore'). These laws very often follow the Model Provisions 1982 and/or the Tunis Model Law 1976 referred to above.
- ii. *Sui generis* systems that have been developed within a different policy area or context but nonetheless provide IP-like protection. This can often refer to systems of protection based on the customary laws/traditional protocols of traditional knowledge holders and bearers of cultural traditions. Examples also include cultural heritage preservation and marketing and consumer protection laws that sometimes have provisions aimed at the protection of TKECs against misappropriation and misuse.

The Pacific Model Law is an IP-based *sui generis* system (so it falls into the first category described above). It creates new IP, or IP-like, rights. Wide experience has shown that the IP protection of traditional cultural expressions involves legal doctrines closest to those underpinning the copyright and related rights systems. Accordingly, the Pacific Model Law addresses the protection of TKECs against the illicit uses and misappropriations that IP protection (primarily copyright) usually addresses, while taking into account the particular nature and characteristics of traditional creativity and cultural

expressions, including their communal nature. Customary laws and traditional protocols have also been incorporated into the Pacific Model Law, but within an IP framework.

As noted previously, the Pacific Model Law addresses only the protection of TKECs at the IP interface; other aspects of protection would need to be addressed with other policy measures.

1.2 Subject matter of the *sui generis* system

Existing national *sui generis* systems of protection have taken different approaches to what subject matter will be covered. While traditional knowledge holders have frequently stressed that they view traditional knowledge holistically, many countries have opted not to incorporate all traditional knowledge into a single system. Possible reasons for this include the subject matter being too diverse, which raises practicality questions. In addition, the design of regimes with a broad scope or that are applicable to a wide range of beneficiary communities requires the drafting of rules that, due to their generality, may not be adequate when applied to specific types of subject matter or particular types of communities (Correa 2003: 34–36). Cultural expressions, medicinal methods, etc. may require different legal treatments in view of their different nature, as is the case under IP law (Correa 2003: 34–36).

The subject matter of *sui generis* systems can be grouped into three areas:

- i. traditional cultural expressions or expressions of culture – examples include the Tunis Model Law 1976 and Panama Law 2000;
- ii. biodiversity-related traditional knowledge – examples include the Peru Law of 2002 Introducing a Protection Regime for the Collective Knowledge of Indigenous Peoples Derived from Biological Resources (the ‘Peru Law 2002’) and Brazil’s Provisional Measure No. 2186-16 of 2001 Regulating Access to the Genetic Heritage, Protection of and Access to Associated Traditional Knowledge; and
- iii. all traditional knowledge – an example is the Philippines’ Indigenous Peoples Rights Act 1997 (the ‘Philippines Law 1997’).

The Pacific Model Law covers TKECs. This is because Indigenous and traditional communities generally regard expressions of their traditional cultures as inseparable from the systems of traditional knowledge underpinning those expressions. The Pacific Model Law does not, however, extend to other dimensions of traditional knowledge, such as knowledge related to biological resources. The nature and scope of protection it offers, including the exceptions, build most directly upon copyright principles and are therefore most directly applicable to literary, musical and artistic expressions of cultural heritage. It is worthwhile noting that a model law is also being developed under the auspices of the Pacific Regional Environment Programme (SPREP) for the protection of traditional ecological knowledge.

1.3 Legal form of protection

Existing laws for the protection of traditional cultural expressions utilise a wide range of legal doctrines and mechanisms. Some extend a true exclusive right while others do not, focusing rather on regulating use of the protected traditional cultural expressions.

The range of existing approaches to the legal form of protection includes:

- i. exclusive property rights: giving the right to authorise or prevent others from undertaking certain acts in relation to TKECs. An exclusive rights approach would be one way of giving effect to the principle of prior and informed consent (PIC). Exclusive rights are provided for in the Tunis Model Law 1976, Model Provisions 1982, Panama Law 2000, Pacific Model Law 2002 and Philippines Law 1997;

- ii. entitlements under a scheme for equitable remuneration: providing for some form of equitable return to rights holders for use of their TKECs, without creating an exclusive right in the TKECs. This approach has been used in some systems for protection of TKECs, often through a *domaine public payant* system;
- iii. a moral rights approach: normally providing the rights of attribution of ownership; not to have ownership falsely attributed; not to have the protected materials subjected to derogatory treatment; and, at least in some jurisdictions, the right to publish or disclose (the right to decide if, when and how the protected materials ought to be made accessible to the public) (Lucas-Schloetter 2004: 298). The integrity right that protects the reputation of creators may address anxiety over inappropriate use of expressions of culture by preventing distortion, alteration or misrepresentation of creators' works. This may provide redress against culturally inappropriate treatment of expressions of culture. The publication right is the creator's right to decide when, where and in what form a work will be published. It may be effective in providing communities with a degree of control over the publication or disclosure of sacred works and thus reduce the possibility of inappropriate use. Furthermore, it could potentially be coupled with a breach-of-confidence action if the sacred information was communicated in confidence (Palethorpe & Verhulst 2000: 31). A number of *sui generis* systems for the protection of expressions of culture provide for moral rights, including the Model Provisions 1982, Pacific Model Law 2002 and Copyright Act of Nigeria 1992;
- iv. an unfair competition approach: providing a right to prevent various acts that constitute 'unfair competition' broadly speaking, such as misleading and deceptive trade practices, unjust enrichment, passing off and taking of undue commercial advantage. This approach underlies the US Indian Arts and Crafts Act 1990, which prevents the marketing of products as 'Indian made' when the products are not made by Indians as they are defined by that legislation; and
- v. a penal sanctions approach: where certain acts and omissions are treated as criminal offences. The Model Provisions 1982 and Pacific Model Law 2002 provide for criminal offences.

These options are not necessarily mutually exclusive, and can be combined. One option may, for example, be more relevant or suited to a particular form of cultural expression than another. Most *sui generis* systems include at least one of these options.

Exclusive property rights in TKECs and IP-type mechanisms in general should complement and be carefully balanced and coordinated with other non-IP measures, to reflect the characteristics of traditional forms and processes of creativity, the stakeholder interests involved, customary uses and practices associated with such forms and processes, and community social structures and practices. It should also be noted that exclusive private property rights in TKECs, even if they are held by communities, may run counter to the characteristics of traditional forms and processes of creativity and may induce unforeseen side-effects, such as competition within and between communities. Among the many countries that have already enacted specific protection for TKECs, few provide for genuine exclusive property rights in TKECs; most aim rather at the regulation of their exploitation.

The Pacific Model Law combines some of the approaches above and provides:

- i. for exclusive property rights by providing that particular uses of TKECs require the PIC of the traditional owners;
- ii. that the traditional owners of TKECs are the holders of moral rights in the TKECs, which comprise the right of attribution of ownership in relation to their TKECs, the right not to have ownership of TKECs falsely attributed to them, and the right not to have their TKECs subject to derogatory treatment; and
- iii. for certain criminal offences in relation to traditional cultural rights, moral rights, sacred–secret material and importation and exportation.

The Pacific Model Law requires equitable benefit-sharing arrangements (monetary or non-monetary compensation) with the traditional owners where a derivative work, traditional knowledge or an expression of culture is used for a commercial purpose. However, this differs from the 'entitlements under a scheme for equitable remuneration/compensatory liability' approach, where the entitlement is not based on the creation of an exclusive property right.

In addition, while there are no specific provisions in the Pacific Model Law regarding unfair competition, it is still possible to utilise common law remedies for passing off, unjust enrichment and the like, as well as trade practices.

1.4 Application of the *sui generis* system

Countries can elect to develop their own national system or opt to implement a regional approach (such as the Pacific Model Law) or an international approach. Each has its own advantages and disadvantages.

- i. National approach: The benefit of developing a national system 'from scratch' is that it enables a country to develop measures that reflect and respond to its particular circumstances. However, the disadvantage is that in the absence of bilateral or multilateral agreements providing protection in foreign jurisdictions, protection is limited to within the particular country. This may, for example, lead to situations where a protection system in a country is circumvented by the use of the same or similar traditional knowledge in another country that does not have the necessary system of protection in place.
- ii. Regional approach: A regional framework can provide more effective protection than a national system. A framework approach, such as the Pacific Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture (of which the Pacific Model Law forms part), can achieve harmonisation across national systems through the use of minimum substantive standards while providing flexibility for countries to modify and adapt matters of detail to suit their particular circumstances. In this sense, a 'regional approach' means a regional framework that guides national laws and ensures a certain level of similarity between them. The national laws remain, however, national, and their application is limited to their respective territories. A 'regional system' can also refer to a more integrated approach that could enable, for example, mutual recognition of rights between joining territories, reciprocal enforcement of rights in territories of the region, and a regional mechanism for the resolution of disputes. This is especially useful where particular TKECs are not confined to one country, as is the case in the Pacific and other regions.
- iii. International approach: It is often suggested that comprehensive protection can only be achieved by way of an international system. Such a system is likely to consist of norms and principles, such as those developed in WIPO IGC, with matters of detail left to national and regional levels. This is important given the world's cultural diversity as well as jurisprudential diversity. It is also realistic, given the varied interests and concerns of countries with positions based on quite different assumptions and ideological standpoints concerning traditional knowledge and traditional knowledge-holding groups. Nonetheless, any international regime that provides effective international legal protection will require a degree of harmonisation, and this can be achieved via norms and principles adopted at international level. An international system has as its main and most attractive feature the facility to enforce rights regarding TKECs of one ratifying country in another ratifying country (such as the international protection for copyright provided by the Berne Convention 1971). Discussions are continuing at WIPO IGC on the development and adoption of such a system. As noted, at the international level there are diverse interests at stake and a wide range of perspectives on the issues. The development of the Pacific Model Law has contributed valuably to the international discussions at WIPO, and the discussions serve to inform further consideration of the Model Law 2002 and, above all, its implementation in PICTs.

The Pacific Model Law is a hybrid of the national and regional approaches. It sets out a high-level framework for national legislation and leaves matters of detail or implementation to be determined by policy-makers in accordance with their national laws and systems. It has also been designed with the circumstances of PICTs in mind, with the expectation that it will form the basis of a harmonised legal framework for the regional protection of TKECs.

PART 2. DEVELOPING THE POLICY FRAMEWORK

If a country has elected to develop legislation based on the Pacific Model Law, including acceptance of the general approach of the Pacific Model Law, the next step is to develop the policy framework that will guide the development of the legislation, that is, the policy objective and the guiding principles. In a similar way to Part 1, countries will need to agree, at a general level, to the policy objective and guiding principles of the Pacific Model Law. There is, nonetheless, flexibility to articulate matters differently and to elaborate the objective and principles in more detail as appropriate. This section explains the policy objective and guiding policy principles of the Pacific Model Law and provides guidance on possible implementation options.

Depending on countries' policy processes, it may be beneficial to obtain the appropriate ministerial approvals regarding the policy framework before proceeding to the development of the legal elements of protection in Part 3. This will ensure that policy-makers have clear guidance on ministers' preferences and expectations as they progress through this stage of the process. The approvals could be obtained at the same time as seeking approval for the approach of the legislation in Part 1.

2.1 Policy objective

The way in which a protection system is shaped and defined will depend to a large extent on the objectives it is intended to serve. In developing the legislation, it is paramount that it has clear objectives and that careful consideration is given to the objectives sought.

An important initial step, therefore, is to determine the policy objective or objectives. This is not necessarily akin to the overarching objectives of protection of a legal and policy framework for traditional knowledge. These overarching objectives are likely to extend beyond the protection that can be achieved via this legislation to include matters such as the prevention of the granting of erroneous IP rights over TKECs. The policy objective, in this case, concerns the aim of the legislation and what it is seeking to achieve. It would form part of, and contribute to, the overarching objectives of protection of a broad legal and policy framework for traditional knowledge.

The policy objective of the Pacific Model Law is to 'protect the rights of traditional owners in their TKECs and permit tradition-based creativity and innovation, including commercialisation thereof, subject to prior informed consent and benefit sharing'.¹ It has four components:

- i. to protect the rights of traditional owners in their TKECs;
- ii. to permit tradition-based creativity and innovation, including commercialisation;
- iii. to ensure that the use of TKECs (in terms of tradition-based creativity and innovation) takes place with the PIC of the traditional owners; and
- iv. to ensure the sharing of benefits derived from the use of TKECs (in terms of tradition-based creativity and innovation) with the traditional owners.

Regarding drafting, the policy objective is purposely high level, in keeping with the approach of the Pacific Model Law that matters of detail are left to be determined at the national level. Countries can transfer the policy objective of the Pacific Model Law in its existing form or develop more specific policy objectives as they see fit, recalling that the core substance of the policy objective would need to be retained. Within that constraint, there is flexibility to articulate the policy objective as desired and to develop more detailed objectives and sub-objectives specific to a country's needs.

¹ The Pacific Model Law does not contain matters of legislative detail such as a preamble, of which a policy objective would typically form part. The policy objective is found in its Explanatory Memorandum.

2.2 Guiding policy principles

Generally, the guiding policy principles of a law are designed both to promote the policy objective of the law and, at a practical level, to provide guidance for policy-makers as they develop its substance (in this case, the legal elements of protection). Where there is uncertainty as to the intent of a particular provision, the courts, government agencies, traditional knowledge holders and others can refer to the guiding policy principles for assistance. Whether a country includes provisions articulating the principles that have guided a law's development often depends on national legislative practices. The Pacific Model Law does not contain a provision stating the guiding policy principles of the legislation, but to assist policy-makers, the guiding policy principles have been extracted as follows.

- i. Recognise that traditional cultures comprise frameworks of creativity and innovation that benefit traditional communities as well as all humanity.
- ii. Recognise that traditional communities are the owners, rights holders and custodians of TKECs and the primary decision-makers regarding their use.
- iii. Respect and give effect to the right of traditional communities to control access to their TKECs, especially those of particular cultural or spiritual significance, such as sacred–secret TKECs.
- iv. Ensure measures and procedures for the protection of TKECs are fair and equitable, accessible, transparent and not burdensome for holders of traditional knowledge, while safeguarding legitimate third-party interests and the interests of the general public.
- v. Recognise that the benefits of protection should accrue to traditional communities rather than individuals, while individual rights (including conventional IP rights) for innovators or creators of original works will be able to be recognised in other systems.
- vi. Encourage the use of customary laws and systems and traditional governance and decision-making systems as far as possible, and recognise that communities will always be entitled to rely exclusively or in addition upon their own customary and traditional forms of protection against unwanted access, which might be the most effective in practice.
- vii. Recognise that the continued uses, exchange, transmission and development of TKECs within the customary context by the relevant traditional community, as determined by customary laws and practices, should not be restricted or interfered with.
- viii. Recognise that the state has a role in the protection of TKECs, including providing assistance to traditional communities in the management and enforcement of their rights in TKECs.
- ix. Strike an appropriate balance between the rights and interests of traditional communities, users and the broader public, including taking international human-rights standards into account and striking balances between, for example, the protection of TKECs on the one hand, and artistic and intellectual freedom, the preservation of cultural heritage, the customary use and transmission of TKECs, the promotion of cultural diversity, the stimulation of individual creativity, access to and use of TKECs and freedom of expression, on the other.
- x. Recognise that special protection for TKECs should be complementary to, and not replace or prejudice the acquisition of, any applicable conventional IP protection and derivatives thereof.
- xi. Ensure enforcement and dispute-resolution mechanisms are accessible, appropriate and adequate in cases of breach of the protection for TKECs.

There is flexibility to adapt the articulation of the guiding principles and to add additional principles if desired. However, as with the policy objective, as countries have elected to develop legislation based on the Pacific Model Law, the thrust of the guiding principles needs to be retained.

PART 3. DEVELOPING THE LEGAL ELEMENTS OF PROTECTION

In developing IP-based legislation for the protection of TKECs, a number of legal elements of protection need to be addressed:

- i) What is the subject matter of protection?
- ii) What are the criteria for protection?
- iii) Who are the beneficiaries?
- iv) What is the scope of protection?
- v) What are the exceptions and limitations?
- vi) How will rights be managed?
- vii) What is the term of protection?
- viii) What are the formalities for protection?
- ix) What are the legal proceedings for taking action (including remedies and penalties)?
- x) How will rights be enforced?
- xi) What processes can be used for dispute resolution?
- xii) What is the relationship with IP protection?
- xiii) How will international and regional protection be addressed?

This section of the Guidelines provides technical information on each of these elements. The nature of each element is detailed along with why the element needs to be addressed. Guidance is provided on the policy questions that need to be considered for each element and implementation options in this regard. Where relevant, the Guidelines identify important policy considerations for policy-makers.

3.1 Subject matter of protection

The subject matter of protection is simply that which will be protected under the legislation. As the Guidelines are concerned with the development of legislation for the protection of TKECs, the general subject matter is obvious.

However, there is an important distinction between the subject matter in general and the protectable subject matter. It is only the latter that will receive protection under the legislation.

In order to demarcate the protected subject matter, policy-makers can progress through a two-step process. This first step is to develop a description of the subject matter that should be protectable. Policy-makers may find it useful to consider this exercise as that of defining the scope of the protectable subject matter. It is commonplace for the scope of the protectable subject matter to be determined at national level rather than at regional or international level. Therefore, the Pacific Model Law should be viewed as indicative only. The second step is to develop a more precise delimitation of those TKECs that are eligible for protection under the legislation. This is addressed under the element 'The criteria for protection'.

3.1.1 Policy questions

The following questions are intended to assist policy-makers to identify the protectable subject matter of the legislation that is appropriate to their national circumstances. It should be noted that there may be additional questions for policy-makers to consider.

a) Which expressions of culture should receive protection?

The legislation should identify as clearly as possible which TKECs will be protectable, or the scope of the subject matter may appear too wide and imprecise.

In developing a description of the expressions of culture for which protection is sought, policy-makers may find it useful to work through the following list:

- verbal expressions, such as names, stories, chants, epics, legends, poetry, riddles and other narratives, histories, words, signs, indications and symbols;
- musical expressions, such as songs and instrumental music;
- expressions by actions, such as dances, plays, ceremonies, rituals and other performances, whether or not reduced to a material form; and
- tangible expressions, such as drawings, designs, paintings (including body-painting), carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalware, jewellery, baskets, needlework, textiles, glassware, carpets, costumes, handicrafts, musical instruments and architectural forms.

Policy-makers may also wish to refer to clause 4 of the Pacific Model Law and the definition of 'expressions of culture'. This definition is a non-exhaustive list intended to provide a basis for discussion. Countries can adapt it as desired. As well, these expressions of culture are only

Expressions of culture include:

- a. names, stories, chants, riddles, histories and songs in oral narratives; and
- b. art and craft, musical instruments, sculpture, painting, carving, pottery, terracotta 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
- d. the delineated forms, parts and details of designs and visual compositions; and
- e. architectural forms.

Pacific Model Law, Clause 4

examples of this particular subject matter, bearing in mind the diversity of culture within the Pacific region. It is not expected that all of these examples will be applicable to all PICTs.

In countries with a number of distinct traditional communities, policy-makers should consider whether the description adequately accommodates that diversity. It is not necessary to have separate definitions for each traditional community. It will be sufficient if the collective scope of the subject matter captures the various expressions.

b) What terminology should be used to describe the subject matter?

Flexibility regarding terminology is important, and many international IP standards defer to the national level for determining such matters. Accordingly, the Pacific Model Law has left detailed decisions on terminology to be determined at national level. For example, there is an option to use the term 'traditional cultural expressions' or another term that may be appropriate rather than 'expressions of culture'. Existing laws show diversity in the terms used to refer to this subject matter. For example, the Tunis Model Law 1976 refers to 'folklore' and the Panama Law 2000 refers to 'traditional expressions of Indigenous communities'.

In addition, a country may wish to use vernacular terms to describe the expressions themselves, such as waiata, the Maori word for 'song' in New Zealand, or tivaevae, meaning 'quilts' in the Cook Islands.

c) Should the legislation cover both tangible and intangible expressions?

Expressions of culture mean any way in which traditional knowledge appears or is manifested, irrespective of content, quality or purpose, whether tangible or intangible ...

Pacific Model Law, Clause 4

Many expressions of culture are preserved and passed between generations by oral means and are traditionally never written down. Under the Pacific Model Law (clause 8), TKECs are protected regardless of the form or mode of their expression. Fixation would therefore not be a requirement for protection. Of note is that fixation is not a mandatory element of international copyright law and many countries,

especially those following the civil law tradition, extend protection to works that are not fixed in material form.

In terms of drafting, if a country considers it appropriate to cover both tangible and intangible expressions, policy-makers may wish to also include the words 'or combinations thereof' to demonstrate that TKECs can be both tangible and intangible and have both tangible and intangible components.

d) How should the relationship with traditional knowledge be treated?

