



Integrating the TBKIP Model Law and the Pacific Model Law

1 Purpose

- 1.1 This paper addresses the integration of the TBKIP Model Law and the Pacific Model Law, including how the models can be harmonised and options for effecting integration.

2 Background

- 2.1 From a legal protection standpoint, the protection of TBKIPs and TKECs each raise distinct policy issues and in turn, require different policy responses and solutions.
- 2.2 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 (such as TBKIPs). For example, the IP-like protection of expressions of culture involve 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. When it comes to knowledge and know-how as such, however, it is the principles of patent law and the considerations relating to the conservation of the environment and biodiversity, as well as health and agricultural policies, that comprise the legal and policy context.
- 2.3 However, these legal and policy issues need to be weighed against the strong likelihood that some countries will wish to deal with the protection of TK in a holistic manner that reflects the indivisible context within which TK is developed, transferred and maintained. This inevitably raises questions of reconciliation and harmonisation between the TBKIP Model Law and the Pacific Model Law, particularly when considering the practical implementation of these laws and the acceptance of the laws amongst traditional communities. It is important that the forms of protection are shaped and influenced by not only legal and policy settings, but cultural settings as well.

3 Analysis between the two model laws

- 3.1 In order to assist countries with harmonisation, the discussion below identifies the areas of convergence and synergy as well as inconsistencies and tensions between the policy framework and the legal elements of protection of the two model laws. The analysis is grouped into three areas: those that are currently aligned, those that need minor modifications and areas where there are tensions and inconsistencies. This analysis is not intended to be comprehensive and/or exhaustive; this has not been possible given the nature of this paper. It is intended to draw policy-makers attention to areas where further work and analysis is required.

Currently aligned

- 3.2 The following areas of the TBKIP Model Law and the Pacific Model Law are aligned:
 - a. Policy framework: Both the policy objective and the principles of the TBKIP Model Law and the Pacific Model Law are consistent. While the TBKIP Model

Law contains additional principles (prior informed consent, benefit sharing, documentation, and regional and international protection), these principles are reflected within the substance of the Pacific Model Law, with the exception of documentation. Specific reference is also made to prior informed consent and benefit sharing in the policy objective of the Pacific Model Law.

- b. Criteria for protection: Neither the TBKIP Model Law or the Pacific Model Law include explicit criteria for protection. However, if countries wish to introduce criteria (and there are suggestions in this regard within the guidelines for each model law), policy-makers should ensure there is consistency across the two areas. This is reasonably straightforward in terms of the association and maintenance criteria, however, different requirements are likely to be needed for the type of creative human intellectual activity.
- c. Scope of protection: The form of protection in the Pacific Model Law and the TBKIP Model Law is the same, that is, it consists of exclusive property rights and moral rights. The exclusive property right is the right to authorise uses of TBKIPs and TKECs for a commercial purpose. The Pacific Model Law differs from the TBKIP Model Law in that it specifies the acts or uses (typically the approach in copyright law) that require the prior informed consent of traditional communities whereas the latter contains a blanket provision rather than specifying particular uses. While this difference in approach may create confusion, it does not necessarily create conflict or tension. That said, policy-makers may wish to consider modifications that would see the forms of protection aligned. The moral rights established under each model law are the same.
- d. Term of protection: Both model laws provide for unqualified indefinite protection.
- e. Formalities: Both model laws provide automatic protection without formalities.
- f. International and regional protection: Both model laws provide for reciprocal protection where reciprocal agreements have been entered into between countries. Further work will be required to develop this element (e.g. what recognition will consist of) and policy-makers should ensure there is consistency and alignment between the laws.

Areas where minor modifications or development needed

3.3 To achieve harmonisation, the following areas would require minor modifications:

- a. Subject matter of protection: The general subject matter of protection understandably differs between the two model laws and this will be evident in the descriptions and terminology used. There is, however, an additional difference that will require modification if harmonisation is to be achieved. The Pacific Model Law treats TKECs in two layers: it provides a stronger degree of protection for sacred-secret material and treats all other TKECs equally. The TBKIP Model Law does not make any such distinction within TBKIPs despite the fact that many communities are likely to have areas of traditional biological knowledge that are considered sacred-secret. Whatever approach is selected (equal treatment without distinction, or provision for different layers), it is important that both pieces of legislation to follow the same approach.

