THE POLICY MAP:

DEVELOPING A LEGAL AND POLICY FRAMEWORK FOR TRADITIONAL KNOWLEDGE

A guide for policy-makers in the Pacific Region

SPC
Secretariat
of the Pacific
Community

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DEVELOPING A LEGAL AND POLICY FRAMEWORK

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

Issues relating to traditional knowledge have received increasing attention internationally over the past decade 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.

Globally, many countries and communities are considering how to best address these issues and concerns. There are considerable differences among countries in this regard. However, there is an increasing tendency to focus on one issue and pass over others. Legal protection, for example, has received considerable attention in isolation from preservation issues, which have been accorded a lower profile generally. The Policy Map has been developed to promote a broad and holistic approach to issues relating to traditional knowledge. By taking this type of approach, it is anticipated that all traditional knowledge-related issues will be suitably addressed and policy solutions will fit seamlessly together and work in a complementary manner.

The Policy Map guides policy-makers through the various stages of the process for developing a legal and policy framework for traditional knowledge. It breaks down this process into its key developmental stages and provides guidance on the types of matters that are useful to address.

These stages are as follows:
- clarifying the need for government action
- initiation with key stakeholders
- understanding the policy context
- assessing the current situation
- defining the problem
- identifying the government's policy objective
- identifying the policy options and developing the preferred approach

The Policy Map forms part of the Traditional Knowledge Toolkit being developed by the Secretariat of the Pacific Community (SPC). It is intended to act as a guide rather than an exhaustive authority on traditional knowledge matters.

CLARIFYING THE NEED FOR GOVERNMENT ACTION

D ifferent Pacific Island countries and territories will have varied interests and concerns with respect to traditional knowledge, often based on diverse assumptions and ideological standpoints. It is therefore difficult to specify with precision why government action is necessary. However, it is possible to highlight the commonly cited grounds for government action. This may assist policy-makers to consider the necessity for government action within their domestic context. This should not replace the need to develop a localised understanding of the problem as part of the policy development process.

The need for government action can be viewed through several different lenses. From a cultural perspective, traditional knowledge has intrinsic value for traditional communities that includes cultural, spiritual and linguistic spheres. When traditional knowledge is lost, this can have an enormous impact on the cultural identity and very way of life of traditional communities. One of the challenges going forward is to find ways to preserve and maintain traditional knowledge so that traditional communities can continue to thrive and develop in ways consistent with their own values and interests.

Through an environmental lens, traditional agricultural knowledge plays an important role in resource management, the sustainable use of biodiversity and food security. The strong practical component of traditional knowledge means that it is of direct and indirect benefit to society more broadly.

From a protection angle, there are many examples of important technologies and medicines being derived directly from traditional knowledge and there is also strong interest in using handicrafts and cultural expressions for commercial enterprises. However, there are widespread concerns regarding illicit uses and misappropriation of traditional knowledge, particularly where the role and contribution of traditional communities has not been recognised and respected. Traditional communities have stressed that their knowledge should not be used by others inappropriately, without their consent and without sharing the benefits.

This has led to calls both for greater respect and recognition of the rights of traditional communities in their traditional knowledge and for the establishment of protection mechanisms to ensure this occurs. While some legal tools can be useful in preventing misuse by third parties, it has been widely acknowledged that a range of protection mechanisms will be needed, including the development of *sui generis* measures.

Traditional knowledge can also be a useful tool for economic development. The absence of measures recognising and protecting the rights and interests of traditional communities regarding their traditional knowledge can, however, hamper their development efforts.

These challenges are diverse and involve many areas of law and policy. In considering government action, it is useful to note at the outset that it is likely to be needed across a wide spectrum of traditional knowledge related issues.

INITIATION WITH KEY STAKEHOLDERS

Given the intrinsic relationship between traditional communities and their traditional knowledge, it logically follows that any form of government activity within this area should be firstly sanctioned by the holders, custodians and guardians of traditional knowledge. Appropriate steps should be taken in this regard.

In addition to obtaining the necessary mandate, policy-makers can utilise this stage of the process to establish or develop a working relationship with traditional communities. Close collaboration with traditional communities is essential. This is not only appropriate as a matter of principle, it will also help to ensure that the policy framework is appropriate and responsive to the needs of these communities. If constructive relationships are formed in the early stages of policy development, this can promote productive engagement throughout the process.

