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CONCERNS AND EXPERIENCES IN PROMOTING, SUSTAINING  
AND SAFEGUARDING THEIR TRADITIONAL KNOWLEDGE,  
TRADITIONAL CULTURAL EXPRESSIONS AND GENETIC  
RESOURCES”**

A SOUTH PACIFIC PERSPECTIVE ON THE PROTECTION OF TRADITIONAL  
KNOWLEDGE, TRADITIONAL CULTURAL EXPRESSIONS AND RELATED  
GENETIC RESOURCES: THE CASE OF BINDEKU/KAMANERU TRIBES OF THE  
HIGHLANDS REGION OF PAPUA NEW GUINEA

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## Introduction

Indigenous and local communities have raised concerns for many years to seek recognition of rights over their traditional knowledge (TK), traditional cultural expressions (TCEs) and related genetic resources following numerous cases of misappropriation and misuse by outsiders. The indigenous and local communities of the South Pacific and Papua New Guinea (PNG) in particular are no exception. Based on past experiences of misappropriation and misuse and the need to respond to these issues, indigenous and local communities perceive the work of the World Intellectual Property Organization Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) as important in that it will facilitate some of their needs and expectations through the establishment of a legally binding instrument at both the international and domestic levels. The ongoing work of the IGC and its outcome especially in setting minimum standards for an effective protection mechanism for TK/TCEs and related GR is the only hope of indigenous and local communities throughout the world for the protection of their rights over traditional knowledge. They also realize that in order to establish an effective protection mechanism it requires participation and input from indigenous and local communities in the work of the IGC. As such a process to facilitate their participation and input is essential.

Here I will highlight some of the needs and expectations of the indigenous and local communities of the South Pacific, in particular the Bindeku/Kamaeku tribes and nine other tribes that reside in the Kerowagi District of the Highlands region of PNG.<sup>2</sup> The views expressed here are influenced by the experiences, needs and expectations of these tribes and communities who possess similar cultures and follow a similar way of life.

## 1. Nature of Traditional Knowledge, Traditional Cultural Expressions and Associated Genetic Resources

When speaking of the nature of TK/TCEs and related GR, numerous groups and individuals have already made attempts to describe their nature. A fact about the nature of the subject matters is that they are extensive and cannot be described in only a few words. One way in which the nature of TK/TCEs and related GR can be described is by illustrating how

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<sup>2</sup> In addition to the Bindeku/Kamaneku tribes, the nine additional tribes of the Kerowagi District are Silku, Graiku, Paglau, Kumai, Gena, Sembugla Waugla, Dagle and Kuglame tribes. These tribes are only a few of the 860 tribes of PNG. The number of tribes is determined by cultural diversity and language spoken in the country. This makes PNG one of the most culturally diverse countries in the world.

they are created, held and utilized or applied in the day to day lives of the creators and holders. TK/TCEs and related GR are created and held by individuals, a family, a clan, a tribe or a whole community and at times by a number of communities. In other words, it can be created and held individually as well as collectively. The subject matter is created while interacting with biodiversity and environment generally. As to how and what TK/TCEs and related GR are utilized for or applied, for most indigenous and local communities and in particular the Bindeku/Kamaneku tribes, these subject matters are fundamental to their survival. This is also true for over 80 percent of the population in PNG and most of the South Pacific islanders.

TK/TCEs and the related GR are all interconnected and as such protection must be extended to them as a whole rather than attempting to single out certain elements and providing protection, such as only the commercial value. Separating them and attempting to provide protection to a single component would kill off the other useful components. Here I attempt to explain each subject matter separately for the purpose of illustration of their interconnected nature, but again when protection is to be provided the holistic nature of TK, TCEs and related GR should be taken into consideration.

For most indigenous and local communities, TK is the cumulative body of know-how, innovations and practices that carry the code for their survival. In other words, TK encompasses all aspects of day to day life which are fundamental to their existence. Some of these aspects include the know-how, innovations and practices related to the conservation and sustainable use of biodiversity, agricultural practices and how to cure ailments, making clothes, building houses and how to adapt to changes in society and their environment. In fact, such know-how to use plants and animals forms the basis of essential services which the Bindeku/Kamaneku tribes and other indigenous and local communities could not otherwise afford.<sup>3</sup>

TCEs for the Bindeku/Kamaneku tribes in particular and the 860 tribes of PNG include among other items names, stories, chants, art and craft, music and musical instruments, dance, ceremonies, rituals, and architectural designs and forms. They are subject matter created by the indigenous and local communities from their interaction with their natural environment. These items enrich social life in the communities and contribute to the enjoyment and well-being of the creators and holders. TCEs are also items which the holders identify themselves with. Take for instance, a legend may tell a story of the birth of a tribe. Based on such a legend a tribe could be the descendent of a snake or some form of animal or plant species. The tribe may take its name after the name of the animal or plant species. It may further have taboos which restrict/regulate the tribe from taking, killing, eating or destroying that plant or animal. Such taboos form part of the customary laws and practices. With such customary laws and practices regulating the taking of a plant and animal species it contributes to conservation of biodiversity. In addition, when the legend is told to others the listeners could easily relate to and tribe and knowing exactly which tribe the story is referring.

