TOWARDS AN EQUITABLE FUTURE IN VANUATU:

THE LEGAL PROTECTION OF CULTURAL PROPERTY

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> ... [T]he developing world remains a market for surplus products of the developed world and a source of cheap raw products, the original justification for colonisation. I.P. rights are not exercised in order to create wealth in those countries but to create wealth from them.[1]

INTRODUCTION

The South Pacific region is enriched with vast cultural, natural and biological resources that have recently attracted foreign commercial and economic interests as competition for developing new products intensifies. Traditional knowledge and "biogenetic and tribal wisdom" are all useful in the development of new pharmaceutical and agricultural products. The increase in demand for these resources 'seriously threatens indigenous bio-cultural resources as well as spiritual and cultural values' of their holders.[2] As was recognised at a recent South Pacific Forum Economic Ministers meeting, traditional ecological knowledge, innovations, and traditional knowledge and expressions of culture, are key resources in the region.[3] The need for a legal protection of traditional knowledge is therefore necessary. The draft *Model Law for the Protection of Traditional Knowledge and Expressions of Culture 2002* (the Model Law)[4] is an attempt by Pacific Island states to protect their traditional knowledge and expressions of culture.

The paper argues that Vanuatu would benefit considerably from adopting the provisions of the Model Law. Nevertheless, total reliance on the Model Law alone would not be sufficient to achieve maximum protection over its traditional knowledge. For this reason, it is in the best interest of the local communities that reliance is also placed upon other mechanisms available namely: the mechanism for protection under the Convention on Biological Diversity *opting the provisions of the Model Law. Nevertheless, total reliance on the Model Law alone would not be sufficient to achieve maximum protection over its traditional knowledge. For this reason, it is in the best interest of the local communities that reliance is also placed upon other mechanisms available namely: the mechanism for protection under the 1992* (CBD)[5]; the *Environmental Management and Conservation Act 2002*; the use of databases; and the principles of customary law.

The paper is divided into six parts. Part one begins with an overview of Traditional Knowledge including a discussion on the meaning given to this term. Part two looks at the existing intellectual property system and its failure to protect traditional knowledge. Part three discusses the importance of the *Model Law* as an alternate law for Pacific Island states including Vanuatu. Part four looks at the current approach taken by Vanuatu in its attempt to adopt the provisions of the Model Law. Part five identifies some of the shortfalls of the approach taken by Vanuatu. Part six then rounds up the discussion by recommending some other possible avenues on which Vanuatu can rely to protect its traditional knowledge.

AN OVERVIEW OF TRADITIONAL KNOWLEDGE

The advance of modern information technologies has seen the increase in awareness of traditional knowledge (TK) internationally over the years. With this comes the increase in focus of the role of intellectual property (IP) in the protection of TK on a global scale. The World Intellectual Property Organisation (WIPO) is the specialised United Nations agency responsible for the promotion of intellectual property world wide. The agency was mandated in its 1998-99 program to undertake exploratory ground work in order to provide an informed and realistic analysis of the IP-aspects of TK.[6] This explanatory ground work has shown that TK is a rich and diverse source of creativity and innovation.[7]

Until the conclusion of the World Forum on the Protection of Folklore,[8] convened by WIPO and UNESCO in Phuket in April 1997, discussion about the intellectual creativity of indigenous peoples and traditional communities was conducted under the rubric of "folklore". At the forum the use of the expression "Traditional Knowledge" was preferred over the term "folklore"[9] as it is said to be broad enough to include, for example, traditional knowledge of plants and animals in medical treatment and as food.[10]

As a result of developments taking place internationally, TK has encompassed a broad range of subjects.[11] As one commentator has observed:

> [I]t is variously defined as innovations and practices in the context of conservation and equitable use of biological use; 'heritage of indigenous peoples'; traditional medicinal knowledge in the realm of health policy; expressions of folklore within a framework of intellectual property protection; folklore or traditional and popular culture within a construction meant to protect culture; 'intangible cultural heritage'; and indigenous intellectual property. [12]

Simply stated, TK refers to knowledge, possessed by indigenous people,[13] in one or more societies, and in one or more forms, including but not limited to, art, dance, and music, medicines and folk remedies, folk culture, biodiversity, knowledge and protection of plant varieties, handicrafts, design and literature.[14]

PROBLEMS OF TK

Difficulties confronting holders of TK

Holders of TK are faced with a variety of difficulties. In the last few decades there has been a decline of traditional knowledge and practices as a result of neglect and disinclination on the part of younger generation to learn the "old ways". The law cannot assist much in this area. It is up to people to use traditional knowledge or seek alternative ways to solve this problem.[15]

Another threat to TK is the abuse of it. This involves the use of TK other than for its specific function (misuse). For example, the use of a substance to heal an ailment may also be used to harm people. In Vanuatu this can be dealt with under the existing law, for instance, the laying of criminal charges under the *Penal Code* [Cap 135]. The use of traditional practices as exhibitions for tourists can also be a form of misuse, particularly when customary rules regulating its use are not complied with. For example, the

attempt by a group of people in Vanuatu to perform the Nagol jump for exhibition purposes in another locality away from where the ritual customarily originates was a misuse of TK.[16] This kind of misuse needs to be prevented but cannot be under existing laws.