Depending on national circumstances, this stage may also involve capacity building activities with traditional communities. This can help to establish or develop a foundation for communities to engage in the policy development process. Guidance should be sought from traditional communities on what types of capacity building and information sharing activities would be most beneficial. This can also be an opportunity to share information such as developments in various international fora considering traditional knowledge issues.

Similarly, this stage can be used to raise awareness and build capacity amongst government officials. It should not be assumed that capacity building efforts are only necessary for external stakeholders. Traditional knowledge is a cross-cutting issue that arises in a multitude of sectors, such as health, environment, and culture, and officials in these areas will need to develop their capacity and expertise regarding traditional knowledge in order to engage effectively.

In terms of possible activities that can be undertaken in this stage, these could include:

» identification of key stakeholders with interests in development of policy regarding traditional knowledge;
» seminars, discussion groups and workshops with key stakeholders; and
» preparation of fact sheets.

IDENTIFYING THE POLICY CONTEXT

Policy development does not occur in isolation. The development of a legal and policy framework for traditional knowledge should reflect the broader legal environment and policy context for each dimension of traditional knowledge at the national, regional and international level. It is important that policy-makers identify and understand the policy context early in the process as this can influence the policy design, implementation structures or barriers, and the actions of political or institutional players. It can also assist in assessing which policy outcomes and objectives may be appropriate for policy development.

At the national level, an initial step for policy-makers is to understand the strategic context. This includes identifying all relevant government goals, policies and commitments. This will influence the development of policy regarding traditional knowledge.

Additionally, policy-makers should identify existing legislation and policies relating to traditional knowledge. As it is a complex, multifaceted and interdisciplinary issue, this is likely to include a range of areas, such as intellectual property, the environment, human rights, health, tourism, trade, research, science and technology, and cultural heritage. These areas are likely to include relevant policy considerations, such as respect for cultural diversity, promotion of artistic and intellectual freedom, stimulation of creativity and innovation, and preservation of cultural heritage.

At the regional level, a number of CROP (Council of Regional Organisations in the Pacific) agencies are involved in work relating to traditional knowledge. For example, the Secretariat of the Pacific Regional Environment Programme (SPREP) has developed a model law for the protection of traditional ecological knowledge. SPC has also developed the Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture. The Pacific Islands Forum Secretariat is the lead CROP agency on matters relating to core

intellectual property, such as copyright, trademarks and patents. Policy-makers should apprise themselves of relevant developments at the regional level to ensure domestic policy development sufficiently aligns with any existing regional agreements or decisions.

Internationally, traditional knowledge has received increasing interest over the past decade. Consideration of traditional knowledge issues occurs within a cross-cutting area of international law and policy development, in which a number of international treaties are already in force. These areas include intellectual property, the environment, human rights, health, access to genetic resources and the preservation of cultural heritage. More than 11 United Nations entities are working on traditional knowledge-related issues, each in their respective area of competence and mandate. While it cannot be expected that Pacific Island countries and territories would have the resources to engage in all or even some of these fora, it would be beneficial for policy-makers to acquaint themselves with these processes as much as possible. As well, over the years, many useful technical papers have been developed in various international fora. Policy-makers may find it useful to consult the websites of the World Intellectual Property Organisation, the United Nations Conference on Trade and Development (UNCTAD) and the Convention on Biological Diversity, for example, regarding technical papers on traditional knowledge issues.

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ASSESSING THE CURRENT SITUATION

This stage is sometimes referred to as 'situational analysis'. It is important to understand what currently exists and what has been happening regarding traditional knowledge in order to define the problem and, following that, identify the policy objective. In sum, this analysis will assist in setting the direction for further stages of the policy development process.

It is also important to develop a localised understanding rather than importing commonly identified issues. For example, while preservation of traditional knowledge may be of critical importance in one country, it may not be a significant issue in another country as intergenerational transmission may be occurring adequately.

Some of the questions that policy-makers could consider include the following:

» What are the main types of traditional knowledge in the country or territory?

» Who are the traditional knowledge holders?

» Are some parts of traditional knowledge shared by several communities? If so, what is the relationship between these groups?

» How is traditional knowledge developed, maintained and transmitted to future generations within the traditional or customary context?

» What role do customary laws play?

» What traditional knowledge documentation efforts have been undertaken?

» Are certain bodies of traditional knowledge in danger of being lost? If so, what are the main underlying causes for this?

