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Creativity, Innovation, Access to Knowledge, and Development in Pacific Island Countries

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PACIFIC STUDIES

CREATIVITY, INNOVATION, ACCESS TO KNOWLEDGE, AND DEVELOPMENT IN PACIFIC ISLAND COUNTRIES

Guest Editors
Sue Farran
Miranda Forsyth

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SPECIAL ISSUE

CREATIVITY, INNOVATION, ACCESS TO KNOWLEDGE, AND DEVELOPMENT IN PACIFIC ISLAND COUNTRIES

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DEVELOPMENT IN PACIFIC ISLAND COUNTRIES

Vol. 36, Nos. 1/2 April/August 2013

PREFACE

THE PAPERS IN THIS VOLUME arise from a conference on Creativity, Innovation, Access to Knowledge, and Development in Pacific Island countries that was held at the Australian National University (ANU) in Canberra in September 2012, with funding assistance from AusAid; the Research School of Asia and the Pacific at ANU; RegNet; the State, Society, and Governance in Melanesia Program at ANU; and the Australian Research Council. The conference in turn arises from a three-year research project that investigates the impact of intellectual property (IP) laws on development in Pacific Island countries (see http://www.ippacificislands.org). Rather than focusing on IP law itself, which frames the debate too narrowly, the approach taken in this project is to ask what objectives IP laws are being required to meet in the region and then what type of regulatory framework is most likely to achieve those objectives. This frees us from taking the classic Western approach to intellectual property, as exemplified in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), as a necessary starting point. As a consequence, the presenters at the conference and authors in this edition discuss broadly how the aims of stimulating innovation and creativity and furthering access to knowledge and development—the objectives associated with successful IP regimes—could best be achieved in the region.

The conference giving rise to these papers occurred at an apposite time because IP rights are becoming increasingly relevant in the region. They are being embedded into free trade agreements, such as those required to join the World Trade Organization, and are also likely to be in the European

Partnership Agreement and the regional trade agreement PacerPlus. New IP laws and institutions are also being introduced in a number of countries in the region through the World Intellectual Property Organization strengthening programs. Finally, there are moves to introduce legislation in many Pacific Island countries that will have a profound impact on how traditional knowledge is accessed and used. Indeed, the Pacific Island region is at the forefront of international moves to introduce traditional knowledge legislation. In all of these contexts, IP regimes are being presented rather unquestioningly as leading to development. The papers presented at this conference have, however, advanced a more nuanced understanding of the relationship between IP and development.

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INTRODUCTION

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THE PACIFIC ISLAND REGION is currently at the very beginning of the development of national and regional intellectual property (IP) policies. In fact, it is such a new subject that 2012 was the first time it was taught as an undergraduate subject at the leading law school in the region at the University of the South Pacific. To date, IP has not been addressed in policy debates concerning key developmental issues, such as food security, education, and climate change. Yet as the articles in this special issue show, it has the potential to have impact on all of these areas. Policy makers in the region do not as yet have an understanding of what effects IP laws have on development, nor do they have an appreciation of what the options are and how to make best use of those flexibilities that are available. This was shown most clearly recently in Vanuatu's World Trade Organization accession package whereby Vanuatu's IP commitments are far higher than is normally required of a developing country, let alone a least developed country.

One of the difficulties of developing IP policy in the region is that very little research has been done to date on the likely consequences of IP regimes in the Pacific Island context. Much of the literature concerning IP and development comes from research conducted in developing Asian countries or else African countries grappling with the HIV/AIDS epidemic.

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While useful lessons maybe learned from these experiences,[1] the relevance of this research to the Pacific is questionable, given the differences between those contexts and the Pacific Island region, which is, in particular, characterized by small populations, very limited manufacturing opportunities, and by and large countries that are well behind the "technological frontier."

The articles in this special issue, which are drawn from conference proceedings, help to bridge this gap and provide useful empirical evidence and insights to assist in understanding the likely developmental ramifications of IP regimes in the region. The authors are from a range of disciplines, including IP law, international law, environmental law, property law, anthropology, and interdisciplinary Pacific Island studies and also include a wide range of Pacific Islander lawyers, policy makers, academics, legislative drafters, information technology specialists, and educators. The conference also had the advantage of having contributors from outside the region, including from the United States and Europe,[2] providing the opportunity to locate the IP challenges of the Pacific within the wider global community. The relevance of this connectedness is evident in Enrico Luzzatto's article, "Traditional Knowledge and Patents: A Brief Summary of the EPO's Perspective," in which he clearly sets out the role and functioning of the European Patents Office in issuing and regulating patents. With the European Union increasingly involved in the region through aid programs and trade negotiations, the significance of these institutions is becoming more important. This is also borne out by Katharina Serrano's article, "Intangible Cultural Heritage in the Pacific Islands: Why Europe Should Listen In," which provides an insightful analysis of current EU approaches to IP and development in the Pacific and suggests a number of ways in which this could be improved.

While each article offers a unique insight into IP developments in the region, there are also a number of overarching themes.

Centrality of Traditional Knowledge to IP Policy in the Region

Traditional knowledge (TK) and manifestations of that TK are highlighted as being a critical asset for the region for a range of reasons—the foundation for cultural industries (Henao and Nand),[3] a means of adapting to climate change (Techera), and ensuring food security (Farran)—as well as bringing a host of other benefits. While there is a desire for legal frameworks to assist in protecting TK against fears of misappropriation and to assist in its commercialization (Daurewa), there are also concerns about the dangers of commodification of TK through such legislation (Nand). A number of authors point out that experiences of land privatization and resource development in the region demonstrate that boundary-drawing

exercises often lead to community conflict (e.g., see Techera),[4] and often any financial benefits are not equitably shared and lead to no lasting benefits (see Suzuki). Strong advice is given to pay attention to the organizational form chosen to exploit the commercialization of TK, building where possible on traditional structures (see Stern and Techera), and to learn from problems associated with various existing forms (see especially Daurewa) if any sustainable developmental outcome is to proceed from such commercialization. A number of authors refer to the potential of adopting a network or partnership approach as a structure to manage TK as a possible means of mediating between the national and local demands. In his conference presentation,[5] Ano Tisam demonstrated the value of social and Internet networking, including the use of mobile phones to engage the public in creating a dictionary of endangered and common usage Cook Island Maori words, especially in circumstances where extant printed sources were out of date or in limited circulations and where it was impossible to secure funding to support grassroots indigenous knowledge projects.

Both the weakness of the state and the large role that customary institutions have played in regulating TK are constant themes (see Daurewa on the weakness of the state and Stern and Techera on the role of customary institutions).[6] Some authors note the policy disjunct in that international and national strategies about property rights, including IP, are made by the state, but the reality of resource management occurs at a local level (Farran, Serrano, Techera). As a solution, it is stressed that strong leadership and awareness of the issues surrounding IP at the grassroots level are two preconditions for the setup of effective IP regimes in Pacific Island countries.

Potential of IP Laws to Further Development

The articles also demonstrate that there is a high level of interest in the developmental potential of culture and cultural or innovation-based industries for the region. This would build on the cultural richness and diversity in the region and would be a new sector with no obvious limits in contrast to the limits of industries based on extracting natural resources (Henao). However, government or donor support is required to get such a new sector off the ground, particularly in relation to assistance with marketing (national and international), product development and entrepreneurship, development of quality control mechanisms, the development of certification marks, and support and training in disciplines related to culture so that TK is not lost to subsequent generations.[7] This requires Pacific Island

countries to develop strategies to link cultural policies with trade and development agendas of individual countries. In terms of organizational structures for new initiatives, it was suggested by a number of presenters at the conference and in some of these articles that networks, particularly existing ones, and public/private partnerships offer the most potential in the context of the region.[8]

Close Linkages between IP Developments and Trade

Many authors identified the fact that IP reforms and developments are being driven largely by free trade agreements (FTAs; Henao, Farran, Forsyth, Serrano). Further, the IP terms of these agreements are often not development friendly and may have negative consequences in terms of access to educational materials (Forsyth, Kala and Somaratne), food security (Farran), access to medicines (Forsyth, Suzuki),[9] and restricted policy space (Forsyth). It is suggested that FTAs therefore also include meaningful assistance for countries to be able to benefit from their IP undertakings, such as through technical capacity building, development of certification marks, and so on. There was agreement that such issues, including some form of special and differential treatment, should be negotiated as part of the trade package deals between the region and its developed partners (Serrano). It is also observed that comparative research might offer alternative models to those advocated by current FTAs.[10]

Tensions Raised by IP Issues

A number of important tensions in the development of IP policy emerge from the articles in this special issue and also through discussions at the conference itself. This introduction is not the place to discuss these in detail, but it is important to highlight the four most recurrent tensions, as these have clear implications for IP policy in the region. The first is that secrecy was seen to offer both advantages, in that it may protect both TK and IP from misappropriation, but it also has disadvantages, in that it may aid in the disappearance of the TK, as it may not be passed down (see Stern in respect of music)[11] and may conflict with arguments made in favor of placing some TK in the global commons (Farran).[12] The region's strong tradition of secrecy will need to be carefully incorporated into new IP frameworks to ensure that cultural understandings are accommodated but also that it does not undercut any benefits that may flow from open access to knowledge or endanger loss of TK. Second, the benefits of sharing

knowledge about TK to deal with climate change (Suzuki)[13] and food security (Farran) and to stimulate further innovation were highlighted (Nand), but it was also observed that sharing may lead to concerns about misappropriation and missing out on entitlements, particularly once financial rewards entered the equation. Third, while bringing TK into the public domain may support the process of establishment of TK-based industries, the missing cultural context of entrepreneurial undertakings may risk undermining the meaning of TK for Pacific peoples themselves (see Serrano's reference to Dream Catcher Syndrome). Finally, the benefits of sharing TK may translate into financial gain for those sharing. However, in situations where possession of TK is associated with a particular status in society, the open sharing of TK may result in negative societal impacts for communities.

State Capacity

Although many authors advocate the introduction of new TK and IP legislation (Nand, Henao), the limited capacity of the state in the region generally was also a constant theme throughout the workshop and in the articles (Forsyth). This limited capacity suggests that the state alone should not be relied on to drive any benefits from this area; rather, civil society and customary institutions also have an important role to play. The example was given of the formation of craftsmen's groups in Samoa who are seeking to improve standards in specific sectors, associations encouraging the sharing of plant material, village initiatives to access microfinance for marketing cultural artifacts, and so on. Other examples of national initiatives were those developed around the Pacific Arts Festival,[14] and a particularly interesting project is being developed to "capture" the Cook Islands Maori language through the development of an online database.[15]

Ways Forward

As well as raising the above-mentioned important considerations for framing the development of IP policy in the Pacific, a number of concrete recommendations are made in these articles. These include capacity building on the basis of smart trade negotiations with developed partners, development of knowledge networks that integrate existing community leaders, and building the IP knowledge base through (1) greater awareness of existing national and regional TK; (2) greater nonpoliticized awareness of the structure, consequences, and costs of proposed IP regimes; (3) taking advantage of opportunities and experiences offered elsewhere, such as

developing a Pacific database for the European Patents Office or learning from the Nepalese experience of resisting UPOV;[16] (4) awareness campaigns based on open access to local and regional initiatives, relevant databases, reports, and discussion forums; (5) the need for assistance for policy makers in the mainstreaming of culture and IP in related policies covering areas like trade, investment, development, education, health, and agriculture, and (6) appreciating how to work within existing legal frameworks to achieve best outcomes for Pacific Island people.

Taken together, the articles in this special issue provide a very positive step toward building an IP framework for the Pacific Island region that really drives sustainable and grassroots development and offers those outside the region seeking to engage with it valuable insights into the perspectives and concerns of Pacific Island people.

Following the structure of the conference that gave rise to these articles, the theme of which was "Innovation, Creativity, Access to Knowledge, and Development in Pacific Island Countries," the articles included here are arranged as follows. Controlling Access to Traditional Knowledge includes contributions from Enrico Luzzatto, Douveri Henao, and Erika Techera. Francis Waleanisia also gave a presentation in this session titled "Combating Misappropriation of Traditional Knowledge, Expressions of Culture, and Related Rights" from the Solomon Islands perspective. Speaking about Solomon Islands initiatives in 2010 and 2012 to draft legislation based on the Model Law, which is referred to in a number of the articles that follow, Francis highlighted the challenges of arriving at definitions of key terms such as "traditional knowledge," "traditional knowledge holders," and "expressions of culture." He also made reference to the difficulties of designing a support framework and enforcement mechanisms that were viable within the resource constraints of the Solomon Islands. While a centralized authority was proposed, the limits of this were acknowledged, as was the problem of getting draft bills passed into law; for example, it had been hoped to get the Pacific Arts Festival Bill passed into law prior to the Festival in 2012, but that proved impossible. The festival was therefore regulated by reference to customary law and traditional controls and observations. Whether the momentum has now been lost remains to be seen.

Community Management of Tangible and Intangible Resources includes articles from Monika Stern and Katharina Serrano. Dr. Lawrence Kalinoe, from the Department of Justice and Attorney-General in Papua New Guinea (PNG),[17] also presented a paper at the conference. In his presentation "Benefit Sharing Arrangements for Community Owned Property Including Traditional Knowledge," Dr. Kalinoe highlighted the lessons that could be learned from the challenges encountered by incorporated land

groups (ILGs) in PNG, which had been introduced to facilitate development and commercial use of land and other natural resources so as to articulate appropriate strategies and policies that could be put in place before the exploitation of TK, such as bioprospecting under the Convention on Bio-Diversity, took off. Experiences with ILGs in terms of both formation and the equitable distribution of benefits had highlighted numerous problems in aligning corporate structures with customary groups such as clans and villages. ILGs are the most popular form of incorporation in PNG and are required by law prior to negotiating extraction contracts for mining, timber, gas, and oil as well as commercial use of land; a review of ILGs had revealed that often there was no link with customary groups, benefits were not equitably distributed, some ILGs were spurious with names unmatched by actual people, and some people belonged to more than one ILG. Disputes were common, sometimes becoming protracted and serious, and the formalities required by law were not always being observed. Reforms were implemented in 2011, and existing ILGs have five years to comply with these; however, new ventures in resource extraction continue to expose problems with respect to the equitable distribution of benefits to those entitled to them, and Lawrence Kalinoe was not optimistic that further opportunities to commercialize other resources would not encounter similar problems as those experienced to date in PNG.

Cultural Industries and Development is illustrated by Salvin Nand's article. Conference presentations were also made by Eliesa Tuiloma (Fiji), Dr. Katerina Teawia (ANU), and George Borugu (Vanuatu). Eliesa Tuiloma highlighted the challenges in formulating policies and structures to address the growing importance of the cultural industry sector from an appropriate Oceanic perspective. He highlighted the divergences of classifications and definitions found elsewhere, such as in the United Kingdom and WIPO, and the problems of deciding where in any classification model TK that did not have materiality should be placed and how TK should be protected when it changes form (e.g., TK becomes cultural expression). Until these underlying issues were addressed, it was difficult for policy makers across the region to move forward on articulating policies to best promote cultural industries. Dr. Katerina Teawia focused on the work of the Human Development Program of the Secretariat of the Pacific Community (SPC), one of the main projects of which is the Pacific Arts Festival, held every four years, most recently in 2012 in the Solomon Islands. Originally founded to promote and protect traditional expressions of Pacific culture, the festival today provides a major platform for cultural exchange, dialogue, and participation and also increasingly has to consider IP issues. The work of the Human Development Program at SPC, however, extends beyond the

festival and since 2006 has brought together a number of focus strands under its umbrella, including culture, gender, youth, and education. The program provides a wealth of information on its Web site through networks and publications such as *Culture Talk* and provides policy advice at regional and national levels. It works with many partners and most recently, at a symposium held in Hawai'i in 2012, hosted a visit by the UN Special Rapporteur on Cultural Rights. Katerina pointed out, however, that despite the good work being done by a hugely understaffed SPC sector, there are many challenges. There are, for example, often diametrically opposed framings of culture, ranging from UNESCOs positive approach to the preservation of cultural heritage to policy statements by aid funders, that suggest that culture is something to be "fixed," that it is a problem and leads to fragmented (and therefore dysfunctional) nations. It is also the case that developing culture through investment is a low priority for Pacific countries; for example, few or no resources are invested in university cultural arts or cultural studies programs. There are also epistemological and etymological barriers to thinking about culture as a key contributor to sustainable development and as a platform for participation in global exchanges. Translating cultural heritage into a commodity for economic purposes is also problematic because of all the different elements that make up culture. There is, however, some progress being made. Katerina referred to an EU-funded project at SPC engaged with work on structuring the cultural sector through facilitating museum exchanges, cultural mapping, planning, and policy making and concluded her presentation with an example from Tonga, demonstrating how it was possible for Pacific Island countries to engage with this process at a local level by framing, mapping, and planning how to make best use of cultural capital in ways that were appropriate to their own ways of thinking.

George Borugu picked up this theme of the challenges facing Pacific Island countries seeking to harness their cultural capital for development purposes, especially where there is the opportunity to spread tourism to the more rural and remote areas so that a wider sector of society can benefit from this industry. Speaking from a tourism perspective, George highlighted the consequences of making the transition from a cultural context in which there were no formal laws to suddenly a situation, as had happened in Vanuatu, of five new laws that the tourism industry and others were expected to comprehend and comply with. An example he gave was of the debate taking place as to whether tourists should be charged for taking photographs of cultural events and, if so, how much and how this was to be enforced and who was to get the money. Differences of views reflect different values being given to culture and the difficulties of translating

cultural performance into commodities. He also picked up on a point made by Katerina that culture is multilayered and complex, using the face painting of dancers in Tanna to illustrate the point. Traditionally, the face paints were distilled from natural resources that required skill and knowledge. Only certain people had the skill and knowledge, and only certain people could apply the paints and perform the dance. Preparation for a dance could take up to three weeks and involve many people. Today, the paints are bought from Chinese stores, so skills and knowledge are no longer necessary, new colors are being introduced, preparation for the dance takes a few days, and the community involvement is being lost. There is also the problem of tourism encouraging internal copying so that artifacts or performances that have traditionally been unique to one island or a certain group of people are being produced or performed elsewhere with insufficient attribution of origin; George referred to the distinctive carved Tam Tams from Malekula and Ambrym. While it was recognized that culture was an important aspect of tourism, it was evident that there was widespread lack of awareness about IP laws, insufficient access to advice, considerable need for training across the sector, and a demand for coherent guidelines to determine the relationship and future direction of culture, tourism, and IP. It is moreover probable that the Vanuatu experience resonates with similar experiences elsewhere in the Pacific where tourism is identified as an important income earner.

The Effects of Copyright Law on Development includes an article from Joseph Daurewa and Shareeni Kala and Ruwani Somaratne's joint article. Ano Tisam from Whupi Ltd, Cook Islands, delivered a paper by Skype to the conference explaining the purpose and development of the Cook Islands Maori Database (referred to elsewhere in this introduction).

Intellectual Property, Climate Change, and Natural Resources are considered in articles by Yuri Suzuki and Sue Farran, and the collection concludes with an article by Miranda Forsyth that was presented under the theme Intellectual Property, Free Trade, and Development. Joseph Foukona, a lecturer at the Law School at USP but currently a PhD student at ANU, also presented a paper at the conference on this theme. Talking about IP in the Solomon Islands, Joseph emphasized the central role of customary law in many aspects of daily life in the Solomon Islands and the difficulties of accommodating concepts in IP laws, such as copyright, exclusive rights, clear divisions between public and private law in systems, and the idea of individual rights, where rights were multiple and often communal, where there was not a clear distinction between public and private domains, and where there was diversity of values. One of the key problems in developing and implementing IP laws was that the focus was

essentially on the state with a corresponding lack of engagement with TK holders at a local level so that policy was being developed and articulated in a way that was removed from those whom it was intended to protect and whose interests it should promote (e.g., through the commercialization of TK). Looking forward, Joseph identified three challenges facing the Solomon Islands; the first was aligning IP laws with custom, the second was enforcing any such laws, and the third was accommodating and facilitating the adaptation of the Solomon Islands way of life to modern technology, which posed considerable challenges for the protection of expressions of traditional culture (e.g., music) but also presented new and exciting opportunities.

Abstracts and PowerPoint presentations of conference papers that are not included in this collection but to which reference is made in this introduction, as well as those that are included, and further details about all the contributors can be found on the Web site of the Intellectual Property Pacific Islands project at http://www.ippacificislands.org/presentations.php and in the copy of the conference program on the News and Events page on the same site.

NOTES

1. See, for example, the conference paper presented by Dr. Kamalesh Adhikari (Australian National University [ANU]) "Victory in Crisis: No to UPOV Campaign in Nepal" given at the Innovation, Creativity, Access to Knowledge, and Development in Pacific Island Countries Conference (The Conference), September 24–25, 2012, Australian National University.

2. For example, the keynote opening paper was given by Professor Margaret Chon of Seattle University, who spoke about "Public–Private Partnerships in Global Intellectual Property."

3. This was also stressed by Eliesa Tuiloma from Fiji in his conference paper "The Potential for Cultural Industries for Development" and George Boruga from the Ministry of Trade, Tourism, and Industry in Vanuatu in his conference paper "The Challenges of Promoting Intellectual Property in Vanuatu and the Tourism Sector."

4. This was also a point made strongly by Dr. Lawrence Kalinoe from the Department of Justice and Attorney-General of Papua New Guinea in his conference paper "Benefit Sharing Arrangements for Communally Owned Property Including Traditional Knowledge" and by Rebecca Monson (ANU) in her paper "The Problem of Property: Knowing and Speaking about Land in Solomon Islands."

5. See note 15.

6. Joseph Foukona (ANU and the University of the South Pacific [USP]), in a paper focusing on the Solomon Islands, also drew attention to the weakness of the state in

supporting and enforcing national copyright laws, a view also expressed by Ano Tisam with respect to the Cook Islands, although it was pointed out that this had both advantages—for the consumer and the entrepreneur, who could adopt a publish-now-and-apologize-later approach, and disadvantages for the creator, who wanted protection and recognition.

7. This was a point strongly made by Dr. Katerina Teaiwa, School of Culture, History, and Language, ANU, in her conference paper "Structuring the Cultural Sector across the Pacific: The Work of the Human Development Program of the SPC."

8. See, for example, the paper presented at the conference by Professor Peter Drahos, Regulatory Institutions Network, ANU, "Indigenous Developmental Networks and the Adaptive Management of Intellectual Property."

9. See also the conference paper presented by Eliesa Tuiloma, "Intellectual Property and Free Trade Agreements and Public Health and Private Monopolies."

10. This is an approach that has been adopted by the Samoa Law Reform Commission as explained by Houlton Faasau, Samoa Law Reform Commission, in his conference presentation "Safeguarding Traditional Knowledge and Traditional Cultural Expressions —Samoa."

11. Ingrid Ahlgren, Resource Management in Asia-Pacific Program, ANU, presenting a conference paper about the Marshall Islands, "The 3 Pillars—Land, Sea, and Sky, or Secrecy, Power, and Revision: A Marshallese Treatment of the UNESCO ICH Convention," addressed some of these concerns surrounding the transmission of traditional knowledge.

12. See also Tisam (note 15), who raised this argument with respect to languages that are threatened with extinction unless there is open access.

13. Dr. Matthew Rimmer (ANU) presented an insightful conference paper on climate change, "Intellectual Property, Climate Change and Indigenous Knowledge."

14. Presented at the conference by Francis Waleanisia, from the Solomon Islands, in a paper titled "Combating Misappropriation or Traditional Knowledge, Expressions of Culture, and Related Rights (Solomon Islands Experience)."

15. Ano Tisam, an information technology consultant with Whupi Ltd, which is a Cook Islands company specializing in providing sustainable information technology solutions to small island developing states, presented a conference paper by Skype from the Cook Islands in which he explained that the aim of the project was not only to try to save languages and dialects that are in danger of disappearing but also to regenerate an interest in the Cook Islands Maori language among younger generations.

16. Union Internationale pour la Protection des Obtentions Vegétales.

17. Dr. Kalinoe was speaking in his personal capacity and not in any official role. His views are not necessarily those of the Department of Justice and Attorney-General in Papua New Guinea.

TRADITIONAL KNOWLEDGE AND PATENTS: A BRIEF SUMMARY OF THE EPO'S PERSPECTIVE

Enrico Luzzatto
European Patent Office

Knowledge of the legal provisions of the European Patent Convention (EPC) relevant to traditional knowledge (TK) is essential to TK holders such as in Pacific Island countries so that they can actively protect in Europe any TK-derived invention they may want to develop. It is also of fundamental importance to be able to properly defend their rights if a European patent application that could be based on their TK is filed without their consent. This paper introduces the role and structure of the European Patent Office (EPO) and basic legal requirements, as set out in the EPC, that are most relevant to TK-related inventions. Examples taken from EPO practice and case law (neem tree, *Pelargonium* species, and *Hoodia*), along with provisions that can be used to prevent misappropriation under European patent law, are discussed to illustrate how the European patent system may affect Pacific Island countries and their traditional knowledge.

Introduction: Patent Grant Procedure at the EPO

The European Patent Organisation is an independent intergovernmental international organization with 38 contracting states (including all 28 member states of the European Union). It has two bodies, the European Patent Office (EPO) and the Administrative Council; the latter supervises the office's activities. The EPO is the patent-granting authority for Europe. The legal basis for its activity is set out in the European Patent Convention (EPC).[1]

The EPO is also responsible for examining oppositions filed against granted European patents and for deciding on appeals filed against decisions

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of the receiving section and the examining and opposition divisions of the EPO. The EPO's structure is shown in Figure 1. A more detailed explanation of the roles and composition of the boards involved in these tasks is given later in this section.

The European patent grant procedure begins with a formalities examination and a mandatory search of the relevant "state of art" disclosures. The first stage ends with the publication of the European patent application and the search report. The search report lists the documents most relevant to the examination of the patent application, which were retrieved during the search. It is publicly accessible, as are all communications between the EPO and the applicants. This is followed by the second stage, the substantive examination, at the applicant's request. This stage can result either in the refusal of the patent application or in the grant of a patent. The final decision is made by a three-member board called the examining division, consisting of three patent examiners. Within nine months after its grant, a patent may be challenged centrally before the EPO in what are referred to as "opposition proceedings," which are initiated by any natural or legal person who considers that the patent does not comply with specific provisions of the EPC, such as novelty, inventive step (nonobviousness), or reproducibility (the grounds for opposition are listed in art. 100 EPC). The opposition division is made up of three patent examiners, at least two of which, one being the person chairing the division, cannot have taken part in the examination proceedings.

The decision to refuse the patent application and the final decision made at the end of the opposition proceedings may be appealed. Appeal proceedings are separate and independent from the earlier proceedings and are dealt with by the board of appeal.

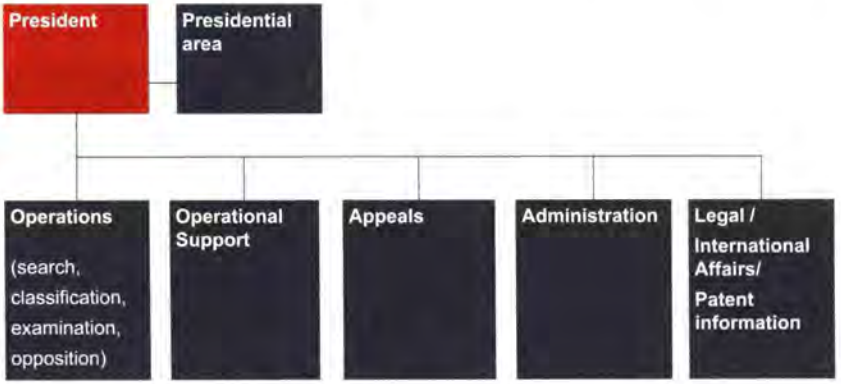

FIGURE 1. **Structure of the EPO.**

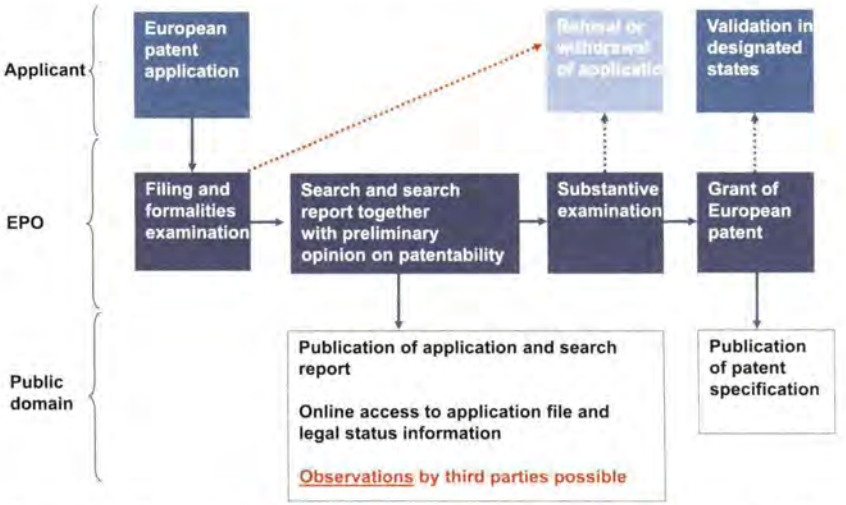

FIGURE 2. **Overview of European patent grant procedure (part 1).**

The grant procedure is summarized in Figures 2 and 3. As shown in the figures, third parties can file observations immediately after the publication of the application and up to the final decision to grant a patent, or once the opposition procedure is open. Filing these observations is free of charge.

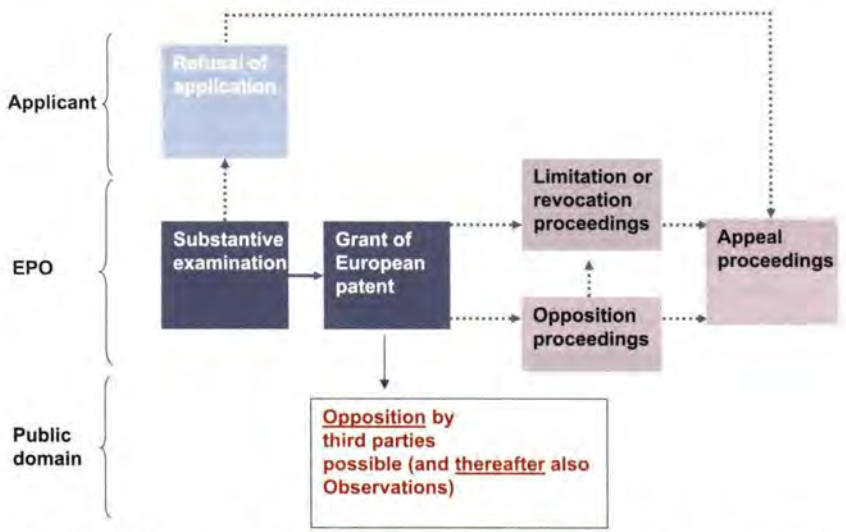

FIGURE 3. **Overview of European patent grant procedure (part 2).**

They can be filed by anyone, without limitation, by postal mail or electronically.[2] All third-party observations submitted are taken into account in the sense that either the documents they quote are admitted into the procedure (if they are more relevant than the documents already available to the EPO) or the division that is involved explains why the quoted documents were not admitted. The third party that files these observations does not become party to the proceedings (art. 115 EPC),[3] contrary to what happens to the person filing an opposition.

EPO's Practice and Legal Provisions Concerning Traditional Knowledge–Related Issues

Genetic resources (GRs) and associated traditional knowledge (TK) have the potential of being translated into substantial commercial benefits. They therefore may represent a valuable source of patentable inventions and benefits to the TK holders. At the international and national levels, requirements for patent applicants to disclose certain information in patent applications ("disclosure requirements") are discussed as a possible means to increase transparency and to prevent "bad" patents, ensuring fair and equitable benefit sharing and allowing developing countries and indigenous and local communities to better control the commercial exploitation of their TK and GRs and thus benefit from the patent system. The scope and modalities of discussed disclosure requirements range from mere encouragements to make information available (e.g., in European Union legislation, described later) to stringent obligations to declare the source, provide evidence of prior informed consent, or both. The sanctions for failing to comply with these obligations vary according to national legislation: for example, the Swiss Patent Act (art. 49a and 81a) foresees a fine in case of willful provision of false information in respect to the source of the GRs or the TK on which the invention is directly based, whereas according to the Norwegian Patents Act (sec. 8b),[4] the "Breach of the duty to disclose information is subject to penalty in accordance with the General Civil Penal Code § 166.[5] The duty to disclose information is without prejudice to the processing of patent applications or the validity of rights arising from granted patents."

TK-Related Provisions under the EPC

No Mandatory Disclosure of Origin, Source, or Prior Informed Consent Requirement

The provisions concerning biotechnological inventions are found in a dedicated chapter (titled "Biotechnological Inventions") of the EPC

Implementing Regulations.[6] Pursuant to rule 26(1) EPC, for European patent applications and patents concerning biotechnological inventions, the relevant provisions of the EPC are applied and interpreted in accordance with the provisions of chapter V of the EPC Implementing Regulations (rules 26 to 34). European Commission directive 98/44/EC[7] is used as a supplementary means of interpretation. This aims to ensure that the recitals preceding the provisions of the directive are taken into account and that a uniform Europe-wide interpretation of the relevant provisions is promoted.[8]

Recital 27 of directive 98/44/EC says that, if an invention is based on biological material of plant or animal origin or if it uses such material, the patent application should, where appropriate and if known, include information on the geographical origin of such material; this is without prejudice to the processing of patent applications or the validity of rights arising from granted patents. The indication of the geographical origin is thus voluntary.

Recital 27 of directive 98/44/EC has to be regarded as encouragement to mention the geographical origin of biological material in the patent application,[9] along the lines indicated by the Convention on Biological Diversity (art. 16(5)).

To provide such information is thus not an obligation under the EPC. Nor does the failure to provide such information have legal consequences for the processing of patent applications or the validity of rights arising from granted patents. No particular guidelines under the EPC go beyond the stipulations in these provisions.

This legal situation with respect to GRs and TK is in line with the general principle under the EPC that, although applicants are encouraged to provide information on prior art related to the claimed invention, there is no stringent obligation on applicants to acknowledge all prior art known to them. The burden to find the relevant prior art for challenging novelty or inventiveness is in principle on the EPO.

Rule 42(1)(b) EPC provides that the description shall "indicate the background art which, as far as is known to the applicant, can be regarded as useful to understand the invention, draw up the European search report and examine the European patent application, and, preferably, cite the documents reflecting such art." To satisfy this provision, the EPO may invite the applicant to provide information on prior art taken into consideration in national or regional patent proceedings and concerning an invention to which the European patent application relates (art. 124 EPC). If the applicant "fails to reply" within the specified period, the application

is deemed withdrawn (art. 124(2) EPC). However, "reply" is to be understood in the broadest sense. Under rule 141(1) EPC, an applicant claiming priority of a previous patent application is required to file with the European patent application a copy of the results of any novelty search carried out by or on behalf of the authority with which the previous application was filed. If these search results are not available to the applicant at the time of filing the European patent application, he can file them with the EPO as soon as he receives them. In a case of noncompliance, as defined in rule 71b(1) EPC, the European patent application is deemed to be withdrawn (rule 70b(2) EPC).

The EPC does not foresee a doctrine of inequitable conduct or fraud to the EPO.

No Examination of Lawful Behavior of an Applicant Who Developed or Acquired the Invention

The EPC does not contain any requirement with respect to GRs and associated TK that the applicant give evidence of compliance with the applicable legal requirements in the providing country, such as prior informed consent requirements. In this general context, the EPO does not examine the questions of who is entitled to apply for a patent and of whether the claimed subject matter has been obtained as a result of illegal or unauthorized activities.

According to art. 60(3) EPC, "In proceedings before the European Office, the applicant shall be deemed to be entitled to exercise the right to a European patent." The applicant is regarded as the entitled party by virtue of a fiction, without this entitlement being examined by the EPO. The reason for this is that the EPO is not in a position to appreciate substantive entitlement to a patent under the respective national laws. It has to rely on final decisions by the competent national judicial bodies (art. 61 EPC).

Likewise, the questions of whether the knowledge or elements that contributed to the invention have been lawfully acquired and of whether the applicant needs authorization by the providers of the technology that the invention is building on to exploit the patent are presumed to be dealt with by national authorities outside the European patent grant procedure.

Safeguards against Misappropriation under European Patent Law

Two aims of a disclosure of origin requirement would be to prevent (or at least to render difficult) the acquisition of patent rights over GRs or TK by

parties without the prior informed consent of their customary custodians and to avoid granting a patent on subject matter that was well known by TK holders' communities and part of the state of the art.[10] As explained earlier, there are no mandatory disclosure requirements under the EPC. However, various provisions in the EPC indirectly serve these purposes, as explained in next section.

Prior Art Concept. The concept of absolute novelty adopted under the EPC lays the basis for preventing misappropriation of GRs or TK already in the public domain. An invention is considered new if it does not form part of the state of the art. The "state of the art," comprises everything made available to the public by means of a written or oral description, by use, or in any other way before the date of filing of the European patent application (art. 54(1) and (2) EPC). There are no restrictions as to the geographical location or the language or manner in which the relevant information was made available to the public; also, no age limit is stipulated for the documents or other sources of the information. However, to obtain the revocation of a patent on the basis of prior use, the prior use must be proved beyond reasonable doubt, and this requires conclusive evidence.[11] The same applies to oral disclosures.[12]

This same concept of state of the art applies to the "inventive step" requirement: any disclosure, including through use, at any time and anywhere in the world may be sufficient to challenge the inventiveness of an application. However, just as in other fields of technology, patents can be granted if an application demonstrates inventiveness, for instance, by showing significant improvements, compared to the prior art (use of) GRs and relevant TK.

Prior Art Access or Accessibility. The access of examiners to prior art information on GRs and associated TK is a huge challenge, because TK is often undocumented ("noncodified") or, if documented, is unlikely to be easily accessible to a patent examiner located in Europe.[13] The EPO strives to continuously enhance the coverage of documented TK. For instance, since February 2009 examiners at the EPO have had access to the Traditional Knowledge Digital Library developed by Indian government organizations, and since 2006 they have had access to the Traditional Chinese Medicine patent database. Dedicated TK portals (e.g., the Korean Traditional Knowledge Portal[14]) and TK-related databases are also easily accessible to EPO examiners.[15] Moreover, the EPO is interested in acquiring new TK-related databases and is ready to provide technical assistance to help set them up. This could be of relevance to the Pacific region.

The importance that TK databases have for the examination work is highlighted by the standard of proof applicable to oral disclosures, which

requires, as indicated earlier, that the content of any oral disclosure be proved in principle beyond reasonable doubt. Hence, it may be difficult to establish that TK that was only transmitted orally belongs to the state of the art. The recording of this oral tradition in a database comprising clear information as to the date wherein it was first made publicly available would avoid such difficulty. Third parties are also constantly encouraged to submit observations and relevant information and documentation in all pending proceedings.