Protectable subject matter under the Pacific Model Law includes both expressions of culture and the traditional knowledge underpinning those expressions. The rationale for this is that many traditional communities regard their expressions of culture and traditional knowledge systems as parts of an inseparable whole: the expression of culture is the manifestation of the traditional knowledge. Traditional knowledge holders have stressed that the two should not be treated separately.

Therefore, the traditional knowledge that will form part of the protectable subject matter of the legislation will be determined by which expressions of culture a country elects to protect. It will be the traditional knowledge underpinning those expressions of culture that will be protected.

Policy-makers may wish to note that since the Pacific Model Law was developed in 2002, WIPO IGC has explored further the relationship between expressions of culture and the underlying traditional knowledge in terms of legal protection. WIPO notes that while expressions of culture and traditional knowledge are inextricably linked and part of a holistic cultural heritage and identity of traditional communities in daily life, from a legal protection point of view each raises some distinct policy issues and is relevant to different aspects of the IP system and other policy areas. This is not to suggest that they should be artificially distinguished in the daily community context. WIPO suggests that distinct

legal tools and a different set of policy questions typically arise when IP is applied to protect expressions of culture on the one hand, and technical knowledge on the other. For example, the IP-like protection of expressions of culture involves legal doctrines and policy questions closest to those underpinning the copyright and related rights systems, and the relevant broader policy context includes laws and programmes related to the safeguarding and preservation of cultural heritage, respect for freedom of expression and the promotion of cultural diversity. Certain forms of cultural expression are already protected by international copyright and related rights law, such as performances of ‘expressions of folklore’, which are protected internationally by the WIPO Performances and Phonograms Treaty (WPPT) 1996. It is these legal and policy aspects that come into play when considering the enhanced protection of traditional cultural expressions. When it comes to knowledge and know-how as such, however, it is the principles of patent law and the considerations relating to conservation of the environment and biodiversity, as well as health and agricultural policies, that make up the relevant legal and policy context. The specific solutions for the *legal protection* of expressions of culture and traditional knowledge may, therefore, differ. WIPO suggests that it is important that the forms of protection provided for expressions of culture be inspired and shaped by appropriate legal and cultural policies. A good solution might be to protect both expressions of knowledge and culture and the knowledge itself in one law, but have distinct chapters for each area that deal with the detailed substance of protection (like a country can have an intellectual property law with different chapters for copyright, patents, trademarks, etc.).

As the Pacific Model Law is an IP-based law, PICTs are encouraged to give WIPO’s observations due consideration. It is, of course, a matter for individual countries to determine whether the traditional knowledge underlying the expressions of culture will also form part of the protected subject matter. In developing legislation based on the Pacific Model Law, there is flexibility to make this determination. The above discussion is intended to assist countries to make an informed decision in this regard. Countries may wish to consider this matter in the context of their respective objectives of protection.

e) Should the protectable subject matter be treated equally under the legislation?

In many traditional communities, some TKECs are considered to hold greater cultural or spiritual significance than others. There are also expressions that are sacred–secret where access and use are highly restricted. Therefore, in developing a description, countries may wish to make reference to different layers or levels of TKECs.

Recognising these distinctions can be critically important from a protection perspective, particularly in respect of the term of protection, the scope of protection and formalities. Varying and multiple levels and forms of treatment may be appropriate for different kinds of expressions. For example, expressions of particular cultural or spiritual significance may be the subject of strong forms of protection, while for other expressions, especially those that are already publicly available or accessible, the focus could be on regulation of their use.

Under the Pacific Model Law, TKECs are treated in two ‘layers’. There is a stronger degree of protection for sacred–secret material.² All other TKECs are treated equally. WIPO IGC has identified three layers or groupings of expressions: secret, confidential or undisclosed expressions; expressions of particular cultural or spiritual value to a community; and other expressions. This approach takes an additional step to the Pacific Model Law and identifies two layers within non-sacred–secret expressions: those of particular cultural or spiritual value, and others.

It is important for policy-makers to consider whether all expressions should be treated uniformly or whether their treatment should reflect differences, where they exist. If a country determines that there should be different treatment, consideration will need to be given to which TKECs would fall into the

² ‘Sacred–secret’ means any TKEC that has a secret or sacred significance according to the customary law and practices of the traditional owners concerned (clause 4). Clause 28 establishes a criminal offence for non-customary use of sacred–secret material.

various layers. Implementation options regarding varying layers of treatment are considered under the elements 'Scope of protection', 'Term of protection' and 'Formalities'.

3.1.2 Further information

Another source of information regarding the subject matter of protection is:

- J.A.L. Sterling. 1998. *World Copyright Law*. London: Sweet & Maxwell. Chapter 6 provides information on the subject matter of protection in copyright.

3.2 Criteria for protection

Having developed a description of the subject matter generally, the next step is to formulate a more precise delimitation of those TKECs that are eligible for protection under the legislation. This is because within an IP-based *sui generis* system such as the Pacific Model Law, it is conceivable that not all TKECs are the subject of protection.

In order to distinguish between expressions that form part of the subject matter in general and those that are eligible for protection under a specific legal measure, laws typically stipulate the substantive criteria that subject matter should display in order to be protectable.

The Pacific Model Law does not include explicit criteria for protection. In developing national legislation, countries could benefit from developing explicit criteria for protection and linking them with the description of protectable subject matter.

3.2.1 Policy considerations

In identifying the characteristics that TKECs should possess in order to be protectable, an important policy consideration is the balance between protection imperatives and the promotion of creativity. If a criterion is too rigorous, the level of protection will be reduced. However, if a criterion is relatively loose, it could have a negative impact on the public domain, which is likely to impact on innovation and creativity.

Another consideration is that of extra-territorial protection. While generous and flexible criteria may provide protection for more expressions nationally, lesser protection may be available in other jurisdictions that do not take such a broad approach. A difficulty for countries is that there is currently no international standard regarding criteria for protection of expressions of culture. That being the case, countries could take guidance from provisions developed within WIPO IGC that have the potential, in their existing or modified form, to evolve into a form of international norm or standard.

3.2.2 Policy questions

The following questions are intended to assist policy-makers to develop criteria for protection that are appropriate to their national circumstances. It should be noted that there may be additional questions for policy-makers to consider.

a) To be protected, should expressions be required to be the result of creative human intellectual activity?

To be protectable as IP, subject matter should be the result of creative human intellectual activity, including collective creativity.³ Examples of this principle include the ‘originality’ requirement of copyright works and the ‘novel’ requirement in patent laws. However, existing *sui generis* systems for the protection of TKECs do not generally require the protected TKECs to be ‘original’ or ‘new’ because such a requirement would protect only contemporary TKECs.⁴ WIPO has also suggested that an ‘originality’ requirement would be out of step with evolving practice and would exclude significant amounts of TKEC subject matter (WIPO 2005 Annex: 11–15).

³ The Convention Establishing the World Intellectual Property Organization 1967 defines IP by reference to rights relating to: literary, artistic and scientific works; performances of performing artists, sound recordings and broadcasts; inventions in all fields of human endeavour; scientific discoveries; industrial designs; trademarks, service marks and commercial names and designations; protection against unfair competition; and all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic field.

⁴ This includes contemporary interpretations, arrangements, adaptations or collections of pre-existing cultural materials made by an identifiable individual or individuals, and not those materials themselves and mere recreations and imitations of them.

This raises the question of what an appropriate principle might be for the protection of TKECs that is in a manner inspired by IP. WIPO has suggested that a focus on ‘intellectual creativity’ may be appropriate as a substantive criterion for protectable expressions of culture (WIPO 2005 Annex: 11–15). TKECs are the products of creative and intellectual processes and this criterion would acknowledge the creative and intellectual value of the material.

Similarly to ‘originality’ in copyright, ‘creativity’ is not susceptible to precise and detailed definition at the international level. If a country considers it appropriate to include a ‘creative’ criterion, it should be noted that conformity would need to be determined by relevant judicial authorities on a case-by-case basis with due regard to the nature of TKECs and guided as appropriate by customary practices and the cultural context of the relevant community that identifies with the TKEC.

A subject of discussion at WIPO and elsewhere is whether or not individual creativity taking place within a traditional context (such as the contemporary but tradition-based art of a traditional community member) can qualify as a ‘traditional’ cultural expression and therefore benefit from *sui generis* protection. On the one hand, some argue that because such contemporary creativity is protectable under copyright, it should not also be able to get additional *sui generis* protection, and that allowing this causes an uneasy overlap between conventional copyright and *sui generis* systems. On the other hand, it is argued that even individual creativity can be ‘traditional’ when it is recognised as such by the artist’s community and is undertaken within a customary and traditional context.

b) To be protected, should expressions be required to have an association with a traditional community?

Most, if not all, existing systems for the protection of TKECs establish a criterion requiring some form of linkage between the TKEC and the community, often to distinguish between ‘authentic’ and ‘non-authentic’ TKECs to prevent the misleading marketing and sale of imitations. This linkage can be embodied by a possible criterion that TKECs should be ‘characteristic’ of a distinct cultural identity and heritage of a particular community.

There is some overlap between the criteria of ‘authenticity’ and ‘characteristic’. Both seem aimed at establishing that only TKECs that have some true linkage with a community should be protectable. However, a number of issues have been identified with the use of the term ‘authentic’, particularly in folkloristics. The term ‘characteristic’ may therefore be a less problematic option, particularly as ‘authenticity’ is implicit in the requirement that the expressions, or elements of them, must be ‘characteristic’: expressions that become generally recognised as characteristic are, as a rule, authentic expressions, recognised as such by the tacit consensus of the community concerned.

Some *sui generis* systems and measures circumscribe the qualities that the makers of TKECs should display. For example, the US Indian Arts and Crafts Act 1990 provides protection only to arts and crafts that are ‘Indian products’ and the Indian Arts and Crafts Board registers trademarks of genuineness and quality; Australia’s Label of Authenticity may be used only by ‘Certified Indigenous Creators’, as defined (Janke 2003: 134–158); and the *toi iho*TM ‘maori made’ mark of New Zealand, a registered trademark ‘of authenticity and quality for Maori arts and crafts’, is licensed to artists of ‘Maori descent to be used on works produced by them which comprise an explicit or implicit Maori referent’ (Arts Council of New Zealand n.d.).

Existing approaches are neutral regarding the physical residence of an individual TKEC holder or performer or community. In other words, a TKEC held or performed by an individual or a community living outside of his, her or its traditional geographical place of origin may still qualify as a protectable TKEC provided it remains ‘characteristic’ of the community’s identity and heritage.

Policy-makers also need to consider whether expressions that characterise more recently established communities or identities will be covered.

c) To be protected, should there be a requirement that expressions be maintained or used by a community?

An unfortunate reality is that some TKECs are no longer maintained or used by traditional communities. This raises a policy question of whether protection should be extended to TKECs that, although once characteristic of a traditional community, are no longer maintained or used by the community or by individuals having the responsibility to do so. Recalling the policy consideration of balancing protection with the promotion of creativity, countries may wish to consider whether there would be benefits in including a criterion that a TKEC be maintained, used or developed by a community, or by individuals having the right or responsibility to do so in accordance with the customary law and practices of that community. If this criterion is not met, then the TKEC would not be protectable even if it is the result of 'creativity' and 'characteristic' of a traditional community.

While this may appear to promote fairness, it is important to bear in mind that many PICTs are in the process of developing cultural preservation and revitalisation programmes to address the loss of cultural practices. If a 'maintenance or use' criterion were instituted, it might effectively exclude many expressions that have not been utilised in recent times.

3.2.3 Further information

Another source of information regarding the development of criteria for protection is:

- J.A.L. Sterling. 1998. *World Copyright Law*. London: Sweet & Maxwell. Chapter 7 provides information on the criteria of protection in copyright.

3.3 Beneficiaries

Traditional knowledge is generally understood to be a collective product of a traditional knowledge-holding community (even though individual innovators or traditional knowledge holders may have distinct personal rights or entitlements within the community structure). Any rights and interests in this material are commonly considered to be those of communities rather than individuals.

This is reflected in a guiding principle of the Pacific Model Law, which states that the benefits of protection should accrue to traditional communities rather than individuals while recalling that individual rights (including conventional IP rights) for innovators or creators of original works will be able to be recognised in other systems. The development of this element involves elaborating this principle in more detail.

3.3.1 Policy questions

The following questions are intended to assist policy-makers to develop a substantive policy regarding beneficiaries of protection that is appropriate to their national circumstances. It should be noted that there may be additional questions for policy-makers to consider.

a) What groups or communities should benefit from the protection of TKECs?

TKECs are held by a range of communities, including Indigenous peoples, tribal peoples, local communities and other cultural communities. In the Pacific region, there is likely to be a range of traditional knowledge-holding communities within one particular country. An initial question for countries is which groups or communities should benefit from protection and whether this should extend to all traditional knowledge-holding communities or only specific groups.

Existing laws for the protection of TKECs utilise a range of approaches. In some cases protection is limited to knowledge held by Indigenous communities,⁵ while in others the concept of beneficiaries is much broader and involves knowledge held by Indigenous as well as local communities or populations.⁶ WIPO IGC has developed a draft provision that establishes that protection of TKECs should be for the benefit of Indigenous peoples and traditional and other cultural communities (WIPO 2005 Annex: 16). It also contemplates that more than one type of community may qualify for protection of their TKECs. Under the Pacific Model Law, the beneficiaries of protection are the 'traditional owners' of TKECs, which is sufficiently broad to encompass the range of traditional knowledge-holding communities.

In regard to identifying which groups or communities should benefit from conferred communal rights and interests in their TKECs, including considering whether or not to delimit the possible beneficiary groups, a country's objectives of protection should be instructive. There may also be moral or historical reasons that justify particular groups benefiting from protection ahead of other groups.

If a country considers it appropriate to delimit the possible beneficiary groups, it could include specific criteria in the legislation that beneficiary groups have to meet, such as being an Indigenous or local community of the country in question.

b) How should beneficiary groups be described?

The Pacific Model Law describes the beneficiaries of protection as 'traditional owners' – a broad term intended to cover the variety of traditional knowledge-holding communities. There is flexibility for countries to use an alternative term to describe the beneficiary group(s) in the legislation. Dependent

⁵ For example, the Panama Law 2000.

⁶ Examples include laws in Bangladesh, Brazil and Portugal.

on the decision taken in section 3.3.1(a) above, it may be considered appropriate to refer to, for example, 'Indigenous people' or 'local communities'.

As well, some countries may prefer an alternative term to 'owners'. The term 'holders' is often considered to be more appropriate than 'owners'. It is used to convey the relationship between a community and its traditional knowledge, which is often seen as being more akin to custodianship.

In addition, existing laws for the protection of traditional knowledge do not necessarily identify beneficiaries as holders of distinct intangible property rights as such, although some have elected to establish distinct rights. Some laws identify the rights holders through the term 'local communities' or 'Indigenous peoples', or a combination thereof. Others do not identify rights holders, but define that 'benefit claimers' shall include 'creators and holders of knowledge and information relating to biological resources'. Other laws contain open definitions such as 'those who have registered their IPRs on traditional medical intelligence'. The Costa Rican law provides that the title holder of *sui generis* community intellectual rights shall be determined by a participatory process.

c) Should particular linkages be required between the beneficiaries of protection and the protected TKECs?

The establishment of required linkages between the beneficiaries of protection and the protectable subject matter can be used for several purposes. If a form of 'relationship linkage' is required between the beneficiary group and the TKEC, this can be useful in ensuring that the appropriate groups benefit from protection. It can also promote greater certainty and transparency within the regime. The linkage could be demonstrated by reference to customary law or community practices. In the absence of such a linkage, a traditional community could potentially claim rights and interests in an expression of culture that is, in actual fact, held by another traditional community.

Relationship linkages can also be useful in scenarios where a small group within a broader community holds a TKEC that other parts of the particular community do not. In this situation, it may be considered appropriate for the group to benefit from protection rather than the community as a whole. The group could use the relationship linkage to demonstrate that it has the relationship required in order to benefit from the protection of the expression(s) in question.

In terms of linkages that could be used, two possibilities are:

- those to whom the custody, care and safeguarding of the TKEC are entrusted in accordance with customary law and practices; and
- those who maintain, use or develop the TKEC as characteristic of their cultural and social identity and cultural heritage (or simply 'as being characteristic of their traditional cultural heritage').

Traditional owners of TKECs are defined as:

- 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 TKECs are entrusted in accordance with the customary law and practices of that group, clan or community.

Pacific Model Law, Clause 4

d) How should the beneficiary group be represented?

Having clarified the beneficiary group or groups in name or description, the next step is to consider whether or not the legislation will prescribe how these groups may or should be represented to receive benefits under the legislation (and to assert their rights). Existing laws for the protection of traditional cultural expressions use a range of approaches to address this issue, including the following.

- Requiring the beneficiary group to have a legal personality: For the purpose of legal procedures such as enforcing rights, a country may require the beneficiary group to have some form of legal

personality. The legislation could prescribe a particular form or provide that the beneficiary group must designate a distinct legal person (such as an association, a legal representative or a trustee) as rights holder in trust. Countries may wish to draw on existing legal models in their domestic law and experience with any community-held IP, such as collective marks, and on applicable customary law. For example, in the Panama Law 2000, existing models are utilised so that the relevant Indigenous communities may be represented by their general congresses or traditional authorities.

- Determining representation through a process such as registration or certification: A registration or certification process could be used to ensure there is a distinct entity to represent the beneficiary group. While it would require state involvement, it would be without the formalities of obtaining and maintaining a legal personality. This approach could also be used to support communities' own rules and customary practices by providing that beneficiary groups determine their representative(s) according to customary practices and notify the appropriate state body for registration or certification purposes. Alternatively, the legislation could specify the criteria to be met in order for a community to register as a beneficiary group. Such criteria could reflect any required linkages between a community and a TKEC. In Thailand, the PVP Law 1999 stipulates that 'a sui juris person, residing and commonly inheriting and passing over culture continually, who takes part in the conservation or development of the plant variety ... may register as a community under this Act'. In Portugal, the representation claimed by any private or public entity for registration of a local plant variety must be certified by a competent municipal chamber.
- Not prescribing a representation requirement: It is not imperative that the beneficiary group be identified as distinct 'owners'. The legislation could be silent in respect of representation requirements, thereby leaving the matter open to all forms of representation. IP need not be separately owned by distinct rights holders. Some forms of IP protection, such as geographical indications, do not need to have distinct 'owners' and may be administered by the state on behalf of groups of eligible producers. Collective marks and certification marks may be protected on behalf of a group of beneficiaries. Where the 'right' is essentially an entitlement to seek certain legal remedies and injunctions, there may not be a need to identify a specific right holder, and it may be possible to define aggrieved or interested parties who have standing to take action. There would be implications for international protection if the beneficiary group were to be granted rights in foreign jurisdictions and there were no distinct rights holders.⁷ The Pacific Model Law does not prescribe how 'traditional owners' may or should be represented for the purposes of legislation. This is not a policy of the Pacific Model Law but, rather, reflects its approach that it is a high-level framework and a matter such as representation should be determined at national level. There is flexibility to institute a representation requirement if desired or to leave the matter open. If the latter approach is taken, a prospective user wishing to use TKECs would apply to the Cultural Authority established under the legislation, which would then follow a prescribed process to identify the relevant traditional owners.

e) Should the state have a beneficiary role?

While it is well established that the beneficiaries of protection should be the communities that hold the TKECs, in some cases it may be considered appropriate for the state to have a beneficiary role as well. For example, where there are difficulties in identifying which groups have rights over specific expressions, particularly expressions that are shared across communities, the state could receive the benefits of protection on behalf of these communities and then apply the proceeds towards initiatives that are for the betterment of all the communities concerned. In existing laws that take this approach, proceeds from the granting of such rights are applied towards national heritage, social welfare and culture-related programmes for the general benefit of traditional communities but without transferring the proceeds directly to the communities. In addition, if there are issues with transferring the benefits

⁷ Although, in respect of collective marks, the Paris Convention provides for the protection of collective marks belonging to associations 'the existence of which is not contrary to the law of the country of origin, even if such associations do not possess an industrial or commercial establishment' (Article 7*bis*).

of protection to the beneficiary group, the state could act as a conduit and receive the benefits on their behalf, then transfer the benefits to the beneficiary group.

If the state assumes a beneficiary role, policy-makers may wish to consider whether the state should also have a role in the management and enforcement of rights, which are often a heavy burden for traditional communities to bear (see the elements 'Management of rights' and 'Enforcement').

f) How can the relationship between a beneficiary group and an individual creator be addressed?