» Is traditional knowledge being used commercially? If so, in what ways?

» Is traditional knowledge currently being accessed by third parties? If so, in what manner? Are traditional communities

reaping benefits from this? Are there cases of inappropriate use?

>> What is the level of awareness of the value of traditional knowledge in the country or territory?

>> What is the current legal and institutional framework surrounding traditional knowledge?

>> Who are the main stakeholders interested in this issue (this may include traditional communities, bearers and performers of cultural traditions and artistic expressions, folklorists, ethnomusicologists, archivists and other cultural scholars as well as government offices and departments dealing with issues such as health, intellectual property, environment, tourism, culture and education)?

>> What are the main traditional knowledge-related concerns and objectives expressed by these different groups of stakeholders?

In order to develop an accurate account of the current situation, it will be critical for policy-makers to engage closely with traditional communities to obtain the necessary ground-level knowledge. Policy-makers should be able to build off relationships initiated earlier in the policy development process.

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STAGE 5:

DEFINING THE PROBLEM

Having analysed the current situation, policy-makers will be able to progress to defining the nature, scale and source of the problem. This is important as a proposal for government action should generally only be made where assessment of the market, the legal system and other institutions relevant to resolving the problem indicate a failure.

It is useful for the problem definition to include matters such as:

▶▶ the factors that contribute to the problem;

▶▶ the symptoms of the problem;

▶▶ the root cause of the problem; and

▶▶ the distributional impact of the problem on the different groups within society, and/or the different sectors within the economy.

The problem definition should be informed by and tested with key stakeholders, particularly traditional communities.

IDENTIFYING THE POLICY OBJECTIVE

The policy objective will set the overall direction for the legal and policy framework and is, in sum, that which would be achieved by addressing the problem as defined in the previous stage.

Although there are many different possible objectives relating to traditional knowledge, these can be loosely grouped into the broad categories of preservation, protection and promotion. It is common for traditional communities to have a diverse range of interests and concerns regarding traditional knowledge and these should be reflected in the policy objective.

While countries and territories are encouraged to take a broad and holistic approach to traditional knowledge, it is recognised that they will have varied interests and concerns. In areas where traditional knowledge is being rapidly lost, preservation may be of key importance. Where illicit uses and misappropriation of traditional knowledge is of primary concern, the focus may be on protection.
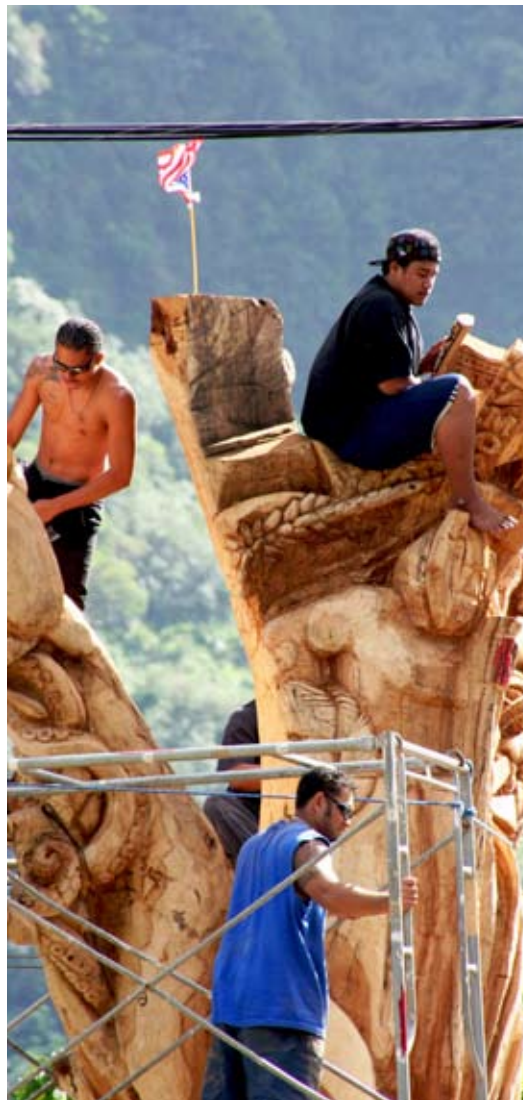
Some countries and territories may be mainly interested in the promotion of traditional knowledge and harnessing its potential for development, including through commercialisation and benefit-sharing. The level of emphasis accorded to preservation, protection and promotion objectives should be determined by national circumstances and guided by traditional communities.

