

# Heritable Knowledge Framework *and the development of*

## Communal Innovation Trusts

An Ethical Framework for Development, Stewardship, and Trade

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As the countries of Oceania face increased pressure from industrial imperatives imposed as conditions of trade and economic cooperation agreements, a fundamental divergence in basic assumptions regarding individual property interests becomes evident. While this issue impacts many agreements around customary land and resource use, probably nowhere is the challenge more profound than in the dissonant domains of intellectual property and Heritable Knowledge<sup>1</sup>.

The industrial and intellectual property frameworks principally defined by European and U.S. concepts of tract and property law are based on a number of assumptions which do not apply in the Pacific cultures. Inherent in property are the concepts of isolatable and definable boundary; severability and alienability; and, restrictive covenants governing use and access. In intellectual property, one faces the additional assumption of a precise individuated and temporal moment of conception and creator. In contrast, inherent in Heritable Knowledge is: 1) the perpetual use, adaptation and synthesis of knowledge by members of a community who recognize ancestral, contemporaneous and future contributions with no temporal constraint; 2) the recognition of sacred and cultural restrictions on the mode of recordation and transference of information through linguistic, artistic and kinesthetic mediums; 3) the recognition that exploitation can undermine sanctity of the knowledge; and, 4) the recognition that as community and heritably derived, title cannot be assigned to, or alienated by a person or generation to the detriment of others.

After consultation with several government officials, public and private sector interests, and tribal and clan leaders, and in response to express interest from the leadership of the Independent State of Samoa, the Kingdom of Tonga, Fiji, and the Provincial Governments of East New Britain and New Ireland Papua New Guinea, as well as representatives of Oceania in the Pacific Island Forum Secretariat, the following document forms the basic discussion for the deployment of a legal framework to deal with Industrial / Intellectual Property impositions from WTO, TRIPS, and other agreements and, simultaneously provides the statutory basis for a relevant regional management of Heritable Knowledge. M-CAM and its partners around the world are committed to supporting local, national and regional implementation of these

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<sup>1</sup> I use the term “Heritable Knowledge” rather than the convention “Traditional Knowledge” as it captures the dynamic, temporal, and perpetual evolution inherent in stewardship of knowledge, stories, cultural and artistic expressions, spiritual and social awareness, health care; and, ecological practices. “Traditional Knowledge” is a pejorative term that often is used to project a contrast between the industrial derogation of “developed” vs. “undeveloped” or “developing” and, as such, should be avoided. Additionally, “Traditional” imposes a temporal assumption while this knowledge is constantly evolving and will continue to do so in vibrant, resilient cultures.



recommendations. As this is a proposal that arises from regional consultation, it is neither the domain of, nor the exclusive property of, any individual party and is authorized for use by any party seeking to build suitable and resilient models for regional stewardship. In point of fact, as the author, I expressly waive any and all copyright arising from, or imputed by, this document and provide perpetual, non-exclusive use of it to all who wish to use any material contained herein. In short, this is a constituent of the Global Innovation Commons.

Often under duress, many Oceania countries have entered, or are contemplating entry, into the WTO or Free Trade Agreements (FTA) in an effort to gain both market access and market supply for goods and services. The industrial and intellectual property rights laws required by both TRIPS and TRIPS Plus are expressly structured to register and protect the alleged rights of multi-national corporations conducting revenue extraction from the region however, to date, no country has actually shown demonstrable, reproducible benefit supporting local economic development arising from these “protections”. And, despite years of consultations, when intellectual property rights are discussed, organizations like WIPO have provided ephemeral acknowledgement of what they refer to (and have co-opted countries into calling) “Traditional Knowledge”. Regrettably, the inclusion of the communal and heritable values into discussions of industrial property has proven an effective distraction from concrete legal framework and enforcement paradigms which would benefit the common wealth of the region. It is, therefore, imperative to set the record clear on both intellectual property and heritable knowledge and their function in the global economic conditions.