Where an individual has developed a tradition-based creation within his or her customary context, it is regarded from a community perspective as the product of communal creative processes. This aligns with the essential characteristics of 'traditional' creations: they contain motifs, a style or other items that are characteristic of and identify a tradition and a community that still bears and practises them. The creation is not 'owned' by the individual but 'controlled' by the community according to customary legal systems and practices. This is what marks such a creation as 'traditional' and provides a policy rationale for providing benefits under the legislation at collective rather than individual level.

In terms of how the interests of individual creators should be addressed within their communities, the Pacific Model Law takes the approach that this is a matter for customary law and practices to address. Customary law often establishes the attribution of rights and benefits within a community, including individual interests in traditional knowledge. This will also be relevant for individual rights that may accrue under existing IP laws. There is, of course, flexibility for countries to incorporate measures that regulate the relationship between individual creators and their community. However, the use of such measures is not commonly recognised as being desirable.

g) Can there be two or more beneficiary groups in particular TKECs?

In some cases, two or more traditional communities in a country may share the same or similar TKECs. As well, communities in different countries and even regions may lay claim to the same or similar TKECs. This can result in potentially overlapping rights in the same or similar expressions, and therefore it will be necessary to clarify the allocation of rights or distribution of benefits among those communities. As this is not a question of whether the groups should benefit, but rather how the benefits should be distributed, the issue is addressed under the element 'Management of rights'. For the purposes of the present element, it is useful to note that there may be two or more beneficiary groups in some TKECs and that policy measures will be needed to address these multiple interests.

3.3.2 Further information

Another source of information regarding beneficiaries of protection is:

- J.A.L. Sterling. 1998. *World Copyright Law*. London: Sweet & Maxwell. Chapter 5 provides information on the beneficiaries of protection in copyright.

3.4 Scope of protection

The protection of TKECs is a central component of the legislation. As the Guidelines focus on the development of an IP-based *sui generis* system (based on the Pacific Model Law), the protection afforded by the legislation is that which IP usually addresses – that is, illicit uses and misappropriations.⁸ It is important to recall that this conception of protection reflects a strong IP focus. It is acknowledged that expectations regarding protection are likely to extend beyond illicit uses and misappropriations. Therefore, general background information is provided in this section to illustrate where the legislation may sit in a broader framework of protection.

The form of protection in the Pacific Model Law draws on legal doctrines similar to copyright and related rights. It consists of:

- i. exclusive property rights⁹ where particular uses of TKECs require the PIC of the traditional owners. Failure to obtain the PIC of traditional owners where required will constitute an illicit use and/or misappropriation; and
- ii. the moral rights of traditional owners in their TKECs.

The development of this element entails clarifying the scope of these rights – that is, the uses, appropriations and omissions that should be prohibited, should require authorisation or should be regulated in other ways. It also involves consideration of whether different types of protection should be applied to different layers, where appropriate, of TKECs.

3.4.1 Background

a) What uses, appropriations and omissions regarding TKECs are frequently identified as being of concern to traditional communities?

From the outset, it is acknowledged that traditional communities are diverse and are likely to have a range of views in this area. It would be useful for policy-makers to progress through a problem-definition process to develop a localised understanding of the uses, appropriations and omissions that are of concern to traditional communities in their particular country.

The uses, appropriations and omissions regarding TKECs that are frequently identified as being of concern to traditional communities include, but are not limited to:

- a) unauthorised reproduction, adaptation and subsequent commercialisation of TKECs, with no sharing of economic benefits. This could include the recording of traditional music, the reproduction of paintings, and the taking of photographs of traditional beadwork and attire worn by Indigenous and traditional persons;
- b) appropriation of traditional languages, such as Indigenous and traditional words, symbols and other distinctive signs being used by non-community members outside the traditional context;
- c) use of TKECs that is insulting, degrading and/or culturally and spiritually offensive. This could include, for example, the modification of an expression to suit foreign markets or the performance of a ritual in an inappropriate context or setting;

⁸ As noted previously, the legislation only covers protection at the IP interface, not protection generally, and is distinguishable from the related concepts of 'safeguarding' and 'preservation' of cultural heritage.

⁹ The legal form of protection will have been agreed upon when assessing the approach of the Pacific Model Law in Part 1 of the Guidelines.

- d) failure to acknowledge the traditional source of a tradition-based creation or innovation. Examples could include the use of traditional music as part of a ‘world music’ album without acknowledging the source of the music;
- e) appropriation of the reputation or distinctive character of TKECs in ways that evoke an authentic traditional product by use of misleading or false indications as to authenticity or origin, or adoption of their methods of manufacture and ‘style’. This could include the marketing of fake traditional souvenir items as ‘Indigenous’, ‘Indian-made’ or ‘authentic’;
- f) unauthorised access to and disclosure and use of sacred–secret materials. This could refer to, for example, disclosure to the public at large of secret and/or culturally sensitive materials such as tribal sites and objects of deep religious and cultural significance;
- g) unauthorised fixation of live performances of TKECs, and subsequent acts in relation to those fixations. For example, the photographing of live performances of songs and dances by Indigenous persons, and the subsequent reproduction and publication of the photographs on DVDs, tape cassettes, postcards or the Internet;
- h) granting of erroneous IP rights over TKECs and derivatives thereof. For example, a patent has been granted over a process for the formation of the Caribbean steel pan musical instrument; and
- i) the exploitation of derivative works created by individuals (particularly those not connected with the traditions and cultural materials they adapted or were inspired by) and the acquisition of IP rights over derivations and adaptations of TKECs and representations.

b) What policy measures can be used to address these concerns?

It is apparent that the majority of concerns related to uses, appropriations and omissions are the type that are typically addressed through IP rights measures. It is acknowledged that there are likely to be additional concerns other than uses, appropriations and omissions regarding TKECs, such as the loss of knowledge. These would need to be addressed through additional policy measures.

Given the breadth of the abovementioned concerns, it is also apparent that a range of policy responses will be needed. It is also evident that protection would need to include not only the protection of the expressions themselves but also of the reputation or distinctive character associated with them and/or the method of production (in the case of handicrafts and textiles, for example). Some of these concerns can be addressed via existing IP rights such as copyright, trademarks, designs, patents and unfair competition, while others will require the use of new IP-type rights by way of a *sui generis* law such as the Pacific Model Law.

Table 1 illustrates policy options that could be used to address the concerns of traditional communities regarding uses, appropriations and omissions relating to TKECs. These options are not mutually exclusive.

Table 1: Policy measures for addressing the concerns of traditional communities regarding uses, appropriations and omissions relating to TKECs

Traditional communities' concerns	Policy measures	Examples
<p>a. Unauthorised reproduction, adaptation and subsequent commercialisation of TKECs, with no sharing of economic benefits</p>	<p>TKECs that meet the criteria for copyright protection can be protected under existing copyright laws.</p>	<p>Examples of copyright laws in the Pacific region include New Zealand's Copyright Act 1994, Australia's Copyright Act 1968, Fiji's Copyright Act 1999 and Samoa's Copyright Act 1998.</p>
	<p>For TKECs that do not meet the criteria for copyright protection, <i>sui generis</i> laws can be used that establish typical copyright-type exclusive rights over TKECs. These rights can extend to acts such as reproduction, adaptation, public performance, distribution, public recitation, communication to the public, the making of derivative works, and importation of unauthorised copies and adaptations under the law of the importing country.</p>	<p>Examples of <i>sui generis</i> laws that establish copyright-type exclusive rights over expressions of culture include the Pacific Model Law 2002, Tunis Model Law 1976 and Panama Law 2000.</p>
	<p>Regarding handicrafts in particular, explicit protection can be provided for designs as tangible expressions of culture.</p>	<p>Examples include New Zealand's Designs Act 1953 and Australia's Designs Act 2003.</p>
<p>b. Appropriation of traditional languages, such as Indigenous and traditional words, symbols and other distinctive signs being used by non-community members outside the traditional context</p>	<p>Defensive protection measures can prevent third parties obtaining IP rights over traditional words, symbols, etc. They will not prevent the use itself, but can act as a deterrent.</p>	<p>The Trade Marks Act 2002 in New Zealand includes a provision to prevent the registration of trademarks that would be likely to offend a significant section of the community, including Maori (section 17).</p>
<p>c. Uses of TKECs that are insulting, derogatory and/or culturally and spiritually offensive</p>	<p>Moral rights principles in copyright law can be used to prevent insulting, derogatory and culturally and spiritually offensive uses of TKECs.</p>	<p>New Zealand's Copyright Act 1994 contains provisions relating to moral rights, as does the Pacific Model Law 2002.</p>
<p>d. Failure to acknowledge the traditional source of a tradition-based creation or innovation</p>	<p>Moral rights principles in copyright law can be used to protect against failure to acknowledge source or misleading indications as to source.</p>	<p>The Model Provisions 1982, the Pacific Model Law 2002 and many copyright-based systems for the protection of expressions of culture provide rights and remedies in respect of failure to acknowledge source.</p>

Traditional communities' concerns	Policy measures	Examples
<p>e. Appropriation of the reputation or distinctive character of TKECs in ways that evoke an authentic traditional product, by use of misleading or false indications as to authenticity or origin, or adoption of their methods of manufacture and 'style'. This could include the marketing of fake traditional souvenir items as 'Indigenous', 'Indian-made' or 'authentic'.</p>	<p>The protection of reputation (the distinctiveness, 'style' and 'authenticity') of TKECs and prevention of false and misleading claims to 'authenticity', origin or link or endorsement by a community can be achieved through options such as:</p> <ul style="list-style-type: none"> - certification trademarks; - geographical indications; and - unfair competition or trade practices. 	<p>Examples of certification trademarks include 'Toi Iho', the Maori Made Mark in New Zealand, and the Label of Authenticity in Australia.</p> <p>There are examples of geographical indications regarding TKECs in Portugal, Mexico and the Russian Federation.</p> <p>Regarding unfair competition or trade practices law, in an Australian case a company was prevented from continuing to describe or refer to its range of hand-painted or hand-carved Indigenous-oriented souvenirs as 'Aboriginal art' or 'authentic' unless it reasonably believed that the artwork or souvenir was painted or carved by a person of Aboriginal descent.</p>
<p>f. Unauthorised access to and disclosure and use of sacred–secret materials</p>	<p>The prevention of exploitation of sacred–secret materials can be achieved through the use of principles dealing with unfair competition, undisclosed and confidential information, breach of trust and confidence, and related areas.</p>	<p>In the Australian case of <i>Foster v Mountford</i>,¹⁰ the common law doctrine of confidential information was used to prevent the publication of a book containing culturally sensitive information. The court held that the publication of the book could disclose information of deep religious and cultural significance to Aborigines that had been supplied to the defendant (an anthropologist) in confidence and that the revelation of such information amounted to a breach of confidence.</p>
<p>g. Unauthorised fixation of live performances of TKECs, and subsequent acts in relation to those fixations</p>	<p>The WIPO Performances and Phonograms Treaty 1996 provides for the protection of the moral and economic rights of performers of expressions of culture.</p>	<p>New Zealand is not a party to the WPPT. New Zealand does, however, have performers' rights provisions in its Copyright Act 1994 (Part 9) and provides performers with certain limited rights to control the exploitation of their performances where they have not given consent to that exploitation. However, there is no concept of group ownership, and members of a group do not have collective rights in a group's performance.</p>

¹⁰ 1976. 29 FLR 233.

Traditional communities' concerns	Policy measures	Examples
h. The acquisition by third parties of erroneous IP rights over TKECs	Defensive protection measures can be used to prevent the granting of erroneous IP rights over TKECs, such as prevention of the unauthorised registration of Indigenous signs, symbols and other marks as trademarks.	The Trade Marks Act 2002 in New Zealand includes a provision to prevent the registration of trademarks that would be likely to offend a significant section of the community, including Maori (section 17).
i. Exploitation of derivative works created by individuals (particularly those not connected with the traditions and cultural materials they adapted or were inspired by) and the acquisition of IP rights over derivations and adaptations of TKECs and representations	<p>The right of adaptation refers to the right of an author or authors to control transformation of their work into another type of presentation, for instance, by translation or by changing a novel into a film script. Arguably, all adaptations involve reproduction where the essential features of the adapted work are used. However, in many national laws, the right of adaptation is viewed separately from that of reproduction.</p> <p>Within WIPO IGC, it has been noted that some key policy and legal questions pivot on the adaptation right, the right to make derivative works and the setting of appropriate exceptions and limitations in this regard. It is often the adaptation and commercialisation of traditional materials by 'outsiders' that cause the most cultural offence and economic harm. Suggestions have been made for communal regulation of the exploitation of derivative works created by individuals, particularly those individuals not connected with the traditions and cultural materials they adapted or were inspired by. The suggestion has also been noted that copyright and other IP rights should not be recognised in such tradition-based creations made by outsiders. Yet it has also been proposed that rights in derivative works should be fully recognised and respected and remain unencumbered by such obligations, since recognising such rights encourages and promotes tradition-based creativity. This is precisely how, some argue, the IP system is intended to work – not to reward the preservation of the past, but rather to revitalise it and incentivise tradition-based creativity for economic growth. Any copyright in the derivative work attaches only to new materials and leaves the underlying materials unaffected.</p>	<p>The Model Provisions 1982, the Tunis Model Law 1976, the Bangui Agreement, and other <i>sui generis</i> systems and national laws do not generally regulate the exploitation of derivative works. The Model Provisions 1982 contain no right of adaptation and have a wide 'borrowing exception'.</p> <p>The Pacific Model Law regulates how derivative works may be exploited and places certain obligations upon the creators of derivative works towards the relevant community. It requires benefit-sharing arrangements providing for equitable monetary or non-monetary compensation to the traditional owners where a derivative work or TKEC is used for a commercial purpose. It also requires the creator to respect the moral rights of the relevant community in the underlying traditions and heritage used, including acknowledging the community.</p> <p>Within WIPO IGC, the suggestion has been made for an adaptation right in respect of TKECs of particular cultural or spiritual value subject to prior registration or notification. In respect of other TKECs, there would be no adaptation right as such; nor would there be prevention of the obtaining of IP rights in the derivative work by its creator. Nor would, in either case, mere 'inspiration' be prevented, as is also the case in copyright law, in line with the idea/expression dichotomy. However, there would be regulation of how derivative works may be exploited.</p>

c) What protection measures can be provided under the legislation?

It is useful to consider where the protection that can be achieved from a *sui generis* law such as the Pacific Model Law sits within a broader framework of protection. Based on Table 1, a country can utilise a combination of existing IP laws, adapted existing IP laws (through the addition of *sui generis* measures) and IP-based *sui generis* systems (such as legislation based on the Pacific Model Law) as well as common law principles (such as breach of confidence) to achieve a broad framework of protection.

The scope of protection that can be provided by legislation based on the Pacific Model Law includes:

- rights to authorise or prevent the unauthorised reproduction, adaptation and subsequent commercialisation of TKECs;
- appropriation of traditional languages, such as Indigenous and traditional words, symbols and other distinctive signs being used by non-community members outside the traditional context;
- uses of TKECs that are insulting, derogatory and/or culturally and spiritually offensive;
- failure to acknowledge the traditional source of a tradition-based creation or innovation; and
- exploitation of derivative works created by individuals outside of the traditional context.

These measures are similar to the protection usually provided by copyright and related rights, that is, protection against illicit uses, misappropriations and omissions.

3.4.2 Policy questions

The following questions are intended to guide policy-makers through the issues relevant to developing a substantive policy on the scope of protection that is appropriate to their national circumstances. It should be noted that there may be additional questions for policy-makers to consider.

a) What acts regarding TKECs should be regulated?

A central element of protection is the scope of acts that will be regulated. Typical copyright-type exclusive rights extend to acts such as reproduction, adaptation, the making of derivative works and importation. Many existing national laws for the protection of TKECs provide these copyright-style economic rights because the protection for TKECs has been conceived within copyright. In determining which uses should require the PIC of traditional communities, policy-makers may wish to refer to the following list of uses that are regulated in existing laws for the protection of TKECs:

- reproduction;
- adaptation;
- public performance;
- distribution;
- public recitation;
- communication to the public;
- the making of derivative works; and
- importation (of unauthorised copies and adaptations under the law of the importing country).

Policy-makers may also wish to refer to clause 7(2) of the Pacific Model Law:

The following uses of TKECs require the prior and informed consent of the traditional owners:

- a. to reproduce the traditional knowledge or expressions of culture;
- b. to publish the traditional knowledge or expressions of culture;
- c. to perform or display the traditional knowledge or expressions of culture in public;
- d. to broadcast the traditional knowledge or expressions of culture to the public by radio, television, satellite, cable or any other means of communication;
- e. to translate, adapt, arrange, transform or modify the traditional knowledge or expressions of culture;
- f. to fixate the traditional knowledge or expressions of culture through any process such as making a photograph, film or sound recording;
- g. to make available online or electronically transmit to the public (whether over a path or a combination of paths or both) traditional knowledge or expressions of culture;
- h. to create derivative works;
- i. to make, use, offer for sale, sell, import or export traditional knowledge or expressions of culture or products derived therefrom;
- j. to use the traditional knowledge or expressions of culture in any other material form;

if such use is a non-customary use (whether or not of a commercial nature).

Pacific Model Law, Clause 7(2)

It is useful to briefly mention at this point that the legislation should specify the context within which acts will be regulated. For example, in the Pacific Model Law the regulated acts only apply to non-customary use. Therefore, protection is extended only to uses of TKECs outside the traditional or customary context whether or not for commercial gain. This aligns with a guiding principle of the Pacific Model Law that provides that traditional and customary uses, exchanges and transmissions of TKECs, as determined by customary laws and practices and whether or not of a commercial nature, should not be restricted or interfered with by the legislation. This is discussed further under the element 'Exceptions and limitations'.

b) What acts should be excepted from regulation?

It is commonplace for some acts to be exempted from regulation, referred to as 'exceptions' or 'limitations'. This is addressed under the next element, 'Exceptions and limitations'.

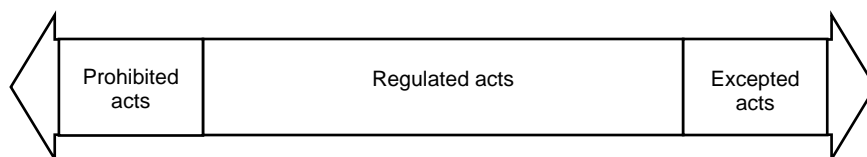
c) Should any acts in relation to TKECs be prohibited?

It is likely that traditional communities may consider that some acts should not be undertaken in any circumstances. Policy-makers should refer to customary laws and practices for guidance in this regard. Prohibiting particular acts not only provides a stronger degree of protection where desirable, it also provides some clarity for prospective users on the boundaries of possible uses.

The Pacific Model Law prohibits any non-customary use of sacred–secret TKECs (clause 28).

d) What is the relationship between prohibited, regulated and excepted acts?

While this is not strictly a policy question, it may assist policy-makers to clarify the matter.



Both prohibited and exempted acts are excluded from the requirement to obtain the PIC of traditional communities, but at opposite ends of the spectrum and in differing ways. Prohibition bars a particular use altogether and therefore the PIC requirement does not apply. Excepted acts, on the other hand, provide that particular uses do not have a PIC requirement and can occur, usually on the proviso that particular conditions are met.

e) What moral rights regarding TKECs should be established?

Moral rights relate to the protection of the personality of the creator or author, the integrity of the work, and similar matters (Sterling 1998: 279). While the scope of moral rights differs in different jurisdictions, certain features are fairly common: moral rights are almost invariably treated in national legislation separately from those sections dealing with economic rights; moral rights are not assignable although they may descend to heirs or successors; and moral rights have the same term of protection as economic rights or a longer term. Also, in civil law jurisdictions, where moral rights and economic rights clash, the moral right is likely to prevail (Sterling 1998: 279).

In determining what moral rights should be established, policy-makers may wish to note that the following types of moral rights frequently appear in both national laws for the protection of TKECs and copyright law:

- the right not to have TKECs subject to insulting, derogatory, cultural and spiritually offensive uses;
- the right of attribution of source in relation to TKECs; and
- the right not to have ownership of TKECs falsely attributed.

There are other types of moral rights, such as the divulgation right (the right to decide when, where and in what form the work will be divulged to any other person or persons) and the retraction right (the right of an author to withdraw a work from publication because of changed opinion), but these do not commonly appear in national laws for the protection of traditional cultural expressions.

f) How should acts regarding TKECs be regulated?

Having determined what should be regulated, the next step is to consider how these acts should be regulated. This has largely been predetermined by:

- the legal form of protection in the Pacific Model Law of exclusive property rights, which enable rights holders to authorise or prevent others from undertaking certain acts; and
- the guiding principle of the Pacific Model Law that traditional communities are the owners, holders and custodians of TKECs and the primary decision-makers regarding their use.

