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.