Yet another problem confronting holders of TK is the commercial exploitation of their knowledge by others. The most well known type is bio-piracy. Bio-piracy means getting monopoly control over biological materials and associated traditional knowledge by using IP rights law in the form of patents or plants breeders right (PBR).[17] The kava plant for instance, is only found in certain Pacific Island countries. However, some overseas companies have already obtained patents for some kava-based preparations. The case of L'Oreal who made millions in profits from the patents on the use of kava to stimulate hair growth in United States and Europe with virtually no returns to the Pacific islanders is illustrative of the kind of risk faced by the Pacific Islands countries.[18]

Difficulties with protecting TK under the existing regime

Whilst the holders of TK are threatened by commercial exploitation by large multinational companies, protecting TK is also a problem. The *Agreement on Trade Related Aspects of Intellectual Property* (TRIPS)[19] does not make reference to the protection of TK. It does not distinguish between indigenous, community-based knowledge and that of industry. What Article 27(3)(b) does is to encourage, *inter alia*, the formulation of an effective *sui generis* system 'for the protection of plant varieties' without spelling out how the mechanism should be formulated.

The prevailing IP system,[20] which protects IP through mechanisms such as patents, copyrights, trademarks, and trade secrets, fails to respond to the concerns of the TK holders. Considering patents first, a patent protects inventions. To qualify as an invention, an item has to be useful, novel and non-obvious.[21] Most traditional medicines in their natural form often fail to meet these requirements. Traditional medicines like other forms of TK have been held in perpetuity from generation to generation, thus it falls within the public domain. Anything, which is in the public domain, is not considered novel as it is "prior art".

In terms of copyright, difficulties arise if the work subject to copyright is related to TK or aspects of it and if it was produced without the prior or informed consent of the communal holders of TK. For example, in the Australian case of *Milphurrurru v. Indofurn Pry Ltd & Others* although the court awarded damages for breach of copyright to aboriginal artists whose designs were wrongfully reproduced on carpets, the court failed to compensate the communities whose images were used in culturally inappropriate ways as 'the statutory remedies do not recognise the infringement of ownership rights of the kind which reside under Aboriginal law in the traditional owners of the dreaming stories...'.[22]

Besides, there are also the requirements of fixation and identification of author. A lot of traditional knowledge materials such as spiritual beliefs, methods of governance, languages, human remains, and biological and genetic resources in their natural state, are unfit for protection by IP in any form in that their authors are not readily identifiable. Thus, there is no "right holder" in the usual sense of the term. The author or inventor of these TK materials is often a large and diffuse group of people. However, copyright cannot be vested over the entire community, as the law does not recognise community ownership.[23]

Trademarks are geared towards protecting business goodwill and commercial concerns. However, trademarks may potentially involve the misuse or appropriation of aspects of TK relating to symbols, designs or other matters that can be categorised as a "sign" under the trademark law.

The IP system also recognises the potential of trade secrets as a way of protecting confidential

information, for example, the recipe for coca-cola. On this basis, this process can be applied in relation to "secret traditional knowledge". However, the process of reducing an oral tradition to writing may give away the closely held detail, and thereby devalue the RK. The Waitangi Tribunal in New Zealand for example is facing a similar problem in the need to record oral evidence or "secret" knowledge.[24]

The above analysis shows protecting all or most forms of TK by copyright or patent, and possibly by trademark would be very difficult under the existing IP system. Essentially, this prompts the question as to the basis on which TK should be protected.

THE MODEL LAW

For the South Pacific region,[25] the need to set up an alternate mechanism outside the prevailing IP regime for the protection of their TK was recognised in the Final Declaration of the*UNESCO Symposium on the Protection of Traditional Knowledge and Expressions of Indigenous Culture* held in Noumea on February of 1999.[26] It was not until 2002 that a draft *Model Law for the Protection of Traditional Knowledge and Expressions of Culture* was produced. The proposed Model Law is a huge step forward for the protection of traditional knowledge and expressions of culture (EC) in the region.[27]

The Model Law provides the basis for those Pacific island countries wishing to enact legislation for the protection of TK and EC (TKEC). In defining 'traditional knowledge' and 'expressions of culture', clause 4 of the draft Model Law adopts an extensive and broad definition beyond the traditional IP rights to cover works that were not in material form, have been transmitted from generation to generation and those that are collectively originated and held.