Based on these factors, the Pacific Model Law regulates acts regarding TKECs by establishing that particular uses require the **prior and informed consent** of the traditional owners. This is referred to as a '**traditional cultural right**'. Failure to obtain the PIC of traditional owners to use expressions of culture where required will constitute an illicit use and/or misappropriation (or, for the purposes of

legal proceedings, an ‘infringement’). Therefore, in order to undertake a regulated act, a prospective user would need to obtain the PIC of the traditional community concerned.

At an operational level, the Pacific Model Law establishes an elaborate process regarding how the PIC of the relevant traditional community should be obtained. In terms of the requirement to obtain the PIC of the traditional communities (recalling that sacred–secret TKECs are excluded from the operation of the regime as they cannot be used outside their customary context), the Pacific Model Law treats all TKECs in the same manner. However, there is flexibility for countries to take a different approach if desired. For example, a country may not wish to impose a PIC requirement for all TKECs and may instead prefer that some expressions be more ‘lightly’ regulated. This is usefully illustrated by the ‘three layers of protection’ approach developed in WIPO IGC.

The **three ‘layers’ of protection** are (in descending order of strength):

- i. sacred–secret, confidential or undisclosed TKECs: legal and practical measures could ensure that communities have the means to prevent the unauthorised disclosure, subsequent use of and acquisition and exercise of intellectual property rights over sacred–secret TKECs;
- ii. TKECs of particular cultural or spiritual value to a community: legal and practical measures could ensure that the relevant traditional community can prevent specified acts taking place without its free, prior and informed consent; and
- iii. other TKECs: legal and practical measures could take a softer approach to ensure that:
 - i. the relevant traditional community is identified as the source of any work or other production adapted from TKECs;
 - ii. any distortion, mutilation or other modification of, or other derogatory action in relation to, a TKEC can be prevented and/or is subject to civil or criminal sanctions;
 - iii. any false, confusing or misleading indications or allegations that, in relation to goods or services that refer to, draw upon or evoke the TKECs of a community, suggest any endorsement by or linkage with that community can be prevented and/or are subject to civil or criminal sanctions; and
 - iv. where the use or exploitation is for gainful intent, there should be equitable remuneration or benefit-sharing on terms determined by a competent authority (where appropriate) in consultation with the relevant community.

Based on WIPO IGC document WIPO/GRTKF/IC/9/4, Article 3: ‘Acts of Misappropriation (Scope of Protection)’

The ‘three layers’ approach is intended to provide supple protection that is tailored to different forms of cultural expression and the various objectives associated with their protection. It reflects a combination of exclusive and equitable remuneration rights and a mix of legal and practical measures.

Policy-makers may wish to note the following regarding this approach.

- Sacred–secret, confidential or undisclosed TKECs would receive the strongest form of protection drawing on existing protection for confidential or undisclosed information, building also upon case law to this effect.¹¹

¹¹ *Foster v. Mountford*. 1976. 29 FLR 233.

- TKECs of particular cultural or spiritual value to a community would receive strong protection in the form of the right of ‘free, prior and informed consent’, but not as strong as that for sacred–secret TKECs. The right of ‘free, prior and informed consent’:
 - is akin to an exclusive property right in IP terms and could apply to the kinds of acts usually covered by IP laws;
 - would grant a community the right to either prevent or authorise, on agreed terms including regarding benefit-sharing, the use of a TKEC; and
 - could be subject to prior notification or registration in a public register, depending on decisions taken under the element ‘Formalities’ (recalling that the use of registration or notification is only an option and for decision by relevant communities).
- Other TKECs (which could be those not registered or notified, depending on the decision taken under ‘Formalities’) would receive the softest protection and would not be subject to prior authorisation. Instead, protection would concern *how* the TKECs were used. The TKECs could be used – as a source of creative inspiration, for example – without the need for prior consent or authorisation, in furtherance of creativity and artistic freedom. However, *how* they are so used would be regulated, drawing mainly upon moral rights and unfair competition principles as well as the payment of equitable remuneration or equitable benefit-sharing, to be determined by a competent authority. This approach is akin perhaps to a compulsory licence or equitable remuneration approach, found in national *sui generis* laws concerning TKECs as well as in conventional copyright law concerning musical works already fixed in sound recordings.¹²

3.4.3 Further information

Other sources of information regarding the scope of protection include:

- WIPO. 2005. *The Protection of Traditional Cultural Expressions/Expressions of Folklore: Revised Objectives and Principles*. WIPO/GRTKF/IC/8/4. Geneva: WIPO. Pages 19–23 of the Annex discuss the ‘three layers of protection’ approach.
- J.A.L. Sterling. 1998. *World Copyright Law*. London: Sweet & Maxwell. Chapters 8 and 9 provide information on the types of moral rights and economic rights respectively used in copyright law.

¹² Article 13, Berne Convention, 1971.

3.5 Exceptions and limitations

It is generally recognised that in certain cases, restrictions should be placed on the exercise or scope of established rights, referred to as ‘exceptions’ or ‘limitations’. Exceptions and limitations provisions can stipulate that a right is not infringed by the doing of certain acts, the right does not subsist in relation to a particular class of subject matter, the right does not apply to things done by the right holder, and/or the right does not apply to certain categories of work.

Restrictions on the exercise or scope of established rights may also occur through the application of legal or other principles that are separate from the law of intellectual property, such as freedom of speech or international human rights standards. The rationale for such restrictions can include consideration of the public interest and prevention of monopoly control.

In the context of protecting TKECs, many traditional knowledge holders have stressed that any IP-type protection should be subject to certain limitations so as not to interfere with the use of TKECs by traditional communities. This is reflected in a guiding principle of the Pacific Model Law that recognises that the continued use, exchange, transmission and development of TKECs within the customary context by the relevant traditional community, as determined by customary laws and practices, should not be restricted or interfered with.

The development of this element involves identifying the exceptions that will be provided for in the legislation regarding uses of TKECs (i.e. uses that are exempt) as well as defining the limitations on the scope of protection.

For simplicity, the Guidelines use ‘exceptions’ to describe those uses that are excepted from the need to seek authorisation, and ‘limitations’ to describe limits on the scope of protection. There is, however, no definition in international instruments of the difference between an exception and a limitation. Sometimes what is called a limitation in one law is referred to as an exception in another. ‘Exceptions and limitations’ is often used to cover all types of restrictions on the exercise or scope of established rights.

3.5.1 Policy considerations

At the national level, a number of factors may influence the determination of the exceptions and limitations to be introduced. Of particular significance will be the basic philosophy of a country regarding the rationale of copyright. This will be relevant in setting the parameters of restrictions at both the legislative stage and in litigation before the courts (Sterling 1998: 376). It is apparent from existing national laws that different countries have different concepts as to what restrictions should be admitted and the extent of such restrictions. For example, in the United States, while copyright law is considered to secure a fair return for an author’s creative labour, its ultimate aim is to provide an incentive to stimulate the creation of useful works for the general public good.¹³ In contrast, the French system is based on the concept of the pre-eminent position of the individual author and the recognition of the principle that the author’s right is a right of personality that must be accorded the highest respect.

At the international level, Article 9(2) of the Stockholm Act of the Berne Convention introduced what is commonly known as the ‘three-step test’, which, in general, governs the way in which exceptions and limitations are to be applied. Countries are able to make their own decisions, within certain parameters, regarding the restrictions to be imposed.

¹³ See *Twentieth Century Music Corp. v. Aiken* 422 US at 156, 186 USPQ at 67, quoted in *Harper and Row*, supra, 471, US at 558.

The three conditions that must be observed in the introduction of any limitation on or exception to the reproduction right are:¹⁴

- i. the limitation or exception can only apply in certain special cases (indicating that general limitations and exceptions to the reproduction right would not be permissible);
- ii. the limitation or exception must not conflict with normal exploitation of the work (covering the unauthorised making of reproductions in areas that are usually within the control of the right holder); and
- iii. the limitation or exception must not unreasonably prejudice the legitimate interests of the author (covering restrictions that would prevent the author from participating in the economic benefits flowing from the use of the work).

Of course, these conditions apply to the development of copyright law, and even then only if a country is party to the Berne Convention (also referred to as a Union country). However, policy-makers may find this test to be useful. Policy-makers may also wish to note that Article 13 of the TRIPS Agreement (the Agreement on Trade-Related Aspects of Intellectual Property Rights – Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, 1994) extended the application of the ‘three-step test’ from the reproduction right to any of the exclusive rights guaranteed under the TRIPS Agreement (Sterling 1998: 356).

In the context of protecting TKECs, a core policy consideration is striking an appropriate balance between protection against misappropriation and misuse of TKECs, and the freedom and encouragement of further development and dissemination of expressions of culture. As well, expressions of culture form a living body of human culture, and therefore a key policy consideration is ensuring that they are not protected too rigidly.

3.5.2 Policy questions

a) What uses of TKECs should be excepted from the PIC requirement under the legislation?

In copyright law, exceptions and limitations introduced by national laws and international and regional instruments cover a range of activities and vary considerably from country to country. Some general categories frequently appear: private use; criticism or review; education (e.g. libraries and research); and use of computer programs and databases. National laws may, of course, contain other or additional restrictions on the exercise of rights. Examples include reporting of current events, photography of artistic works on public display, and administrative and judicial procedures.

The Pacific Model Law contains typical copyright exceptions that restrict the exercise or scope of ‘traditional cultural rights’. These are not obligatory exceptions and are intended only to provide guidance for policy-makers.

The Pacific Model Law provides that PIC is not required for any of the following uses:

- a. face-to-face teaching;
- b. criticism or review;
- c. reporting news or current events;
- d. judicial proceedings; and
- e. incidental use.

Pacific Model Law 2002, Clause 7(4)

¹⁴ Article 9(2) reads ‘It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.’

Within WIPO IGC, the following have been identified as possible excepted uses:

- illustration for teaching and learning;¹⁵
- non-commercial research or private study;
- criticism or review;
- reporting news or current events;
- use in the course of legal proceedings;
- the making of recordings and other reproductions of TKECs for inclusion in an archive or inventory for non-commercial cultural heritage safeguarding purposes;¹⁶ and
- incidental uses.

Further exceptions could be drawn from existing IP principles, in particular, copyright exceptions. However, not all typical copyright exceptions may be appropriate as they may undermine customary rights under customary laws and protocols. An example could be an exception that allows a sculpture or work of artistic craftsmanship permanently displayed in a public place to be reproduced in photographs or drawings and in other ways without permission (McDonald 1997: 44). Similarly, national copyright laws often allow public archives, libraries and the like to make reproductions of works and keep them available for the public. However, doing so in respect of copyrighted cultural expressions may raise cultural and spiritual issues.

b) Should conditions be established for the application of the exception?

In some cases, national laws provide that an exception is only applicable when certain conditions or procedures are observed. Other national laws do not: the defendant in an action for infringement must show that the conduct in question falls within the scope of a statutory exception.

In the context of protection of TKECs, countries can include conditions that must be met in order for the exception to be applicable. For example, there could be a condition that in each case a use must be compatible with fair practice, the relevant community is acknowledged as the source where practicable and possible, and such uses would not be offensive to the relevant community. The Pacific Model Law provides that the user must make sufficient acknowledgement of the traditional owners by mentioning them and/or the geographical place from which the TKECs originated.

A user of traditional knowledge or expressions of culture mentioned in clause 7(4)(a)–(d) must make sufficient acknowledgement of the traditional owners by mentioning them and/or the geographical place from which the traditional knowledge or expressions of culture originated.

Pacific Model Law, Clause 7(5)

¹⁵ While exceptions for teaching purposes are sometimes limited to ‘face-to-face’ teaching such as in the Pacific Model Law, special exceptions for distance learning may also be appropriate. The term ‘teaching and learning’ could be used to encompass both scenarios.

¹⁶ National copyright laws in some cases allow public archives, libraries and the like to make, for non-commercial safeguarding purposes only, reproductions of works and expressions of folklore and keep them available for the public (an example is the UK’s Copyright, Designs and Patents Act 1988). In this respect, appropriate contracts, IP checklists and other guidelines and codes of conduct for museums, archives and inventories of cultural heritage are under development by WIPO.

c) What limitations should be applied on the scope of protection of the legislation?

As noted previously, many traditional knowledge holders have stressed that any intellectual property-type protection of TKECs should be subject to certain limitations so as not to protect them too rigidly. Overly strict protection may stifle creativity and cultural exchanges, as well as be impracticable in its implementation, monitoring and enforcement.

In terms of defining the limitations of the scope of protection, it is widely acknowledged that protection should not prevent communities themselves from using, exchanging and transmitting amongst themselves expressions of their cultural heritage in customary ways and in developing them by continuous re-creation and imitation. This is reflected in a guiding principle of the Pacific Model Law that states that the continued use, exchange, transmission and development of TKECs within the traditional and customary context by members of the relevant traditional community, as determined by customary laws and practices, should not be interfered with or restricted by the legislation.

Stated differently, this means that protection will extend only to utilisations of TKECs taking place outside the traditional or customary context (*ex situ* uses), whether or not for commercial purposes. As it is utilisations outside the traditional or customary context that have caused most concern to traditional communities, this type of limitation is a useful way of achieving a balance between protection and ongoing use and development of TKECs by traditional communities.

The legislation could provide that all members of a community, or even all nationals of a country, would be allowed, in accordance with traditional or customary practice, unrestricted use of TKECs, or certain of them so specified.

3.5.3 Further information

Other sources of information regarding exceptions and limitations include:

- WIPO. 2005. *The Protection of Traditional Cultural Expressions/Expressions of Folklore: Revised Objectives and Principles*. WIPO/GRTKF/IC/8/4. Geneva: WIPO. Pages 26–28 of the Annex discuss exceptions and limitations.
- J.A.L. Sterling. 1998. *World Copyright Law*. London: Sweet & Maxwell. Chapter 10 provides information on exceptions and limitations in copyright law.

3.6 Management of rights

Having progressed through the development of rights regarding TKECs, the next step is to consider how those rights will be managed. Under copyright law, this would involve consideration of whether the rights holder will exercise the rights, or assign or license their use, or confide their administration to another (Sterling 1998). In the context of the protection of TKECs, it is generally considered that the scope needs to be much broader.

There is, of course, the standard exercising of rights and consideration of how and to whom prospective users apply to use TKECs. However, there are also a number of additional measures that can be used to support the management process, such as the provision of technical assistance and training to traditional communities as well as awareness-raising and cultural sensitisation programmes with industry and the general public. Consequently, the phrase ‘management of rights’ is purposely used to convey that this element requires broader consideration than the typical ‘exercise of rights’ under copyright law.

This broad approach is particularly critical from a prevention perspective. Prevention is an important component of protection. Traditional communities frequently emphasise that when their TKECs are misappropriated, the damage is often of a spiritual nature that cannot be remedied through monetary compensation or, in some cases, at all. It is therefore important that a proactive approach is taken to try to minimise the incidence of infringement as much as possible.

Given this broad conception of the management of rights, it becomes apparent that the state will have to play a role in the process. This is reflected in a guiding principle of the Pacific Model Law that recognises the role of the state in providing assistance to traditional communities in the management and enforcement of their rights in TKECs. The use of a state body also provides an identifiable point for prospective users of TKECs to engage with that can promote certainty. Under the Pacific Model Law, a state body – referred to as the Cultural Authority – is established to fill this role. The nature of assistance and guidance will be for individual countries to determine.

The development of this element involves clarifying what the management of rights will consist of and who will carry out the various aspects, including consideration of the respective roles of the state and traditional communities. It is also useful to note at this point that matters of policy relating to the management of rights should be included in the legislation, while matters of detail should be included in delegated or secondary legislation.

3.6.1 Policy considerations

Key policy considerations in this area include striking a balance between acknowledging the rights of traditional communities to control access to and use of their TKECs on the one hand, and on the other hand recognising the capacity and resourcing constraints that many communities face and the need to provide assistance in this regard.

3.6.2 Policy questions

The following questions are intended to assist policy-makers to develop a framework for the management of rights under the legislation. It should be noted that there may be additional questions for policy-makers to consider.

a) What should the ‘management of rights’ consist of?

Given that the management of rights has a broader scope than the typical ‘exercise of rights’ under copyright law, policy-makers will need to consider what should be encompassed within that scope, based on their national circumstances and other relevant factors.

At a minimum, the management of rights involves the administration of rights, including consideration of how and to whom prospective users apply to use TKECs. Additional measures and initiatives that can form part of the management of rights include:

- the provision of technical assistance to traditional communities (such as capacity building, training and education programmes);
- maintaining relationships with regional or government bodies in other countries within the region with responsibilities for the protection of TKECs; and
- undertaking prevention work with industry and the general public (such as developing a code of ethics for industry groups, and conducting public awareness campaigns and cultural sensitisation activities).

In determining the scope of the management of rights, policy-makers may find it useful to consider the aforementioned measures and initiatives as well as clause 37 of the Pacific Model Law. It is important to bear in mind that the functions listed in clause 37 are intended to be indicative only. Policy-makers may also find it useful to proceed on the basis of identifying what needs to be done and then identifying who will carry out those tasks as appropriate.

Functions of the Cultural Authority

The functions of the Cultural Authority may include the following:

- (a) to receive and process applications under Part 4;
- (b) to monitor compliance with authorised user agreements and to advise traditional owners of any breaches of such agreements;
- (c) to develop standard terms and conditions for authorised user agreements;
- (d) to provide training and education programmes for traditional owners and users of TKECs;
- (e) to develop a Code of Ethics in relation to use of TKECs;
- (f) to issue advisory guidelines for the purposes of this Act;
- (g) to liaise with regional bodies in relation to matters under this Act;
- (h) to maintain a record of traditional owners and/or knowledge and expressions of culture;
- (i) if requested to do so, to provide guidance on the meaning of customary use in specific cases;
- (j) such other functions as are conferred on it by this Act.

Pacific Model Law, Clause 37

b) Who will carry out the management of rights?

Once a country has determined what measures will be encompassed within the scope of the management of rights, the next step is to consider who will carry out the various measures. Given the guiding principle of the Pacific Model Law, which recognises the role of the state in providing assistance to traditional communities in the management of their rights, there is an expectation that the state will have a role. Countries will therefore need to establish a body, or assign an existing body. While there is this requirement, countries have considerable flexibility to determine what roles and

functions the state body will have and what roles traditional communities will have. In some countries, there may be additional bodies, such as pan-tribal organisations, that should have a role as well.

Some management measures, such as technical assistance and capacity-building work with traditional communities, would most likely be carried out or supported by the state, as would bilateral and regional relationship management. Prevention work through awareness campaigns and the development of codes of ethics may be more suitably progressed as joint initiatives between traditional communities and the state, depending on resourcing constraints.

However, the administrative aspect of the management of rights is not so straightforward. A complex policy question needs to be addressed: *To whom should prospective users have to apply to use TKECs?*

Two guiding principles of the Pacific Model Law are instructive in this regard:

- recognise that traditional communities are the owners, rights holders and custodians of TKECs and the primary decision-makers regarding their use; and
- respect and give effect to the right of traditional communities to control access to their TKECs, especially those of particular cultural or spiritual value or significance, such as sacred–secret TKECs.

Under the Pacific Model Law, authorisation can be obtained only from the relevant traditional community or communities.¹⁷ Prospective users have the option of applying to a state body (the Cultural Authority) that then performs an intermediary function between the prospective user and the community, or applying directly to the traditional community. However, in some circumstances traditional communities may not wish to or cannot exercise rights directly. In this case, a state body, such as an agency, authority or statutory body, may be designated to act at all times at the request of and on behalf of relevant communities.

In identifying to whom prospective users would have to apply to use TKECs, countries may find the following approaches, which are used in existing laws for the protection of traditional cultural expressions, to be instructive:

- i. the relevant traditional community; or
- ii. a state body (whether existing or specially created); or
- iii. both a state body and the relevant traditional community; or
- iv. a collective management organisation.

An explanation of each approach follows.

Option i: The relevant traditional community

Under this option, a prospective user would apply directly to the relevant traditional community for authorisation to use the expression and the underlying traditional knowledge concerned. This approach could be considered to be the ideal arrangement as traditional communities themselves will decide whether or not to grant authorisation. It therefore gives recognition to the principle that traditional communities are the primary decision-makers regarding their TKECs.

However, at a practical level a number of limitations have been identified with this approach. For example, there are often capacity issues within communities that can negatively impact on the

¹⁷ There is an exception where no traditional owners can be identified or no agreement has been reached about ownership (clause 19, Pacific Model Law).

negotiation of a fair and equitable agreement. Moreover, communities may face resourcing constraints that hamper their ability to obtain external advice on the proposed use and the terms and conditions of the agreement.

