Making the case for a pluralistic approach to intellectual property regulation in developing countries

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Many of the poorest and least developed countries in the world are currently experiencing pressure to adopt global intellectual property regimes in order to promote their socio-economic development. These regimes are claimed to be necessary to stimulate innovation, creativity and the transfusion of new knowledge. However, international organizations and developing agencies making such claims often overlook the existing local intellectual property systems that exist in many developing countries. These occupy much of the same regulatory space as global intellectual property rights, but are often based on very different value systems and cultural and philosophical underpinnings. The introduction of a global system based on private property rights and the market economy is therefore likely to have significant effects both upon these local regulatory systems and upon the social and economic relations of the society of which they are a part. This paper, which takes as an example the Pacific Islands region, argues that consideration be given to a pluralistic approach to intellectual property regulation, one that involves the creative weaving together of both global and local systems for the production and use of knowledge and innovation.

Keywords: *intellectual property, development, innovation, Pacific Islands, regulation*

INTRODUCTION

Today there is strong pressure on many of the poorest and least developed countries in the world to adopt global intellectual property regimes. This pressure is being exerted through two distinct mechanisms: as an overt *quid pro quo* for joining the global trading system through the operation of the Agreement on Trade Related Aspects of Intellectual Property ('TRIPS') and a growing network of Free Trade Agreements that often ratchet up the standards of protection,¹ and also through the operation of a powerful discourse about the importance of this system for achieving development. The inequity of incorporating intellectual property rights in Free Trade Agreements is regularly brought to public attention through the work of a coalition of civil society advocates, academics, human rights groups and others. They have helpfully highlighted the negative impacts such regimes can have on a range of development goals, for instance, access to medicine,

1. P Drahos, 'BITS and BIPS: Bilateralism in Intellectual Property' (2001) 4 Journal of World Intellectual Property 791.

knowledge and food security.² This paper however deals with the second mechanism just identified, whereby global intellectual property rights are positioned by a range of international organizations and donor agencies as an essential policy tool to transform creativity and innovation into sustainable development, to paraphrase the submission of the World Intellectual Property Organization ('WIPO') to the Post 2015 Development Agenda Taskforce.³ This article demonstrates how this ideological mechanism complements the economic and political pressures exerted by the World Trade Organization ('WTO'), through TRIPS, to carve out a central role for intellectual property regimes in even the smallest and most vulnerable countries of the world. It also illustrates how this global system is marginalizing local systems that also regulate the production and use of knowledge and other valuable intangibles which may be better adapted to promoting innovation or creativity in the country concerned.

I therefore advocate a broader view of the range of potential mechanisms that can be used in the intellectual property regulatory space in developing countries, including customary law and informal practices and protocols. In other words, there is value in approaching intellectual property policy as a *pluralist* endeavour. This involves utilizing the range of tools and capacities that are locally available, and are culturally attuned, within particular national or sub-national contexts, rather than relying solely on the global model.⁴ Whilst there has been a great deal of awareness about the existence and importance of traditional knowledge in the past decade,⁵ there has been much less recognition of the local regulatory systems that create the conditions needed for the development and transmission of traditional, local or indigenous knowledge, and their relevance for broader intellectual property regulation.⁶

The first part of this paper describes the ideological dimension to the spread of the global intellectual property rights regime, focusing on the example of the Pacific Islands region. A combination of historical and political factors, as well as the prominence of neoliberal market rationality, has positioned the global intellectual property

2. For example, UNDP, 'Towards a Human Rights-Based Approach to Food Security: A Self-Assessment Tool to Achieve Balanced Plant Regimes' (2012) <http://www.undp.org/content/dam/undp/library/Poverty%20Reduction/Trade,%20Intellectual%20Property%20and%20Migration/Towards%20a%20Human%20Rights-Based%20Approach%20to%20Food%20Security-%20A%20Self-Assessment%20Tool%20to%20Achieve%20Balanced%20Plant%20Regimes/SAT-FS_ENG.pdf>; T Wong and G Dutfield, *Intellectual Property and Human Development: Current Trends and Future Scenarios* (Cambridge University Press, Cambridge 2011); R Pedro, G Tansey and D Vivas-Eugui *Negotiating Health: Intellectual Property and Access to Medicines* (Earthscan, London 2006); R Melendez-Ortiz and P Roffe, *Intellectual Property and Sustainable Development* (Edward Elgar, Cheltenham 2009); M Chon, *Intellectual Property and the Development Divide* (2006) 27 Cardozo Law Review 2821; and L Helfer (ed), *Intellectual Property and Human Rights* (Edward Elgar Publishing, Cheltenham 2013).

3. WIPO, Contribution to the UN Taskforce on the Post 2015 Development Agenda (2012), available at <http://www.un.org/en/development/desa/policy/untaskteam_undf/groupb_wipo_intproprihts.pdf>.

4. Examples are given in section 3 below.

5. There is no globally agreed upon definition of traditional knowledge and many problems with the term, in particular the implicit division between ancient and modern knowledge as discussed below. For this reason, Drahos and Frankel have helpfully suggested the alternative terminology of 'indigenous people's innovation'. See P Drahos and S Frankel (eds), *Indigenous Peoples' Innovation: IP Pathways to Development* (ANU ePress, Canberra 2012). However, the term 'traditional knowledge' is used in this paper interchangeably with indigenous and local knowledge.

6. With the notable exceptions of Drahos and Frankel above n 5 and P Drahos, *Intellectual Property, Indigenous People and their Knowledge* (Cambridge University Press, Cambridge 2014).

regime as *the* primary means of stimulating innovation, technological advancement and creativity. This section shows that although many countries in this region are being coerced into adopting global intellectual property norms through membership of the WTO, there is also a real belief at critical national and regional policy levels that these laws will advance their development. Such a belief is problematic because of the past decade or so of research demonstrating that intellectual property laws are not in the best interests of most developing countries, and certainly not for those who are far behind the technological frontier.⁷ Whilst the ideology identified in this section is itself the subject of significant contestation both within and outside the global North, it remains an identifiable narrative promulgated by highly influential Bretton Woods institutions and major development agencies.

Second, the paper argues that a major but largely unexplored factor in the acceptance of the message that global intellectual property laws promote development, is the hegemonic power of global intellectual property rights discourse. A first step towards developing a pluralist approach therefore involves highlighting this current tendency to universalize the highly specific forms of regulation of intangible property that are embedded in the global intellectual property rights system. The importance of countering the hegemony of global IPR is demonstrated by reflecting upon what has happened in the context of land tenure in many developing countries in the past century, and the consequences of devaluing and transforming customary tenure following Western models of private land ownership.

The last part of the paper then sets out an alternative, pluralistic, approach to intellectual property policy in less developed countries through identifying a number of heuristic devices.

The penetration of the global intellectual property system into the Pacific Islands region, possibly its last geographical frontier, is the focus of this paper. Although issues of traditional knowledge are extremely relevant to this development and are regularly mentioned below, the various movements in the region to protect traditional knowledge through *sui generis* legislation have been discussed at length in a number of other publications,⁸ and as such they are not the main focus here.

7. See Commission on Intellectual Property Rights, *Integrating Intellectual Property Rights and Development Policy* (London 2002), available at <http://www.iprcommission.org/papers/pdfs/final_report/ciprfullfinal.pdf>; E Hassan, O Yaqub and S Diepeveen, *Intellectual Property and Developing Countries: A Review of the Literature* (RAND Europe 2010), available at <http://www.rand.org/content/dam/rand/pubs/technical_reports/2010/RAND_TR804.pdf>; N Netanel, 'Introduction: The WIPO Development Agenda and its Development Policy Context', in N Netanel (ed), *The Development Agenda: Global Intellectual Property and Developing Countries* (Oxford University Press, Oxford 2009); and KE Maskus, 'Intellectual Property Rights and Economic Development' (2000) 32 Case Western Reserve Journal of International Law 471.

8. G Pigliasso, 'Are the Grassroots Growing? Intangible Cultural Heritage Lawmaking in Fiji and Oceania', in K Rio and E Hviding (eds), *Made in Oceania: Social Movements, Cultural Heritage and the State in the Pacific* (Sean Kingston, Oxford 2011) 322–37; M Forsyth, 'How Can Traditional Knowledge Best be Regulated? Comparing a Proprietary Rights Approach with a Regulatory Toolbox Approach' (2013) 25(1) The Contemporary Pacific 1; M Forsyth, 'Lifting the Lid on "the Community": Who has the Right to Control Access to Traditional Knowledge and Expressions of Culture?' (2012) 19 International Journal of Cultural Property 1; M Forsyth, 'The Traditional Knowledge Movement in the Pacific Island Countries: the Challenge of Localism' (2011) 29(3) Prometheus 269; S Farran, 'The "Unnatural" Legal Framing of Traditional Knowledge and Forms of Cultural Expression in the Pacific' (2013) 1(2) Journal of New Zealand and Pacific Studies 181.

