

# CROSS-CULTURAL NEGOTIATIONS AND INTERNATIONAL INTELLECTUAL PROPERTY LAW: ATTEMPTS TO WORK ACROSS CULTURAL CLASHES BETWEEN INDIGENOUS PEOPLES AND MAJORITARIAN CULTURES

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## ABSTRACT

This Article characterizes the paradigmatic nature of culture. The underlying method of this Article is autoethnographic, and it deals with the particular cultural clashes occurring between indigenous peoples and majoritarian cultures. Geert Hofstede and his co-authors employ a cultural rubric of individualism versus communitarianism to sketch the cultural conflicts embedded in the disagreement between the German band, Enigma, and the Ami tribal couple, the Duanas, over the ownership of an Ami traditional folk song.<sup>1</sup> In addition, Hofstede and his co-authors use a cultural schema of hierarchy versus egalitarianism to draw out key elements of the cultural conflict between the Chilean government and the Mapuche/Pehuenche tribe over control of the right to build a dam that

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1. *Infra* Part II.A.

would flood the tribe's ancestral lands.<sup>2</sup> Using these authors' framework, this Article examines general programs of action and specific strategies in potentially overcoming these cultural barriers. Ultimately, it outlines key principles, specific strategies, and incentives for negotiation in overcoming cultural clashes between indigenous cultures, such as the Kani tribe in India; the Ami tribe in Taiwan; the Mapuche/Pehuenche tribe in Chile; and various majoritarian cultures.

## I. INTRODUCTION: CULTURE, HUMOR, AND PARADIGMS

The following miscommunications illustrate the intricacies of translating across languages and, more importantly, translating the internal cultural logic of humor to an outsider or a "foreign" culture:

A few years ago, the Dairy Association led a wildly successful marketing campaign throughout the United States built on the slogan "Got Milk?" Unfortunately, when the campaign was exported to Mexico, the translation read: "Are you lactating?"<sup>3</sup>

A U.S. software company suffered from having the name of its industry translated as an "underwear" company when launching internationally. A European company selling its chocolate and fruit dessert called "Zit," and the Finns who attempted to sell "Super Piss," a product for unfreezing car door locks, could not be successful in the United States.<sup>4</sup>

To those of us who get the joke, to explain it—recontextualizing imagery from one of T.S. Eliot's poems—is to spread it out "[l]ike a patient etherized upon a table."<sup>5</sup> Essentially, to dissect the joke is to kill the joke. As Arthur Koestler noted, the cultural logic of a joke comes from the sudden juxtaposition of two things that are normally kept separate; that sudden juxtaposition produces a certain tension that must be dispelled through laughter.<sup>6</sup> The "logic" that directs what is normally kept apart, as

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2. *Infra* Part II.B.

3. DAVID LIVERMORE, LEADING WITH CULTURAL INTELLIGENCE: THE NEW SECRET TO SUCCESS 106 (2010).

4. *Id.*

5. T.S. ELIOT, *The Love Song of J. Alfred Prufrock*, in PRUFROCK AND OTHER OBSERVATIONS (1920), available at <http://www.bartleby.com/198/1.html/>.

6. Briefly sketched, the psychological "mechanics" of humor are essentially the same as other "creative" acts; these mechanics involve the sudden clash between two mutually exclusive codes of rules, or associative contexts, which are suddenly juxtaposed. "The conscious and unconscious processes underlying creativity are essentially combinatorial activities—the bringing together of previously separate areas of knowledge and experience. The scientist's purpose is to achieve *synthesis*;

opposed to what usually accompanies each other, resides in the culture that generates this matrix of meaning. The cathartic power of the joke lies precisely in the seamlessness or invisibility of its cultural logic, which yields a different way of viewing and experiencing reality when it is disturbed.

Culture creates “paradigms” in the sense that Thomas Kuhn originally used the word in 1966—well before its explosion into ubiquity in several disciplines.<sup>7</sup> Simply described, a paradigm is the cultural matrix that directs attention to certain questions and ignores others, and maps acceptable methods of attempting to solve these selected problems for a particular community at a particular point in time.<sup>8</sup> A rough analogy to how paradigms (and cultures, as paradigmatic) work is the child’s game of seeing different “animals” in an unruly squiggle of lines, curves, and splotches of color. There is no foolproof way to interpret a jagged line or a small dot. However, once the child grows accustomed to interpreting these rather ambiguous markings in a roughly uniform and meaningful way—that is, once the child acquires a mental “model” of how to interpret these markings—then these pictures are no longer random configurations. As the child habitually refers to this mental “pattern,” the child becomes progressively skillful at uncovering carefully camouflaged “animals” in the tangled undergrowth of shapes and hues. As more animals are successfully mentally “captured” via reference to this model or pattern, the more the model or pattern becomes equated with the obvious or commonsensical. An example of this is illustrated in M.C. Escher’s *Sea and Sky* in Figure 1 below.

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the artist aims at a *juxtaposition* of the familiar and the eternal; the humorist’s game is to contrive a *collision*.” ARTHUR KOESTLER, *JANUS: A SUMMING UP* 129 (1978) (emphasis in original).

7. THOMAS KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* viii (1970).

8. *Id.*

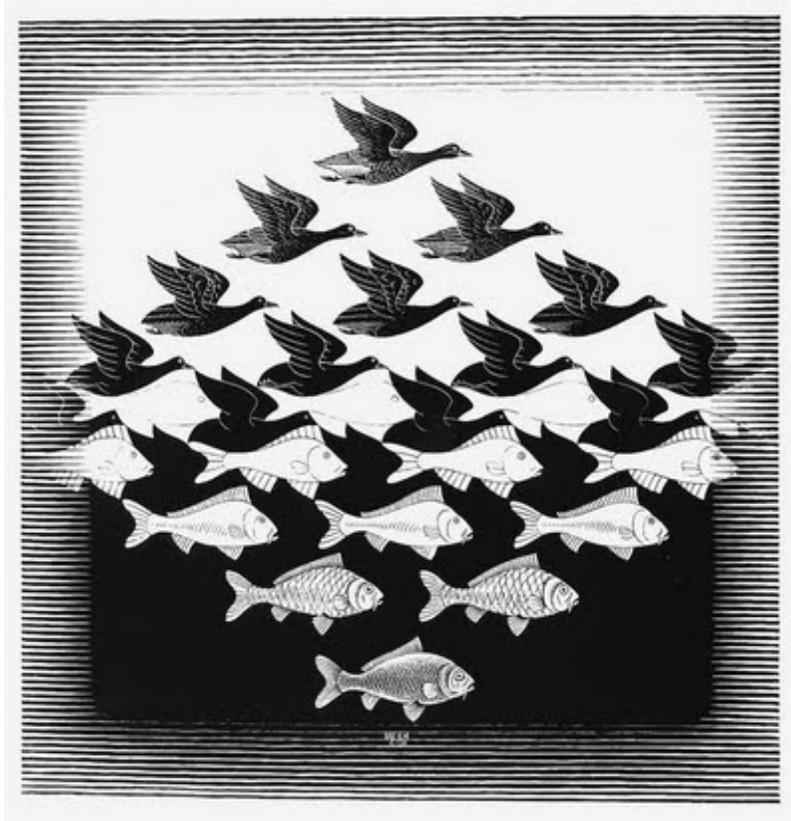


Figure 1. M.C. Escher's *Sea and Sky*<sup>9</sup>

The figures of the fowl and the fish at the topmost and bottom portions, respectively, are evident. The mid-line figures, however, are ambiguous and may be interpreted as either fish or fowl, depending upon which cultural lens is “commonsensically” referenced. This occurs because “culture is the way in which a group of people solves problems and reconcile dilemmas.”<sup>10</sup> Just as our culture is “like water to a fish,”<sup>11</sup> it

9. M.C. Escher, *Sea and Sky* (1938), available at <http://www.mcescher.com/Biography/lw306.jpg>.

10. FONS TROMPENAARS & CHARLES HAMPDEN-TURNER, *RIDING THE WAVES OF CULTURE: UNDERSTANDING CULTURAL DIVERSITY IN GLOBAL BUSINESS* 6 (2d ed. 1998).

nourishes and limits us in ways that defy rational thought processes; through hard-wired or amygdala-based responses, we either see the fish or the fowl first.<sup>12</sup> Culture is the “collective programming of the mind”<sup>13</sup> and entails sharing “particular symbols, meanings, images, rule structures, habits, values, and information processing and transformational patterns.”<sup>14</sup>

This Article’s method is principally autoethnographic. It is written to explore how lawyers and clients could potentially interact effectively in legal negotiation and counseling situations where cultural clashes between the client’s and lawyer’s cultures, the majoritarian culture, the culture of law, and other embedded layers of culture could cause potential conflicts. It is an attempt to work across differences while both respecting and acknowledging them.