Option ii: A state body

Where the relevant communities are not able or do not wish to exercise rights directly, a state body may be designated to act at all times at the request of and on behalf of the communities. In this case, the rights holder would confide the administration of their rights to the state body so that the body could grant authorisation, where appropriate, on behalf of the traditional community concerned.

Many Indigenous peoples, however, have expressed serious reservations about any state body acting on their behalf. This underscores the need for any state body to derive its entitlement to act from the explicit wishes and authority of the community concerned.

An existing office, authority or society could be used and it could be governmental, quasi-governmental or non-governmental. Many national laws providing *sui generis* protection for traditional cultural expressions utilise this approach. For example, the Tunisian Copyright Act 1994 provides that ‘... any transcription of folklore with a view to exploitation for profit shall require authorisation from the Ministry responsible for culture against payment of a fee for the benefit of the welfare fund of the Copyright Protection Agency established pursuant to this Law’.¹⁸ The Nigerian Copyright Act 1997 vests the right to authorise acts in relation to folklore in the Nigerian Copyright Commission.¹⁹ The Indigenous Peoples Rights Act of 1997 of the Philippines also uses this approach.

This approach may also be useful where there are shared expressions across a number of traditional communities in the same country and it is difficult to agree upon an equitable way to distribute benefits received across the communities involved. The agency could collect the benefits and transfer them to an initiative that benefits all the communities.

If this approach is taken, policy-makers will need to address a number of questions, including the following.

- What consultation, if any, should the state body have with the relevant traditional community? While this approach is based on the rights holder confiding the administration of their rights to a state body, it may not be preferable to grant the body an absolute power in this regard. For example, a country may wish to include a provision establishing that where authorisations are granted by an agency, such authorisations should be granted only in appropriate consultation with the relevant community, in accordance with their traditional decision-making and governance processes.
- What authorisations can be granted by the state body? It may not be desirable for the body to have an absolute power to grant authorisations, and some parameters may be necessary. At a minimum, it could be expected that authorisations should comply with the scope of protection provided for the TKECs concerned. A provision could also be included specifying that in order to act on behalf of a community, a state body would need to negotiate the scope of its authority with the community. This may, for example, include specified restricted uses that require consultation with the community concerned.
- What should the authority do with the benefits received? The state body may receive benefits for the use of particular TKECs. A country may wish to include a provision specifying that monetary or non-monetary benefits collected by the authority for the use of expressions of culture should be provided directly by the authority to the community concerned.

¹⁸ Section 7, Tunisian Copyright Act 1994.

¹⁹ Section 28, Nigerian Copyright Act 1997.

This body could also carry out various tasks associated with the management of rights. These other functions are discussed further in this section of the Guidelines.

Option iii: Both a state body and the relevant traditional community

Under this option, the state body plays a primarily administrative role in the authorisation process, although in some instances it can grant authorisation. Both the state body and the relevant traditional community have specified roles in the authorisation process. The state body, whether existing or specially created, acts as a contact point for prospective users and receives applications for authorisation to use TKECs if communities are not able to, and then forwards the applications to the relevant communities. The state body acts in the interests of the relevant communities and mediates between the communities and users. This is the approach taken in the Peru Law 2002, which provides for a 'Competent National Authority' and an 'Indigenous Knowledge Protection Board', each having various specific duties. Prospective users are also able to apply directly to the relevant traditional community if desired, although the state body will carry out a 'watchdog' role to ensure that the interests of the community are appropriately promoted.

The Pacific Model Law takes a similar approach and provides for the establishment of a 'Cultural Authority' to which application can be made by prospective users of particular TKECs to obtain the PIC of the 'traditional owners'. The prospective user can also apply directly to the community concerned. Where an application is made to the Cultural Authority, the Cultural Authority has to identify the traditional owners and act as a liaison between the prospective user and traditional owners, including resolving uncertainties or disputes as to ownership. If no 'traditional owners' can be found or there is no agreement as to ownership, the Cultural Authority can be determined to be the traditional owner. In cases where the prospective user deals directly with the traditional owners, the Cultural Authority still has a role in providing advice on the terms and conditions of the agreement.

If this approach is taken, policy-makers will need to address a number of questions, including the following.

- What authorisations can be granted by the state body? The Pacific Model Law provides that where no 'traditional owners' can be found or there is no agreement as to ownership, the Cultural Authority can be determined to be the traditional owner. It can then grant authorisations, if appropriate. For countries using this approach, it is important that any authority of a state body to act is obtained from the traditional communities. In some countries, it may not be appropriate that a state body grant authorisations in any situation. A provision could be included in the legislation specifying that in order to act on behalf of a community, a state body needs to negotiate the scope of its authority with the community concerned.
- Should the state body have a role in determining whether PIC has been obtained? Under the Pacific Model Law clause 7(2), uses of TKECs are regulated through a requirement to obtain the PIC of the traditional owners. Countries may wish to consider whether indicators of what constitutes PIC are needed. Clause 23(1) of the Pacific Model Law provides that if an authorised user agreement is entered into, traditional owners are deemed to have given their PIC. Some of the characteristics of PIC that are often identified are: all members of the communities affected consent to the decision; consent is determined in accordance with customary processes; there is full disclosure of the intent and scope of the proposed activity; and decisions are made in a language and process understandable to the communities.
- Should the state body have a role in determining equitable compensation and, as appropriate, facilitating and administering the payment and use of equitable compensation?
- How should prospective users make application to use TKECs? Having determined who prospective users make application to, the secondary question is how this is done. Matters of operational detail in this regard would typically form part of secondary legislation rather than primary legislation. However, as this issue forms part of the broader framework of the management of rights, it is useful to make brief reference to the types of issues that would need to

be addressed. They include guidance on procedures for applications for authorisations; the information any application for authorisation has to contain; allowing for the collecting of fees, if any, for authorisations and the purpose for which the collected fees must be used; public notification procedures; and the terms and conditions upon which authorisations may be granted by the authority.

Option iv: A collective management organisation

Another option is the use of a collective management organisation, which is potentially the most practical means of administering rights in TKECs. Systems of collective administration and management of IP rights are well developed for copyright and certain related rights. Increasingly, the exercise of rights is being confided to collecting societies that have the resources and expertise to act effectively for the rights holder (Sterling 1998: 393). Typically, the organisation is registered as a legal entity (company, etc.) under the relevant law. There is often a board, consisting of, for example in the case of authors, representatives of authors and publishers.

In the case of TKECs, rights holders are compensated for use of their material through licence schemes. For example, through these schemes approved collecting organisations would be paid for the reproduction of expressions. The collecting society would then be responsible for distribution of the money to their members. Alternatively, a national trust fund could be established, into which part of any funds obtained from licences granted in relation to TKECs are paid. The fund could be used to, for example, assist the preservation of cultural practices within traditional communities.

3.6.3 Further information

Another source of information regarding the management of rights is:

- J.A.L. Sterling. 1998. *World Copyright Law*. London: Sweet & Maxwell. Chapter 12 provides information on the exercise of rights in copyright law.

3.7 Term of protection

It is commonplace for IP laws, such as copyright and patent law, to establish a term of protection following which the protected subject matter enters the public domain for the common good, thereby facilitating and encouraging disclosure of innovation. Copyright generally provides for a term of protection based on the life of the author plus a fixed term of years. For the related rights of performers, producers, broadcasters, etc., protection is usually determined on the basis of a fixed term of years beginning at a certain point in time.²⁰

However, many traditional communities desire indefinite protection for at least some aspects of expressions of their traditional cultures, and in this instance, most branches of the IP system do not meet their needs.²¹ On the other hand, it is generally seen as integral to the balance within the IP system that the term of protection not be indefinite so that works ultimately enter the 'public domain'.

The development of this element involves determining the term of protection in relation to the nature of TKECs, particularly where different layers of TKECs have been identified. It also involves consideration of whether particular conditions should be invoked in order to maintain the term of protection.

3.7.1 Policy considerations

A fundamental policy consideration is striking an appropriate balance between traditional knowledge holders' desire for indefinite protection and that of the promotion of the public domain for the general public good.

3.7.2 Policy questions

The following questions are intended to assist countries to develop a policy regarding the term of protection that is appropriate to their national circumstances. It should be noted that there may be additional questions for policy-makers to consider.

a) Should all TKECs receive the same term of protection?

Depending on decisions taken under the element 'Subject matter of protection', a country may have determined that there are different layers of TKECs and that for the purposes of protection, the layers should be treated differently. Under the element 'Scope of protection', different strengths of protection were discussed for different layers (referred to as the 'three layers of protection' approach).

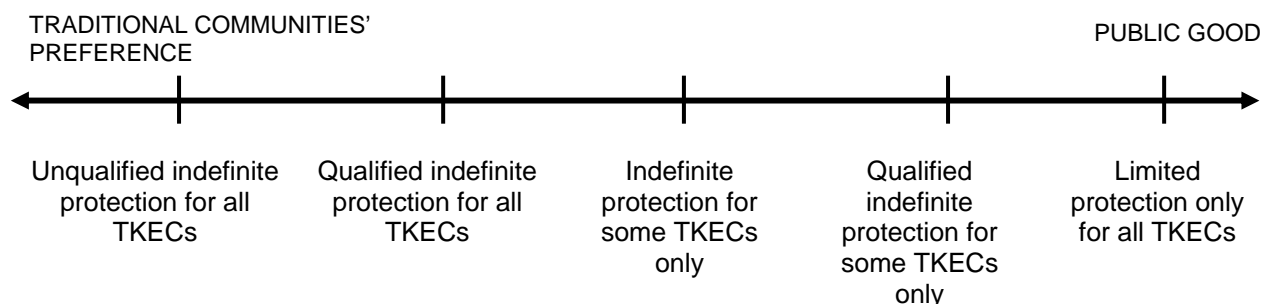
It may be considered inappropriate that a single term of protection be used to cover all TKECs. Therefore, in determining the term of protection, countries may need to consider whether different terms of protection are necessary to accommodate different layers of TKECs. For example, indefinite protection could be used only for sacred–secret expressions, while those expressions of significance to a traditional community could also qualify for indefinite protection but only if particular conditions are met and maintained.

The Pacific Model Law does not establish a time limit. Clause 9 provides that traditional cultural rights continue in perpetuity. This is a matter that countries have the flexibility to change if desired. The

²⁰ The general international term of protection for authors' rights is the life of the author plus 50 years (by virtue of the Berne Convention and the TRIPS Agreement) and the fixed term of protection is 50 years for the related rights. See Sterling 1999: 380.

²¹ Trademarks are renewable, and unfair competition protection is indefinite. Extended protection in the copyright domain is also not entirely without precedent. While the Berne Convention and the TRIPS Agreement stipulate 50 years as a minimum period, countries are free to protect copyright for longer periods.

range of options regarding the possible terms of protection for TKECs can be loosely illustrated using a spectrum, as follows.



Each of these options caters for the interests of traditional communities and the public good in a different way.

- i. Unqualified indefinite protection for all TKECs: All TKECs would receive indefinite protection and protection would not be linked to any conditions. This is the approach taken in the Pacific Model Law as well as the Model Provisions 1982.
- ii. Qualified indefinite protection for all TKECs: This option provides the same coverage of protection for TKECs but qualifies the protection with conditions that must be met in order for protection to be maintained.
- iii. Indefinite protection for some TKECs only: The policy rationale here is that it may be inappropriate that a single term of protection be used to cover all TKECs.
- i. Qualified indefinite protection for some TKECs only: Indefinite protection would be available for some TKECs provided particular conditions were met. Such conditions could be the criteria for protection established under the legislation.
- ii. Limited protection only for all TKECs: No distinction would be drawn between different layers of TKECs.

b) Should the term of protection be linked to particular conditions?

If an expression of culture and its underlying traditional knowledge receive indefinite protection, one means for ensuring that the protection remains valid is to impose conditions that must be met for protection to continue. For example, such conditions could be that the expression continues to be maintained and used by, and is characteristic of, the relevant community. This would entail a trademark-like emphasis on current use, so that once the community that the TKEC is characteristic of no longer uses the TKEC or no longer exists as a distinct entity, protection for the TKEC would lapse (Scafidi 2001: 793).

Such an approach has the merit of giving effect to customary laws and practices and drawing upon the very essence of the subject matter of protection. When a TKEC ceases to be characteristic of and ceases to identify a community, it ceases by definition to be a TKEC for the purposes of protection under the legislation, and it follows that protection should lapse. This general line of thinking is reflected in the US Indian Arts and Crafts Act 1990, which excludes from protection products that are no longer 'Indian' because, for example, they have become 'industrial products'. This act sets out in some detail what constitutes an 'Indian product'. The Panama Law 2000 seems to link the term of protection to the protected subject matter continuing to display the characteristics that qualified it for protection in the first place (as protection is indefinite rather than unlimited).

If any notification or registration requirements (discussed in 'Formalities' below) are considered useful, and depending also on their legal effects, the period of protection may also be linked to the maintenance of registration.

3.7.3 Further information

Another source of information regarding the term of protection is:

- J.A.L. Sterling. 1998. *World Copyright Law*. London: Sweet & Maxwell. Chapter 11 provides information on the term of protection in copyright.

3.8 Formalities

This element concerns how protection will be acquired and maintained under the legislation, referred to as 'formalities'. This should not be confused with how authorisation to use TKECs will be obtained.

The Pacific Model Law does not contain a formalities provision. Automatic protection is granted without formalities. The policy rationale for this is that the imposition of formalities has been identified by traditional knowledge holders as having a significant bearing on the accessibility of protection. There is flexibility to modify this policy if countries wish to incorporate greater certainty and precision.

The development of this element involves identifying how protection will be acquired under the legislation.

3.8.1 Policy considerations

Important considerations for policy-makers include the need for practically feasible formalities and avoiding excessive administrative burdens for rights holders and administrators alike. At the same time, it is important to be cognisant of the need for transparency and certainty, particularly for external researchers and other users of TKECs in their relations with traditional communities.

3.8.2 Policy questions

The following questions are intended to assist countries to develop a policy regarding formalities that is appropriate to their national circumstances. It should be noted that there may be additional questions for policy-makers to consider.

a) How should protection be acquired?

There are three broad approaches that are used across existing laws for the protection of traditional cultural expressions regarding how protection is acquired:

- i. automatic protection without formalities: Protection is provided automatically without formalities so that it is available as of the moment an expression is created, similar to copyright. As noted above, examples of this approach include the Pacific Model Law 2002 and the Model Provisions 1982;
- ii. a registration or notification system: An alternative to automatic protection is to provide for some kind of registration, possibly subject to formal or substantive examination. A registration or notification system is often used to provide greater transparency and certainty, which can be important for users of TKECs and researchers. Existing laws that utilise this approach include the Panama Law 2000 and the Peru Law 2002. A registration system may merely have declaratory effect, in which case proof of registration would be used to substantiate a claim of ownership, or it may constitute rights; and
- iii. a hybrid of automatic protection and registration: This approach reflects the general principle that TKECs should be protected without formality following copyright principles and in an endeavour to make protection as easily available as possible, but requiring some form of registration or notification for those expressions that would receive strong protection, that is, sacred–secret expressions (ensuring, though, that registration should not entail the inappropriate disclosure of such material) and expressions of particular cultural or spiritual significance for which strong PIC-based protection would be applicable. This approach also provides different treatment for different layers of TKECs.

If automatic protection is considered appropriate, policy-makers may wish to consider whether or not it would be beneficial to add a specific provision to the legislation clarifying this.

If registration or notification is considered appropriate, policy-makers would need to consider further questions of implementation. Secondary legislation or administrative measures could provide guidance on issues such as:

- the manner in which applications for notification or registration should be made;
- to what extent and for what purposes applications are examined by the registration office;
- measures to ensure that the registration or notification of TKECs is accessible and affordable;
- public access to information concerning which TKECs have been registered or notified;
- appeals against the registration or notification of TKECs;
- the resolution by the registration office of disputes relating to which community or communities should be entitled to benefit from the protection of a TKEC, including competing claims from communities from more than one country; and
- the legal effect of notification or registration.

While a notification or registration system may have initial application at the national level, thus implying national registers or other notification systems, eventually some form of regional and international register could form part of regional and international systems of protection. Such an international system of notification/registration could perhaps draw from existing systems such as Article 6*ter* of the Paris Convention or the registration system provided for in Article 5 of the Lisbon Agreement for the International Registration of Appellations of Origin 1958.

If a country prefers the hybrid approach, the implementation questions outlined regarding notification and registration would also be applicable. There would be no need to register or notify sacred–secret expressions as these would be separately protected. The registration option would be applicable only in cases where communities wished to obtain strict, PIC protection for TKECs that were already known and publicly available and of particular cultural or spiritual value or significance. Policy-makers may wish to note the following regarding how this approach could be implemented.

- Only a community that claims protection of a particular expression and the underlying traditional knowledge may register or notify, or, in cases where the community is not able to do so, a competent authority with rights management responsibilities can do so, acting at the request of and in the interests of the community.
- Registration or notification need not be an obligation: protection could remain available for unregistered expressions. The registration option is applicable only in cases where communities wish to obtain strict, PIC protection for expressions that are already known and publicly available.
- Registration or notification can be declaratory only and not constitute rights. This is for individual countries to determine. Without prejudice thereto, entry in the register could presume that the facts recorded therein are true unless proven otherwise, and also not affect the rights of third parties.
- To the extent that such registration or notification may involve the recording or other fixation of the TKECs concerned, any IP rights in such recordings or fixations could vest in or be assigned to the relevant community.
- Information on and representations of the TKECs that have been so registered or notified could be made publicly accessible at least to the extent necessary to provide transparency and certainty to third parties as to which TKECs are so protected and for whose benefit.

- The competent authority receiving such registrations or notifications could resolve any uncertainties or disputes as to which communities – including those in more than one country – should be entitled to registration or notification or should be the beneficiaries of protection, using customary laws and processes, alternative dispute resolution and existing cultural resources, such as cultural heritage inventories, as far as possible. In so far as taking existing cultural resources into account, the authority could refer also to cultural heritage inventories, lists and collections such as those established under the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage 2003. There may, more broadly, be some opportunities for developing synergies between inventories established or being established for cultural heritage preservation purposes (such as States Parties are obliged to do under the UNESCO Convention referred to) and the kind of registers or notification systems suggested here. Indeed, measures could be developed to ensure that cultural heritage inventories, lists and collections reinforce, support and facilitate the implementation of *sui generis* provisions for the protection of TKECs (UNESCO 2005). To this end, WIPO is developing IP protocols and best practices for the recording and digitising of intangible cultural heritage.²² These protocols and best practices will be of assistance to communities, museums, archives, cultural agencies and others who collect, record, make inventories of, digitise and make available elements of intangible cultural heritage. They will help such parties to identify IP issues, clarify IP options and develop IP strategies that further their overall safeguarding objectives.

3.8.3 Further information

Other sources of information regarding formalities include:

- WIPO. 2005. *The Protection of Traditional Cultural Expressions/Expressions of Folklore: Revised Objectives and Principles*. WIPO/GRTKF/IC/8/4. Geneva: WIPO. Pages 32–36 of the Annex provide information on formalities.
- J.A.L. Sterling. 1998. *World Copyright Law*. London: Sweet & Maxwell.

²² See <http://www.wipo.int/tk/en/folklore/culturalheritage/index.html>.

3.9 Legal proceedings (sanctions and remedies)

It is common for countries to have civil remedies as well as criminal sanctions for copyright infringement. Similarly, in the context of the protection of traditional cultural expressions, it has been broadly acknowledged that both civil and criminal actions should be available where the rights of traditional communities have been breached. The development of this element involves prescribing the civil and criminal legal proceedings in this regard.

3.9.1 Policy questions: civil proceedings

Civil law is not primarily concerned with punishment; this is the domain of criminal law. The remedies provided by civil law have other purposes, such as compensation, the remedying of wrongs and stopping unlawful conduct. There are exceptions to this general principle, in particular the civil remedy of exemplary damages (designed to inflict punishment rather than compensate) and the sentence of reparation (designed to compensate the victim rather than punish the offender).

The following questions are intended to assist countries to clarify the civil proceedings for infringement.

a) What constitutes an infringement?

During the development of the element 'Scope of protection', countries will have determined the types of acts relating to TKECs that will be regulated under the legislation. Countries may wish to consider including a specific provision linking these regulated acts to what constitutes an infringement under the legislation. For example, there could be a provision that states that 'traditional cultural rights in TKECs are infringed by a person who does any restricted act'. The provision could also clarify whether the doing of the restricted act had to be to the work as a whole to constitute infringement or whether the doing of the restricted act to any substantial part of the work is sufficient. It could also clarify whether the doing of a restricted act includes both direct and indirect acts.