Opposition Procedure. Improved access of examiners to background information on GRs and associated TK at an early stage of patent examination should help reduce the need for opposition procedures. As indicated earlier, these are at the disposal of any third party, including the custodians of GRs and TK who consider that the patent has been wrongly granted. Whereas the information submitted as "third parties' observations" under art. 115 EPC may or may not be admitted into the proceedings, that submitted by the party or parties filing the opposition ("opponent/s") at the beginning of the opposition proceedings are *de jure* part of the proceedings and must be taken into account by the EPO. This guarantees that prior art that anyone in the public considers relevant and that has not been retrieved during the search stage is brought to the attention of the EPO and duly considered when assessing the compliance of the granted patent with the relevant provisions of the EPC.

EPO's Case Law Concerning TK

The Neem Case

A prominent example of a patent that has been opposed and eventually revoked is the neem oil case (European Patent EP-B-0436257). Neem is an evergreen tree endemic to the Indian subcontinent. Neem oil has an extensive history of human use in India and surrounding regions for a variety of therapeutic purposes. Traditional Ayurvedic uses of neem include the treatment of fever, leprosy, malaria, ophthalmia, and tuberculosis. Neem has also been traditionally used as a parasiticide and an insecticide.

During the examination procedure, following novelty objections of the examining division based on prior art citations from the search report, the applicant restricted the scope of the application to the fungicidal use of neem oil obtained by hydrophobic extraction of neem seed. The patent was granted. Oppositions were filed based *inter alia* on the following:

- Lack of novelty or inventive step (based *inter alia* on a prior use in India)
- Insufficient disclosure
- Noncompliance with the provisions of EPC art. 53(a) (going against morality, because the patent rights could jeopardize the life of the Indian neem gatherers)

The opposition division considered that the prior use had been sufficiently established and therefore decided to revoke the patent for lack of novelty over this prior use. The revocation was confirmed by the board of appeal with the decision T416/01[16]; however, this was done on the basis of a different ground, namely, lack of an inventive step in view of a document introduced by the opponents at the beginning of the opposition procedure and published in 1981. Given that the patent was revoked on another ground, the board of appeal did not take a position either on the prior use or on the art. 53(a) EPC objection. Concerning the former issue, the board stated,

> To prove the alleged public prior use, the respondents put forward affidavits A2, A7, A13 and the testimony of Mr A. D. Phadke. The appellant has disputed the validity of the evidence brought forward *inter alia* on the grounds that it casts doubt on the credibility of the evidence. This doubt was based on the long period which had elapsed between the actions and the affidavits and testimony. The appellant's main argument was that the recollection of dates and numerals was uncertain for most people and hence some supporting documents, such as laboratory books or notebooks, were required. However, there is no dispute between the parties concerning the existence of the prior art document (8) as part of the state of the art within the meaning of Article 54(2) EPC. In the board's view, document (8) is highly relevant for the ruling of the present case. Thus, it can be left open whether or not the prior use is proven as the case can be decided on the basis of document (8) alone.

The Pelargonium Case

The *Pelargonium* species (*P. sidoides* and *P. reniforme*), which were the object of patent EP-B-1429795, are native and endemic of southern Africa. They are traditionally used by local ethnic communities in the treatment of respiratory tract infections.

The patent claims were directed to a method for producing an extract from two *Pelargonium* species. Oppositions were filed on the grounds *inter alia* of the following:

- Lack of novelty and inventive step
- Insufficient disclosure
- Noncompliance with art. 53(a) EPC (going against morality) because of noncompliance with the Convention on Biological Diversity provisions relating to prior informed consent and to an agreement as to the term of access to GRs and benefit sharing

The opposition division revoked the patent for lack of inventive step in view of two prior art documents introduced by the opponents.[17] Concerning the art. 53(a) EPC objection, the opposition division held that the disclosure of prior informed consent and the access to GRs and benefit sharing are not linked to the patentability requirements and thus their absence is not a ground for revocation under the EPC. The patent proprietor did not file an appeal against this decision, and the decision of the opposition division became therefore final.

The Hoodia Case

Hoodia is a genus of plants that grow naturally in South Africa and Namibia. The appetite suppressant activity of the plants' flesh has been known for centuries by indigenous populations of southern Africa, such as the San people.

Patent application EP-A-98917372.9 relating to an extract of *Hoodia* comprising an appetite-suppressant agent was refused by the examining division for lack of novelty and lack of inventive step (the latter ground concerned a more restricted version of the claims than those originally filed and was limited to the medical use of *Hoodia* extracts as an appetite suppressant).

During the appeal proceedings, a modified version of the claims was filed by the applicant. The board of appeal considered this claim to comply with the requirements of the EPC and ordered the grant of a patent on its basis. In its decision,[18] the board of appeal took a position on the available information about TK relative to *Hoodia*'s uses:

> *The Board is aware that the traditional knowledge of the original inhabitants of the Kalahari desert, like the San people, is the subject of a large number of publications.*

> Many thereof have been published on the Internet. However, most of these documents have been published after the filing date of the present patent application and there is *no convincing evidence on file that this post-published information, about what was known before the filing date, reflects reality. Therefore, the Board will not take into account post-published documents relating to traditional knowledge allegedly available to the public before the filing date*, and consider only those documents which have been published before said date and which refer to different uses of plants of the genera *Trichocaulon* and *Hoodia*." (emphasis added)

The problem the board of appeal encountered in assessing the documents was the lack of convincing evidence that the relevant information had been made available to the public prior to the filing date of the patent application. The mere fact that some documents state certain information was known to the public prior to a certain date is not always legally sufficient to prove it. The timing of evidence may, therefore, be crucial.

Patents Relating to Materials Obtained from Species Common in Pacific Island Countries or to Their Uses

Various patent applications relating to species common in Pacific Island countries (e.g., kava, ngali nut, mamala, and coral) have been filed, and some patents on these subject matters have been granted by the EPO. Some of these patent applications were withdrawn after having received a negative search report, a negative opinion from the examining division, or both. For some patents, opposition proceedings have been initiated, third-party observations have been filed, or both.

In the case of a patent for the medical use of ngali nut oil (EP-B-1083914), the prior art search did not disclosed any document that could have been used as a basis for a novelty or an inventive step objection by the examining division. The patent was granted and was not opposed. However, if anyone anywhere in the world, for instance, an indigenous community in Pacific Island countries, could have proved use of ngali nut oil as a medicament or that its medical properties were available to the public before the first filing (priority) date (e.g., by having the prior use or prior knowledge recorded in a database with the clear indication of the relevant dates), they could have filed third-party observations and eventually an opposition before the EPO based on this prior use. The proven prior use or prior knowledge could have led to the revocation or the limitation

of the patent by the EPO. Therefore, it is important that records be made of prior art, including prior use, regarding TK.

Even once a European patent has been granted by the EPO and the opposition period has elapsed, the patent can always be challenged at the national level on the same grounds as in an opposition before the EPO.

Conclusions

Discussions at the international level about TK, GRs, and intellectual property have been going on for decades and are ongoing. The World Intellectual Property Organization (WIPO) Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore was set up in 2000 and is expected to finalize documents to be approved by a diplomatic conference in the near future. The EPO is following these discussions with great interest, being well aware of the relevance of the problem.

Notwithstanding the ongoing discussions and different views on the role of intellectual property with respect to TK and GRs, a clear understanding of the legal and procedural framework within which the EPO works is pivotal to ensure that TK is appropriately protected and that it is not unduly exploited by seeking protection for something that is already part of the state of the art.

At the national level legislation often differs from one country to another; for instance, some countries may grant to TK a *sui generis* protection (e.g., some Pacific Island countries), and some may require mandatory disclosure of the origin or source of the GR or TK on which the patent is based (e.g., Norway and Switzerland). Regardless, patent applications at the EPO are examined at all stages solely under the requirements of the EPC. It is therefore essential, in particular for TK holders, such as the Pacific Island countries, to be aware of these requirements to actively protect in Europe any TK-derived invention they may want to develop and to be able to properly defend their rights if a European patent application that could be based on their TK is filed without their consent. This paper describes the most relevant requirements with respect to TK, which, in view of the foregoing analysis of the EPC and of the relevant case law, can be summarized as follows:

1. The lack of disclosure of origin or source is not a ground for refusing a patent application or revoking a granted patent. The same applies to the lack of a declaration that the prior informed consent was obtained or that an agreement about access to TK and GRs and benefit sharing was signed.

2. Public prior use, irrespective of the place where it occurred, is part of the prior art under the same circumstances as any written document. If prior use is established as required under the applicable standard of proof, it may lead to the revocation of a patent. The same applies to oral disclosures.
3. The development of TK-related databases that provide a clear indication of the information disclosed (e.g., scientific name of the plants or animals referred to in the disclosure) and of the date of its first public disclosure represent an important tool for the EPO (and patent offices worldwide) to further limit the risk of granting a patent for known subject matter. TK holders, like the Pacific Island countries, would certainly help to further limit this risk by creating databases of this kind and allowing access to them by EPO and other patent office examiners.
4. Third-party observations are free-of-charge, easy-to-use, and powerful tools that can bring to the EPO's attention any prior art disclosure considered relevant to the examination of the patent or patent application.

In a sensitive field such as inventions related to TK, GRs, or both, even a single patent that turns out to have been unduly granted (i.e., where relevant prior art was missed or not properly taken into account) can create mistrust and a negative perception of the patent system in general and of the EPO as the involved granting authority in particular. All efforts must be made to avoid this, not least because patent rights could represent one of the opportunities for TK holders to obtain those benefits to which they are entitled, as clearly stipulated in the Convention on Biodiversity and the Nagoya Protocol. As stated in the foreword of WIPO and United Nations Environment Programme Study 4, "The patent system ... recognizes innovations based on genetic resources and provides a framework for investment in the development of valuable new products and processes. It therefore offers the potential to yield the desired benefits from access to genetic resources." The study further highlights "the need, when genetic resources are first accessed, for a clear understanding of intellectual property issues."[19]

It is hoped that the information provided in this paper may help increase this understanding.

ACKNOWLEDGMENTS

I am grateful to my colleague Sabine Demangue for her help in preparing this paper and to my colleagues Marko Schauwecker, Tanneke Laffargue-Haak, and Heli Pihlajamaa for their comments.

NOTES

1. The complete text of the EPC is available at http://www.epo.org/law-practice/legal-texts/html/epc/2010/e/index.html.

2. Form available at http://tpo.epo.org/tpo/app/form/.

3. The text of article 115 is available at http://www.epo.org/law-practice/legal-texts/html/epc/2010/e/ar115.html.

4. The text of the relevant section of the Norwegian Patent Act is available at http://www.patentstyret.no/en/For-Experts/Patents-Expert/Legal-texts/The-Norwegian-Patents-Act/#Chapter 2.

5. "Any person who gives false testimony in court or before a notary public or in any statement presented to the court by him as a party to or legal representative in a case, or who orally or in writing gives false testimony to any public authority in a case in which he is obliged to give such testimony, or where the testimony is intended to serve as proof, shall be liable to fines or imprisonment for a term not exceeding two years."

6. The text of the EPC Implementing Regulations is available at http://www.epo.org/law-practice/legal-texts/html/epc/2010/e/rcii_v.html.

7. The text of the EC Directive is available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1998:213:0013:0021:EN:PDF.

8. See the *Official Journal of the EPO* 8-9 (1999): 573, 587, and "Guidelines for Examination in the EPO" (2012), G-II, 5.2.

9. The text of the directive is available at http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_1/wipo_grtkf_ic_1_8-annex1.pdf.

10. See, e.g., WIPO, "Technical Study on Disclosure Requirements in Patent Systems Related to Genetic Resources and Traditional Knowledge," http://www.wipo.int/tk/en/publications/technical_study.pdf.

11. A discussion on this topic and references to the relevant decisions of the EPO Boards of Appeal are available at http://www.epo.org/law-practice/legal-texts/html/caselaw/2010/e/clr_vii_d_2_3_4_a.htm and http://www.epo.org/law-practice/legal-texts/html/caselaw/2010/e/clr_i_c_1_9_3.htm.

12. A discussion on this topic and references to the relevant decisions of the EPO Boards of Appeal are available at http://www.epo.org/law-practice/legal-texts/html/guidelines/e/g_iv_7_3.htm.

13. See the distinction between codified and noncodified TK given, e.g., at http://www.wipo.int/edocs/mdocs/sct/en/wipo_grtkf_ic_17/wipo_grtkf_ic_17_inf_9.pdf.

14. http://www.koreantk.com/en/JZ0100.jsp.

15. Accessible, e.g., via the Epoxy portal at https://epoxy.epo.org/.

16. The complete text of this decision is available at http://www.epo.org/law-practice/case-law-appeals/recent/t010416eu1.html#q=.

17. The complete text of this decision is available at https://register.epo.org/espacenet/application?number=EP02777223&lng=en&tab=doclist.

18. The complete text of this decision is available at http://www.epo.org/law-practice/case-law-appeals/recent/t040543eu1.html.

19. http://www.wipo.int/tk/en/publications/769e_unep_tk.pdf, p 4.

PROTECTING AND PROMOTING TRADITIONAL KNOWLEDGE: A TOOL FOR ECONOMIC DEVELOPMENT IN THE PACIFIC

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With dwindling natural resource receipts for pacific government coffers, developing alternative revenue sources and economic activities is paramount. One sector that may provide sustainable revenue flows, a high participation rate of Pacific Islanders, and stable market demand is the utilization of the traditional knowledge (TK) sector. Significant challenges remain in establishing a stable and predictable policy and legal framework in which operators can confidently commercialize TK products. However, as will be seen in this paper, governments in the Pacific have taken the bold step to do this, which proves that there are opportunities beyond fish, rocks, and timber in Oceana.

Introduction

THE PACIFIC'S RELIANCE on its natural resources—fisheries, forestry, mining, and petroleum—is a ticking time bomb. Largely reliant on external markets, these resources remain highly volatile and, more worrisome, compromise the vulnerable ecosystem that clothes and feeds the islands. To defuse this threat, economies of the Pacific have deployed diversification policies to develop other sectors such as agriculture, tourism, and seasonal worker schemes. Unfortunately, these sectors are still contingent on external markets and therefore remain vulnerable.

A paradigm shift is required whereby the Pacific's greatest resource—traditional knowledge (TK)—must be harnessed. This paradigm shift must have the capacity to encompass a regional and global market and use

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readily available resources without being detrimental to the environment. No doubt significant challenges remain in developing a stable and predictable policy and effective legal framework for operators to commercialize TK products domestically and abroad. As I will show in this paper, the Pacific has taken bold steps to explore these development options and is proving that fish, rocks, and timber are not the only resources.

This paper will emphasize that TK has the potential to drive economic prosperity in Pacific economies. It will address this notion in four parts. Part 1, Limiting Our Wealth, examines the overwhelming reliance on natural resources and aid, which is affecting the health of Pacific economies. Part 2, First Action, tapping the silent majority, prescribes TK and broadly knowledge-based industries as an antidote to the declining revenue streams derived from natural resource receipts and external grants. Part 3, Second Action, and Part 4, Third Action, identify policy and legal arrangements to facilitate the prescriptions mentioned in Part 2. These include facilitating domestic demand, developing trade policies promoting TK products, and aid-for-trade frameworks promoting TK industry growth. The paper ends with a conclusion and recommendations.

Part 1: Limiting Our Wealth

Pacific economies are heavily reliant on natural resource receipts and external grants to fuel their fiscal policies. While taxation systems and custom duties provide steady revenue streams and potential opportunities from nonnatural resource investments are active, they remain comparatively insignificant. Therefore the outlook for fiscal policies is only positive when natural resource receipts and external grants have an upward trend. This is not the case when both these revenue streams are on the decline.

An Asian Development Bank Report on Pacific Economies, relative to gross domestic product, indicates that external grants are on the decline. This may be attributed to reprioritization of aid flows and the current state of the global economy. However this view may be distorted by external grant providers imposing conditions on aid to meet their foreign policy objectives. An example of this is China's checkbook diplomacy in the region, whereby infrastructure projects were given to the islands in response to and conditional upon them adopting the One China Policy. There is also a resurgence of the United States in the region as it adapts its aid programs to mitigate China's influence.

There are also declining receipts from natural resources, with a downward trend in revenues generated by fishing licensing fees and in the mineral and petroleum sectors. All follow a downward trend on exports,

and concessions on taxes hamper collecting high revenues. Coupled with a limited tax base and reduction from custom duties through regional and multilateral trade commitments, as discussed below, it is a precarious situation.

Four actions must be taken. First, increase private sector activity through investing targeted service and manufacturing sectors. Second, facilitate effective domestic demand through local content arrangements and market and product development assistance. Third, establish an effective trade regime to access markets and protect goods and services. Last, improve external grants to promote nonnatural resource sectors.

Traditional knowledge (TK) and, more broadly, knowledge-based industries have the capacity to facilitate these four actions. The Pacific region is home to an array of cultures, 10 percent of the world's biodiversity, the largest ocean in the world, and a human resource that has engaged with its ecosystems for generations in the fields of science, medicine, transportation, agriculture, art, and the creative sector.

Therefore, the first action on targeted private sector activities must involve government investment in stimulating TK and other knowledge-based industries and encourage venture capital investments to fund product development.

The second action on facilitating effective domestic demand requires better capitalizing on the current production of high-quality TK products by helping producers make the transition to a full commercial industry. The current lack of commercialization can be partly explained by the fact that often TK products circulate or are produced in a nonmonetary context. So a legal framework on TK protection and related intellectual property needs to be established as well as grants, local content, and related industry support policies.

The third action would require a trade policy that secured investment, markets, and protection of TK products. This may be facilitated through the Melanesian Spearhead Group (MSG) and Pacific Island Country Trade Agreement (PICTA) as well as negotiated in the Pacific Agreement on Closer Economic Relations (PACER) Plus and Economic Partnership Agreements (EPAs), respectively, with Australia, New Zealand (ANZ), and the European Union.

The fourth action may be facilitated through the aid-for-trade frameworks whereby greater emphasis is placed on providers of the external grants to promote private sector growth and encourage trade in TK industries.

The following discussions will examine these four actions in greater detail.

Part 2: First Action: Increasing Private Sector Activity through Investing in Targeted Service and Manufacturing Sectors

Convincing the Source

Most Pacific islanders are engaged in the rural economy. This realization has made planners suggest technical training should be devoted to developing agricultural skills so that islanders may commercialize their major asset: land. While this may seem logical, the advantages are short term, with limited scope and markets.

A better use of resources would be to focus on technical training for the rural population to develop knowledge-based industries, in which TK and other knowledge-based processes and products are the source ingredient. The potential is greater because inclusion is not subject to gender, demographics, or social classes as land ownership is. Therefore coverage is wider and there is also a constant demand for TK products.

Technical training also has the potential to introduce different approaches to developing and diversifying the product. For example, a *bilum* (a local woven basket) may remain a string bag, but training in garment making and design may transpose materials and patterns onto upholstery or furniture and lead to fusions with other materials in producing other garments. Technology may also improve product durability and production lines.

Technical training must also be used as a bridge to access scientific fields of biotechnology and engineering. For example, TK products of a medicinal nature would need basic skill sets to appreciate toxicology, morphology, and taxonomy arrangements.

The proposed technical training should consist of the following:

- providing the skills and tools to further advance the commercial viability of TK products;
- providing opportunities to integrate different technologies or other products to further develop TK products;
- providing opportunities to enhance skills in fields related to enhancing TK products;
- developing business skills in commercializing the product;
- facilitating relationships with financial institutions to provide seed funding for TK products to be commercialized.

The focus is maximizing training programs to commercialize the TK product.

Finally, an appreciation of business skills is also important. The commercial relationships associated with developing TK products require

negotiation skills, appreciating price formulations, and ensuring a profit is made. It also means designing an appropriate model to disperse money to all stakeholders.

Incubating TK Industries

Skills training are not sufficient to drive an industry. Components such as capital, investment partners/collaborators, and markets to consume the product are essential. Therefore, government policy must focus on five areas: (1) tax-free status on the industry and customs duty exemption on materials used; (2) start-up grants; (3) promote a conducive investment climate for collaborators; (4) subsidized utilities; and (5) domestic industry protection from imported like products.

These five areas are not revolutionary and are regularly applied in the natural resource sector. Unfortunately for most Pacific economies, these concessions have not yielded positive results or stable revenue returns, as mentioned previously. The difference with the TK sector is that most of the investment will be onshore and potential markets domestically and abroad remain positive. Table 1 shows suggested policy changes in these five areas using the bilum industry as an example.

Another critical facility is the legal protection framework for TK. Several Pacific economies have enacted policy and law on TK protection and some have explored amending intellectual property legislation to recognize TK, as for instance has been done in Vanuatu. One possible approach is to apply a *sui generis* framework that would allow the TK owner to choose what intellectual property to apply in different parts of product development. There has been some regional integration in this area with the MSG and Forum Island Countries formulating mechanisms to recognize and protect TKs.

While the Pacific should be commended for its efforts in developing TK systems, great challenges remain in capacitating regulatory bodies charged with administering the protection of these rights. Unfortunately for the sector, protecting these rights is not a priority, and scarce public service resources are used elsewhere.

Part 3: Second Action: Facilitating Domestic Demand

Most TK products are transacted in cultural noncommercial settings. Even when commercial, the transactions largely remain in the informal sector, where returns are not high. Therefore, while there is demand for TK products, the main challenge is to develop a variety of markets for TK consumption.

TABLE 1. **Suggested Changes in Government Policy Using the *Bilum* Industry as an Example.**

Tax-free status on the industry and custom duty exemption	Start-up grants	Conducive investment for collaborators	Subsidized utilities	Domestic industry protection
Waiving collections on goods and services tax, income tax, and customs duties on equipment and materials such as dyes, strings, and machinery for processing	Whether in partnership with financial institutions or government grants, the objective is to provide capital to commercialize *bilums*; this must be done on merit and viability to be commercialized	Attracting partners to invest in *bilum* production would require encouraging capital venture type funds where exemptions are given on business registration, tax incentives, capital movements, as well as visa and work permit applications; the scope of these partners may be a fashion house to furniture company or it may be a sector outside the garment industry—flexibility is the key	Power, water, and information and communication technology facilities are critical for TK products; these services should be subsidized	Domestic protection is required from competing imported products, so that the *bilum* industry is able to grow; these measures may range from import tariff protection to quantitative restrictions

This is where government policy can assist the industry in facilitating domestic consumption though the following activities: (1) mandatory local content of TK products; (2) national treatment on government procurement on TK products; (3) promotion of TK products. Table 2 identifies how these polices may apply.

This policy will remain effective only though a vibrant and proactive industry body that coordinates TK stakeholders to formulate standards for their products and meet production targets to meet the demand. It would be unwise for governments to assume this role.

Part 4: Third Action: Trading TK

While domestic demand may provide sufficient returns to TK owners, the ambition to export to a regional and global market must be encouraged in order to encourage revenue inflows. Therefore, a trade policy must

TABLE 2. **How Government Policy Can Assist Domestic Consumption Though Mandatory Local Content of TK Products, National Treatment on Government Procurement on TK Products; and Promotion of TK Products.**

Mandatory local content	National treatment on government procurement	Promotion of TK products
Retailers and distributors to have certain percentage reserved for TK products (e.g., all hotel rooms to have linen, paintings, and cosmetics that are sourced internally), this could be imposed in the form of a quantitative requirement, e.g., 10% of the floor space	Local content procurement in education materials, TK medicine, and other basic services the government procures to deliver services	"Made in the Pacific" labeling and encouraging consumers to be patriotic and purchase local products

advocate (1) tariff free and quota free duties on TK products; (2) noncumbersome rules of origin; (3) flexible biosecurity rules on TK products; (4) liberalized TK services; (5) protection and recognition of TK rights; and (6) protection and promotion of investments of partners in developing TK products.

Table 3 identifies the trade agreements Pacific economies are party to and how these arrangements may promote TK trade. Table 3 considers two existing frameworks: the Melanesian Spearhead Group Trade Agreement (MSG TA)[1] and the PICTA.[2] As we show below, both have membership of Pacific economies and, in their current state, focus on tariff liberalization for goods. The scope of biosecurity, services, TK protection, and investment are not part of the texts of these agreements but have, nonetheless, been advanced in different stages of negotiations.

Table 3 also considers agreements that are currently being negotiated, such as the Economic Partnership Agreement (EPA) between the African, Caribbean, and Pacific group of states and the European Union, as well as the PACER Plus Agreement (PPA). It is intended that both will have comprehensive provisions relating to economic and trade relations. The EPA has a draft text, while the PPA does not have one.

While the five areas highlighted are important considerations for TK trade, significant capacity constraints exist in coordinating functional trade departments within Pacific island states. The multifaceted policy and regulatory features of trade today, as well as international relations, requires full-time dedicated officers. This is not the case in many Pacific economies, as staff often have multiple roles, and there is also a shortage of technical staff.

TABLE 3. **The Trade Agreements Pacific Economies Are Party to and How These Arrangements May Promote TK Trade Considering Two Existing Frameworks: The Melanesian Spearhead Group Trade Agreement (MSG TA) and the Pacific Island Country Trade Agreement (PICTA).**

Tariff free and quota free duties on TK products	Noncumbersome rules of origin	Flexible biosecurity rules on TK products	Liberalized TK services	Protection and recognition of TK rights	Protect and promote investments of partners in developing TK products
MSG TA					
Most tariff lines are already duty free and quota free—this is not an issue	Change of tariff headings arrangements are favorable for TK products and provide flexibility in determining rules of origin	Biosecurity protocols are being established; this remains a major challenge for TK products accessing MSG markets	There is no services framework in the current text; however, efforts are under way for its formulation—TK services need to be identified and negotiated for market access	A current framework is under consideration by MSG members on reciprocal enforcement of TK rights; this is a positive sign for the region and for TK trade	No investment framework has been considered, which may cause reluctance for collaborative and investment activities
PICTA					
Tariff liberalization remains limited and therefore is an issue for TK products to access these markets	The cumulative rule is not desirable for TK products; change of tariff headings similar to MSG need to be adopted	No framework is in place and therefore may pose a market access barrier	Service negotiations are under way and, as with the MSG, TK services need to be identified by members with a view to negotiating their liberalization	No TK protection framework, and there seems to be no desire to establish one; this is a negative prospect for TK entrepreneurs exporting under PICTA	No investment framework and similar issues with MSG may arise

TABLE 3. **Continued.**

Economic Partnership Agreement					
Most tariff lines are already duty free and quota free; this is not an issue	The cumulative rule is not desirable for TK products	Rules are not flexible, and this is coupled with member state rules as well; development assistance must be sourced from the EU	No services framework	No TK protection framework, and there seems to be no desire to establish one; this is a negative prospect for TK entrepreneurs exporting under EPA	No investment framework and similar issues with MSG may arise
Pacer Plus Agreement					
No liberalization framework, but it is most likely to be asymmetrical whereby ANZ will apply duty free, quota free to Pacific products and the Pacific members will apply the same over a period of time	It is proposed that a change of tariff heading similar to MSG TA apply, as this will provide the flexibility to identify TK products	Protocols of biosecurity and standards are critical to access ANZ markets, and the Pacific would require assistance to meet these rules	ANZ must liberalize service sectors critical for TK products; this also includes visa and work permit related issues	ANZ must protect and recognize TK; this should be nonnegotiable	Investment frameworks must be advanced whereby entities are encouraged to move capital, personnel and technologies to advance TK products

Part 5: Fourth Action: Aid-for-Trade with a TK Twist

As discussed earlier, external grants are on the decline, although coordination among providers has improved, and therefore aid flows are now limited to entities that have the capacity to effectively deliver development priorities and assistance. One particular arrangement that should be of interest to TK entrepreneurs is aid-for-trade.

In its efforts to maintain the relevance of multilateral trade, in 2004 World Trade Organization members considered a new framework whereby aid by the Organisation for Economic Cooperation and Development members and other emerging economies was contingent on encouraging trade liberalization. This may range from addressing supply capacity and trade-related infrastructure in order to export more, to formulating trade policy frameworks.

The Pacific engaged in a similar exercise in 2010 whereby an Aid-for-Trade Facility hosted by the Pacific Islands Forum Secretariat was to manage a pool of resources (45 million Euros from 2010 to 2014), mostly from the European Union (EU), to target trade-related assistance. The author was part of this process, and the following initiatives were proposed with regards to enhancing TK industries:

- model policy in promoting creative, cultural and innovative industries;
- legal instruments in formulating key bodies to represent producers, practitioners, and stakeholders in the different sectors of the creative, cultural, and innovative areas;
- templates on drafting industry standards;
- template contracts to parties in the value chain of these industries;
- template financing contracts;
- toolkits on product and market development;
- toolkits on export promotion;
- intellectual property and traditional knowledge protection;
- funding of national consultants to use these toolkits to implement policies to promote TK industries and develop the private sector.

When prioritization was made by Pacific officials, the entire TK proposal was dropped and emphasis was shifted to institutional building as well as trade policy development. One conclusion that might be drawn from this is that in the eyes of many Pacific economies, TK remains an artifact only used on cultural celebrations, which has no economic relevance. Such a viewpoint is superficial and contributes to keeping many economies in bondage to natural resources and external grants.

Conclusion

This paper has identified the urgency for Pacific economies to look beyond natural resources receipts and external grants to fuel its fiscal policy. It has suggested TK industries provide an alternative to fill the revenue gap. For this to occur, four actions were proposed. These include the following:

1. upskilling TK entrepreneurs to assist them in commercializing their product;
2. facilitating the domestic demand for TK products;
3. formulate trade policies to promote and protect TK products and entrepreneurs;
4. formulating aid-for-trade frameworks that promote TK products.

The paper also mentioned critical challenges facing these actions. They include the following:

- shifting the mindset of technical training from agriculture to TK activities;
- establishing and supporting entities representing TK entrepreneurs;
- prioritizing trade policy in the public service;
- looking beyond institutional development in aid-for-trade assistance.

In conclusion, I am reminded of what an old friend told me when we pondered the revenue declines in external grants and natural resource receipts. He remarked, "The future of the Pacific does not lie in its rocks, timber and fish. It is in the hearts and minds of its people to use its invaluable resource, its knowledge, to unlock prosperity." TK is a viable alternative and has potential to diffuse this dilemma if a number of practical measures are implemented.

NOTES

1. Came into force in 1994 and currently consist of Fiji, Papua New Guinea, Solomon Islands, and Vanuatu.

2. Came into force in 2003. Members include most Pacific island economies.

PROTECTING NATURE AND CULTURE: ENHANCING LEGAL FRAMEWORKS FOR THE CONSERVATION OF HERITAGE IN THE PACIFIC

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It is well recognized that for Pacific Island peoples, nature and culture are inextricably linked. The protection of the natural environment and biodiversity, for example, are essential for the maintenance of traditional and contemporary lifestyles and cultures. Conversely, many aspects of Pacific intangible heritage, including traditional knowledge, are inherently associated with natural resources. Therefore, in this context, the protection of nature and culture cannot be separated. More broadly, the preservation of the unique biological and cultural diversity of this region is of importance for all people. The significance extends beyond ensuring cultural integrity and environmental health to providing a possible avenue for sustainable economic development for the people of the region. The prospects and challenges in this regard are illustrated, for example, by tourism. Tourism can assist the conservation of both nature and culture by raising awareness, providing valuable livelihood options, and incentivizing protection efforts, but it is not without risks. Therefore, appropriate legal frameworks are essential to facilitate enhanced protection, mitigate threats, and guide best practice management. While most Pacific Island nations have adopted environmental laws, specific legal regimes for the safeguarding of intangible heritage are less common. In circumstances where many natural and cultural resources are in the hands of local villages, community-based frameworks are arguably the most appropriate. This article explores how heritage law and policy and environmental law can enhance the protection of traditional knowledge in the Pacific. The obstacles, opportunities, and options are analyzed as well as how more integrated protection of nature and culture can be facilitated.

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Introduction

THE PROTECTION OF TRADITIONAL KNOWLEDGE is most commonly explored in the context of intellectual property law and the role that this field can play. Rather than contribute directly to that discussion, this article explores a different perspective: the safeguarding of traditional knowledge as a critical element of intangible cultural heritage. It is beyond dispute that addressing the unregulated exploitation of traditional knowledge is a crucial issue. Therefore, it is not suggested that the areas of law explored here could or should take the place of intellectual property regimes. Rather, it is proposed that environmental law and heritage law could work in conjunction with intellectual property regulation to ensure the maintenance and revitalization of intangible heritage. In this way, traditional knowledge could be more comprehensively safeguarded, regardless of its commercial value and whether it is addressed by markets. Mechanisms are needed to ensure that intangible heritage, including traditional knowledge, practices, and skills that are at risk of being lost, are safeguarded and can continue to evolve in the future. It is these issues that will be explored here and in particular the legal frameworks that can support safeguarding and revitalization initiatives.

The Pacific region is home to a diverse abundance of intangible heritage, including songs, dances, and other cultural expressions, such as artwork and music; traditional knowledge, customs, and practices; artisanal skills, arts, and crafts; belief systems and creation myths; and a rich diversity of languages.[1] In particular, traditional ecological knowledge across the region is extensive, including, for example, complex information about the treatment of poisonous plants and how they may be used for food, significant medical knowledge held by traditional healers, and biocultural indicators for weather forecasting.[2] There is little doubt that traditional knowledge is an essential component of intangible heritage. Furthermore, it is clear that traditional knowledge, together with other forms of intangible heritage, is at risk from change and decay through the natural passage of time but more worryingly is threatened by the processes of globalization and modernization as well as population growth and urbanization. It is these processes that can result in environmental degradation and natural resource exploitation as well as altered value systems, all of which can contribute to the degradation of natural and cultural heritage.

There are many reasons why traditional knowledge should be safeguarded as intangible heritage. First and foremost, it is a critical component of the cultural heritage of indigenous peoples and is of intrinsic value in and of itself. Traditional knowledge is a foundational component or otherwise associated with many aspects of traditional lifestyles, culture, and heritage

and therefore must be safeguarded if these rights are to be secured. From a legal perspective, indigenous collective rights for the protection of and respect for culture have been specifically recognized in the International Labor Organization (ILO) Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries[3] and in the UN Declaration on the Rights of Indigenous Peoples.[4] More particularly, the UNESCO Convention on the Safeguarding of Intangible Cultural Heritage (CSICH)[5] is specifically aimed at safeguarding intangible heritage, including traditional knowledge. The precise mechanisms and programs are explored in further detail below.

Second, for most indigenous peoples, nature and culture are inextricably linked. This is well recognized in the literature broadly[6] but also in the specific context of Pacific Island countries (PICs), where indigenous peoples are closely connected to nature through the cultural and spiritual values they place on it.[7] In seeking to protect the environment, traditional knowledge has an important part to play. Conversely, much intangible cultural heritage relies on access to and the use of natural resources.[8] Therefore, it is appropriate that natural and cultural heritage be protected in tandem. Furthermore, the international community has acknowledged the value of cultural heritage in protecting the environment. The Convention on Biological Diversity (CBD)[9] has the overall aims of conserving biodiversity, facilitating its sustainable use, and ensuring the equitable sharing of benefits. Two key provisions specifically refer to traditional knowledge. Article 8(j) calls for States to respect, preserve, and maintain "knowledge, innovations and practices of indigenous and traditional communities . . . relevant for the conservation and sustainable use of biological diversity."[10] In addition, Article 10(c) encourages States "to protect and encourage customary use of biological resources in accordance with traditional cultural practices" compatible with conservation and sustainable use.[11] This logically involves the protection of traditional knowledge associated with those practices. The focus in the CBD is on utilization, and the references to consent and benefit sharing imply that the greatest risk is from unauthorized and inequitable exploitation. However, as noted above, there are other threats to traditional knowledge that the treaty does not seek to address. For example, the CBD does not protect the lifestyles of indigenous and traditional people, which are essential to the maintenance of traditional knowledge. This again points to the need to safeguard traditional knowledge for its heritage value rather than purely its commercial or other utility.[12]

Socioeconomic development is a third motivation for protection of traditional knowledge as intangible heritage. In this context, heritage can be financially valuable and provide opportunities for economic development and the establishment of sustainable livelihoods. For example, tourism and,

in this context, cultural and/or heritage tourism can contribute directly to poverty reduction and economic growth by providing small business opportunities in urban and rural areas but also by catalyzing expansion across a wide range of other sectors.[13] Traditional knowledge and associated intangible heritage, such as customary practices and skills, is the "capital" on which cultural tourism relies. If appropriately managed, this "capital" need not be consumed. In other words, cultural assets could be utilized indefinitely. Of particular significance is that cultural tourism empowers local communities and utilizes communal ownership of tangible and intangible heritage (e.g., natural sites and traditional knowledge) as an asset rather than a challenge. Human resources are combined with cultural capital to create sustainable livelihood opportunities that facilitate the maintenance of intangible cultural heritage in its community context.

While growth in tourism has many advantages, including financial but also less direct benefits associated with raising awareness about the environment and culture of the region, it can also have negative impacts.[14] Risks include the overcommercialization of heritage, where intellectual property laws are particularly relevant. However, it is also important to ensure that intangible heritage does not become "corrupted" or "skewed" toward one aspect at the expense of another. Furthermore, there is a risk that tourism could result in traditional knowledge and intangible cultural heritage being removed from their community contexts and losing their meaning to traditional holders. Therefore, it is essential that mechanisms be put in place to protect the natural and cultural assets on which tourism relies before these impacts occur. This is all the more pressing, as the tourism sector is predicted to continue to grow as overseas travelers seek holiday destinations that provide access to unique environments and culturally diverse experiences. Tourism has been contributing significantly to Pacific Island economies for some time and is recognized as providing an important opportunity for socioeconomic expansion in the future.[15] Significant work has been done for a considerable period of time in safeguarding intangible cultural heritage in the Pacific region. For example, the Fiji National Museum has been involved in the recording of Fijian oral tradition since 1975.[16] A further example is the Vanuatu Oral Tradition Collection Project (which led to the development of the Fieldworker program), which was established in 1976.[17] But if cultural tourism and other cultural industries are to be scaled up, then greater attention must be paid to the safeguarding of intangible heritage assets, such as traditional knowledge. This has been well recognized in the Pacific region, where the potential for tourism associated with "biodiversity, the environment, the natural and built heritage, and culture" has been investigated.[18] Strategies and policies have been developed aimed

at minimizing adverse impacts and fostering sustainable tourism. Nonetheless, it remains the case that laws to protect the natural environment and safeguard the cultural heritage of indigenous peoples remain incomplete. Although planning frameworks need to facilitate tourism development, heritage laws must provide a backstop to prevent damage.[19]

International Heritage Protections

While there is no specific international law focused on cultural heritage tourism, there are a number of relevant instruments that support the safeguarding of intangible heritage. The Declaration on the Rights of Indigenous People recognizes that indigenous people have the right to practice their culture.[20] Although widely endorsed, the Declaration remains soft law, and the only binding legal instrument in this context is the ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries (ILO169).[21] Article 27(1) provides in relation to indigenous peoples that

> education programmes and services ... shall be developed and implemented ... to address their special needs, and shall incorporate their histories, their knowledge and technologies, their value systems and their further social, economic and cultural aspirations.