“Autoethnography,” an offshoot of Critical Communication, Sociological, and Symbolic Interactionist studies, explores how the study of culture (“ethnos”) is always intertwined with the self (“auto”) that weaves the narration.<sup>15</sup> Autoethnography is qualitative, rather than quantitative.<sup>16</sup> Qualitative researchers stress the socially constructed nature of reality, the intimate relationship between the researcher and what is studied, and the situational constraints that shape inquiry, with an emphasis on the value-laden nature of inquiry.<sup>17</sup> They seek answers to questions that stress how a social experience is created and given meaning.<sup>18</sup>

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11. *Id.* at 20.

12. Iris Burke, Introduction to the Basic Cultural Worldviews: The Neuroscience of Culture, Lecture at the University of Florida Levin College of Law (May 21, 2012). *See also* GEERT HOFSTEDE, GERT JAN HOFSTEDE & MICHAEL MINKOV, *CULTURES AND ORGANIZATIONS: SOFTWARE OF THE MIND* 4–7 (3d ed. 2010). For illustrations of how “hard wired” culture is, see GERT JAN HOFSTEDE, PAUL B. PEDERSEN & GEERT HOFSTEDE, *EXPLORING CULTURE: EXERCISES, STORIES AND SYNTHETIC CULTURES* 8 (2002) (suggesting that an ambiguous picture yields different culturally-based interpretations, ranging from “two women walking and a man threatens one of them with a piece of wood” to “gardening”).

13. Lieh-Ching Chang, *An Examination of Cross-Cultural Negotiation: Using Hofstede Framework*, 2 J. AM. ACAD. BUS. 567, 567 (March 2003), available at <http://www.aeflup.com/ficheiros/Cultural%20Negotiation.pdf>.

14. *Id.* (internal quotations omitted).

15. *See generally* ETHNOGRAPHICALLY SPEAKING: AUTOETHNOGRAPHY, LITERATURE, AND AESTHETICS (Arthur P. Bochner & Carolyn Ellis eds., 2002); *THE SAGE HANDBOOK OF QUALITATIVE RESEARCH* (Norman K. Denzin & Yvonna S. Lincoln eds., 3d ed. 2005).

16. *See* Norman K. Denzin & Yvonna S. Lincoln, *The Discipline and Practice of Qualitative Research*, in *THE SAGE HANDBOOK OF QUALITATIVE RESEARCH*, *supra* note 15, at 10.

17. *See id.*

18. *Id.*

Thus, this Article starts from the conviction that there is no omniscient perspective from which one can record cultural interactions from a clinical distance. This does not mean that there is no such thing as “objectivity”; rather, the notion of objectivity reflects a complex, historical and sociological unfolding in which participant-observers—even lawyers—are already implicated.

These complexities are further magnified when indigenous populations,<sup>19</sup> attempting to protect their traditional knowledge, expressions of folklore,<sup>20</sup> ancestral lands, and cultural identities, come into contact with either the culture of international globalization or the majoritarian culture of their own country. In this Article, two particular cultural clashes are analyzed in terms of general pragmatic strategies and their actual resolutions. First, this Article analyzes the confrontation between an individualistic capitalist culture and a communitarian economically-subsistent culture.<sup>21</sup> Then, it evaluates the clash between a hierarchical majoritarian government determined to join the race towards development at all costs, and a comparatively egalitarian coalition,

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19. Who are “indigenous peoples”? Article 1 of the ILO Convention Concerning Indigenous and Tribal Peoples in Independent Countries gives the following description: those who “inhabited a country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.” ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries, art.1, ¶ 1, June 27, 1989, available at [http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100\\_ILO\\_CODE:C169](http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100_ILO_CODE:C169). For a more detailed exploration of the complexities of attempting a working definition of “indigenous peoples,” see Caroline Joan S. Picart & Marlowe Fox, *Beyond Unbridled Optimism and Fear: Indigenous Peoples, Intellectual Property, Human Rights and the Globalization of Traditional Knowledge and Expressions of Folklore (Part I)*, 15 INT’L COMMUNITY L. REV. 319, 319–39 (2013).

20. For simple analytic reasons, this Article distinguishes between indigenous peoples’ “traditional knowledge” (which has a more scientific basis—e.g., a traditional cure for a disease) and “traditional cultural expressions” or “expressions of folklore” (which seem more akin to artistic forms, such as tribal songs used in a ritual to heal a disease). Nevertheless, both traditional knowledge (“TK”) and expressions of folklore (“EoF”) appear imperiled and prone to exploitation by both multinational corporations (“MNCs”) and governments amid the pressures of globalization. For an in-depth examination of how the pressures of globalization imperil TK and EoF, as well as various strategies to attempt to bridge the gap between preserving indigenous culture and harnessing some of the gains of joining the global trade market for indigenous peoples, see Caroline Joan S. Picart & Marlowe Fox, *Beyond Unbridled Optimism and Fear: Indigenous Peoples, Intellectual Property, Human Rights and the Globalization of Traditional Knowledge and Expressions of Folklore (Part II)*, 16 INT’L COMMUNITY L. REV. 2 (forthcoming 2014).

21. *Infra* Part II.A.

2014] *Cross-Cultural Negotiations and International Intellectual Property Law* 43

composed of tribal members and sympathizers, that is equally determined to preserve their traditions and resources.<sup>22</sup>

## II. EXAMPLES OF CULTURAL CONFLICTS: INDIVIDUALISM VERSUS COMMUNITARIANISM AND HIERARCHY VERSUS EGALITARIANISM

### A. INDIVIDUALISM VERSUS COMMUNITARIANISM: ENIGMA VERSUS DIFANG AND IGAY DUANA

The husband and wife team, Difang Duana (Kuo Ying-Nan) and Igay Duana (KuoHsiu-chu)<sup>23</sup> were betel nut leaf farmers and members of the Ami tribe from Taiwan.<sup>24</sup> In 1988, the couple traveled to France to sing on a tour, in which they, and approximately thirty other aboriginal Taiwanese artists, were paid \$15 a day.<sup>25</sup> Their performances were recorded without their knowledge by the Institute for World Cultures, part of the French National Education Ministry.<sup>26</sup> These recordings were then compiled into an “anonymous” collection of “Taiwanese aboriginal songs.”<sup>27</sup> The French government sold the recording, again without seeking permission and devoid of any kind of notice or public announcement, to EMI Music, a large record company.<sup>28</sup> EMI then authorized Enigma, a German rock band, to use and edit an excerpt from the Duanas’ “Elders’ Drinking Song” or “Weeding and Paddyfield Song No. 1”<sup>29</sup> (in other versions, described as “Palang,” a host’s welcoming song<sup>30</sup>) to become part of the background in

22. *Infra* Part II.B.

23. *Difang and Igay Duana*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Difang\\_and\\_Igay\\_Duana](http://en.wikipedia.org/wiki/Difang_and_Igay_Duana) (last updated Mar. 11, 2013) (last visited May 31, 2013); TITVWeekly, 0817 #80 Difang Duana & Enigma Copyrights Issue, YOUTUBE (Aug. 19, 2008), <http://www.youtube.com/watch?v=EaVnHFHj6MM>.

24. Ashley Esarey, *An Ami Couple Seeks Recognition for Their Music*, ACADEMIA SINICA, TRAVEL IN TAIWAN SPECIAL (1995), [http://www.sinica.edu.tw/tit/special/0996\\_Innocence.html](http://www.sinica.edu.tw/tit/special/0996_Innocence.html).

25. *Difang and Igay Duana*, *supra* note 23.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* For additional factual information regarding the Duana case, see Agnès Lucas-Schoetter, *Folklore*, in INDIGENOUS HERITAGE AND INTELLECTUAL PROPERTY: GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE 342 (Silke von Lewinski, ed., 2d ed. 2008) and Chong Hui-Yeung, *IPR Draft Law for Aborigines Under Attack*, TAIPEI TIMES, Aug. 23, 2000, at 4, available at <http://www.taipeitimes.com/News/local/archives/2000/08/23/49186>.