THE CONTEXT

The paper takes as a focus the non-Francophone small island developing states in the Pacific Islands region.⁹ These countries all have small and dispersed populations (all but one of the 14 states have a population of less than one million, and seven are home to fewer than 100 000 people), limited state capacity, restricted resource bases, distance from external markets and acute vulnerability to natural disasters.¹⁰ They also share numerous positive features: many communities are still heavily reliant on traditional knowledge for day-to-day life, customary institutions play important roles, there is a vibrant cultural life, and a tradition of continuous adaption to their unique geographic situations. Small island states are regularly overlooked in the intellectual property and development literature, which tends to focus on the rapidly developing Asian states and the major emerging economies of Brazil, Russia, India, China and South Africa. However, their relatively subaltern perspective provides important insights into the global issue of intellectual property and development. Given the current focus on alternative models to stimulate innovation,¹¹ we should be paying attention to, and supporting, the different mechanisms used in this region to regulate the production and use of knowledge. Unfortunately, external interest is mostly applied in the opposite direction, namely trying to force these states into the same small intellectual property rights box as the rest of the world.

A QUESTION OF TERMINOLOGY

Before turning to the substantive arguments in this paper, it is first necessary to deal with an issue of terminology. Intellectual property is used in a broad sense to refer to rights and responsibilities over and in relation to intangible products of the human mind (ideas, creations, inventions, processes, knowledge). The most commonly discussed types of intellectual property regimes are those that have been developed principally in the Western legal context and are contained in TRIPS and other global international intellectual property treaties (henceforth 'global IPR'). Although these international instruments reflect a combination of a number of different legal traditions (principally a US utilitarian approach and a Continental European 'fruits of labour' approach), the result is a regime that focuses on exclusive possession, individual creation and ownership, state-centred implementation and enforcement mechanisms, and – in the modern era – an embeddedness in the liberal market economy. As Sell argues, it is 'a conception of IP based on protection and exclusion rather than competition and diffusion'.¹²

9. The paper is based on fieldwork conducted in Vanuatu, Samoa and Fiji between 2011 and 2014, and is part of an Australian Research Council project to investigate the impact of development on Pacific Island countries.

10. See C Tisdell, 'Globalization, Development and Poverty in the Pacific Islands' (2002) 29 (11/12) *International Journal of Social Economics* 902.

11. See T Pogge, M Rimmer and K Rubenstein, *Incentives for Global Public Health: Patent Law and Access to Essential Medicines* (Cambridge, Cambridge University Press 2010); and S Shavell and T van Ypersele, 'Rewards Versus Intellectual Property Rights' (2001) 44(2) *Journal of Law and Economics* 525.

12. S Sell, 'Post-Trips Development: The Tension between Commercial and Social Agendas in the Context of Intellectual Property' (2002) 14 *Florida Journal of International Law* 193, 193.

It is not over-stating the matter to say that today the concept of intellectual property *per se* has come to be conflated with global IPR. However, just as every society depends upon its knowledge resources, creativity and innovation, so most societies can be assumed to have their own endogenous norms and institutions that regulate their production and use.¹³ These are also intellectual property regimes, although they operate on the basis of very different principles and institutional structures to global IPR. For example, Simet comments in relation to the Tolai people in Papua New Guinea:

Ownership of knowledge among the Tolai is highly regulated, and the ways of acquiring it are clearly defined. Knowledge is owned either by an individual, group or the wider public and may be protected by means of *pidik* (secrecy). A particular class of spirits known as *turangan* are present in the creation, transfer and use of knowledge.¹⁴

Indigenous knowledge regulation systems, like the bodies of knowledge they regulate, are dynamic and continually evolving to accommodate new social realities, and should not be seen as only relevant to 'traditional' lifestyles or knowledge production.¹⁵ This paper refers to all systems of norms that regulate the production and use of intangibles as 'intellectual property systems'. Although often involving fundamentally different notions of 'property' to a Western conception of the term, these other intellectual property systems often occupy the same regulatory space as global IPR, and classifying them together is one way to draw attention to their existence. Insisting that the global IPR regime is just one of many systems that regulate rights to intangible valuables is also an opportunity to challenge the increasingly reified nature of global IPR, and to create awareness of its politically and economically contingent nature.¹⁶ The broad use of the term intellectual property system in this paper is therefore part of an exploration of concrete ways in which neoliberal visions of private property rights can be resisted in this field.

The term 'local intellectual property system' is used in this paper to refer to those local norms and institutions that are not global IPR and operate today in a variety of countries to regulate the production and use of valuable intangibles, including but not limited to traditional knowledge.

13. These claims can be borne out by examining the vast body of anthropological literature that exists on just about every different society of earth. See for example, K Whimp and M Busse (eds), *Protection of Intellectual, Biological and Cultural Property in Papua New Guinea* (Asia Pacific Press, Canberra 2000); R Coombe, 'Protecting Traditional Environmental Knowledge and New Social Movements in the Americas: Intellectual Property, Human Rights, or Claims to an Alternative Form of Sustainable Development?' (2005) 17 Florida Journal of International Law 115; H Geismar, *Treasured Possessions: Indigenous Interventions into Cultural and Intellectual Property* (Duke University Press, Durham, NC and London 2013); J Leach, 'Modes of Creativity and the Register of Ownership', in R Ghosh (ed), *CODE: Collaborative Ownership and Digital Economy* (MIT Press, Cambridge, MA 2005) 29–44; M Halewood, 'Common Law Aboriginal Knowledge Protection Rights: Recognizing the Rights of Aboriginal Peoples in Canada to Prohibit the Use and Dissemination of Elements of their Knowledge' (PhD thesis, York University 2005); and C Green and T Drescher, 'The Tipi with Battle Pictures: The Kiowa Tradition of Intangible Property Rights' (1994) 84 TMR 418.

14. J Simet, 'Copyrighting Traditional Tolai Knowledge?', in Whimp and Busse above n 13, 65.

15. Drahos and Frankel, above n 5.

16. M Busse, 'Epilogue: Anxieties About Culture and Tradition – Property as Reification' (2009) 16 International Journal of Cultural Property 357, 359.

1 GLOBAL INTELLECTUAL PROPERTY RIGHTS REGIMES = DEVELOPMENT

1.1 The international discourse about intellectual property and development

The promotion of global IPR as a development tool must be understood in the context of the economic and market-based focus of most development projects today.¹⁷ Economic growth is seen to be catalysed by innovation and new technology, which in turn is claimed to be incentivized by global IPR. Global IPR regimes are promoted as the best vehicle for developing countries to stimulate their own domestic innovation. They are also said to open up new sources of wealth, such as the development of cultural industries and commercialization of traditional knowledge, and to stimulate foreign investment. DeBeere, Armstrong, Oguamanam and Schonwetter argue that '[t]he still dominant paradigm of IP protection, globally and in Africa, promotes IP as a "power tool" to facilitate economic growth'.¹⁸ For example, the World Bank's 2004 report *Poor People's Knowledge: Promoting Intellectual Property in Developing Countries* presented a range of case studies demonstrating the importance of global IPR in 'promoting the innovation, knowledge, and creative skills of poor people in poor countries, and particularly about improving the earnings of poor people from such knowledge and skills'.¹⁹ In the Pacific Islands region in 2015 Australia just announced a further round of funding to 'expand capacity-building IP programs to benefit developing and least-developed countries, with a focus on the Indo-Pacific'. It is promoted as demonstrating Australia's 'commitment to assisting least-developed and developing countries to promote and protect their creativity and innovation through the intellectual property and multilateral system'.²⁰ Global intellectual property rights are also being actively promoted as a way to address the growing problem of food security.²¹ The idea that global IPR can promote development is also being advocated by many academics; Sunder observed that '[i]ntellectual property rights in poor people's knowledge are increasingly considered a key to third-world development'.²²

17. J Ferguson, 'Decomposing Modernity: History and Hierarchy after Development', in A Loomba et al. (eds), *Postcolonial Studies and Beyond* (Duke University Press, Durham, NC and London 2005) 167–8; A Escobar, *Encountering Development: The Making and Unmaking of the Third World* (Princeton, Princeton University Press 1995); D Alessandrini, *Developing Countries and the Multilateral Trade Regime* (Hart Publishing, Oxford and Portland, OR 2010); M Chon, 'Intellectual Property and Theories of Developmental Justice', in D Gervais (ed), *Intellectual Property, Trade and Development* (2nd edn, Oxford University Press, Oxford 2014) 270.

18. J de Beer, C Armstrong, C Oguamanam and T Schonwetter *Innovation and Intellectual Property: Collaborative Dynamics in Africa* (UCT Press, Capetown 2013) 7.

19. J Finger and P Schuler, *Poor People's Knowledge: Promoting Intellectual Property in Developing Countries* (World Bank, Washington, DC 2003).

20. <<http://www.psnews.com.au/aps/477/news/intellectual-funds-for-pacific-neighbours>>.

21. Bragdon argues 'It is a widely held view that intellectual property (IP) is a tool to stimulate innovation and thus promote overall social well-being. Some argue that IP regimes are essential to stimulate precisely the kind of innovation required to tackle global food security challenges by incentivizing research and development in agriculture, such as for drought-resistant seeds', S Bragdon, 'Small Scale Farmers: The Missing Element in the WIPO-IGC Draft Articles on Genetic Resources' (Quaker United Nations Office, Briefing Paper No. 1, 2013) 1.