Its regulatory effect is directed towards those uses of TKEC that are not regulated by either customary law or the prevailing IP system. The island states are free to adapt and/or adopt the provisions of the Model Law as they see fit in accordance with their own national needs, the wishes of their traditional communities and their legal drafting traditions.[28]

The policy objective of the Model Law is to protect the rights of traditional owners in their traditional knowledge and expressions of culture and to permit tradition-based creativity and innovation, including commercialisation thereof, subject to prior and informed consent and benefit-sharing. These resources previously have been regarded, for the purposes of intellectual property law, as part of the public domain. The Model Law also reflects the policy that it should compliment and not undermine intellectual property rights.[29]

The protection given to TKEC under the Model Law is referred to as Traditional Cultural Rights (TCRs). Like western style IP rights, TCRs also include the right to produce, publish, perform and to make available on line TKEC.[30] Otherwise, TCRs are inalienable and continue in force in perpetuity.[31] However, as in the western oriented IP systems, the Model Law also provides for the moral rights of authors independent of their TCRs.[32] These rights include the right of attribution; the right against false attribution; and the right against derogatory treatment in respect of TKEC.[33] In the event these rights have been tampered with, the Model Law creates offences and civil actions for contraventions of TKEC.[34]

One commentator has observed:

> In effect the Model Law establishes a frame work for exploiting TKEC through the use of contract. It contains detailed provisions to ensure that TKEC is only dealt with in a non-

> customary way after prior and informed consent has been obtained from the traditional owners. It provides for two ways seeking authorisation: directly through a custom owner and indirectly through a Cultural Authority. The Cultural Authority is essentially the administrator of the Model Law.[35]

At this point, it should be noted that the current draft is only a starting point and it is envisaged that it will continue to be modified consequent on members' experience in enacting and administering the law and in accordance with further international developments.[36] This was reflected by the meeting of the legal and cultural experts from around the region at a conference held in Noumea, New Caledonia to review the Model Law.[37]

THE SITUATION IN VANUATU

Vanuatu's Intellectual Property Laws

Vanuatu has taken the initiative to protect its TKEC by the use of formal IP legislation, namely the *Copyright & Related Rights Act 2000* (the *Copyright Act*), the *Trademarks Act 2003*, the *Patents Act 2003*, and the *Designs Act 2003*, although these specific enactments are still awaiting formal gazettal.[38] Undoubtedly, the incorporation of TKEC provisions in these pieces of legislation is largely influenced by the Model Law.[39]

The Interpretation sections of the Acts define 'expression of indigenous culture' to include

> all material objects; names, stories, histories and songs in oral narratives; dances, ceremonies and ritual performances or practices; and the delineated forms, parts and details of designs and visual compositions, and specialised and technical knowledge and the skills required to implement that knowledge, including knowledge and skills about biological resources use and systems of classification

The Acts go on to define 'indigenous knowledge'[40] as meaning:

> knowledge that is created, acquired or inspired for traditional economic, spiritual, narrative, decorative or recreational purposes; and whose nature or use of which has been transmitted from generation to generation; and that is regarded as pertaining to a particular indigenous person or people in Vanuatu.

Under the *Copyright Act* the cultural rights attached to the expressions of culture includes economic rights conferred under s 8(1) comprising the right to produce, reproduce, publish, distribute works, and in performance rights under s 23(1). Under s 41, infringements upon rights conferred under sections 8 and 23 amount to an offence (for example, reproducing an indigenous carving), if the person doing the act is not one of the custom owners of the expression; has not been sanctioned or authorised by the custom owners to do the act in relation to the expression or has not done the act in accordance with the rules of the custom. Moreover, a civil action in the Supreme Court is available to the custom owners under s 42 if they can show that the infringement falls within any of the similar criteria under s 41 above.[41] Thus, a custom owner could institute a civil suit against any person who has been convicted for reproducing a traditional carving without the owner's authorisation.

However, the new *Copyright Act* does not incorporate any contractual provisions, unlike the new patents, trademarks and designs Acts[42] which recognise the importance of the use of contract to maximise the

share of profits when dealing with non custom owners. In cases where potential litigation might arise, the *Copyright Act* seeks to engage the Council of Chiefs and the National Cultural Council to stand in for the traditional owners in protecting the traditional system. It is a new piece of legislation and its efficacy has not been tested as yet. However, since the Act is not yet in force, further consultation should be conducted with a view to incorporate contractual provisions and increase the role of the Council of Chiefs and the National Cultural Council.

Under the remainder of the Acts,[43] similar provisions are found in the clauses seeking to protect the indigenous knowledge and expressions of culture (IKEC). The grant of a patent to an applicant for an invention that is related in any way to indigenous knowledge[44], the registration of a trademark[45] that involves an expression of indigenous culture or a registration of a design[46] which is related any way to indigenous knowledge is impossible without: the consent of the custom owners; and an agreement on the payment of an equitable share of the benefits to them from exploiting the patent, or where the National Council of Chiefs acts in the absence of the custom owners, an agreement on the payment of an equitable share of the benefits to the National Council of Chiefs. However, the Council of Chiefs must consult the Vanuatu National Cultural Council before entering into such an agreement.[47]

The involvement of the two institutions of the Council of Chiefs and the National Cultural Council along with the custom owners in the whole process guards against both unscrupulous pharmaceutical companies and custom owners from benefiting from IKEC at the expense of genuine custom owners. The involvement of both the Council of Chiefs[48] and Vanuatu National Cultural Council[49] in the whole process leading up to the grant of patents, designs or trademarks over indigenous property rights should be highly commended. This could be the basis upon which national heritage policy and legislation could be formulated. The National Cultural Council is a statutory body and its functions could be increased by way of amendments to the principal Act to cater for the increase in functions.