30. Esarey, *supra* note 24.

Enigma's song, "Return to Innocence."<sup>31</sup> "Return to Innocence," which remixed two minutes of the Duanas' unauthorized recording, achieved a high media profile partly because it was used to promote the 1996 Olympics.<sup>32</sup> The song was so popular that it stayed on Billboard Magazine's International Top 100 hits for thirty-two weeks.<sup>33</sup>

From the very beginning, the contrast between Enigma's culture of individualism, infused with the forces of global capitalism, and the Duanas' culture of communitarianism and subsistent economics was clear. Geert Hofstede, Gert Jan Hofstede, and Paul B. Pedersen<sup>34</sup> outlined basic communicative characteristics of extreme individualists and extreme communitarians that are useful in analyzing the identity-related and economic-based conflicts captured in this case.<sup>35</sup> One of the dimensions of culture that Hofstede and his co-authors studied in their pioneering work is the dimension of individualism versus collectivism (which this Article refers to as "communitarianism" because of the negative connotations that accompany the word "collectivism").<sup>36</sup> Individualistic cultures, such as that of the United States, tend to value personal achievement, innovation, and autonomy above all other traits.<sup>37</sup> In these cultures, individuals tend to look out exclusively for the interests of themselves and their nuclear families.<sup>38</sup> Thus, individualistic cultures place a high premium on "self-sufficiency, personal time, freedom, challenge, and extrinsic motivators such as material rewards, honesty, talking things out, privacy and individual

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31. Difang and Igay Duana, *supra* note 23.

32. Esarey, *supra* note 24.

33. *Id.*

34. Gert Jan Hofstede, son of Geert Hofstede, is a senior researcher and assistant professor in information technology at Wageningen University in the Netherlands. HOFSTEDE, PEDERSEN & HOFSTEDE, *supra* note 12. Paul B. Pedersen, a well-known author and authority in the field of cross-cultural counseling, is professor emeritus at Syracuse University and a visiting professor in the Department of Psychology at the University of Hawai'i. *Id.* Geert H. Hofstede is an international authority in the field of cross-cultural social psychology and is cofounder of the Institute for Research on Intercultural Cooperation at Tilburg University, where he also serves as a senior fellow. *Id.* Obviously, their groundbreaking work on understanding and pragmatically negotiating across cultures is of paramount importance to structuring the theoretical foundations of analysis of this Article.

35. *See id.* at 94, 96.

36. *Id.* at 91 (discussing that Hofstede and his co-authors disavow any political connotations of the word).

37. *Id.* at 92.

38. *Id.*

2014] *Cross-Cultural Negotiations and International Intellectual Property Law* 45

rights.”<sup>39</sup> In contrast, communitarian cultures are characterized by powerful, group-oriented identities.<sup>40</sup> They are “societies in which people from birth onward are integrated into strong, cohesive in-groups, which throughout peoples’ lifetime continue to protect them in exchange for unquestioning loyalty.”<sup>41</sup> Thus, communitarian cultures, such as some Asian cultures, value “group responsibility, harmony, social order, relationships and loyalty.”<sup>42</sup>

As applied to rhetorical registers, Michael Cretu, spokesperson for the band Enigma, epitomized the extreme individualist view through his motive, language, and non-verbal communications throughout the conflict.<sup>43</sup> In general, extreme individualists typically reflect a self-centered vernacular, frequently using the words “I” and “me.”<sup>44</sup> Mr. Cretu emphasized that he thought the Duanas’ recording was in the public domain and kept stressing his lack of deliberate intent in appropriating their recording.<sup>45</sup> Non-verbally, extreme individualists will make eye contact freely, and when they are in groups, they are likely to stand out visually.<sup>46</sup> Correspondingly, Mr. Cretu stood out as the star and spokesperson for Enigma; the other band members were never visible during coverage of this story.<sup>47</sup> Furthermore, Mr. Cretu rhetorically rationalized his extreme individualistic motivation to accumulate individual wealth and prestige by vehemently defending his individual innocence while seeking to maximize profit by minimizing reputational damage.<sup>48</sup>

In stark contrast, the Duanas, who spoke for the Ami tribe, embodied the extreme communitarian ideal.<sup>49</sup> Extreme communitarians can be very silent, especially in the company of a group of outsiders, and typically use

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39. John Barkai, *Cultural Dimension Interests, the Dance of Negotiation, and Weather Forecasting: A Perspective on Cross-Cultural Negotiation and Dispute Resolution*, 8 PEPP. DISP. RESOL. L.J. 403, 412 (2008).

40. HOFSTEDE, HOFSTEDE & MINKOV, *supra* note 12, at 92.

41. *Id.*

42. Cristina Walters, *Cross-Cultural Negotiations: A Role Evaluation of Four Cultural Dimensions and Two Cultural Components*, 27 MICH. BUS. L.J. 39, 39 (2007) (citing Chang, *supra* note 13).

43. *Difang and Igay Duana*, *supra* note 23.

44. HOFSTEDE, PEDERSEN & HOFSTEDE, *supra* note 12, at 94.

45. *Difang and Igay Duana*, *supra* note 23.

46. HOFSTEDE, PEDERSEN & HOFSTEDE, *supra* note 12, at 94.

47. *Difang and Igay Duana*, *supra* note 23.

48. *Id.*

49. *See* Esarey, *supra* note 24.

the word “we” instead of “I.”<sup>50</sup> Thus, the Duanas emphasized tribal ownership and heritage of the song as an expression of folklore, which is communally created and owned. The Duanas sought recognition, first of the Ami tribe and only secondarily of themselves as performers.<sup>51</sup> In addition, extreme communitarians tend to be physically very close with in-groups but reserved with out-groups.<sup>52</sup> Correspondingly, the Duanas seemed to have a distinct network within their community.<sup>53</sup> They learned about Enigma’s use of their recording only because a friend had told them about it; the Duanas always underlined their identities as members of the tribe.<sup>54</sup> Finally, an extreme communitarian will prioritize honoring and gaining recognition for the tribe. As classic extreme communitarians, the Duanas only wanted to be allowed to perform the song at the Olympics as ambassadors of Ami culture; initially they did not seek financial remuneration.<sup>55</sup>

Thus, in terms of general value systems, the key elements of the cultures of extreme individualists versus extreme communitarians may also be sketched comparatively. An extreme individualist will believe that honest people will speak their mind to everyone and anyone, while an extreme communitarian tends to believe that one’s in-group constitutes the only audience who should be trusted.<sup>56</sup> While an extreme individualist communicates in low-context or explicit concepts, so that the listener must adapt to the speaker, an extreme communitarian uses an imprecise communication style with discreet, non-verbal elements, such as crucial tonal cues and pauses wherein the speaker must adapt to the listeners, to make sure the audience understands the speaker.<sup>57</sup> Finally, an extreme individualist believes that the successful completion of a task takes precedence over relationships, while an extreme communitarian believes that relationships are always more important than the task at hand.<sup>58</sup>

Working across these differences in a negotiation or counseling context will be discussed later. For now, this Article turns to outlining another

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50. HOFSTEDE, PEDERSEN & HOFSTEDE, *supra* note 12, at 96.

51. Esarey, *supra* note 24.

52. HOFSTEDE, PEDERSEN & HOFSTEDE, *supra* note 12, at 96.

53. Esarey, *supra* note 24.

54. *Id.*

55. *Id.*

56. *See* HOFSTEDE, PEDERSEN & HOFSTEDE, *supra* note 12, at 94, 96.

57. *Id.*

58. *Id.*

2014] *Cross-Cultural Negotiations and International Intellectual Property Law* 47

cultural clash: the clash between peoples with hierarchical values and those with more egalitarian values.

B. HIERARCHY VERSUS EGALITARIANISM: THE CHILEAN GOVERNMENT  
AND THE MAPUCHE/PEHUENCHE TRIBE

Briefly sketched, in the case of the Pangué/Ralco hydroelectric project, which roughly spanned from 1990 to 2002, Chile's central government and domestic courts colluded with a Spanish transnational company, Endesa, to systematically evict the Mapuche/Pehuenche people from their traditional lands in order to create dams that would power Chile's attempts to obtain full economic development.<sup>59</sup> The cultural clash between the majoritarian elite and the tribe, lying at the margins of Chile, took place against the backdrop of the Chilean government's ambitious resolve to join the sphere of developed nations; the Chilean government aimed to achieve this goal through the construction of the Pangué/Ralco Hydroelectric Project in Chile's Alto BíoBío.<sup>60</sup> Clearly, the majoritarian elite had control of the vertical structure of power and believed it was in the best interest of Chile, as a whole, to follow their lead. The construction of the Pangué dam was facilitated by the "leverage of international capital brokered by the World Bank Group's International Finance Corporation (IFC)."<sup>61</sup> But to the Mapuche/Pehuenche tribe, the building of the dam meant the flooding of their ancestral lands and resources, the loss of their semi-nomadic way of life and their cultural identity.<sup>62</sup> Viewing themselves as equal to any other Chileans, the Pehuenche simply sought to preserve their rights as citizens.<sup>63</sup>

Again, Hofstede and his co-authors' schematization of cultural dimensions is invaluable in contrasting hierarchical and egalitarian cultures. They used the term "power-distance" to define the variable that determines the degree of hierarchy (or respect for rank) that is culturally accepted in a particular society.<sup>64</sup> Under this definition, power distance is the "extent to which the less powerful members of institutions and organizations within a country expect and accept that power is distributed

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59. Marcos A. Orellana, *Indigenous Peoples, Energy and Environmental Justice: The Pangué/Ralco Hydroelectric Project in Chile's Alto BíoBío*, 23 J. ENERGY & NAT. RES. L. 511, 511–18 (2004), available at [http://www.ciel.org/Publications/Ralco\\_Brief\\_22Jul04.pdf](http://www.ciel.org/Publications/Ralco_Brief_22Jul04.pdf).