In identifying the policy objective, it may be useful to draw on election manifestos, recent policy statements and Cabinet minutes for guidance to ensure the policy objectives are appropriately aligned with existing policy. Some examples of objectives include the following:

» Recognise that traditional communities consider their traditional knowledge and cultural heritage to have intrinsic value and acknowledge that traditional cultures comprise frameworks of innovation and creativity that benefit traditional communities as well as all humanity.

» Promote and support the conservation and preservation of traditional knowledge by respecting, preserving, protecting and maintaining traditional knowledge systems and providing incentives to the custodians of those knowledge systems to maintain and safeguard them.

» Respect and facilitate the continuing customary use and development of traditional knowledge by traditional communities and promote the continued development of traditional knowledge systems.

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▶▶ Prevent the misappropriation and illicit uses of traditional knowledge and other unfair commercial and non-commercial activities.

▶▶ Promote respect for the cultural and spiritual values of traditional knowledge, including customary laws and understandings.

▶▶ Encourage the harnessing of traditional knowledge for sustainable development, including rewarding and protecting tradition-based creativity and innovation.

Policy-makers should engage closely with stakeholders, particularly traditional communities, to identify their interests and expectations in terms of what they want the policy to achieve. This will include consideration of the respective roles of traditional communities and government in the preservation, protection and promotion of traditional knowledge.

Countries and territories may also wish to consider whether it would be beneficial to develop a set of policy principles that can guide and hold together the elaboration of any detailed menu of options, creating a consistent and complementary framework for traditional knowledge.

IDENTIFYING AND DEVELOPING POLICY OPTIONS

This stage involves the identification and development of policy options for making the policy objective actionable. All viable options for achieving the policy objective should be identified, including an assessment of the status quo and possible gaps. Useful matters to consider include: how to address the symptoms and the root cause of the problem, how to influence the factors contributing to an outcome, how each option will achieve or contribute to achievement of the policy objective, and various degrees of government action.

Depending on a country or territory's policy objective, the policy options will most likely need to accommodate the areas of preservation, protection and promotion. While it is difficult to compartmentalize policy options into these three groups given the significant degree of overlap, the following list includes possible national actions/tools that governments and other stakeholders could consider using to meet the policy objective:

Preservation of traditional knowledge

» *In-situ* actions aimed at maintaining the traditional knowledge base and preserving and strengthening the communities themselves. Examples include cultural heritage preservation laws and programmes, recognition and preservation of local languages, recognition and strengthening of customary law and practices and recognition of specialists (such as professional accreditation).

» *In-situ* measures aimed at strengthening inter-generational transmission of traditional knowledge. Examples include raising awareness of the value of traditional knowledge to encourage renewed interest and pride in traditional knowledge by community youth, including traditional knowledge in formal school curricula, training youth in traditional knowledge, and use of modern technologies to improve transmission among regionally dispersed communities.

» *Ex-situ* actions aimed to safeguard existing knowledge from erosion and loss, independent of the communities in which it is held. Examples include documentation, museums, databases and registers (including using non-written media such as video).

Protection of traditional knowledge

▶▶ Intellectual property rights, including existing intellectual property rights, modified or adapted intellectual property rights (such as preventing inappropriate intellectual property rights being granted to third parties), and stand-alone *sui generis* intellectual property systems (such as the Model Law for the Protection of Traditional Knowledge and Expressions of Culture).

▶▶ Non-intellectual property-based *sui generis* systems.

▶▶ Customary and indigenous laws and protocols.

▶▶ Use of contracts and licenses.

▶▶ Measures to ensure that private and public institutions interested in using traditional knowledge obtain the prior informed consent of indigenous and local communities.

▶▶ Provisions in access and benefit sharing (ABS) legislation requiring benefit sharing regarding the use of traditional knowledge.