Furthermore, Article 23(1) provides that

> handicrafts, rural and community-based industries ... and traditional activities of the peoples concerned, such as hunting, fishing, trapping and gathering, shall be recognised as important factors in the maintenance of their cultures and in their economic self-reliance and development. Governments shall, with the participation of these people and whenever appropriate, ensure that these activities are strengthened and promoted.

Therefore, international law embodying indigenous collective rights strongly supports the protection and ongoing practice of intangible heritage.

In the context of international heritage law, there are several relevant instruments. Most well known is the World Heritage Convention (WHC),[22] which was the first global treaty to recognize the protection of both natural and cultural heritage. The WHC is focused on the protection of natural and cultural sites, and the definitions in the treaty do not incorporate intangible heritage. However, Article 4 specifically acknowledges the duty of Member States to ensure the "transmission to future generations of the cultural and

natural heritage" covered by the treaty. In terms of Pacific heritage sites, such as Chief Roi Mata's Domain in Vanuatu,[23] this necessarily involves safeguarding the associated traditional knowledge and practices. Although, the Convention does not safeguard intangible heritage per se, there has been relatively broad ratification of this treaty in Pacific that has catalyzed action and the protection of cultural sites.[24]

A more recent and relevant instrument is CSICH, which seeks to balance the protections provided to sites under the WHC with the safeguarding of intangible heritage. Inherently, this treaty is of significant importance for the PICs, which, as noted above, possess large amounts of intangible heritage, and five States have ratified the Convention.[25] CSICH seeks to safeguard all intangible cultural heritage regardless of its economic utility. Without defining a list of intangible heritage items, Article 2(2) sets out domains to be safeguarded including "oral traditions and expressions," "social practices," "knowledge and practices concerning nature and the universe," and "traditional craftsmanship."[26] The treaty establishes a *Representative List of the Intangible Cultural Heritage of Humanity*, and both Tonga and Vanuatu have items listed on it.[27] As well as providing a normative framework for listing, CSICH focuses on the processes of safeguarding heritage, including maintaining the "living" nature of culture and its transmission to future generations.[28] Significantly, it emphasizes the need for the involvement and consent of heritage custodians, and the importance of ensuring that intangible heritage continues to evolve and remain functionally relevant to traditional owners. In association with CSICH, UNESCO offers practical strategies for safeguarding intangible cultural heritage, such as the Living Human Treasure program. This program encourages States to officially recognize people with a high degree of knowledge and skills required for performing or re-creating elements of intangible cultural heritage and to facilitate the transmission of knowledge and skills to younger generations.[29] PICs such as Fiji have established such a program,[30] and Fiji, Papua New Guinea, and Vanuatu have all been part of the Indigenous Language Revitalization and Preservation in Melanesia and the Pacific project.[31]

While it is clear from the above that there has been considerable progress toward safeguarding intangible heritage, there are still gaps in the legal protections at the national level. This is a concern because both the WHC and the CSICH require legal frameworks to be put in place to support heritage protection. Under the WHC *Operational Guidelines*, States have the responsibility to take appropriate legal measures to protect heritage sites,[32] which is a requirement for the successful nomination of a World

Heritage site.[33] Similarly, CSICH requires State parties to ensure safeguarding of intangible cultural heritage[34] through the creation of inventories[35] and the implementation of policies and legal measures to foster documentation institutions, bodies for heritage management training and the "transmission of such heritage through forums and spaces," and appropriate access to intangible cultural heritage.[36] Designing new and culturally appropriate laws can be problematic for legally pluralist nations. Laws must meet contemporary regulatory needs but not transgress deeply ingrained traditional beliefs or customary laws. Little assistance is given to legally pluralist countries such as those in the Pacific, and the particular challenges they face in implementing international obligations.[37] Therefore, in designing domestic laws, PICs may need to look to other jurisdictions for guidance or adapt existing law to meet the need for intangible heritage laws. These two sources are explored in the next section.

Domestic Legal Frameworks

The above international legal and policy framework provides an important foundation for the protection of traditional knowledge as a collective indigenous right, in association with biodiversity conservation, and under heritage law itself. At the domestic level, the question remains how to develop appropriate legal frameworks for the safeguarding of traditional knowledge. Many countries in the Pacific have legal frameworks for the protection of antiquities and/or heritage sites,[38] but few have any intangible heritage laws. Most also have some environmental laws that regulate development, for example, and provide for environmental impact assessment,[39] but relatively few have dedicated protected area management legislation.[40] This latter situation is understandable in a region where the majority of land is held by traditional owners rather than the government, but it means that satisfying the legal requirements in relation to the protection of natural heritage sites and objects is problematic. Similarly, the vast majority of cultural heritage in the region is intangible, and therefore laws that provide for sites to be listed and protected would not by themselves be effective in protecting the unique heritage in the Pacific.

In designing effective intangible heritage laws, the unique legal and cultural environment of the Pacific must be taken into account. It is in this context that community-based approaches have attracted attention, mainly in the area of environmental protection. The recently released IUCN report *Protected Planet Report 2012* evidences the shift toward community-based approaches. The report tracks global progress toward Target 11 of the CBD's Aichi Biodiversity Targets, which calls for at least 17 percent of the world's terrestrial areas and 10 percent of marine areas to be protected by

2020. Relevantly, the report notes that since 1990, "the amount of area managed exclusively by governments has declined from 96 percent to 77 percent, a trend reflecting the rise of community-based conservation and co-management schemes with indigenous peoples."[41] The growth in interest is for several reasons: community-based approaches tend to have the respect of the people and therefore are more likely to be complied with, local communities have specialist information that makes them the most appropriate lawmakers, and the monitoring and enforcement of rules and resolution of local disputes at the community level tends to be more cost effective.[42] The significance of collaborative approaches is well recognised in the region:

> Collaborative approaches ... when planning, coordinating and implementing tourism development programmes should be encouraged at the local level in order to *preserve the cultural heritage, protect the environment and ensure more equitable distribution of economic benefits.*[43]

Furthermore, it is communities rather than individuals that tend to be the holders of intangible cultural heritage in the Pacific. This is recognized broadly by CSICH, which refers to the involvement of local communities, and UNESCO has drawn attention to the importance of community-based initiatives.[44] There are many examples of community-based approaches to natural heritage protection, and several are explored below as they might be utilized to assist in safeguarding cultural heritage. Furthermore, examples of national intangible heritage laws from outside the region will be highlighted to illustrate other possible options for future legal developments in the region.

Pacific Examples

Vanuatu has enacted the Environmental Management and Conservation Act 2002 (EMCA), which provides for the conservation, sustainable development, and management of Vanuatu's environment.[45] "Conservation" is defined widely in section 2 as including "the preservation and protection of natural resources and heritage." The Act covers environmental impact assessment, bioprospecting, and community conservation areas (CCAs). It is the last of these that is of relevance to heritage protection. The EMCA provides for the registration and protection of any area as a CCA provided it possesses, inter alia, unique "cultural ... resources" or merits protection under the WHC.[46] Cultural resources are not defined but would presumably include intangible heritage. The government works with and provides

assistance to custom landowners in determining the land to be included in the CCA, the nature of the site, and the safeguards to be put in place.[47] A conservation, protection, or management plan is developed to ensure that objectives are met, and then the site may be registered as a CCA. Landowners are then responsible for the implementation of the management plan.[48] Importantly, it is an offense to contravene any term or condition of a registered CCA.[49] This legal framework has been used to protect natural heritage sites[50] but could also be utilized where traditional knowledge and intangible heritage is associated with a specific site or is dependent on biological resources at a given place. It could also be an option where heritage is the basis of cultural tourism activities at a specific location.

Samoa has both intellectual property legislation that protects expressions of folklore[51] and protected area management legislation.[52] In relation to community-based conservation, however, a different legal approach has been taken. There, the traditional governance institution (*fono*) has been acknowledged and empowered under the Village Fono Act 1990. That Act recognizes the authority of the fono and validates decisions made by it in accordance with custom and usage of the village. The jurisdiction of the fono under the Act is limited to residents of the village.[53] But in the area of fisheries management, these laws have been expanded by permitting the fono to pass bylaws that are enforceable against villagers and outsiders in State courts.[54] This regime effectively decentralizes fisheries management to the local level. The reempowerment of the fono is itself an example of revitalization of a cultural institution. But the bylaw mechanism might also be used in relation to the management of local intangible heritage and cultural tourism ventures. For example, the powers of the village fono include the making of "rules governing the development and use of village land for the betterment of the village."[55] This could include tourism ventures based on local heritage.

A further example is provided by Fiji, which has been active in establishing programs and projects to protect its intangible cultural heritage.[56] For example, the Fiji National Museum preserves and protects archaeological sites and heritage objects but is also concerned with safeguarding intangible heritage through, for example, the recording of Fijian oral traditions.[57] The Fiji Arts Council's work includes programs promoting traditional and contemporary arts and crafts, preserving traditional knowledge, and facilitating cultural tourism. However, at present, Fiji has little relevant domestic heritage legislation. Although draft heritage legislation has been prepared (the World Heritage Decree 2011), as the title suggests this is limited to sites that might be eligible for world heritage listing, and the definitions of

cultural heritage within the draft decree match those in the WHC. However, drawing from broader conservation mechanisms (and moving away from purely legal measures), Fiji has another successful initiative that might be adapted to the cultural heritage context. The Locally Managed Marine Areas (LMMA) Network[58] has been particularly successful in Fiji. The LMMA approach involves a learning network of practitioners who utilize common strategies and assessment tools in the context of community-based marine management. The initiative involves a network of existing agencies (avoiding duplication and overlap), each of which agrees to follow the same training, monitoring, and assessment criteria. Of critical importance are two key elements utilized in the LMMA Network system: the Social Contract and the Learning Framework. The former is the commitment given by the community to achieve the goals of LMMAs. The latter encompasses the common approaches used at all sites, including a monitoring guide that outlines factors and methods to measure biological, socioeconomic, and governance conditions for success. Common procedures are also incorporated for the collection and analysis of data.[59] Significantly, the LMMA system involves a network of practitioners that extends beyond national borders as well as a forum for the sharing of ideas and experiences. The LMMA approach could also be utilized in the cultural heritage field. The social contract could involve a community's commitment to safeguarding intangible cultural heritage and/or establishing cultural tourism enterprises. The Learning Framework in this context could involve procedures for mapping and recording, survey and inventory frameworks, revitalization options, and commercialization guidelines. One important aspect of the LMMA system is that the local community must develop a marine management plan that may include customary laws and traditional knowledge. Such plans typically include *tabu* areas that cannot be fished, restrictions on who may harvest specific products, seasonal closures, and the protection of special areas such as breeding and nursery grounds. Similarly, a cultural heritage management plan could also utilize cultural protocols, customary laws regarding the ownership, transmission and use of intangible cultural heritage, and traditional practices more broadly. In the tourism context, such plans could also include sacred sites where tourist access is restricted and/or specific aspects of village traditional knowledge that are kept secret, with other areas and practices shared as part of a cultural tourism experience. Similarly, some artifacts could be produced as souvenirs and others kept private. The LMMA system would need to be supported by law to ensure that the management and action plans would be enforceable. In this regard, the combination of the LMMA approach and intellectual property laws could work well. This would require political will and governmental

support and is a possible area where public–private partnerships (including government, nongovernmental organizations, and local communities) would be appropriate.

Global Examples of Intangible Heritage Law

Looking beyond the Pacific region, there are examples of domestic legislation that have been specifically developed to protect intangible heritage. Although these laws have arisen in different sociopolitical and legal contexts, they illustrate possible options should PICs wish to go down this path. One such example is the Intangible Cultural Heritage Law of the People's Republic of China. This new law aims to protect, promote, and ensure the survival of intangible cultural heritage for future generations.[60] The law refers to the recording of items of intangible heritage; respecting their authenticity, integrity, form and content; and ensuring their protection from damage and misuse. The State Council is responsible for the protection and promotion of national intangible cultural heritage,[61] and reference is also made to State support for heritage relating to minorities and rural areas.[62] Dissemination of information about intangible heritage is also covered, including through masters of cultural heritage, representatives of a particular field, and those active in heritage field[63] who can hold intangible heritage, train others, assist with surveys, and take part in raising public awareness.[64] This law is one of the first to be aimed specifically at the safeguarding of intangible heritage in line with the CSICH.

Vietnam's Law on Cultural Heritage applies to both intangible and tangible heritage,[65] including "oral tradition, folklore, ways of life, lifestyles, festivals, secrets of traditional handicrafts, knowledge of traditional medicine ... and other forms of traditional knowledge."[66] The law seeks to protect and promote all cultural heritage,[67] to regulate "conservation and promotion of cultural heritage," and to identify "rights and responsibilities of organisations and individuals,"[68] including foreigners.[69] The legislation aims to ensure "unified management" but recognizes "collective, community and private ownership."[70] It seeks to promote the utilization of cultural heritage[71] and prevent its destruction or illegal use.[72] Owners or other managers of cultural heritage have rights and responsibilities, including protection and promotion,[73] and the State has the obligation of creating the conditions for them to do so.[74] In particular, "responsible state authorities must apply necessary measures to preserve intangible cultural heritage and prevent threats of its misuse, loss or dying out."[75] Furthermore, Article 24 provides that State policies "shall encourage work to preserve, restore and develop traditional handicrafts with particular value; research and apply

knowledge of traditional medicine ... and promote ... other forms of traditional knowledge."[76] Therefore, while comprehensive, the Vietnam law is a framework for protection and promotion rather than creating new and specific rights. It does, however, provide a structure within which cultural tourism could be established.

In South Africa's National Heritage Resources Act 1999, "living heritage" is defined as including intangible heritage, including "indigenous knowledge systems."[77] The Act creates a system for management of intangible heritage by providing that the national estate includes places or objects associated with living heritage[78] and establishing the South African Heritage Resources Agency[79] with responsibility to promote "identification and recording of ... living heritage."[80] It also provides a system for grading heritage based on significance,[81] designation of protected areas,[82] and the maintenance of heritage registers.[83] However, it does not directly address the issue of safeguarding of intangible heritage.

Other national regimes include Malawi's Arts and Crafts Law, which provides for the "development, promotion, preservation, presentation and study of arts and crafts and folklore in Malawi."[84] In Turkey, there is one law that covers natural, cultural, and underwater heritage sites but not intangible cultural heritage.[85] In Peru, Law 27811 introduces a "protection system for the collective knowledge of indigenous peoples regarding biological resources." Although this is directly relevant to the discussion of traditional knowledge and intellectual property rights, the law does not seek to safeguard intangible heritage more broadly.

In a region where there is much intangible heritage in need of safeguarding and where specific legal frameworks are a requirement of CSICH, it is imperative to explore all possible legal avenues. It is in this context that the above intangible heritage laws illustrate approaches that could be taken in the Pacific. However, it is clear that these legal frameworks are largely top down rather than community based. Therefore, if specific intangible heritage laws are to be developed in the Pacific, it may be necessary to draw relevant elements from these global frameworks and combine them with the environmental law approaches referred to in the previous section.

Lessons Learned

These international examples demonstrate the different approaches taken and bring sharply into focus the need for comprehensive and harmonized legal regimes. It is clear that Pacific heritage laws have arisen in different domestic settings, and there has been no systematic development of law in this area. While it is acknowledged that laws must be adapted for specific

national contexts, it is also clear that there are commonalities in terms of the types of heritage and the risks to them across the region.[80] Furthermore, opportunities for economic development utilizing cultural heritage, for example, through cultural tourism, have been embraced throughout the region. Given the nature of the Pacific, a regional approach may well be the most appropriate way forward. Some relevant regional work has already been done in terms of protecting traditional knowledge. For example, the Secretariat of the Pacific Community (SPC) Model Law on Traditional Knowledge and Expressions of Culture and Traditional Knowledge Implementation Action Plan addresses the protection of traditional knowledge through the development of national and regional frameworks at two levels: traditional biological resources (including the protection of plant genetic resources and knowledge) in collaboration with the Secretariat of the Pacific Regional Environment Program and traditional knowledge and expressions of culture (including traditional arts, songs, and dances) in collaboration with the SPC. At this stage, the model laws are in the pilot phase, and it has yet to be seen how effective this approach will be. Again, though, it provides a possible way forward. This model law project could be expanded to support cultural heritage protection more broadly. Alternatively, model intangible heritage laws could be developed drawing on the global examples noted above. In this regard, natural heritage legislation that already exists in the region might provide a suitable model, and lessons may be learned from other laws in different jurisdictions as illustrated above.

Conclusion

Cultural and heritage tourism provides an attractive opportunity for sustainable development. Such tourism would assist intangible cultural heritage to remain within its community context and allow it to continue to be used and developed at the village level and would facilitate its "living" nature. Laws that safeguard intangible cultural heritage and protect it from unauthorized exploitation will be essential if intangible cultural heritage is to be harnessed in this sense. But heritage laws are just one way in which the protection of traditional knowledge may be enhanced. In terms of ensuring sustainable cultural tourism in the region, laws to protect intellectual property rights and to safeguard intangible heritage will need to be supplemented with further protective measures. For example, the issue of souvenirs can be a vexed one, and legislation that facilitates the manufacture and marketing of locally made items and that controls the import of objects made overseas will be needed. Mechanisms could include country-of-origin labels, authenticity, and quality marks and the indelible branding

of foreign-made items could all be considered. In this regard, it is interesting to note that the Vietnamese heritage law covers antiquities, relics, and "copies" designed to resemble the originals.[87] A further issue relates to the resourcing of heritage conservation. For any cultural tourism enterprises, start-up funding, as well as business training and education, will be needed. In the longer term, it has been recognized that "mechanisms should be established to facilitate the channelling of part of the tourism revenues to support the conservation of . . . cultural heritage."[88] Possible public–private partnerships need to be explored, and again lessons may be learned from the environmental context in this regard. Both governments and villages would benefit from the identification of "champions" to advocate for and support cultural heritage tourism. At the government level, this could be a cultural heritage officer and at the community level perhaps an elder or particularly significant holder of traditional knowledge. Space would need to be created for the exchange of ideas and experiences through, for example, a cultural heritage tourism forum. Again, this is an area where lessons may be learned from the LMMAs where a networked approach has been used to great effect.

The challenge for the future will be to ensure that appropriate legal strategies are identified to facilitate both the safeguarding of intangible heritage (including traditional knowledge) and the sustainable development of the cultural tourism industry. In seeking to conserve cultural heritage, international law has a powerful standard-setting role to play, and existing laws and global institutions must work more cooperatively to assist developing nations. However, important lessons may also be learned from existing laws in other areas. This article has focused on environmental law as a crosscutting field and potential source of regulatory options for the development of intangible heritage laws, but no doubt there are other relevant areas that can add value to the legal discourse. If the overarching goal of ensuring the integrity of intangible cultural heritage for future generations is to be achieved and, in particular, traditional knowledge safeguarded, then all options and opportunities must be explored.

NOTES

1. For an exploration of the cultural heritage of the Pacific region, see J. Liston, G. Clark, and D. Alexander, eds., *Pacific Island Heritage: Archaeology, Identity & Community* (Canberra: ANU E Press, 2011).

2. UNESCO-MAB, *International Symposium—Conserving Cultural and Biological Diversity: The Role of Sacred Natural Sites in Cultural Landscapes* (Paris: UNESCO, 2005), 168, in relation to East Rennell in the Solomon Islands.

3. ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries, opened for signature June 27, 1989, 28 ILM 1382 (entered into force September 5, 1991).

4. Declaration on the Rights of Indigenous Peoples, UN Doc. A/RES/61/295 (September 13, 2007).

5. Convention for the Safeguarding of the Intangible Cultural Heritage, opened for signature October 17, 2003, UNESCO Doc. MISC/2003/CLT/CH/14 (entered into force April 20, 2006).

6. L. Maffi, "Biocultural Diversity and Sustainability," in *The Sage Handbook of Environment and Society*, ed. J. Pretty, A. Ball, T. Benton, J. Guivant, D. R. Lee, D. Orr, M. Pfeffer, and H. Ward (London: Sage, 2007), 267–77.

7. P. Gerbeaux, T. Kami, P. Clarke, and T. Gillespie, *Shaping a Sustainable Future in the Pacific: IUCN Regional Programme for Oceania 2007–2012* (Suva: IUCN Regional Office for Oceania, 2007); A. Smith and D. O'Keefe, *Training Workshops in Cultural Heritage Management in the Pacific Island Nations Interim Report: Workshop 1, Levuka, Fiji* (Paris: UNESCO and ICOMOS Australia, 2004).

8. For example, traditional ecological and medicinal knowledge relies directly on natural resources. Another example is that the customary practice of totem species relies on access to animals and plants. Traditional arts and crafts such as *tapa* and *kava* bowls are made from specific plants. Less directly is the maintenance of traditional lifestyles, which depend upon access to flora and fauna for food, traditional agricultural practices, and building materials for homes and canoes, for example.

9. UN Convention on Biological Diversity, opened for signature June 5, 1992, 1760 UNTS 79 (entered into force December 29, 1993).

10. Article 8(j), UN Convention on Biological Diversity.

11. Article 10(c), UN Convention on Biological Diversity.

12. The CBD has received wide support from PICs, and 14 states have ratified the CBD: Cook Islands, Fiji, Kiribati, Marshall Islands, Federated States of Micronesia, Nauru, Niue, Palau, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu, and Vanuatu as well as Australia and New Zealand, www.cbd.int/convention/parties/list.

13. UNESCAP, *Plan of Action for Sustainable Tourism Development in Asia and the Pacific, Phase II* (2006–2012), 1.

14. B. McKercher and H. Du Cros, *Cultural Tourism: The Partnership Between Tourism and Cultural Heritage Management* (Oxford: Routledge, 2002). Also well recognized in the Pacific is UNESCAP, *Plan of Action for Sustainable Tourism Development in Asia and the Pacific, Phase II* (2006–2012), 14.

15. UNESCAP, *Sustainable Tourism Development Issues in Pacific Island Countries*, 2002, E/ESCAP/SB/PIDC(7)/2, 1; UNESCAP, *Implementation of the Plan of Action for Sustainable Tourism Development in Asia and the Pacific, Phase II* (2006–2012) *and The*

Regional Action Programme for Sustainable Tourism Development, accessed December 11, 2012, http://www.unescap.org/ttdw/common/TPT/Tourism/PASTA/Res62-3.pdf.

16. S. Buadromo and J. S. Ramos, "The Role of the Fiji (National) Museum in Collecting Oral Traditions," *Domodomo* 13, no. 1 (2001): 26–30.

17. E. Techera, "International Heritage Conservation: National and International Legal Contexts" in *Island Futures: Conservation and Development Across the Asia-Pacific Region*, ed. D. Niles and G. Baldacchino (Tokyo: Springer Link, 2011), 37–51.

18. UNESCAP, *Plan of Action for Sustainable Tourism Development in Asia and the Pacific, Phase II* (2006–2012), refers to very early resolutions from 1949 that recognized the importance of tourism (pp. 1 and 6).

19. Indeed, the need for "effective enforcement of laws and regulations concerning the conservation of the natural environment and biodiversity in relation to tourism development" has been recognized: UNESCAP, *Plan of Action for Sustainable Tourism Development in Asia and the Pacific, Phase II* (2006–2012), 6.

20. Article 31, Declaration on the Rights of Indigenous People.

21. ILO169 has been ratified by 20 countries but only one from the Pacific region: Fiji.

22. Convention for the Protection of the World Cultural and Natural Heritage (Paris), opened for signature November 16, 1972, 1037 UNTS 151 (entered into force December 17, 1975).

23. UNESCO World Heritage Centre, *Chief Roi Mata's Domain*, accessed September 22, 2012, http://whc.unesco.org/en/list/1280.

24. Thirteen PICs having ratified the WHC: Cook Islands, Fiji, Kiribati, Marshall Islands, Federated States of Micronesia, Niue, Papua New Guinea, Samoa, Solomon Islands, Tonga, and Vanuatu as well as Australia and New Zealand.

25. Signatories include Fiji, Palau, Papua New Guinea, Tonga, and Vanuatu.

26. Article 2(2), Convention for the Safeguarding of the Intangible Cultural Heritage.

27. The Lakalaka dances and sung speeches of Tonga and the Vanuatu sand drawings: UNESCO, *Intangible Heritage Lists*, accessed September 22, 2012, http://www.unesco.org/culture/ich/index.php?lg=en&pg=00011.

28. UNESCO, *Safeguarding without Freezing*, accessed September 22, 2012, http://www.unesco.org/culture/ich/index.php?pg=00012.

29. UNESCO, *Encouraging Transmission of ICH: Living Human Treasures*, accessed September 22, 2012, http://www.unesco.org/culture/ich/index.php?pg=00061.

30. UNESCO, *Establishment of a National Living Human Treasures System in Fiji*, accessed September 22, 2012, http://portal.unesco.org/culture/en/ev.php-URL_ID=29181&URL_DO=DO_PRINTPAGE&URL_SECTION=201.html.

31. This project has several phases with the last period (phase II) running from 2006 to 2009: UNESCO, *Projects and Activities on Intangible Heritage in Which UNESCO is Involved*, accessed September 22, 2012, http://www.unesco.org/culture/ich/index.php?project_id=00097.

32. UNESCO World Heritage Centre, *Operational Guidelines* (2011), para.15(f).

33. UNESCO World Heritage Centre, *Operational Guidelines* (2011), para. 53. Furthermore, legal declaration of buffer zones around sites is also required (para. 104).

34. CSICH Article 11.

35. CSICH Article 12.

36. CSICH Article 13.

37. E. Techera, "Legal Pluralism, Indigenous People and Small Island Developing States: Achieving Good Environmental Governance in the South Pacific," *Journal of Legal Pluralism and Unofficial Law* 61 (2010): 171–205.

38. Such as Fiji's Preservation of Objects of Archaeological and Palaeontological Interest Act (Cap. 264).

39. See Vanuatu's Environmental Management and Conservation Act 2002 discussed further below.

40. Samoa is an exception to this: National Parks and Reserves Act 1974.

41. B. Bertzky, C. Corrigan, J. Kemsey, S. Kenney, C. Ravilious, C. Besançon, and N. Burgess, *Protected Planet Report 2012: Tracking Progress towards Global Targets for Protected Areas* (Gland, Switzerland: IUCN; Cambridge: UNEP-WCMC, 2012).

42. A. Agrawal and C. C. Gibson, "Enchantment and Disenchantment: The role of Community in Natural Resource Conservation," *World Development* 27, no. 4 (1999): 638; see also J. Colding and C. Folke, "The Taboo System: Lessons about Informal Institutions for Nature Management," *Georgetown International Environmental Law Review* 12 (2000): 421.

43. UNESCAP, *Plan of Action for Sustainable Tourism Development in Asia and the Pacific, Phase II* (2006–2012), 6 (emphasis added), accessed September 22, 2012, http://www.Unescap.Org/Ttdw/Common/Tpt/Tourism/Pasta/Pasta_Text.Pdf.

44. See CSICH Articles 11 and 15.

45. The Environmental Management and Conservation Act 2002 (Cap. 283) (Vanuatu) was assented to on December 31, 2002, and commenced on March 10, 2003.

46. EMCA sec. 35.

47. EMCA sec. 36.

48. EMCA sec. 39.

49. EMCA sec. 41(f).

50. Such as the Crab Bay CCA, Malekula Island, Vanuatu.

51. Copyright Act, 1998, sec. 29.

52. Relevant legislation includes the National Parks and Reserves Act and the Lands, Surveys and Environment Act 1989, but they do not include environmental impact assessment or true integrated natural resource management.

53. Village Fono Act 1990, sec. 9.

54. See the Fisheries Act 1988, sec. 3.

55. Village Fono Act 1990, sec. 5(2)(b).

56. Buadromo and Ramos, "The Role of the Fiji (National) Museum in Collecting Oral Traditions," 26–30. See also E. J. Techera, "Safeguarding Cultural Heritage: Law and Policy in Fiji," *Journal of Cultural Heritage* 12 (2011): 329–34.

57. Buadromo and Ramos, "The Role of the Fiji (National) Museum in Collecting Oral Traditions," 26–30.

58. The Locally Managed Marine Area Network, *Welcome to the LMMA Network Website*, accessed 27 October 2012, http://www.lmmanetwork.org.

59. For a useful summary of the LMMA system, see E. Techera, "Customary Law and Community-based Fisheries Management across the South Pacific Region," *Journal of the Australasian Law Teachers Association* 2, no. 1–2 (2009): 279–92.

60. Intangible Cultural Heritage Law of the People's Republic of China, Article VI. Note that this is drawn from an unofficial translation, as no official English version could be located.

61. Intangible Cultural Heritage Law of the People's Republic of China, Articles VII and VIII.

62. Intangible Cultural Heritage Law of the People's Republic of China, Article VI.

63. Intangible Cultural Heritage Law of the People's Republic of China, Article XXIX.

64. Intangible Cultural Heritage Law of the People's Republic of China, Article XXXI. The government has the obligation of funding to support these heritage "representatives."

65. Law on Cultural Heritage, Article 1.

66. Law on Cultural Heritage, Article 4(1).

67. Law on Cultural Heritage, Article 8(1).

68. Law on Cultural Heritage, Article 2.

69. Law on Cultural Heritage, Article 3.

70. Law on Cultural Heritage, Article 5.

71. Law on Cultural Heritage, Article 12.

72. Law on Cultural Heritage, Article 13.

73. Law on Cultural Heritage, Articles 14–16.

74. Law on Cultural Heritage, Article 17.

75. Law on Cultural Heritage, Article 20.

76. See also Article 54 regarding the scope of state management.

77. National Heritage Resources Act 1999, sec. 2 (xxi).

78. National Heritage Resources Act 1999, sec. 3.

79. National Heritage Resources Act 1999, sec. 11.

80. National Heritage Resources Act 1999, sec. 13.

81. National Heritage Resources Act 1999, sec. 7.

82. National Heritage Resources Act 1999, sec. 28.

83. National Heritage Resources Act 1999, sec. 30.

84. Laws of Malawi, Chapter 49:07; see in particular, sec. 3.

85. Legislation for the Conservation of Cultural and Natural Property.

86. This is illustrated, for example, by the threats to Pacific languages and the multinational approach taken to safeguard them, referred to above; see note 30.

87. Law on Cultural Heritage, Article 4.

88. UNESCAP, *Plan of Action for Sustainable Tourism Development in Asia and the Pacific, Phase II* (2006–2012), 7.

MUSIC IN TRADITIONAL EXCHANGES IN NORTH VANUATU

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Music is a social phenomenon allowing the possibility of indefinite re-creations. Depending on the cultures, places, and times, musical exchanges have been locally managed in various ways. Today the rights to copy a particular music are a sensitive topic of current international interest because of the development of the music industry. In Vanuatu custom, a principle close to the concept of intellectual property rights has existed for centuries for music or other intangible knowledge. Traditionally, not everyone has the right to hand over certain parts of this knowledge; complex rules must be observed. Although for most sets of music anyone who knows a song can sing it, a certain number of sets are governed by precise rules of transmission. Through examples of ceremonies and specific cases observed in northern Vanuatu, I present various ways in which music can be circulated and exchanged with other valuable objects of traditional currency or even coins of modern currency.

Introduction

In Vanuatu, during public performances of traditional dances, it is sometimes possible to hear people from a community other than that of the performers object: "this was our dance, they have stolen it," "this drum is from our place, they have taken it for themselves." At other times, however, the origin of a dance or a musical instrument may be explained by a story recounting an exchange between two people, families, or communities. Sometimes the names of the owner of the dance and of those who have obtained it may be quoted. Traditionally, borrowing part of a dance, an

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instrument, songs, or a whole dance is a common practice subjected to specific local rules.

The ownership principle over music and dances has often been observed in Melanesia. In 1922, Malinowski wrote:

> The other type of transaction belonging to this class, is the payment for dances. Dances are "owned"; that is, the original inventor has the right of "producing" his dance and song in his village community. If another village takes a fancy to this song and dance, it has to purchase the right to perform it. This is done by handing ceremonially to the original village a substantial payment of food and valuables, after which the dance is taught to the new possessors. (Malinowski 1922, 186)

More recently, and more specifically in Vanuatu, Lindstrom explained the continuing practice of these rights and the consequences that failing to comply with them could cause:

> Traditional copyright, or patents, protect valued knowledge, including songs, myths, histories, genealogies, and herbal cures, as well as artistic motifs and carving designs. Only people who possess a copyright can make legitimate public use of copyrighted knowledge, whether this is a public repetition of a lineage's genealogy, the performance of particular song, a beating of the slit-gong rhythm, or the reproduction of a carving motif. A dance team celebrating feast, for example, must ask permission to sing a song that belongs to a neighbouring group. If someone misuses copyrighted material (for example, appropriates someone's kava magic), copyright holders may protest and demand compensation. (Lindstrom 1996, 127)

Thus a principle very similar to intellectual property, applying to songs, dances, and other kinds of knowledge has existed for centuries in Vanuatu.

In Oceania, music belongs to the vast field of orality, because it is transmitted by word of mouth and is never written. Oral knowledge like music, dances, myths, tales, legends, magic formulae, genealogies, sand drawings, names, know-how, etc., represent "living traditions" that are handed down from generation to generation, with a certain openness to variations, transformations, innovations, and borrowing. Because of its immaterial nature, an oral knowledge is never entirely given, it always remains known by the original owner. Therefore, it is both transmitted and kept at the same time.

While focusing on objects rather than on orality in her research, Weiner noticed the inalienable character of these intangible assets:

> Scattered in the ethnographic literature are examples of myths, genealogies, ancestral names, songs, and the knowledge of dances intrinsic to a group's identity that, taken together as oral traditions, form one basic category of inalienable possessions. . . . Of course, words and objects are not always mutually exclusive, for objects may have oral histories transmitted with their ownership and myths may be related to geographical landmarks, giving material authenticity to words. Because inalienable possessions succeed their owners through time, transferability is essential to their preservation. In many societies, oral traditions have great longevity and, especially among groups where durable objects are scarce, texts as inalienable possessions are guarded and carefully transmitted from one generation to the next. But words can be altered and reframed; what one person says can be paraphrased by another resulting in vastly different meanings. Some people forget or deliberately tamper with parts of text whereas others may die before the entire corpus of their knowledge is given to their successors. (Weiner 1992: 37, 38)

Studying inalienable assets, Weiner (1992) and Godelier (1996) draw upon the same idea: "keeping-while-giving" or "keeping for giving." However, keeping-while-giving in the case of oral knowledge is of a different and separate nature than that of the objects themselves, because these intangible assets can be kept as well as given at the same time. Passed-on knowledge can still remain in the memory of the persons who transmit it until their death. However, because in certain cases some of the knowledge depends on property rights, the person who transmits it must pretend afterward that he has forgotten it and no longer has the same rights, even if he has actually internalized this knowledge.

When transmitted, music becomes part of a system of exchanges involving material objects. Pigs are valuable objects exchanged in all the islands of the archipelago.[1] Besides pigs, other objects, whose nature varies from one region to another, are exchanged for all types of goods and services; at the same time they constitute a unit of measurement for the value of all objects exchanged. Thus, they possess certain characteristics of a currency. On the islands of Pentecost, Ambae, and Maewo, the inhabitants exchange mats made of pandanus leaves dyed in red (Fig. 1) and further north, in

FIGURE 1. **Exchanges of Red Mats on Pentecost Island.**

the Banks Islands, ropes of small beads made from shells. These "currency" objects, as well as pigs, are used to pay for a musical element, a song, a dance performance, etc.

Melanesia and its exchanges have fascinated anthropology for a long time. Thus were born some true anthropological masterpieces: Malinowski's descriptions of *kula* (Malinowski 1922) and Mauss's "Essai sur le don" (Mauss 1923, 1924) were commented on and developed by great researchers such as Lévi-Strauss (1950). Later, Weiner discerned keeping-while-giving possessions and emphasized the importance of inalienable assets (Weiner 1992). In the same way, Godelier (1996) has explained why and how some things can be kept and given and others not. It is precisely this idea of keeping-while-giving that is interesting for the topic of this article, all the more so because as far as I know, this notion has never been applied to oral knowledge and more particularly to music.

The different ways in which music circulates in the traditional system of northern Vanuatu (Penama and Torba Provinces; Pentecost Island to Torres; see map in Figure 2), in particular on Pentecost Island, will be analyzed to show the important and specific part played by music and other knowledge in customary exchanges.

FIGURE 2. **Vanuatu Map. ©A. François, CNRS.**

Music as a Paid Service

The first exchange involving music is of a very simple nature: It is the purchase of a service, the payment for a dance performance. The service rendered is paid for immediately after the performance: The woman leading the dances for a marriage is rewarded by a mat; the drummers are paid during or after the ceremony; a man possessing a form of magic knowledge (often comprising an incantation or song) is compensated for his services, etc. (as seen in Fig. 3). The owner of a song can also be rewarded in exchange for the right of performance of his/her dance or song.[2] All these cases concern a simple, immediate exchange involving no debt on either side. It is a commercial form of exchange because it is the performance of music that is alienable in this case but not the "music" itself. However, as Godelier (1969: 138, 139) has very rightly pointed out, although this type of service is compensated, it involves more than just the economic aspect of the service: The performers are looking for recognition of their talent, for fame, and the organizers hope to increase their prestige through well-performed ceremonial dances and music. Music, in these cases, constitutes a service conferring prestige on everyone, both on the organizer of the ceremony, on the musicians, and the dancers.

Transfer of Rights

In Vanuatu, some people are recognized as song specialists, a kind of composers. Although they do not write in the strict sense of the term, they "compose" songs, memorize them, and pass them on orally (today, they sometimes use a cassette recording). Indeed, alongside the repertoire considered as ancient and anonymous, new compositions are constantly

FIGURE 3. **Circular Exchange of Music Performance.**

innovating music, which is called "traditional" (*kastom musik* in Bislama).[3] Maurice, an elderly composer from the Wutsunmel region (center of Pentecost Island), explained to me that, if someone commissions a song from him, he composes it and gives it to the person in exchange for a payment. The composer himself must forget the song, because, henceforth, it belongs to the person who commissioned it. This explanation of the "forgetting" composer is very explicit concerning the existence of rights to music. In this case, the music is, in principle, alienable.