60. *Id.* at 511.

61. *Id.* at 513.

62. *Id.*

63. *See id.*

64. HOFSTEDE, PEDERSEN & HOFSTEDE, *supra* note 12, at 61.

unequally. Institutions . . . [include] the family, the school, and the community; *organizations* are the places where people work.”<sup>65</sup> Thus, whereas high-power-distance (hierarchical) cultures emphasize the dependence of subordinates upon their superiors’ discretion, low-power-distance (egalitarian) cultures expect a comparatively higher interdependence between bosses and subordinates.<sup>66</sup> As Walters observes in a business context:

High power distance results in little consultation between superiors and their subordinates and emphasizes formal hierarchy, resulting in an increased level of respect for each level. Low power distance cultures tend to view the hierarchy prevalent in any corporation as less important than high power cultures, with CEOs, managers and subordinates consulting with each other from the bottom-up and top-down.<sup>67</sup>

Again, Hofstede and his co-authors’ schematization of the key elements of hierarchical culture and egalitarian culture<sup>68</sup> is instructive as a summary of the essential areas of conflict between the Chilean government and the Mapuche/Pehuenche tribe. An extremely hierarchical culture, like the Chilean government, believes that “might makes right” and that power is good.<sup>69</sup> Such a culture has a strong conviction that privileges and status symbols are “natural” to those who have access to them and are sources of pride and power.<sup>70</sup> Furthermore, they believe that power, status, and privilege go together.<sup>71</sup> Thus, extreme hierarchical cultures prefer a centralized structure, where less powerful people are dependent on those who are more powerful.<sup>72</sup> By contrast, an extremely egalitarian culture, such as the Pehuenche tribe, believes that inequalities among people should be minimized, and privileges and status symbols should be frowned upon.<sup>73</sup> Extreme egalitarian societies prefer a decentralized structure, where there is interdependence between people who are less and more powerful.<sup>74</sup>

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65. *Id.*

66. *Id.*

67. Walters, *supra* note 42, at 40.

68. See HOFSTEDE, PEDERSEN & HOFSTEDE, *supra* note 12, at 98, 100.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

Having outlined the key components of these two types of cultural clashes (Individualism-Communitarianism and Hierarchy-Egalitarianism), this Article moves into an analysis of how to work across these two types of cultural clashes, within a negotiation context both theoretically and pragmatically.

### III. TRANSLATING ACROSS CULTURES, WORKING ACROSS DIFFERENCES

#### A. GENERAL PROGRAMS OF ACTION

Although David Livermore's<sup>75</sup> program of developing "cultural intelligence"<sup>76</sup> is aimed at promoting international business and Iris Burke's<sup>77</sup> strategies for working across cross-cultural differences is geared toward legal counseling and negotiation, both feature an autoethnographic bend as well as similar methods and objectives.<sup>78</sup> They each begin with

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75. David Livermore is a pioneer in cultural intelligence and global leadership. LIVERMORE, *supra* note 3. He is president and partner at the Cultural Intelligence Center in East Lansing, Michigan and a visiting research fellow at Nanyang Technological University in Singapore. *Id.* Prior to leading the Cultural Intelligence Center, Livermore spent twenty years in leadership positions with a variety of non-profit organizations around the world and taught in universities. *Id.* He is a frequent speaker and adviser to leaders in Fortune 500s, non-profits, and governments and has worked in more than 100 countries across the Americas, Africa, Asia, Australia, and Europe. *Id.* Livermore's experientially based and highly acclaimed program, used by international business practitioners, make it an invaluable resource for this Article.

76. *Id.* at 30–31.

77. Iris A. Burke is a professor emeritus at the University of Florida Levin College of Law who specializes in family law (particularly multi-disciplinary and non-adversarial approaches), interviewing and counseling, pro se litigation, legal research and writing, and appellate advocacy. *Iris A. Burke*, LEVIN COLLEGE OF LAW, UNIVERSITY OF FLORIDA, <http://www.law.ufl.edu/faculty/iris-a-burke> (last visited Sept. 19, 2013). In 1997, Burke, together with Legal Skills Professor Peggy F. Schrieber, formed the Pro Se/Unbundling Family Law Advice Clinic to work with the Family Court Self Help of the Eighth Judicial Circuit and assist low income pro se litigants in family law cases. *History of the Clinics*, LEVIN COLLEGE OF LAW, UNIVERSITY OF FLORIDA, <http://www.law.ufl.edu/academics/clinics/about-the-clinics/history-of-the-clinics> (last visited Sept. 9, 2013). The author owes a great deal to Professor Burke's mentorship in formulating the initial version of this paper.

78. Iris Burke, A Short Summary of Strategies for Working Across Cultural Differences, Lecture at the University of Florida Levin College of Law (May 21, 2012). This general approach is also one practiced in many fields, going far beyond purely legal uses. *See, e.g.*, Randall Bass & Joy Young, *Introduction*, in *BEYOND BORDERS: A CULTURAL READER 2* (Randall Bass & Joy Young, eds., 2003); Thomas A. Schwandt, *Three Epistemological Stances for Qualitative Inquiry: Interpretivism, Hermeneutics, and Social Construction*, in *HANDBOOK OF QUALITATIVE RESEARCH* 192–93 (Norman K. Denzin & Yvonna S. Lincoln, eds., 2d ed. 2000); Gloria E. Anzaldua, *Preface: (Un)natural bridges, (Un)safe spaces*, in *THIS BRIDGE WE CALL HOME: RADICAL VISIONS FOR TRANSFORMATION 3* (Gloria E. Anzaldua & Analouse Keating, eds., 2002). To see this approach as applied to law and culture

knowing the self as a cultural entity, freezing the impulse to stereotype and judge others/cultures that are radically different, moving outwards to study and reflect upon cultural differences, and finally enabling better communication and possibly collaboration.<sup>79</sup> But that movement across the inner and outer selves is a never-ending spiral and requires a feedback loop of discovery, critique, and adaptation in order to potentially forge better communicative links across cultural chasms. Table 1 below illustrates how the two general schemas correlate with each other.

Table 1: A Comparison of Livermore's and Burke's General Programs of Action for Working Across Cultural Differences<sup>80</sup>

	<b>Livermore's Schema</b>	<b>Burke's Schema</b>
Internal	<b>Drive:</b> Show the interest and confidence to adapt cross-culturally.	Learn about yourself. Do not stereotype.
Internal-External	<b>Knowledge:</b> Understand how differences such as religion, family, education, and legal and economic influences affect the way people [yourself included] think and behave.	Understand what culture is and how it works [personally and generally]. Learn about your client.

(especially of indigenous peoples), see generally Rosemary J. Coombe, *Intellectual Property, Human Rights and Sovereignty: New Dilemmas in International Law Posed by the Recognition of Indigenous Knowledge and the Conservation of Biodiversity*, 6 *IND. J. GLOBAL LEGAL STUD.* 1 (1998), available at <http://www.repository.law.indiana.edu/ijgls/vol6/iss1/3>; ROSEMARY J. COOMBE, *THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES: AUTHORSHIP, APPROPRIATION AND THE LAW* 18 (1998); JANE E. ANDERSON, *LAW, KNOWLEDGE, CULTURE: THE PRODUCTION OF INDIGENOUS KNOWLEDGE IN INTELLECTUAL PROPERTY LAW* 5 (2009).

79. See LIVERMORE, *supra* note 3, at 30–31; Burke, *supra* note 78.

80. See LIVERMORE, *supra* note 3, at 30–31; Burke, *supra* note 78.

External- Internal	<b>Strategy:</b> Monitor, analyze, and adjust plans in unfamiliar cultural setting.	<b>Work Across Differences:</b> Identify conflicts. Discuss differences. Avoid binaries of morality. Avoid making judgments. You do not have to justify or change your worldview.
External	<b>Action:</b> Choose the right verbal and nonverbal behaviors, depending on context.	<b>Work Across Differences:</b> Work within/prioritize the client's worldview. Be sensitive to power imbalances. Consider three worldviews: the client's, yours, and the law's.