- b. Beneficiaries: The principle that benefits of protection should accrue to communities rather than individuals is generally consistent between the two model laws (although there are differences in articulation). However, each model law uses different terms to describe the beneficiary group. Policy-makers should ensure there is consistency in the description of the beneficiary group as well as how the relationship is described between the group and TBKIPs and TKECs (e.g. ‘owners’ compared with ‘holders’).
- c. Exceptions and limitations: Clause 7 of the Pacific Model Law specifies particular uses where PIC is not required (these are typical copyright exceptions and are only intended to provide guidance for policy-makers and can be modified at the national level) and also establishes conditions that must be met for the exception to be applicable. The TBKIP Model Law does not include a similar provision. There may be some uses of TBKIPs that have a commercial dimension that may not be the intended target of the legislation and therefore exceptions to the PIC requirement are needed. Whatever the case might be, policy-makers should seek to align the exceptions as much as possible.
- d. Management of rights: Neither model law specifies what the ‘management of rights’ should consist of – this is left to individual countries to determine. When policy-makers undertake this assessment, it is advisable to concurrently consider the management of rights in TBKIPs and TKECs. Both areas are likely to be very similar given the generic nature of activities relating to the administration of rights. For example, the provision of technical assistance, maintaining relationship with regional and/or government bodies and undertaking prevention work are relevant to the administration of rights in both TBKIPs and TKECs. However, there is a detailed process in the TBKIP Model Law that does not appear in the Pacific Model Law regarding the determining of ownership. If a country elects to incorporate this into the legislation based on the TBKIP Model Law, it can be easily carried over to the legislation based on the Pacific Model Law. This is also the case for the database established under the TBKIP Model Law.

Both model laws provide for the establishment of a state body to have a role in the management of rights: the Pacific Model Law refers to this body as the Cultural Authority and the TBKIP Model Law refers to it as the Competent National Authority. It is not necessary to establish two separate bodies for each piece of legislation – the functions are sufficiently aligned for one body to carry out the operations under both pieces of legislation.

When considering who a prospective user must apply to, policy-makers should ensure there is consistency between the two laws. The Pacific Model Law provides that a prospective user can apply to either the state body or the relevant traditional community, whereas the TBKIP Model Law provides that the applicant must go through the state body. Modifications will therefore be needed in this area.

- e. Legal proceedings: With regard to where proceedings can be brought, it makes sense for the same body (whether that be the ordinary courts or a specialised body) to have jurisdiction to hear proceedings under both pieces of legislation.

To ensure equitable treatment of the two areas of TK, it is important that there is consistency regarding sanctions and remedies across the two model laws. This is important as a matter of principle to ensure there is equitable legal treatment of TBKIPs and TKECs. If a country determines that the intervention of the criminal

law is required under the Pacific Model Law, due consideration should be given to making similar provision under the TBKIP Model Law.

It is also important for procedural and administrative consistency. When civil or criminal proceedings are brought, there should be consistency regarding who may institute proceedings, when and where proceedings may be brought, whether there are penalties for bring unjustified proceedings and the matters to be considered by the courts, or specialised bodies as the case may be.

Of note is that there is considerably more detail in the Pacific Model Law than the TBKIP Model Law regarding legal proceedings and therefore, policy-makers may wish to use the former as a starting point. There is already a degree of harmonisation between the two model laws. For example, the remedies available are identical as are the matters to be considered by the court. In terms of inconsistencies, the explanatory note in the TBKIP Model Law refers to there being penalty of imprisonment yet that is a penalty available in that regard under the Pacific Model Law. The determination of penalties is a matter for individual countries; this aspect can be easily modified to address this situation.

- f. Enforcement: Both model laws share the guiding principle that the state should have a role in providing assistance to traditional communities in the enforcement of their rights but neither specifies what this should consist of – this is left to individual countries to determine. It is advisable that policy-makers consider the enforcement of rights in TBKIPs and TKECs concurrently as, similar to the management of rights, there will be many opportunities for alignment.
- g. Dispute resolution: Clause 33 of the Pacific Model Law states that disputes may be resolved using mediation, alternative dispute resolution procedures and customary law and practices. The TBKIP Model Law is silent on this matter but does not have any provision to the contrary. While it is not necessary to state in the legislation what alternatives are available, it may be helpful to confirm that ADR is available, if that is the approach taken with the Pacific Model Law.
- h. Relationship with IP protection: Clause 12 of the Pacific Model Law provides for the imposition of terms and conditions on the creator of a derivative work. There is not an analogous provision in the TBKIP Model Law. In the interests of consistency, a country should ensure that the same approach is taken in both laws - in other words, if a country developing legislation based on the Pacific Model Law elects to impose terms and conditions, it should take a similar approach when developing legislation based on the TBKIP Model Law.

Tensions

3.4 Overall, the two model laws are generally consistent. This is largely due to the consistency between the policy frameworks: both laws have the same objective but choose slightly different measures and mechanisms to achieve that end. As the above discussion has shown, there are inconsistencies but these can be easily modified to bring both pieces of legislation into alignment. Some of these modifications are only administrative in nature whereas others are critical. If this harmonisation work is not carried out, there will be tensions, notably in the following areas:

- a. Management of rights: Under the Pacific Model Law, a prospective user can apply to either the state body or the relevant traditional community, whereas the TBKIP Model Law provides that the applicant must go through the state body. Therefore under the former, the community's position as the primary decision-

maker is recognised but in the latter, it could be seen as being undermined by the requirement that the applicant go through the state body. This inconsistency is likely to create tension. It will be difficult to explain to communities why they can determine access and use relating to their TKECs but not their TBKIPs.

- b. Legal proceedings: There are stronger sanctions available for TKECs under the Pacific Model Law compared with those for TBKIPs under the TBKIP Model Law. This may have an unintended hierarchical effect where offences in relation to TKECs are treated more seriously than they are with respect to TBKIPs.