Again, indigenous and local communities through maintaining close contact with their environment come to learn of the value and usefulness of biological and genetic resources.<sup>4</sup> As such they conserve and use them in a sustainable manner. For instance, the indigenous and local communities grow medicinal plants in their backyards to treat ailments. In fact, plants form the basis of traditional healing practices. Without medicinal plants there is no traditional healing practice. To sustain the practice medicinal plants are conserved and used on a sustainable basis.

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<sup>3</sup> Chambers, W. Bradnee and Kambu, Alphonse. "Mohammed and the Mountain: The *Sui Generis* Debate and Traditional Knowledge" in *Journal of International Biotechnology Law*, 2005 (forthcoming).

<sup>4</sup> Value is not limited to commercial value, but is extensive and includes cultural, spiritual and psychological value.

To further illustrate the connection with TK/TCEs and GR and the holistic nature lets take the case of a traditional healing practice. In gathering medicinal plants to cure ailments a process is usually followed. First, the practitioner gathers the right proportion of plants, vines, bark or other parts of plants. The preparation of the cure and its application is done simultaneously with chants, secret and sacred words, songs, and rituals. This process is usually carried out by the practitioner who is usually a special person who knows the art well.

This process encompasses numerous components including the medicinal, spiritual, identity and psychological aspects which form part of the larger cultural complex of indigenous and local communities.

The know-how of the practitioner regarding the plants is the TK. The words, chants and rituals he uses are the TCEs. And the plants he grows in his backyard, conserves and uses are related with the GR component. These three components form the total cultural complex of traditional healing.

From the illustration above a number of features can be drawn. First and again their interconnection would make it difficult to separate one from the other because without each other they would not exist. Second, TK/TCEs and GR all connect to life especially that they contribute to its facilitation and promotion. Third, the creators and holders can be private individuals or groups. As such countries must cautiously distinguish and give recognition to the respective creators and holders, both individuals and groups. Failing to give appropriate recognition may cause dissatisfaction and conflicts both within and outside the community.

The South Pacific Model Law for the Protection of Traditional Ecological Knowledge, Innovations and Practices and the Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture is progressive in that it reflects some of these views of the indigenous and local communities of the South Pacific on TK/TCEs and GR. One important point the Model Law for the Protection of Traditional Ecological Knowledge, Innovations and Practices discovers and affirms is the importance of such knowledge in the facilitation and improvement of human life. TK/TCEs and related GR together are some of the entitlements and amenities of life. As these subject matters play a vital role in the survival of indigenous and local communities any protection mechanism developed should facilitate and promote the survival of indigenous and local communities.

## 2. The Role of Customary Laws and Practices

Customary laws and practices are extensive<sup>5</sup> and play a tremendous role in the regulation and protection of TK/TCEs and related GR. These subject matters have been dealt with under customary laws and practices from time immemorial and it is still true even for today. The rights associated with the TK/TCEs and GR, prior informed consent, access, sanctions and compensation in case of misappropriation, dispute settlement and enforcement issues are all an integral part of the body of customary laws and practices. To this end customary laws and practices may possess some of the answers to questions of effective protection and regulation of TK/TCEs and related GR.

While customary laws and practices have the possibility of contributing to the effective protection of TK/TCEs and related GR, little is known about the customary legal system due to inadequate inquiry into this system of law. Further efforts in exploring customary laws and practices remains an outstanding task, which the WIPO IGC and other stakeholders must pursue in their future work. Only upon thorough investigation of the customary laws and

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<sup>5</sup> Customary laws and practices cut across every aspect of social life including transaction and management of property, crimes, marriages and divorce, sanctioning and enforcement in the community.

practices can one draw possible ways, doctrines and principles from the system to use in the effective protection of TK/TCEs and related GR.

When speaking of customary laws and practices today, one usually refers to the smaller portion of customary laws which have entered the formal law and institutions. That is, the portion of customary laws and practices that have been discovered and entered the formal courts and finally used in court decisions. While this is acceptable, one crucial fact is that formalized customary laws and practices have been selected purposely to suit the needs of the Western or formal legal system.