22. M Sunder, 'The Invention of Traditional Knowledge' (2007) 70 *Law and Contemporary Problems* 97, 111; see for example, R Taplin and A Nowak, *Intellectual Property, Innovation and Management in Emerging Economies* (Routledge, Abingdon 2010).

This approach has been somewhat tempered since WIPO adopted the Development Agenda in 2007 in response to concerns about its IP maximalist approach. DeBeer²³ argues that the Development Agenda ‘represents at least an attempted paradigm shift for IP policies in the twenty-first century’ and that its key demand was ‘to re-establish the public policy aspects of IP rights, emphasizing that the protection and enforcement of IP cannot be an end in itself’.

However, the Development Agenda has little if any binding force on WIPO or its member states as it consists only of recommendations, and many of those are clothed in ambiguous language.²⁴ It is instructive that WIPO still frames its mandate in terms that present a wholly positive view of the potential of the global IP regime, even for least developed countries: ‘As a United Nations agency, WIPO is committed to working with developing and least developed countries to enable them to reap benefits from the IP system and to enhance their participation in the global innovation economy’.²⁵

There have been extensive critiques of the various ways that global IPRs have negatively impacted upon many developing countries, for example through restricting access to foreign goods such as textbooks, software, plant varieties, pharmaceuticals and so forth.²⁶ There have also been a range of studies challenging claims that global IPR regimes lead to economic growth in developing countries.²⁷ However, the main response of WIPO and many other academics to critiques of the effects of global IPR regimes on development have been to suggest that it is possible to calibrate and fine-tune the global IPR system to meet different levels of development. Indeed, Gervais argues that ‘calibration is now an (one might say ‘the’) accepted recommended strategy for most countries to follow’.²⁸ An exemplar of this approach comes from Blakeney and Mengistie who argue ‘A clear IPR policy and strategy in SSA [Sub-Saharan African] countries, coupled with a programme of building the necessary implementing capacity, will enable the exploitation of any flexibility in the TRIPS and the use of IPR as a tool for development’.²⁹

Although this approach is informed by current geo-political FTA-dominated realities that should not be overlooked or marginalized, this article questions whether such a response – that leaves the global IPR = development discourse largely unchallenged – is

23. J de Beer, ‘Defining WIPO’s Development Agenda’, in J de Beer (ed), *Implementing the World Intellectual Property Organisation’s Development Agenda* (Wilfrid Laurier University Press, Waterloo, ON, Canada 2009).

24. At the 11th Session of the Committee on Development and Intellectual Property (CDIP) in WIPO in 2013, Brazil, on behalf of the Development Agenda Group, presented a report in which it stated ‘Of course, we recognize that we have made good progress over the last six years. But we are really concerned that Member States may not be maintaining the same commitment to the effective implementation of the Development Agenda at this point in time’, <<http://www.ip-watch.org/weblog/wp-content/uploads/2013/05/CDIP-DAG-General-Statement-May-2013.pdf>>.

25. World Intellectual Property Organization website, <<http://www.wipo.int/cooperation/en/index.html#development>>.

26. See the literature referenced above n 2.

27. For a recent summary of these see R Ostergard, Economic Growth and Intellectual Property Rights Protection, in Gervais above n 17.

28. D Gervais, ‘IP Calibration’, in Gervais above n 17, 88.

29. M Blakeney and G Mengistie, ‘Intellectual Property and Economic Development in Sub-Saharan Africa’ (2011) 14(3/4) *The Journal of World Intellectual Property* 238, 259. See also C Deere, *The Politics of Intellectual Property Reform in Developing Countries*, in Netanel above n 7, 127–8.

likely to be the best way forward for developing countries, especially those that are Least Developed Countries, Small and Vulnerable Economies, Small Island Developing States, and others far behind the technological frontier.

Focusing on exceptions and flexibilities, whilst important, deflects deeper critiques of the values and assumptions that underpin global IPR, and does not confront its embeddedness within neoliberal capitalist ideology. The making of such critiques and recognition of this broader context allows the imagination of more fundamental reforms. Much can be learnt in this regard from post-development scholars, such as Pahuja who questions the basis of the 'imperial narrative of progress and advancement, a narrative which posits some societies as having achieved its promise and as others still en route towards it'.³⁰ The assumption that all developing countries are going to, or wish to, follow the development route of the First World is not axiomatic, and there is value in calling attention to alternative visions. For example, some Melanesian countries are creating their own indicators of well-being that measure development according to culturally significant criteria, such as speaking vernacular languages and participating in local cultural activities;³¹ Vanuatu has for many years been promoting a development model based on a traditional economy;³² and in 2013 the inaugural Pacific Islands Development Forum called for a new approach to development based on green growth, one that champions sustainable development by adopting innovative and 'outside of the box approaches', revisiting traditional practices and improving existing mechanisms.³³ These visions of development are not focused on rejecting Western technology and ideas (or even capitalism); rather they seek to develop an alternative vision of modernity, one that mediates the benefits of globalization with an appreciation of their current social and environmental resources.

1.2 The internalization of the global IPR = development discourse by developing countries

Notwithstanding the problematic aspects of the global IPR = development narrative, it is highly effective. For example, six Pacific island countries have introduced or modernized their intellectual property laws as part of their development plans since 2000.³⁴ As mentioned above, the pressure to introduce global IPR regimes is very closely linked to membership of the WTO, as all WTO member states are required to be

30. S Pahuja, *Decolonising International Law* (Cambridge University Press, Cambridge 2011) 212.

31. Vanuatu National Statistics Office, 'Alternative Indicators of Well-Being for Vanuatu' (2012) available at <<http://www.vnso.gov.vu/>>.

32. B Rousseau and J Taylor, 'Kastom Ekonomi and the Subject of Self-Reliance: Differentiating Development in Vanuatu', in T Yarrow and S Venkatesan (eds), *Differentiating Development: Beyond an Anthropology of Critique* (Berghahn, Oxford 2012); F Hickey, 'Nearshore Fisheries and Human Development in Vanuatu and Other Parts of Melanesia' (SPC Traditional Marine Resource Management and Knowledge Information Bulletin #24, 2008) available at <<http://www.spc.int/coastfish/en/publications/bulletins/traditional-management/198-traditional-information-bulletin-24.html>>.

33. Pacific Islands Development Forum, 'Summit Outcomes' (2013), <<http://pacificidf.org/summit-outcomes/>>. See further, M Forsyth, 'Alternative Development Paradigms in Vanuatu and Beyond' (SSGM In Brief 2014/25) available at <http://ips.cap.anu.edu.au/sites/default/files/SSGM%20IB%202014_25%20Forsyth%20Proof%202.pdf>.

34. This is described in detail in Chapter 1 in M Forsyth and S Farran, *Weaving Intellectual Property Policy in Small Island Developing States* (Intersentia, Cambridge 2015).

compliant with TRIPS, which requires adoption of minimum standards of IP protection and engagement with global IP institutions. Economic and political pressure on Pacific island countries to implement these regimes also comes through potential FTAs, such as the proposed European Partnership Agreement and Pacer Plus.³⁵ However, these geo-political factors alone cannot explain the widespread enthusiasm towards global regimes displayed by politicians and key policy developers in the region. A number of countries in the region that have enacted global IPR regimes are (or were) Least Developed Countries (Vanuatu, Solomon Islands, Samoa [until 2014]) and hence exempt from complying with TRIPS until 2021 or until they graduate from this status, and others such as the Cook Islands, which recently enacted a copyright act, are not members of the WTO.

Compliance with TRIPS or other FTAs also does not fully explain why so many other developing countries have TRIPS Plus standards and do not make full use of existing flexibilities within the international system.³⁶ So whilst in no way seeking to argue that Pacific Island countries and other developing countries have complete freedom of choice about whether or not to engage in the international intellectual property system, it is important to seek to identify whether or not the TRIPS framing is the only real driving factor at play, or whether, as I suggest below, the IP = development discourse is also an important factor. This is critically important because responding to these ideological mechanisms requires a very different approach to addressing the geo-political mechanism. In particular, *it suggests that exemptions and flexibilities in international treaties may not be sufficient to avoid the adoption of global IPR regimes that are not strictly legally required in developing countries*. It also contradicts the recent claim that ‘the push to apply higher protection to least-developed countries has been sidelined’.³⁷

The operation of this ideological mechanism was demonstrated in Solomon Islands during World Intellectual Property Day 2015. Speeches during the event repeatedly referenced the promised benefits of intellectual property frameworks for artists and musicians, and the consequent need for Solomon Islands to strengthen its engagements with the international intellectual property regime. Such promises included the collection of royalties for artists through collecting societies, the protection of cultural values and heritage from external exploitation, and, generally, the message that ‘Intellectual Property Rights will affect them in a lot of positive ways’.³⁸ The celebrations led to the revival of the previously defunct Solomon Islands Music Federation on the basis that ‘there are now better opportunities ahead, and of which the establishment of the Solomon Islands Intellectual Property System is one avenue towards this direction’.³⁹

35. See S Musungu, ‘An Analysis of the EC Non-Paper on the Objectives and Possible Elements of an IP Section in the EC-Pacific EPA’ (International Centre for Trade and Sustainable Development, 2007), available at <<http://www.iprsonline.org/ictsd/docs/Musungu%20Pacific%20EPA.pdf>>; Robinson>.