4 Options

4.1 There are at least three options for integration between the two model laws:

- a. Option 1 – Distinct laws with harmonisation as far as possible
- b. Option 2 – Integrate into a single law with distinct chapters for TBKIPs and TKECs
- c. Option 3 – Full integration with no distinction

4.2 Each of these options are described below along with a general discussion of their advantages and disadvantages in terms of acceptance by communities, enactment into law in countries and practical implementation.

Option 1: Distinct laws with harmonisation as far as possible

4.3 This option would involve a country developing one piece of legislation based on the TBKIP Model Law and another piece of legislation based on the Pacific Model Law.

4.4 The analysis section has shown what areas would need to be modified to ensure both laws are harmonised as far as possible. In addition to those modifications, policy-makers should note that if a singular body is to be used as the Competent National Authority/Cultural Authority for both laws, and if a singular specialised body is to be used for legal proceedings, provisions (depending on a country's legislative practices) relating to the establishment, powers etc need only appear in one piece of legislation.

4.5 A key advantage of this approach is that it enables the particular legal tools, doctrines and solutions that are of most relevance to TBKIPs and TKECs respectively to be used. Furthermore, the protection of TBKIPs and TKECs will involve different stakeholders and different policy contexts – if distinct laws are used, these differences can be better accommodated.

4.6 The primary limitation of this option is that it does not reflect communities' preference for holistic treatment of their traditional knowledge. This in turn, may affect the extent to which they accept these new laws, quite apart from frustrations they may experience at the practical level in having to deal with two regimes. That said, harmonisation between the two laws can play a useful role in tempering this effect and if carried out to the fullest extent possible, may considerably reduce the practical implementation issues. However, harmonisation will not be able to address concerns regarding the principle that TK should not be separated.

Option 2: Integrate into a single law with distinct chapters for TBKIPs and TKECs

- 4.7 This option would involve one piece of legislation with a chapter for the protection of TBKIPs (based on the TBKIP Model Law) and a chapter for the protection of TKECs (based on the Pacific Model Law). This approach is not unusual; some countries have intellectual property laws that have different chapters for copyright, patents, trade marks etc.
- 4.8 With regard to advantages, the containment of the legal protection measures within one piece of legislation would help to reduce, but arguably not eliminate, the perception that TK is being artificially segregated when it should be treated holistically. This is likely to assist acceptance of the new protection regime within communities.
- 4.9 As well, this option shares the advantages of Option 1 - having distinct chapters still enables the particular legal tools and doctrines of most relevance to TBKIPs and TKECs respectively to be used. The different stakeholders and policy contexts can also be accommodated.
- 4.10 There are no major disadvantages with this option, provided the provisions from both model laws are harmonised to the fullest extent possible. Having said that, some communities may still have concerns regarding the separation of TK into TBKIPs and TKECs.

Option 3: Full integration with no distinction made between TBKIPs and TKECs

- 4.11 This option would involve one piece of legislation providing protection for TK generally. No distinction would be made between TBKIPs and TKECs, the subject matter of protection would be TK. At a general level, assuming all harmonisation steps have been taken, it should be relatively straightforward to collapse the two model laws into one piece of legislation and replace all references to TBKIPs and TKECs respectively with TK. There will of course be some matters that are of more relevance to TKECs than TBKIPs and vice versa.
- 4.12 The most significant benefit of this option is that it treats TK in a holistic manner by not dissecting it. It recognises and reflects that TK is inextricably linked and part of a holistic cultural heritage, a principle that is of considerable importance to traditional communities. As a result, this approach is likely to receive the greatest acceptance by communities.
- 4.13 However, at a practical level, there are a number of disadvantages. From a legal protection standpoint, the protection of TBKIPs and TKECs each raise distinct policy issues and in turn, require different policy responses and solutions. If all TK is treated in the same manner (as it would be under this approach), there will not be flexibility to reflect these important differences in responses and solutions. As well, the stakeholders and policy context for TBKIPs and TKECs differ and it could be difficult

5 Summary

- 5.1 It is possible to integrate and harmonise the TBKIP Model Law and the Pacific Model Law. Some areas are currently aligned whereas others require modifications. Also, given that the model laws are both high level frameworks, there are some areas where further policy development work is needed, providing an opportunity for more alignment.
- 5.2 There are at least three options by which integration can be effected, each of which have their own advantages and disadvantages when considered against factors such as

acceptance by communities, enactment into law in countries and practical implementation.

- 5.3 Option 3 is the strongest in terms of reflecting the holistic principle, but it is arguably the weakest at a practical level. Conversely, Option 1 is most likely to be the least acceptable of the three options to communities but it is likely to be effective from a legal and policy perspective. Option 2 falls in the middle – there is likely to be strong community acceptance whilst also being practically effective at the implementation level.
- 5.4 In terms of a recommended way forward, Option 2 would appear to be the preferred integration approach as it strikes an appropriate balance between the holistic principle and being practically effective.