In contrast, Tracy Novinger, a specialist in intercultural communication, created a detailed taxonomy of various obstacles to communication, such as culturally shaped perceptions (e.g., hierarchy) and personal perceptions within a cultural framework (e.g., adaptability); and she mapped out a series of factors to watch for in relation to verbal (e.g., accent and cadence) and nonverbal processes of communication (e.g., Kinesics or body motion and Proxemics or space sense).<sup>81</sup> While fascinating in its intricacy and thoroughness, Novinger's list can make it easy to lose sight of the larger picture. Novinger's approach comes closest to a quantitative approach, with its catalogue of variables and focus on decoding cultural expressions.<sup>82</sup> To counterbalance this tendency for cataloging minutiae, this Article highlights some of the more pragmatic strategies suggested by Hofstede and his co-authors, as well as by Fons Trompenaars and Charles Hampden-Turner,<sup>83</sup> in relation to the specific cultural clashes discussed in the next section.

81. TRACY NOVINGER, *INTERCULTURAL COMMUNICATION: A PRACTICAL GUIDE* 24 (2001).

82. *Id.*

83. Fons Trompenaars is a world-renowned expert on international management and the author of the global bestseller *Riding the Waves of Culture*. TROMPENAARS & HAMPDEN-TURNER, *supra* note 10, introduction. He is also the cofounder and director of Trompenaars Hampden-Turner and is the author or coauthor of eleven bestselling books on culture and business, innovation, and leadership. *Id.* Charles Hampden-Turner is a research associate with Trompenaars Hampden-Turner in Amsterdam. *Id.* Recognized as a key business thinker, Hampden-Turner has worked as a consultant for Shell, BP,

B. NEGOTIATING THE INDIVIDUALIST VERSUS COMMUNITARIAN DIVIDE:  
SPECIFIC STRATEGIES

Hofstede and his co-authors catalogued words with positive connotations for both individualists and communitarians.<sup>84</sup> They noted that what is positive for an individualist is usually negative for a communitarian, and therefore proposed using words with positive connotations for addressing the appropriate groups in order to move from the “outer” circles to the “inner” circles.<sup>85</sup> Table 2 below comparatively juxtaposes these words.

Table 2: A Comparison of Positive Words for Extreme Individualists and Extreme Communitarians

<b>Words with Positive Connotations for Extreme Individualists<sup>86</sup></b>	<b>Words with Positive Connotations for Extreme Communitarians<sup>87</sup></b>
self, friendship, “do your own thing,” contract, litigation, self-interest, self-respect, self-actualizing, individual, dignity, I, me, pleasure, adventure, guilt, privacy	we, harmony, face, obligation, sacrifice, family (in a symbolic sense), tradition, decency, honor, duty, loyalty, shame

Trompenaar and Hampden-Turner, in turn, suggest practical tips for negotiating with groups, as well as strategies designed to promote respect, create a sense of authenticity, and enhance overall long-term efficiency in dealing with the potentially conflicting impulses of other cultures.<sup>88</sup> They detail several guidelines for dealing with individualists (when one is a communitarian) and communitarians (when one is an individualist).<sup>89</sup> When negotiating with an individualist, a communitarian must prepare for

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Digital Equipment, the BBC, Nissan, and many other companies. *Id.* Their pragmatic, experientially-based program of strategies in negotiating across cultural differences is crucial to this Article.

84. HOFSTEDE, PEDERSEN & HOFSTEDE, *supra* note 12, at 94, 96.

85. *Id.*

86. *Id.* at 94.

87. *Id.* at 96.

88. TROMPENAARS & HAMPDEN-TURNER, *supra* note 10, at 68.

89. *See id.*

a quick decision or a sudden offer.<sup>90</sup> It is important to realize that individualist negotiators are conducting business alone and therefore must retain the respect of their group.<sup>91</sup> The main goal of the individualist negotiator is to make a quick deal.<sup>92</sup> In contrast, when negotiating with a communitarian, an individualist should show patience in the consent and consultation periods.<sup>93</sup> When communitarian negotiators are surrounded by helpers, they enjoy a high status in the group and their main goal is to build lasting relationships.<sup>94</sup>

Next, this Article turns to applying a similar approach to working across the clash between hierarchical and egalitarian cultures.

### C. ATTEMPTING TO BRIDGE THE DIVIDE BETWEEN HIERARCHY AND EGALITARIANISM: SPECIFIC STRATEGIES

Table 3 below distills Hofstede and his co-authors' discussion of positive words, core values, and core distinctions for cultures of hierarchy and egalitarianism from *Cultures and Organization: Software of the Mind*.<sup>95</sup> The goal is not simply to catalogue them, but rather to use them in order to break down barriers and boundaries that impede effective communication and, when possible, to enable problem-solving.<sup>96</sup>

Table 3: A Comparison of Positive Words, Core Values, and Core Distinctions Between Extremely Hierarchical and Extremely Egalitarian Cultures

<b>Extremely Hierarchical</b> <sup>97</sup>	<b>Extremely Egalitarian</b> <sup>98</sup>
<b>Positive words:</b> respect, father (as a title), master, servant, older brother, younger brother, wisdom, protect, obey, orders, pleasing	<b>Positive words:</b> rights, complain, negotiate, fairness, task, necessity, co[-]determination, objectives, question, criticize

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. See generally HOFSTEDE, PEDERSEN & MINKOV, *supra* note 12.

96. HOFSTEDE, PEDERSEN & MINKOV, *supra* note 12, at 4–7.

97. See HOFSTEDE, PEDERSEN & HOFSTEDE, *supra* note 12, at 98.

98. See *id.* at 100.

<b>Core value:</b> respect for status	<b>Core value:</b> equality between people
<b>Core distinction:</b> powerful/dependent	<b>Core distinction:</b> responsible for task X/not responsible for task X

There is some correspondence, in terms of value systems, between this dichotomy (cultures of hierarchy versus cultures of egalitarianism) and that of Trompenaars and Hampden-Turner's dichotomy ("ascription-oriented" cultures versus "achievement-oriented" cultures). John Barkai,<sup>99</sup> in *Cultural Dimension Interests, the Dance of Negotiation, and Weather Forecasting: A Perspective on Cross-Cultural Negotiation and Dispute Resolution*, also notes that status, derived from either age or seniority, is very important to high-power-distance (hierarchical) cultures, while opportunity and equality are the norm for low-power-distance (egalitarian) cultures.<sup>100</sup> Noting these general intersections, this Article moves into identifying the following practical pointers for dealing with cultures of hierarchy (when one is more egalitarian) and for interacting with egalitarian cultures (when one is more hierarchical).<sup>101</sup> For example, as an egalitarian negotiating with a hierarchical culture, make sure you have a clear figurehead who commands respect from within and outside of the group.<sup>102</sup> You should display respect for status and influence, and use a title that reflects the degree of influence you possess.<sup>103</sup> In comparison, as a hierarchical negotiator working with an egalitarian culture, make sure your

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99. Professor John Barkai joined the faculty of the William S. Richardson School of Law, University of Hawai'i at Manoa, in 1978. *John Bakai*, WILLIAM S. RICHARDSON SCHOOL OF LAW, UNIVERSITY OF HAWAII AT MANOA, <https://www.law.hawaii.edu/personnel/barkai/john> (last visited Sept. 9, 2013). Prior to coming to Hawai'i, he was a criminal trial lawyer in Detroit and a tenured faculty member at Wayne State University Law School. Professor Barkai also served previously as Associate Dean at the law school. *Id.* Barkai currently directs the clinical program and teaches Alternative Dispute Resolution (ADR), Evidence, and Prosecution Clinic. *Id.* In addition, he teaches conflict resolution and international negotiations for the University of Hawai'i College of Business Administration. *Id.* Thus, like Professor Burke of the University of Florida Levin College of Law, Professor Barkai has spent a lifetime practicing skills of negotiating cultural differences and teaching these skills to generations of students. *See id.*

100. Barkai, *supra* note 39, at 411.

101. *Id.*

102. *See* TROMPENAARS & HAMPDEN-TURNER, *supra* note 10, at 121.

103. *Id.*

2014] *Cross-Cultural Negotiations and International Intellectual Property Law* 55

focus is on pragmatic solutions.<sup>104</sup> You should display respect for knowledge and skill, and use the title that reflects your competence.<sup>105</sup>

Although these guidelines provide detailed strategies, it is important to proceed to a more specific analysis of the two cases, described earlier in this paper, in order to see whether and how factors that are more specific to interacting with indigenous populations can be delineated.