The Pacific Model Law does not include a provision specifying what amounts to infringement under the legislation on the basis that this will be determined at national level.

b) When may infringement proceedings be brought?

The legislation will need to clarify when proceedings can be brought. Typically, it will state that an infringement under the legislation is actionable.

Under the Pacific Model Law, infringement proceedings may be instituted in two situations:

- i. where traditional cultural rights are infringed – that is, if a person makes a non-customary use of a TKEC (whether or not such use is of a commercial nature), and the traditional owners have not given their PIC to that use (clause 30(1)); and
- ii. where moral rights are infringed – that is, if a person does an act or makes an omission in relation to a TKEC that is inconsistent with the moral rights of the traditional owners of that TKEC, and the traditional owners have not given their PIC to the act or omission (clause 30(2)).

Countries may wish to also clarify when infringement proceedings may not be brought. For example, the legislation may include a provision stating that no person may bring proceedings for the infringement of unregistered rights (if a registration or notification system is adopted), where relevant.

In addition, policy-makers may wish to consider whether an action may be brought when there is a strong likelihood that rights may be infringed. For example, under the Peru Law 2002 an action may be brought if imminent danger exists that rights may be violated. Also, under the Panama Law 2000 Indigenous communities or the country or regional governor may take preventative action (Article 22).

This 'precautionary'-type approach is important given the spiritual and cultural damage that frequently occurs when expressions of culture are misappropriated. In some cases, the damage to particular individuals and/or traditional communities is irreversible. It is therefore preferable to prevent infringements before they occur rather than wait until after the fact to take an action.

c) Who may institute infringement proceedings?

It is important to specify who may institute infringement proceedings. This will be determined largely by the decisions taken under the element 'Enforcement', regarding the role of the state in enforcement.

A guiding principle of the Pacific Model Law is that 'traditional communities are the owners, holders and custodians of TKECs and the primary decision-makers regarding their use'. It follows, therefore, that the legislation would make provision for traditional communities to be able to take an action to enforce their rights. This is reflected in clause 30 of the Pacific Model Law, which provides that traditional owners may institute civil proceedings. It is also the case in many *sui generis* laws for the protection of traditional cultural expressions.

However, policy-makers may wish to consider whether it is necessary for the legislation to make provision for other individuals or bodies to be able to take an action. For example, under the Panama Law 2000, apart from the affected Indigenous communities, the regional or country governor may take preventative action (Article 22). In the Peru Law 2002, infringement actions may also be brought *ex officio* by decision of INDECOPI (the competent national authority).

There is also a possibility that some traditional communities may wish a state body to enforce their rights on their behalf while other communities in the same country may not wish to do so. The legislation would need to be able to accommodate the relevant scenarios while ensuring consistency with the guiding principle that traditional communities are the owners, holders and custodians of TKECs and the primary decision-makers regarding their use.

Policy-makers may also wish to address whether the legislation should include limitations on who can take an action, to prevent erroneous or non-mandated actions. For example, the legislation may provide that only a mandated representative of a traditional community can bring an action rather than individual members of a community.

d) Where may infringement proceedings be brought?

The legislation should specify which court infringement proceedings would need to be brought to. The Pacific Model Law purposely leaves the court blank as this should be determined at national level.

However, a secondary question arises: Are the ordinary courts an appropriate body for legal proceedings relating to TKECs? Given that the majority of PICTs are small countries with limited resources, the Pacific Model Law does not establish new institutions for the purposes of legal proceedings. It uses ordinary courts but does not prescribe what type of court, leaving this to be determined at national level.

When the Pacific Model Law was being developed, it was recognised that the procedural character of the ordinary courts process may not be appropriate. New or existing institutions other than the ordinary courts may be better able to manage matters requiring resolution under the legislation because of the need for specialist knowledge, the desirability of less formality in proceedings than is the practice of the ordinary courts and the desirability of different fact-finding procedures or other procedures such as mediation that may not be available through the ordinary courts. Indeed, traditional communities have widely criticised the use of the Western judicial system and called for more appropriate processes, including greater recognition of customary law processes.

There are numerous examples that countries can draw on for guidance if they wish to establish a dedicated body under the legislation for civil proceedings rather than use the formal and adversarial

processes of the ordinary courts. In terms of specialised bodies on Indigenous issues, there are the Maori Land Court and the Waitangi Tribunal in New Zealand. In respect of less formality and different fact-finding procedures, many countries have family courts. Regarding IP models, some countries provide that proceedings can be taken to commissioners (such as the Commissioner of Trade Marks) in addition to the ordinary courts. Copyright tribunals are also used in Australia and New Zealand.

e) Should there be a penalty for bringing unjustified proceedings?

In order to provide a deterrent for vexatious claims, policy-makers may wish to consider whether it is appropriate to incorporate a penalty in the legislation for bringing unjustified proceedings. While not a typical feature of copyright law or laws for the protection of traditional cultural expressions, it does appear in New Zealand's copyright and trademark legislation as well as Fiji's copyright law.

An example of an unjustified proceedings provision from New Zealand's copyright legislation is provided below.

- 1) Where a person brings proceedings alleging an infringement of copyright, a court may, on the application of any person against whom the proceedings are brought:
 - a. make a declaration that the bringing of proceedings was unjustified;
 - b. make an order for the payment of damages for any loss suffered by the person against whom the proceedings are brought.
- 2) A court shall not grant relief under this section if the person who brought the proceedings proves that the acts in respect of which proceedings were brought constituted, or would have constituted if they had been done, an infringement of the copyright concerned.
- 3) Nothing in this section makes a barrister or solicitor of the High Court of New Zealand liable to any proceedings under this section in respect of any act done in his or her professional capacity on behalf of a client.

Section 130, Copyright Act 1994 (New Zealand)

f) What types of remedies should be available for infringement?

Common remedies that are available under copyright laws and legislation for the protection of traditional cultural expressions are injunctions, damages and account of profits. Often, a general provision is also included that enables the court to grant additional relief as it considers appropriate. Of particular importance in the prevention of infringement is the availability of judicial procedures that enable speedy recourse to the courts for relief pending trial of the action (such as the issuing of injunctions to prevent the further distribution of the defendant's product).

In the context of infringements regarding TKECs, traditional communities often argue that the remedies available under current law may not provide for damages equivalent to the degree of cultural and non-economic damage caused by the infringing use. While in some cases damages awarded by courts have taken cultural issues into account,²³ when TKECs are misappropriated and/or used offensively the primary damage is often not monetary in nature, but cultural. Consequently, monetary remedies will have very limited effect in addressing the cultural harm caused to traditional communities. Forms of cultural redress are therefore critical. Existing customary law practices will be instructive in this regard.

Policy-makers can refer to clause 31 of the Pacific Model Law to assist them in identifying what remedies may be appropriate. It may also be useful to note the following regarding clause 31.

²³ See the Australian case of *George M*, Payunka, Marika and Others v. Indofurn Pty Ltd* 30 IPR 209.

- It includes civil remedies that are commonly available, such as injunctions, damages and account of profits.
- It includes additional remedies, such as a public apology and a declaration that the traditional cultural rights of the traditional owners have been contravened (clauses 31(1)(c) and (d)).
- It provides that the court can make an order that infringements of moral rights cease or be reversed (clause 31(1)(e)).
- It provides that the court may grant an order for the seizure of any object made, imported or exported contrary to the Act. Policy-makers should consider whether to provide greater clarification for the courts in the legislation on this matter. Such provisions could clarify matters such as the ability of the court to be able to order erasure, removal, obliteration, delivery up and to whom (owner or other person the court thinks fit), and also disposal. It could also clarify whether those with an interest in the infringing objects will be served with notice, and whether those with an interest in the infringing objects have any rights and what those rights are. Policy-makers may wish to refer to existing copyright legislation for further guidance on this matter (clause 31(1)(g)).

The Court may grant all or any of the following remedies in relation to civil claim proceedings:

- an injunction;
- damages for loss resulting from the unauthorised use;
- a declaration that the traditional cultural rights of the traditional owners have been contravened;
- an order that the defendant make a public apology for the contravention;
- an order that any false attribution of ownership, or derogatory treatment, of the traditional knowledge or expression of culture cease or be reversed;
- an order for an account for profits;
- an order for the seizure of any object made, imported or exported contrary to the legislation;
- such other orders as the Court considers appropriate in the circumstances.

Pacific Model Law, Clause 31

- It provides that the court may grant any such orders as it considers appropriate in the circumstances. This could be used to provide cultural redress in respect of cultural and non-economic damage caused by the infringing use. However, countries may wish to provide greater clarity in this regard through the inclusion of a specific remedy. If there is some uncertainty as to application of a remedy, specific legislative provision is desirable (clause 31(1)(h)).

Once it has been determined which remedies should be available, policy-makers will need to consider these against the various civil remedies of general application that are available under the common law and the general statute law in their country, and assess their adequacy. The outcomes of this assessment may result in one or more of the following.

- Existing civil remedies are considered to be sufficient.
- It is considered that some remedies require modification for the purposes of the legislation: it may be necessary to vary some aspect of a remedy to make it effective in the particular context of protecting TKECs. An example of a modification to an existing civil remedy is contained in section 81 of the Commerce Act 1986 in New Zealand, which specifies a range of circumstances in which the High Court may grant an injunction to restrain certain behaviour. The section enlarges the range of circumstances in which the existing remedy would be available under the common law, and clarifies the application of the remedy.
- It is considered necessary to create new remedies: this may arise in circumstances such as if there is a demonstrated inadequacy of existing civil remedies in achieving the desired policy objective or there are difficulties in modifying existing remedies to improve their utility. If policy-makers are considering a new remedy, it is wise to undertake prior consultation with persons knowledgeable in the operation of the remedy to ascertain the likely pitfalls, and consider whether

the proposed remedy will create anomalies or inconsistencies in the operation of the law generally (i.e. whether the innovation is desirable in principle as well as effective in practice).

g) What matters should be considered by the court?

It is common for legislation to specify criteria for the court to consider when making a decision regarding relief. This can vary from precise rules of law to very broad standards (such as the public interest or the welfare of a child).

In developing criteria, policy-makers may wish to refer to clause 31(2) of the Pacific Model Law, which specifies what the court must take into account when considering the relief to be granted. This criterion is indicative only and countries can adapt as desired.

The [] court in deciding what relief is to be granted may take into account all or any of the following:

- a) whether the defendant was aware or ought reasonably to have been aware of the traditional cultural rights and moral rights of the traditional owners;
- b) the effect on the honour or reputation of the traditional owners resulting from the unauthorised use;
- c) anything done by the defendant to mitigate the effects of the unauthorised use;
- d) any cost or difficulty that may have been associated with identifying the traditional owners;
- e) any cost or difficulty in ceasing or reversing any false attribution of ownership, or derogatory treatment, of the traditional knowledge or expression of culture;
- f) whether the parties have undertaken any other action to resolve the dispute.

Clause 31(2), Pacific Model Law

3.9.2 Policy questions: criminal proceedings

a) Is it necessary to create a criminal offence?

Most legal systems draw a distinction between conduct that is treated as a criminal offence and conduct that, while regarded as wrongful, is regulated only by the civil law. A primary question, therefore, for policy-makers to address is whether or not particular conduct requires the intervention of the criminal law or whether civil remedies are adequate and appropriate for the purposes of enforcement. Understandably, rights holders are in a stronger position where both civil and criminal penalties are available. In some countries, the same act of infringement can bring about liabilities for damages, etc. under a civil action, and for fines and/or imprisonment under criminal provisions.

In determining whether there should be criminal offences under the legislation, it is important to note that the criminal law is concerned with the punishment of offenders and the deterrence of others from wrongdoing. Generally, it is not concerned with compensation, which is the province of the civil law. The criminal law is intended to punish only conduct that is in some way blameworthy. The notion of blameworthiness is an integral feature of the criminal process (Legislation Advisory Committee 2001: 141).

Policy-makers may wish to consider the following questions when determining whether to create a criminal offence (Legislation Advisory Committee 2001: 143).

- Will the conduct in question, if permitted or allowed to continue unchecked, cause substantial harm to individual or public interests?

- Would public opinion support the use of the criminal law, or is the conduct in question likely to be regarded as trivial by the general public?
- Is the conduct in question best regulated by the civil law because the appropriate remedies are those characteristic of the civil law (e.g. compensation, restitution)?
- Is the use of the criminal law being considered solely or primarily for reasons of convenience rather than as a consequence of a decision that the conduct itself warrants criminal sanctions?
- If the conduct in question is made a criminal offence, how will enforcement be undertaken, who will be responsible for the investigation and prosecution of the offence, and what powers will be required for enforcement to be undertaken?
- If the new offences in question are unlikely to be enforced, or likely to be enforced only rarely, the question of whether a criminal sanction is warranted should be examined carefully, because creating offences that are not going to be enforced will bring the law into disrepute. If enforcement of the new law is going to be left to the police as part of their general duty to enforce the law, it may be useful to make prior enquiries of the police as to the likely priority to be given to the new offence or offences being created.
- Would it be more economic or practicable to regulate the conduct in question through the use of existing or new civil law remedies?
- Is the conduct that is to be categorised as a criminal offence able to be defined with precision?

The following policy questions are relevant only if a country decides that the intervention of the criminal law is required.

b) What should constitute an offence?

Where a country has determined that the intervention of the criminal law is required, it will need to identify what constitutes an offence.

Some existing laws for the protection of TKECs provide that particular acts in relation to TKECs are offences. For instance, under the United States Code, Title 18, Part I, Chapter 53, it is unlawful, and subject to fines or imprisonment, to imitate any government trademark used or devised by the Indian Arts and Crafts Board (Section 1158: Counterfeiting Indian Arts and Crafts Board trademark), and to offer or display for sale or sell any good in a manner that falsely suggests it is Indian produced, an Indian product, or the product of a particular Indian or Indian tribe or Indian arts and crafts organisation resident within the United States (Section 1159: Misrepresentation of Indian-produced goods and products).

Policy-makers may wish to refer to the Pacific Model Law for guidance in identifying what constitutes an offence.

The Pacific Model Law establishes offences in relation to:

- traditional cultural rights: if a person makes non-customary use of a TKEC (whether or not such use is of a commercial nature) and the traditional owners have not given their PIC to that use, the person is guilty of an offence (clause 26);
- moral rights: if a person does an act or makes an omission in relation to a TKEC that is inconsistent with the moral rights of the traditional owners of that TKEC, and the traditional owners have not given their PIC to the act or omission, the person is guilty of an offence (clause 27);
- sacred–secret material: if a person uses sacred–secret TKECs other than in accordance with a customary use, the person is guilty of an offence (clause 28);
- importation: if a person imports an article or other thing into [] that relates to TKECs of that country, and the person knew, or ought reasonably to have known, that the article or thing would have contravened the traditional cultural rights or the moral rights of the traditional owners had it been created in [], the person is guilty of an offence (clause 29(1)); and
- exportation: if a person exports TKECs and the export is a non-customary use (whether or not such use is of a commercial nature) and the traditional owners have not given their PIC to the export of the TKECs, the person is guilty of an offence (clause 29(2)).

Under the Pacific Model Law, the same act in relation to traditional cultural rights (i.e. non-customary use without the PIC of traditional owners) constitutes a criminal offence and an infringement under civil law. As well, the same act or omission in relation to moral rights constitutes a criminal offence and an infringement under civil law. Therefore, a traditional community could potentially take a civil action for damages, etc. and also for fines and/or imprisonment under criminal provisions. As noted previously, some countries' copyright laws provide that the same act of infringement can bring about liabilities for damages under a civil action, and for fines and/or imprisonment under criminal provisions.

The Pacific Model Law establishes three additional acts as offences: the use of sacred–secret material, importation of TKECs and exportation of TKECs. Policy-makers may find it useful to consider these acts against the list of questions in section 3.9.2(a) above to determine whether the acts are sufficiently blameworthy in their national context to constitute a criminal offence.

If a country has determined that some types of TKECs will be treated differently (such as TKECs of high spiritual value), policy-makers may wish to consider whether it is appropriate for infringing uses in relation to those TKECs to carry more severe consequences. For example, the use of sacred–secret material under the Pacific Model Law is a criminal offence.

c) When may criminal proceedings be commenced?

It is commonplace for legislation to establish when criminal proceedings may be commenced, and countries may wish to include a provision clarifying this matter. There is no provision in the Pacific Model Law in this regard.

In the case of IP laws, criminal proceedings can generally only be commenced after the matter arises. For example, trademark legislation may provide that no proceeding may be commenced for any offence that was committed before the actual date of registration of the trademark concerned.

Similarly to civil proceedings, policy-makers may also wish to consider whether an action may be brought when there is a strong likelihood that rights may be infringed. As previously discussed,

'precautionary'-type approaches are used in Peru and Panama that allow rights holders to bring a preventative action, as sometimes the damage to particular individuals and/or traditional communities from infringing acts is irreversible.

d) Who should be responsible for bringing criminal proceedings?

As it can take considerable resources to bring criminal proceedings, policy-makers may wish to consider this in light of the traditional communities in their country and whether assistance is needed in this regard. This is considered in further detail under the element 'Enforcement'. It may be necessary to explicitly provide for a particular agency to be responsible for bringing criminal proceedings (such as the police or a state body). If it is not the police, and instead a state body is to be used, policy-makers will need to give consideration to including provisions in the legislation that grant the agency appropriate powers to gather information (such as search warrants) as well as establishing offences for not cooperating with such investigation.

e) What should be the penalties for offences?

When considering penalties, it is important to recall that the criminal law is concerned with the punishment of offenders and the deterrence of others from wrongdoing, rather than compensation.

There are no rules in international or regional instruments on copyright and related rights specifying the penalties that are to be applied, nor are there rules at these levels in respect of traditional knowledge. Criminal penalties vary widely from country to country, both in respect of the amount of fines that may be imposed and possible terms of imprisonment (Sterling 1999: 432).

The Pacific Model Law provides that those persons found guilty of an offence are punishable on conviction by a fine or a term of imprisonment. Neither the amount of the fine nor the term of imprisonment is specified, as this is left to the enacting country to determine. As individual countries are likely to have conventions relating to appropriate penalties, further discussion on this matter is not included here.

If a country considers that the use of fines is appropriate, a secondary question that policy-makers may wish to consider is how the proceeds of fines should be used. The proceeds could be treated in the same way as other funds received by the government and form part of the consolidated fund for general purposes. An important policy consideration is that penalties are imposed for the purposes of punishment, not compensation – although there are some exceptions to this principle. If it is considered appropriate, the proceeds could be channelled into a fund for promoting and safeguarding national culture, for example.

f) Should the court be able to grant orders for delivery up?

Similarly to civil proceedings, policy-makers may wish to consider whether the legislation should include provisions regarding orders for delivery up in relation to criminal offences. The Pacific Model Law does not contain a provision in this regard. If it is considered desirable, policy-makers will need to consider:

- when the orders may be made;
- matters to be considered by the court;
- the rights of persons with interest in the goods or other object; and
- whether goods will be returned where no order is made.

g) What types of defences should be provided for?

The Pacific Model Law provides that it is a defence to a criminal offence if a determination has been published and the traditional owners specified in that determination have given their PIC to the use in question. This is the only defence established under the Pacific Model Law. Policy-makers may wish to consider whether this is sufficient or whether additional defences are appropriate.

3.9.3 Further information

Other sources of information regarding civil and criminal proceedings include:

- Legislation Advisory Committee. 2001. *Guidelines on Process and Content of Legislation*. Wellington: Ministry of Justice. Chapters 11 and 12 provide information on remedies and criminal offences respectively.
- J.A.L. Sterling. 1998. *World Copyright Law*. London: Sweet & Maxwell. Chapter 13 provides information on infringement in copyright law.

3.10 Enforcement

Enforcement is an important and often overlooked aspect of the protection of traditional knowledge. As with other IP laws, while rights can be established via legislation, whether effective protection is achieved will depend to a significant extent on enforcement. However, while comprehensive rights may be recognised in TKECs in the legislation, the intended beneficiaries may be unable to enforce them – due to cultural or economic reasons, for example (Correa 2003: 38).

Many laws for the protection of traditional cultural expressions provide for the state to have a role in the enforcement of the rights of traditional communities. This approach is reflected in a guiding principle of the Pacific Model Law that ‘recognises that the state should have a role in the protection of TKECs, including providing assistance to traditional communities in the management and enforcement of their rights in TKECs’.

The development of this element involves consideration of what role the state should have in enforcing the rights of traditional communities.