36. See I Mgbeoji, ‘A False Dawn? TRIPS and TRIPS-Plus Impacts in Africa’, in Gervais above n 17, 180; and C Correa, ‘TRIPS and TRIPS Plus Protection and Impacts in Latin America’, in Gervais above n 17, 141.

37. D Gervais, ‘IP Calibration’ in Gervais above n 17, 94. See for example, Vanuatu’s TRIPS Plus WTO accession package negotiated in 2012 and discussed in Forsyth and Farran, above n 34.

38. ‘World Intellectual Property Day Celebrated’, Solomons Star News, 27 April 2015, 12.

39. ‘Solomon Islands Music Federation Revives’, The Island Sun, 11 June 2015, available at <<http://www.islandsun.com.sb/index.php/music-entertainment/music/7770-solomon-islands-music-federation-revival>>.

A number of intellectual-property-related commitments currently under consideration or in development by the Solomon Islands government were also announced at this event. These included Solomon Islands finalizing its draft national intellectual property strategy, becoming a member of the World Intellectual Property Organization, signing the Berne Convention, finalizing the draft bill on the Protection of Traditional Knowledge and Cultural Expressions and signing the Paris Convention.⁴⁰ As the Solomon Islands has been a member of the WTO since 1996 and is exempt from compliance as a Least Developed Country, neither pressures of accession nor WTO membership are adequate explanations for this adoption of global IPR.

Unfortunately, there is cause for great scepticism about the confidence placed in the global intellectual property system by Solomon Islands. Whilst a detailed analysis is beyond the scope of this paper, the following observations can be made. First, although it was claimed that integration into the global intellectual property system will 'protect Solomon Islanders and their culture, traditional knowledge and practices from exploitation',⁴¹ in fact there is currently no international treaty for the protection of traditional knowledge, or room for much optimism about one in the near future.⁴² At a sub-regional level, there has been a Melanesian Spearhead Group Treaty on Traditional Knowledge in existence since 2011, but as of July 2015 it still has not been ratified by all the member states. As a consequence, any legislation that Pacific Island countries introduce will not be enforceable outside of national boundaries.

Second, the global intellectual property regime has a tendency to concentrate ownership of intangible assets within powerful interest groups. Although the trope of the struggling artist or genius scientist is often used to advocate for strengthened rights, in actual fact the main beneficiaries of global IPRs are largely corporations.⁴³ Available statistics also show a clustering of intellectual property ownership rights in certain countries.⁴⁴ The international system is clearly geared towards benefiting well-resourced

40. 'Solomon Islands to Modernise Intellectual Property Rights Law', Radio New Zealand International, 20 April 2015, available at <<http://www.radionz.co.nz/international/pacific-news/271623/solomons-to-modernise-intellectual-property-rights-law>>.

41. Ibid.

42. The WIPO ICG has been developing such a treaty for the past 14 years but as of 2015 has not reached any consensus on key issues and its mandate to continue appears uncertain: see K Gopakumar, 'WIPO: Failure to Reach Consensus, "No Decision" Adopted on Four Issues', Infojustice.org 2 October 2014, <<http://infojustice.org/archives/33342>>.

43. About one-third of all patents owned by organizations in both Australia and the US were owned by just 100 companies. H Moir, 'Who Benefits? An Empirical Analysis of Australian and US Patent Ownership' (Centre for the Governance of Knowledge and Development, Working Paper, 2008), available at <<http://cgkd.anu.edu.au/menus/workingpapers.php>>.

44. For example, in 2014, 75% of the patents held worldwide were held by just four countries: China, USA, Japan and Korea (statistics taken from <<http://www.wipo.int/ipstats/en/>>). In 2002 it was estimated that over half (53%) of the value of all royalty and licence fees paid worldwide were received in just one territory, the United States (see <<http://www.worldmapper.org/display.php?selected=168#>>). In terms of geographical indications of origin, under the Lisbon System whilst France has over 500 active registrations and Italy some 100, the six African countries that are also part of this system only have two registrations between them, despite having been members of the treaty since the 1970s: C Saez, 'France, Italy, Heavyweights of Lisbon Appellations of Origin System; Africa Struggling', 16 May 2015, <http://www.ip-watch.org/2015/05/16/france-italy-heavyweights-of-lisbon-appellations-of-origin-system-africa-struggling/?utm_source=IP-Watch+Subscribers&utm_campaign=7919e2fea7-DAILY_SUMMARY&utm_medium=email&utm_term=0_b78685696b-7919e2fea7-352137905>.

companies in technologically advanced countries, rather than promoting economic development in less developed countries.

Third, in terms of whether joining the Berne convention *will* assist local musicians, research conducted in Jamaica found that simply updating copyright legislation to comply with TRIPS was unlikely to maximize economic returns for musicians. Indeed, despite the considerable international consumption of Jamaican music, the research indicated ‘a steady haemorrhage of royalty fees’ from Jamaican collecting societies to their foreign counterparts.⁴⁵

Having identified the potentially misplaced confidence of many in the Pacific Islands in the global intellectual property regime as a source of development, this paper now turns to investigate one of the key mechanisms that has been used to date to engender such confidence, namely the hegemonic power of intellectual property discourse.⁴⁶

2 THE HEGEMONIC POWER OF INTELLECTUAL PROPERTY DISCOURSE AND THE NECESSITY TO COUNTER IT

This section identifies discourse as an important mechanism by which the global IPR system has achieved its current levels of hegemony in relation to knowledge production, creativity and innovation. It then discusses some lessons that can be learnt from attempts to impose private systems of real property around the globe, and concludes by outlining some reasons why local intellectual property systems may promote more evenly distributed development outcomes.

2.1 Intellectual property as discourse

Foucault’s observations about the power of discourse to allow one particular viewpoint to render all others invisible has been used extensively in many contexts, but seldom in respect to intellectual property.⁴⁷ Said used this theory in his ground-breaking analysis of Orientalism, arguing that through discourse Europe was able to produce ‘the Orient’, and hence to gain authority over it. He argues that the discourse of Orientalism was so authoritative that ‘no one writing, thinking, or acting on the Orient could do so without taking account of the limitations on thought and action imposed by Orientalism’.⁴⁸ Similarly, Escobar demonstrates how the discursive creation of the ‘developing world’ in the post-war period itself created the need for international interventions to assist the Third World in following the road to development through the route of industrial growth and capitalist expansion.⁴⁹

45. S Taylor, ‘Reggaenomics: The Relationship between Copyright Law and Development in Jamaica’ (PhD thesis, Victoria University of Wellington 2013) 81.

46. Some of the other factors that contribute to the positive approach displayed by many policy makers towards the global IPR regime that are not explored in detail here include the belief that such regimes: will counter the threat of bio-piracy; are necessary to promote industries such as tourism and cultural industries; will support small businesses; and will encourage technology transfer and foreign direct investment (see further, Forsyth and Farran, above n 33, Chapter 1).

47. Cf A Roy, ‘Postcolonial Theory and Law: A Critical Introduction’ (2008) 29 *Adelaide Law Review* 316; A Roy, ‘Intellectual Property Rights: A Western Tale’ (2008) 16 *Asia Pacific Law Review* 219.

48. E Said, *Orientalism* (Penguin Books, London 1995) 3.

49. Escobar, above n 17.

There are clear parallels with global IPR and development, whereby it has become almost impossible to conceive of developing national intellectual property policy outside the global IPR paradigm, or of decoupling the idea of the state from the development of innovation and creativity. This is increasingly the case even in those countries that have strong local norms and institutions for the regulation of knowledge, creativity and innovation, such as in the Pacific Islands region. A major vector of this discourse is the technical assistance provided to developing countries by WIPO. Netanel⁵⁰ refers to these programmes as involving ‘single-minded devotion to teaching developing country officials and citizens why intellectual property is in their best interests’. Other avenues are international and regional development programmes that promote global IPR, as outlined in the preceding section. As a result of these factors, the vast majority of countries around the world have established intellectual property offices that administer global IPRs and develop policies based firmly within the confines of its discourse.⁵¹ In turn, these national offices and legal regimes have effectively blinkered actors engaged in developing policies for the production and use of intangible valuables from any consideration of local intellectual property systems.⁵²

The effects of the global IPR discourse – that presents the global IPR system as the only or only *real* system of intellectual property – is to marginalize the huge variety of local intellectual property systems existing worldwide. This is problematic for many reasons. Local intellectual property systems emerge from a variety of different considerations and objectives, in a similar way to how the global IPR system developed (and continues to develop) from different philosophical underpinnings.⁵³ For example, many of these objectives in the Melanesian context are linked to the importance of the preservation and development of social relations,⁵⁴ while other systems, such as that of the Karen in Thailand, are informed by animist beliefs that connect the spirits of people with nature.⁵⁵ As Gana points out, the norms and institutions which define what knowledge (ancient or modern) is to be protected and how, reflect the underlying values of a society.⁵⁶ In other words, the distinctions that a particular legal system makes, for example between what can and cannot be alienated and different types of knowledge, are not universal; they emerge from a particular historical, social and

50. Netanel, above n 7, 7.

51. See C Deere, *The Implementation Game: The TRIPS Agreement and the Global Politics of Intellectual Property Reform in Developing Countries* (Oxford University Press, Oxford 2009).