Perceived weaknesses in Vanuatu's IP Laws

As seen above, instead of creating a *sui generis* regime for the protection of its IKEC, Vanuatu seeks to adopt western-style legislation with modifications to suit its specific needs. Arguably, there is still the likelihood that practical difficulties could arise should these enactments be in force. The paper now looks at some of the perceived weaknesses of the approach taken.

Objective & purpose of protection

Generally, the whole objective of adopting a *sui generis* system is to remedy the failure of the current IP system to accommodate the interest of the indigenous or local communities to protect their TKEC. The mechanism under the new *Copyright Act* fails to achieve this objective by not acting retrospectively.

Take s 4 of the *Copyright Act* for instance, which states:

> This Act does not affect contracts or agreements made before the commencement of this Act relating to works, performances, sound recordings, broadcasts or *expressions of indigenous culture* (emphasis added).

Although the above provision is in line with the policy intent behind the Model Law to compliment existing IP rights,[50] in effect, custom owners who have previously lost their IKEC to non-customary owners or third parties as a result of unscrupulous deals or through unfair contracts prior to the commencement have no basis to recoup that cultural right. This provision turns a blind eye to what could have been an infringement on TK and EC.

Derivative works

The protection of derivative works in relation to indigenous knowledge and expressions of culture is also an underlying policy of the Model Law. This policy is incorporated into the *Copyright Act*. Under s 6 (2) of the *Copyright Act* 'collections of expressions of indigenous culture if the collections are original by reason of the selection or arrangement of their contents' are protected as works. As it appears, individual authors who own the copyright in relation to the derivative work have the exclusive right to carry out acts which are associated with the economic rights[51] provided for under s 8 (1) of the *Copyright Act*.

However, the right to produce derivative works under the Act could lead to unwarranted results when it is read together with the provisions of sections 41 and 42 which guard against non-customary use of IKEC by non-custom owners. For instance, the author could later realise that he has sold a work related to IKEC to a third party without the prior consent of the owners. He has therefore committed an offence under s 41 in failing the formalities required. He has also subjected himself to a possible civil action by the custom owners. It seems therefore that the only way to determine if copyright exists in a work is through litigation, which would not be in the best interest of the local communities.

Absence of moral rights

It is contemplated that Vanuatu would incorporate into its legislative mechanism the policy of the Model Law in creating two distinct but related rights namely; traditional cultural rights and the moral rights attached to these traditional cultural rights. However, there is no express provision in any of the relevant new pieces of legislation to suggest that custom owners also have moral rights attached to the cultural rights in their IK and EC, or that works related to IK and EC should be protected from cultural misuse. The *Copyright Act* only gives an author of a work the moral rights in a work under the existing IP system.[52] The term 'author of a work' is defined under the definition section of the Act to refer to an individual who has created the work. Arguably, communal ownership is excluded.

In comparison, under the *Patents*, *Trademarks* and *Designs Acts*, there are requirements for access agreements to be signed between the parties. Further, under these Acts the parties are free to insert into the agreement other conditions, including how and when a trademark, design or a patent relating to TK and EC is to be used.[53] Under this mechanism, the TK and EC holders can precisely define the scope of their moral rights including the extent to which a third party can subsequently use that subject matter.

Nevertheless, contractual provisions can be subject to different judicial interpretations. It is possible that a court of competent jurisdiction may opt for an interpretation which is not in the best interest of custom owners at all. A case in point is the Morning Star case[54], involving an aboriginal artist, Yumbulul who had the authority required under customary laws to paint sacred arts of his tribe. His artwork ended up on ten-dollar currency released by the Australian Reserve Bank. The artist Yumbulul had proof that he has been misled and pressured into signing the licence enabling the transfer of the design by deceptive means. The court, however, held that Yumbulul should have understood the terms of the agreement even though the details were not provided.

Protection beyond national laws

The efficacy of any protective mechanism is measured by its ability to extend the protection beyond the borders of the enacting country. This was recognised bythe Secretariat of the Pacific Community's Cultural Affairs Adviser, Rhonda Griffiths, when she stated that:

> Frequently, exploitation of traditional knowledge and culture occurs outside of enacting counties, so it is important that Pacific Island countries find a solution to protect traditional

knowledge and expressions of culture between the different countries of the region.[55]

The proposed legislative mechanism adopted in Vanuatu will face difficulties in this area. This is because the mechanism is based on the Model Law, which focuses on the national law level of the island states. To find a solution to this problem, Vanuatu must show commitment in joining hands with the rest of the Pacific Island countries in the region. For a possible solution can only come about through the establishment of regional mechanism or a joint cooperation between the island states.[56]

SUPPLEMENTARY APPROACHES

Arguably, the approach taken in Vanuatu in incorporating the provisions of the Model Law into formal IP legislation to protect its IKEC from exploitation through non-customary uses still poses practical difficulties. It is favourable therefore, to utilise other available legal mechanisms to assist in giving maximum and effective protection over the IKEC of the local communities in Vanuatu. Other possible avenues include: the provisions of the Convention on Biological Diversity *he provisions of the* 1992 (CBD); the *Environmental Management and Conservation Act* 2002; the use of databases; and greater recognition of customary law principles.