#### IV. CONCRETE APPLICATIONS AND CASE STUDIES: THE KANI TRIBE IN INDIA, THE AMI TRIBE IN TAIWAN, AND THE MAPUCHE TRIBE IN CHILE

##### A. CORE PRINCIPLES FROM EVOLVING INTERNATIONAL AND INTELLECTUAL PROPERTY LAW<sup>106</sup>

Based on current and ongoing attempts at collaboration between majoritarian groups and indigenous peoples, some core principles have been identified as a way of balancing the rights of the two parties.<sup>107</sup> The indigenous peoples are concerned with the right to protect their cultural identity, traditional resources, and ancestral lands (First Generation human rights).<sup>108</sup> On the other hand, developing countries, for example, are concerned with the right to pursue development and scientific progress (a Third Generation human right).<sup>109</sup> Among these core principles are: prior informed consent, mutually agreed terms, and benefit-sharing.<sup>110</sup> The effectiveness of these principles as pragmatic guidelines to working across

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104. *Id.*

105. *Id.*

106. More extensive accounts analyzing the interaction between international law and human rights law as possible tools to protect the rights of indigenous peoples are forthcoming. *See, e.g.*, Picart & Fox, *Beyond Unbridled Optimism and Fear: Indigenous Peoples, Intellectual Property, Human Rights and the Globalization of Traditional Knowledge and Expressions of Folklore (Part I)*, *supra* note 19 and accompanying text; Picart & Fox, *Beyond Unbridled Optimism and Fear: Indigenous Peoples, Intellectual Property, Human Rights and the Globalization of Traditional Knowledge and Expressions of Folklore (Part II)*, *supra* note 20 and accompanying text.

107. *See* BERTA ESPERANZA HERNÁNDEZ-TRUYOL & STEPHEN J. POWELL, JUST TRADE: A NEW COVENANT LINKING TRADE AND HUMAN RIGHTS 59 (2009).

108. First Generation or “Civil and Political Rights” include the right to nondiscrimination based on race, gender, language, religion, culture, family, ethnicity, national origin and social origin. *See id.*

109. *Id.* at 61 (explaining that Third Generation or “Solidarity Rights” include, ironically, the right to development as well as environment, peace, democracy, a common heritage, communication and humanitarian assistance).

110. *See The Nagoya Protocol, CONVENTION ON BIOLOGICAL DIVERSITY*, <http://www.cbd.int/abs/about/#objective> (last visited Jan. 4, 2013).

cultural differences is illustrated in the case of the production of a commercially viable form of Jeevani, an anti-fatigue agent established in consultation and cooperation with the Kani tribe in India.

The Jeevani product was developed based on the traditional knowledge of the Kani, an ethnic group that lives in Southwest India.<sup>111</sup> Working alongside three Kani consultants, the Tropical Botanical Garden and Research Institute (“TGBRI”) heard of the anti-fatigue properties of a wild plant cultivated by the Kani.<sup>112</sup> TGBRI scientists successfully purified and isolated the active ingredient to invent the Jeevani drug.<sup>113</sup> When TGBRI transferred manufacturing rights to Arya Vaidya Pharmacy Coimbatore Ltd., TGBRI agreed to split the license and royalty income fifty-fifty with the Kani.<sup>114</sup> It took some time for the Kani clans to speak with one voice, but eventually they established the Kerala Kani Samudaya Kshema Trust to manage the resultant income.<sup>115</sup>

The result is one of the most successful narratives illustrating the principles of prior consultation, informed consent, and benefit-sharing between a pharmaceutical company and a tribe. According to Director of Investor Responsibility at Insight Investment, Kerry ten Kate, and Sarah A. Laird of University College London’s Department of Anthropology: “Through 2001, the Trust Society—fully managed by Kani—has received 1,350,000 Indian rupees (about US \$30,000) of royalties and fees. This income has been invested in an interest-bearing account, and only the interest from the account is expended.”<sup>116</sup> The success story continues today; as sales of Jeevani have increased, in turn, so has the demand for the raw material.<sup>117</sup> Thus, in order to respond effectively to the spike in demand, the Forestry Department has allowed the Kani to cultivate the plant and sell the raw materials in a semi-processed form to the manufacturer.<sup>118</sup>

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111. POOR PEOPLE’S KNOWLEDGE: PROMOTING INTELLECTUAL PROPERTY IN DEVELOPING COUNTRIES 20 (J. Michael Finger & Philip Schuler eds., 2004).

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* For additional factual information regarding the production and sales of Jeevani, see *Using Traditional Knowledge to Revive the Body and a Community*, WORLD INTELLECTUAL PROPERTY ORGANIZATION, <http://www.wipo.int/ipadvantage/en/details.jsp?id=2599> (last visited Aug. 23, 2013).

2014] *Cross-Cultural Negotiations and International Intellectual Property Law* 57

As Kate and Laird note, the Kani's traditional knowledge would not have qualified for a patent, given the necessity of an inventor and the patentability requirements of novelty and fixation, among other obstacles.<sup>119</sup> In keeping with the usual patterns, it was the TGBRI research team that had the resources and technical knowledge to purify and isolate the active ingredient in the plant, invent an herbal formulation that readily lent itself to medicinal application, and undergo the arduous process of patenting this discovery.<sup>120</sup> Because India, at that time, did not have the legislation to protect tribal traditional knowledge, the Kanis would not have been able to benefit financially without this partnership.<sup>121</sup>

Nevertheless, one must not idealize the Jeevani example because the Kani case is plagued by what constitutes "informed consent."<sup>122</sup> For example, the Kanis do not constitute a clearly delineated cohesive tribe; rather, they are a loose, scattered group, and only one sub-group was represented and consulted to form the agreement.<sup>123</sup> Within that sub-group, only three younger members of the tribe served as consultants.<sup>124</sup> In contrast, nine medicine men, elders of the tribe, wrote to the chief minister of the district, vigorously protesting the sale of their traditional knowledge to a pharmaceutical company.<sup>125</sup> Another cultural layer within the tribe needed to be addressed: the generational divide.<sup>126</sup> This reveals the potential rewards and challenges of attempting to bridge cross-cultural differences using international and intellectual property law.<sup>127</sup>

#### B. THE DUANAS VERSUS ENIGMA: SUCCESSFUL RAPPROCHEMENT

This Article now returns to the case of the Duanas versus Enigma and examines how this particular conflict was resolved. After about two years

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119. POOR PEOPLE'S KNOWLEDGE, *supra* note 111, at 20.

120. T. Shiras Khan, *Kani Tribals Reap Financial Benefits from Wonderdrug Jeevani*, INFOCHANGE, <http://infochangeindia.org/agriculture/changemakers/kani-tribals-reap-financial-benefits-from-wonderdrug-jeevani.html> (last visited Aug. 22, 2013).

121. POOR PEOPLE'S KNOWLEDGE, *supra* note 111, at 20.

122. *Id.* at 21.

123. *Id.* at 26–27.

124. *Id.* at 27.

125. *Id.*

126. For an analysis of the significance of generational cultural differences, see generally ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000).

127. See generally Anil K. Gupta, *Value Addition to Local Kani Knowledge: Patenting, Licensing, Benefit-Sharing*, INDIAN INST. MGMT., <http://www.iimahd.ernet.in/publications/data/2002-08-02AnilKGupta.pdf> (last visited Aug. 22, 2013).

of litigation (and, more importantly, significant press coverage), the Duanas' battle for recognition of the Ami tribe's ownership of the "drinking"/"welcoming" song yielded a settlement.<sup>128</sup> Based on press releases, the deal contained several incentives for both groups to settle the matter amicably. For example, Enigma/Virgin Records was able to clear the names and reputations of the band and recording company, and cut back the financial losses due to bad press.<sup>129</sup> Correspondingly, the Duanas and the Ami Tribe were given a foundation to preserve the tribe's culture and, as to the tribe's music, granted full attribution on all future releases, and given a platinum copy of "Cross of Changes" (which includes the single, "Return to Innocence").<sup>130</sup>

Crucial to motivating the financially powerful parties, Enigma and Virgin Records, to come to the negotiating table was the unrelenting press coverage in favor of the Duanas, particularly when the song was used to promote the 1996 Summer Olympics.<sup>131</sup> The Taiwanese reaction to the story, especially when the promo began to be featured heavily on CNN and other networks, catalyzed Magic Stone Record Company ("Magic Stone") to offer the Duanas a contract and also to lend them the services of the "hot shot copyright lawyer," Huang Hsiu-lan.<sup>132</sup> In keeping with their communitarian culture, the Duanas initially only sought recognition for both the tribe and themselves as the specific performers of the song. At first, Difang Duana made the following declaration: "All I want is for the people of the world to know that part of the music they hear is performed by the Ami aboriginal tribe in Taiwan and the singers are Kuo Ying-nan and KuoHsiu-chu."<sup>133</sup> The Duanas had originally only wanted to perform the song at the Olympics, but when Enigma and the Olympic Committee snubbed their request, Huang, Magic Stone's lawyer, began collaborations with the Dewey Ballantine law firm and used more aggressive tactics.<sup>134</sup>

Even more significantly, a precedent for successfully pressuring Enigma/Virgin Records into negotiation already existed. In 1994, Munich-

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128. Richard F. Roper, *Taiwanese Settle Lawsuit Claiming Their Original Composition Was Stolen; They Will Now Set Up Foundation*, BUS. WIRE, June 23, 1999, available at <http://www.angelfire.com/az/MizSpiffysLair/article3.html>.