Both property (tangible and intangible), per se, and heritable knowledge can only derive economic value through contract law (in the form of transfers, licenses, leases, etc.). Therefore, it is **contract**, not property, law that is the engine of economic engagement. Ironically, neither WIPO nor WTO is necessary to promulgate new laws as the countries in the region already have relatively well defined contract law provisions and, in most cases, a relatively effective corpus of jurisprudence in the area of contracts. In short, the legal framework to protect both foreign IP&R and local communal heritable rights requires no substantive alteration in basic law. Further, under model legal frameworks already in place, existing conventions and laws already provide the basis for heritable knowledge and the perpetuation of “Traditional Knowledge” consultations is a smoke-screen as neither WTO nor TRIPS actually binds explicit, equitable enforcement of TK on member states at present.

For the purpose of clarity, allow me to review the fundamental legal and moral frameworks that already exist and can be immediately used to deal with Heritable Knowledge rights. I believe that it is time that the Forum Island Nations and the entire developing world stand together and act using existing, adequate frameworks, rather than staying trapped in maelstrom of endless consultation without result. In short, I call on all Forum Island Nations to stand together in support and defense of Heritable Knowledge Rights in the form of a Communal Innovation Trust contract based model rather than trying to force these matters into a property based framework that is both *prima facie* inappropriate and unenforceable.

- **Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970**

In Paris, on November 14, 1970, the Sixteenth General Conference of the United Nations Educational, Scientific and Cultural Organization (UNESCO) adopted this convention which, with two fundamental exceptions, can provide more than adequate basis for all matters which are discussed under recent Traditional Knowledge issues. First, I would recommend that the Forum Island Nations rely, and hold trading partners accountable for the provisions contained therein with the simple amendment, as I will discuss below, of removing the term “Property” and substituting the term “Communal Heritable Trust”. Second, I would recommend that Article I of the Convention be amended in each section to include all derivative works arising from or inspired by the defined interests. On a technical point, the convention calls for the establishment of national inventories of all cultural and heritable matters however, all countries must exempt these from copyright term so they remain inalienable and not exposed to public domain use following their reduction to a recorded medium.

While this convention serves as an adequate and existing framework to allow for the immediate, internationally recognized basis for Heritable Knowledge protection, there are additional materials that can be used by Forum Island Nations to augment national laws and practices, some of which have been summarized in subsequent writings<sup>2,3</sup>. Of particular note is the mention in the cited reference to “the right to the restitution of cultural, intellectual, religious and spiritual property taken without their free and informed consent or in violation of their laws, traditions and customs.” (Article 12).” The reference to a violation of **custom** affords every country the immediate capacity to enact enforcement practices without additional legislation in accordance with existing, binding conventions.

- **The Native American Graves Protection and Repatriation Act. U.S. PL 101-601 Of 1990. One Hundred First Congress of the United States of America at the Second Session.**

The most comprehensive national law on indigenous cultural artifacts and heritable rights protection and repatriation is the NAGPRA of 1990. Any nation in Oceania can use much of this, if desired, as a framework for negotiation in trade agreements by referencing the Act and insisting that all Heritable Knowledge be treated in a manner

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<sup>2</sup> From: Eric Bergman. Reversing the Flow of Traffic in the Market of Cultural Property. Accessed from: <http://saiic.nativeweb.org/ayn/repatriation.html>. “The United Nations Economic and Social Council’s Commission on Human Rights adopted a declaration at its eleventh session providing for the protection of the rights of Indigenous peoples including, “the right to the restitution of cultural, intellectual, religious and spiritual property taken without their free and informed consent or in violation of their laws, traditions and customs.” (Article 12). More recently, in June of 1995 the Economic and Social Council drafted the report entitled Protection of the heritage of Indigenous people. Although the report lacks any real legal power, it helps to lend legitimacy to individual claims.”

<sup>3</sup> See: Clifford Lynch. Repatriation, Reconstruction, and Cultural Diplomacy in the Digital World. *EDUCAUSE Review*, vol. 43, no. 1 (January/February 2008): 70–71.



commensurate with no less than the full provisions of NAGPRA. Once again, I would recommend the inclusion of derivative and inspired works to insure that full benefit is enjoined.

- **Uniform Commercial Code, Article 9**

Under the Uniform Commercial Code of the United States (and its international harmonized equivalents), “Personal Property” definitions could be expanded to include Communal Innovation Trusts and, with slight modification, can serve as the established legal framework for the use of the inalienable, perpetual trusts as a restricted form of collateral for economic benefit should that be desired.

## **Specific Recommendations**

As the status of FTA, WTO accession and TRIPS implementation is varied among the Forum Island Countries of Oceania, my recommendations are framed in such a fashion that they can be equally applied. Each of these can be enacted with little or no new legislation under existing contract law.