The CBD

The reliance upon the CBD is justified because Vanuatu has ratified the CBD pursuant to the Convention on Biological Diversity *(Ratification) Act 1992*. The provisions of the CBD are binding on Vanuatu.[57]

The CBD was signed in Rio de Janeiro on the 5th of June, 1992.[58] It was a crucial step for the protection of TK, for it recognises the need to 'respect, preserve, and maintain' the ecological knowledge of indigenous peoples and local communities, and to ensure that the benefits of commercial applications are shared equitably.[59] Whereas TRIPS treats TK as part of the global commons available for exploitation by all who so wish, the CBD takes the view that if a product or a process has existed in a culture for a long period of time, it is owned and hence protected under intellectual property.[60]

Notably, there are two crucial provisions of the CBD from which Vanuatu can benefit considerably. First, the mechanism of 'prior informed consent' under Article 15(5) which ensures that consent of the indigenous people is received before the resources are shared. However, under the CBD the phrase 'prior informed consent' is not defined.

Arguably, this leaves open the opportunity for misuse of resources protected under the CBD. For example, a person could coerce the owners of TK and EC into consenting and this could mean that a prior informed consent has been obtained. Hence, a definition of free consent will avoid issues of consent to arise at a later period. The need for better definition of prior informed consent is illustrated by a situation in Solomon Islands, where a group of people donated blood samples to a donee company. The blood samples showed a strain with immunity to a virus. Based on this information, the donee company developed a drug for which a US patent was applied. The donee company did not pay compensation at all to the people on the assertion that the blood samples were given with consent. On what basis consent was obtained was not known.[61] This is an area Vanuatu can work on to improve upon.

The second mechanism is the use of "mutually agreed access contracts" to formalise the process of benefit sharing, transfer of technology and the results of the research. The underlying policy is to ensure that a single company is not given exclusive rights to prospect the relevant aspects of the local people's TK or granted a monopoly over TK or resources.[62]

The Environmental Management & Conservation Act 2002 ((EMA)[63]

The EMA incorporates some of the underlying policies of the CBD. It is also a crucial step for the protection of custom resources and TK generally. For instance, under s 12, all projects, proposals or development activities that are likely to have an impact on, *inter alia*, important custom resources are subject to environmental impact assessment (EIA). It is an offence under the EMA to conduct any activity that is subject to an EIA; or to undertake any such activity where approval has been refused.[64]

The EMA also regulates bio-prospecting.[65] A bio-prospecting permit is required under the EMA. All applications for a bio-prospecting permit are considered by the Biodiversity Advisory Council.[66] In determining an application for a permit, the Council has to be satisfied,*inter alia*, that a legally binding and enforceable contract is concluded with custom landowners, or any owner of the traditional knowledge. The contract has to specify certain matters such as; (i) rights of access; (ii) rights of acquisition of any biological resource or traditional knowledge; (ii) appropriate fees, concessions or royalties in relation to the activity undertaken.[67]

The use of the EMA to supplement the TK provisions of the formal IP enactments referred to above should ensure that unscrupulous pharmaceutical companies are regulated in every aspect of their activities. Essentially, the EMA stands as a protection against cases such as the "blood sample case" (above) in Solomon Islands.

TK databases

The use of database systems can be used as a defensive protection of TK. It is useful as evidence of prior art to defeat a claim to a patent or possibly copyright on a TK or any aspect of it.[68] This system is commonly used around the world. Its operation is coordinated through a central institution.[69] Arguably, such a system can pressure holders of sacred TK to disclose closely held details. As such, its effect is said to be similar to registering TK as trade secrets. Commercial exploitation of TKEC by multinational pharmaceutical companies is on the increase and defensive protection as is a positive step for developing countries such as Vanuatu.

Greater recognition of customary law principles

Finally, customary law plays an important role in the protection of TK as it is the law upon which the protection scheme discussed earlier must rely. [70] For example, customary law will determine the traditional owners of TKEC, or whether the use of such TKEC is non-customary or otherwise, or the methods by which disputes about ownership will be determined.[71]

However, rules of customary law will only provide some protection for TKEC if the rules are recognised by statute or the courts, and are enforced.[72] In Australia for instance, the courts have rejected claims of communal proprietorship in sacred images in two cases on the basis that there is no 'statutory recognition'[73] or 'remedies'[74] in relation to communal ownership under Australia's legal system.