129. *Id.*

130. *Id.*

131. Esarey, *supra* note 24.

132. *Id.*

133. *Id.*

134. *Id.*

based choir, Capella Antigua, and its record label, Polydor Germany, sued Enigma/Cretu for similarly using samples from Capella Antigua's 1976 LP *Paschale Mysterium*, which was clearly copyrighted.<sup>135</sup> However, Capella Antigua appeared to have a stronger case because European law acknowledges a broad array of moral rights (*droit moral*)<sup>136</sup> while American law does not (save in the case of "visual works of art").<sup>137</sup> Thus, Capella Antigua's claim that Enigma/Cretu had infringed its "right of integrity" by distorting the original excerpt and embedding it in the derivative works "Sadness (Part I)" and "Mea Culpa"<sup>138</sup> initially seemed stronger than the Duanas' claim, which was eventually filed in the United States.<sup>139</sup> Nevertheless, in both cases, Enigma/Virgin Records settled.<sup>140</sup> On June 23, 1999, via the efforts of the international law firm Oppenheimer Wolff & Donnelly LLP, Enigma/Virgin Records and the Duanas arrived at a settlement acceptable to both parties, described above.<sup>141</sup> Perhaps the fact that the Duanas had achieved a stardom of their own, even if limited to

135. *Enigma (Musical Project)*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Enigma\\_%28musical\\_project%29](http://en.wikipedia.org/wiki/Enigma_%28musical_project%29) (last updated Jan. 9, 2013, 5:35 PM). See also *Difang and Igay Duana*, ZIKKIR, available at [http://zikkir.net/words/Difang\\_and\\_Igay\\_Duana](http://zikkir.net/words/Difang_and_Igay_Duana) (last updated Sept. 19, 2011, 1:41 PM); Yvonne Lin Mei-Jung, *Intellectual Property Rights of the Aboriginal Peoples of Taiwan*, TAIWAN FIRST NATIONS, <http://www.taiwanfirstnations.org/TFNIPR.html> (last visited Aug. 22, 2013).

136. See, e.g., Cour d'appel [CA] [regional court of appeal] Paris, Apr. 10, 1995, RIDA 1995, 166 (Fr.) (affirming the artist's right to divulgation). See generally André Françon & Jane C. Ginsburg, *Authors' Rights in France: The Moral Right of the Creator of a Commissioned Work to Compel the Commissioning Party to Complete the Work*, 9 COLUM.-VLA J.L. & ARTS 381 (1985). In general, artists' moral rights have been codified in the Berne Copyright Convention, Rome, 1928; Berne is the oldest and most comprehensive international treaty giving authors rights outside their home countries, and the protection of the artists' moral rights is enshrined in article 6bis. See Berne Convention for the Protection of Literary and Artistic Works, art. 6bis, Sept. 9, 1886, amended on Sept. 28, 1979, available at [http://www.wipo.int/treaties/en/ip/berne/trtdocs\\_wo001.html#P123\\_20726](http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html#P123_20726). The United States did not sign the Berne Convention until 1988 (effective March 1, 1989) and refused to adopt article 6bis. See M. Garfinkle, et al., *Art Conservation and the Legal Obligation to Preserve Artistic Intent*, 36 J. AM. INST. CONSERV. 165, 165 (1997).

137. The Visual Artists Rights Act (VARA) protects the rights of integrity and attribution of artists of "work[s] of visual art." Visual Artists Rights Act, 17 U.S.C. § 106A (1990). However, "a work of visual art" is narrowly defined as "a painting, drawing, print, sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author . . ." 17 U.S.C. § 101 (2010). The Duanas' "moral rights" would clearly not be protected under U.S. law. See *id.*

138. *Enigma (Musical Project)*, *supra* note 135.

139. *Id.*

140. *Id.*

141. Roper, *supra* note 128, at 1.

Taiwan and Japan, was sufficient to tip the negotiating power in their direction and eventually force Enigma/Virgin Records to settle out of court.<sup>142</sup>

C. THE MAPUCHE TRIBE VERSUS THE CHILEAN GOVERNMENT:  
SETTLEMENT VIA AN INTERNATIONAL REGIONAL COURT

Unlike the battle of the Duanas, the Mapuche tribe's comparatively less publicized fight against its own government lasted over ten years.<sup>143</sup> As a last legal resort, the tribe and its sympathizers appealed to the Inter-American Human Rights Commission ("IACHR"), which in October 2003 forged a "friendly settlement."<sup>144</sup> The settlement included reparations to the Mapuche families for their legal rights to natural resources projected to be flooded by dams, as well as additional protections for the Mapuche tribe.<sup>145</sup> For example, the government granted the tribe ownership over "lands of good quality, technical support to promote agricultural productivity, educational scholarships, and monetary compensation . . . of US \$300,000 per family."<sup>146</sup> In exchange, the Mapuche tribe legally transferred their ancestral rights and discontinued the international legal action.<sup>147</sup> More generally and systemically, the Chilean government also agreed to strengthen national laws that guarantee respect for indigenous rights.<sup>148</sup> This included constitutional reform that would culminate in legal recognition of Chile's indigenous peoples and ratification of the International Labour Organization Convention 169 on indigenous peoples' rights.<sup>149</sup> Furthermore, the government resolved to improve and strengthen the legal procedures for delineating the territory of the Mapuche/Pehuenche

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142. *Id.*

143. *Enigma (Musical Project)*, *supra* note 135. See generally *The Mapuche People of South America*, HUM. RTS. RES. CTR., <http://www.hrusa.org/indig/reports/mapuche.pdf> (last visited Aug. 22, 2013); James Langman, *Indigenous Fight to Keep Land in Chile*, WASHINGTON TIMES (Feb. 11, 2003), available at <http://www.latinamericanstudies.org/chile/pehuenches-03.htm>.

144. Beroiza, Case No. 4617/02, Inter-Am. Comm'n H.R., Report No. 30/04 (2004), available at <http://www.cidh.oas.org/Indigenas/Chile.4617.htm>.

145. Orellana, *supra* note 59, at 522–23. See also *Chile: Mapuche Increase Opposition to Bío Bío River Dam*, TOWARD FREEDOM (Dec. 1, 2008, 12:41 PM), <http://towardfreedom.com/home/content/view/1470/1/>.

146. Orellana, *supra* note 59, at 525.

147. *Id.*

148. See generally *The Mapuche People of South America*, *supra* note 143.

149. *Id.* See also *Hydro-Electric Projects and the Forceful Resettlement of Indigenous Peoples*, CTR INT'L ENV'T'L L., available at [http://www.ciel.org/HR\\_Envir/HRE\\_Current\\_Activities.html](http://www.ciel.org/HR_Envir/HRE_Current_Activities.html) (last visited Aug. 22, 2013).

people and ensuring their meaningful participation in the official development process.<sup>150</sup> Additionally, the government agreed to create a municipality in the upper BíoBío and promulgate specific measures to ensure environmental protection of the upper BíoBío.<sup>151</sup> The government further agreed to guarantee that no other hydro-electric projects would occur in the region and to allow for community monitoring over the operation of the dam.<sup>152</sup>

What emerges from a comparison of the cases are two principal insights. First, rapprochement along a vertical axis (hierarchy vs. egalitarianism) is more difficult to achieve than settlement along a horizontal axis (individualism vs. communitarianism). This is because power differences within a hierarchical cultural construction of reality are “naturalized” as inevitable and even moral in terms of the ruling elite.<sup>153</sup> Second, in both cases, media coverage and popular international support were key factors.<sup>154</sup>

## V. CONCLUSION: PARADIGM SHIFTS AS CULTURAL SHIFTS

In summary, this Article concretely illustrates the paradigmatic nature of culture. The underlying method of this Article is autoethnographic, and the principal culture clashes this Article addresses are those occurring

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150. See generally *Hydro-Electric Projects and the Forceful Resettlement of Indigenous Peoples*, *supra* note 149.