There is a close connection between spirit entities and composition. Most of the time, people believe that a song or dance was brought to the living by the ancestors' spirits in dreams while asleep or walking alone in the bush. The composer plays the role of "receiver" of songs (Ammann 2008, 2012) or of mediator between the spirits and humans. This supernatural origin of songs is an important element in the conception of rights because it plays a large part in the protection of songs. When someone wants to acquire a song, in return for payment, the composer gives that person the whole performance and transmission rights. Magic ensures that this rule is respected. Geismar (2005) explains how the people from the island of Ambrym use their magical knowledge to protect their artefacts from the international market. Indeed, if a person appropriates a form of oral expression without having given something in exchange, that person would be exposed to sickness or even death caused by the spirits' harmful action. A song, the rights to which have been given, may sometimes tell the story of the family behind it. Sometimes the composer remains known throughout his life and that of a certain number of subsequent generations. The language of the song may also identify the community from which the song comes; a legend may recount the history of the song; the lyrics of a song can tell the story of the person who ordered it as well as the story of that person's family, etc. The origin of a song, therefore, remains explicit, at least for a certain period of time; it is only the right of use that is transferred. The origin (the composer–mediator, the family, or community from which the song stems) can be said to remain attached to the work in circulation. This paternity is inalienable and remains known, while the right of use, once it has been paid for, is transferred (alienable) and can continue to circulate. The idea of a gift from the ancestors' spirits is very important here, because, on the one hand, it is very close to the inalienable sacred objects Godelier (1996) describes. On the other hand, it involves supernatural power or even magic as the element guaranteeing the respect of ownership rules. In this case, it is more a question of precious objects both kept and given (alienable while inalienable) in the manner explained by Godelier: Rights of use are indeed given, but the identity of a song remains known

and inalienable. This memory of the origin of a song signifies the esteem attributed to the composer, of the community or the region from which the song comes, or the person who ordered the song. A song can also testify to the history of the social relations that gave rise to it, for instance the relationships between the person who ordered a song and the composer, or between two communities that had exchanged their musical repertoires. Ammann even evokes the possibility of using a song about immigration as an evidence of the ownership of a piece of land (Ammann 2012, 44).

As Godelier himself says, it is not necessarily the nature of the object that determines whether it belongs to inalienable, sacred objects or to valuable ones that can be given and kept but the sociological context.

Transmission of Inalienable Oral Knowledge

In the case described above, music can be classified, according to Godelier, as a precious possession both given, through the transfer of rights, and kept, through what could be termed its paternity, its origin. However, cases are also found in which music circulates as a totally inalienable object, owned and transmitted only within a specific group of people. In these contexts, music may be part of inalienable, sacred objects. In the following cases, music is considered as very old; a priori its composer or mediator is unknown, but it possesses an even more sacred dimension because of its connection with the ancestors.

Transmission of Inalienable Repertoires within the Context of Kinship

As documented by Tattevin (1928), magic songs belonging to specific clans in the south of Pentecost Island make it possible to influence the weather, tides, etc. Only the initiated members of the clan have the right to use them, but anybody can ask these initiates to do the magic and reward them with a mat or coins. Although the service can be rendered to anyone, the magic repertoire itself is transmitted only within the clan in return for payment and through initiation. Therefore, it is knowledge made sacred by its power and ancestral origin; it has an identity and so represents an inalienable repertoire. This is the same case as mentioned above when a song testifies to the ownership of a piece of land. This type of song can only be transmitted inside a group along specific kinship relationships and is kept secret within this group (Ammann 2012).

Thus, secrecy protects the power of some people over others. Knowledge belonging to one group of people—genealogies, family histories, artistic knowledge, magic learning, etc.—gives this group of people a common

identity and, as it were, a certain prestige over others who do not share this knowledge.

Transmission of Inalienable Repertoires within a Hierarchical Context

In the north of Vanuatu, in the Banks and Torres Islands, there is a musical repertoire surrounded by taboos and secrets and governed by very specific rules of transmission. In the Banks Islands, when dancing the *Neqet* on Mota-Lava or the *Utmag*[4] on Mere-Lava (Fig. 4), the initiates dance to the rhythms of rattles worn on their feet and beat bamboo drums, but the inaudible songs are performed only in their heads so as not to reveal them. In the Torres Islands, during the *Newet*[5] dance, only the soloist knows the song. He performs it in the middle of a circle formed by the other musicians who beat different drums and sing a repetitive hocket[6] to cover the solo singing. Thus, the music is constructed so that the audience and those who do not own the rights cannot hear these songs. The singer acquires his knowledge by "getting into custom" (*go insaed long kastom*), a Bislama expression used to explain that a person has gone through the traditional initiations.[7]

FIGURE 4. ***Utmag*: Dance of the Spirits, Mere-Lava Island.**

The knowledge of these dances, the right to participate in them as well as the emblems, masks, decorations, is acquired through the initiation to the *tamate* of *salagoro*[8] (Vienne 1984, 329).

Thus, the "taboo" repertoire is acquired in different initiation systems: secret societies or hierarchical grade systems. The analysis of a few examples from Pentecost Island can show more precisely how this takes place.

In northern Vanuatu, there is a hierarchical grade system based on political and economic competition. To move up through the grades, a man or woman has to acquire a certain amount of traditional insignia (pigs, mats, shell necklaces, finery, knowledge, songs, rhythms, etc.). Each grade entitles its holder to rights to a certain reserved musical repertoire.[9] Promotion to a higher rank is finalized through an important celebration during which goods are exchanged, pigs killed and shared along with food among the participants while numerous dances are performed. These ceremonies confer prestige on those who organize them and allow the organizers to show their hierarchical superiority to the public. As Ammann (2012, 229) says, these ceremonies also allow those who hold the secret to publicly show that they have access to this secret knowledge.

To illustrate this, a *havwa*[10] dance (Fig. 5) performed at the male *tungoro* grade-taking ceremony; part of the *bolololi*[11] system will be

FIGURE 5. ***Havwa*: A Women's Dance from North Pentecost Island.**

described here. The women's havwa dance is not requisite to move up to this grade. However it gives great prestige to the ceremony, to the man being promoted, and his to family, as well as a specific status to the girl responsible for the dance. The candidate for the grade must ask one of his biological or classificatory "daughters" (*nituku*[12]) for the havwa dance. She approaches the other women to organize the dance and to enlist their participation, and she (with the help of her family) pays them for this service. However, to have the right to organize the havwa, the daughter herself must be graded and have previously acquired all the feminine attributes giving her this right. The dance must be prepared long in advance. After the last rehearsals, an important ceremony during which gifts are exchanged takes place. The girl organizing the dance kills a pig and receives mats and pigs from her parents. Today, it is also possible to see cloth and cash circulating. As Figure 6 shows, several kinds of wealth are, thus, spread out over the central village square (*nasara*) and then distributed to the women who will later participate in the dance.

Then gifts are also distributed to their paternal uncles (father's brothers whom they call by the same name as the latter [*tata*] and paternal aunts [*fafa*][13], so that those receiving these gifts will encourage them during the dance. A few days later, at the tungoro grade-taking ceremony, after the

FIGURE 6. **Mat Payments for a *Havwa* Dance.**

first song of the dance, the grade-taking candidate (the girl's "father"—biological or classificatory) publicly offers her a pig categorized *livoala*.[14] This is the pig with the greatest value[15]. The havwa dance brings considerable prestige to the woman who has organized it until the end of her life; it gives her the highest hierarchical status. Moving up to a new grade allows a man to increase the prestige of his whole family who have also helped him pay for and organize his new grade ceremony. When a woman who has acquired the havwa dance dies, the rhythm played on a wooden drum announcing her death is followed by the rhythm of this dance. Thus, the hierarchical system provides an opportunity for passing on specific rhythms or songs, strictly reserved to and transmitted within each grade-taking. In the bolololi system in the north of the island, or the *leleutan* one in the center, the specific rhythms attached to the different grades must be purchased along with other items such as mats, belts, armbands, bracelets, names, leaves, etc. Each of these rhythms must be bought with a pig with tusks of different lengths.

In the central (Apma) region of Pentecost Island, the *raka*, the second female grade, provides the opportunity not to buy a rhythm but to acquire the right to the *Sawan* song. It is a girl's father who decides to move her up the female ranks. For this, he must seek the help of one of his sisters (or parallel female cousins) who have already attained this grade, because they alone have the power to confer this status on her.

The ceremony is preceded by a ten-day reclusion period (today this has been reduced to 3–4 days) for the grade-taker. The Sawan song is interpreted several times during the ceremony; it corresponds to the time the girl comes out of the reclusion hut to warn people of her presence so that nobody sees her. Also, it is especially performed to accompany the girl during the final ceremony. The girl then pays for the attributes attached to her grade, including the Sawan dance; she will then be able to interpret it with other women who have already reached this rank and to receive payment for this dance from new candidates to the grade. It is strictly forbidden for anyone who has not made this payment to interpret this song.

As seen in Figure 7, here the exchange appears as pyramidal. The rhythms that correspond to the different grades in the men's ranking system follow a similar pyramidal system. Graded people who transmit musical expression keep it at the same time. They can give this musical expression several times without ever losing the right to it. Thus, they keep while giving. Whoever receives it may, in turn, pass it on according to specific rules, comprising limits imposed by both kinship and the hierarchical system. This is the right to share: the rights remain collective—they are the

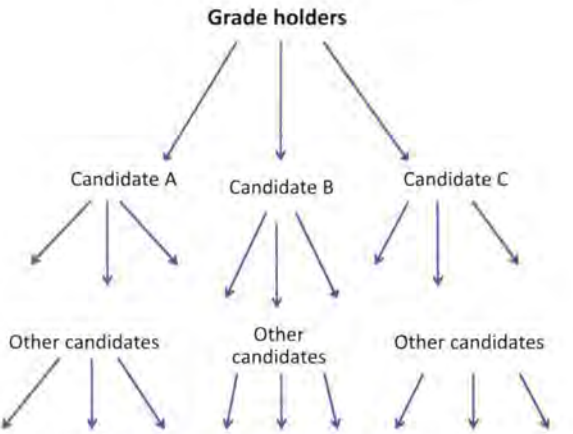

FIGURE 7. **Pyramidal System of Music Transmission.**

specific attributes of a group of people sharing the same status—but not just anyone can become part of this group at any time, because very strict rules must be respected. It is important to note that in this case it is the hierarchical system that manages the rights to perform a musical repertoire, because music is an integral part of it. Knowledge—music, names, dances, etc.—is prestigious and requisite to access a social and political rank. It is the accumulation of the rights associated with this knowledge that opens the possibility for a person to acquire the related grade.

Conclusion

Music in the islands of central and northern Vanuatu plays a very important role in exchanges. Because of the property rights governing it and the payments necessary for its acquisition, we may say that economic aspects and values are combined to confer prestige on those who perform it or even on those who pay for its performance. Music is coveted like precious goods and has value because it is not easy to obtain. The giver is in a position of superiority. As Harrison (1992, 233) states, following Lowie, in these contexts, knowledge is cultural and economic wealth. Prestige, reputation, political influence, and the necessary economic means led the author (Harrison 1992, 235) to compare the situation with the "social capital" described by Bourdieu (1980) concerning access to culture in French society. According to Bourdieu:

> Social capital is the aggregate of the actual or potential resources which are linked to possession of a durable network of more or less institutionalized relationships of mutual acquaintance and recognition—or in other words, to membership in a group—which provides each of its members with the backing of the collectivity-owned capital, a "credential," which entitles them to credit, in the various senses of the word. These relationships may exist only in the practical state, in material and/or symbolic exchanges which help to maintain them. (Bourdieu, 1986)

Therefore, the exchanges, of which music is part, are also an important way of consolidating social relationships. An individual relies on his/her relationships to directly access different kinds of knowledge and hierarchical grades implying them. Following the acquisition, this person shares this secret knowledge with a specific group of persons; thus, it is preciously kept within the group. Ammann (2012, 298) remarks that the notion of secrecy allows a difference to be maintained between the "initiates" and the "noninitiates" and that the possibility to publicly demonstrate a right to perform, for instance a secret song, confers greater prestige.

This analysis has emphasized three types of transactions involving music in northern Vanuatu. The first is the simple exchange of one performance for tangible goods (traditional wealth or, more rarely, modern currency). The second concerns the purchase of all the property rights (rights of use), but with the identity of the song, its origin always remains known and brings fame and prestige to the person or people who created this music. Thus, the identity of the song is inalienable, although the rights were transmitted. The last is a pyramidal transaction in which the giver loses none of his/her rights while the acquirer obtains the same rights as him/her. Therefore, these rights are in a way shared by all of those who have gained access to them. Thus, music can have three economic forms: a commercial object (or service); a precious object, the right to which is given but whose origin remains fixed; and an inalienable sacred object. The sacred nature of music also stems from its relationship with the supernatural world: music is brought to humans by the spirits, is often sung in a language no one understands (one often recognized as that of a founding hero), and, in many cultures, is used to communicate with the ancestors and may have magic powers. Thus, depending on the social context, music can have the three characteristics of Godelier's classification: it can be commercial, precious, and sacred (Godelier 1996, 132). As Godelier said, exchanges make the reproduction of social relationships possible but they also enable the transmission of traditions such as know-how and knowledge; they have a preservation role within a community.

In Vanuatu, music can be treated differently depending on the repertoire and socio-cultural context. Traditionally, all repertoires do not have the same rules of acquisition. With the development of technology—recordings, the media, internet—and the world music industry, festivals with their craze for the remotest music and the search for "exoticism," the protection of rights has become a sensitive and complex international issue. How can this music, some of which still possesses today its own traditional laws, be both promoted and protected? Such laws are connected to social relationships, prestige, politics, religion, etc., existing within local cultures. The internal system of management and circulation of knowledge is today confronted with the problems of social change that find expression notably in a "democratization" of knowledge (Carneiro da Cunha 2004). If, on a national scale, certain societies manage to handle their knowledge by combining several systems (Geismar 2005), it is on the international level that the question is most problematic. In Europe, the original aim of copyright protection was to protect authors and promote creativity. Today laws are increasingly concerned with economic and commercial aspects to the detriment of authors, creativity, distribution, and exchanges. Even in Western countries, where this system originated, debates on copyright seem insolvable in the face of technological progress. Imposing Western laws without taking into account local situations, with all their variants or existing systems of intellectual property rights, will not only fail to protect these repertoires in the context of the global market but could also radically alter the whole specific systems in these areas. If today the local systems are in fact not capable of protecting their cultures from the abuses of the great global market, this is also the case for the system proposed by WIPO (World Intellectual Property Organization) (Forsyth 2003), imposed from outside and from above on these new nations. A more direct dialog is needed, one that would take greater account of the existing systems and would consult the local actors. Such an approach might give these local actors the possibility to express themselves freely, rather than under the influence of economic pressures.

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NOTES

1. In 2007, during a project on *kastom ekonomi*, a bank using traditional currencies was even created on Pentecost Island.

2. The fact that the organizers of a ceremony and dance would include somebody else's song has at least two explanations. First, during certain dances one song cannot be performed twice; thus, if the organizers do not have enough songs, they have to "borrow" some. However, a song considered as beautiful can bring more prestige to the dance and its organizers.

3. This is the lingua franca of Vanuatu, one form of Melanesian Pidgin English.

4. Neqet and Utmag are the men's mask dances connected to grade-taking societies or secret societies.

5. Newet is the men's most popular dance from the Torres Islands.

6. This is a vocal technique in which at least two singers or a group of singers (or musicians) alternate sounds and silences so as to form a continuous sound.

7. Certain knowledge is acquired in stages during different initiations.

8. The primary meaning of tamate is "dead" or "ancestor." Salagoro is a system of the Banks Islands' secret societies. The salagoro initiates intervene as tamate, "dead-ancestors" (Vienne 1984: 321, 322).

9. Geismar (2005, 39) makes the same remark about the grades on Ambrym Island, which give access to sculptures corresponding to the different grades. Ammann (2012, 202) evokes an Ambrym hierarchical society where men buy the right to make and wear certain hierarchically classified masks during the Rom dance.

10. Havwa is the women's dance from the north of Pentecost Island. As explained above, to have the right to organize it, special conditions are required.

11. The name of the hierarchical grade system of the Raga (North) region of Pentecost Island; the system of the central region of the island is called leleutan.

12. Daughters of a man, his brothers, or parallel cousins (Raga language, North Pentecost).

13. It is interesting to mention that as it is a matrilineal society, the havwa dance, which implies exchanges among a daughter, her father, and her father's lineage (his brothers and sisters), thus, consolidates the relationships between father and daughter and both their lineages.

14. In Vanuatu, pigs are categorized and valued according to the specific curve of their tusks. In the North of Pentecost Island, a livoala pig is the pig of which the tusks pierce the jaw bone and form a complete circle.

15. Pigs whose tusks exceed one full circle are extremely rare.

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INTANGIBLE CULTURAL HERITAGE IN THE PACIFIC ISLANDS: WHY EUROPE SHOULD LISTEN IN

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Pacific Island countries (PICs) are developing countries that represent one of the culturally richest and most diverse regions worldwide. A decade ago, the realization evolved at the international level that intangible cultural heritage (ICH) represents a development tool with an inherent commercial value. Regional initiatives are currently trying to balance objectives of development and protection of ICH with the need for commercial exploitation and effects of commodification. Yet the same cannot be said about the Economic Partnership Agreement (EPA) between PICs and the EU. This article advocates that current efforts by the European Union (EU) in supporting regional and national processes, which are meant to establish a preliminary level of legal protection for Pacific ICH, are insufficient and inappropriate to the "'living'" character of ICH. It promotes a more context-oriented design of intellectual property rights provisions in EU policy instruments aimed at sustainable development of the Pacific region.

PACIFIC CULTURE has often been described as "expressed through hundreds of languages, long-standing cultural traditions across largely dispersed island communities, works of Pacific art, and land sites of unique cultural importance for Pacific people."[1] Marshallese navigational charts (*rebbilib*), Vanuatu's sand drawings (*sandroing*), Tuvaluan action songs known as *faatele*, or Samoan traditional body tattoos, the *pe'a*, are but a few examples of the region's cultural wealth. While tangible cultural heritage has seen much publicity through its protection via UN Educational, Scientific and Cultural Organization (UNESCO) Heritage Sites,[2] currently only few island countries have put in place legal frameworks for the protection of their

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traditional knowledge (TK) and intangible cultural heritage (ICH).[3] Even where intellectual property rights (IPRs) are protected under conventional trademark or copyright legislation, these laws either do not consider ICH to the extent necessary for meaningful protection or are incompatible with the complex nature of ICH, rendering them inappropriate for its protection.[4]

Apart from the inadequacy of existing legislation, a missing universal definition of ICH contributes to the infant state of ICH protection in the Pacific. While literature agrees on some common features and domains of ICH, no exhaustive definition exists yet.[5] ICH is often referred to as "knowledge [that] was generated, added upon and passed down the line by words, observations and practices."[6] UNESCO defines ICH as "constantly recreated by communities and groups, in response to their environment, their interaction with nature, and their history,"[7] while Article 2 of the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage lists "practices, representations, expressions, knowledge, skills, instruments, objects, artefacts and cultural spaces associated with communities, groups and individuals" as domains belonging to ICH.[8] At the government level, definitions range from "nonmaterial culture" to "cultural living heritage" and "folklore and ethnic culture."[9] The international practice then is to define the content and scope of each reference at the national level, in accordance with the distinct nature of each country's context, its historic development, sociolegal circumstances, natural habitat available to stakeholders, and so on. According to Yahaya, so far there are no signs that "the finer terminology of 'heritage' has . . . been streamlined or standardized, and thus no uniformity exists between countries."[10] The difficulties encountered in defining and protecting ICH reflect the fact that to date a sui generis system of ICH protection in the Pacific is missing despite the relatively active regional approach of the Pacific Island countries (PICs).

Yet the struggle to ascertain meaningful and effective mechanisms of ICH protection seems not to impede on the ability of Pacific Islanders to claim ownership of their cultural heritage at the national as well as the local level. In particular, since independence, national traditions, customs, and values have been cherished and advocated as part of the national identity of Pacific people and are heralded as such in almost all postcolonial Pacific societies. Pacific constitutions reaffirm the link between the identity of the people and their customs and traditions by endorsing that "the happiness and welfare of the people . . . , both present and future, depend very largely on the maintenance of . . . values, culture and tradition."[11] Statements such as "all we have and are today as a people, we have received as a sacred heritage which we pledge ourselves to safeguard and maintain . . ."[12] reflect the idea of a generational contract as well as a sense of continuity that

underlies Pacific societies. These testimonials document the historic importance of cultural heritage and its critical place in relation to the distinctiveness of Pacific people; they are also indicative of claims of ownership based on perceptions of community rather than being expressions of individual rights.

However, culture in the Pacific Islands is still treated in isolation from other national policies such as trade, development, education, health, or environment. International lobbying for these "prime sectors" of Pacific governments over the past decade has been successful, thereby leaving little policy space for mainstreaming of culture. In Vanuatu, for example, although the National Self Reliance Strategy 2020 demands that a "cultural impact assessment ... be developed and implemented as a development planning tool required for all new development initiatives,"[13] the 2005 document is merely a recommendation to the government, and so far not much progress has been recorded in turning it into legally binding commitments. Consequently, in Vanuatu's Priorities and Action Agenda 2006–2015, there is no reference whatsoever to ICH as a development tool.[14] As a result, national initiatives to streamline culture remain limited with a patchy picture of actions relevant to ICH. According to the Vanuatu Ministry of Education, there has been "some progress" in this area, "but much remains to be done" due to "insufficient financial and human resources" at the disposal of the ministry.[15] This is, for example, evidenced by the slow progress of the planned Cultural Tourism Policy, which has been in planning since the end of 2011. At the time of this writing, the Ministry of Tourism has not been able to draft the Terms of Reference for the development of the policy, nor was funding for policy advice secured.

About a decade ago, a common consciousness among developing and newly industrialized countries evolved that ICH may be utilized as an economic development tool with inherent commercial value. This realization was based on the insight that culture is often one of the few "resources" that developing countries have in abundance; it is also one of the limited areas they may be able to exploit due to the existence of a comparative advantage. Also, commercializing on ICH presents an opportunity to develop an ownership-driven development agenda through establishment of cultural industries carried by a variety of stakeholders at the grassroots level. Countries such as Korea, Vietnam, and China started to actively assist in the development of cultural industries and the utilization of cultural heritage for purposes of sustainable development. Accordingly, in some countries—developed as well as developing—ICH has become part of national economic development planning as well as an asset in industrial development plans. In England, for instance, the creative and cultural industries sector contributed £57.3 billion to the British economy,[16] while

Thailand's creative industries contributed about US$43 billion to the Thai economy in 2008.[17] In comparison, Pacific Island governments have only recently started realizing that Pacific ICH can be not only exploited to attract more tourism and enhance the "Pacific paradise" value of the islands for foreign direct investment but also used as tool for development through job creation, utilization of niche markets, and formation of creative industries whose particular role in economic development has also been increasingly recognized within the cultural policy discourse.[18] This idea of ICH as development tool and a commercially exploitable culture (in whatever manifestation) has found interest in politically strongly supported regional subgroupings, such as the Melanesian Spearhead Group (MSG) as well as among a number of local businesses across Pacific Island capitals.

Representatives of PICs agree unequivocally at regional meetings that "while cultural industries contribute to economic development [in the Pacific islands], the sector still represents a largely untapped socio-economic potential."[19] However, commercial use of ICH in the Pacific, as elsewhere, is controversial and carries a particularly contentious note. Research demonstrates that commercial use of ICH outside its traditional context changes the perception of the communities themselves toward their own cultural heritage.[20] This so-called "Dream Catcher Syndrome,"[21] which is closely related to notions of misappropriation and out-of-context commodification of culture, has been exhaustively discussed in the American Indian context, where it led researchers to conclude that such commodification inevitably leads to a "loss of meaning" for the bearers of the tradition themselves.[22] As a consequence, the element of culture is removed from its context and becomes a meaningless item, story, or song without the significant cultural connotation that led it to be classified as ICH for the community in first place.

In the Pacific, the "Dream Catcher Syndrome" can be observed in various places around the Pacific Island region. In Samoa, for example, body tattoos have a traditional meaning for the bearer, and only certain families or tattooists (*tufuga*) may perform the customary, sacred act of tattooing (*tatau*) people of Samoan descent only. In the words of Makerita Urale, a Samoan tattoo artist and film director, "The traditional male [Samoan] tattoo, which extends from the waist to the knees, embodies the concept of serving the people. It's also a rite of passage and a symbol of bravery, because it's very bloody and it sometimes takes an entire year to complete."[23] In recent times, however, Samoan tattoos have become part of a "Pacific pop culture" with tourists and visitors to Samoa perceiving the tattoos as "sexy" and collecting Samoan traditional body art as a kind of "trendy souvenir" from the Pacific. In this sense, Samoan body tattoos,

despite their value as pieces of art, are losing their traditional meaning through detachment from the original context; their content and unique justification for their existence have been lost to many Samoan traditionalists in the process of commercialization.[24]

The above example, as many others,[25] illustrates the obvious need for a coherent, streamlined, and holistic approach to ICH protection, at least at the national or, even better, at the regional level. According to Forsyth, a diversity of approaches may result in very different pieces of legislation at the national level.[26] The latter may not only conflict with each other but even also prevent or impede attempts at international enforcement of rights related to ICH. Furthermore, the need for a coherent approach to ICH becomes evident when looking at PICs' international engagement with developed partners via multilateral trade and development treaties. These agreements often contain provisions with direct or indirect impact on the protection, development, or commercial use of culture, including Pacific ICH. The Economic Partnership Agreement (EPA) between the European Union (EU) and PICs, building on the interim EPA signed by Papua New Guinea and Fiji in 2009, is a case in point.[27] Based on Articles 36 and 37 of the Cotonou Agreement (CA), the Pacific EPA is an agreement that will go beyond economic development and trade liberalization to include issues such as peace building, human rights, sustainable economic development, and support for regional integration. It is understood that the latest draft of the Pacific EPA text also contains provisions on IPRs relevant to the protection and management of ICH. As such, it constitutes a document that should be included in the debate surrounding Pacific ICH.

Protection of ICH is undisputedly crucial. However, the modes of protection and the various policy and legislative options present a complex picture of ICH. The multifaceted nature of Pacific societies, the colonial heritage within their legal systems, as well as the diversity of issues hiding behind the mask of ICH are key parameters within which this article seeks to provide some recommendations in regard to the meaningful protection of ICH. There is a growing international literature examining the status and regulation of ICH in various parts of the world, including the Pacific region. Through the application of the "Pacific lens" to ICH issues, this article not only contributes to international knowledge exchange but also supports the Pacific countries' pioneering role in setting international standards for ICH protection. In the following section, I highlight some of the ICH-relevant initiatives undertaken at the regional level. Emphasis will be placed on region-specific issues pertinent to the protection of ICH in legal pluralist environments of the PICs. Furthermore, the article will analyze the involvement of the EU in establishing a viable and meaningful regime of ICH

protection in the Pacific Islands. It will conclude with some recommendations for a context-oriented engagement of the EU with PICs at the intersection of the IPR, trade, and development debate.

Intangible Cultural Heritage: The Pacific Way

In response to pressures of globalization, diminishing trade preferences, and aid dependency, Pacific governments realized around 1999 in a trade-related context that Pacific ICH is a commercially exploitable "commodity" in which PICs have a considerable relative trade advantage. What followed was recognition that, without proper protection and assignment of balanced and meaningful property rights, Pacific ICH was at imminent risk of misappropriation and excessive exploitation without appropriate compensation for traditional right owners, including individuals as well as communities. The trade context gave rise to some debate on how to manage and regulate Pacific ICH against the background of its "living" nature. In a move toward an integrated design of IP-related legislation at the national level, PICs developed three major regional initiatives of relevance for ICH: the Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture (2002), the Traditional Biological Knowledge, Innovations and Practices Model Law (2008), and the Melanesian Spearhead Group's draft Treaty on Traditional Knowledge (2011). In the following section, these regional initiatives are discussed in brief to highlight parallels and differences in approach.

In 2002, the Framework Treaty on Traditional Knowledge and Expressions of Culture (TKEC) was endorsed by the Regional Meeting of Ministers of Trade under the auspices of the Pacific Islands Forum Secretariat (PIFS). Based on a very broad, open-ended definition of TK and "expressions of culture" in Article 4 as well as the relatively new concept of Traditional Cultural Rights (TCRs), the TKEC Framework Treaty is applicable to tangible and intangible cultural heritage without making this distinction expressis verbis. According to Donald Marahare, former president of the Network of the Indigenous Peoples of the Solomon Islands, "The policy objective of the [Framework Treaty] 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 commercialization thereof, subject to prior and informed consent and benefit-sharing."[28] The TKEC Framework Treaty was "designed with the circumstances of the Pacific in mind, expected to form the basis of a harmonized regional legal framework."[29] Its main objective is to encourage sui generis legislation in PICs and to give policymakers a framework that

can be adapted to individual national circumstances of each country in the region. The TKEC Framework Treaty uses a combination of legal forms of protection, such as exclusive property rights, moral rights, criminal offenses, and civil actions.[30] Furthermore, it permits commercial use of TCEK but ensures that this is based on prior informed consent of the traditional owners who are to be included in benefit sharing on the basis of equitable, accessible, transparent contracts. In addition, it ensures that the rights granted are inalienable and continue in force in perpetuity.

The innovative elements of the TKEC Framework Treaty are thus threefold. First, it represents the earliest Pacific initiative to take TKEC out of the public domain and to allocate meaningful TCRs to traditional owners of TCEK. Second, it symbolizes a first balanced approach between ownership conventionally articulated through national IP policies and stewardship based on cultural policy, including heritage and diversity policy. Third, it combines exploitation of ICH with the necessary protection for its context while at the same time protecting present rightful owners as well as future generations of traditional custodians of ICH. As such, the Framework Treaty goes beyond a purely IP-based system of ICH protection based on introduced notions of IP law by empowering communities through collective rather than individual rights and by protecting TCRs usually omitted in conservative, Western-style IP-based systems. Under the Framework Treaty, the traditional owners of ICH are thus treated as de facto custodians of ICH—an approach already advocated in early works on cultural rights of indigenous people.[31]

As a result of renewed initiatives, the Pacific Trade Ministers, with support from the World Intellectual Property Organization (WIPO), endorsed the Traditional Biological Knowledge, Innovations and Practices (TBKIP) Model Law in 2008. The main driving force behind this initiative was the realization of the important role that TK plays in resource management, the sustainable use of biodiversity, and food security in Pacific societies. An additional catalyst was the growing concern regarding illicit uses and misappropriation of TK in the Pacific as well as the awareness of the potential economic damage of such practices. A Member of the Vanuatu Parliament, MP Regenvanu, recently voiced his concern by stating that "a number of entities are continuing to patent genetic material from Vanuatu presumably without any access and benefit sharing agreements, or consideration of the rights in identifying these plants and animals as potential sources of pharmaceuticals."[32] These so-called bad patents are addressed in the 2008 Model Law through the development of traditional biological knowledge databases combined with an alternative dispute resolution system in the form of a Traditional Ownership Tribunal to be set up in addition to

existing national authorities. To what extent national implementing legislation based on the TBKIP will be able to effectively address biopiracy remains to be seen once the legislation is in force and its enforcement mechanisms can be tested through cases brought to the courts' or Tribunal's attention.[33] Currently, according to a source at the Ministry of Finance and Economic Management, the loss of revenue due to illicit bioprospecting activities without any benefit-sharing agreement is estimated in Vanuatu alone at US$60 million over the past decade.[34]

The TBKIP Model Law is expected to form a considerable basis for the legislation currently debated in Vanuatu and elsewhere in the Pacific. Similar to the Framework Treaty 2002, the Model Law determines that the traditional owners of TBKIPs are the holders of moral rights in their TBKIPs and that these comprise the right of attribution of ownership, the right not to have ownership of TBKIPs falsely attributed, and the right not to have their TBKIPs subject to derogatory treatment. The Model Law further stipulates that where TBKIPs are used for a commercial purpose, there is a requirement for fair and equitable benefit-sharing arrangements (monetary or nonmonetary compensation) with the traditional owners. It remains to be seen how and to what extent these provisions will be mirrored in national legislation over the next couple of years. However, the recent Pacific move toward the accession of WIPO and the signature of UNESCO Treaties is expected to have an impact via stronger IP-based legislative regimes in opposition to regimes based to a greater extent on customary law. For the sake of a balanced approach to ICH protection, the latter should thus receive a more prominent place in regional frameworks than is the case to date.

In December 2009, the Traditional Knowledge Action Plan for the Pacific region, based on directives of Pacific Trade Ministers, was launched at a Traditional Knowledge workshop convened by the PIFS and WIPO in Fiji. Responsibility for the implementation of the TK Action Plan rests with the PIFS working in close collaboration with the TradeCom,[35] WIPO, the Secretariat of the Pacific Community, and the South Pacific Regional Environmental Program.[36] Heralded as "milestone development for the region,"[37] the Action Plan's main objective is twofold. First, it aims at the development of national systems of protection, setting out new rights and obligations in TK that will complement existing forms of protection for IP (Phase I), and, second, the development of cultural industries in the region through activities to promote the commercialization of TK (Phase II). The Action Plan itself stipulates that "legal certainty of ownership and management of resources will be established, providing security and predictability for economic developments in business, technology and investment, local creativity and innovation."[38]

Phase I of the TK Action Plan resulted in its implementation in a first group of countries consisting of the Cook Islands, Fiji, Kiribati, Palau, Papua New Guinea, and Vanuatu, mainly through inclusion of TK in conventional legislative acts. At their May 12, 2012, meeting in the Marshall Islands, the Forum Trade Ministers agreed to extend the priority for Phase II of the TK Action Plan to include technical assistance for the drafting of TK policy and legislative frameworks in PICs.[39] What has been perceived as problematic in this legislation-first, top-down approach is the fact that it has not been based on consultation with stakeholders[40]—an omission that may result in misinterpretation of rights or, even worse, oversight of rights currently recognized under customary law. At the same time, the Ministers decided most recently to focus on further commercialization of TK and cultural industries despite the dangers outlined above under the "Dream Catcher Syndrome." In the face of its strong commercial focus, the TK Action Plan must thus be seen as an opposite force to the Model Law. By applying Western value systems to the protection of amorphous, community- and context-based, living ICH, the Action Plan largely mirrors conservative, IP-based agendas of trade-driven development initiatives led by WIPO or the EU in the EPA context. Simultaneously, the commercial focus carries to a large extent the exclusion of customary law from recognition or enforcement of IPRs. As a result, formal state institutions are the only ones involved with ICH enforcement and offer either inadequate or insufficient protection for this amorphous concept. Both the issues created by the state-centered approach of the Action Plan and the nonpluralist intake on ICH protection have been highlighted by Forsyth.[41]

In the most recent move, the MSG Framework Treaty on the Protection of Traditional Knowledge and Expressions of Culture was adopted at the MSG Leaders Summit on March 31, 2011. As members of the MSG, the governments of Fiji, Papua New Guinea, the Solomon Islands, and Vanuatu pledged "to protect traditional knowledge holders and owners against any infringement of their rights as recognized by this Treaty . . . and to protect expressions of culture against misappropriation, misuse and unlawful exploitation."[42] At the time of this writing, the MSG Treaty has been approved in principle by its members but has not been signed by all MSG countries yet.[43] The MSG Framework Treaty is similar to the 2002 Framework Document in scope and subject matter as well as in the allocation of TK ownership or the duration of protection. Its innovation relates to the collaborative element of the MSG Framework Treaty, which stipulates in Article 15 cooperation in cross-border measures as well as the networking of judicial authorities and enforcement agencies. Such collaboration has the potential to develop into an integrated and harmonized approach to TK

protection, at least at the subregional level. This in itself, if executed, would guarantee that customary protection and management practices are included in the legislation of at least the MSG member countries.

Why Europe Should Listen In

Article 167 of the Treaty on the Functioning of the European Union (Lisbon Treaty) commands the mainstreaming of culture into EU policies in the fields of external relations, development, and trade. The 2007 European Agenda for Culture reinforces the Lisbon Treaty mandate by stating that "culture is increasingly perceived [by the EU] as a strategic factor of political, social and economic development and not in terms of isolated cultural events or showcasing."[44] In its 2010 progress report on the implementation of the EU Agenda for Culture, the European Commission stressed that next to EU technical and financial assistance, the EU is increasingly concerned with the protection of rights of indigenous people and the promotion of cultural rights in general.[45] In relation to development cooperation, the progress report makes a reference to "living culture and cultural heritage," recognizing them as "important for growth, jobs and cultural identity." Furthermore, in cooperation with a UNESCO-managed expert facility, the EU is committed to support the development of an institutional and regulatory framework based on IPRs to "facilitate and respect the commercial exploitation of the [ACP countries'] cultural heritage."[46]

Until the entry into force of the CA in 2000, culture did not appear as a stand-alone issue in EU–ACP relations and was seen mostly through the lens of human resource development or the preservation of natural heritage in ACP countries.[47] Article 27 of the CA states that the cultural dimension is to be implemented at all levels of development cooperation and in developing cultural industries and enhancing market access opportunities for cultural goods and services.[48] In the Pacific, the EU recognized accessibility as the biggest impediment to the development of a "sustainable Pacific arts sector that is valued as a pathway to economic empowerment."[49] The EU's current efforts—supported by a grant of €713,000 from the 10th European Development Fund and covering the period 2008–2013—focus on a restructuring of the Pacific cultural sector so that culture is better recognized as a driver of and a tool for development.

In EPAs with ACP countries, the EU addresses culture as a nontrade objective and uses EPA provisions "to promote intellectual property protection standards and ensure that the rights of artists and performers get the protection they deserve."[50] Usually, IPR-related trade provisions would

seek to strengthen IPR enforcement in ACP countries, as this is of vital interest to European right holders against the background of frequent IP breaches in developing countries with weak IP (enforcement) regimes. In return, the EU is prepared to agree, usually in an additional protocol to the EPA, on "preferential treatment for developing countries' cultural goods, services and cultural practitioners, outside of the provisions on trade liberalization."[51] The draft Pacific–EU EPA text of June 2006 is the latest publicly available text and does not contain any IPR-related provisions. The 2011 EPA draft text does likely contain IPR-related provisions that are thought to be similar to the provisions contained in the EU–CARIFORUM EPA.[52] If this is correct, PICs need to be aware that the IP standards required of them in EPAs mostly exceed standards advocated through WIPO treaties and the Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement of the World Trade Organization.[53]

As outlined above, PICs are in the midst of formulating regional frameworks for ICH protection, and drafting of national legislation has begun. While there has been little debate on the cultural dimension to development or on the contribution that a cultural protocol may have to sustainable development and service provision in the Pacific,[54] there is common agreement that any IPR-related provisions need to take into account the peculiarities of the Pacific context, especially the pluralist nature of Pacific legal systems as well as the living and amorphous characteristics of ICH. Ideally, the Pacific EPA should mirror the key provisions of the 2002 Framework Treaty and the 2011 MSG Model Law in adopting a community rights–based approach to ICH and allowing sufficient recognition for already existing models of customary ICH protection and enforcement. Instead of a state-centered approach to ICH as reflected in the TK Action Plan, the Pacific EPA should focus on indigenous communities as custodians of ICH. In addition, IPR-related EPA provisions should provide sufficient recognition of and address issues emerging in Pacific communities following the commercialization and commodification of ICH.