On the other hand, most customary laws and practices that administer TK/TCEs and related GR continue to exist outside the formal law and institutions. As such it would be unjust to draw experiences from merely the formalized customary laws and practices. It is necessary to look beyond the formalized portion of customary laws and practices into the informal law and institutions in which they operate.

In attempts to protect TK/TCEs and related GR that have always been treated under informal customary laws and practices it is appropriate to explore this body of law in greater detail in order to draw accurate, if not the closest possible views, principles and doctrines to use in protecting TK/TCEs and related GR. One may even be required to reassess conceptual issues including collective ownership, prior informed consent, access, and public domain through the eyes of indigenous and local communities and their customary laws and practices. Until now some of these concepts have been viewed and analyzed through the eyes of the Western legal system. The danger with this situation of trying to analysis concepts of customary legal system using the Western legal system is that it could give rise to error of law. In fact, errors of law have occurred in the past when two different legal systems come into contact with each other. Errors of law have occurred due to differences in the languages, cultures and social structures. In protecting and regulating TK/TCEs and related GR, concepts, principles and doctrines that should form the foundation of the protection system should be drawn first from customary laws and practices. Only when there are gaps then should principles, doctrines and concepts of Western and other legal systems be borrowed to fill in the deficiencies. Customary laws and practices should not be underestimated or seen as primitive and backward, but seen as a system upon which an effective protection system could be constructed to protect TK/TCEs and related GR.

### 3. Misappropriation and Misuse

Researchers and outsiders have visited indigenous and local communities to conduct research on their language, culture social life and the biodiversity in the area in which they inhabit. The communities by nature who are usually willing to share and assist people allow the researchers to conduct their work. Such an arrangement is usually done with trust being the bond. However, as soon as the researchers obtain what they want they leave and no-one hears of them, the results of their of their work and benefits if any that may have evolved from the research.

On a personal account I have had the opportunity to meet one researcher, a linguist, who had approached and expressed interest in visiting my community and people to conduct research about our language. The researcher was fortunate because being the chief I was able to grant him permission to visit the community and people to conduct research. However, I had set a couple of conditions, especially that the researcher acknowledges the people in the work and deposit a copy of the final outcome of the work with the community and people so that we could be able to learn about our own language too. I personally made arrangements for the researcher to visit the community and requested certain members of the community to take care of the person.

After visiting the community and people for a few weeks the researcher obtained the necessary information for the research and disappeared. It has been almost three years since we last heard from the person. We have not seen or received even a copy of any work that evolved from the research. The consequence of this situation is that there is clearly a breach of trust between the community and the researcher. Trust is one vital matter that the community values more than anything, and once it is breached the relationship between and among the concerned groups collapses. When there is distrust, it could harm future work that may otherwise benefit all the parties concerned.

Misappropriation of TK/TCEs and GR is not a new phenomenon for both the Western world and the indigenous and local communities. Misappropriation and misuse had consequences when they occurred. One was required to compensate or pay for the inappropriate act in some form of capital, goods or services. For the indigenous and local communities the worst consequence could be the excommunication of the offender from the community for a number of years. This is similar to imprisonment that is found in Western legal system.

#### 4. Community Responses

Due to past experiences of misappropriation within their own community and beyond, the community is responding by addressing the issue with caution. The provision and use of TK/TCEs and GR is usually built on trust. When trust which is the essence of cooperation tends to disappear as a consequence of misappropriation of TK/TCEs and related GR, the community becomes suspicious of every outsider even those who may have good intentions to work in the community. As to what initiatives the community can pursue in the case of misappropriation is determined by cost efficiency and what is easily available to them. Documentation, legal and educational responses are options but may require technical, financial and other resources to facilitate them. The indigenous and local communities who at often times are not in a position to afford the technical, financial and other resources to respond tend to choose options that require little of such resources.

The option that is usually readily available to them is becoming defensive against outsiders who may want to use the TK/TCEs and related GR. Indigenous and local communities are beginning to be reluctant to share their TK/TCEs and GR. They are beginning to put a gridlock on their doors of their TK/TCEs and related GR as a consequence of misappropriation. When this happens it will be difficult for outsiders to unlock it. Being defensive does little good when there is yet much to benefit from TK/TCEs and related GR by humanity in general. However, there is reason for being defensive and reluctant on the part of indigenous and local communities to share their TK/TCEs and GR. And that is breach of trust. One word of caution to the users is that they must be cautious when dealing with indigenous and local communities so as not to breach trust.