3.10.1 Policy considerations

In terms of supporting the enforcement process, there may be national policies or laws that provide a context for the state to have a role in this regard, particularly in the context of Indigenous communities.

From a practical perspective, it is important to be cognisant of the costs and resources associated with enforcement. These can be significant depending on factors such as the size of a country and the extent of use of TKECs. Policy-makers should consider whether there are adequate resources available for the state to play a particular role in the enforcement of rights.

3.10.2 Policy questions

The following questions are intended to assist countries to develop a policy regarding enforcement that is appropriate to their national circumstances. It should be noted that there may be additional questions for policy-makers to consider.

a) What role should the state have in enforcing the rights of traditional communities?

The role of the state pivots primarily on the traditional communities concerned. It would be useful for policy-makers to examine the capacity of traditional communities to enforce their rights under the legislation. If it is considered that enforcement by traditional communities may be hampered by particular factors such as capacity and resources, it may be appropriate and/or necessary for the state to have a role in the enforcement of rights under the legislation.

In existing national laws, the role of the state takes a range of forms regarding enforcing IP rights as well as rights in TKECs, including the following.

- i. **Monitoring:** In the context of enforcing IP rights, some countries have established specialised IP enforcement units, such as an interagency anti-piracy taskforce.²⁴ They work closely with industry groups as well as crime and investigation authorities to monitor and enforce against illegal activities. Some countries have established channels or official routes to assist rights owners in informing them when suspected infringements or evidence of suspected infringing

²⁴ Examples include the Intellectual Property Rights Branch of the Criminal Investigation Bureau in Singapore, and the Intellectual Property Strategy Headquarters in Japan.

activity takes place. The US Indian Arts and Crafts Act 1990 vests various rights and responsibilities in an 'Indian Arts and Crafts Board', which has a specific role in monitoring violations of the Indian Arts and Crafts Act in the US. The Pacific Model Law includes a monitoring function for the Cultural Authority.

- ii. Legal proceedings: The state can have a role in both civil and criminal matters, if desired. This role can vary from assisting traditional communities, where appropriate, in enforcing their rights regarding their TKECs through the provision of technical advice or providing financial assistance through dedicated legal funds, to having full responsibility for enforcement. The precise role is likely to be influenced by traditional communities' needs and aspirations.

Policy-makers may wish to consider whether a specialist institution or agency needs to be created to oversee or assist in enforcement of the legislation, such as investigating and prosecuting infringements. Some existing laws use national authorities to ensure effective protection. A specific role may be envisaged for a state body in enforcing protection for traditional knowledge. In respect of criminal proceedings, a country may consider it appropriate for a state body to have a role in enforcement in addition, or as an alternative, to the police. This may be necessary if the police in a country do not see themselves as taking a lead role in investigating and prosecuting what they view as 'regulatory offences'. Within WIPO IGC, it has been acknowledged that a state body could be tasked with, among other things, advising and assisting communities with regard to the enforcement of rights and with instituting civil, criminal and administrative proceedings on their behalf when appropriate and requested by them (WIPO 2005).

The US Indian Arts and Crafts Act 1990 contains extensive enforcement provisions. While Indian tribes, Indian arts and crafts organisations and individual Indians have the right to bring civil suits under the act, the Indian Arts and Crafts Board can also receive complaints and act upon them, including by way of referring criminal matters to the Federal Bureau of Investigation and the US Attorney General. For example, a person who sells a product falsely suggesting it is Indian produced can be subject to very heavy fines and imprisonment, with penalties escalating for repeat infringement.

- iii. Enforcement training: Effective enforcement may require enhanced awareness of infringement by police and customs officials, which can be improved through training and cooperative relationships between the officials and traditional communities. Ongoing training is important for enforcement officials.
- iv. Border control: Enforcement issues in relation to TKECs often concern the importation of infringing product. The strengthening of border measures in a region can assist with this problem. The above-mentioned training for customs officials can be useful. Also, in some countries, customs and enforcement authorities have procedures to notify rights holders in order to carry out verification procedures for IP rights-infringing products.
- v. Public education and outreach: Many countries recognise the contribution of IP rights to their economy and have enacted national policies and public education measures, and in some cases established agencies, to promote respect for these rights. This is closely related to but distinct from the education programmes and awareness campaigns discussed under the element 'Management of rights'. These measures are more prevention focused, to try to minimise the incidence of infringements. Enforcement-related campaigns are often directed towards promoting awareness of respect for the rights of others and encouraging consumers to refuse to buy pirated or counterfeit goods. There are also reward schemes for the provision of information by the public about illegal activity or border infringements.

It may not be necessary or appropriate for the state to carry out all of these roles. Policy-makers should draw guidance from their domestic circumstances and the needs of traditional communities. Moreover, some of these enforcement measures would not necessarily require legislative backing

and could therefore operate alongside the legislation (such as the public education and training measures and the enforcement training).

In addition, copyright experience has shown that even with extensive enforcement campaigns, infringements may still continue. Consequently, effective enforcement involves constant review of current procedures and adaptation to deal with the methods devised by infringers to circumvent the law.

3.10.3 Further information

Other sources of information regarding enforcement include:

- Legislation Advisory Committee. 2001. *Guidelines on Process and Content of Legislation*. Wellington: Ministry of Justice. Chapters 11 and 12 provide information on remedies and criminal offences respectively.
- J.A.L. Sterling. 1998. *World Copyright Law*. London: Sweet & Maxwell. Chapter 13 provides information on infringement in copyright law.

3.11 Dispute resolution

The desirability of alternative dispute resolution mechanisms in cases relating to traditional knowledge is frequently emphasised. Alternative dispute resolution or ADR²⁵ is a 'catch-all' term that describes a number of methods used to resolve disputes out of court, such as negotiation, conciliation, mediation and the many types of arbitration. In matters involving Indigenous and traditional communities, ADR can be considered to encompass the use of customary laws, or customary laws can be considered to be an additional approach to ADR.

Common characteristics of ADR methods are that they are faster, less formal, cheaper and often less adversarial than a court trial. The general principle is that if disputes and conflicts can be resolved without recourse to the courts, this should be encouraged as a preferable alternative to reliance on the general legal system.

In the context of the protection of TKECs, customary laws and decision-making processes will generally be the means by which traditional communities are regulated and controlled. It follows, therefore, that these are likely to be the preferred means of dispute resolution as traditional communities will be accustomed to these practices. Many existing national laws for the protection of traditional knowledge make explicit reference to the use of customary laws and/or ADR. For example, in the Philippines, the Indigenous Peoples Rights Act 1997 provides that 'when disputes involve Indigenous cultural communities/Indigenous peoples, customary laws and practices shall be used to resolve the dispute'.²⁶ Clause 33 of the Pacific Model Law specifies that disputes may be resolved using mediation, ADR procedures and customary law and practices.

For the purposes of the legislation, where ADR methods (including customary law and practices) are utilised, they would generally occur as alternatives to civil and criminal proceedings under the legislation. In such cases, detailed provisions relating to ADR may not be necessary and countries may take the approach of the Pacific Model Law and simply confirm that ADR is an available option.

Alternatively, countries may consider it necessary to establish a specific process in the legislation for resolving disputes. An important policy consideration in this context is that customary laws used for social control within traditional communities vary greatly. For example, policy-makers should not assume that the role of elders is the same or that similar procedures for resolving disputes are in use across different communities. Close consultation with traditional communities will be critical to ensure that any ADR process established under the legislation is an appropriate means to achieve reconciliation (Wichard & Wendland 2006).

²⁵ In recent years, the term ADR has come to mean 'appropriate dispute resolution' to emphasise that ADR methods stand on their own as effective ways to resolve disputes and should not be seen simply as alternatives to a court action.

²⁶ Section 65, Primacy of Customary Laws and Practices.

3.12 Relationship with intellectual property protection

There is a generally accepted principle that new forms of protection for TKECs should be complementary to any applicable conventional IP protection. This is often referred to as ‘filling the gap’ and is reflected in a guiding principle of the Pacific Model Law that states that ‘special protection for TKECs should be complementary to, and not replace or prejudice the acquisition of, any applicable conventional IP protection and derivatives thereof’.

In both developing and implementing the legislation, there are at least two important relationships that policy-makers should be familiar with: firstly, the relationship between the protection available for TKECs under conventional IP laws and the protection that will be provided by the legislation; and secondly, the relationship between the legislation and conventional IP laws in terms of the protection available for works derived from TKECs (derivative works). Having a clear understanding of these relationships is critical, particularly when the legislation is promulgated to stakeholders: policy-makers should expect interested parties to enquire about the interface between the legislation and conventional IP laws. Information regarding the relationship with IP laws is provided in the ‘Background’ section below, as it does not strictly relate to policy questions.

There is, however, an important policy question for policy-makers to address. The abovementioned guiding principle of the Pacific Model Law specifies that special protection should be complementary to, and not replace or prejudice the acquisition of, any applicable IP protection. In other words, the policy question of whether IP rights in works derived from TKECs (derivative works) should be recognised has already been determined. However, this recognition can be qualified by the imposition of terms and conditions on the creator of a derivative work. This is the approach taken in the Pacific Model Law (see clause 12). In developing this element, policy-makers will need to consider whether terms and conditions should be imposed, in what circumstances, and what the nature of those terms and conditions might be.

3.12.1 Background

a) What is the relationship between the legislation and existing IP laws in terms of the protection provided to TKECs?

Some of the needs of traditional communities regarding the protection of TKECs may be met by solutions existing already within current IP laws, including through appropriate extensions or adaptations of those laws. For example:

- copyright and industrial design laws can protect contemporary adaptations and interpretations of pre-existing TKECs, even if made within a traditional context;
- copyright law may protect unpublished works of which the author is unknown;
- the *droit de suite* (resale right) in copyright allows authors of works of art to benefit economically from successive sales of their works;
- performances of expressions of culture may be protected under WPPT 1996;
- traditional signs, symbols and other marks can be registered as trademarks;
- traditional geographical names can be registered as geographical indications; and
- the distinctiveness and reputation associated with traditional goods and services can be protected against ‘passing off’ under unfair competition laws and/or the use of certification trademarks.

The Pacific Model Law was developed to provide forms of protection for TKECs not currently available under conventional IP laws. Policy-makers may wish to refer to the background section of

the element 'Scope of protection' for further information on the relationship between the protection provided under the legislation and protection available under existing IP laws.

b) What is the relationship between the legislation and existing IP laws in terms of the protection provided to derivative works?

Many national laws distinguish between TKECs (referred to as 'pre-existing' or 'the base') and contemporary expressions, adaptations and interpretations derived therefrom. The former generally require *sui generis* protection, while the latter may qualify for conventional copyright or other IP protection. For example, the Tunis Model Law 1976 protects 'works derived from national folklore' as original copyright works, whereas folklore itself – described as 'works of national folklore' – is accorded a *sui generis* type of copyright protection because it is unprotected by copyright. The Model Provisions 1982 make a similar distinction, as do national laws in Hungary, Indonesia and many others.

Figure 1 illustrates the relationship between the protectable subject matter (the 'base'; Wendland 2002), which is protected under the legislation, and derivative works, which could be protected under conventional IP laws.

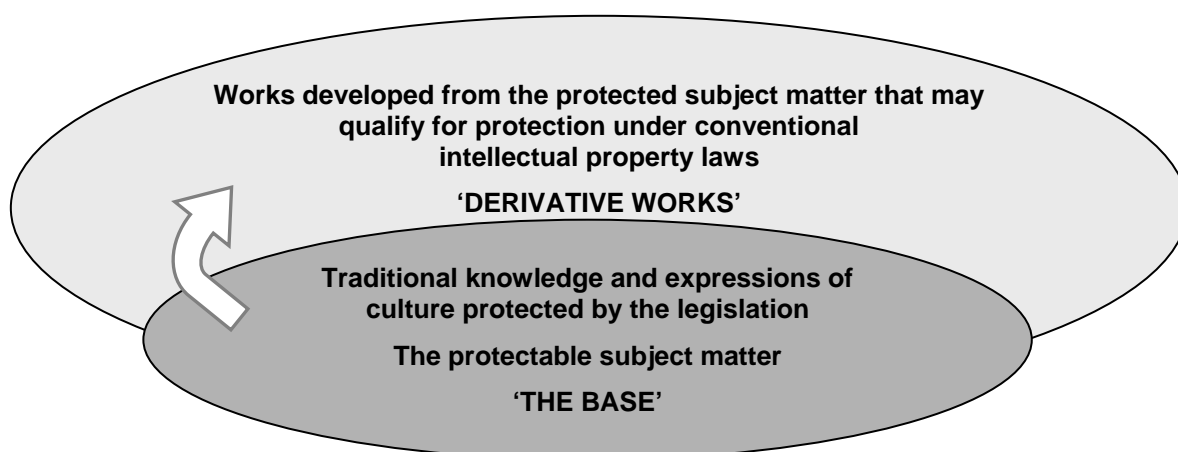


Figure 1: Relationship between the 'base' and derivative works

The relationship is usefully explained through the following fictitious example.

Tom is an Australian living in Noumea. He would like to create a sculpture work that draws substantially on particular carvings of the local Kanak community. He intends to sell the work upon completion. As the proposed use is non-customary in nature, under the Pacific Model Law the PIC of the community is required in order to use the cultural expression to create a derivative work. Tom obtains authorisation from the community to create a work that draws on the TKECs of the Kanak community.

This authorisation is set out in an agreement between Tom and the community. The agreement does not contain any terms or conditions regarding the future use of the work in terms of the community's interests. The agreement provides that as the creator of the work, any copyright, trademark, design or other IP right that exists in the work vests in Tom.

After the work is completed, Tom sells the work for a considerable sum of money. Several years later, he is approached by a major publishing company that wants to use an image of the sculpture for the cover of a book. As Tom is the copyright holder, he negotiates an agreement with the publishing company that provides for Tom to receive an initial payment of \$10,000 along with a percentage of sales.

Tom has received a fair return for his creative labour and, arguably, the availability of IP rights has provided an incentive for innovation and creativity. However, this example also raises a

number of issues regarding the relationship between the rights of the community concerned and Tom's IP rights. While Tom has made his own creative contribution, he drew primarily on, and benefited from, the TKECs of the local Kanak community, who did not benefit commercially. This highlights a key issue regarding the protection of a traditional community's rights and interests in derivative works and is discussed in further detail under the 'Policy questions' section below.

3.12.2 Policy questions

The following questions are intended to assist policy-makers to develop a policy on the regulation of derivative works that is appropriate to their national circumstances. It should be noted that there may be additional questions for policy-makers to consider.

a) Should terms and conditions be imposed regarding derivative works?

The imposition of terms and conditions regarding derivative works can be a means of appropriately recognising the prior relationship, rights and interests of traditional communities with the TKECs that underpin those works. In the absence of terms and conditions within an agreement to ensure the community concerned has ongoing rights and interests in derivative works, a user can enjoy the benefits of IP rights without a requirement for benefits to be shared with the community concerned.

Such an approach is not uncommon, particularly in the context of traditional knowledge associated with genetic resources. Under Article 8(j) of the Convention on Biological Diversity, parties are required to encourage the equitable sharing of the benefits arising from the utilisation of traditional knowledge, innovations and practices. At a practical level, there have been a number of examples where users (e.g. companies, collectors, researchers) have entered into agreements with Indigenous and traditional communities in this regard. Agreements have included provisions that in exchange for using and applying the traditional knowledge of traditional communities and being able to obtain IP rights over research outcomes, the user will fairly and equitably share the benefits that accrue from that utilisation with the communities concerned.

It is a policy decision for individual countries as to whether it is appropriate to impose terms and conditions in this regard. The Pacific Model Law establishes terms and conditions that an authorised user agreement must contain (see clause 12).

The following policy questions are relevant only if a country decides that it will impose terms and conditions regarding derivative works.

b) In what circumstances should terms and conditions be imposed?

The imposition of terms and conditions on the creator of a derivative work may be necessary only in particular circumstances. For example, if an individual wanted to develop a derivative work for their own personal use with no commercial intentions, it may not be appropriate to require this individual to meet conditions such as benefit-sharing.

Under the Pacific Model Law, terms and conditions are only imposed where a derivative work is to be used for a commercial purpose. Policy-makers may wish to consider whether this is an appropriate circumstance in which to impose terms and conditions or whether alternative or additional scenarios are appropriate, such as a non-customary use.

Secondary questions to consider include whether the terms and conditions should be imposed in all cases, and whether all terms and conditions must be satisfied or whether it is sufficient to meet one or more of the conditions.

c) What types of terms and conditions should be imposed?

The types of terms and conditions to be imposed should be developed in close consultation with traditional communities. In terms of the available options, as mentioned previously, it is not uncommon to impose a condition for benefit-sharing; there are international standards in this regard. Other options include acknowledging the community from which the work is derived and moral rights-type provisions specifying that the work will not be subject to derogatory treatment.

Policy-makers may wish to refer to clause 12(2) of the Pacific Model Law for guidance:

If a derivative work ... is to be used for a commercial purpose, the authorised user agreement must:

- (a) contain a benefit-sharing arrangement providing for equitable monetary or non-monetary compensation to the traditional owners; and
- (b) provide for identification of the TKECs on which the derivative work is based in an appropriate manner in connection with the exploitation of the derivative work by mentioning the traditional owners and/or the geographical place from which it originated; and
- (c) provide that the TKECs in the derived work will not be subject to derogatory treatment.

Clause 12, Pacific Model Law

Continuing on with the fictitious example of 'Tom', the following scenario is intended to illustrate how terms and conditions can operate in practice.

After the work is completed, Tom is approached by a major publishing company, which wants to use an image of the sculpture on the cover of a book. As Tom is the copyright holder, he negotiates an agreement with the publishing company that provides for him to receive an initial payment of \$10,000 along with a percentage of sales.

The agreement between Tom and the community includes several terms and conditions regarding the use of the sculpture for a commercial purpose, as follows.

- In recognition of the fact that Tom's work was derived from the TKECs of the community, the agreement contains a benefit-sharing arrangement whereby the community will receive 20% of any monetary compensation that Tom accrues.
- Any reproduction of the derivative work will make explicit reference to the fact that the work is based on the TKECs of the particular Kanak community of New Caledonia.
- The TKEC will not be subject to derogatory treatment in the derivative work.

Based on these terms and conditions, Tom transfers 20% of the initial payment he receives from the publishing company to the community and advises them that he will transfer 20% of the percentage sales he receives. The description of the work on the inside cover of the book makes explicit reference to the Kanak community of New Caledonia and acknowledges that the work is derived from their cultural expression.

This example shows how a balance can be struck between appropriately addressing the rights and interests of a traditional community and allowing the creator of a derivative work to enjoy the benefits of his or her IP rights. Where this balance sits within countries will of course be influenced by the local context and circumstances.

3.12.3 Further information

Other sources of information regarding the relationship with IP protection include:

- the website of the Convention on Biological Diversity, Article 8(j): Traditional Knowledge, Innovations and Practices Portal, contains a considerable amount of information on benefit-sharing and traditional knowledge; and
- WIPO. 2005. *The Protection of Traditional Cultural Expressions/Expressions of Folklore: Revised Objectives and Principles*. WIPO/GRTKF/IC/8/4. Geneva: WIPO. Pages 42–44 of the Annex provide information on the relationship with IP laws.

3.13 International and regional protection

Intellectual property has long had an international dimension, reflecting agreement in the mid-nineteenth century that effective and appropriate protection was dependent on a degree of international coordination and cooperation (WIPO 2004c: 2). This is equally the case for the protection of TKECs.

The first major question that was dealt with at the international IP level was the recognition of foreign rights holders as having access to national IP systems on a par with domestic nationals. Generally, but not exclusively, this was resolved by the national treatment principle (or the 'right of assimilation'). Practical mechanisms were also created to facilitate the obtaining and administration of IP rights, particularly when foreign rights holders faced difficulties (leading to recognition of rights of priority, and the elaboration of international application and registration systems). Another aspect of the international dimension has seen the progressive development of substantive standards, setting international standards for how IP should be protected at national level (such as minimum standards for protection) and how other interests, such as third parties and the general public, should be safeguarded (such as through exceptions to IP rights and remedies for the abuse of IP rights).

Regarding the development of substantive standards within international forums regarding TKECs, such as WIPO IGC, and the potential impact on national laws for the protection of TKECs, it is likely that such international standards will continue to respect national discretion as has been the case with existing international IP laws. Countries are likely to have wide discretion in giving effect to any international standards that emerge.