52. The first mover advantage in the enactment of laws over a new regulatory space is enormous. This is illustrated by the actions and comments of Paul Bremer, head of the Coalition Provisional Authority in Iraq in 2004. Amongst the first sets of rules that were developed were detailed provisions on copyright and intellectual property rights. Bremer is said to have expressed ‘the hope that these institutional arrangements would “take on a life and momentum of their own” such that they would prove very difficult to reverse’, D Harvey, *A Brief History of Neoliberalism* (Oxford University Press, Oxford 2007) 7.

53. C May and S Sell, *Intellectual Property Rights: A Critical History* (Lynne Rienner Publishers Inc, Boulder CO 2006); P Drahos, *A Philosophy of Intellectual Property* (Dartmouth Publishing Company, Aldershot, UK 1996).

54. M Busse, ‘Property’, in J Carrier (ed), *A Handbook of Economic Anthropology* (2nd edn, Edward Elgar, Cheltenham 2013) 115.

55. D Robinson, ‘Legal Geographies of Intellectual Property, “Traditional” Knowledge and Biodiversity: Experiencing Conventions, Laws, Customary Law and Karma in Thailand’ (2013) 51(4) *Geographical Research* 375, 378.

56. R Gana, ‘Has Creativity Died in the Third World? Some Implications of the Internationalization of Intellectual Property’ (1995) 24 *Denver Journal of International Law and Policy* 109, 112.

cultural context.⁵⁷ Ownership, which is an integral component of global IPR regimes, is not at the heart of some of these alternative intellectual property systems. The term stewardship or custodianship is sometimes employed instead, as it involves both rights and obligations.⁵⁸ Rights and obligations are also often communally shared, although this is by no means always the case, and in some societies there is a mixture of individual and communal rights depending upon the particular subject matter concerned.⁵⁹

Gana cogently argues that the Western model of protection of creativity globalized through TRIPS differs in many fundamental ways to the underlying values and norms expressed in the protection of creativity in the Third World.⁶⁰ She further posits that these differences arise from five causes: different forms of property ownership (i.e. communal as opposed to private); different purposes of protection (i.e. 'to achieve a myriad of social, political and economic goals' as opposed to encouraging creativity); different theories of creation or creativity; the fact that in indigenous societies 'the value ascribed to creative expression is jointly held by the group as a whole'; and the fact that Third World societies are based on different organizing principles that affect 'the very idea of what is considered the appropriate subject of private ownership'.⁶¹ Boateng has recently added to this list by arguing that Western intellectual property rights are based upon a different conception of time to some indigenous African systems.⁶² Gana also observes that 'forms of recognition and protection are a function of, and deeply embedded in, the institutions and underlying norms of social organization'.⁶³ She raises the concern that the TRIPS model will dominate and eventually efface such systems, as it 'imposes a model assumed to be objectively the 'right form' of intellectual property protection'.⁶⁴ In conclusion she asks 'is there any possibility that indigenous laws protecting creativity will have room to assert themselves in a system based on this foreign model of intellectual property protection?'⁶⁵

While, there are a number of promising moves in this direction, for example in relation to New Zealand's Waitangi Tribunal Report on the WAI 262 claim,⁶⁶ and in Ecuador's new draft intellectual property laws, many local intellectual property systems around the world are today obscured by the dominant presence of global IPR.⁶⁷ The effectiveness of the hegemony of global IPR discourse in the development sphere is, in fact, astounding. It is hard to think of another field or area where the disappearance of local or indigenous

57. See M Strathern, 'Multiple Perspectives on Intellectual Property', in Whimp and Busse (eds) above n 13; May and Sell, above n 52, 197.

58. Busse, above n 16, 363; J Lai, *Indigenous Cultural Heritage and Intellectual Property Rights* (Springer, Switzerland 2015) 5–6; WAI 262 (Waitangi Tribunal Report, 2011) available at <https://forms.justice.govt.nz/search/Documents/WT/WT_DOC_68356606/KoAotearoaTeneiTT2Vol2W.pdf>.

59. See for example, Stern's description of music exchanges in Vanuatu: M Stern, 'Music in Traditional Exchanges in North Vanuatu' (2013) 36 *Journal of Pacific Studies* 59.

60. Gana, above n 55.

61. *Ibid* 133–6.

62. B Boateng, 'The Hand of the Ancestors: Time, Cultural Production, and Intellectual Property Law' (2013) 47(4) *Law and Society Review* 943–73.

63. Gana, above, n 55, 128.

64. *Ibid* 140.

65. *Ibid* 140.

66. See Lai, above n 57 Chapter 4; WAI 262, above n 57; and the Organic Code for the Social Economy of Knowledge and Innovation (Código Orgánico de la Economía Social del Conocimiento e Innovación) <<http://coesc.educacionsuperior.gob.ec/>>.

67. Chon, above n 17, 262 makes a similar point.

variants has been subject to less challenge. The dying out of local languages, local economic systems, local epistemological frameworks and local agricultural systems have all been publicly highlighted and lamented; not so local intellectual property systems. Even in the extensive critical intellectual property and development literature, there is very little real challenge to the paradigm of global IPR, or any advocacy for thinking outside of this very circumscribed conceptualization of intellectual property.⁶⁸

One of the major factors that has allowed the global IPR system to maintain and perpetuate its hegemony has been its ability to neutralize critiques by absorbing them within itself.⁶⁹ This is illustrated by consideration of the treatment of traditional knowledge, which clearly had the potential to challenge many of the fundamental assumptions and principles of the global system when it emerged as a political issue in the 1990s. The literature on traditional knowledge exposes in detail many of the fundamental differences between the regulation of knowledge from some indigenous perspectives, where concepts such as ownership, authorship and possessive individualism may not exist, and the Western approach. For example, as Coombe argues:

The law rips asunder what First Nations people view as integrally related, freezing into categories what Native peoples find flowing in relationships that do not separate texts from ongoing creative production, or ongoing creativity from social relationships, or social relationships from people's relationship to an ecological landscape that binds past and future generations in relations of spiritual significance.⁷⁰

However, such insights and critiques have been effectively siloed into the traditional knowledge agenda within a WIPO subcommittee, and the 'solutions' proposed for the 'protection' of traditional knowledge have to an overwhelming extent been centred around global IPR mechanisms such as legislation, international treaties, the creation of state authorities, private property rights and rights of exclusion. The potentially radical critiques that these perspectives could have brought to bear on conceptions of the regulation of intellectual property more generally, such as the need to focus on the relationships that sustain creative production and knowledge dissemination, have been effectively circumvented.

2.2 Lessons from real property

Some of the problems that may be caused by the unchecked domination of the global IPR model may be illustrated by reference to the example of real property. Over the past century, customary land tenure systems in many postcolonial countries have been transformed into privately owned property systems based on modern Western land tenure principles. In many cases this has occurred on the basis of the argument that it is essential to promote economic development.⁷¹ However, decades of experience in this area have demonstrated that in many instances such changes have not in fact brought the anticipated economic benefits. Further, these changes have often

68. Cf Gana, above n 55; Boateng, above n 61; WAI 262 above n 57.

69. Nay refers to this as a process of 'assimilation'. O Nay, 'International Organisations and the Production of Hegemonic Knowledge: How the World Bank and the OECD Helped Invent the Fragile State Concept' (2014) 35(2) Third World Quarterly 210, 224.

70. R Coombe, *The Cultural Life of Intellectual Properties: Authorship, Appropriation, and the Law* (Duke University Press, Durham and London 1998), 229.