The main challenge relates to the fact that, due to a lack of home-grown expertise in the area of protection of ICH, Pacific governments often have no other choice than to accept IPR-related proposals as a given. In consequence, IPR provisions in the Pacific EPA may inevitably be removed from the Pacific context or will be often based on preconceived perceptions of a particular system of culture management, exploitation, and protection that is biased toward the EU's requirements. Without relating this external model to the Pacific context, the value of the resulting provisions and the effectiveness of legislation drafted on the basis of Western assumptions

about ICH will, unsurprisingly, be limited. The EU could, at a minimum, ensure that Pacific concerns are taken seriously in negotiations of any IPR-related provisions in the Pacific EPA. So far, the 2011 draft EPA text does not reveal a great concern for the issues described above.

Another relevant issue in ICH protection in the Pacific relates to the orthodox distinction between individual and collective rights and the difficulties that state legal systems are facing in protecting the latter via IPR provisions designed to provide protection for individuals. Despite the fact that "over the past two decades, there has been a gradual shift towards an understanding of cultural rights as a collective right, in addition to an individual right" based on "the progressive global acknowledgement of cultural diversity and difference" as well as "the recognition of rights of indigenous peoples,"[55] the Pacific EPA is unlikely to adapt to this shift in IPR-related provisions that are traditionally replicas of Western-style IPR standards orientated toward individual ownership of IPRs. This is another reason why IPRs in the EPA should be avoided entirely, or, if included, these concerns should influence their content so that IPRs negotiated in this development context look at protection of ICH from a non-Western perspective.

Conclusion

The EPA presents a unique opportunity for the EU to sustain the regional initiatives in Pacific ICH management and protection; it also has the potential to remedy the fragmented national approaches to ICH via an integrated, harmonized sui generis solution that all PICs can subscribe to. The development dimension of the EPA should ensure that the EPA becomes a tool for a contextualized approach to IPRs in the Pacific region taking into account the peculiarities and sensitivities of Pacific ICH. In an open-minded approach, pluralist environments could be seen as enriching the landscape of ICH management options; they could also offer important elements of protection via customary avenues and institutions alongside the conventional state-centered approaches. The mandate of the CA to respect the development status of EPA partners as well as regional integration initiatives currently under negotiation in the six ACP subregions appears to be supportive of an alternative approach to IPR provisions, one that goes beyond concerns of market access and effective enforcement. Before setting up a binding IPR regime via the Pacific EPA, the EU should listen to the words of Boyle in which he highlighted the potential impact of IPRs when he stated, "When you set up property rules in some new space, you determine much about the history that follows."[56]

NOTES

1. K. Serrano and M. Stefanova, "Between International Law, *Kastom* and Sustainable Development: Cultural Heritage in Vanuatu," in *Island Futures*, ed. G. Baldaccino and D. Niles (Tokyo: Springer, 2011), 19.

2. There are currently seven officially inscribed UNESCO Heritage Sites in the Pacific, located in Fiji, the Marshall Islands, the Federated States of Micronesia, Papua New Guinea, the Solomon Islands, Tonga, and Vanuatu.

3. The terms "traditional knowledge" and "cultural property" are used broadly and interchangeably in this article to reflect the definition in Article 2 of the Convention for the Safeguarding of the Intangible Cultural Heritage 2003.

4. Samoa Law Reform Commission, "The Protection of Samoa's Traditional Knowledge and Expressions of Culture," Issues Paper 08/10 (2010).

5. A. Yahaya, "The Scope and Definitions of Heritage: From Tangible to Intangible," *International Journal of Heritage Studies* 12, no. 3 (2006): 292–300.

6. H. A. Menaka, "Traditional Knowledge (TK) of Communities: Protection and Redevelopment in the Face of Emerging Intellectual Property Rights Regime" (paper presented to the Annual Research Symposium conducted by the University of Jaffna, December 2010), 1, accessed December 10, 2012, http://archive.cmb.ac.lk/research/bitstream/70130/175/1/TRADITIONAL%20(COPY)%5B1%5D.doc.

7. UNESCO, "Definition of Intangible Cultural Heritage," accessed December 12, 2012, http://www.unesco.org/services/documentation/archives/multimedia/?id_page=13&PHPSESSID=99724b4d60dc8523d54275ad8d077092.

8. UNESCO, Convention for the Safeguarding of the Intangible Cultural Heritage, 32nd Session of the General Conference, Paris (September 29–October 17, 2003), accessed December 12, 2012, http://portal.unesco.org/en/ev.php-URL_ID=17716&URL_DO=DO_TOPIC&URL_SECTION=201.html.

9. UNESCO, International Round Table "Intangible Cultural Heritage"—Working Definitions, Piedmont, Italy (March 14–17, 2001), accessed December 12, 2012, http://www.unesco.org/culture/ich/doc/src/05299.pdf.

10. Yahaya, "The Scope and Definitions of Heritage," 292.

11. Constitution of Tuvalu 1986, Preamble.

12. Constitution of the Republic of the Marshall Islands 1979, Preamble.

13. Malvatumauri National Council of Chiefs, the Vanuatu Cultural Centre, and the Vanuatu Credit Union League, National Self Reliance Strategy 2020 (July 26, 2005), 2.

14. Vanuatu Government, Priorities and Action Agenda 2006–2015 (2006), accessed December 8, 2012, http://www.ausaid.gov.au/countries/pacific/vanuatu/Documents/government-of-vanuatu-priorities-action-agenda-2006-15.pdf.

15. Vanuatu Ministry of Education, Interview with anonymous informant (name and contact details with the author), Port Vila, Vanuatu (February 23, 2012).

16. UK Local Government, "What Is the Direct Economic Impact of Creative Industries?" (2009), accessed December 14, 2012, http://www.idea.gov.uk/idk/core/page.do?pageId=11138810.

17. Kenan Institute Asia, "Economic Contributions of Thailand's Creative Industries," accessed December 14, 2012, http://www.theglobalipcenter.com/sites/default/files/reports/documents/Thailand_IP_report_2.pdf.

18. J. Hartley, *Creative Industries* (London: Blackwell, 2005), and D. Hesmondhalgh, *The Cultural Industries* (London: Sage, 2002).

19. Secretariat of the Pacific Community, Report of the Meeting on the Regional Consultation on the Cultural Industries, Suva, Fiji (2010), accessed December 14, 2012, http://www.spc.int/hdp/index2.php?option=com_docman&task=doc_view&gid=263&Itemid=44.

20. S. D. Osborne, "Protecting Tribal Stories: The Perils of Propertization," *American Indian Law Review* 28 (2003/2004): 203–36.

21. In Native American culture, a dream catcher is a customary object meant to protect a sleeping person from bad dreams while letting positive dreams and thoughts through. At the same time, it constitutes the symbolic representation of unity and strength of mind. In modern-day America, the dream catcher has been discovered by tourists as a popular souvenir item without that much attention being paid to its original meaning. The expression "Dream Catcher Syndrome" has established itself in discussions of expropriation of tribal meanings. It refers to the loss of integrity of native ICH once it is removed from its cultural context and ceases to have the customary meaning and attributes that made it possess a tribal meaning in first place. For further discussion of "Dream Catcher Syndrome," see Osborne, "Protecting Tribal Stories," and R. Ruble, "Dream Catchers: Sacred or Sellers? American Indians Contemplate Marketing of Culture," *Indian Country Today*, January 9, 2002.

22. Osborne, "Protecting Tribal Stories."

23. M. Urale, "Traditional Tattoo Designs Appropriated" (podium discussion, Planet IndigenUs Festival, Toronto, August 21, 2004), accessed February 15, 2013, excerpts available at http://www.ammsa.com/publications/windspeaker/traditional-tattoo-designs-appropriated.

24. For an in-depth analysis, see case study discussing the differences of perception of the role of the Samoan tattoo in M. Forsyth, "Lifting the Lid on 'the Community': Who Has the Right to Control Access to Traditional Knowledge and Expressions of Culture?," *International Journal of Cultural Property* 19 (2012): 1–31.

25. Other examples of commodified Pacific ICH and torn out of context include the commercialization of the kava ceremony in Vanuatu for purposes of tourist attraction or the Japanese commercial utilization of traditional whale fishing techniques of the

I-Kiribati people. It is even possible to maintain that the "Pacific way of life" has been objectified in itself, leaving numerous Pacific Islanders behind without a sense of real meaning to their daily routines and customary practices.

26. M. Urale, "Traditional Tattoo Designs Appropriated."

27. Due to the complexity of the agreement, several conclusion deadlines have been missed for the Pacific EPA, which has been under negotiation since 2002. At the June 2012 EU–ACP meeting held in Port Vila, Vanuatu, Pacific leaders demanded that the EU embrace in good faith its responsibility to negotiate a comprehensive, development-friendly EPA with PICs. The latest available draft text dates back to June 2006 and does not contain any provisions related to IPRs yet. The most recent draft EPA text, including IPR-related provisions, is that of June 2011 but this is unavailable to the public due to a missing response from the EU Commission.

28. D. Marahare, "Towards an Equitable Future in Vanuatu: The Legal Protection of Cultural Property," *Journal of South Pacific Law* 8, no. 2 (2004), http://www.paclii.org/journals/fJSPL/vol08no2/6.shtml.

29. A. Haira, "Guidelines for Developing National Legislation for the Protection of Traditional Knowledge and Expressions of Culture Based on the Pacific Model Law 2002" (presentation, Secretariat of the Pacific Community, Nouméa, November 3, 2006).

30. Haira, "Guidelines for Developing National Legislation for the Protection of Traditional Knowledge and Expressions of Culture Based on the Pacific Model Law 2002."

31. See, for example, E.-I. Daes, "Discrimination Against Indigenous Peoples: Study on the Protection of the Cultural and Intellectual Property of Indigenous Peoples," UNESCO, E/CN.4/Sub.2/1993/28 (1993).

32. R. Willie, "Patents in US on Vanuatu Biodiversity Raises Alarm," *Vanuatu Daily Post*, April 24, 2012, accessed December 19, 2012, http://www.dailypost.vu/content/patents-us-vanuatu-biodiversity-raises-alarm.

33. It should be mentioned in this context that the Vanuatu Parliament is expected to debate the WIPO Ratification Bill and the Bill for the International Treaty on Plant Genetic Resources for Food and Agriculture (Ratification) Act in the First Ordinary Session in 2013.

34. Vanuatu Ministry of Finance and Economic Management, Interview with anonymous informant (name and contact details with the author), Port Vila, Vanuatu (May 18, 2012).

35. The TradeCom is an ACP Group Program financed by the European Development Fund (EDF), aiming at support for the formulation of trade policies, trade negotiations, and the implementation of international trade agreements in African, Caribbean, and Pacific countries.

36. The initial time frame of the TK Action Plan was 24 months commencing from March 2009. The limited implementation capacity of PICs resulted in an extension of

the Action Plan beyond March 2011. At the 2012 Forum Trade Ministers' Meeting (FTMM) in Majuro, Republic of the Marshall Islands (RMI) on May 11, 2012, a decision was taken to extend the TK Action Plan to 2012–13.

37. Pacific Islands Forum Secretariat, "TK Implementation Action Plan Progressing Well," (press release 86/10, September 27, 2010), accessed February 10, 2013, http://www.forumsec.org/pages.cfm/newsroom/press-statements/2010/tk-implementation-action-plan-progressing-well.html.

38. Traditional Knowledge Action Plan 2009. The strong commercial focus on TK derives from the trade-driven context of the Action Plan as well as from international pressure to adopt robust, Western-style IPR regimes in Pacific countries.

39. In Vanuatu, the 2009 TK Action Plan was taken into account with the drafting of the Disaster Risk Reduction and Disaster Management National Action Plan 2006–2016.

40. M. Forsyth, "Do You Want It Giftwrapped? Protecting Traditional Knowledge in the Pacific Islands" (conference paper presented at the conference Trade, Intellectual Property and the Knowledge Assets of Indigenous Peoples: The Developmental Frontier, December 8–10, 2010, Wellington, New Zealand).

41. Forsyth, "Do You Want It Giftwrapped?"

42. MSG Framework Treaty on the Protection of Traditional Knowledge and Expressions of Culture (2011).

43. The treaty was signed by Fiji and the Solomon Islands at the Special Leaders Summit on September 2, 2011. Following the completion of in-country processes, PNG and the FLNKS have agreed to sign the treaty. Vanuatu is expected to complete in-country consultations and obtain the government's approval in 2013. The treaty needs the deposition of two instruments of ratification by national governments with the MSG Secretariat for its entry into force. So far, no deposition of a ratification document has been made.

44. European Commission, European Agenda for Culture, COM (2007) 242 final (2007).

45. European Commission, The European Agenda for Culture—Progress towards Shared Goals, SEC (2010) 904 (2010)

46. European Commission, European Agenda for Culture.

47. Lomé IV Convention, Articles 13 and 14 (1995).

48. In 2007, the title of Article 27 CA was amended from "cultural development" to "culture and development" to better reflect the role culture plays in general economic development of ACP countries.

49. European Commission, European Agenda for Culture.

50. European Commission, European Agenda for Culture.

51. Additional Protocol to the EU–CARIFORUM Economic Partnership Agreement (2008). This practice of the EU is not founded in legal provisions of the EPA itself but rests entirely on the goodwill of EU negotiators. As such, it is imaginable that the EU can use such a protocol in a stick-and-carrot approach to ensure that high IPR standards are included in EPAs.

52. The IPR-related provisions in the EU–CARIFORUM EPA.

53. Provisions that go beyond commitments made by developing countries in TRIPS context are usually referred to as "TRIPS plus standards," indicating the onerous nature of such provisions.

54. Secretariat of the Pacific Community, Report of the Meeting on the Regional Consultation on the Cultural Industries.

55. E. Huffer, "Cultural Rights in the Pacific—What They Mean for Children" (2006), 3, accessed February 15, 2013, http://www.unicef.org/eapro/Cultural_rights_in_the_Pacific what_this_means_for_children.pdf.

56. J. Boyle, *The Public Domain: Enclosing the Commons of the Mind* (New Haven, CT: Yale University Press, 2008), 56.

"THE NEW ECONOMY": UTILIZING CREATIVE, CULTURAL, AND INNOVATIVE INDUSTRIES FOR SUSTAINABLE SOCIOECONOMIC DEVELOPMENT IN FIJI

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Today, creative, cultural, and innovative industries are becoming important differentiators and drivers of competitiveness and economic development in many regions of the world. Creative industry has many characteristics, including being knowledge intensive and of high economic value. These characteristics determine that the development of creative industry not only directly promotes economic growth but also drives upgrades of other industries, thereby promoting economic growth indirectly as well as directly. The Pacific region has long been projected as a pristine paradise with vast cultural, natural, and biological resources that have unique opportunities for sustainable economic development in Pacific Island countries. Pacific Island countries have great potential to develop vibrant creative industries using their own tangible and intangible cultural properties. However, to create and sustainably use benefits from the cultural economy, first, creative industries need to be developed, using local customs, traditions, and traditional knowledge. Second, creative industries need to be protected and creatively exploited using appropriate intellectual property mechanisms. This paper intends to propose new methods for evaluating the role of intellectual property laws in the development of creative industries and the role of those industries in the economic, social, and cultural development suitable for Fiji.

Introduction

CREATIVE INDUSTRY is made up of creativity and innovation, which are the intellectual products of individual creations. Relevant and efficient laws provide the intellectual property rights (IPR) to protect creative

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achievements. The survival of any creative industry is closely related to the implementation of effective IPR strategies. In the course of commercial structural adjustments and socioeconomic development patterns, the Fijian government has encouraged the development of creative industry. For example, the import substitution policy[1] allows people to create new local products/services for sustainable socioeconomic development. However, promotion alone will not secure a bright future for creative industry. To promote healthy development in the creative industry, there is also a strong need for effective policy formulation to establish a good IPR environment.

Overview of Creative Industry

Creative industry is a collective of a broad range of activities, which include the cultural industries as well as all cultural or artistic productions. Cultural industries combine the creation, production, and commercialization of creative contents, which are tangible and cultural in nature. Thus, creative industries are those in which the consequential product or services contains a substantial element of artistic or creative endeavor.

Creative industry is becoming a powerful component of modern postindustrial knowledge-based economies. Its profound importance is evident in the advanced industrial economies, and the information economy is already a leading edge from which national wealth flows and a key to improving competitiveness.[2] Creative industry can provide developing countries the much needed increase in "human capital" that can create new parameters for socioeconomic development.

According to a World Bank survey in 2003, creative industries are estimated to account for more than 7 percent of the world's gross domestic products.[3] Creative industry already represents a leading sector in the Organisation for Economic Co-operation and Development economies, showing annual growth rates of 5–20 percent yearly.[4] In the United Kingdom, which has the largest cultural economy in the world, the creative industry was generating 2.89 percent of gross value added to the UK economy by 2009.[5] Countries such as Australia, New Zealand, Canada, and Ireland have also successfully exploited the benefits of cultural industries.

World wide, creative industries are becoming a pivotal sector of the economy. However, the potential of the creative industries in the Pacific Island Countries (PICs) remains largely untapped.[6] Despite its capacity to assist the socioeconomic development of PICs through promoting small businesses, increasing employment, increasing exports, and perhaps providing comparative advantages in international trade, this sector is one of the

TABLE 1. **World Trade Statistics on Creative Goods and Services, Creative Goods: PIC Exports 2003 to 2008.**

	Exports (Free on Board, in Millions of $)						Growth Rate
Economic Group	2003	2004	2005	2006	2007	2008	2003–2008
Oceania	12	20	22	21	27	27	15.76
Cook Islands	—	—	0	—	—	—	—
Fiji	11	9	5	5	5	—	—
French Polynesia	—	9	16	15	20	26	—
Kiribati	—	—	—	—	—	—	—
New Caledonia	1	1	1	1	1	1	5.43
PNG	0	0	—	—	—	—	—
Vanuatu	—	—	—	—	0	—	—

Source: International Monetary Fund (IMF) balance of payments statistics and United Nations Conference on Trade and Development calculations based on IMF balance of payments statistics.

least developed. A survey conducted by the United Nations in 2008 shows that compared with other developing countries, PICs import more creative industry goods and services than they export. Tables 1 and 2 illustrate the number of exports and imports of creative goods and services in PICs from 2003 to 2008.

Based on the data shown in Tables 1 and 2, from 2003 to 2008 Fiji alone spent 311 million dollars in importing creative goods and services while generating only 35 million in revenue from exports. The volume of imports suggests that there is high demand for creative industry products. PICs

TABLE 2. **World Trade Statistics on Creative Goods and Services, Creative Goods: PIC Imports 2003 to 2008.**

	Imports (Free on Board, in Millions of $)						Growth Rate
Economic Group	2003	2004	2005	2006	2007	2008	2003–2008
Oceania	152	234	197	218	184	187	0.73
Cook Islands	—	—	3	—	—	—	—
Fiji	77	83	57	51	43	—	—
French Polynesia	—	67	68	67	67	92	—
Kiribati	—	—	—	—	—	—	—
New Caledonia	55	66	68	66	70	96	8.75
PNG	21	18	—	—	—	—	—
Vanuatu	—	—	—	—	5	—	—

Source: IMF balance of payments statistics and United Nations Conference on Trade and Development combined calculations based on IMF balance of payments statistics.

should realize that a system involving intellectual property rights with creative markets can create a new bright spot for their socioeconomic development. However, very little has been done to protect and promote the creative industry in the Pacific.

According to George and Mitchell, Pacific governments and societies generally do not see these industries as viable enterprises.[7] They also added that there are very limited avenues available in the Pacific for artists to seek vocational training, since artists tend to be self-taught and develop their skills through "trial and error."[8] Given the intangible nature of many creative works, relevant policies are needed to protect the lawful benefits of the participants and creative enterprises through intellectual property systems. In addition, many creative industry products are distributed by digital products, which are susceptible to being easily copied, resulting in substantial loss to the creators. Therefore, the creative industry needs better, more effective intellectual property protections to safeguard the lawful rights and interests of participants and to encourage the development of creativity and innovations.

Present Intellectual Property Structure in Fiji

Intellectual property (IP) laws are claimed to provide protection to the creators and their creations, such as literary and artistic works, symbols, names, images, designs, and inventive processes used in commerce. The current national IP regime is based on preindependence UK legislation. Fiji's IP system is not compliant with the Trade Related Aspects of Intellectual Property Rights Agreement (TRIPS), despite Fiji being a World Trade Organization member since 1996. Fiji is also party to the Universal Copyright Convention,[9] the World Intellectual Property Organization Convention (WIPO),[10] the Berne Convention (Literary and Artistic Works),[11] the Rome Convention (Performers, Producers of Phonograms),[12] and the Geneva Convention (Unauthorized Duplication of Phonograms).[13]

The Copyright Act of 1999, Trademarks Act of 1933, Patents Act of 1879, Merchandise Marks Act of 1933, Industry Emblem Act of 1973, and the United Kingdom Designs Protection Act of 1936 operate to protect the intellectual property rights of creators in Fiji. Geographical indications, protection of plant varieties, and integrated circuit topographies, recognized under the TRIPS agreements, are largely not protected under any legislation in Fiji. During a 2006 regional consultation on the cultural industries in Suva, the Pacific Forum members recommended and accepted the need to strengthen regional cooperation and integration for IP promotion and protection.[14] Given the inherent disadvantageous characteristics,

such as size and lack of resources, regional integration may provide better assistance to PICs in promoting and protecting intellectual property and IP rights holders.

The Relationship between Creative Industry and Intellectual Protection

Intellectual property is a good tool to protect intellectual products, since creative industry is the product of intellectual activities. Innovation and creativity are the main components of creative industry. A creative product may be associated with expensive research (such as labor and material costs spent on research, design, production, etc). The high cost associated with some creative products is perhaps one of the reasons why a country like Fiji, which has limited resources, is producing very few creative products. Therefore, it is vital for policy makers to formulate and implement sufficient IP protection to promote and protect the interests of rights holders. From the music industry to the drug industry, intellectual property is a lucrative market, and both individuals and corporations have a lot to lose from the infringement of intellectual property rights. For example, the music industry yields a high economic return. According to South Pacific Recording, the music industry loses approximately $10 to $20 million each year as a result of piracy in Fiji.[15] Although these facts bring to light the economic losses to industries and individuals from IP infringement, the Fijian government is far from reaching a consensus on how to address these issues. Therefore, it becomes vital that a systematic and vigilant IP protection system should be in place for the sustainable survival and development of creative industry.

For sustainable development of the creative industry, the current IP system should be improved to comply with international IP standards. The main creative products are copyright works. In accordance with Fijian copyright law, the copyright is created once the work is completed.[16] Unlike another two important IP rights, patent rights[17] and trade mark rights,[18] applications for copyright protection are required, and must be approved, before taking effect. This means that formal application needs to be made to the Fiji Intellectual Office and, depending on the individual application, a copyright certificate is issued to the rights holders. However, it is often difficult to adduce evidence to support such applications for copyright. Therefore, it is advisable to fix the creativity at the beginning in written form and record the whole process of formation, development, and improvement through procedures provided by law.

Patents and trademarks are required by the applicable legislation to be registered before relevant rights can be created. These rights are thereafter given statutory protection. Another option sometimes preferred is to use trade secret practice to protect intellectual products. Trade secrets may work for some, but disputes can arise and may become difficult to solve in judicial practice. To receive protection under the law on trade secrets, it is important for a rights holder to prove that they are entitled to certain forms of production and that such production can be treated as a trade secret. Trade secrets also require proof that the other person possesses technology or operation information that is the same or similar to that of the rights holder. Therefore, the protection of intellectual products through trade secrets may require higher evidential requirements, which in turn may prove to be problematic.

It is equally necessary that all participants, including the holder of any IPR and the IP officers and facilitators should have a sound understanding of IP protection and promotion. Protection alone will not be a sufficient indicator of a sustainable creative industry. There is a strong need for effective promotion and legal literacy campaigning to promote creativity. For example, the Fiji Intellectual Property office should be facilitating workshops, seminars, and legal literacy courses accessible to people interested or involved in the industry.

Creative Industry and Related "IPR" Concerns

With increasing globalization, there is a strong tendency to combine culture and economy. A country like Fiji will need to improve its cultural innovation ability to have any chance of competing in the cultural market. According to Songjie and Xinghua "a creative city needs to have the hard power of the development of creative industry (suitable environment that is fit for the cultural development) and soft power (culture heritage and the reality of culture, especially talents reserve)."[19] Fiji has both the soft and hard power; however, it is still far from enjoying the benefits of creative products.

In Fiji, there are many IP issues in relation to the creative industry that are hindering its ability to develop competitive advantages and to compete for a cultural market share. First, there is no proper IP system available in Fiji. Second, the current IP laws are outdated and do not comply with international standards. Third, the enforcement of the law against piratical infringements is weak and ineffective, which hinders cultural innovations and is not favorable to encouraging artistic workers. Fourth, there are very few excellent cultural works with independent copyright. The difficulty is

that most cultural works are associated with a group of people, culture, or/and religion. This creates difficulty in identifying the true rights holders and sometimes leaves potential creative products out of economic reach. Fiji imports most of its cultural products with few outstanding local works. Most revenue from film tickets; the sale of cable, satellite, and music rights; as well as DVDs, internet, and mobile phone downloads are generated from importing these products and services. All technologies, like computers, are from foreign companies, while popular books, even compulsory textbooks for teaching in primary, higher, and tertiary institutions, are from abroad.

Finally, there is no independent cultural brand. There are few products associated with brand Fiji, like Fiji Water; however they do not qualify as cultural products. Independent brands are the basic core of competitiveness in the creative industry and are important tools for maintaining and spreading national cultural products. Countries with a developed cultural industry all have independent brands of cultural products, for example American Hollywood films, Indian Bollywood films, Disney cartoons, French fashion designs, Korean and Japanese computer games, etc. In comparison, Fiji has not developed any significant independent cultural brands in the international cultural market.

The New National IP Strategic Plan

Since the promulgation of the National Intellectual Property Strategy in December 2011, Fiji's IP system has entered a new phase. The IP strategy is a significant decision made for Fijian socioeconomic development, the implementation of which will determine the development direction of Fijian Society. At the current time of "import substitution strategy," economic growth pattern transition, and the promotion of local products and services, the creative industry can be properly harnessed if these policies are effectively implemented.

The Fijian National IP strategy, which has been developed with the assistance of WIPO, aims to "ensure the establishment of an IP system," that "is linked as directly as possible to the pace and characteristics of social development and economic growth, hence social and economic development policies."[20] The proposed IP strategy, if enacted, will support the implementation of a People's Charter for Change, Peace, and Progress (PCCPP).[21] The aim of the IP strategy it to first work closely with pillars 4, 5, and 11 of the PCCPP before engaging with "sector-specific issues" such as culture, health, education, poverty reduction, trade, science and technology, agriculture, the exploitation of traditional knowledge, and

bio-diversity."[22] In order to achieve the first priorities, the IP strategy has implemented three key components: to initiate IP policies and legislative reforms; to modernize the administration of IP, and to strengthen the capacity for enforcement and regulation. It is proposed that these are to be implemented over a three-year period starting in 2012. The implementation of this IP strategy suggests that through the support of a stronger IP system, the percentage of cultural products can increase and the contribution to the economic development be larger.

Developing Creative Industry: Solutions and Recommendations

Creativity is a ubiquitous asset, which is deeply embedded in a country's social and historical context.[23] This industry, if properly developed and utilized, can provide new opportunities for Fiji to develop new areas of wealth and employment-creation consistent with wider trends in the global economy. However, "the nurturing and effective harnessing of this asset may be just as challenging, if not more so, for policy makers."[24] The biggest challenge faced in developing this industry is not the problem of whether to choose creative resources, "rather attention needs to be paid to those areas which offer greatest opportunity for linking up with the international economy via the strengthening of domestic supply capabilities."[25]

This paper provides the following policy recommendations, which, if properly implemented, could assist the government to effectively promote and create a new economy from creative industry.

Recommendation 1. To create the cultural innovation environment, there needs to be a robust IP system in Fiji. An effective IP protection is essential for both domestic and international markets. Policy makers together with the Fiji Intellectual Property Office (FIPO) should take the current opportunity, while the government is reviewing the IP system in Fiji, to make amendments to copyright, trademark, and other related laws. This will allow improvement in relevant property rights systems to safeguard intellectual products.

Recommendation 2. In order to create effective policies for creative industry, government needs to build an innovation policy system. The current IP system in relation to the cultural industry is underdeveloped. The main reason is that we lack relevant experience in IP and IP public policies. Therefore, to improve the cultural innovative ability, Fijian policy makers, including FIPO, need to coordinate the IP system with national cultural, education, socioeconomic, and foreign trade policies and to incorporate relevant IP provisions into these policies.

Recommendation 3. There is also a need for specialized education and training, including support for IP practice talents both in their own rights

and with an added business dimension. To effectively harness profits from creative works, Fiji should establish suitable scientific and research conditions, research and development capacity, as well as promotion for groups of creative artists (for example, dance, music, costume, etc.). Since many creative artists are not familiar with domestic and foreign IP laws and rules, the government, perhaps through FIPO, should try to provide workshops.

Recommendation 4. In order for individuals or enterprises to successfully benefit from IP rights, assistance should be provided for IP management. IP in itself is not a product, but the special idea behind it is. IP is the way an idea or concept is expressed and the distinctive way it is named or described. With the advancement of technology, it is important to understand and manage innovations and "know-how." However, many enterprises do not know how to manage or handle IP related issues. As such, relevant governmental departments, like FIPO, should provide guidance to enterprises to establish a set of IP management mechanisms, including IP application, management, dispute alerts, solutions, etc. The Fiji Intellectual Property Office may consider providing consulting and legal services for IP management.

Recommendation 5. Fiji needs to improve IP law enforcement and judicial protection. The enforcement of any IP regime is an important prerequisite for policy development in the new economy. Therefore, the improvement of IP law enforcement and level of judicial protection can create a positive environment for the healthy development of the creative industry.

Conclusion

Today creative industry has become a pivotal industry for many countries around the world and is becoming an increasingly important part of national economies both in terms of impact and size as well as job-creation and value added to gross domestic product. If properly harnessed, Fiji can benefit from creative industry. For example, creative industry can provide a potential source for national income and help create more sustainable employment. While the socioeconomic potential of creative industry is great and many developing countries like those in the South Pacific have untapped potential in this area, most, such as Fiji, are still marginal players, despite their rich cultural heritage and an inexhaustible pool of talent.

As has been suggested in this paper, creative industry needs effective IP regimes before the fruits of this industry are sustainably included in the national economic development. Because it is in the nature of creative products to be more easily copied than scientific and technological products, in order to develop, the creative industry requires IP protection. It is

necessary, therefore, to ensure that the enforcement of any IP strategy is centered on the creation, use, and protection of IP. It is possible that if properly implemented and managed, the creative industry could become the new economy and a socioeconomic growth point for the South Pacific region.

NOTES

1. Since July 30, 2012, the government of Fiji has passed an import substitution policy to boost and promote locally grown and created products. This affords local producers and makers more opportunities both in the local market and in the export market. Import substitution policy reduces a country's foreign economic dependency by simply replacing imports with domestic productions.

2. United Nations Conference on Trade and Development, "Creative Industry and Development" (TD (XI)/BP/13, June 4, 2004), http://unctad.org/en/Docs/tdxibpd13_en.pdf.

3. United Nations Conference on Trade and Development, "Creative Industry and Development," Para 2.

4. J. Howkins, *The Creative Economy* (London: Penguin, 2001).

5. Department for Culture, Media & Sport, "Statistics: Creative Industries Economic Estimates," http://www.culture.gov.uk/what_we_do/research_and_statistics/4848.aspx.

6. Secretariat of the Pacific Community, *Regional Consultation on the Cultural Industries* (Suva: Secretariat of the Pacific Community, 2010).

7. H. George and L. Mitchell, "Situational Analysis of the Cultural Industries in the Pacific Secretariat of the Pacific Community" (report to the South Pacific Forum Secretariat, 2010), 8.

8. George and Mitchell, "Situational Analysis."

9. Since December 1971.

10. Since March 1972.

11. Since December 1971.

12. Since 1972.

13. Since April 1973.

14. Secretariat of the Pacific Community, *Regional Consultation on the Cultural Industries*, 30–31.

15. Iliesa Tora, "Pirates Cost Govt $20m Yearly," *The Fiji Times*, July 9, 2011. South Pacific Recording is Fiji's largest and longest established local Music and Video Company, involved in imports, manufacturing, distribution, wholesale, retailing, and exports.

16. The Copyright Act 1999 (FJ), section 14.

17. The Patent Act 1879, section 6.

18. The Trade Marks Act 1970, section 11.

19. Li Songjie and Li Xinghua, "The Role of Cultural Creative Industry in the Process of the City Development: The Case of Jingdezhen," *Studies in Sociology of Science* 2, no. 2 (2011), 74–78.

20. The Fiji National Intellectual Property Strategy has been developed with the assistance of the World Intellectual Property Office, Regional Bureau for Asia and the Pacific branch, see M. Leesti, "Fiji National Intellectual Property Strategy 2009 (Draft 1)" (World Intellectual Property Organization, 2009).

21. The current Interim Government of Fiji issued a socioeconomic policy paper "People's Charter" in 2008.

22. People's Charter for Change, Peace, and Progress 2008 (FJ), Pillar 4, "Enhancing Public Sector Efficiency, Performance Effectiveness and Service Deliver"; Pillar 5, "Achieving Higher Economic Growth While Ensuring Sustainability"; Pillar 11, "Enhancing Global Integration and International Relations."

23. United Nations Conference on Trade and Development, "Creative Industry and Development" (TD (XI)/BP/13, June 4, 2004), http://unctad.org/en/Docs/tdxibpd13_en.pdf.

24. United Nations Conference on Trade and Development, "Creative Industry and Development," Para 31.

25. United Nations Conference on Trade and Development, "Creative Industry and Development," Para 32.

COPYRIGHT PROSECUTION—THE FIJI EXPERIENCE

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Film Fiji

Since the introduction of the Copyright Act of Fiji in 1999 and its recent amendment, Fiji has seen a fluctuation in the respect afforded to intellectual property rights. This research looks at copyright infringement, in particular movie piracy and the laws that relate to it, including the Berne Convention, other relevant international instruments, and domestic laws. Research was undertaken in assessing a recent movie piracy case, which serves as a precedent for movie piracy cases in Fiji. This particular case shows that Fiji is ready to undertake efficient and effective prosecutions of movie piracy cases. However, it also shows a lack of commitment by enforcement agencies. The research concludes that Fiji needs holistic commitment to move forward in protecting and respecting intellectual property rights, in particular copyright.

Introduction

INTELLECTUAL PROPERTY exists in most facets of Fiji's society today. From the day-to-day music performances in the clubs, to the creation of a particular corporate image, the issue of intellectual property remains relevant. The Fiji government has made fairly significant efforts to regulate the recognition and protection of some forms of intellectual property rights in line with those that are internationally recognized. The private and nongovernment sectors have also played a part in this process and continue to do so.

The protection of intellectual property is a broad topic. This article will focus on copyright of movies, and in particular copyright protection through prosecution, which is an ongoing issue in Fiji insofar as its realization is

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concerned. The prosecution of copyright infringement has not developed to an expected standard, and, therefore, this article considers the existing legal framework and institutional mechanisms in relation to the prosecution of copyright infringement in movies. To illustrate some of the problems and shortcomings of the present situation, and some specificity to the bigger picture, it will provide some insight as to the practicality of the current legal framework by discussing two copyright infringement cases.

Institutional Mechanism for Copyright Prosecution

The three main organizations that make up the institutional mechanism for copyright prosecution are the Fiji Police Force, the Director of Public Prosecution's office (DPP's office), and the newly established Fiji Intellectual Property Office (FIPO).

The Fiji Police Force is established by Section 21 of the State Services Decree No. 6 of 2009.[1] It also has its own legislation, which regulates its functions and responsibilities. According to Section 5 of the Police Act [Cap 85], the force, among other functions, is responsible for "*the protection of . . . property*, the prevention and detection of crime and the enforcement of all laws and regulations with which it is directly charged" (emphasis added).

Therefore, the protection of copyright as a form of intellectual property is a fundamental role of the Fiji Police Force. In 2011, the Fiji Police Force established a Copyright Division in all main police stations in Fiji.[2] As a result, when an official complaint pertaining to copyright infringement is made, the officer tasked with handling copyright cases conducts and oversees the investigation of the complaint. Once the investigation is completed, a case file is compiled and forwarded to the DPP's Office for advice on whether there is sufficient evidence to proceed to the charging of the accused.[3] At the time of writing however, the Fiji police force has suspended fresh investigations in copyright infringement cases because of a shortage of senior and experienced officers in all police stations around Fiji.[4]

The DPP's office was a constitutional office under Fiji's 1997 constitution. After the abrogation of the 1997 constitution in April 2009,[5] the DPP's office was established under the State Services Decree No. 6 of 2009. Under the said decree, the DPP's office can institute and conduct criminal proceedings against any person. It is under this authority that the DPP's office prosecutes criminal offenses under the Copyright Act of 1999. Prior to 2010, there was the informal establishment of a Copyright Unit that was tasked with handling copyright prosecutions. Only one copyright

infringement case managed to reach the trial stage. It resulted in an acquittal, since the prosecution failed to prove that the accused had knowledge that the copy that he was dealing with was an infringing copy.[6] In January 2010, the DPP's office established a formal copyright unit. The unit, although challenged with limited resources and lack of expert knowledge, managed to initiate ten copyright infringement cases in the Suva Magistrates Court, three cases in Nadi Magistrates Court, two cases in Lautoka Magistrates Court, and two cases in Sigatoka Magistrates Court. From all these cases, only two cases proceeded to full trial, and in each of these the respective accused persons were acquitted.[7]

FIPO was approved by cabinet in April 2011 and was to be based within the office of the attorney general.[8] The cabinet based its decision on a submission made by the Attorney General, Mr. Aiyaz Sayed-Khaiyum, in which he explained that Fiji is a state party to the World Intellectual Property Organization (WIPO) and is a signatory to a number of international treaties and conventions governing intellectual property, including the Trade Related Aspects of Intellectual Property Rights Agreement (TRIPS). The attorney general also pointed out that because the majority of Fiji's intellectual property laws continue to be a relic of the colonial era, and have not been revised since their original enactment, Fiji's current intellectual property regime does not fully comply with its international treaty obligations, including in particular, the TRIPS Agreement. The Attorney General also highlighted that government departments have been separately managing intellectual property rights without much coordination. Consequently, the establishment of FIPO should see a better management of intellectual property issues among government departments by having ready access to the necessary legal resources.[9]

A National Steering Committee was also established by government to oversee the foundation, staffing, management, and administration of FIPO, in consultation with WIPO. By August 2012, a senior officer from the Fiji police force was transferred to FIPO to assist Mr. Terence O'Neil Joyce, the manager of FIPO, in the investigation of copyright infringement cases and other tasks. Despite these latest developments in FIPO, it has yet to achieve full operation because of the confusion that exists in relation to its functions. In particular, there appears to be a general confusion among the public, which seems to believe that the Fiji Police Force are still responsible for the investigation of copyright infringement cases. A program of public awareness raising may be necessary in order to educate the public, in particular copyright owners or custodians of copyrights, about the role and functions of FIPO.