In developing this element, policy-makers will need to consider the recognition of the rights of foreign rights holders regarding TKECs in national systems of protection, including in what circumstances foreign rights holders would have access to national protection systems and the nature and extent of rights granted to foreign nationals. Practical mechanisms to facilitate the obtaining and administration of rights regarding TKECs may need to be addressed if foreign rights holders experience difficulties. This may be difficult to anticipate prior to the legislation coming into force.

3.13.1 Background

IP is essentially protected through rights recognised and exercised under national laws (regional laws may also apply, and for the sake of simplicity in this document any reference to national laws also refers to applicable regional laws). As a rule, it is at the national level that rights holders are recognised as having legal identity (or legal personality), that they are given standing to take legal action, and that they are considered entitled to be granted or to hold an IP right. It is ultimately under national law that IP rights are legally recognised (though international arrangements can facilitate applying for rights, can facilitate their registration and recording and, in some jurisdictions, can form the basis for rights directly exercised by individual rights holders), and national legal mechanisms allow IP rights holders to take action to restrain infringement of their rights and to secure other remedies such as damages. Contracts and agreements that affect the ownership of, licensing of and other dealing in IP rights are also concluded and enforced under national laws (WIPO 2004c: 4).

Similarly, the protection of TKECs – whether through conventional IP rights, *sui generis* adaptations or extensions of IP rights, or distinct *sui generis* systems such as the Pacific Model Law – ultimately takes place at national level. Any general approach to the IP protection of this subject matter, including its international dimension, involves consideration of what legal tools and mechanisms are required at national level, how they should operate, and what legal and operational contributions the international dimension can make to protection at national level. It also requires a shared understanding of the role, and the limits on the role, of international mechanisms, whether they are legal, policy, administrative or capacity-building mechanisms. This is not to diminish the international dimension of IP protection, but to set it in a practical and operational context (WIPO 2004c: 5).

Nonetheless, even if its protection ultimately hinges on the operation of national laws, the nature of IP has long demanded international cooperation, including through international legal instruments, but

also through a wide range of other international systems and processes. In fact, it has been considered necessary to craft an international dimension to IP protection since the mid-nineteenth century, first through a series of bilateral trade and IP agreements, and then through the first multilateral treaties on IP (the Paris Convention on the Protection of Industrial Property concluded in 1883, and the Berne Convention for the Protection of Literary and Artistic Works in 1886²⁷) (WIPO 2004c: 5).

The initial driver towards these landmark multilateral treaties on IP came in part from recognition of the need for consistent recognition of foreign rights holders in national jurisdictions, and the consequent desire for a multilateral framework to allow reasonable non-discriminatory access to the IP system for foreign rights holders. Accordingly, a major effect of the creation of the Paris and Berne unions was to ensure that countries in each union provided non-discriminatory access to their industrial property or copyright systems for nationals of all other countries (WIPO 2004c: 5).

3.13.2 Policy considerations

Coordination and clarification of linkages with related elements of international law is important. With respect to TKECs, these areas would include cultural heritage, education, creative industries, tourism promotion, human rights, labour standards, Indigenous peoples' issues, and trade and industry (small business development, arts and crafts promotion). International legal instruments of particular relevance to TKECs include those administered or under development by UNESCO (such as the Convention for the Safeguarding of the Intangible Cultural Heritage, and the Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions).

3.13.3 Policy questions

a) How can the rights and interests of foreign holders of rights be recognised?

One of the cornerstone elements of the international dimension of the conventional IP system is the mechanism for establishing the entitlement of foreign nationals to receive protection (enabling nationals of one country to enjoy IP rights in a foreign jurisdiction). As a rule, the international standard is for relatively open access to IP systems for foreign nationals (provided that they are nationals of a country with relevant treaty commitments) – a rule that dates back to the first international conventions in the 1800s. By virtue of the obligations under the Paris Convention, the Berne Convention, TRIPS and other IP treaties, the principle of national treatment applies to most categories of IP protection (subject to certain exceptions). In addition, World Trade Organization (WTO) members are required (also subject to certain exceptions) to apply the most-favoured-nation principle at least in relation to the IP protection required under the WTO TRIPS Agreement. Some specific aspects of IP protection (such as the duration of term of copyright protection) may also be determined in certain circumstances by the principle of reciprocity.

The protection of foreign holders of rights in TKECs is, however, a complex question, particularly where different customary laws are at play and also where TKECs are part of the shared cultural heritage of countries. Moreover, while international mechanisms for enabling nationals of one country to enjoy IP rights in a foreign jurisdiction are one of the foundational elements of the general international dimension of IP law, there is currently no international instrument establishing obligations and undertakings regarding the recognition of the rights and interests of foreign holders of rights

²⁷ Article 5 of the Berne Convention provides that 'Authors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention', and that 'protection in the country of origin is governed by domestic law. However, when the author is not a national of the country of origin of the work for which he is protected under this Convention, he shall enjoy in that country the same rights as national authors'.

regarding TKECs. Existing TKEC *sui generis* national laws either do not protect foreign rights holders at all or show a mix of approaches. Some systems of registration and recognition of *sui generis* rights in TKECs appear to be focused on rights holders who are nationals of the country of protection, or that are communities recognised in that country. One model that has been applied has been for reciprocal protection to apply. For example, the Panama Law 2000 and the Pacific Model Law provide for protection of foreign materials. The Model Provisions 1982 provide protection for TKECs of foreign origin either according to a reciprocity principle or on the basis of international treaties (Section 14).

On the presumption that countries will determine that foreign rights holders should be entitled to protection (on the basis that the Pacific Model Law forms part of a regional framework agreed to at the Regional Ministers of Culture meeting in 2002), and recognising that there are also likely to be important exceptions and limitations present, policy-makers may find it useful to refer to the following approaches for guidance on how this could be implemented.

- i. National treatment: The question of how rights and interests of foreign holders of rights in TKECs could be recognised in national laws has been resolved, broadly speaking, in existing IP laws by reference to the principle of 'national treatment', although this principle can be subject to some important exceptions and limitations. National treatment can be defined as granting the same protection to foreign rights holders that are granted to domestic nationals, or *at least* the same form of protection. Examples include the Berne Convention, the Rome Convention 1961²⁸ and WPPT 1996.²⁹
- ii. Reciprocity: Instead of national treatment, or supplementing national treatment, other international legal mechanisms have been used to recognise the IP rights of foreign nationals. Under 'reciprocity' (or reciprocal recognition), whether a country grants protection to nationals of a foreign country depends on whether that country in turn extends protection to nationals of the first country; the duration or nature of protection may be determined by the same principle. Under a 'mutual recognition' approach, a right recognised in one country would be recognised in a foreign country by virtue of an agreement between the two countries. Another, related mechanism for affording access to a national system is 'assimilation' to an eligible nationality by virtue of residence. For example, the Berne Convention provides that authors who are not nationals of one of the countries of the [Berne] Union but who have their habitual residence in one of them shall, for the purposes of the Convention, be assimilated to nationals of that country.³⁰
- iii. Most-favoured-nation: Also of potential application to the recognition of rights of foreign rights holders is the 'most-favoured-nation' principle. The TRIPS Agreement provides (subject to exceptions) that with regard to the protection of IP, any advantage, favour, privilege or immunity granted by a [WTO] member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other members.

While a national treatment approach would, in light of precedent and past experience in the IP field, appear to be an appropriate starting point, the very nature of TKECs suggests that national treatment should be supplemented by certain exceptions and limitations or other principles, such as mutual recognition, reciprocity and assimilation, especially when this concerns the legal status and customary laws of beneficiaries of protection.

²⁸ Article 2 of the Rome Convention 1961, in so far as performers are concerned, provides that: 'For the purposes of this Convention, national treatment shall mean the treatment accorded by the domestic law of the Contracting State in which protection is claimed: (a) to performers who are its nationals, as regards performances taking place, broadcast, or first fixed, on its territory; National treatment shall be subject to the protection specifically guaranteed, and the limitations specifically provided for, in this Convention.'

²⁹ WPPT 1996 states that: 'Each Contracting Party shall accord to nationals of other Contracting Parties, as defined in Article 3(2), the treatment it accords to its own nationals with regard to the exclusive rights specifically granted in this Treaty, and to the right to equitable remuneration provided for in Article 15 of this Treaty.'

³⁰ Article 3(2), Berne Convention.

For example, it is broadly accepted that the beneficiaries of protection should be the traditional communities in whom the custody, care and safeguarding of TKECs are entrusted in accordance with the customary laws and practices of the communities. Under one strict conception of national treatment, a foreign court in the country of protection would have recourse to its own laws, including its own customary laws, to determine whether a foreign community qualifies as a beneficiary. This may not satisfactorily address the situation from the community's viewpoint; the community would, reasonably, wish for its own customary laws to be referred to. Under mutual recognition and assimilation principles, a foreign court in the country of protection could accept that a community from the country of origin of the TKECs has legal standing to take action in country A as the beneficiary of protection because it has such legal standing in the country of origin. Thus, while national treatment might be appropriate as a general rule, it may be that mutual recognition, for example, would be the appropriate principle for addressing certain issues, such as legal standing.

In considering which approach to use, policy-makers may wish to refer to the Pacific Model Law, which uses the reciprocal approach. By way of example only, if Fiji and the Cook Islands have a reciprocal arrangement, the beneficiaries of protection in Fiji will enjoy the same rights and interests regarding their TKECs in the Cook Islands as they do under Fiji's law, and vice versa. The legislation could specify that the rights and benefits arising from the protection of TKECs under the legislation should be available to all eligible beneficiaries who are nationals or habitual residents of a prescribed country, depending on whether a national treatment or reciprocity approach is taken.

Recognition of other laws

In accordance with reciprocal arrangements, this Act may provide the same protection to TKECs originating in other countries or territories as is provided to TKECs originating in the [enacting country].

Pacific Model Law, Clause 39

b) What should recognition of the rights of foreign nationals consist of?

Access by foreign rights holders regarding TKECs to national *sui generis* protection systems may entail various forms of recognition. For instance, it may concern:

- recognition as eligible Indigenous or local communities, or recognition of the legal identity of a collective or community as rights holder;
- entitlement to be granted a right relating to TKECs, including entitlement for TKECs or related subject matter to be entered on a register, where applicable;
- participation in any official mechanisms for the collective administration of rights;
- participation in benefit-sharing arrangements or other funds concerning the exploitation of TKECs; and
- entitlements concerning enforcement of rights, including *ex officio* enforcement action taken by national authorities or public prosecutors.

Under some national laws, rights in TKECs may be specifically reserved for certain classes of individuals or communities identified and recognised under domestic law – for example, 'Indians' in the US Indian Arts and Crafts Act 1990, or certain local or Indigenous communities. Hence, the availability of such rights to foreign individual or collective claimants may also be dependent on their compliance with similar or adapted criteria to be eligible rights holders. This may entail clarifying whether eligibility of foreign rights holders for rights or benefits reserved for particular categories of TKECs holders would be assessed according to the laws of the country of origin, or the laws of the country in which protection is claimed.

c) How should practical impediments, if any, to foreign rights holders be addressed?

The practical exercise and enforcement of IP rights can pose major difficulties for rights holders, especially when multiple jurisdictions are involved and when rights holders have limited resources. This has given the administration of IP rights an international dimension. If the validity of a patent, trademark or industrial design right depended on the timely filing of applications, then applicants would face considerable hurdles in securing the early filing date necessary to safeguard their rights in countries other than their own. Hence the notion of a right of priority was introduced into the Paris Convention for such industrial property rights, so that a filing date in one country would have effect in another Paris Union country provided an application was filed within a certain period of time. International systems such as the Madrid and Hague international registration systems and the Patent Cooperation Treaty are, in essence, developments of this important mechanism, motivated by the recognition that seeking IP rights in multiple jurisdictions creates practical burdens both for applicants and for national authorities, and entails considerable duplication of administrative activities by various authorities. Such developments provide public benefits by reducing the investment of public resources in duplicative administration and the checking of formalities, and creating more effective and useful public information resources. There is, similarly, an international dimension to the question of making more practicable the exercise of IP rights covering TKECs for the benefit of traditional communities.

The difficulty of enforcement of IP rights in multiple jurisdictions has also led to the development of quasi-international mechanisms for alternative dispute resolution. ADR procedures respond in part to practical difficulties with conventional litigation for parties in more than one jurisdiction, and the international aspect of disputes over such IP-related subject matter as Internet domain names.

As the Pacific Model Law and the regional framework have introduced a comparatively new approach to the protection of TKECs, and in the absence of practical experience regarding its implementation, it is difficult to gauge at this point whether administrative measures are needed to address practical impediments. Even so, the development of cooperative mechanisms would most likely occur at regional level for subsequent implementation at national level. If and when it occurs, countries wishing to implement measures to address practical impediments may need to make amendments to their legislation for the protection of TKECs.

3.13.4 Further information

Another source of information regarding the relationship with international and regional protection is:

- WIPO. 2005. *The Protection of Traditional Cultural Expressions/Expressions of Folklore: Revised Objectives and Principles*. WIPO/GRTKF/IC/8/4. Pages 45–48 of the Annex provide information on the relationship with international and regional protection.

PART 4. DEVELOPING ADDITIONAL LEGISLATIVE FEATURES

Following the development of the legal elements of protection of the legislation, there are a number of additional legislative features that policy-makers will need to address. The majority of these features will be shaped by national legislative practices. The Guidelines focus only on complex matters in which policy-makers are likely to require assistance: the development of transitional measures and the development of regulatory making powers.

4.1 Transitional measures

4.1.1 Policy questions

The following questions are intended to assist policy-makers to develop a policy on transitional measures that is appropriate to their national circumstances. It should be noted that there may be additional questions for policy-makers to consider.

a) Should protection operate retroactively or prospectively?

Most countries have general transitional provisions, but these provisions may not provide the result intended in the context of TKECs. A key issue for policy-makers is whether protection should operate retroactively or prospectively, and in particular how to deal with utilisations of TKECs that are continuing when the legislation enters into force and that had lawfully commenced before then.

In terms of policy considerations, it is an accepted principle that laws should respect, as far as possible, rights previously lawfully acquired. That said, it has also been noted that prior and ongoing uses of TKECs should be regulated as far as possible within a certain period of protection measures coming into force (WIPO 2005: 40).

Existing laws utilise a range of approaches, as follows (WIPO 2005: 40).

- i. Retroactivity of the law, which means that all previous, ongoing and new utilisations would become subject to authorisation under the new law or regulation.
- ii. Non-retroactivity, which means that the only new utilisations that would come under the law or regulation would be those that had not been commenced before the law or regulation's entry into force. For example, the Panama Law 2000 provides that rights previously obtained shall be respected and not affected by the legislation. The US Indian Arts and Crafts Act 1990 only operates prospectively (as from 1935, when the predecessor Act came into force).
- iii. An intermediate solution, in terms of which utilisations that become subject to authorisation under the law or regulation, but were commenced without authorisation before the entry into force, should be brought to an end before the expiry of a certain period (if no relevant authorisation is obtained by the user in the meantime, as required).

Application

- (1) This Act applies to TKECs that:
 - (a) were in existence before the commencement of this Act; and
 - (b) are created on or after that commencement.
- (2) This Act does not affect or apply to rights that exist immediately before the commencement of this Act, including intellectual property rights.
- (3) This Act does not affect or apply to contracts, licences or other agreements entered into by traditional owners before the commencement of this Act in relation to the use of TKECs.

Clause 3, Pacific Model Law

The Pacific Model Law follows in general the intermediate solution. Clause 3 sets out the general application of the Act and specifies that the Act does not affect or apply to rights that exist immediately before the commencement of the Act.

As well, clause 35 establishes a period of 60 days (referred to as the ‘application period’) within which a person making a non-customary use of protectable TKECs before the commencement of the Act must obtain the PIC of the traditional owners to continue to use the particular TKEC.

Procedure for transitional arrangements

- (1) ... this section applies to a person if, immediately before the commencement of this Act, the person was making a non-customary use of a TKEC.
- (2) The provisions of this Act do not apply to the person during the period of 60 days (the ‘application period’) starting on the commencement of this Act.
- (3) During the application period, the person must apply ... to the Cultural Authority to obtain prior and informed consent from the traditional owners to continue to use the TKEC.
- (4) If the person does not apply to the Cultural Authority ... the Act applies to the person on and after the end of the application period.
- (5) If a person has applied to the Cultural Authority ... the Act continues not to apply to the person until the traditional owners reject the application or enter into an authorised user agreement with the person, whichever first occurs.

Clause 35, Pacific Model Law

Countries are able to modify these provisions as desired. Policy-makers may also wish to consider whether it would be beneficial for the purpose of clarity to include a linkage to the criteria for protection, such as ‘the Act applies to all TKECs that ... after that commencement that fulfil the criteria for protection’.

4.1.2 Further information

Another source of information regarding transitional measures is:

- WIPO. 2005. *The Protection of Traditional Cultural Expressions/Expressions of Folklore: Revised Objectives and Principles*. WIPO/GRTKF/IC/8/4. Pages 39–41 of the Annex provide information on transitional measures.

4.2 Regulatory making power

There is a general principle that matters of policy should be included in the empowering statute (primary legislation) while matters of detail should be left to delegated legislation (secondary legislation). This interface has been characterised as that between the principle and the detail, between policy and its implementation (Legislation Advisory Committee 2001: 125).

As there is a considerable operational dimension to the protection approach taken in the Pacific Model Law, secondary legislation will be needed to provide guidance on these matters. In order to make secondary legislation, a regulatory making power will need to be developed for inclusion in the primary legislation (referred to as an 'empowering clause'). This segment of the Guidelines provides guidance in this regard.

4.2.1 Policy questions

a) Who is the appropriate person to make the delegation to?

The empowering clause will need to delegate power to an appropriate person to make regulations. The person to whom the power is given should have an appropriate degree of responsibility. Within central government, law-making powers are often delegated to the governor-general, ministers or officials. Law-making powers can also be given to professional bodies to regulate particular industries.

If the law-making power will potentially impact on individual rights and liberties, careful consideration must be given to the person that will exercise the power. It may be appropriate for the governor-general or an equivalent to exercise the power (Legislation Advisory Committee 2001: 126). If the law-making power involves prescribing technical matters that will not impact upon individual rights, an official may be the appropriate person to exercise the power.

For the purposes of the legislation, the matters prescribed will relate mostly to procedural matters rather than matters that could impact on individual rights and freedoms. Therefore, it may be appropriate for a minister rather than a governor-general to exercise the law-making power, recognising that this is a matter for individual countries to determine based on their national circumstances and practices.

The empowering clause in the Pacific Model Law is contained in clause 38. It delegates the law-making power to the minister responsible for the Act. The responsible minister is a matter for countries to determine.

Regulations

The Minister may make regulations prescribing all matters:

- (a) required or permitted by this Act to be prescribed; or
- (b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.

Clause 38, Pacific Model Law

b) What should be the scope of the delegation?

Within the empowering clause, the limits of the law-making power should be specified as clearly as possible. It is common for countries to have standard wording providing for the making of regulations and the specific purposes for the regulations are simply inserted. In terms of the legislation, the scope of the delegation will be influenced by the policy decisions taken in Part 3. It is, therefore, difficult to define the necessary scope in the Guidelines. The following non-exhaustive list is intended to provide guidance to policy-makers on the types of matters that could be covered in regulations.

- Management of rights
 - Procedures for applications for authorisation
 - Information any application for authorisation has to contain
 - Fees, if any, that the state body may charge for its services
 - Purpose for which the collected fees must be used
 - Public notification procedures
 - Terms and conditions upon which authorisations may be granted by the state body
 - Resolution of disputes
- Formalities³¹
 - The manner in which applications for notification or registration should be made
 - To what extent and for what purposes applications are examined by the registration office
 - Measures to ensure that registration or notification is accessible and affordable
 - Public access to information concerning which TKECs have been registered or notified
 - Appeals against the registration or notification of particular TKECs
 - Resolution by the registration office of disputes relating to which community or communities should be entitled to benefit from the protection of an expression of culture and its underlying traditional knowledge, including competing claims from communities from more than one country
 - The legal effect of notification or registration

4.2.2 Further information

In developing the actual regulations, policy-makers can obtain detailed guidance from Part 4 of the Pacific Model Law. It contains provisions that would typically form part of regulations. Other sources of information regarding regulatory making powers include:

- Legislation Advisory Committee. 2001. *Guidelines on Process and Content of Legislation*. Wellington: Ministry of Justice. See Chapter 10, 'Delegation of Lawmaking Power', which provides information on empowering clauses.
- WIPO. 2005. *The Protection of Traditional Cultural Expressions/Expressions of Folklore: Revised Objectives and Principles*. WIPO/GRTKF/IC/8/4. Pages 39–41 of the Annex provide information on transitional measures.

³¹ These matters would be relevant if a decision were made to use a registration or notification approach.

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