71. H De Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (Basic Books, New York 2000).

resulted in the fracturing of social relations, the dispossession of communities, environmental degradation and violent conflict.⁷² Cotula argues that the process of commodification evidenced by the recent global land rush involves ‘far-reaching repercussions for societies. In Polyani’s words, “instead of economy being embedded in social relations, social relations [became] embedded in the economic system”’.⁷³ Changes to property regimes can have fundamental impacts upon social relations, for example through introducing what Filer refers to as an ideology of property ownership.⁷⁴ As Strathern observes, ‘new practices of remuneration create new social divisions between people’.⁷⁵

Moreover, many scholars have argued that customary land tenure systems promote usage of land that is creative, dynamic and flexible, and generate broad social benefits.⁷⁶ They also demonstrate that customary tenure should not be equated with ‘communal’, rather it is ‘a complex but flexible system of rights and obligations at individual, family, clan and tribal levels’.⁷⁷ Commenting on the link between land tenure and development, the Executive Officer of the Land and Language Desk at the Vanuatu Cultural Centre noted:

The Ni-Vanuatu have also objected to ... proposals to record land rights and eventually register titles. Such measures may seem innocuous but we know from experience that demarcation and registration propels land into a commercial realm where it can be leased or sold to non-indigenous people – and thereby lost to the community. Westerners see the Ni-Vanuatu engaging in traditional farming, fishing and animal husbandry and think poverty – not self-sufficiency. They perceive our country’s low gross domestic product – about one-10th of Australia’s – as a ‘problem’ that must be solved. But there’s more to Vanuatu than GDP. A few years ago, Vanuatu ranked at the top of the New Economics Foundation’s Happy Planet Index, which focuses on life expectancy, experienced wellbeing, and ecological footprint. Holding on to and using our land and waters provides us with healthy diets and lifestyles – and the best seafront views on the planet. We don’t want to exchange these for money now – and see our children in urban slums tomorrow.⁷⁸

72. See for example, J-P Platteau, ‘The Evolutionary Theory of Land Rights as Applied to Sub-Saharan Africa: A Critical Assessment’ (2006) 27(1) *Development and Change* 27, 29–86; J-P Platteau, ‘Does Africa Need Land Reform?’ in C Toulmin and J Quan (eds), *Evolving Land Rights, Policy and Tenure in Africa* (DFID/IIED/NRI, London 2000); D Fitzpatrick, A McWilliam and S Barnes, *Property and Social Resilience in Times of Conflict: Land, Custom and Law in East Timor* (Ashgate Publishing Limited, Farnham UK 2012) 83.

73. L Cotula, ‘The New Enclosures? Polyani, International Investment Law and the Global Land Rush’ (2013) 34(9) *Third World Quarterly* 1605, 1608.

74. C Filer, ‘Custom, Law and Ideology in Papua New Guinea’ (2006) 7(1) *The Asia Pacific Journal of Anthropology* 65, 66.

75. M Strathern, ‘Global and Local Contexts’, in J Leach and L Kalinoe (eds), *Rationales of Ownership: Transactions and Claims to Ownership in Contemporary Papua New Guinea* (Sean Kingston Publishing, Canon Pyon, UK 2004) 115.

76. See J Fingleton (ed), ‘Privatising Land in the Pacific: A Defence of Customary Tenures’, The Australian Institute (2005), available at <<http://www.tai.org.au/node/943>>; J Wagner and M Talakai, ‘Introduction to Customs, Commons, Property and Ecology: Case Studies from Oceania’ (2007) 66(1) *Human Organization* 1.

77. Fingleton, above n 75, ix.

78. J Simo, ‘Indigenous People, Not Australians, Should Determine Vanuatu’s Future’, *Sydney Morning Herald*, 27 November 2013, available at <<http://www.smh.com.au/comment/indigenous-people-not-australians-should-determine-vanuatus-future-20131117-2xotx.html>>.

The experience with real property can provide three helpful lessons for intellectual property policy. First, the existence of local property systems should be recognized, rather than ignored, as happened to many indigenous tenure systems that did not look like property at all to the colonial powers.⁷⁹ Second, changes to any property system are likely to have far-reaching social and political consequences. As Polanyi observed, with the increasing creation of new fictitious commodities, opportunities and benefit flows are created unequally for different groups.⁸⁰ These will have implications for the effectiveness of new property systems achieving their objectives, and may also lead to unintended social and economic spill-over effects. Further, all systems of property rights exist within networks of power relations, and are subject to capture and contestation by different interest groups. Whilst this paper argues that local intellectual property systems should not be overlooked, they also should not be romanticized or preconceived as being necessarily less prone to manipulation by those in power than other forms of property rights.⁸¹

Third, and this point is crucial but often overlooked, the type of property system a country chooses is closely related to the particular development pathways that country wishes to pursue.⁸² As Busse observes, ‘different systems of property and exchange create different types of person, ethics and social organisation’.⁸³ Global IPR, like private land tenure, favour visions of development that prioritize economic growth measured by GDP and the creation of sources of cash income for various interest groups.⁸⁴ Other types of property regimes, in contrast, favour views of development that may prioritize the maintenance of social relations, spiritual beliefs, cultural identity, or ensuring the continuation of the use and development of traditional knowledge.

2.3 Why local intellectual property systems may promote better development outcomes

There is a considerable body of literature suggesting that global IPR regimes do not necessarily lead to economic growth, technology diffusion, useful research and development, or increased creativity.⁸⁵ The authors of a three-year study into innovation and creativity in Africa concluded that ‘patent systems (even were the institutional capacity to exist, and in most cases it does not) are irrelevant to many of the modes of innovation and creativity happening in Africa. Copyright also seems to be ineffective in many African settings, because of its lack of enforceability’.⁸⁶ Building on these observations, this section suggests that *local* intellectual property systems may be more likely than global IPR to

79. C Rose, ‘The Several Futures of Property: Of Cyberspace and Folk Tales, Emission Trades and Ecosystems’ (1998) 83 Minnesota Law Review 129, 140–43.

80. K Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (Beacon Press, Boston, MA 1944).

81. See S McDonnell, ‘Exploring the Cultural Power of Land Law in Vanuatu: Law as a Performance that Creates Meanings and Identities’ (2013) 33 Intersections: Gender and Sexuality in Asia and the Pacific, available at <<http://intersections.anu.edu.au/issue33/mcdonnell.htm>>.

82. This argument is extensively made in Miranda Forsyth and Sue Farran, *Weaving Intellectual Property Policy in Small Island Developing States* (Intersentia 2015).

83. Busse, above n 53, 115.

84. Chon, above n 17, 262, makes a similar point.

85. See Wong and Dutfield above n 2; de Beer, above n 22; Deere, above n 28; Commission on Intellectual Property Rights, above n 7.

86. De Beer et al., above n 18, 392.

promote the development and sharing of new technology and the fostering of creativity in certain contexts. As a result, there is value in approaching intellectual property policy as a pluralist endeavour, namely one that utilizes the range of tools and capacities that are available, and that are culturally attuned, rather than focusing solely on the global model. This approach is based on insights from academics as diverse as the post-development scholar Gibson-Graham, who argues that we should adopt approaches that '[s]tarts with what is in place and builds from there (in other words it is assets-based and path-dependent)',⁸⁷ and the creator of responsive regulation, John Braithwaite, who advises: '[t]hink in context; don't impose a preconceived theory'.⁸⁸ I set out three, non-exhaustive, arguments.

First, the processes of innovation⁸⁹ and creativity occur differently in different societies, and depend upon a complex range of factors, including the cultural context and the existing level of technological development in a country.⁹⁰ Whilst global IPR such as patents and plant variety rights may stimulate agricultural innovation in many developed countries, in countries where agriculture is largely performed on a small scale, these rights are less likely to have an incentivizing effect. Writing about agricultural innovation in Uganda, Tabaro argues that 'innovation' must be 'understood in a broader context in which minor innovation and adaptation and assimilations of existing (imported technologies) are more common than major innovations'.⁹¹ Strategies to stimulate innovation in such a context should therefore explore 'the possibilities of learning from local experiences and building on those experiences, as well as learning from the store of social and intellectual capital incorporated into traditional or indigenous forms of innovation that small producers and farmers can and do in fact undertake'.⁹²

Research in Vanuatu also suggests that new technology, such as new plant varieties, is often produced collectively and so depends upon many small and indirect contributions, in contrast to the type of commercial breeding programmes that plant variety rights legislation is targeted towards.⁹³ As any domestic plane trip will testify, individuals are constantly engaged in transporting cuttings of new varieties of edible and decorative plants around the country. Incentives to innovate (for example, to produce more bountiful harvests and larger specimens) are often located in customary traditions such as yam ceremonies and other traditional festivals, and the incentive to share new species is still partially stimulated by traditional naming rights. In relation to technology transfer, it is clear that merely importing foreign technology will not suffice if

87. JK Gibson-Graham, 'Forging Post-Development Partnerships: Possibilities for Local and Regional Partnerships', in A Pike, A Rodriguez-Pose and J Tomaney (eds), *Handbook of Local and Regional Development* (Routledge, London 2011) 230.

88. J Braithwaite, 'The Essence of Responsive Regulation' (2011) 44 UBC Law Review 475, 476.

89. I use a broader definition of innovation than purely commercialization of new products as this is overly restricted given the importance of the informal economy in many developing countries. See V Telle and D Johnsson, 'Traditional Knowledge as a Source for Innovation', in Gervais, above n 17, 314.

90. See M Maciel and S Albagli, 'Knowledge Societies, Seen from the South: Local Learning and Innovation Challenges' (2009) *International Social Science Journal* 60, 97–107.

91. E Tabaro, 'Patent Law Reform in Uganda: Addressing Priorities and Strategies' (2009) 12 (6) *The Journal of World Intellectual Property* 571, 584–9.

92. *Ibid.*

93. M Forsyth and S Farran, 'Intellectual Property and Food Security in Least Developed Countries' (2013) 34(3) *Third World Quarterly* 516.

there is not an existing level of absorptive capacity.⁹⁴ The research I have conducted with agricultural extension officers in Vanuatu and Fiji suggests that one of the best strategies to increase uptake of new agricultural technology is for one or two innovative farmers to adopt and vernacularize the new technology, and then for it to be distributed in the modified (and familiar) form for farmers for their use. Such a process does not lend itself to global IPR, but is likely to be facilitated by local intellectual property mechanisms, such as farmer-to-farmer technology transfer through naming rights and festivals.