The way forward is to consider and give primacy to customary rights through statutory recognition.[75] In Vanuatu, customary law is recognised as part of the law of the country thus, a statutory enactment granting recognition as contemplated will still be in the realm of the legislators.[76]

CONCLUSION

The advance of modern information technologies has seen an increase in awareness of TK. With this comes an increase in threat to TKEC as competition for developing new product intensifies, particularly as the prevailing IP system fails to protect TKEC and their holders. In light of this, in 2002 the South Pacific region through the regional cultural Ministers endorsed a draft *Model Law on the Protection of Traditional Knowledge and Expressions of Culture*. The draft Model Law provides the basis for those Pacific island states wishing to protect their TKEC. The Model Law in turn has influenced Vanuatu in incorporating TKEC protection provisions into its formal IP legislation. However, the Model Law and the legislative mechanisms adopted by Vanuatu produce some practical difficulties. For this reason, it is in the best interests of the traditional communities that other mechanisms are explored and/or relied upon to ensure effective protection of their TK and EC.

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[1] A quote from L.T.C. Hams, 'Offering Cake for the South' (2000) *European Intellectual Property Review* 451, at 452, which seeks to reiterate the use of western style IP systems by developed countries to exploit, for commercial and economic gains, the developing but resourceful countries in the south.

[2] Indigenous People's Biodiversity Network (IPBN), & the ABYA YALA FUND (1994) http://nativenet.uthscsa.edu/archive/nl/9408/0257.html (at 5/1/05).

[3] Secretariat of the Pacific Community, '*Background For the Regional Framework For the Protection of Traditional Knowledge and Expressions of Culture*', SPC/UNESCO/PIFS/RMOC/Information Paper 5 26 August 2002, 6.

[4] The draft Model Law was a result of a joint effort of Secretariat of the Pacific Community (SPC), Pacific Island Forum Secretariat, UNESCO and the Council of Pacific Arts comprising the twenty-seven countries and territories participated in the Festival of Pacific Arts. It was endorsed by the First Conference of Ministers of Culture of the Pacific Region at SPC in 2002, [online], available from: http://lyris.spc.int/read/messages?id=8290 (Accessed 11/22/2004)

[5] Signed on 5th June, 1992 in Rio de Janeiro. Reference is made to the copy of Convention attached as Schedule to the Convention on Biological Diversity *(Ratification) Act 1992* (Vanuatu) [Commenced 1 March, 1993].

[6] WIPO, *Protection of Traditional Knowledge: A Global Intellectual Property Issue*. Roundtable on Intellectual Property and Traditional Knowledge, Geneva, November 1 and 2, 1999, a Document prepared by International Bureau, October 22, 1999 p. 2, [available from: http://www.wipo.int/documents /en/meetings/1999/folklore/pdf/tkrt99_2.pdf (Accessed 28/11/2004).

[7] WIPO Report on Fact-finding Missions on Intellectual Property and Traditional Knowledge (1998-1999).

[8] That Forum was convened in response to the recommendations on February 1996 of the WIPO Committee of Experts on a Possible Protocol to the Berne Convention and the Committee of Experts on a

Possible Instrument for the Protection of the Rights of Performers and the Producers of Phonograms.

[9]. Section 2 of the 1982 *Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions* (the Model Provisions) defines 'expressions of folklore' as 'productions consisting of characteristics elements of the traditional artistic heritage developed and maintained by a community or by individuals reflecting the traditional artistic expectations of such a community'. This definition was taken to exclude subject matters such as traditional agricultural, ecological and medicinal knowledge and practices: *See* WIPO. Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999), Geneva, April 2001, p. 22.

[10] M Blakeney, 'What is Traditional Knowledge? Why should it be Protected? Who should Protect it? For whom?: Understanding the Value Chain.' Centre for Commercial Law Studies Queen Mary and Westfield College, University of London. A paper prepared for the WIPO Roundtable on Intellectual Property and Traditional Knowledge, Geneva, November 1 and 2, 1999, pp 2-3.

[11] M Torsen. *Cultural Property Protection: International and U.S. Current Affairs*, Washington School of Law, p. 1, available from: http://cyber.law.harvard.edu/bold/devel03/torsentk.html (Accessed 28/11/2004).

[12] Ibid, p. 1.

[13] Take for instance, the widely accepted definition of Dr Martinez Cobo who describes indigenous communities, peoples and nations as "those which, having historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the society now prevailing in those territories or parts of them": Study of the Problem of Discrimination Against Indigenous populations, E/CN.4/Sub.2/1986/7 cited in M Blakeney, above n 10, pp 2-3.

[14] S Ragavan, 'Protection of Traditional Knowledge' (2001) 2 *Minnesota Intellectual Property Review* 1, 4.

[15]See, for instance, the speech by Leanne Simpson, the Director of Indigenous Environmental Studies, Department of Native Studies, Trent University, [available from: http://www.snowchange.org/views /indigenous/leanne_trad_en.html (Accessed on 30/11/2004).

[16] See *Re the Nagol Jump, Assal & Vatu v The Council of Chiefs of Santo* [1980-1994] Van LR 545, where the applicants by way of an application to the Supreme Court successfully prevented the respondents from performing the Nagol jump on the island of Santo. The Nagol jump is a traditional ceremony, akin to the bungy jumping and originated from the southern part of the island of Pentecost.