### **1. Equality of Status –**

In a global market, the respect we expect should be commensurate with the respect that we give. In keeping with that fundamental moral construct, we recommend that the countries of Oceania acknowledge and defend the legitimately granted and registered intellectual and industrial property rights of those conducting business and trade in the region. We applaud the efforts already underway to afford legal protections towards this end and encourage the same provided that such enforcement does not jeopardize any fundamental Human Right.

However, we believe that, in a similar manner, effective immediately, each country should acknowledge and enforce the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property as amended above including explicit reference to derivative uses. Specifically, we recommend that § (d) of Article 13 be a mandatory provision in every construction of WTO, FTA or any other international counter-party agreement.<sup>4</sup> In other words, if any counter-party wishes to have the intellectual property or industrial property rights emanating therefrom to be protected and recognized, a pre-condition of such recognition is an affirmative and enabled commitment to this provision. We would recommend that the recovery should, when in commercial use, include, at the discretion of the Communal Innovation Trustees within a country, the requirement that manufacturing, reproduction, or other commercial acts, if continued, must be done with local facilities and local employment.

### **2. Affirmative Accountability Recognition in Foreign Engagements –**

As a condition of business, academic, trade or any other engagement, we recommend that all Immigration and Corporate Licensure organizations require those conducting any enterprise

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<sup>4</sup> Article 13 (d) “to recognize the inalienable right of each State Party to this Convention to classify and declare certain cultural property as inalienable which should therefore ipso facto not be exported, and to facilitate recovery of such property by the State concerned in cases where it has been exported.”

within the countries, to attest and warrant that they are conducting all activities in a manner fully compliant with the then highest standard of accountability, transparency and ethics of any jurisdiction in which they operate. Given the history of the region and the frequency with which corporations have sought to operate in the region to avoid financial, environmental, intellectual property, heritable trust, or business laws in force elsewhere, adopting a uniform condition of immigration and corporate licensure will provide an effective tool to interdict those operating in bad faith.

### 3. Creation of Communal Heritable Trusts -

In accordance with the Constitution of the member States, many of which states that the State be based on, and recognize custom and tradition we propose the creation of a form of Trust Corporation<sup>5</sup> (defined under applicable Constitutional or Legislative frameworks) which shall be called the Communal Innovation Trust<sup>6</sup>.

The Communal Innovation Trust shall register (using culturally relevant means including, but not limited to written, artistic, oral, kinesthetic, or customary practice) and hold, in perpetuity, all right, title and interest in ancestral and heritable knowledge pertaining to living things, natural things and all uses, derivative uses, and improvements thereof and derived, in any fashion therefrom. Such registry shall be retained in written records or be *de facto* established as registered by the independent attestation of unwritten traditions or practices by no less than three unrelated parties. Further, the Communal Innovation Trust shall register and hold, in perpetuity, all right, title and interest in ancestral or heritable knowledge pertaining to artistic, music, cultural and oral traditions and all uses, derivative uses, or improvements thereof.

The Communal Innovation Trust shall be inalienable from the State. Under the consent of the cultural chief or designate, regional government, or national government, the Communal Innovation Trust may be licensed, used as an assessable but unseverable collateral guarantee for financial transactions, or serve as the basis for enterprise. Such use shall require, in all instances, payment of consideration which shall be a proportion of all value and consideration derived from its use.

The Communal Innovation Trust shall apply, retroactively to all subject matter taken from the State without participating consideration in the form of employment, knowledge and revenue sharing, and mode of production contemporaneous location.

The Communal Innovation Trust shall pre-empt any and all Intellectual Property Rights heretofore promulgated or hereinafter contemplated and shall be defended as a sovereign Contract Right of the State.

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<sup>5</sup> Please see the Uniform Trust Code – 2003. Drafted by the National Conference of Commissioners on Uniform State Laws and approved at its Annual Conference in St. Augustine, Florida, July 28 – August 4, 2000.

<sup>6</sup> The following is an attempt to integrate “best practices” from related Acts including the Organization of African Unity “African Model Legislation for the Protection of the Rights of Local Communities, Farmers, Breeders, and for the Regulation of Access to Biological Resources.” It also is informed by Title IX of the Uniform Commercial Code of the United States of America.