Creativity is similarly heavily culturally contextual. The notion of individual creators that underpins Western copyright law is not relevant to many cultures in the developing world. Amongst many Melanesian communities, inspiration and new ideas are said to come from spirits and dreams, and are not attributable to the individuals who first voice them, rendering the notion of authorship in copyright rather meaningless. Lindstrom observes in relation to the people from the island of Tanna in Vanuatu:

Islanders do not explain their production of songs or other new knowledge in terms of a knower's individual talent, genius or creativity. Local epistemology seeks authorities and not individual authors ... the Tannese intimate that they are repeating truths told by their fathers, whispered by spirits when intoxicated by kava, or revealed by ancestors in dreams.⁹⁵

Further, in some societies the value of creativity is located in productive relationships, and not in things. Consequently, as Leach argues in the context of PNG, assumptions about creativity built into global IPR regimes 'might be responsible for undermining forms of creativity that do not neatly register in its terms'.⁹⁶

Second, knowledge is generated, shared and absorbed differently in different cultural and social contexts. Global IPR regimes are premised upon a particular approach to knowledge transfer that is based upon written communication and the perception that knowledge is able to be separated from the holder. However, many cultures transfer knowledge orally and do not share the same type of objectification of knowledge. For example, according to Gegeo and Watson-Gegeo, amongst the Kwara'ae people of the Solomon Islands 'all knowledge is subjective knowledge ... there can be no detachment of the knower from the known as in mainstream Anglo-European epistemology'.⁹⁷ Sanga similarly observes that in the Solomon Islands 'indigenous knowing is socially constructed and mainly exists in tacit form'.⁹⁸ Given these fundamental differences to knowledge generation and sharing, intellectual property policies should be based upon understandings of how new knowledge is generated and transferred in particular cultural contexts, and make use of the institutions that have traditionally supported such generation and transfer. These will vary from location to location, but, for example, may include institutions such as the Oceanic concept of *talanoa*. This is an indigenous approach to research and data exchange that is based on oral traditions

94. P Sampath and P Roffe, 'Unpacking the International Technology Transfer Debate: Fifty Years and Beyond' (ICTSD, Issue Paper No 36, 2012), available at <<http://ictsd.org/i/publications/150036/>>.

95. L Lindstrom, 'Big Men as Ancestors' (1990) 29(4) *Ethnology* 313, 316.

96. Leach, above n 13, 37.

97. D Gegeo and K Watson-Gegeo, 'How We Know: Kwara'ae Rural Villagers Doing Indigenous Epistemology' (2001) 13(1) *The Contemporary Pacific* 55, 62.

98. J Sanga, *An Exploratory Case-study into the Cultural Effects on Knowledge Management Practices in the Solomon Islands* (thesis, Victoria University of Wellington, 2009), available at <<http://researcharchive.vuw.ac.nz/handle/10063/940>>.

and prioritizes collaborative dialogue as a way of learning and sharing new information.⁹⁹

Third, global IPR regimes are heavily state-based and dependent upon significant pools of technological and legal know-how, as well as judicial and administrative capacity. Such resources are, however, in very short supply in many of the world's most underdeveloped and small economies. Consequently, when global IPR regimes are implemented in such contexts, they are often very badly executed and are subject to capture by sectoral interest groups.¹⁰⁰ In contrast, in many developing countries, the *local* intellectual property system is highly decentralized. It relies upon local institutions and norms, such as customary laws, that provide mechanisms for reciprocal sharing of knowledge and other valuable intangibles, public shaming for transgressions of these laws, and regimes of secrecy or *tabu*.¹⁰¹ All of these resources can probably be implemented more effectively in countries with limited state capacity than administratively heavy legal regimes, although of course they do not have extra-territorial reach.

3 'ALTERNATIVES TO' GLOBAL INTELLECTUAL PROPERTY RIGHTS

Innovation, the development of new technology, the promotion of creativity, and the diffusion of knowledge are all critical for increasing the well-being of citizens of both developing and developed countries. However, as described above, policies and programmes designed to achieve these objectives often focus solely on global IPR, squeezing out consideration of local approaches.

This section suggests a number of heuristics to counter this trend that actively embrace the possibilities offered by plural intellectual property systems, responding to calls in the post-development literature to creatively imagine 'alternatives to' Westernized visions of development.¹⁰²

3.1 Identify concrete goals for intellectual property policy

First, in thinking about intellectual property policy it is important to move away from the merely ritualistic desire to update and modernize the intellectual property regime towards considering the specific objectives such a regime should advance. The possibilities include technology development and transfer, stimulation of creativity, productive use of knowledge assets and so forth. It may be advisable to single out certain

99. P Nuttall, 'Sailing for Sustainability: The Potential of Sail Technology as an Adaptation Tool for Oceania. A Voyage of Inquiry and Interrogation through the Lens of a Fijian Case Study' (PhD thesis, Victoria University of Wellington, 2013) 80–81.

100. See a description of the Fijian experience: J Daurewa, 'Copyright Prosecution – The Fiji Experience' (2012) 36 *Pacific Studies* 105.

101. See Geismar, above n 13, 77, for an example of a group of local carvers from Vanuatu gaining control of the international market for their wooden slit-gongs through using their local intellectual property mechanisms.

102. A McGregor, 'Development, Foreign Aid and Post-Development in Timor-Leste' (2007) 28(1) *Third World Quarterly* 155, 157; G Curry, 'Moving Beyond Postdevelopment: Facilitating Indigenous Alternatives for "Development"' (2003) 79(4) *Economic Geography* 405; Escobar, above n 17, 19.

specific goals to pursue as a matter of priority, such as agricultural innovation to cope with climate change, or the development of cultural industries.

This advice does not mean that international global IPR obligations should be ignored; rather that an element of disjunct between domestic intellectual property policy and the international system should be consciously adopted. Even if the economic or political pressure to legislate for global IPR cannot be resisted, the ideological pressure to view them as pro-development can be.¹⁰³ Indeed, this is what makes identifying the existence of these ideational mechanisms at play so important. Okediji refers to a similar concept as ‘a sort of legitimate inconsistency with the spirit, if not the text, of the robust rights negotiated’.¹⁰⁴ The active implementation of global IPR regimes should only occur after an analysis has been conducted that takes into account their likely impact upon the operation of local intellectual property systems, the administrative capacity to ensure their effective and fair implementation and enforcement, and the costs of implementation in light of the likely benefits.

3.2 Take a pluralist view of the available intellectual property mechanisms

In considering how to achieve the goals identified for intellectual property policy, tools and institutions from local intellectual property system(s) should be considered alongside global IPR. The crucial point is the need to counter the strong pressure to *automatically* pursue global IPR mechanisms, and instead to see them as just one possible option amongst a range of others. Some examples of these other systems in the context of the Pacific Islands are customary institutions such as systems of *tabu*; bio-cultural protocols based on customary norms;¹⁰⁵ holding *talanoa* for knowledge exchange and development; traditional festivals and competitions; public displays and prizes; and apprenticeships and the revitalization of traditional craft guilds, such as the *tufuga* of Samoa, to ensure the handing down of valuable skills and knowledge from master craftsmen and women.¹⁰⁶ These arguments are not based on romantic visions of returning to some imaginary pre-colonial past, but rather on the pragmatic reality that these existing systems are already culturally attuned to promoting goals such as knowledge diffusion and promotion of creativity and innovation. Further, although critically threatened in some contexts, in other places the capacity already exists to operationalize them.

Consideration should also be given to ways in which local intellectual property mechanisms can be modernized. For example, public shaming has been an effective sanction used by Pacific Island communities in the past, and it has recently been

103. See the discussion about the usefulness of hypocrisy as governance tool in N Brunsson, ‘Ideas and Actions: Justification and Hypocrisy as Alternatives to Control’ (1993) 18(6) *Accounting, Organisations and Society* Vol 489.

104. R Okediji, ‘The Limits of Development Strategies at the Intersection of Intellectual Property and Human Rights’, in D Gervais (ed), *Intellectual Property, Trade & Development: Strategies to Optimize Economic Development in a TRIPS-Plus Era* (Oxford University Press, Oxford 2007) 357.

105. See generally, K Swiderska, ‘Protecting Traditional Knowledge: A Framework Based on Customary Laws and Bio-cultural Heritage’, Paper for the International Conference on Endogenous Development and Bio-Cultural Diversity, COMPAS (IIED, Geneva 2006) available at <<http://pubs.iied.org/G01069.html>>; IJ Davidson-Hunt et al., ‘Biocultural Design: A New Conceptual Framework for Sustainable Development in Rural Indigenous and Local Communities’ (2012) 5(2) *S.A.P.I.E.N.S.* available at <<http://sapiens.revues.org/1382>>.