▶▶ Breach of confidence law, unfair competition law, trade practices and marketing law.
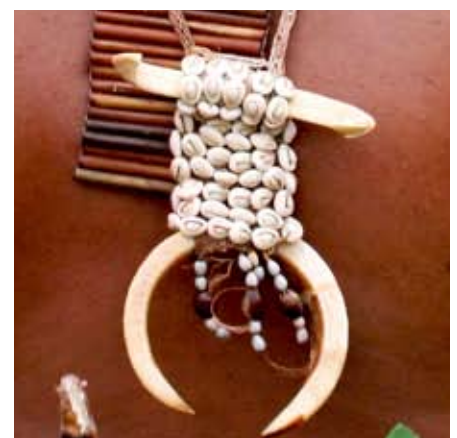
▶▶ Codes of ethics.

Promotion of traditional knowledge for development

▶▶ Further development of traditional knowledge systems.

▶▶ Support for national and local production and export of traditional knowledge-derived products. Examples include micro-credit schemes, business development support programmes for small and medium sized enterprises (SMEs), access to finance for SMEs, and technical assistance in new product development and meeting international product standards.

▶▶ Accreditation of traditional practitioners.

▶▶ Incentives to stimulate traditional knowledge-based innovations.

▶▶ Facilitating partnerships among community-based SMEs (thereby enhancing economies of scale, joint marketing and sales, etc.), as well between SMEs and foreign direct investors (recalling the importance of working with investors that are committed to technology transfer and knowledge sharing).

▶▶ Encouraging research on traditional knowledge-related matter where agreed to by the traditional communities concerned, including assistance with scientific validation of traditional knowledge-based products.

Following the identification of policy options, each option should be assessed. This assessment could include the costs and benefits, associated risks, and so forth, as well as fiscal, legal, and other implementation issues. Policy-makers may find it useful to rank each option according to its relative strengths and weaknesses. Where possible, conclusions should be supported with practical evidence.

It is important to note that a 'package' approach is likely to be necessary in order to achieve the desired policy objective. Assuming the policy objective covers the areas of preservation, protection and promotion, it follows that a range of options would be needed and collectively, these options would form the legal and policy framework for traditional knowledge. The preferred approach will most likely consist of a package of measures selected from the available menu of options.

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FURTHER INFORMATION

Policy-makers seeking further information on the matters contained in this Policy Map may wish to consult the following:

▶▶ CBD Secretariat. 2003. Development of elements of a sui generis system for the protection of traditional knowledge, innovations and practices. (UNEP/CBD/WG8J/3/7).
http://www.biodiv.org/doc/meetings/tk/wg8j-03/official/wg8j-03-07-en.doc.

▶▶ Correa, C.M. 2004. Protecting traditional knowledge: Lessons from national experiences (draft).
http://r0.unctad.org/trade_env/test1/meetings/tk2/correa.draft.doc.

▶▶ Twarog, S. 2004. Preserving, protecting and promoting traditional knowledge: National actions and international dimensions.
http://r0.unctad.org/trade_env/test1/meetings/tk2/twarog.pdf.

▶▶ UNCTAD. 2004. Protecting and promoting traditional knowledge: Systems, national experiences and international dimensions. (UNCTAD/DITC/TEC/10).
http://www.unctad.org/en/docs/ditcted10_en.pdf.

▶▶ UNCTAD. 2004. Report of the UNCTAD-Commonwealth Secretariat Workshop on Elements of National Sui Generis Systems for the Preservation, Protection and Promotion of Traditional Knowledge, Innovations and Practices and Options for an International Framework.
http://r0.unctad.org/trade_env/test1/meetings/tk2/TKworkshop.report.final.2August2004.pdf.

▶▶ WIPO Secretariat. 2001. Intellectual property needs and expectations of traditional knowledge holders: WIPO report on fact-finding missions on intellectual property and traditional knowledge (1998–1999). Geneva: World Intellectual Property Organization.
http://www.wipo.int/tk/en/tk/ffm/report/.

▶▶ WIPO Secretariat. 2003. Comparative summary of existing national sui generis measures and laws for the protection of traditional knowledge. (WIPO/GRTKF/IC/5/INF/4).
http://www.wipo.int/documents/en/meetings/2003/igc/doc/grtkf_ic_5_inf_4.doc.

▶▶ WIPO Secretariat. 2005. The protection of traditional cultural expressions/expressions of folklore: Revised objectives and principles. (WIPO/GRTKF/IC/8/4).
http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_8/wipo_grtkf_ic_8_4.doc.

▶▶ WIPO Secretariat. 2005. The protection of traditional knowledge: Revised objectives and principles. (WIPO/GRTKF/IC/8/5).
http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_8/wipo_grtkf_ic_8_5.doc.