#### 5. Needs and Expectations

If one were to ask about the needs and expectations of the indigenous and local communities regarding their TK/TCEs and related GR, there are many and perhaps varied in nature. The indigenous and local communities have expressed their needs and expectations frequently in the past and by now the message should be clear. It is time for the national governments and the international community to move forward into action. A number of steps must be taken in addressing their needs and expectations. The foremost concern for the indigenous and local communities is for the national governments and the international community to act promptly in recognizing their rights over TK/TCEs and related GR as well as their customary laws and practices. It is not necessary to create and confer new rights, but to discover and recognize the antecedent rights as they exist under customary laws and practices. The existence of rights over TK/TCEs and related GR is a fact that exists but many

often fail to recognize and accept them. Only after the recognition of rights can one speak about access, prior informed consent, benefit-sharing arising from their use and even documentation for both positive and defensive protection. Without recognition of concrete rights over TK/TCEs and related GR at both the national and international levels, the creators and holders of TK/TCEs and related GR fear that misappropriation and misuse will continue to occur.

A second need and expectation is for governments and the international community to develop a protection mechanism that reflects the laws and institutions of the indigenous and local communities. This is simply because TK/TCEs and related GR have always been administered by the laws and institutions of indigenous and local communities. Most of the rules, norms and processes which may form part of the protection mechanism should come from a system which the indigenous and local communities are familiar with. To this end it is the customary laws and practices of indigenous and local communities and their informal institutions which must form part of the basis for the development of a protection mechanism, both internationally and nationally. Again, the challenge remains for customary laws and practices to be explored further. If any discovery and development of concepts, doctrines, principles and rules were to be forthcoming, indigenous and local communities must be involved to participate and contribute. The merit arising from their involvement and contribution would lead to first-hand and accurate information that may lead to an effective protection mechanism.

Other needs and expectations are those that could facilitate the protection of TK/TCEs and related GR in one way or another. Education and awareness within the indigenous and local communities about the value and importance of TK/TCEs and related GR is crucial if they were to be engaged in their capacity to protect, preserve and maintain TK/TCEs and GR or even to contribute to the development of a protection mechanism.

## 6. Lessons for the Intergovernmental Committee

There are a number of lessons to be learned and one of the biggest ones is from customary laws and practices and how they operate. Again, the customary laws and practices I am referring to here is not limited to the components that have entered the formal law and institutions, but should include the body of customary laws and practices that still remain in the informal sector. The work of the IGC in this area is perhaps inadequate and this is one matter for it to consider in its work in the future. There are merits for exploring this body of law further. Some of the concepts, principles and processes that one can learn from exploring the informal body of customary laws and practices include democracy, fairness, transparency and consensus which cut across every subject including ownership, access, benefit sharing, prior informed consent and other issues the IGC is attempting to address.

To illustrate some of these aspects in hypothetical situation I will refer to one of the practices found in my immediate community, country and the Pacific region. It is called the Melanesian Way of Consensus. This is a way that is used in deciding all matters of community life including access to land and resources, making gardens, marriages, ceremonies and festivals and relationships with other communities. It is also a way used in dispute settlements. If an issue arises in the community the elder/chief would call a gathering where every member of the community comes together. Once the members gather, discussions begin with the elder/chief chairing the gathering and members of the community are free to express their views regarding the issues that would eventually lead to a decision. The elder/chief guides and facilitates the discussions. He does not judge. The rules used to guide this process are customary laws and practices and the elder/chief is someone who possesses extensive knowledge of the customary laws and practices. In fact, this is a process to establish consensus among all members of the community so that everyone is satisfied with the decision. A later development of this way saw the birth of Village Courts or Customary Courts that perform similar tasks but playing a role of mostly dispute settlements.

The virtue of this way is again democratic and fair because every member of the community has a say in the issue. It is also transparent because the decision is made by and in the presence of all community members. In addition the decision reached is binding on every member of the community and each must uphold the decision. Breach of this duty will have consequences of some sort that must again be determined by the community.

### Conclusions and Recommendations

- Immediate recognition of the rights of indigenous and local communities over their TK/TCEs and related GR and their customary laws and practices under an international legally binding protection mechanism to prevent misappropriation and misuse.
- Respect the interconnected (holistic) nature of TK/TCEs and related GR. As such protection must be extended to the entire subject matter rather than just the commercial aspects of TK/TCEs and related GR.
- Keep in mind the TK/TCEs and related GR are entitlements and amenities of life for the 300 million indigenous peoples the protection mechanism that is developed takes into consideration this fact and ensure that the mechanism promotes the facilitation of the survival of the indigenous and local communities.
- Promote trust between users and providers by establishing mechanisms for prior informed consent from the holders of TK/TCEs and GR for use in research, bioprospecting, documentation or other purposes. Also consider benefit sharing for profits derived from use of TK/TCEs and related GR.
- Explore the body of customary laws and practices existing in both formal and informal law and institutions to seek answers to questions of effective protection mechanism.

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