Legal Framework for Copyright Prosecution

International law has served, among other fundamental purposes, to provide guidelines and standards for Fiji's domestic laws. According to the Fiji National Intellectual Property Strategy Report Draft 1, which was submitted to the World Intellectual Property Organization in 2011, Fiji has ratified the following intellectual property treaties and conventions:

(1) World Trade Organisation and the TRIPS Agreement since January 1996.
(2) Universal Copyright Convention since December 1971.
(3) WIPO Convention, since March 1972.
(4) Berne Convention (Literary and Artistic Works), since December 1971.
(5) Rome Convention (Performers, Producers of Phonograms and Broadcasting Organizations), since April 1972.
(6) Geneva Convention (Unauthorized Duplication of Phonograms), since April 1973.

Since the ratification of the above treaties and conventions in Fiji, there are fundamental principles that have been adopted and incorporated into national law through the Copyright Act. For example, the duration or term of protection of a copyright being fifty years as stipulated in Article 7 of the Berne Convention is reflected in Section 22 of the Copyright Act. The act was enacted in 1999 and came into force in July 2000. A broad spectrum of copyright issues are provided for in the act, but for the purposes of this article I will focus on the criminal provisions that exist in the act, since they provide for prosecutions of copyright infringements in Fiji.

Division 5 of the act provides for criminal offences. Section 121(1) focuses on criminal liability for dealing with infringing copies. An object is an infringing copy if its making constitutes an infringement of the copyright in the work in question.[10] Section 121(1) is the provision that the DPP's office uses when charging accused persons who are allegedly engaged in the illegal dealing of infringing copies. The other characteristic of this particular subsection is that it outlines the various ways of dealing with an infringing copy or copies.[11]

Since 2007, the DPP's office has focused on four aspects of the essential characteristics of Section 121(1), which prosecutors are to consider when handling copyright infringement cases. These aspects were also used to educate the Criminal Investigations Department of the Fiji police force and relevant stakeholders that dealt with copyright infringement cases.[12] They are as follows:

(a) That copyright should exist in the work or subject matter;
(b) That the person dealt with the copyright in the work in a way that would infringe it;
(c) That this article or object is an infringing copy;
(d) That the person knows or ought reasonably to have known that it is an infringing copy.[13]

All the characteristics except characteristic (b) apply to all subsections under Section 121(1). Characteristic (b) is viewed as the act or manner in which the copyrighted work was infringed. For example, the act under Section 121(1)(a) relates to the making an infringing copy for sale, whereas the act under Section 121(1)(b) relates to the importing of an infringing copy.

The Copyright Amendment Decree came into force in September 2009 and was introduced to primarily address fundamental issues in copyright that were considered not to be adequately provided for in the Copyright Act. One of these was the issue of proving who the copyright owner is during criminal proceedings. Generally, prosecutions for offences under Section 121(1) of the Copyright Act in relation to overseas copyrighted works were unsuccessful due to the difficulty of proving who the copyright owner was and, equally, that the defendant had no license in the work.[14] Section 126 of the Copyright Act requires the copyright owner to give evidence in court, and so it was difficult for the state with its limited resources to bring the copyright owner from overseas to Fiji to confirm ownership over the copyrighted work. However, when the Copyright Amendment Decree was passed in 2009, a big administrative burden was lifted off the state. The effect of Section 2 of the said decree meant that prosecution had only to bring to court an original copy of the movie that was the subject of the proceedings and show the court the name of the copyright owner and other required details, which appeared on the surface of the original copy. This was done to achieve two legal aims. First, it was to prove who the copyright owner was. Second, after showing the court who the copyright owner was, the burden of proof would naturally shift to the defense to prove that he or she had the license or authority from the copyright owner to deal with the copyrighted work.

The introduction of the Copyright Amendment Decree in 2009 compelled the Office of the Director of Public Prosecutions to apply its provisions in all the courts of law in Fiji. But because it was novel, the initial focus was restricted to the cases investigated in Suva, since the Copyright Unit within the Office of the Director of Public Prosecutions was primarily based in Suva. The following cases are classic examples of prosecutions.

Reality on the Ground (Case Studies)

The Case of Yogesh Lal[15]

Mr. Yogesh Lal, the accused in this case, was charged with the offense of dealing in infringing copies contrary to Section 121(1)(d)(i) of the Copyright Act of 1999. The prosecution alleged that he was offering for sale three infringing copies in DVD format of the movie *Clash of the Titans*, which was owned by Warner Brothers Entertainment and Legendary Pictures.

When the matter proceeded to trial, the prosecution advised the learned magistrate that since this was the first copyright infringement case to reach trial after the Copyright Amendment Decree 2009 came into effect, the prosecution was going to rely on the provisions of the said decree to prove who the copyright owner was. This was accepted by the court. During judgment, the court confirmed the applicability of the Copyright Amendment Decree as conducted by prosecution. But the accused was acquitted because there was no evidence pertaining to the actual sale (as required for "dealing") of the infringing copies.[16]

The Case of Dharmend Rama[17]

Mr. Dharmend Rama, the accused in this case, was charged with four counts of dealing in infringing copies contrary to Section 121(1)(d)(i) of the Copyright Act of 1999. The prosecution alleged that the accused had offered for sale six infringing copies of the movie *Sherlock Holmes*, copyright belonging to Warner Brothers Entertainment; ten infringing copies of the movie *2012*, copyright owned by Columbia Pictures; nine infringing copies of the movie *Legion*, copyright owned by Bold Films; and eight infringing copies of the movie *This Is It*, copyright of which was owned by The Michael Jackson Company.

The accused pleaded guilty to all the counts in the charge, and the matter was set for sentencing. During sentencing, the learned magistrate acquitted the accused because the prosecution had failed to meet the required standard of proof in their submission of the summary of the facts. A summary of facts for any criminal case after a plea of guilt has been entered in a court of law should show the relevant elements of the offense(s) in the charge. The elements of an offense when put together make up the offense. However, in this case, the prosecution argued that the summary of facts included all the elements of the offense(s) in the charge. This claim was not acceptable to the magistrate. The consequent acquittal resulted in

the decision being appealed to the high court of Fiji. However, at the time of writing, the Director of Public Prosecutions has not yet endorsed the filing of the appeal, much to the frustration of stakeholders. In part this is because of problems of understaffing and the management of caseloads. But it is also indicative of the challenges that advocates of stronger copyright enforcement face in trying to ensure that all the agencies involved in copyright enforcement share the same commitment to making copyright laws work successfully in Fiji.

Conclusion

Fiji currently possesses the institutional mechanism and normative legal framework to combat copyright infringement in movies, but whether these are sufficiently adequate in the ongoing fight against movie piracy is a question of contention. This article has demonstrated that the Fiji Police Force, the DPP's Office, and FIPO have made efforts to combat copyright infringement. However, this research has also highlighted some major challenges to the realization of copyright prosecution in Fiji. The notion that the Fiji police force and FIPO are mandated to carry out the same task of investigating copyright infringement has caused some confusion, and this has contributed to the current situation where there have been no copyright infringement cases investigated and brought before the courts during 2012. The policy makers and those in control of the institutional mechanisms must make a move to educate all personnel concerned about the significance of copyright and the harmful effects of its infringement. The enforcement agencies, in particular the agencies referred to above, that make up the institutional mechanism for copyright prosecution in Fiji need to lobby for specialized training for the agencies so that there is uniformity in the mind-set and attitude toward the understanding of copyright. The fact that Fiji ratified relevant international legal instruments close to half a century ago and domesticated its fundamental copyright principles over a decade ago implies a lack of political will to combat copyright infringement. The establishment of FIPO is worthy of praise, but the fact that its functions and status are yet to be placed on a formal footing through legislation shows that the wheels of justice have in some respects ground to a halt for victims of copyright infringement cases. While in a general sense, Fiji has been moving forward with the respect for copyright through the prosecution of copyright infringement cases, essentially it needs successful copyright prosecutions in order to send out a clear message to the public that dealing in copyright infringement objects will not be tolerated under the law.

NOTES

1. Prior to April 2009, the Fiji Police Force was established under the (now) abrogated 1997 Constitution of Fiji.

2. Comment made by Assistant Superintendent of Police Luke Rawalai, Director of Criminal Investigations Department, Fiji Police Force, in conversation with the author.

3. This was the precharge procedure that existed between the Fiji police force and the DPP's office in 2010 and 2011.

4. Comment by Inspector Fisi Nazario, Fiji Police Force, during the Fiji Performing Rights Association Copyright Workshop in August 2012, at the Holiday Inn, Suva.

5. *Fiji Times Online*, "President Abrogates Fiji Constitution," accessed August 21, 2012, http://www.fijitimes.com/story.aspx?id=118886.

6. State v. Seth Rizwan Ali (unreported).

7. These statistics were obtained from the DPP's office database in August 2011. The number and the status of the cases are therefore subject to change.

8. However, according to Mr. Terence O' Neil Joyce, Manager of FIPO, it is yet to be established by way of legislation.

9. Elenoa Baselala, "Property Protection," *The Fuji Times Online*, April 13, 2011, http://www.fijitimes.com/story.aspx?id=170635.

10. Section 12, "Meaning of Infringing Copy," Copyright Act of Fiji, 1999.

11. The various ways of dealing with an infringing copy include the making of the copy, the importing of the copy, the possessing of the copy, the offering or exposing the copy for sale, and the distributing of the copy for commercial purposes.

12. Content of Course for police officers who underwent Criminal Investigator's Qualifying Course in 2011 at the Nasova Barracks in Suva.

13. These four principles resulted from discussions between the DPP's office and an IP expert from New Zealand.

14. Explanatory Note, Copyright Amendment Decree, 2009.

15. State v. Yogesh Lal, Criminal Case No. 867 of 2010.

16. According to the manager of the copyright unit of the DPP's office in September 2011, this case was in the process of being appealed because the essence of the charge was that the accused had *offered* the infringing copies for sale, which is provided for under Section 121(d)(1), but had not actually sold infringing copies, which is provided for under Section 121(1)(e) (emphasis added).

17. State v. Dharmend Rama, Criminal Case No. 1497 of 2010.

CHALLENGES OF COPYRIGHT LAWS FOR EDUCATION IN A FIJI UNIVERSITY

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Globalization poses new questions regarding the relation between copyright law and education. In an Information Communication Technology (ICT) environment, a key issue is how education can best benefit from the educational resources available while still observing laws such as copyright. Changing trends and the digitalization of resources has added new challenges in the area of education, especially in the Pacific Island Countries. The use of Internet search, online database, and electronic resources has grown with the advancement of these technologies. This paper illustrates some of the challenges that exist in smaller nations such as Fiji, by reporting on some empirical research undertaken by the authors at Fiji National University.

Introduction

COPYRIGHT REQUIRES an original work of authorship to be fixed in a tangible medium of expression from which it can be perceived either directly or with the aid of a machine or device. Copyright protects the form of expression only and does not extend to the idea or concept underlying the work. It includes the following: literary works, such as educational materials and computer programs; musical works, including any accompanying words; dramatic works, including any accompanying music; pictorial, graphic, and

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sculptural works; motion pictures and other audiovisual works; sound recordings; architectural works; and more.

Facts cannot be copyrighted. However, the creative selection, coordination, and arrangement of information and materials forming a database or compilation may be protected by copyright. Note, however, that the copyright protection only extends to the creative aspect, not to the facts contained in the database or compilation (Klein and Hodge 2008).

A copyright is the exclusive rights to distribute, display, perform, or reproduce an original work in copies or to prepare derivative works based on the work. The copyright gives the owner of the copyright the exclusive right to distribute copies or phone records of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; that is, to perform the copyrighted work publicly, in the case of literary, musical, dramatic, and choreographic works, pantomimes, motion pictures, and other audiovisual works.

A fair use of a copyrighted work may include the practice of any of the exclusive rights provided by copyright, for example, reproduction, for purposes such as critical comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research. These are the four factors that should be evaluated on a case-by-case basis in order to determine whether a specific use is fair use:

1. The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2. The nature of the copyrighted work;
3. The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. The effect of the use upon the potential market for, or value of, the copyrighted work.

The distinction between fair use and infringement can be unclear and cannot be easily defined. There is no right number of words, lines, or notes that qualify as a fair use (Nair 2012). Indeed, it has been suggested that clarity on this issue is covertly weakened by the conservative nature of academics and policies that avoid confronting the copyright issue (Trosow 2010).

Work that might be copyright but is in the public domain may be used by anyone, anywhere, anytime without permission, license, or royalty payment. Public release, disclosure and dissemination describe the availability of a work. Publicly released, disclosed, or disseminated information may, however, be owned and protected by copyright and, therefore, not be in

the public domain. This may be particularly relevant in the context of education because of the prevalence and popularity of Internet searches by students.

The Internet is another form of publishing or disseminating information; therefore, copyright applies to Web sites, e-mail messages, Web-based music, and more. The fact that the Internet provides easy access to the information does not mean that the information is in the public domain or is available without limitations. Copyrighted works found on the Internet should be treated the same as copyrighted works found in other media.

If the publisher has made original and creative contributions to the published work, the publisher may have some rights posted on the public websites. The fair use principle applies to materials and use of works found or placed on the Internet. The same factors will be considered as for fair use in print. As in the print environment, it is not necessary for an author to include a copyright statement on the material in order for the work to maintain its copyright protection. However, notices may be found on the home page of a Web site or on special terms and conditions pages that provide for specific uses. It is a good practice to provide notice whenever possible, even though it is not required. In addition, there may be disclaimers and use notices that apply to use of the material. Many organizations encourage links by posting terms and conditions and "how-to" instructions on their Web sites, usually under the headings of Copyright, Legal Notices, or About Us.[1]

Literature: The Contemporary Context of Education

The digitization of creative content poses a more serious challenge to copyright law than other technological advances to date. The challenge is that digital technologies continue to increase the ways in which individuals can consume and enjoy creative works, for example, by "ripping" music files from a compact disc (CD) to store on a computer or portable music device, despite the fact that copyright law does not explicitly permit those uses without the authorization of the copyright owner. At the same time, however, advances in digital technologies provide copyright owners with growing capacity to either restrict or charge for subsequent uses of their creative works.

Copyrighted works in digital form can be flawlessly and inexpensively reproduced and instantaneously distributed worldwide. Copyright holders consequently fear that unauthorized copying and redistribution of their works will cause their economic returns to decline.[2]

Copyright issues related to university research output in the form of theses and dissertations have been the subject of considerable discussion

among researchers and academics. Theses and dissertations have long been regarded as the basis of university research, as has the publication of scholarly works. Traditionally, authors create and produce intellectual outputs, which will be marketed or distributed by the publishers and which libraries will collect, preserve, organize, and disseminate. They arise from particular needs within a society, and their types and functions reflect the diversity within the society. This gives rise to the idea that libraries are institutions that assist their users in deriving and accessing information (Chidi 2012). Where these sources of information are digitalized or held as electronic copies there are concerns about copyright because digital documents can be easily downloaded and reused (Vijayakumar, Murthy, and Khan 2005).

In many Pacific Island countries, of which Fiji is an example, the development of library and information services in universities has not really been sufficiently resourced to deal with the rising student enrollment numbers. Consequently, academic and administrative staff of universities in the region are increasingly adopting strategies other than using the university library to obtain information. These strategies may involve getting the material directly from publishers, downloading or photocopying journals articles, opting for reprints, personal subscriptions to journals, and depending more on freeware databases. This leads to the situation where academic staff may rarely visit or access materials from the library. There is an increase dependence on lecture notes and handouts as well as photocopying of textbooks in Fiji and the Pacific region (Ouma and Sihanya 2009).

Although it has been suggested that undergraduate students need information to improve their social, economic, and political experiences and that this information is best retrieved from libraries, access to information outside of the library setting means that many of the advantages of library use are being lost. In particular, whereas previously staff and students may have familiarized themselves with their obligations under copyright law in libraries and consequently been able to respond to queries that relate to copyright issues, this is no longer necessarily the case. Although there may be copyright policies and procedures in place to meet legal obligations to prevent and rectify unlawful use of copyright material (for example, regulations regarding plagiarism by students) and that are directed at promoting a positive, ethical, and copyright compliant culture, as well as procedures established for the use of all works in the library's collection that will ensure copyright compliance, if staff and students are actually not using the library, further steps may need to be taken. For example, where there are computers, photocopiers, scanners, and printers for users to download, print, scan, or copy copyright material, copyright compliance should be encouraged by providing information on copyright by means of prominent notices at these locations (Moore 2010).

Although there is copy protection for software and the digitalization of content, there are also numerous override programs available for download or purchase by computer users. Indeed, many business end users have reacted so negatively against copy protection that software publishers have been forced to unprotect unsold software and to offer registered holders' unprotected copies in return for protected ones. As a result, software publishers are often frustrated in their efforts to commercialize intellectual property for the use of public domain, freeware, and shareware industry. The distribution of free software goes against the commercialization of intellectual property once it leaves the head of the creator, reverts immediately and by definition to the public domain. There is also the view that compensation of the author should be voluntary on the part of the end user. The sheer force of practice appears to be overwhelming the software field, so great is the number of public domain programs available via hundreds if not thousands of digital contents. If the current trends continue, this will lead to software not being purchased or licensed, in much the same way that original copies of books are not getting sold in the market because of illegal copies (Geist 2010).

Methodology

This paper is written on the basis of the survey conducted at the Fiji National University among its students. Two hundred and fifty-one questionnaires were circulated to students at two main locations: Suva and Lautoka campus in Fiji. The questionnaire had four main components, which required the students to address their attitudes toward, first, general access to the Internet and downloading capacities; second, the information found on the Internet; third, the freely available digital information on the Internet; and, finally, the digital content on the Internet and how it is used when students pay for the content.

Out of 251 questionnaires collected, fifty-one questionnaires were discarded because they were incomplete. The remaining sample of 200 questionnaires was used to generalize the analysis for the use of digital content and the use of Information Communication Technology (ICT) facilities at the local university and to evaluate copyright use and infringements. The Statistical Package for Social Science (SPSS) was used to analyze the data.

Analysis and Discussion

The full analysis is based on 200 questionnaires. The students who responded ranged from certificate, diploma, and bachelor level students from Suva

and Lautoka campuses. Forty-three percent of the students were first year or new to the tertiary education system. The remaining 57 percent were a combination of second and third year students. The responses to the questions asked are indicated below.

General Use of ICT on Campus

The use of the Internet on campus either in the computer laboratories or via use of personal laptops of students revealed that 88 percent of students have access to the Internet, while 12 percent of the 200 said they did not have access to the Internet. The reason for the 12 percent without Internet access could be linked to fewer interactions in the computer labs—where Internet access is always available, or the use of personal laptops on campus without Internet connectivity.

The main use of ICT facilities and in particular the use of software or downloads from the Internet was predominantly done at home: 46 percent of respondents indicated that they preferred home for such activities. Another 9 percent did the same from business or the workplace, but 46 percent also used other places such as university library, campus computer laboratories, and Internet cafes.

The different type of software enquires made by the sample varied. The following were given as the types of software being accessed:

1. Business applications such as accounting packages, email systems, and office suites were downloaded by 42 percent of respondents.
2. Games and entertainment from the Internet for home and personal use were downloaded by 40 percent of respondents
3. Material for home studies and education, research, and assignments were downloaded by 30 percent of respondents.
4. Programs for personal use and productivity such as budget and money management, horoscope, chatting, calculation of tax, and other purposes accounted for 11 percent.
5. Finally, utilities such as downloading the antivirus, system utilities files, open source software, and others for a laptop or personal computer (PC), accounted for 58 percent of downloads.

The respondents had options to select more than one category of download, and most respondents indicated two or more options, so there is some overlap in these percentages.

While using the Internet, 17 percent of users stated that they were able to electronically purchase software that was license protected, 23 percent

opted for limited use of license, 37 percent went for the chats on the Internet, 16 percent for file downloading, and 26 percent depended on emails from others with downloads. Of all these methods of acquiring software, there were 29 percent or more respondents communicating with and getting the software from the distributors or retailers and application service providers rather than getting software from software publishers. Only 22 percent and 19 percent were actually buying online.

Thirty-seven percent of respondents indicated that within a time period of two years they downloaded between one and five downloads. Twenty-eight percent indicated that they only downloaded once or not at all in the same period, 20 percent indicted between five and twenty-five downloads, and 14 percent more than twenty-five. Asked to indicate how long ago prior to the questionnaire the acquisition of software was, 84 percent recorded this as being between the last ten days and a month, while 16 percent responded two years.

The primary use of the software declared by 78 percent was for personal use, 18 percent was for professional use, and 2 percent of use was for file swapping or trading. The other 2 percent did not specify their reasons. Thirty-seven percent of respondents used software for redistribution, while 63 percent did not redistribute software. The amount of redistribution among this 37 percent was one to five times for 53 percent of this group and once only for 28 percent, while more than five times accounted for 19 percent. Those who indicated that they did redistribute software indicated that they had mostly done this recently, within the previous ten days to the last month: 85 percent. Of this recent redistribution activity, this was mainly for copies of CDs and email copies: 53 percent of the group. Others purposes were significantly less, with approximately 8 percent each for chat, file downloads, using personal digital assistants, peer-to-peer transfers, or posting on Web sites.

ICT Use Evaluation

All students at the university are given the freedom of use of ICT facilities available on campus and to students at home. The responses from students also indicated that the students proceeding from secondary to tertiary level, or already at university and progressing through their studies, exercised choices on how to use the Internet and what to download, and these choices were freely expressed. It was also apparent that the students preferred not to buy online but to evaluate their options of getting the software from distributors. The survey reveals that 14 percent of the students also

download quite extensively, with more than twenty-five downloads in the most recent period of the last ten days to last month.

The fact that 63 percent of the students indicated that they do not distribute downloads to which they have access suggests that students may be mindful of the use of downloaded material. The redistribution is significantly lower here.

Attitude of Copyright Effect on Students

The analysis is shown in Table 1.

Asked to express their views on the application of copyright restrictions to material on the Internet, a number of different views were expressed by the sample. The suggestion that all the information provided on the Internet should be totally free was strongly supported by 55 percent of the students. The downloading of information from Web sites that are available only by subscription was strongly supported by 34 percent and somewhat agreed to by 36 percent of students. Fifty-three percent of the students strongly agreed with the proposal that they did not knowingly violate the copyright laws, and 52 percent strongly agree that information on the Internet should be copyrighted as the property of the author and sources.

Seventy-six percent of students strongly agreed or somewhat agreed that it is okay to share printed material such as that in magazines and newspapers even if the subscription is only paid by one person. Forty eight percent of students strongly agreed that they should never share downloaded software without proper licenses while 27 percent of the students strongly agreed that sharing of the above mentioned on the Internet would not hurt anyone. Thirty percent also agreed generally that they changed dates of their PCs for using software against the expiration of the software license. A large percentage (79 percent) also agreed or somewhat agreed that newsworthy articles should be free and freely accessible. Sharing information from the Internet with friends and family was supported by 59 percent.

There is some negativity about software being expensive, which was seen to justify sharing, and similarly that when software gets outdated it can be expensive to acquire new versions. This approach is supported by the fact that 75 percent of students preferred to just borrow the downloaded material for short term use. Another 55 percent thought that most subscribed sites online were not worth the cost.

That there should be stricter regulations to protect copyright was a proposal with which 77 percent of the students agreed generally. Approximately 55 percent thought that information should be sold just like any other

TABLE 1. **Attitudes toward Copyright Expressed in Percentages.**

	Strongly Agree	Somewhat Agree	Neither Agree/ Disagree	Somewhat Disagree	Strongly Disagree
Info free on Internet	55	26	6	8	5
Not violate copyright law	53	21	12	6	8
Ok to share downloaded info	34	36	11	8	11
Internet info should be copyrighted	52	25	11	5	7
Ok to share printed material	37	39	12	5	7
Never share downloaded software	48	25	13	7	7
Expensive software so share	44	28	13	6	9
Quickly out-dated software so share	31	35	14	9	11
Share software won't hurt anyone	27	22	20	17	14
Short term purpose, borrow software	42	33	12	6	7
Subscription based site: not worth it	29	26	23	13	9
Online and normal subscription is no different	24	37	18	9	12
Info not to be shared on Internet	30	22	22	11	15
Copied CD borrowed	24	30	15	15	16
Stricter regulation for Internet copyright	44	33	10	6	7
Changed date to use expired software	15	15	17	14	39
No fees for Internet of print material	43	36	8	6	7
Info should be sold like any other material	28	28	25	10	9
Internet users violate copy right laws at some time	43	26	12	7	12
Copy/share info off Internet is ok	23	31	21	9	16
Copyright should not be applied to anything on Internet	19	20	23	11	27

product online. Sixty-nine percent also agreed generally that there is always a violation of copyright laws at some point in time while online. Finally, there were 38 percent who generally disagreed that anything found on the Internet should be copyrighted.

Free Digital Content

Most of the students have free access to digital contents from home. Only 30 percent do not have access to free digital content. This free information is accessed, downloaded, and redistributed.

The primary recipients of this redistribution are mostly the friends and family of students. Only 15 percent is used for business and colleagues and the rest, 85 percent, is redistributed knowing where the software is being sent to. The type of information that is being shared here is in the form of Web site addresses, uniform resource locators, or links. The amount of copying of digitalized material ranged from 29 percent admitting that a small portion was copied; 30 percent acknowledging that they copied a substantial amount; and 34 percent of students admitting to posting entire documents to peer to peer.

Paid Digital Contents

Thirty percent of the students indicated that they use digital content for which they pay, having subscribed to the Web site, and that they are paying for the access. However, out of the total sample 54 percent still do not have paid digital content. For those with access to paid content, this was not accessed daily and but more usually once a week (38 percent) or infrequently (30 percent). Whether the digital content providers allows or does not allow redistribution is not clear among the students, since 66 percent responded "don't know."

The distribution pattern for paid digital content is very similar to the distribution of free content; hence students tend to redistribute more to friends and family, and in such cases may be sending full documents. There seems to be lower awareness of students toward copyright issues here because when they receive copies from others, recipient students opted not to subscribe or get their own copy themselves. This represented 30 percent of respondents. However, approximately 22 percent of the students are able to understand that licenses and terms and conditions can prioritize purchasing of copyrighted work effectively.

Conclusion

From the analysis done using the sample of undergraduate students from Fiji National University, 72 percent of the students agreed that they should not violate copyright laws. The responses indicated that the majority of the students are aware of the copyright terms and conditions. Nevertheless, this

study reveals that for reasons beyond their control, for example, the cost of most licensed software material, which is expensive for the average student, most students tend to infringe on copyright laws, mostly by using borrowed downloaded material.

Also the research shows that 77 percent of students from the undergraduate sample taken agreed that there should be stricter regulations to protect copyright material, which indicates that their level of awareness about the copyright laws is fairly high.

Despite a high awareness of copyright and a general support for copyright protection, the majority of these undergraduate students infringe copyright laws due to the high cost of original, licensed, learning resources plus the scarcity of these. It is therefore very important that university libraries play an important role in this matter to provide the students with the learning resources they need.

It is recommended that libraries can comply with the country's copyright laws and allow undergraduates to access learning resources. Libraries can set out the copyright guidelines that users, either staff or undergraduates, should comply with when they use the library resources through their Web sites. For example, you can access the Fiji National University library copyright terms and conditions through the Web site link.

Computers make it possible to reproduce protected copyrighted material digitally and transmit it to and from anywhere in the world using the common networks, very fast. The Digital Millennium Copyright Act provides specific laws in Australia to combat digital copyright infringements. However, in Fiji the law related to educational establishments and libraries on renting digital resources for educational purposes is governed by sections 73 and 74 of the Fiji Copyright Act of 1999.

It is also recommended that all this information should be disseminated to students when they enroll at university in order to avoid violations of copyright terms and conditions. The corporate and private sectors are very mindful of the way copyright laws are violated in Fiji. For example, the Web site of Vodafone Fiji[3] is used to communicate the terms and conditions to its customers, who have to register with the website.

NOTES

1. For example, the local online newspaper link is http://www.fijitimes.com.

2. Copyright Issues in Digital Media: August 2004.

3. The Vodafone Fiji website link for the Terms and Conditions: http://www.vodafone.com.fj/pages.cfm/general/terms-conditions.html.

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REGULATION OF ACCESS TO GENETIC RESOURCES AND ASSOCIATED TRADITIONAL KNOWLEDGE: APPROACHES AND CHALLENGES IN THE SOUTH PACIFIC

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Regulatory frameworks regarding access to genetic resources and associated traditional knowledge (TK) with access and fair and equitable benefit sharing (ABS) are of international significance because of their social, economic, and cultural implications for local communities in general and the South Pacific countries in particular. This has led to development of an international regime specifically addressing ABS and to regional and national initiatives in countries including Vanuatu. The main aim of this paper is to examine the current position of regulatory frameworks that address the issue of access to genetic resources and associated TK in Vanuatu. This paper will highlight approaches taken in Vanuatu, examine strengths and weaknesses of the legal and administrative framework, and provide recommendations for the future.

Introduction

THE SOUTH PACIFIC REGION comprises small island countries with indigenous populations. Reliance of South Pacific societies upon biological diversity and its components for economic and sociocultural use is evident. For example, Regenvanu argues that 80 percent of the population in Vanuatu "satisfies most of their food and other requirements from their ancestral land and seas, using traditional methods of agriculture and other forms of resource utilization and conservation."[1] In addition, one of the most recent surveys of the area, conducted by Bradacs, Heilmann, and

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Weckerle, suggests that there are many different types of medicinal traditional knowledge (TK) used by specialists, including people of high rank in the local social system, and such knowledge is also widely used by villagers throughout Vanuatu.[2] It is also evident that there is an unbreakable link between genetic resources (GR) and associated TK on the one hand, and local social, economic, and legal systems—such as traditional leadership and customary law and procedure—on the other.[3] However, the majority of South Pacific countries are developing countries, and some of them are least developed countries. As Techera has said, these countries encounter a number of challenges such as "pressure from the process of globalization and modernization, as well as population growth, development and environmental development."[4] In addressing these challenges, it has been acknowledged that the empowerment of indigenous and local communities is essential for conservation and sustainable use of biological diversity[5] and also for sustainable development of the South Pacific countries. In particular, a number of studies show that empowerment and involvement of such groups has led to success in the management of natural resources while improving the livelihood of such groups.[6] It follows, in relation to the control of the exploitation of biological resources, including genetic resources and associated TK, that if indigenous and local communities are involved and benefits are shared in an equitable way, sustainable use of such resources may be achieved.[7] Therefore, regulation of access to GR and associated TK with access and fair and equitable benefit sharing (ABS) is of international significance, having particular social, economic, and cultural implications for South Pacific countries and their local communities.

The international regime on the sharing of benefits arising from the use of genetic resources and associated TK established by the Convention on Biological Diversity 1992 (CBD)[8] has entered a new phase, namely, that of domestic implementation, as a result of the recent adoption of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity 2010 (Nagoya Protocol).[9] Despite this, it remains an elusive task for contracting parties to the convention to identify an effective legal strategy for implementing ABS at the regional and national levels.

The focus of this paper is the regulation of access to genetic resources and associated TK in Vanuatu, and the role that legislation and other regulatory frameworks play in ensuring the empowerment and involvement of the indigenous and local communities concerned. Key regulatory gaps and challenges will be addressed, and recommendations will be made for the future.

Legal, Policy, and Administrative Framework

Vanuatu has ratified the CBD and has signed the Nagoya Protocol. The CBD has three aims: conservation of biodiversity, sustainable use of its components, and fair and equitable sharing of benefits arising from the use of genetic resources.[10] In relation to the third aim, the convention provides a conceptual framework, as well as basic rights and duties for states, for addressing how access to genetic resources and TK is regulated and how benefits resulting from the use of such resources can be shared between the resource providers and resource users. The CBD affirms the sovereign right of a state over its natural resources and specifies the authority of a state to regulate access to genetic resources.[11] It addresses the basic obligation of a state in relation to access, which is based upon the intention of linking the ABS system and the first two goals of the convention.[12] It also provides that access to genetic resources is given with the prior informed consent of the party providing the genetic resources,[13] through its competent national authority(ies), unless otherwise determined by that party.[14] Further, once prior informed consent is granted, the CBD provides that access is upon mutually agreed terms between the party providing genetic resources and the prospective user of the resources.[15] The convention further draws attention to benefit sharing and it states that benefit sharing arising from the use of genetic resources must be upon mutually agreed terms.[16] Ratification of the convention certainly led to development of legislative and policy frameworks in Vanuatu. Vanuatu has a legislative framework that regulates access to genetic resources and associated TK. In addition, regulations related to intellectual property and a new law that addresses TK in particular have been developed, including regulations pertaining to access to TK with equitable benefit sharing.

Vanuatu signed the Nagoya Protocol in November 2011. Going beyond the CBD, the protocol establishes an obligation on the contracting parties to adopt measures to ensure prior informed consent and the involvement of indigenous and local communities in order to grant access to genetic resources with fair and equitable benefit sharing.[17] Although such measures are needed where indigenous and local communities have an "established right" to control access under domestic law, we need to see how each contracting party interprets the provision that deals with collective indigenous rights including rights to self-determination and natural resources.[18] Further, as well as providing a conceptual framework concerning ABS regarding TK[19] associated with genetic resources, the protocol gives details of states' duties to implement ABS in relation to access to such knowledge. In particular, it obliges states to implement ABS, through national legislation,

policy, and administrative frameworks, in a way that does not conflict with the customary norms and governance system of such groups.[20] The ambit of the obligations encompasses also, inter alia, duties to establish a mechanism in order to inform prospective users of TK of their obligations,[21] a community protocol, minimum requirements for mutually agreed terms, and model contractual clauses for fair and equitable benefit sharing in order to assist indigenous and local communities in their participation in the implementation of ABS.[22] Another notable feature of the protocol is the specific emphasis upon compliance with the ABS regulations regarding genetic resources and associated TK.[23] Clearly, the absence of a monitoring requirement for compliance with ABS regulations in relation to TK is the one of the most notable limitations in the protocol, one which "might constitute an omission with far-reaching consequences."[24] However, contracting parties need to take "appropriate, effective, and proportionate legislative, administrative or policy measures" to ensure that, if such resources are used within their jurisdiction, they are accessed in accordance with the legislative and regulatory requirements of the party providing such knowledge.[25] This obligation clearly rests on the fact that it is the protocol's aim to "further support the effective implementation" of ABS provisions,[26] which reflects the absence of compliance measures in many countries to date.[27] Awareness raising and capacity building for local communities are equally essential in ensuring the implementation of ABS regarding TK, and these aspects are also addressed by the protocol.[28]

At the domestic level in Vanuatu, the National Biodiversity Strategy and Action Plan (NBSAP),[29] funded by Global Environmental Facility, was published in 1999 to fulfill the requirement under the CBD. One of the most significant features of the NBSAP is its specific focus on community-centered approaches to the sustainable management of biological diversity, including cooperation with the government and the provinces. The NBSAP was later followed by the NBSAP Add-on Project (NBSAP Phase II).[30] NBSAP Phase II identified capacity-building needs within four thematic areas: scientific capacity, functional biodiversity management capacity, indigenous knowledge, and financial and institutional capacity.[31] Establishment of a National Scientific Research Council, an institutional body to coordinate scientific research involving genetic resources and TK, was also a priority of NBSAP Phase II.

In relation to the Nagoya Protocol requirements, Vanuatu designated the Department of Environmental Protection and Conservation (DEPC), in the Ministry of Lands and Natural Resources, as a national focal point for ABS. This department will report to the Secretariat of the CBD on issues relating to the implementation of ABS. If the protocol enters into

force, this will facilitate communication and information sharing, as well as accumulation of experiences at an international level.

As well as the direct implementation of ABS as examined above, it is evident that Vanuatu has made an effort to provide legislation that covers key issues involving access to genetic resources and associated TK. The Environmental Management and Conservation Act 2002 [Cap 283], establishes a basic framework for ABS regulations in Vanuatu. The act was amended in 2011 and is currently known as the Environmental Protection and Conservation Act 2011 [Cap 283] (EPCA).[32] The EPCA establishes a Biodiversity Advisory Committee,[33] which comprises the director of DEPC and an additional five members approved by the minister.[34] The mandate of the committee includes any matters that are relevant to the implementation of the CBD, and in particular matters relating to the commercial exploitation of genetic resources and associated TK.[35] As well as the establishment of such a body, the act establishes a permit system through which access to TK associated with genetic resources is granted. This system comprises an access application to the director of the DEPC,[36] a legally binding and enforceable contract between an access applicant on one hand and landowners or TK owners on the other,[37] and access permission from the Biodiversity Advisory Council.[38] Additionally, the payment of a bioprospecting information bond is a new requirement under the EPCA in relation to regulation of access to resources. The access applicant needs to pay an application fee of 50,000 Vatu and a bioprospecting information bond of 100,000 Vatu to the DEPC.[39] The main purpose of the bioprospecting information bond is to ensure that all information gathered by access to resources and associated TK is provided to the director of the DEPC.[40] Last and most important, a benefit-sharing agreement with the relevant local communities is a core element of ABS regulation under the act, and no access permit will be granted unless the contract is concluded at the local level.