[17] Commission on Intellectual Property Rights, *Integrating Intellectual Property Rights and Development Policy* (2002), p. 74 http://www.iprcommission.org/papers/pdfs/final_report /CIPRfullfinal.pdf (Accessed 30/11/2004).

[18] See Miranda Forsyth, 'Intellectual Property Laws in the South Pacific: Friend or Foe?'(2003) 7(1) *Journal of South Pacific Law* http://law.vanuatu.usp.ac.fj/jspl/2003%20Volume7Number1/forsyth (at 12/12/04).

[19] *Trade-Related Aspects of Intellectual Property Rights Agreement* http://www.wto.org/english/docs_e /legal_e/27-trips.pdf

[20] The existing framework of IP laws that are recognized internationally are those identified by TRIPS namely; patents (part II, s.5, art.27); copyrights (part II, s 1, art. 27); trademarks (part II, art. 15); geographical indications (part II, s 3, art. 22); protection of undisclosed information (part II, s 7, art. 39); layout designs of integrated circuits (Art. 35); and industrial design (Art. 25).

[21] M Ruiz, *The International Debate on Traditional Knowledge as Prior Art in the Patent System: Issues and Options for Developing Countries* (2002) <http://www.ciel.org/Publications /PriorArt_ManuelRuiz_Oct02.pdf (Accessed 29/11/2004).

[22] *Milphurrurru v. Indofurn Pry Ltd & Others* (1995) 30 IPR 209.

[23] Ibid.

[24] S Frankel and G McLay, *Intellectual Property in New Zealand* (2002), 116.

[25] It all started at the 1997 World Forum on the Protection of Folklore when UNESCO and WIPO were requested to convene regional consultations on the "expressions of folklore". Seeing that traditional knowledge was not included in the subject matter covered by the *1982 Model Provisions for National Laws for the Protection of Folklore Against Illicit Exploitation and Other Prejudicial Actions*, WIPO was called upon to undertake work towards the protection of TK.

[26] The Final Declarations containing the priority recommendations of the UNESCO Symposium are available from: http://portal.unesco.org/culture/en/file_download.php /3650681371ca1bd46dfcb8b36e4ac80fNoumea1999.pdf (Accessed 29/11/2004).

[27] Other regions around the world have also recognised the importance of a *sui generis* system. For instance, the Organization of African Unity (OAU) has drafted the Model Legislation on Community Rights on Access to Biological Resources: See P L.C. Marin. *Providing Protection for Plant Genetic Resources- Patents, Sui Generis Systems and Bio-Partnership* (2002) p 77.

[28] Explanatory Memorandum, Model Law for the Protection of Traditional Knowledge and Expression of Culture (2002) at 1, 3.

[29] SPC, above n 3. See also clause 11 of the draft Model Law.

[30] Clauses 6 – 8 under Part 2 of the draft Model Law.

[31] Ibid, clauses 9, 10.

[32] Ibid, clause 13 (4).

[33] Ibid, clause 13 (1).

[34] *See* Part 5 ibid.

[35] Miranda Forsyth, above n 18.

[36] WIPO, above n 6.

[37] 'Legal and cultural experts from around the region meet in Noumea' *Vanuatu Daily Post* (Port Vila,

Vanuatu) Thursday 2 October 2003, p 7; Press release, Secretariat of the Pacific Community, Cultural Affairs Programme. http://lyris.spc.int/read/messages?id=26873 (at 9/10/2003).

[38] See *Copyright & Related Rights Act* No. 42/ 2000 (Part 7), *Trademarks Act* No. 1/2003 (Part 15, s 94), *Patents Act* No 2 /2003 (Part 12, s 47) and *Designs Act* No. 3/2003 (Part 10, s 62). It should be noted that when this instant article went to press all these pieces of legislation are not yet in force despite been assented to; c.f. Part V of the *Copyright and Neighbouring Rights Act* 2000 of Papua New Guinea (PNG) which seeks to protect the expressions of folklore of the traditional communities in PNG.

[39] Angeline Saul, personal interview conducted at State Law Office, Port Vila, 27 October 2003. Angeline Saul, is a regular participant to recent regional conferences on the draft Model Law including the one held in early October 2003 in Noumea to revise the Model Law; As regards the *Copyright Act* of 2000, the insertion of the provision relating to expressions of indigenous culture well ahead before the Model Law was endorsed in 2002 does not come as a surprise particularly when Vanuatu has involved extensively in past numerous intellectual property conferences organised by World Intellectual Property Organisation (WIPO). For instance, the Fourth Asia Pacific Copyright & Neighbouring Rights Seminar held in Tokyo, Japan (8-10th March 2000). This is because the draft Model Law has since been revised to take onboard comments from WIPO, which has actively involved in the area of TKEC.

[40] It is worth noting that the meanings attached to the expressions 'traditional knowledge' and 'indigenous knowledge' found both in the draft Model Law and the Acts respectively are similar both in content and expression.

[41] S 42 is read with ss 34 and 23 of the *Copyright Act*.

[42] *Patents Act* No. 2 of 2003; *Trademarks Act* No. 1 of 2003; *Designs Act* No. 3 of 2003.

