



*WIPO Regional Expert Meeting on the Establishment
of a Caribbean Framework for the Protection of
Traditional Knowledge, Folklore and Genetic
Resources, Kingston, Jamaica, March 18 – 19, 2008*

International Experiences with Regional Frameworks
and Systems: the South Pacific

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Background

- Mandate & Developments in TK in the Pacific
- Pacific Model Law on TK & EC
- Benefits and Challenges
- Concluding Remarks



Mandate and Developments in TK at Regional Level

- regional organization serves 14 Pacific Islands states located in the north, south and west Pacific and spread over 30 million square km of ocean: *Cook Islands, Federated States of Micronesia, Fiji, Kiribati, Marshall Islands, Nauru, Niue, Palau, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu, Vanuatu*
- total population 7 million people, majority are indigenous or of indigenous ancestry
- development classification: Least-developed & Developing Country status, all are Small Island Developing States
- established 1971, mandate from Pacific Leaders, responsible for regional developments in economic, social and political policy formulation. Leaders' directives implemented through ministerial processes at the regional level and line ministries at national level



- 2005 Leaders agreed to streamline work of regional organizations, through *Pacific Plan*, in key areas: economic growth, sustainable development, good governance & security
- mandate to develop systems of protection for TK came from Pacific Leaders in 1999 via Trade Ministers; and under the *Pacific Plan* endorsed in 2005, Leaders have enhanced the mandate of Trade Ministers in 1999
- 1999 mandate instructed the Forum Secretariat (holds the mandate on IP developments) to work with the Secretariat of the Pacific Community (holds the mandate for regional developments in culture); and the Secretariat of the Pacific Regional Environment Programme (holds the mandate for regional developments in biodiversity and environmental issues) to develop systems of protection for the region's TK



- 1999 mandate responded to concerns by member countries to growing misappropriation of the region's TK by people from outside, taking place without the consent of and compensation to TK owners; and often in culturally degrading or insensitive manner. Clear directive to adopt a protective approach & to promote TK as economic assets
- a review was carried out on a suggested approach and to survey options, recommended that due to inadequacies in the existing IP system TK best protected by distinct sui generis system
- two regional models developed, one for TK & ECs (Pacific Model Law on TK & EC), through an expert group made up of legal experts in the region, facilitated by the SPC, UNESCO and technical advice from WIPO; separate process for development of Model Framework on Traditional Biological Resources, Innovations and Practices overseen by SPREP



- separate processes for development influenced by the nature of protection sought, expressions of culture adopting a copyright-like and related rights approach and biological resources & biodiversity underpinned by patent law
- 2002 Pacific Model Law on TK & EC endorsed for adoption by Ministers of Culture and by Trade Ministers in 2003
- regional framework on Traditional Biological Resources has been endorsed at Officials level, yet to receive ministerial endorsement
- 1999 – 2006 Secretariat of the Pacific Community led on responsibility to assist member countries implement Model Law on TK & EC
- 2007 lead development role moved to Forum Secretariat, Secretariat's political mandate best positioned it to advance implementation



- Forum Secretariat's role as key agency for implementation of the 2005 Pacific Plan influenced move
- Pacific Plan promotes the recognition and protection of Pacific cultural values, identities and TK and has endorsed the development of a cultural strategy to strengthen Pacific cultural identity; and endorsed feasibility to be undertaken into the establishment of a regional institution to advocate for and protect TK and IPRs
- at this juncture of the Forum Secretariat's carriage of the Model Law on TK & EC, focus and implementation moves from the narrow focus of Trade Minister's in 1999 to develop systems of protection for TK to situating the ML's implementation in wider context of Pacific Plan



Pacific Model Law on TK & EC

- guided by WIPO document developed in response to consideration by the WIPO IGC on elements of a sui generis system for the protection of traditional knowledge

- developed through range of questions posed:

policy objective of protection, subject-matter of protection, ownership of rights, nature of rights, administration & enforcement of rights, loss & expiration of rights

- hybrid of national and regional approaches. High-level framework for national legislation to be adopted/adapted based on the regional model leaving matters of detail with national laws and systems



- designed for Pacific context – basis of a harmonized legal framework for regional protection of TK and EC. Makes provision for recognition and enforcement between jurisdictions at future point, nature of that process is yet to be determined by member countries
- adopts a copyright-like approach to protection, provides flexibility to countries to adopt protection for both ECs and their underlying TK or to do that separately. Provides protection within an IP context leaving areas falling outside that context to other policy measures
- creates new rights in TK and EC which under IP law considered as part of the public domain



- Two new categories of rights promoted under ML and which are not dependent on registration or formalities before rights are established:
 - i) traditional cultural rights – grants TK owners exclusive rights in range of non-customary use of TK, regardless of whether use is for commercial or non-commercial purposes. Includes 'derivative' works
 - ii) moral rights – grants TK owners rights in attribution of their TK & EC, rights against false attribution and right against derogatory treatment of their TK & EC
- works in harmony with IPRs, new rights are in addition to and do not affect IPRs eg. for derivative works, rights vest in the creator under IPRs
- establishes procedures for obtaining consent & benefit-sharing



Benefits & Challenges

Benefits

- regional approach more effective in addressing infringements which often take place across national boundaries and jurisdictions
- cost of regional infrastructure such as future arrangements for enforcement met through pooling of resources
- collective approach that could contribute to development of international norms and practice, ultimately to internationally-binding instruments of protection
- strengthens Pacific culture and identity, strengthens regionalism, contributes to world culture from a strong platform



Challenges

- degree of regional integration, broadly, at early stage of developments, regional approaches require convincing before member countries buy in to concept. Developments on ML at current time in Pacific taken a sub-regional approach with implementation advancing most in 5 of 14 member countries
- high levels of disparity between countries i.e. economic development, resource endowments, international obligations (e.g 4 out of 14 countries are WTO members) affect political will and decision to participate in activities to implement the ML
- cost-effectiveness of maintaining a regional enforcement structure



Challenges

- cost of implementing a sui generis system which contributes but is limited, in its ability to ensure an effective system of protecting and managing TK. Realization in the Pacific for need to adopt a holistic approach adopting both positive and defensive approaches to TK developments. An expensive exercise that will test member countries' political will to advance work in this area



Concluding Remarks

- in spite of the challenges, response from member countries, very positive, close identification with subject matter
- high level of political will be required to prioritize developments in culture which is often given marginal consideration in national budgetary allocation processes
- not all member countries will be able to proceed with developments at the same time, consideration may need to be given to a sub-regional approach with flexibility for remaining countries to join as and when they are ready
- impact of externalities and contextual processes on TK developments e.g. various international obligations including trade arrangements, how will these obligations influence the shape and form of regional and national systems of protection for TK