The Fisheries Act 2005 [Cap 315] provides a framework through which access to marine species is regulated. This includes, inter alia, regulations of scientific research conducted in marine areas within the jurisdiction of Vanuatu,[41] access to resources within marine reserves[42] and protection of marine mammals.[43] However, steps to obtain permission at a domestic level are too general and are less precise than those in the EPCA considered above. As observed above, regulations under the EPCA make it clear that those who wish to access genetic resources and TK must proceed by obtaining a permit and following the regulations that set out the process by which a permit is granted. What is notable about the regulatory framework under the Fisheries Act is that conditions for access to marine species are largely

at the discretion of the director of the Department of Fisheries. Clearly, these regulations are not consistent with the requirements of the Nagoya Protocol. The protocol requires that ABS regulation must provide for "legal certainty, clarity, and transparency," "information on how to apply for prior informed consent," and "clear rules and procedures upon which mutually agreed terms are required and established." While it remains to be seen how the criteria in the protocol can be objectively assessed, it is evident that the regulations under the Fisheries Act are less precise and that the criteria for obtaining authorization for access to marine species remain elusive when compared with those of the EPCA. Provisions in the Fisheries Act may add to the conservation and sustainable management of marine species, but, as discussed below, the division of rules between two pieces of legislation has contributed to regulatory inconsistency in how ABS is addressed.

The Patents Act 2003 addresses, among other things, a key issue of ABS, namely, compliance of regulations for access to TK associated with genetic resources. The statute follows a western intellectual property law model.[44] Yet it provides that a patent that is "based on, arose out of, or incorporates elements of"[45] TK will only be granted if there is compliance with ABS, and that, in particular, there is prior informed consent and a benefit-sharing agreement with the custom owner(s) of such knowledge. Further, the act provides that where the custom owner cannot be identified, or ownership is in dispute, the National Council of Chiefs must enter into a benefit-sharing agreement with the patent applicant.[46] Apart from the Patents Act, there is to be a separate piece of legislation solely concerned with the protection of TK. The Draft TK Bill will, for example, include a register of TK, and anyone wishing to use this knowledge will need to pay compensation to the owner of the knowledge.[47] It is also hoped that the Draft TK Bill will complement the intellectual property legislation referred to above.[48] Notwithstanding, the legislation, if enacted, may present further difficult challenges, namely, the identification of the legitimate owners of genetic resources and associated TK who are to retain control over access to such resources and to receive benefits from their use. The legislation considered above is tacit on how to identify the owner of a particular piece of TK. Concerns will arise where TK is transmitted over generations among communities, or where the same knowledge is held by more than one community. This concern has been addressed by Forsyth, and it is likely to remain a complex issue.[49]

The Vanuatu Cultural Research Policy (VCRP) provides a permit system through which access to TK is regulated and through which benefits from the use of such knowledge is shared with the local communities concerned. The Vanuatu National Cultural Council (VNCC) is responsible for the

research permit system. The members of the council include the director of Vanuatu Cultural Centre (VCC), president of the National Council of Chief (*Malvatumauri*), a member of the Public Service Commission, a representative from the National Council of Women, as well as a senior employee from VCC. The VCRP applies to cultural research involving *kastom*, which is "indigenous knowledge and practice and the ways it is expressed and manifested."[50] The focus of the VCRP is not research activities involving genetic resources and associated TK, which is where the issue of ABS under the CBD and the Nagoya Protocol arises. However, it is a responsibility of the VNCC to assist in regulating access to genetic resources and associated TK, where there is a risk of these being exploited in a way that violates the rights of local communities, inter alia, the right to be involved in the obtaining of prior informed consent and benefit sharing. In relation to this responsibility, a concern arises to ensure the adequate monitoring of activities of approved researchers. Approved researchers may collect samples of genetic resources and associated TK without the VNCC's knowledge or permission in remote islands in Vanuatu. In addition, Vanuatu has a limited provision for the infrastructure that is essential for the biochemical screening of collected materials. Consequently, research activities involving genetic resources and associated TK often can be undertaken outside of Vanuatu. Therefore, the prominent challenge for the VCRP is the incapacity of the VNCC and the VCC based in the capital (Port Vila) to monitor the activities of approved researchers undertaking research once this is carried out in the remote islands and when overseas.[51] Yet one of the most notable features of the VCRP is its collaborative and cooperative approach, which involves relevant communities, volunteer field workers, researchers, and the VCC in research activities involving TK. Arguably, experience and networks gained through the VCRP could provide valuable lessons for the regulation of access to genetic resources and associated TK within the context of the CBD and the Nagoya Protocol.

Regulatory Gaps and Challenges

Drawing upon this analysis, it is evident that Vanuatu has made significant advances in developing a comprehensive regulatory framework. However, some concerns remain in order to effectively regulate access to these resources and to prevent misappropriation of genetic resources and associated TK. The major challenges in Vanuatu can be described in the following three ways: overcoming some inconsistencies between regulatory frameworks; ensuring improved coordination among the relevant government departments and institutions; and encouraging the participation of stakeholders, particularly at the local level.

It is clear that the current legislative framework regulating access to genetic resources and associated TK in Vanuatu operates on a sectorial basis. For example, the Fishery Department regulates access to marine genetic resources under the Fisheries Act, whereas access to TK is regulated by the VNCC under the VCRP. Access regulation under different regulatory standards can lead to different outcomes in various sectors. Furthermore, the ABS regime in place in Vanuatu is drafted in broad terms and backed by different policy goals. In some cases, regulation of access to genetic resources and TK has been undertaken outside the EPCA regulations. Therefore, this could lead to divergent interpretations of internationally described terms in ABS, and inconsistency in the regulation and mandate of competent authorities unless the law and/or the policies are harmonized through a common understanding among different government agencies.

Apart from legislation, the important lesson to be learned from the implementation of the VCRP is that a regulatory framework for access to genetic resources and TK will not be effective without an institutional body to implement it. In Vanuatu, there are a number of government departments that are currently regulating access to genetic resources and associated TK. As discussed, the DEPC is regarded as the principal government agency for implementing the domestic ABS regime in light of the requirements of the CBD, with the Department of Trade primarily concerned with compliance of prior informed consent and benefit sharing, the Fisheries Department having a basic legislative framework, and other departments—such as the Forestry Department or Quarantine Services—having no clear regulatory standard or institutional arrangements for regulating access to genetic resources and associated TK. This leads to different views on the transactions concerning such resources and knowledge that are subject to ABS.

Law and policy makers in Vanuatu have recognized the needs for the coordination at the administrative level. In 2001, the Council of Ministers endorsed the establishment of a National Scientific Research Council, and the establishment of such a body clearly draws on the experience of research coordination under the VCRP.[52] However, resourcing is a critical challenge to functional operations of such a body. Mainly because of a lack of funding and institutional incapacity, the National Scientific Research Council has not been operationalized yet. For the same reason, the Biodiversity Advisory Committee under the EPCA has not been established. Related concern includes a lack of common understanding of the issues both at the national and the local level, which certainly undermines the effort toward coordination and collaboration among government bodies.[53] Different levels of

awareness across Vanuatu certainly undermine the efforts toward coordination and collaboration between the relevant government departments and institutions: for example, some are mindful about unilateral exploitation of genetic resources and associated TK that undermines communities' control, whereas others are more conscious of the promotion of research activities involving such resources.

Establishment of comprehensive ABS regulations and a system for ABS administration is not an easy task and may not be a feasible goal within a short period of time. Of course, as a common understanding grows among different government agencies and there is more international support, improved cooperation might be expected with a better exchange of information and better regulation of access to genetic resources and TK associated with genetic resources. Yet, until that time, it is necessary for Vanuatu to identify the roles and responsibilities of relevant government departments and institutions, in order to examine how coordination and collaboration on regulation of access can be carried out in the future. The establishment of the Biodiversity Advisory Council and National Scientific Research Council should remain a priority to assist in promoting and harmonizing coordination among relevant government departments.

Despite the significant efforts being made, in light of requirements of the CBD and the Nagoya Protocol, Vanuatu needs to identify the most effective regulatory options for achieving the conservation and sustainable use of genetic resources and associated TK with equitable benefit sharing. Regulatory frameworks involving the regulation of access to genetic resources and associated TK have led to many difficulties for law and policy makers because of the multifaceted nature of the issue: the environment, intellectual property, and collective rights of traditional communities are all involved. At the international level, a major effort to address legal strategy in relation to access to genetic resources and associated TK has been undertaken at the CBD, World Intellectual Property Organization (WIPO), and United Nations (UN) Food and Agriculture Organization. At the regional level, the Secretariat of the Pacific Regional Environmental Programme (SPREP) and Melanesian Spearhead Group (MSG) have developed regional regulatory instruments in this area. The Pacific Islands Forum Secretariat, in cooperation with the Secretariat of the Pacific Community, SPREP, and WIPO, developed and led the implementation of the Traditional Knowledge Action Plan in 2009. The main aim of this Action Plan is to provide technical assistance in the development of national systems for the protection of TK that, among other things, address key issues such as the regulation of access to TK associated with genetic resources. Importantly, Vanuatu is one of six beneficiary countries in a pilot program under the Action Plan.

It is evident that legal instruments developed by SPREP and MSG provide a useful framework for the development of a national regulatory framework and reflect the region's specific concerns. Notwithstanding, the implementation of any legislative or other type of framework that regulates access to genetic resources and associated TK must ensure that all stakeholders, particularly at the local level, are involved. As discussed, the Environmental Conservation and Protection Act has clearly provide a framework supporting the involvement of local communities in regulating access to resources. As seen, for example, in the requirement of prior informed consent at the local level, which has been suggested as a part of customary international law,[54] and is a core element of both international and national ABS regime. However, some issues needs to be addressed in this area, such as the establishment of PIC procedures as well as using different types of regulatory options, including, inter alia, customary law, community protocols, and traditional governance systems.[55] Customary law plays a central role, in particular, for access to TK,[56] and the Nagoya Protocol establishes clear obligations to take it into account in implementing ABS. Prior informed consent procedures and the use of customary law and community procedures certainly enhance the participation to access, control, and benefit sharing of communities. Clearly, it remains to be seen how and to what extent customary law can be used in relation to access to genetic resources and TK in Vanuatu. Vanuatu could learn, in this regard, from the experience of other countries and regions. For example, the Secretariat of the CBD has developed a database of ABS measures showing the legal, policy, and administrative approaches taken in different countries and regions.[57] Further, the UN Environment Programme (UNEP) has developed a database of community protocols, and this experience from other countries could contain valuable implications for the regulatory approaches taken by Vanuatu.[58]

Apart from legal, policy, and administrative frameworks, it is necessary for Vanuatu to identify a policy strategy and approaches that integrate the issue of access to genetic resources and associated TK with the broad goals of the CBD and the Nagoya Protocol, namely, the conservation of biological diversity with sustainable use of its components. The interface of ABS and conservation has been clearly recognized by the Vanuatu government. It is noted by the DEPC that they will be considering ABS-related issues in the review of the NBSAP early in 2013, as well as their National Environment Policy that will be drafted in 2013.[59] It is also hoped that such a strategy is aligned with Vanuatu's national strategy for sustainable development, which covers environmental, economic, and social development. Clearly, it is important that the sharing of benefits resulting from genetic

resources and associated TK promotes the economic and social development of local communities and of the country as a whole, while also ensuring environmental sustainability. The need to integrate ABS into sustainable development is also relevant to a fundamental duty under the Vanuatu's Constitution.[60] Section 7(d) of the Constitution establishes a duty of every one to "safeguard the national wealth, resources and environment in the interests of the present generation and of future generations."

Conclusion

The focus of this research has been to identify the strengths and some weaknesses of law and other regulatory frameworks in Vanuatu for ABS. the current position of ABS regulation in Vanuatu is a pioneering attempt in the South Pacific region to achieve the international goal of fair and equitable benefit sharing in the use of genetic resources and associated TK. The legislation considered above addresses all key issues relating to access to genetic resources and TK, both benefit sharing and compliance. In legislation, particularly the EPCA, Vanuatu has opted for cooperative approaches, which, inter alia, address the involvement and participation of relevant local communities in regulating access to genetic resources and associated TK.

Although this paper identified some challenges, these are also recognized by officers in the Vanuatu government. Therefore, Vanuatu's approach to ABS should be warmly welcomed. Furthermore, experiences from Vanuatu contain valuable lessons for other South Pacific countries, as well as elsewhere in the world, in establishing a national strategy on ABS. Based upon the analysis above, set out below is a recommendation for Vanuatu to strengthen its legal regime for dealing with the complex challenges associated with ABS. Most importantly, it is preferable for the responsibility to implement ABS to fall under one office of government, in order to summarize key issues and concerns that need to be addressed to regulate access to genetic resources and associated TK. In this regard, the establishment and operation of the Biodiversity Advisory Committee and National Scientific Research Council should remain a priority to assist in promoting and harmonizing coordination among all relevant government departments. Only then will the future of Vanuatu's genetic diversity and associated TK be assured.

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FOOD SECURITY IN PACIFIC ISLAND COUNTRIES

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This paper considers the advantages, disadvantages, and challenges confronting the use of intellectual property regimes in the context of food security. While there has been some shift in agricultural practices, subsistence cultivation remains an important aspect of the daily lives of many Pacific Islanders and reflects traditions that for centuries have preserved biodiversity and provided a buffer against crops failures and food loss caused by natural disasters. Climate change, population growth, the cost of imported foods, and loss of traditional knowledge mean that many of these aspects of food security are under pressure. Intellectual property regimes which result in disease-resistant crops, higher yielding cultivars, and climate adapted livestock may provide a solution, but are often out of reach for Pacific Islanders. At the same time, traditional agricultural practices, cultivation knowledge, and a biodiversity of resources may be vulnerable to unprotected exploitation either by other Pacific Islanders or by outsiders.

WHILE MANY READERS will be familiar with the Pacific region, its geography, and its people, nevertheless just to give my paper some contemporary context I propose to draw attention to certain statistics that are relevant to the question of food security. What is understood by food security also needs to be clarified, as well as its particular significance to people of the region. The link between food security and intellectual property and innovation may not at first seem obvious, and indeed food security cannot or should not be seen as an isolated concern, but as integral to various other contemporary issues concerning Pacific Island countries (PICs), especially trade and development, climate change, and the movement of people.

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Once these issues are understood, then it is possible to look critically at the relationship between present and proposed intellectual property regimes and present and future food security. It is here that quite crucial questions arise about the dynamics of legal development and the power of various influences and players. It is only once these are recognized that proposals might be mooted that seek to balance pragmatism with idealism and suggest a way forward for Pacific Island nations on this area of national and international concern.

Some Statistical Context

Most of the countries in the Pacific islands region are among the least developed in the world according to the United Nations (UN) Human Development Index (HDI).[1] To give examples, out of 187 listed countries, the rankings of Pacific Island countries are indicated in Table 1.

The HDI report, "measures the average achievements in a country in three basic dimensions of human development: a long and healthy life, access to knowledge and a decent standard of living." The purpose of the data is to "highlight the very large gaps in well-being and life chances that continue to divide our interconnected world." In this context it should be noted that Australia is ranked second in the world and New Zealand fifth, illustrating the gaps referred to.[2]

Some Pacific Island countries, notably Samoa, Solomon Islands, Tuvalu, and Vanuatu, are also ranked among the world's forty-eight least developed countries (LDCs). That is, they are included among the world's poorest countries, which means that they are characterized by

> weak human and institutional capacities, low and unequally distributed income and scarcity of domestic financial resources. They often suffer from governance crisis, political instability and, in some cases, internal and external conflicts. Their largely agrarian economies are affected by a vicious cycle of low productivity and low investment. They rely on the export of few primary commodities as major source of export and fiscal earnings, which makes them highly vulnerable to external terms-of-trade shocks. . . . These constraints are responsible for insufficient domestic resource mobilization, low economic management capacity, weaknesses in programme design and implementation, chronic external deficits, high debt burdens and heavy dependence on external financing that have kept LDCs in a poverty trap.[3]

TABLE 1. **The Ranking of Pacific Island Countries out of 187 Listed Countries According to the United Nations Human Development Index (HDI).**

Country	UN HDI Ranking
Fiji	100
Vanuatu	125
Kiribati	122
Papua New Guinea	153
Solomon Islands	142
Federated States of Micronesia	116
Tonga	90
Samoa	99

Marshall Islands, Nauru, and Tuvalu not ranked in HDI.

Almost all Pacific Island countries are included in the UN's list of thirty-eight Small Island Developing States (SIDS).[4] Table 2 compares SIDS rankings with HDI rankings.

As pointed out by the UN Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries, and the Small Island Developing States (OHRLLS),

> SIDS tend to confront similar constraints in their sustainable development efforts, such as a narrow resource base depriving them of the benefits of economies of scale; small domestic markets

TABLE 2. **A Comparison of the UN SIDS Ranking with the HDI Rankings of Pacific Island Countries.**

Country	Rank among SIDS	UN HDI Rank out of 187 Countries
Tonga	17	90
Samoa	20	99
Fiji	21	100
Federated States of Micronesia	24	116
Kiribati	26	122
Vanuatu	27	125
Solomon Islands	29	142
Papua New Guinea	32	153

Marshall Islands, Nauru, and Tuvalu not ranked in HDI.
Table adapted from http://www.unohrlls.org/UserFiles/SIDS%20HDI%20RANKING.pdf.

> and heavy dependence on a few external and remote markets; high costs for energy, infrastructure, transportation, communication and servicing; long distances from export markets and import resources; low and irregular international traffic volumes; little resilience to natural disasters; growing populations; high volatility of economic growth; limited opportunities for the private sector and a proportionately large reliance of their economies on their public sector; and fragile natural environments.[5]

The above statistics underpin many of the issues that inform the aid/trade and development debate in the region, but for the purposes of this paper two further dimensions need to be factored in: poverty and climate change.

Traditionally it has been thought that the informal subsistence economies of the Pacific Islands have kept poverty at bay.[6] However, this is no longer the case,[7] and while some areas of countries may be better off than others, or some countries may be better off than others, poverty is on the increase. While it has been recognized that "Poverty in the Pacific may not be as visible or as extreme as in some of the harshest parts of the world"[8] and that some caution may need to be exercised when applying poverty calculi to the Pacific,[9] it is recognized that people in the region suffer from poverty measured by access to basic necessities, poverty of opportunity,[10] and what has been termed vulnerability poverty (see below).

Although only Vanuatu has been assessed according to the UN Development Programme (UNDP) Multidimensional Poverty Index (MPI), with research in 2007 indicating that around 30.1 percent of the population were in poverty,[11] in the Summit Report on Food Security in the Pacific, it was estimated that 2.7 million (out of an approximate 10 million people in the Pacific) were in poverty.[12] Increased prices of imported foodstuffs and fuel—affecting cooking and transport of foodstuffs—has a proportionately higher impact on these countries than on more affluent ones.[13] Moreover, higher food prices have cascading effects on development across the board, leading to regressions in standards of education and health.[14]

Other evidence of growing food poverty is the fact that it is now considered unlikely that many Pacific Island countries will meet Millennium Development poverty alleviation goals (MDGs). The Pacific Forum has noted that "the Pacific faces the highest levels of vulnerability, with very low coping capacity and resilience to the endogenous and exogenous shocks that has adversely impacted Pacific communities in recent years. As a result, the Pacific region runs the very high risk of not achieving the MDGs."[15]

Similarly the Asian Development Bank's 2011 report found that "The Pacific region as a whole is unlikely to achieve the target of halving the proportion of people living in extreme poverty (Millennium Development Goal 1, Target 1a) by 2015."[16]

Indeed it has been pointed out by organizations such as Oxfam (New Zealand) that World Trade Organization (WTO) accession is likely to aggravate poverty in the region, because of the inequality of bargaining power that PICs face and the consequential loss of ability to promote local business opportunities for local people, loss of ability to protect local economies from foreign exchange crises, pressures for privatization and deregulation of services, the expense of meeting WTO commitments and concurrent loss of revenue to governments, the high probability of privatization of public services, and loss of sovereignty over trade-related matters.[17] Oxfam makes a clear connection between growing poverty and WTO, stating:

> Many Pacific Island countries are being pressured by rich countries through the World Trade Organisation to make commitments to further open their economies to foreign goods and services. This will mean Pacific governments will lose much-needed revenue to invest in basic services. They will also lose control over trade policies that will help them develop their economies and end poverty.[18]

In assessing population percentages living below the National Basic Needs Poverty Line,[19] Oxfam statistics indicate that this is 25 percent in Fiji, 20 percent in Samoa, 38 percent in Papua New Guinea, and 40 percent in Vanuatu.

Even in those countries that are not signed up to the WTO, there are food shortages, either because people cannot afford food or because they cannot grow it. This links to another form of poverty (mentioned above): vulnerability poverty, which means that Pacific Island countries and their people are

> vulnerable to circumstances such as natural disasters, national and international economic downturns, fluctuations in remittances and tourism, civil conflict and changes in international aid distribution. This kind of vulnerability highlights how poverty is not an absolute state but one that is related to circumstances.[20]

Crucial to these circumstances is climate change.

Climate Change

It has been pointed out by the UN Food and Agriculture Organization (FAO) in a briefing paper on Climate Change and Food Security in the Pacific (2009) that "Despite the fact that PICTs make negligible contributions to global greenhouse gas emissions rates (0.03 per cent), they find themselves—unfairly—facing the frontline of climate change impacts. Climate change seriously threatens ongoing regional development and the very existence of some low-lying atoll nations in the Pacific."[21]

Although not all Pacific islands are low-lying coral atolls, they are all subject to the effects of climate change, either because of salt-water inundation or because of the more frequent incidence of cyclones, irregular rainfall patterns, and changing temperatures.[22] They are also subject to natural hazards such as earthquakes, tsunamis, and volcanic eruptions.

The FAO has explicitly stated that

> Careful consideration must be given to the impact of climate change on food security, and building the resilience of the agriculture, fisheries and forestry sectors to safeguard food security in a time of multiple crises and risks.[23]

Climate change, in combination with other factors, is likely to have a significant adverse effect upon food security in the future, requiring changes in agricultural technology, such as the introduction of new species resilient to salinity, drought, and flood, and new techniques for food preservation to help populations through periods of natural disaster.[24] In 2009 the FAO held a Climate Change and Food Security in the Pacific meeting in Copenhagen to

> raise awareness of the imminent impacts of climate change on food security in Pacific island countries and territories and to urge participants to consider the importance of mainstreaming food security in climate-related policies, strategies and programmes.[25]

At national and regional levels there have been a number of initiatives to focus on climate change. For example, the Pacific Islands Framework for Action on Climate 2006–2015 established six basic principles.[26] Although there is reference in the framework to agriculture, there is no specific link made between climate change, food security, biodiversity, and intellectual property. Similarly, the Pacific Adaptation Climate Change Program, implemented by the Secretariat for the Pacific Regional Environment Program

(SPREP),[27] which includes among its three main programs food production and food security, makes no specific link between the regulatory environment and building capacity for adaptability to climate change, even though reference is made in national reports to the importance of maintaining biodiversity.[28]

The Meaning and Significance of Food Security in the Pacific

In defining food security, the World Health Organization (WHO) quotes the World Food Summit of 1996:

> "when all people at all times have access to sufficient, safe, nutritious food to maintain a healthy and active life." Commonly, the concept of food security is defined as including both physical and economic access to food that meets people's dietary needs as well as their food preferences.[29]

The Inter-American Institute for Cooperation on Agriculture (IICA) define it as

> the existence of the necessary conditions for human beings to have physical and economic access, in socially acceptable ways, to food that is safe, nutritious and in keeping with their cultural preferences, so as to meet their dietary needs and live productive and healthy lives,[30]

and the FAO defines food security as existing when

> all people, at all times, have physical and economic access to sufficient, safe and nutritious food that meets their dietary needs and food preferences for an active and healthy life.[31]

The WHO state that food security is based on three pillars: availability —sufficient quantities of food available on a consistent basis; access—having sufficient resources to obtain appropriate foods for a nutritious diet; and use—appropriate use based on knowledge of basic nutrition and care, as well as adequate water and sanitation. The WHO also draws a direct correlation between sustainable economic development issues and ill health due to malnutrition, environment, and trade.

The negative consequences of WTO accession, increasing urbanization and demographic changes, and climate change are therefore all factors that

influence actual or potential poverty in the region, but most fundamentally, as suggested by the UN Economic and Social Commission for Asia and the Pacific (ESCAP), "the most broadly used standard for measuring poverty in practice is likely to continue to be the adequate consumption of food and other essentials."[32] Food security is therefore crucial to the futures of Pacific Island people, and its importance is at last beginning to be realized in the region and highlighted in a number of initiatives.

The Pacific Islands Forum (PIF), the regional body representing all the island states, started to focus attention on food security in 2008, and in 2009 Ministers of Trade, Agriculture and Health endorsed the concept of a Pacific Food Summit. A Framework for Action on Food Security was developed and drafted between 2008 and 2010, and at the Inaugural Pacific Food Summit, held in 2010 in Vanuatu, it was recognized and agreed that

> In the Pacific . . . food security is being threatened by declines in traditional crop production, increased dependence on imported foods, growing vulnerability to climate change, overfishing and illegal fishing, volatility in international commodity prices, and failure to enact and enforce food safety and quality standards. Collectively, these and other threats hinder productivity, trade and development and contribute to greater risk of chronic diseases (such as type 2 diabetes and hypertension), vitamin and mineral deficiencies, child malnutrition and food-related diseases.[33]

It was recognized that one of the keys to food security was to promote, facilitate, and preserve the growing of indigenous food crops and to encourage the cultivation of varieties that would withstand climate change, pests, and disease while also offering a balanced diet. Biodiversity was seen as essential to food security in the region.

The Relationship between Present and Proposed Intellectual Property Regimes and Present and Future Food Security

While food security has made it on to the local agenda, as have concerns about traditional knowledge and indigenous intellectual property, there has been rather less connectivity made between trade, intellectual property, and food security. Indeed it seems to be generally ignored that the law (apart from legislation relating to food standards)[34] may be one of the "multiple" barriers to food security, or indeed one of the enabling factors.[35] This is partly because of the disjunction at government level between

different ministries and departments—for example, different ministries deal with agriculture and trade—and partly because of the failure to recognize that obligations incurred under trade treaties or international membership of WTO could have direct consequences on the future food security of the region.

A mixed intellectual property regime will affect all food security in PICs, especially patents and plant breeders' rights, but copyright, trademarks, and geographical indicator regulations may also be relevant to agricultural trade activities vital for earning the foreign income needed to meet demands on national budgets.

However, it is those countries that are members of the WTO that are most adversely affected because WTO membership requires trade-related aspects of intellectual property rights (TRIPS) compliant legislation, which encompasses (among other things) genetic resources and plant varieties. Member states may include plants and genetic resources within patent law or can exclude plants from patentability and put in place their own sui generis law or a combination of measures.[36] There is pressure, however, to sign up to the Union Internationale pour la Protection des Obtentions Végétales (UPOV).[37] UPOV protects the rights of plant breeders provided they develop plant varieties that are new, distinct, uniform, and stable (Article 5 (1)). Commercial plant breeders are likely to favor and support UPOV because its requirements are much easier to comply with than those of patent law, making it easier for commercial plant breeders to secure monopolies. By contrast, it is more difficult for farmers to bring their own plant varieties under UPOV protection because the UPOV requirements of demonstrating stability and uniformity present obstacles to varieties developed by farmers, since these tend to be variable and lacking uniformity.

The UPOV model is particularly unsuitable for the Pacific region. Not only are many food crops grown not from seed but from plant-stock propagation, but the possible exemptions are of little relevance. For example, the "farmers' rights" exception under Article 15 of the 1991 version of the UPOV convention, which permits states to restrict breeders' rights "in order to permit farmers to use for propagating purposes, on their own holdings, the product of the harvest which they have obtained by planting . . . the protected variety," does not extend to the sharing or exchange of propagating material; while the "research exemptions" that allow national legislation to make exceptions for "acts done privately and for non-commercial purposes [and] for experimental purposes" (Article 15(1)(i) and (ii)) are of little relevance to countries with minimal research and development capacity. The only exemption that could be of use is the public interest exemption.[38] However, resistance on the grounds of public interest based

on the need to protect farmers' rights, indigenous cultural practices, and respect for traditional knowledge, as well as to safeguard biodiversity and promote food security, needs strong political will and national and international support.

Although the UN Special Rapporteur on The Right to Food has observed that "No State should be forced to establish a regime for the protection of intellectual property rights which goes beyond the minimum requirements of the TRIPS Agreement" and has expressed the view that "free trade agreements obliging countries to join the 1991 UPOV Convention or to adopt UPOV-compliant legislation, therefore, are questionable,"[39] the reality is that without sufficient resources, or political power, PICs seeking membership of the WTO are likely to give in under pressure. Even where PICs are not seeking WTO membership, it is likely that within regional trade negotiations (for example, PACER Plus) those countries that are constrained by TRIPS and TRIPS Plus agreements will be likely to seek to extract the same commitment from trading partners, and further afield (for example, under European Union–Africa Caribbean Pacific agreements) it is likely that uneven playing fields and imbalances of negotiating power will result in UPOV or UPOV-type plant regimes, or the use of patent law.

Balancing Pragmatism and Idealism: A Way Forward for Pacific Island Nations

The use of nontraditional intellectual property regulations has two potentially negative consequences for food security in Pacific Island countries: the first is that these regulations effectively exclude Pacific Islands (along with other developing countries) from access to essential resources due to their protective and prohibitive features. The second is that traditional knowledge used to promote food security does not fall within the scope of these laws, with the consequence that either the food products of that knowledge are traded without appropriate acknowledgment going to those whose knowledge made their production possible or traditional knowledge is constrained within an unsuitable regulatory framework that undermines the value of such knowledge (for example, the principles of sharing; communal and intergenerational knowledge transfer rather than individual ownership; timelessness rather than fixed points in time for origin and expiry; and exchange instead of financial return). At the same time it has to be recognized that some traditional knowledge is being lost, just as biodiversity is being lost. Changing lifestyles, urbanization, and different forms of knowledge transmission all contribute to future food crises.

It seems clear however, that TRIPS Plus regulatory regimes do little to enhance food security in the region and, if complied with, seem likely the aggravate poverty rates. Unless Pacific Islanders can stand firm and negotiate alternative regimes, then it may be better to avoid legislation altogether. This would not necessarily mean that there is a food security vacuum. Not only are there traditional practices of encouraging biodiversity and the exchange of plant material, but there are also a number of national and regional initiatives that, if left unconstrained by western-style intellectual property laws, could ensure a brighter future for food security in the region. Among these are initiatives to secure germplasm or plant samples in "banks," and projects being developed by the Centre for Pacific Crops and Trees (CePACT) Programme to develop new plant species that are more resistant to climate change and to other problems affecting and depleting other food crops.[40] There are also national programs that could be adapted elsewhere, for example, the Kastom Gaden Association in Solomon Islands,[41] the Island Food Community of Pohnpei,[42] and renewed focus on kastom economy and island food in Vanuatu.[43] These projects have mixed aims and agendas but share an interest in promoting local foods through cultivation and use, and identify the need to conserve crop varieties and improve access to plant resources.[44] They also raise awareness about the loss of traditional knowledge and promote better diets.

The above initiatives are not always problem free, however. For example, the issue arises with gene banks as to who will control the release of "banked" material back into the community and how this will be regulated. Similarly, where private collections are developed for archival or research purposes, then it is unlikely that there will be free access to genetic stocks (an example is the national stock of breadfruit trees in Hawai'i's Botanical Gardens). Similarly, where new strains are developed as a result of research they are invariably not only located outside PICs but also funded by organizations that may expect to see a return on their investment and may not be able or willing to act purely altruistically toward PICs, for example the Centre for Legumes (CLIMA) at the University of Western Australia and the Australian Centre for International Agricultural Research at Australian National University.

It might also be possible for those PICs not yet yoked to UPOV or TRIPS Plus intellectual regimes to develop Pacific focused sui generis legislation looking at comparative models developed elsewhere in the developing world such as India and Africa,[45] or through giving greater attention to the interests of farmers and the national need for taking measures to ensure food security when interpreting the "public interest" exception under UPOV or similar trade-linked agreements that affect plant varieties and genetic resources.

Conclusion

The current intellectual property regimes that directly affect food security are shaped by and protect agricultural corporations in the developed world, notably those corporations that develop genetically modified crops, seeds, pesticides, and fertilizers. In particular the current regime divorces seed and plant development from farming or food growing. The funding mechanisms for research into climate change resistant food crops ignores the argument that the food resources of the world should belong to the global commons.[16] The focus on trade rather than welfare within the rhetoric of economic development has resulted in the uncoordinated development of national policies while the ongoing dependency on aid for most PICs has severely undermined autonomy in international interactions. There is, moreover, a danger that the rationale that informs western models of intellectual property will begin to shape the thinking of Pacific Island governments and individuals, so that excluding rather than sharing becomes the norm; claiming ownership and property rights over the outcomes of years of skill, knowledge, and labor may become more prevalent rather than the acknowledgment of communal and transgenerational contribution to present knowledge and biodiversity, and this is particularly likely to occur once financial incentives enter the picture.

The future of food security in the region is influenced by a number of factors operating together. Until this interconnectedness is recognized there is a danger that the combined risks to food security will not be adequately addressed. As a start, it is essential that this multidimensionality is acknowledged. Then more needs to be done to ascertain and publicize good practice in local initiatives so that others can see what could be done, if only at a local or microeconomic level. Governments considering trade treaties should consider the likely food security threats implicit in such agreements and take advice from agencies that have expertise in identifying likely adverse consequences such as WHO, Oxfam, and the UN Children's Fund (UNICEF). At a regional level, open access has to be negotiated and put in place, if necessary by ring-fencing certain food crop varieties, and aid donors should be encouraged to continue to support regional research initiatives offering free distribution of disease-resistant and pest-resistant crops. At an international level, there is scope for constructive dialogue with other developing countries facing similar dilemmas. Above all, perhaps, the words of the Special Rapporteur on Food Security should be borne in mind:

> The expansion of intellectual property rights can constitute an obstacle to the adoption of policies that encourage the maintenance of agrobiodiversity and reliance on farmers' varieties. Intellectual property rights reward and encourage standardization and homogeneity, when what should be rewarded is agrobiodiversity, particularly in the face of the emerging threat of climate change.[17]

NOTES

1. For the 2011 UN HDI rankings, see United Nations Development Programme (UNDP), *Human Development Reports*, accessed February 20, 2013, http://hdr.undp.org/en/statistics/; also see, the United Nations Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and the Small Island Developing States (UN-OHRLLS), "Least Developed Countries: About LDCs," accessed February 20, 2013, http://www.unohrlls.org/en/ldc/25/, and UN-OHRLLS, "Small Island Developing States: Country Profiles," accessed February 20, 2013, http://www.unohrlls.org/en/sids/44/.

2. UNDP, "Human Development Report 2011: Sustainability and Equity: A Better Future for All," accessed February 20, 2013, http://hdr.undp.org/en/reports/global/hdr2011/.

3. UN-OHRLLS, "Least Developed Countries: About LDCs."

4. Small Island Developing States (SIDS) were recognized as a distinct group of developing countries facing specific social, economic, and environmental vulnerabilities at the Rio Earth Summit in 1992. UN-OHRLLS, "Small Island Developing States: About SIDS," accessed February 20, 2013, http://www.unohrlls.org/en/sids/43/. They and other non-UN member states (for example Cook Islands and Nuie) are members of the Alliance of Small Island States (AOSIS).

5. UN-OHRLLS, "Small Island Developing States: About SIDS."

6. D. Abbott and S. Pollard, *Hardship and Poverty in the Pacific: A Summary* (Manila: Asian Development Bank, 2004).

7. In fact, poverty in the Pacific was identified some twelve years ago. In 2000 the Asian Development Bank (ADB) created a Poverty Reduction programme: Steve Pollard, "Poverty in the Pacific—A Forgotten Priority," Development Policy Blog, April 16, 2012, http://devpolicy.org/poverty-in-the-pacific-a-forgotten-priority/. See also ADB, *Hardship and Poverty in the Pacific*, and Marin Yari, "Beyond 'Subsistence Affluence': Poverty in Pacific Island Countries," *Bulletin on Asia-Pacific Perspectives 2003/04*, 41, accessed February 20, 2013, http://www.unescap.org/pdd/publications/bulletin03-04/bulletin03-04_ch3.pdf.

8. Lesley Russell, "Poverty, Climate Change and Health in Pacific Island Countries" (working paper, Menzies Centre for Health Policy, University of Sydney/ANU, 2009),

13, accessed February 20, 2013, http://ussc.edu.au/s/media/docs/publications/0904_pacificislandspaper_russell.pdf.

9. See Matthew Morris, "Measuring Poverty in the Pacific" (Development Policy Centre Discussion Paper No. 9, ANU, 2011), accessed February 20, 2013, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2041821.

10. "Poverty of opportunity is evident in many ways, including rapid emigration from some countries, high but often hidden unemployment, and the emergence of a culture of youth crime and high youth suicide rates." Russell, "Poverty, Climate Change and Health in Pacific Island Countries," 13.

11. S. Alkire, J. Roche, M. Santos, and S. Seth, "Vanuatu Country Briefing" (Oxford Poverty and Human Development Initiative [OPHI] Multidimensional Poverty Index Country Briefing Series, 2011), accessed February 20, 2013, http://www.ophi.org.uk/policy/multidimensional-poverty-index/mpi-country-briefings/.

12. FAO/WHO/UNICEF/PIFS, "Towards a Food Secure Pacific: Framework for Action on Food Security in the Pacific," http://foodsecurepacific.org/wp-content/uploads/2013/01/FINAL-TOWARDS-A-FOOD-SECURE-PACIFIC_June1.pdf. See also, WHO Pacific, "Pacific Food Summit Report" (Manila: WHO, December 2010), accessed June 5, 2013, http://www.wpro.who.int/nutrition/documents/docs/PacificFoodSummitReport.pdf.

13. UNICEF, *Situation Reporting: Food Price Increases/Nutrition Security in the Pacific Islands* (Report No. 1) (Suva: UNICEF, 2008). See also Australian Government Treasury, "The Second International Food and Fuel Price Shock and Forum Island Economies," *Economic Roundup* 3 (2011), accessed February 20, 2013, http://www.treasury.gov.au/PublicationsAndMedia/Publications/2011/Economic-Roundup-Issue-3/Report/The-second-international-food-and-fuel-price-shock-and-Forum-island-economies.

14. UNICEF, "Situation Monitoring: Food Price Increases in the Pacific Islands" (working paper, UNICEF Pacific, 2011), http://www.unicef.org/pacificislands/FINAL_SITUATION_REPORTING2.pdf. See, generally, Oxfam New Zealand, "Poverty in the Pacific," accessed February 20, 2013, http://www.oxfam.org.nz/what-we-do/where-we-work/poverty-in-the-pacific.

15. Pacific Islands Forum Secretariat, "2010 Pacific Regional MDGs Tracking Report," accessed February 20, 2013, http://www.forumsec.org.fj/resources/uploads/attachments/documents/PIFS_MDG_TR_20101.pdf.