[43] Ibid.

[44] See s 47 of the *Patents Act* No. 2 of 2003.

[45] See s 94 of the *Trademarks Act* No. 1 of 2003.

[46] See s 62 of the *Designs Act* No. 3 of 2003.

[47] See *Patents Act* No. 2 of 2003; *Trademarks Act* No. 1 of 2003; *Designs Act* No. 3 of 2003.

[48] *See* Chapter 5 of the Constitution of the Republic of Vanuatu, which provides for its establishment and functions.

[49] A statutory body established under the *Vanuatu National Cultural Council Act* [Cap. 186] (as amended) as the custodian of expressions of culture. It is administered under the Internal Affairs Department with greater involvement by the Cultural Centre. The Director of the Cultural Centre, Ralph Reganvanu, is currently the secretary to the National Cultural Council. The Council is aware of its likely increased functions under the newly passed pieces if IP legislation: Personal discussion with Mr Peter Koromas, an officer of the Internal Affairs Department, dated 3 November 2003.

[50] Explanatory Memorandum, *Model Law for the Protection of Traditional Knowledge and Expression of Culture* (2002), at p. 1.

[51] These include but not limited to the right of reproduction; publication; performance; broadcasting;

adaptation or transformation; translation; transmission; distribution; communication in any other way to the public and the importation of copies of the work being subject of the copyright.

[52] See s. 9 of the *Copyright Act* 2000.

[53] *See s. 47 (7) of the Patents Act, s. 62 (7) of the Designs* Act and s. 94 (7) of the *Trademarks Act*.

[54] *Yumbulul v. Reserve Bank of Australia* (1991) 21 I.P.R. 481. Yumbulul created the Morning Star Pole on a commission from a company. It was later acquired by the Australian Reserve Bank, through a sub-license of copyright, from Aboriginals Artists Agency as a collective society for aboriginal artists. The Agency had acquired an exclusive licence for Yumbulul's work. The Bank later released ten dollar currencies which had representation of the "Morning Star".

[55] Press release, Secretariat of the Pacific Community, Cultural Affairs Programme. http://lyris.spc.int /read/messages?id=26873 (at9/10/2003).

[56] The issue of regional co-operation in the legal protection of traditional knowledge and expressions of culture was the focus of the meeting of the legal and cultural experts from around the South Pacific region that was held in early October in Noumea: *See* 'Legal and cultural experts from around the region meet in Noumea' *Vanuatu Daily Post* (Port Vila, Vanuatu) Thursday 2 October 2003, p 7.

[57] No. 23 of 1992, s 1 (1); s 1(2).

[58] See s 1 (1) of the Convention on Biological Diversity *(Ratification) Act* No. 23 of 1992.

[59] Article 8(j) of CBD.

[60] G. Bodeker, 'Traditional Medical Knowledge, Intellectual Property Rights & Benefit Sharing' (2003) 11 *Cardozo J. Int'l & Comp. L.* 785, 789.

[61] S Ragavan, above n 14, 33.

[62] Commission on Intellectual Property Rights, above n 17.

[63] Act No. 12 of 2002. It was commenced on 10 March 2003.

[64] Ibid, s 24.

[65] S. 2 defines bio-prospecting as including harvesting or exploiting 'samples of genetic resources; (b) samples of any derivatives of genetic resources; (c) the knowledge, innovations, and customary practices of local communities associated with those genetic resources, for purposes of research, product development, and including investigative research and sampling but does not include customary uses if genetic resources.'

[66] Ibid, s 33, ss (3).

[67] Ibid, s 34(6)(a).

[68] M Ruiz, above n 21.

[69] For instance, the Society for Research and Initiative for Sustainable Technologies and Institutions

(SRISTI) in India has developed databases of traditional knowledge and innovations in close collaboration with members of the local communities: See S Sahail, *Traditional Knowledge and Its Protection in India*, http://216.239.63.104/search?q=cache:3ojmegkQ57cJ:www.genecampaign.org/ikfolio/graham-sahai.doc+%22Legal+protection+of+traditional+knowledge%22+%22indigenous+people%22&hl=en

[70] Minutes of the Commission of Intellectual Property Rights Workshop on Traditional Knowledge, 24 January 2002 http://www.iprcommission.org/papers/pdfs/workshops/workshop4.pdf

[71] G Powles, Modules for LA422: Customary Law, School of Law, USP, August 2003.

[72] Ibid.

[73] Y*umbulul v. Reserve Bank of Australia* 21 I.P.R. 481 (1991) the Federal Court stated that 'the question of statutory recognition of Aboriginal communal interests in the reproduction of sacred objects is a matter for consideration by law reformers and legislators'.

[74] *Milphurrurru v. Indofurn Pry Ltd* (1995) 30 IPR 209.

[75] The *sui generis* system of protection of countries such as Bangladesh, Philippines and organisations such as the Organisation of African Unity (OAU) seek to give increased recognition to customary laws: Commission on Intellectual Property Rights, above n 17, 79.

[76] S 95(3) of the *Constitution of Vanuatu*, 1980.