

**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.

## 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.<sup>1</sup> 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.<sup>2</sup> 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<sup>3</sup> and in the UN Declaration on the Rights of Indigenous Peoples.<sup>4</sup> More particularly, the UNESCO Convention on the Safeguarding of Intangible Cultural Heritage (CSICH)<sup>5</sup> 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<sup>6</sup> 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.<sup>7</sup> 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.<sup>8</sup> 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)<sup>9</sup> 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.”<sup>10</sup> 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.<sup>11</sup> 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.<sup>12</sup>

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.<sup>13</sup> 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.<sup>14</sup> 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.<sup>15</sup> 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.<sup>16</sup> A further example is the Vanuatu Oral Tradition Collection Project (which led to the development of the Fieldworker program), which was established in 1976.<sup>17</sup> 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.<sup>18</sup> 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.<sup>19</sup>

### **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.<sup>20</sup> 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).<sup>21</sup> 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),<sup>22</sup> 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,<sup>23</sup> 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.<sup>24</sup>

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.<sup>25</sup> 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.”<sup>26</sup> The treaty establishes a *Representative List of the Intangible Cultural Heritage of Humanity*, and both Tonga and Vanuatu have items listed on it.<sup>27</sup> 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.<sup>28</sup> 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.<sup>29</sup> PICs such as Fiji have established such a program,<sup>30</sup> and Fiji, Papua New Guinea, and Vanuatu have all been part of the Indigenous Language Revitalization and Preservation in Melanesia and the Pacific project.<sup>31</sup>

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,<sup>32</sup> which is a requirement for the successful nomination of a World

Heritage site.<sup>33</sup> Similarly, CSICH requires State parties to ensure safeguarding of intangible cultural heritage<sup>34</sup> through the creation of inventories<sup>35</sup> 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.<sup>36</sup> 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.<sup>37</sup> 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,<sup>38</sup> but few have any intangible heritage laws. Most also have some environmental laws that regulate development, for example, and provide for environmental impact assessment,<sup>39</sup> but relatively few have dedicated protected area management legislation.<sup>40</sup> 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.”<sup>41</sup> 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.<sup>42</sup> 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*.<sup>43</sup>

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.<sup>44</sup> 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.<sup>45</sup> “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.<sup>46</sup> 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.<sup>47</sup> 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.<sup>48</sup> Importantly, it is an offense to contravene any term or condition of a registered CCA.<sup>49</sup> This legal framework has been used to protect natural heritage sites<sup>50</sup> 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<sup>51</sup> and protected area management legislation.<sup>52</sup> 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.<sup>53</sup> 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.<sup>54</sup> 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.”<sup>55</sup> 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.<sup>56</sup> 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.<sup>57</sup> 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<sup>58</sup> 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.<sup>59</sup> 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.<sup>60</sup> 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,<sup>61</sup> and reference is also made to State support for heritage relating to minorities and rural areas.<sup>62</sup> 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<sup>63</sup> who can hold intangible heritage, train others, assist with surveys, and take part in raising public awareness.<sup>64</sup> 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,<sup>65</sup> including "oral tradition, folklore, ways of life, lifestyles, festivals, secrets of traditional handicrafts, knowledge of traditional medicine . . . and other forms of traditional knowledge."<sup>66</sup> The law seeks to protect and promote all cultural heritage,<sup>67</sup> to regulate "conservation and promotion of cultural heritage," and to identify "rights and responsibilities of organisations and individuals,"<sup>68</sup> including foreigners.<sup>69</sup> The legislation aims to ensure "unified management" but recognizes "collective, community and private ownership."<sup>70</sup> It seeks to promote the utilization of cultural heritage<sup>71</sup> and prevent its destruction or illegal use.<sup>72</sup> Owners or other managers of cultural heritage have rights and responsibilities, including protection and promotion,<sup>73</sup> and the State has the obligation of creating the conditions for them to do so.<sup>74</sup> In particular, "responsible state authorities must apply necessary measures to preserve intangible cultural heritage and prevent threats of its misuse, loss or dying out."<sup>75</sup> 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.”<sup>76</sup> 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.”<sup>77</sup> The Act creates a system for management of intangible heritage by providing that the national estate includes places or objects associated with living heritage<sup>78</sup> and establishing the South African Heritage Resources Agency<sup>79</sup> with responsibility to promote “identification and recording of . . . living heritage.”<sup>80</sup> It also provides a system for grading heritage based on significance,<sup>81</sup> designation of protected areas,<sup>82</sup> and the maintenance of heritage registers.<sup>83</sup> 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.”<sup>84</sup> In Turkey, there is one law that covers natural, cultural, and underwater heritage sites but not intangible cultural heritage.<sup>85</sup> 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.<sup>86</sup> 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.<sup>87</sup> 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.”<sup>88</sup> 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](http://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](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](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](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.