16. Abbott and Pollard, *Hardship and Poverty in the Pacific*, vi.

17. Oxfam New Zealand, "Proposed WTO Accession: Key Issues for Tonga" (Oxfam New Zealand Discussion Paper, 2005), amended November 7, 2005, http://www.oxfam.org.nz/sites/default/files/reports/WTO%20Key%20issues%20for%20Tonga.pdf. The WTO claims to recognize the dilemmas of small island developing states; see C. Chakriya Bowman, "Managing the Challenges of WTO Participation: Case Study 33: The Pacific Island Nations, Towards Shared Representation," accessed February 20, 2013, http://www.wto.org/english/res_e/booksp_e/casestudies_e/case33_e.htm.

18. Oxfam New Zealand, "Poverty in the Pacific," accessed February 20, 2013, http://www.oxfam.org.nz/what-we-do/where-we-work/poverty-in-the-pacific.

19. Oxfam explains that the "National Basic Needs Poverty Line is a measure of the minimum income needed to buy sufficient food and meet basic requirements such as housing, clothing, transport, school fees etc. Statistics are taken from the Asian Development Bank report 'Hardship and Poverty in the Pacific' (December 2004) and the UNDP Human Development Report statistics."

20. L. Good, "Poverty in the Pacific—An Analysis" (Pacific Issues Paper No 6, Directorate General for Development, European Commission, April 2003).

21. FAO/SPREP/USP, "Climate Change and Food Security in the Pacific" (policy brief, November 2009), 5, accessed February 23, 2013, ftp://ftp.fao.org/docrep/fao/012/i1262e/i1262e00.pdf.

22. See Commonwealth Scientific and Industrial Research Organisation (Australia) (CSIRO), "New Insight into Climate Change in the Pacific," accessed February 20, 2013, http://www.csiro.au/Portals/Media/New-insight-into-climate-change-in-the-Pacific.aspx.

23. FAO/SPREP/USP, "Climate Change and Food Security in the Pacific."

24. An Asian Development Bank (ADB) report recognizes the threat of climate change to the attainment of MDGs and the need of PICs to address issues triggered by climate change with partners if "they are to continue to . . . maintain biodiversity and culture." ADB, "The Millennium Development Goals in Pacific Island Countries: Taking Stock, Emerging Issues, and the Way Forward" (Manila: ADB, 2011), 32, accessed February 20, 2013, http://www.adb.org/publications/workshop-report-millennium-development-goals-pacific-island-countries-taking-stock-emer. See also the establishment of the Global Environmental Facility's Least Developed Country Fund in November 2002, from which money has been allocated to five LDCs in the region (Kiribati, Samoa, Solomon Islands, Tuvalu, and Vanuatu) to aid in the preparation of National Adaptation Programmes of Action plans.

25. ReliefWeb, "Climate Change and Food Security in the Pacific," published November 26, 2009, last accessed September 2, 2012, http://reliefweb.int/node/334893. For the full briefing note see W. Morrell and N. El-Hage Scialabb, "Climate Change and Food Security in the Pacific" (policy brief, FAO/SPREP/SPC/USP, 2009), accessed February 20, 2013, http://www.sprep.org/att/irc/ecopies/pacific_region/493.pdf.

26. These are as follows: implementing adaptation measures; governance and decision making; improving understanding of climate change; education, training, and awareness; contributing to global greenhouse gas reduction; and building partnerships and cooperation.

27. The project, which was scheduled to run from 2008 to 2012 over thirteen Pacific Island countries, was implemented by UNDP in partnership with SPREP and funded by the Global Environment Fund and the Australian Agency for International Development with support from the United Nations Institute for Training and Research

and the Capacity Development for Adaptation to Climate Change (UNITAR C3D+) Programme.

28. See, e.g., SPREP, "Pacific Adaptation to Climate Change: Fiji Islands," paragraphs 44–45, accessed February 20, 2013, http://www.sprep.org/att/publication/000668_Fiji Report_NationalPACCReport_Final.pdf.

29. World Health Organization, "Food Security," accessed February 20, 2013, http://www.who.int/trade/glossary/story028/en/.

30. IICA, "IICA's Definition of Food Security," accessed June 5, 2013, http://www.iica.int/esp/programas/SeguridadAlimentaria/Documents/SeguridadAlimentarias_Quees_Eng.pdf.

31. World Food Summit, "Plan of Action Article 1" (1996), http://www.fao.org/wfs/index_en.htm.

32. UNESCAP, "Beyond 'Subsistence Affluence.'"

33. WHO, *Meeting Report of the Pacific Food Summit* (WPDHP1002530-E Report Series Number: RS/2010/GE/22(VAN)), 1, accessed February 20, 2013, http://www.wpro.who.int/nutrition/documents/docs/PacificFoodSummitReport.pdf.

34. For example, there is a Pacific Food Safety Quality Legislation Expert (PFSQLE) Group.

35. For example, land energy and transport were added to the framework for food security following the Food Summit meeting in Port Vila in 2010.

36. Article 27 (3)(b) TRIPS.

37. Although a sui generis framework itself, UPOV is a TRIPS Plus requirement, but may be mandated by WTO accession negotiations, as happened in the case of Vanuatu.

38. In India, this has been relied on to afford greater protection farmers' rights and to try and ensure food security in the Plant Varieties and Farmers Rights Act 2011.

39. Olivier De Schutter, "Seed Policies and the Right to Food: Enhancing Agrobiodiversity, Encouraging Innovation" (presentation by the Special Rapporteur on the Right to Food to the 64th session of the UN General Assembly, October 2009, A/64/170), 15.

40. Located at the Secretariat of the Pacific community in Noumea, New Caledonia. SPC Land Resources Division, "The Center for Pacific Crops and Trees (CePaCT)," accessed February 20, 2013, http://www.spc.int/lrd/index.php?option=com_content&view=article&id=649&Itemid=107.

41. The customary gardening association was formed in 2001 and operates locally and through a Melanesian network of farmers. One of its key aspects is the Plant Material Network, which provides members with improved seed and rootstock varieties. It is currently funded by an Australian government grant of AU$2.53 million. Kastom Garden Association, "About KGA," http://kastomgaden.org/about/.

42. Initially a two year project running from 2005 to 2007, this community-based project is still going strong and has developed to include projects to document pandanus and banana varieties in order to build a data base of plant resources in order to protect their gene bank. Its current work is funded by the US Forestry, Australian Government, and Secretariat of the Pacific Community.

43. For example, 2007 and 2008 were declared years of the Kastom economy in Vanuatu. See R. Regenvanu, "The Traditional Economy as Source of Resilience in Vanuatu," accessed June 5, 2013, http://www.aidwatch.org.au/sites/aidwatch.org.au/files/Ralph%20Regenvanu.pdf.

44. See, e.g., Island Food Community of Pohnpei, "Report on the Strategic Planning Retreat, April 24, 2004," http://www.islandfood.org/publications/strategy.pdf; L. Kaufer, L. Englberger, R. Cue, A. Lorens, K. Albert, P. Pedrus, and H. V. Kuhnlein, "Evaluation of a 'Traditional Food for Health' Intervention in Pohnpei, Federated States of Micronesia" *Pacific Health Dialog* 16, no.1 (April 2010), 61; and T. Jansen and M. Q. Sirikolo, eds., "Petanigaki ta Siniqu ni Lauru" or "The Forest Foods of Lauru" (Kyogle, N.S.W, Australia: Kastom Gaden Association (KGA) and Terra Circle Inc., of Australia, 2011).

45. See, for example, the African Model Legislation for the Protection of the Rights of Local Communities, Farmers, and Breeders, and for the Regulation of Access to Biological Resources and in India the Protection of Plant Varieties and Farmers Rights Act.

46. As might be advocated under the International Treaty on Plant Genetic Resources for Food and Agriculture.

47. De Schutter, "Seed Policies and the Right to Food," 14.

THE DEVELOPMENTAL RAMIFICATIONS OF VANUATU'S INTELLECTUAL PROPERTY COMMITMENTS ON JOINING THE WORLD TRADE ORGANIZATION

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After over a decade of protracted negotiations, Vanuatu joined the World Trade Organization (WTO) in 2012. Intellectual property provisions formed part of Vanuatu's accession package, and included some Agreement on Trade-Related Aspects of Intellectual Property (TRIPs) Plus provisions. This paper will look at the potential effects that these new undertakings will have on two key areas of development, namely, health and education. It argues that the new intellectual property framework is likely to have detrimental effects on access to both medicines and other medical technology and also educational materials, which is at odds with the developmental aspirations of membership. Although these can to an extent be mitigated by better use of flexibilities permitted within the WTO framework, this should be coupled with the embracing of an open access mentality toward intellectual property rights.

Introduction

VANUATU BECAME the 157th member of the World Trade Organization (WTO) on August 24, 2012, concluding negotiations that began in 1995. As this long period suggests, the road to accession has been rocky, and was faced with a last minute, but active, "Say No to WTO" campaign by civil society, churches, and the chiefs, and one Supreme Court challenge. From an intellectual property perspective, the WTO accession means major changes to Vanuatu's legal regime. It was required to become compliant with the Agreement on Trade-Related Aspects of Intellectual Property

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(TRIPs) by the end of 2012, requiring the introduction of a whole raft of intellectual property (IP) laws, and the establishment of an intellectual property office. This paper briefly examines those aspects of Vanuatu's IP commitments that have the greatest impact, or potential impact, upon development in the country. As we will see, the package that Vanuatu signed up to commits it to a number of TRIPs Plus standards, and does not take advantage of flexibilities that were available to it as a Least Developed Country (LDC). The paper is based on both desk research and also a number of interviews with key stakeholders in the two sectors discussed. The research presented here forms part of the preliminary findings of an ongoing three year project.[1]

A Developmental Perspective?

In order to investigate the impact of new intellectual property laws on development, it is first necessary to define what is meant by development, and what criteria will be used to measure it. The conventional measures of national development are salary levels and economic growth measured by gross domestic product (GDP). However, this conception of development has been subjected to much criticism as being overly narrow, for example, by the economist Amartya Sen, who has reconceptualized development as "freedom."[2] Numerous alternative criteria have been proposed, such as The Human Development Index, the Millennium Development Goals, International Human Rights, and Burma's Gross National Happiness Index. A movement has also started in Vanuatu to develop alternative indices of "well-being," that take into account a range of factors including participation in the traditional economy and cultural activities.[3] A representative of the National Statistics Office has explained this development, arguing that for far too long economists have used income and expenditure patterns to paint a picture of a society's well-being. He points out that although Vanuatu is a LDC, it was voted the Happiest Country in the World by the New Economics Foundation.[4] For example, the alternative indicators study found that:

> TORBA Province, the northern most province in the country with the lowest GDP per capita and least access to markets . . . in effect the most "economically handicapped" and, coincidentally, the Province with the highest subjective well-being (or, happiness) of any other province by a significant amount. It is also the province with the highest perceived equality, highest levels of trust in neighbours, most positive assessment of traditional leaders, highest rates of community interaction, and the list goes on.

In contrast to this approach, the Pacific Island Forum leaders' 2011 statement on Sustainable Development focuses heavily on economic development, for example, by recognizing "the way in which regional and economic integration can improve the prospect of stable, long-term economic growth in Pacific communities by creating jobs, enhancing private sector growth, and raising standards of living, through the freer flow of goods, services, and investment within the Pacific."[5] Thus, the term "development" is currently being used by a range of different players to mean very different things and is being measured according to very different criteria. As Merry argues, "How indicators are named and who decides what they represent are fundamental to the way an indicator produces knowledge."[6] However, the common use of the term "development" risks hiding the different interpretations and meanings vested in the term by the different actors involved. For example, Vanuatu's recent accession to the WTO was both promoted and critiqued on the basis that it would promote "development," with opposing parties talking at cross-purposes about what development means.

This lack of a uniformly accepted definition and indices of measurement of development is problematic for the current investigation into the developmental implications of intellectual property law. The definition of development chosen for such an investigation can, in fact, largely determine its outcome. For example, and this is adopting a very "broad brush" approach, if we look at development as meaning increased foreign investment and greater GDP, then we would support IP rules that favor granting strong proprietary rights over new technologies. However, if we look at development as meaning ensuring access by all citizens to adequate food, education, and health, then we may favor free access to new technologies. Although these different viewpoints over development are represented in the growing literature and policy debates about IP,[7] especially in the new era of proliferation of what Margaret Chon calls "norm entrepreneurs,"[8] there is not, as yet, a satisfactory conceptual framework to apply. However, this paper is not the place to fill that hole, although that is certainly the intention for future research. Having noted the difficulties with any measure of development, we now move on to consider the impact of Vanuatu's new IP laws in the areas of health and education, on the basis that these two sectors at least should be central to any measurement of development where IP is implicated.

Health

Vanuatu's accession to the WTO raises many issues about the relationship between trade and health in general. A number of academics and public

policy advocates have drawn attention to the aspects of globalization mediated through WTO Agreements that are having negative impacts on health in the region, highlighting problems of food security and fostering increased dependence on imported food of poor nutritional quality.[9]

Intellectual property laws also have an effect upon a number of different health-related areas, but the focus here is on access to medicines. As is well known, patents granted to drug companies can restrict access to medicines by allowing those companies to charge higher prices than would be obtainable if they did not have such a monopoly right. Although patents are only available for twenty years, there are a variety of ways of extending these, known collectively as "evergreening," which means that patents can effectively last significantly longer than this. For example, the life of a patent can be extended by data exclusivity periods, such as those Vanuatu has agreed to in its accession package, and also by recognizing patents for new uses of known substances, which allows companies to extend their monopoly by presenting the same drug in a different form or combination. So if a country introduces patent laws that allow drug manufacturers to register their patents, this means that patients in that country can legally only have access to the drugs produced by that company, which are likely to be significantly more expensive than an imitation (or generic brand) of the same drug.

Vanuatu passed a *Patents Act* in 2003 as part of its initial program to join the WTO. However, the law was only gazetted in February 2011 (and hence came into operation) as part of the renewed bid to join the WTO. The *Vanuatu Patents Act 2003* repealed the *Registration of United Kingdom Patents Act* [Cap 80], which essentially provided that any person who had registered a patent in the United Kingdom (UK) could, within three years of the date of issue of the patent, apply to have the patent also registered in Vanuatu. This Act was used very rarely, and according to the Vanuatu Financial Services Commission who administered the patent register under the Act, only about 100 patents had ever been registered. Because of the existence of this old Act, it cannot be said that Vanuatu's patent regime is *entirely* a consequence of its WTO membership, but there is no doubt that the new system that has been put in place as a result of the accession is greatly strengthened and is likely to result in many more patents being filed than in the past. This is particularly the case given that Vanuatu was required to signal "readiness to participate" in the Patents Co-operation Treaty (PCT) as part of its accession package.[10] Further, previously Vanuatu had complete autonomy over decisions about whether or not to enforce its patent laws, but as a result of WTO membership it can now be compelled to enforce these laws through international trade sanctions implemented by

the WTO's own enforcement machinery, even where they operate against domestic interest.

The attention of the effect of patents on access to medicine in the past few decades has really been focused on human immunodeficiency virus (HIV)/acquired immune deficiency syndrome (AIDS) and those countries in Africa affected by that epidemic. However, the question for Vanuatu, which does not—yet—have an AIDS epidemic, is whether the same level of concern is justified.

In general this research found that at present the introduction of patent legislation is unlikely to increase the cost of most medicines in Vanuatu. This is because approximately 95 percent of drugs in the country are provided for free by the government through health clinics and hospitals, and all of these drugs are generic medicines that have been off patent for a number of years. Those medicines that are only available on patent have tended to be donated to Vanuatu through either international programs, such as the Global Fund,[11] or else through bilateral aid programs. Further, Vanuatu, and indeed almost all Pacific Island countries (PICs), do not have local manufacturing companies to produce generic drugs. This means that generic medicines have to be purchased from a country that is not TRIPs compliant, and there are fewer and fewer of these as membership of the WTO increases. These factors point to changes in national patent laws having a potentially minimal effect on the supply of pharmaceuticals in Vanuatu, as the situation in Vanuatu currently stands. This is confirmed by looking at Fiji, which has been a WTO member since 1996, and has only had the issue of a patent over a medicine arise once. It was resolved in that case by using an exception that allows a government to supply generic medicine in particular conditions.[12]

However, if certain circumstances change and what Meads calls the "generic bubble"[13] bursts, then changes in patent law could have a significant impact on access to medicines in Vanuatu. These circumstances include the following:

- There is a massive worldwide epidemic, for example, severe acute respiratory syndrome or swine flu, for which either vaccines or treatment are developed that are covered by patent, and no donor is willing to donate these to Vanuatu.
- New vaccines are developed (for example, for malaria or cervical cancer) that are covered by patent and that Vanuatu would like to use.
- There is a rise in HIV/AIDS in the country and there is a need to move to second or third line retroviral medicines, which are currently not available off-patent, to treat it.

- Resistance develops to some of the treatments that Vanuatu uses for major diseases such as tuberculosis and malaria, and there is a need to treat these with new generation drugs that are not available off-patent.
- There are new demands for treatments for noncommunicable diseases (NCDs) for example, statins, new diabetic treatments, chemotherapy, and dialysis. Noncommunicable diseases are reaching epidemic levels in the region, and since these are also diseases for the wealthy countries, it is likely that more effective treatments for these conditions will be developed and will be patented. The 2011 Forum Leaders Communiqué states "Leaders noted with concern the huge economic costs of NCDs in the Pacific and in particular the rapidly rising expenditure on NCDs comprising well over 50 percent of the total health budget of many island countries;"[14] While Vanuatu has a lower incidence of heart disease and diabetes than many other PICs, changes in diet, urbanization, and loss of land on which to grow healthy local food may all combine to change this picture.
- Donor support drops off, for example, as a result of the global economic crisis. For instance, in 2011 the World Health Organization (WHO) had to decrease its budget dramatically, and this has meant less assistance for Pacific Island countries.
- Vanuatu ceases being a LDC (it is programmed to "graduate" from LDC status in 2013) and therefore does not qualify for donor support, for example to pay for antiretroviral medication (as is the current case in Fiji, which has to fund this on its own).

Any one of these factors, among others, could alter the situation in Vanuatu to mean that the health requirements of ni-Vanuatu would be best supported by the government, or private pharmacies, being able to access generic drugs. For example, the Malaysian Minister of Health recently stated "With the increasing prevalence of patients with NCDs, many countries are faced with a huge challenge in providing sufficient access to essential medicines ... The positive economic impact of generic substitutions can be enormous."[15]

Consequently, Vanuatu's new patent regime introduced as a consequence of the WTO accession means that ni-Vanuatu access to medicine is likely to be constrained in the medium to long term. This conclusion is of course also relevant to other areas of medical technology, for example, hospital equipment and machinery, diagnostic machines, and technology for use in dentistry. The conclusion should also be viewed in the context of the limitations of Vanuatu's health system generally and drug purchase and

distribution mechanisms more particularly, where a range of systemic factors already significantly hinder public access to medicine.[16]

The rationale for introducing patent laws, apart from being a condition of WTO membership, are that they will stimulate investment in research and development leading to the development of new pharmaceuticals to treat new diseases and better treat existing diseases. However, Vanuatu does not currently have any local capacity to conduct research and development (R&D) in this area, and given the start-up costs and depth of experience required, it is unlikely to develop that capacity soon. Therefore, the availability of patents is unlikely to stimulate any R&D. Further, Vanuatu is such a small market that whether it grants patents over pharmaceuticals or not is unlikely to make the slightest difference as an incentive to multinational pharmaceutical companies. The UK Commission on Intellectual Property Rights[17] found that "the presence or absence of IP protection in developing countries is of at best secondary importance in generating incentives for research directed to diseases prevalent in developing countries."[18] Patents may also improve quality by prohibiting counterfeit medicine. However, since there are no drug testing facilities in Vanuatu, it is hard to see how such laws would assist.

The limiting effects of patents on access to medicine can be mitigated by making use of various flexibilities in patent law allowed on the grounds of public health.[19] Even though these flexibilities have not been incorporated into the *Patent Act* as yet, there are no legal grounds stopping Vanuatu from amending the Act to incorporate them, unless it has specifically made a contrary commitment in the accession negotiations. As a precedent, Chile amended its laws to take greater advantage of available safeguards and options after joining the WTO.[20] There is no doubt, however, that Vanuatu's lack of technical expertise in this area is likely to be a significant constraining factor in making full use of these flexibilities.

Further, perhaps an even greater difficulty than the new patent regime will be finding a country to supply the required generic medicines, since most countries in the world are now also covered by TRIPs, as mentioned above. Although there are mechanisms that theoretically allow a country to purchase generic drugs through compulsory licenses in drug manufacturing countries in the context of a health emergency, the provisions are so cumbersome and uncertain they have rarely been used.[21] The rather radical conclusion this points toward is the need for the establishment of a generic medicine plant in the Pacific Island region in a country that is not yet a WTO signatory. This would have a range of developmental benefits, including facilitating access to generic medicines for countries in need (in the

Pacific, but arguably also elsewhere, to take over the market left by Indian manufacturers since 2005, when India's patent laws came into effect), providing a new industry for the region, and requiring investments by domestic governments, private business, and development partners in high-level training programs for nationals. Such a facility could also be used to better produce and market remedies based on traditional medicinal knowledge and plants, such as noni and kava. It is acknowledged, however, that there are a range of practical obstacles that make this an unlikely eventuality.

Education

Intellectual property rights (IPR) are linked to education because of the potential for owners of works to use the doctrine of copyright to restrict access to textbooks, journals, and other print and online learning materials. Copyright gives authors of works exclusive legal rights over those works, including reproduction and dissemination rights. As a result, copyright owners have the right to control the production, dissemination, and use of educational materials. This means that copyright owners can charge high prices for their works, making them inaccessible to students in least developed countries such as Vanuatu. Copyright laws can also prevent students and teachers from photocopying educational materials for use in the classroom, in course packs and at home, and can also prevent bulk copies of books being locally reprinted and sold or distributed at affordable prices.

In the case of Vanuatu, research indicates that copying of textbooks for use by students is widespread. According to one informant who had been a school principal for twelve years, teachers regularly photocopy parts of textbooks, or even whole textbooks if they are small. He does not consider that it is possible to satisfy the educational needs of the students without photocopying textbooks because the textbook subsidy is too small. Overseas learning materials are generally used as supplements by teachers, particularly in the Francophone programs. It is very common for provincial educational authorities to reprint (photocopy) teaching materials and then sell these to the schools. The Ministry of Education is currently trying to stop this practice and to distribute copies directly to schools, which have to pay the production costs. However, the physical delivery of materials to schools is both costly and difficult. At a tertiary level, there is a heavy reliance on overseas textbooks, and these are extremely costly. Many students simply do not buy textbooks because of the cost, and others photocopy large sections of them. This reinforces the findings of the UK Commission on Intellectual Property that

> it is arguably the case that many poor people in developing countries have only been able to access certain copyrighted works through using unauthorised copies available at a fraction of the price of the genuine original product. We are therefore concerned that an unintended impact of stronger protection and enforcement of international copyright rules as required, inter alia, by TRIPS will be simply to reduce access to knowledge products in developing countries.[22]

Vanuatu did not have any copyright legislation prior to the first round of WTO negotiations. A Copyright Act was drafted in 2000 (the *Copyright and Related Rights Act 2000* [Copyright Act] in preparation for joining the WTO, but was not gazetted until February 8, 2011, when the negotiations resumed. As a result of accession, Vanuatu acceded to the Berne Convention on September 27, 2012, meaning that it will have to recognize and enforce copyright of foreign authors. Further, as part of its accession package, Vanuatu agreed to the TRIPs Plus requirement of becoming a signatory to the World Intellectual Property Organization (WIPO) Copyright Conventions that extend copyright protection into the digital realm and make it an offense to circumvent technological rights managements systems in certain circumstances.[23] Vanuatu's copyright regime is therefore a direct consequence of joining the WTO.

This research found that WTO accession does have a potentially negative effect upon the quality of education in Vanuatu in a number of respects. First, photocopying or reprinting foreign textbooks is no longer legal, meaning fewer students will have access to these materials. Textbooks are fundamental to basic learning; Professor Heyneman states that a World Bank study showed that "textbook availability was the single most consistent correlate of academic achievement in developing countries."[24] Copying of textbooks is particularly needed to deal with distributions problems in Vanuatu where delays in ordering and transportation difficulties can mean that students can be delayed in accessing their textbooks for many months. In such circumstances, photocopying books is the only way to provide immediate access. Second, through agreeing to ratify the WIPO Copyright Conventions, Vanuatu has agreed to extend copyright laws into the digital environment. The essential provisions of these treaties have already been included in the *Copyright Act*.[25] This is likely to have a curtailing effect on the accessibility of material online to ni-Vanuatu, including educational material, and will limit the extent to which Vanuatu is able to bridge the "digital divide."[26] Although there is a lot of content that is available online for free, there is also a lot that is protected by technological protection

measures. These are, however, often quite easy to get around, and there is often advice on the Internet about how to do so.[27] However, by introducing such laws, Vanuatu has made it an offense to do this, meaning that such materials will remain inaccessible.[28] While individual citizens may be prepared to take the risk of infringement and access them anyway, educational institutions are likely to be far more cautious about taking such risks. Thus, the copyright laws are likely to have a significant impact upon educational quality in Vanuatu. In a 2009 study into access to knowledge in Africa, the authors found that

> The link between education and the availability of adequate learning materials such as textbooks is undeniable: It is difficult to imagine effective learning independent of learning materials, both inside and outside of classrooms. Learning materials take many forms. Hard-copy books are still the basis of education systems worldwide and are especially so in Africa. Digital materials are, however, quickly becoming learning tools of choice. As information and communication technologies (ICTs) proliferate, the shift from hard-copy to digital learning materials should accelerate. Technology can have a transformative effect on entire systems of education and on individual teachers and learners within those systems.[29]

Experiences in the US and EU where the WIPO Copyright Conventions have been implemented demonstrate that they seriously affect access to works online, and have "retarded creativity and technological innovation and stifled competition."[30] For these reasons Correa argues "Should a developing country not be signatory to the WCT and/or the WPPT, as in the case of Brazil, it should refrain from signing them, since they have TRIPs Plus provisions mandating a more rigid copyright protection than such a country's current stage of development is capable of absorbing, which creates greater drawbacks than benefits for society as a whole."[31]

Finally, Vanuatu's new copyright legislation does not give libraries the right to lend books, which also impacts negatively upon education. The Act currently gives the exclusive right of public lending to copyright owners, meaning that libraries that allow borrowing of books will be in breach of the Act.[32]

One of the major ways that most developed countries minimize the impact of copyright laws on access to education is through copyright collecting societies. These allow an educational institution to pay a license fee for access to a whole range of works. However, Vanuatu's small size

means that it is unlikely for a national collecting society to be feasible, meaning that the negative impact will not be able to be mitigated in this way. It may be that this can be dealt with at a regional level, and the University of the South Pacific is currently working on the development of such a proposal,[33] but it will require broad-based support from educational institutions across the region and may involve costs that will be passed on to students.

There are some flexibilities that can be built into the copyright laws to facilitate greater access to educational materials, although this is an area where the law is still very uncertain, and there are very few model guidelines to follow.[34] These flexibilities include allowing for parallel imports, utilizing compulsory licensing mechanisms, incorporating educational flexibilities, including a general fair use provision, and providing for a public lending right. However, to really mitigate against the negative impact of copyright laws on access to educational materials, Vanuatu should also conduct awareness-raising about the exceptions that currently do exist in its copyright laws, in order to ensure that people are not discouraged from using materials they have the right to access. The understanding that copyright is a balancing act and that users do have rights to access is not well understood in Vanuatu. As the African Copyright and Access to Knowledge (ACA2K) project argues:

> Informal interpretation and application of the law by institutions such as libraries and enforcement agencies have enormous relevance for access to learning materials. Access-enabling interpretations of the law could be reasonable in the absence of precedents adopting the opposite position.[35]

Vanuatu should also consider introducing policies that encourage authors to use flexible copyright protection schemes—such as Creative Commons licensing—that both protect and promote free access to works.

Costs and Institutional Capacity

Establishing and running a TRIPs compliant IP system is likely to be extremely costly for Vanuatu. It is not clear exactly how much the administrative costs will be, but they are likely to be significant. Further, Vanuatu is required by its accession package to train at least fifteen "officials, customs officers and private sector people as well as educators" in TRIPs issues, which is an additional cost.[36] Vanuatu currently lacks expertise in this area, and since it is of a highly technical nature, developing competence in

these areas will take considerable time. The World Bank estimated that a comprehensive upgrade of the IPR regime in developing countries could require capital expenditure of US$1.5–2 million. The director of the new IP Office in Vanuatu (established in keeping with Vanuatu's WTO commitments) had estimated an initial budget proposal of 25 million vatu to the government to fund the set-up and staffing of the office, although this is unlikely to be granted. In comparison, the estimate spending on health (public and private) in Vanuatu in 2009 was estimated at 2,692 million vatu, so it is about 10 percent of the total amount currently spent on health. The significance of the administrative burden of becoming TRIPs compliant was highlighted by a group of LDC countries on November 11, 2011, when they asked the WTO for an extension of the 2013 deadline to be TRIPs compliant. A chief reason was that

> Least Developed Country Members continue to face serious economic, financial and administrative constraints in their efforts to bring their domestic legal system into conformity with the provisions of the TRIPS Agreement, and as such the continued relevance of the previous request made for an extension of the transition period under Article 66.1.[37]

Despite being a LDC country and hence eligible for the current deferral of full implementation until 2013, Vanuatu waived this flexibility in its accession package. However, as a result of a new extension negotiated on behalf of the LDCs in June 2013, Vanuatu will have a "second chance" to take advantage of this new intellectual policy space.[38] This discussion of costs is relevant to the issue of development because by spending money on its intellectual property system, Vanuatu will have to spend less on other areas, such as health and education.

Conclusion

This paper has demonstrated that the intellectual property commitments Vanuatu made as a result of acceding to the WTO are likely to have a negative effect on access to medicines and access to educational materials, at least in the medium to long term. Vanuatu is overwhelmingly a net importer of intellectual property and is likely to remain this way for many years to come, given the country's lack of research and development and current state of technological development. It is best served by having laws that reflect that reality, instead of enacting laws that support foreign owners of intellectual property, especially given the considerable public expense that

will be required to implement and enforce such a system. However, there is still room within the legal framework that Vanuatu is now part of to introduce some flexibilities to mitigate against some of these consequences, and Vanuatu is urged to give careful consideration to legal reforms to take advantage of this "wiggle room." Perhaps even more important, though, is the need to avoid adopting an "ideology of ownership" to use Filer's term (which he coined in relation to landownership)[89] in relation to intellectual property. Legal flexibilities are only useful if they are actually implemented and supported by both officials and a public who are informed about, and believe in, users' rights of access to intellectual property.

NOTES

1. See http://www.ippacificislands.org.

2. Amartya Sen, *Development as Freedom* (Oxford: Oxford University Press, 1999).

3. See Vanuatu National Statistics Office, "Alternative Indicators of Wellbeing for Melanesia" (2012), accessed February 28, 2013, http://www.vnso.gov.vu/index.php/component/docman/doc_download/193-well-being-survey-2012?Itemid=18.

4. Bob Maikin, "Well-being for Melanesia," *Vanuatu Daily Post*, September 5, 2012.

5. "The Waiheke Statement on Sustainable Development," *Cook Islands Herald*, September 9, 2011, Online Edition, accessed March 1, 2013, http://www.ciherald.co.ck/articles/t415a.htm.

6. Sally Engle Merry, "Measuring the World: Indicators, Human Rights, and Global Governance," *Current Anthropology* 52 (2011): 584, accessed February 28, 2013, http://www.jstor.org/stable/pdfplus/10.1086/657241.pdf?acceptTC=true.

7. See, for example, Commission on Intellectual Property Rights, *Integrating Intellectual Property Rights and Development Policy* (2002), accessed February 28, 2013, http://www.iprcommission.org/home.html; UNCTAD-ICTSD, *Resource Book on TRIPS and Development* (Cambridge: Cambridge University Press, 2007); Daniel Gervais, ed., *Intellectual Property, Trade and Development: Strategies to Optimize Economic Development in a TRIPS-Plus Era* (Oxford: Oxford University Press, 2007); Madhavi Sunder, *From Goods to a Good Life: Intellectual Property and Global Justice* (New Haven, CT: Yale University Press, 2012).

8. Margaret Chon, "A Rough Guide to Global Intellectual Property Pluralism" (Seattle University School of Law Research Paper No. 09-01, November 16, 2009), 5, http://ssrn.com/abstract=1507343.

9. For example, A. M. Thow and W. Snowdon, "The Effect of Trade and Trade Policy on Diet and Health in Pacific Islands," in *Trade, Food, Diet and Health: Perspectives and Policy Options*, ed. C. Hawkes, C. Blouin, S. Henson, N. Drager, and L. Dubé

(Chichester, UK: Wiley and Sons, 2010), 147–168; David Legge and Deborah Gleeson, "Trade Agreements and Non-Communicable Diseases in the Pacific Islands" (2011, manuscript on file with author). See also Public Forum on Trade and Health in the Pacific, "People's Health Movement Australia" (background paper, 2010), accessed February 28, 2013, http://phmoz.org/wiki/index.php?title=People%27s_Health_Movement_Australia; United Nations Human Rights, *Pacific Trade and the Right to Health* (Suva, n.d.).

10. See WHO, Regional Office for the Western Pacific, "Informal Intercountry Consultation on Public Health and Intellectual Property Rights for Selected Pacific Island Countries," Nadi, Fiji, March 25–27, 2009, 16. This report notes that Papua New Guinea joined the PCT in 2003, and according to the statistics for that year, 81 percent of patent applications were PCT applications. See also Peter Drahos, *The Global Governance of Knowledge: Patent Offices and Their Clients* (Cambridge: Cambridge University Press, 2010), 270–72.

11. See, for example, "Global AIDS Response Progress Report 2012, Republic of Vanuatu," accessed February 28, 2013, http://www.unaids.org/en/dataanalysis/knowyourresponse/countryprogressreports/2012countries/ce_VU_Narrative_Report.pdf.

12. See WHO, "Briefing Note: Access to Medicines: Country Experiences in Using TRIPS Safeguards" (February 2008), accessed February 28, 2013, http://asia-pacific.undp.org/practices/hivaids/documents/trips/Country_experiences.pdf.

13. Sarah Meads, "Trade, Medicines and Human Rights: Protecting Access to Medicines in Fiji and the Pacific" (master's thesis, Victoria University of Wellington, 2008), 70.

14. Pacific Islands Forum Secretariat, "Forum Communiqué," 42nd Pacific Islands Forum, Auckland, New Zealand, accessed February 28, 2013, http://www.forumsec.org/pages.cfm/newsroom/press-statements/2011/forum-communique-42nd-pif-auckland-new-zealand.html.

15. See Y. B. Dato' Sri Liow Tiong Lai, "Statement by Y. B. Dato' Sri Liow Tiong Lai, Minister Of Health, Malaysia at United Nations High Level Meeting on NCD (Plenary Meeting), 19 September 2011, New York—Theme: The Prevention and Control of Non-Communicable Diseases," accessed February 28, 2013, http://www.twnside.org.sg/title2/FTAs/info.service/2011/fta.info.195.htm.

16. See, for example, AusAID Office of Development Effectiveness, *Working Paper 3: Vanuatu Country Report* (2009), 14, accessed February 28, 2013, http://www.ode.ausaid.gov.au/publications/documents/working-paper-health-service-delivery-vanuatu.pdf.

17. Commission on Intellectual Property Rights, *Integrating Intellectual Property Rights and Development Policy*.

18. Commission on Intellectual Property Rights, *Integrating Intellectual Property Rights and Development Policy*, 38.

19. These are set out in Carlos Correa, *Intellectual Property Rights, the WTO and Developing Countries: The TRIPS Agreement and Policy Options* (Penang: Zed Books, 2000), 242–43.

20. Carol Deere, *The Implementation Game* (Penang: Oxford University Press, 2009), 72.

21. See WHO, Regional Office for the Western Pacific, "Informal Intercountry Consultation on Public Health and Intellectual Property Rights for Selected Pacific Island Countries," 6–7. See also Jenny Wakely, "Compulsory Licensing under TRIPs: An Effective Tool to Increase Access to Medicines in Developing and Least Developed Countries?," *European Intellectual Property Review* 33, no. 5 (2011): 299–309, 302.

22. Commission on Intellectual Property Rights, *Integrating Intellectual Property Rights and Development Policy*, 101.

23. Anticircumvention provisions are provisions that make it illegal to circumvent or defeat technological protection devices (or rights management systems) that have been installed by copyright owners as technological barriers to access.

24. Stephen P. Heyneman, cited in Margaret Chon, "Intellectual Property 'From Below': Copyright and Capability for Education" *University of California, Davis, Law Review* 40 (2007): 823.

25. See sections 2, 8, 36, 37 of the act.

26. The "digital divide" refers to the inequitable access to information and communication technologies, including access to the Internet, between the developing and developed countries.

27. Xuan Li and Carlos Correa, eds., *How Developing Countries Can Manage Intellectual Property Rights to Maximise Access to Knowledge* (Geneva: South Centre, 2009), 119.

28. See sections 36 and 37 of the Copyright Act.

29. C. Armstrong, J. de Beer, D. Kawooya, A. Prabhala, and T. Schonwetter, eds., *Access to Knowledge in Africa: the Role of Copyright* (Claremont, South Africa: UCT Press, 2010), 2, http://www.aca2k.org/attachments/281_ACA2K-2010-Access%20to%20knowledge%20in%20Africa-s.pdf.

30. South Centre, *The Threat of Technological Protection Measures to a Development Oriented Information Society* (Policy Brief No. 9, August 2007), 5–6.

31. Li and Correa, *How Developing Countries Can Manage Intellectual Property Rights to Maximise Access to Knowledge*, 123.

32. Section 8(1)(h).

33. Kathy Moore, USP, *Proposal to Form a Regional Copyright Licensing Agency Pacific Islands Copyright Agency* (n.d.), copy on file with author.

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THIS LIST of significant publications relating to the Pacific Islands was selected from new acquisitions list received from Brigham Young University–Hawai'i, University of Hawai'i at Mānoa, Bernice P. Bishop Museum, University of Auckland, East–West Center, University of the South Pacific, National Library of the Australia, Melanesian Studies Resource Center, Center for Pacific and Asian Studies, University of Nijmegen, University of California, San Diego, Secretariat of the Pacific Community Library, Center for South Pacific Studies, University of New South Wales, Macmillan Brown Library at University of Canterbury, and the Australian International Development Assistance Bureau's Center for the Pacific Development Training. Other libraries are invited to send contributions to the Books Noted editor for future issues. Listings reflect the extent of information provided by each institution.

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