106. See further Forsyth, ‘Lifting the Lid’, above n 8.

re-adapted for use in the digital sphere. Two international businesses were forced to acknowledge misuses they had made of traditional expressions of culture from the Pacific Islands through public shaming in 2013. The first instance involved Nike withdrawing a new range of women's tights that closely resembled a traditional Samoan tattoo reserved only for male chiefs. The collection sparked uproar within Pacific communities around the world and they protested on social media and rallied together by signing a global petition.¹⁰⁷ The second example involved a collection of dresses by New York designer Nanette Lepore featuring Fijian *kesakesa* motifs that she referred to as her 'Aztec' collection. This also led to outrage on behalf of Fijians around the world, many of whom protested on the brand's Facebook page and forced the designer to issue an apology. This experience prompted a desire amongst members of the Fijian Fashion Industry to develop a Code of Ethics that can be used to inform international fashion houses about their cultural responsibilities when using motifs taken from or inspired by indigenous cultural heritage. It was also suggested that the development of such a Code of Ethics could be used as the basis of establishing a collaborative relationship between Pacific designers and international fashion houses.¹⁰⁸

3.3 Do not isolate the national Intellectual Property Office

Intellectual Property Offices worldwide risk a high degree of regulatory capture by big business and international organizations such as WIPO and major global Patent Offices.¹⁰⁹ Lund has observed that 'The exercise of authority is intimately linked to the legitimacy of the particular institution. Not only in the sense that an institution has to be legitimate to exercise authority, but especially because the actual exercise of authority also involves a specific claim to legitimacy'.¹¹⁰ This resonates in the context of intellectual property administration: through administering a particular type of (global) intellectual property regime, national IP offices also make claims to the legitimacy of their authority and the regime they administrate, thus further establishing or entrenching both. If national Intellectual Property Offices in developing countries are entirely dominated by individuals who have only been exposed to the global IPR mindset, there is a very high chance that they will direct future policies down a regulatory pathway that emphasizes proprietary interests and state-centric institutional structures, rather than being open to the pluralistic approach advocated here.

To combat such an eventuality, national Intellectual Property Offices could either be situated as part of a government department where the promotion of innovation and technology diffusion is critical, such as agriculture, or be headed by a standing committee that contains representatives from a range of sectors and interest groups. This will also help to counter the belief that intellectual property is a technical matter that can only be dealt with by 'experts', by demonstrating that policy in this area raises important moral, ethical and economic issues for which the capacity to engage already exists.

107. See M Forsyth, 'How Can the Theory of Legal Pluralism Assist the Traditional Knowledge Debate?' (2013) 33 *Intersections: Gender and Sexuality in Asia and the Pacific*, <<http://intersections.anu.edu.au/issue33/forsyth.htm>>.

108. *Ibid.*

109. P Drahos, 'Rethinking the Role of the Patent Office from the Perspective of Responsive Regulation', in F Abbott, C Correa and P Drahos, *Emerging Markets and the World Patent Order* (Edward Elgar Publishing, Cheltenham 2013) 85.

110. C Lund, 'Twilight Institutions: Public Authority Local Politics in Africa' (2006) 37(4) *Development and Change* 685, 694.

3.4 Strategically harness regional initiatives

Regional approaches may overcome problems of capacity in small developing countries, although there are often high barriers to effective regulatory cooperation amongst such states, meaning that such endeavours need be strategic and realistic. One possibility could be to develop a generalized regional authenticity mark that could then be administered at a local level by different customary bodies or other nodes. For example, in the Pacific Islands there are numerous art forms and disciplines that are well recognized as having their roots in a particular place or within a particular social group. Some examples include PNG *bilums* (woven bags), Vanuatu *tam-tams* (carved slit drums); Fijian *drua* (sailing canoes), and Samoan *tatau* (tattoos). All these products are susceptible to being mass produced far more cheaply in Asia where the costs of production are not nearly as high as in the Pacific islands. A regional authenticity mark, standardized and certified by a regional office, is one possible way to counter such a problem. A regional approach could ensure far greater public awareness-raising about the existence and standards of the mark than could individual groups operating alone. The process of creating such a mark could also be a helpful catalyst for some communities to revive their cultural traditions and to empower customary or community leaders to develop mechanisms to ensure the continued transmission of such heritage. In developing such a mark it will be important to learn from the experiences in Australia and New Zealand where authenticity marks have encountered (and in some respects overcome) a number of hurdles.¹¹¹

3.5 Hybridize intellectual property policy

Finally, developing countries should actively hybridize their intellectual property regimes, creatively blending elements from global and local intellectual property systems. For example, in some Pacific island countries such as Vanuatu and Samoa there are provisions within the Copyright, Patent and Trademark Acts that seek to protect indigenous knowledge in addition to standard global property intellectual property subject matter. While such provisions do not have an extra-territorial applicability, they can be of use in helping to ensure that indigenous knowledge is not misappropriated within the country. The importance of this was recently illustrated in Fiji, where the national airline, Air Pacific, lodged trademark applications for over fifteen different *masi* [traditional paper cloth] motifs, all of which are based on 'the rich storehouse of designs within the iTaukei heritage arts'.¹¹² This raised public concern that it would 'give Air Pacific the exclusive ownership and use of the motifs and prevent *masi* makers, carvers, tattooists, artisans, craftspeople, fashion designers and artists from using these motifs without Air Pacific/Fiji Airways permission'.¹¹³ An opposition to the trade mark application was lodged and there was a dynamic public campaign against the registration, mostly orchestrated by Fijian women, effectively using a range of different social media to mobilize diverse

111. See Drahos, above n 6, Chapter 10; Lai, above n 57, 110–18.

112. C Koya, 'Anthropological Evidence of the 15 Intended iTaukei Tapa Cloth Designs' (2013), available at <<https://docs.google.com/file/d/0B0fYC2m4wjFqCHlBc2xSQjVmMG8/edit?usp=sharing&pli=1>> accessed 5 November 2013.

113. Pax Viti, 'Petition to Prime Minister Voreqe Bainimarama: Appeal to Stop Air Pacific Trademarking 15 Distinct Masi Motifs', Change.org, available at <https://www.change.org/petitions/prime-minister-voreqe-bainimarama-appeal-to-stop-air-pacific-trademarking-15-distinct-masi-motifs?utm_campaign=friend_inviter_modal&utm_medium=facebook&utm_source=share_petition&utm_term=permissions_dialog_false>.

support groups. While the outcomes of this case were still not known in 2015 (which is suggestive in itself), the case demonstrates the problems inherent in changing the legal regime for the protection of intangible property. However, some of these problems could be overcome by vernacularizing the introduced global IPR. For example, the trademark legislation could carve out clear exceptions for registrable trademarks, such as the Vanuatu Trade Mark Act 2003 that prohibits the registration of trademarks that contain indigenous knowledge unless certain conditions are met (section 94). The New Zealand Trade Mark Act 2002 also provides in section 17(1)(c)(i) that a trade mark application can be denied on the grounds of cultural offence to significant sections of the community, and in particular Maori.¹¹⁴

Another potential intersection between global IPR regimes and local intellectual property is where questions of morality, *ordre public* and ethical issues arise, such as in considerations of patentable subject matter. It may be possible to integrate mechanisms that refer any such questions to institutions that represent customary or community leaders, such as the National Council of Chiefs in Vanuatu. This would allow for important cultural viewpoints to be articulated, and would also send a message about the importance of integrating customary values into modern intellectual property policy.

To sum up, this section suggests that intellectual property policy in developing countries should be re-directed away from the automatic prioritizing of global IPR towards the identification, development and use of more innovative, culturally rooted local intellectual property mechanisms.

CONCLUSION

This paper has aimed to make two main interrelated points. First, there is a need to identify and to actively counter the hegemonic power of global IPR discourse, by which the regulatory system embodied by TRIPS is presented by key global institutions and development agencies as the only real system of regulating intellectual property. In turn, this will expose the existence of local intellectual property systems worldwide. Second, the potential of these alternative systems to promote innovation, the development of new technology, creativity and the diffusion of knowledge should be actively embraced through the adoption of a pluralistic approach to intellectual property. This will enable a switch from the current approach to intellectual property policy prevalent in many developing countries that focuses on modernization and compliance with the global IPR system, to one that considers as a *first step* what local mechanisms and institutions are currently involved in the regulation of intangibles, and what are the prevailing epistemologies, stimulants of innovation and creativity and the underlying values of those local intellectual property systems. These existing systems of intellectual property are fundamental to achieving the aims of innovation and technological development because they have been created from the cultural, economic and social fabric of that particular society. Simply because the types of technology or knowledge being invented, or imported, are ‘modern,’ does not mean that the processes used to produce, master, adapt and diffuse that technology should change completely: the types of learning relationships between people remain the same. This is not to say that local intellectual property regimes are or should remain static;

114. See further Lai, above n 57, 99–110.

quite the contrary. They have adapted and should continue to adapt over time, indigenizing the most valuable aspects of global IPR for example. However, seeking to displace them with a new system that is not even proven to be beneficial for most developed countries is deeply problematic. In conclusion, the most productive way for developing countries to benefit from the innovative and creative resources of its people is by weaving together a pluralist intellectual property strategy that draws upon the most useful elements of global and local systems.