151. Orellana, *supra* note 59, at 525.

152. *Id.* The battle for control over indigenous ancestral lands and dam building continues. See James Langman, *Company Vows More Chilean Dams on the Way*, (2013) *ECOAMERICAS*, 55, available at <http://www.futaleufuriverkeeper.org/wp-content/uploads/2013/06/EcoAmericas-Futaleufu-Dams-May-2013.pdf>.

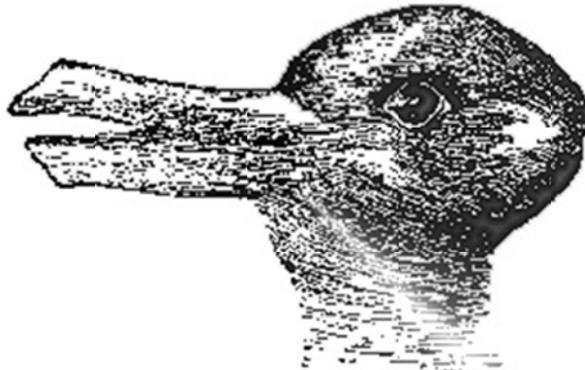
153. For an example of the use of anti-terrorism laws against the Mapuche, see Gale Courey Toensing, *Inter-American Court Hears Mapuche Human Rights Case Against Chile*, *INDIAN COUNTRY TODAY* (June 3, 2013), <http://indiancountrytodaymedianetwork.com/2013/06/03/inter-american-court-hears-mapuche-human-rights-case-against-chile-149677>. See also Luis Carcamo-Huechante, *Mapuche Political Prisoners Hearing at the Inter-American Court of Human Rights, May 29-30, 2013*, *CULTURAL SURVIVAL* (May 15, 2013), <http://www.culturalsurvival.org/news/mapuche-political-prisoners-hearing-inter-american-court-human-rights-may-29-30-2013>; Ryan Seelau, *Mapuche Testify Against Chile Before Inter-American Court of Human Rights*, *INDIGENOUS NEWS* (May 31, 2013), <http://indigenousnews.org/2013/05/31/mapuche-testify-against-chile-before-inter-american-court-of-human-rights-oas/>.

154. The activists opposing the construction of the Belo Monte dam in Brazil seem to have learned the value of recruiting and deploying star power (especially that of director James Cameron) in drawing media attention to their cause. See Alexei Barrionuevo, *Tribes of Amazon Find Ally Out of 'Avatar'*, *N.Y. TIMES*, Apr. 10, 2010, at A1, available at <http://www.nytimes.com/2010/04/11/world/americas/11brazil.html>.

between indigenous peoples and majoritarian cultures. It applies the cultural schema of individualism versus communitarianism, used by Hofstede and his co-authors, to sketch the cultural conflicts between the German band, Enigma, and the Ami tribal couple, the Duanas, over the ownership of an Ami traditional folk song. Additionally, it applies Hofstede and his co-authors' cultural rubric of hierarchy versus egalitarianism to draw out the cultural conflict between the Chilean government and the Mapuche/Pehuenche tribe for control over the right to build a dam that would flood the tribe's ancestral lands. The Article also examines programs of action and specific strategies to overcome cultural barriers. It outlines key principles and incentives for negotiation and overcoming cultural clashes between indigenous cultures (such as the Kani tribe in India, the Ami tribe in Taiwan, and the Mapuche/Pehuenche tribe in Chile) and various majoritarian cultures.

The Article closes by returning to the analogy of interpreting ambiguous figures in relation to encountering cultural conflicts. Ambiguous figures, such as the duck-rabbit illusion or the "young woman"—"old woman" illusion below in Figure 2 and Figure 3, respectively, show us that we perceive phenomena as a whole, and that this process is not purely a rational, step-by-step procedure. We either see the duck or the rabbit; we either recognize the shape of the young woman or the old woman. We can alternate across them, but we cannot see them at the same time.

Figure 2: The Duck-Rabbit Illusion is an ambiguous figure that can be seen either as a duck or a rabbit.<sup>155</sup>



155. *Duck-Rabbit Illusion*, WOLFRAM MATHWORLD, <http://mathworld.wolfram.com/Rabbit-DuckIllusion.html> (last visited Aug. 22, 2013).

Figure 3: The Old Woman/Young Lady Illusion, another ambiguous figure, is often used to show gestalt switches or analogically, to see how the same object can be viewed/experienced in different ways.<sup>156</sup>



In explaining how a paradigm shift occurs in science, Kuhn had two insights that are relevant to this Article. First, when one has begun to see the formerly “invisible” rabbit (as opposed to the “obvious” duck), it is as if one now lives in a different world; objectively, it is the same world, but it is one that can now be glimpsed from multiple vantage points.<sup>157</sup> Second, when a scientific “revolution” occurs (e.g., the shift from Newton’s model to Einstein’s model in physics), it occurs not so much because the Einsteinians have rationally convinced the Newtonians they are correct. Rather, it is because the prior generation (the Newtonians) has died off, and the younger generation has grown up with the Einsteinian way of questioning and finding answers, and continues using that paradigm.<sup>158</sup>

The insight is crucial as it underlines how opening one’s self up to cross-cultural negotiation necessitates openness and an awareness and acceptance of limitations. “Reality” is not just the “duck” or the “rabbit.” It

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156. *Old Woman/Young Lady Optical Illusion*, DECEPTOLOGY, <http://www.deceptology.com/2010/05/old-woman-young-lady-optical-illusion.html> (last visited Aug. 22, 2013).

157. KUHN, *supra* note 7, at 18–19.

158. *Id.* For a similar observation regarding generational change, see generally PUTNAM, *supra* note 126.

is both and more, seen through different lenses, and even more fundamentally, lived through different modes of relationality.<sup>159</sup> Cross-cultural work is difficult. As Novinger's book illustrates through a startling story, the significance of tapping into a common cultural set of norms can sometimes have dramatic consequences:

A well-dressed Mexican pulled up in a taxi to the Palacio de Justicia in Lima, Peru. Armed guards were standing on the steps ascending to the building. The passenger paid and thanked the driver and opened the door of the cab, intent on the information he had come to get. As he leaned forward and put one foot onto the pavement, a cold rifle muzzle jabbed him in the temple and jerked his attention to matters at hand. The Peruvian guard holding the rifle shot two harsh words at him. The Mexican reddened, emerged from the taxi, and drew himself erect. With a sweep of his arm, he retorted three words: “¿Qué! ¿Nosconocemos?” (What! Do we know each other?) With a half bow the guard lowered the rifle and courteously gestured the man up the steps, speaking in deferential tones.<sup>160</sup>

What occurred here was an exchange that tapped into a set of norms regarding formality and hierarchy shared between the Mexican civilian and the Peruvian guard. The Peruvian guard had said “¿Que quieres?” (What do you want?)—using the familiar form. The familiar form is normally used with family members, close friends, former classmates, or children.<sup>161</sup> The Mexican appears to have replied reflexively in indignation, despite the rifle butt on his neck. “Do we know each other?” served as a powerful cultural rebuke, probably reminding the guard of class/status differences (and masculinity) embedded in the formal and informal modes of address.<sup>162</sup> Chastened, the guard amended his discourtesy. The Mexican man's response, in Novinger's view, was risky because the guard could have easily pulled the trigger.<sup>163</sup> But the hard-wired nature of the Mexican man's response awoke a corresponding cultural instinct in the Peruvian

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159. Generally characterized, “relationality” refers to the phenomenon in which any form of representation of “reality” is directed towards a specific audience, like an invitation to a particular type of relationship; this occurrence can privilege some types of relationships or forms of knowledge, while discouraging others. Mary M. Gergen & Kenneth J. Gergen, *Qualitative Inquiry: Tensions and Transformations*, in HANDBOOK OF QUALITATIVE RESEARCH 1038 (Norman K. Denzin & Yvonna S. Lincoln, eds., 2d ed. 2000). See generally Kenneth J. Gergen, *Who Speaks and Who Responds in the Human Sciences?*, 10 HIST. HUM. SCI. 151–73 (1997).

160. NOVINGER, *supra* note 81, at 13.

161. *Id.* at 5.

162. *Id.*

163. *Id.*

2014] *Cross-Cultural Negotiations and International Intellectual Property Law* 65

guard, leading him to recognize the Mexican not as an “outsider” but as someone deserving of respect and deference.<sup>164</sup> The story emphasizes that studying and working across cultural differences is, indeed, challenging work, but it is through such endeavors that lived reality can potentially become—in the words of J.R.R. Tolkien—simultaneously “wide and deep and high.”<sup>165</sup>

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164. *See id.*

165. J.R.R. TOLKIEN, *TREE AND LEAF* 11 (1964).