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**INTERGOVERNMENTAL COMMITTEE ON  
INTELLECTUAL PROPERTY AND GENETIC RESOURCES,  
TRADITIONAL KNOWLEDGE AND FOLKLORE**

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**WIPO PANEL ON, "INDIGENOUS AND LOCAL COMMUNITIES'  
CONCERNS AND EXPERIENCES IN PROMOTING, SUSTAINING  
AND SAFEGUARDING THEIR TRADITIONAL KNOWLEDGE,  
TRADITIONAL CULTURAL EXPRESSIONS AND GENETIC  
RESOURCES"**

EXPERIENCES FROM VANUATU

APRIL 24, 2006

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\* This document comprises the presentation in the form received from the presenter. Any views expressed in the presentation are not necessarily those of WIPO or any of its Member States.

I am presenting this paper in my capacity as the Director of the Vanuatu Cultural Centre, the main cultural heritage management agency in the Republic of Vanuatu, but also as an indigenous person from the island of Uripiv in the north of Vanuatu.

*Nature of traditional knowledge, traditional cultural expressions and related genetic resources in Vanuatu*

The Pacific Islands region, comprising over 20 states and territories, has a number of distinctions of relevance to the question being addressed by this panel. Firstly, the Pacific Island states have the highest proportion of indigenous people within the national population of any region in the world. Secondly, these states have the highest rate of traditional land ownership (the proportion of the total land area held under traditional customary land tenure) of any region in the world. Thirdly, Pacific Island societies embody and demonstrate a very high level of cultural continuity with previous generations; that is, the majority of Pacific Islanders enact aspects of their traditional culture on a daily basis in their lives. Fourthly, all the Pacific Island states are poorer developing countries. Vanuatu itself is classified as an LDC (Least Developed Country).

Vanuatu is recognised to be one of the places in the Pacific where traditional customs have been retained to the greatest extent. Here, 80% of the population:

- live and are supported throughout their lives in extended-kin-based communities on their ancestral land, which is held and used according to customary tenure;
- satisfy most of their food and other requirements from their ancestral land and seas, using traditional methods of agriculture and other forms of resource utilisation and conservation;
- live in communities where social order is maintained and most disputes resolved by community leaders appointed and governing according to customary principles;
- speak their indigenous language (of which there are over 100 in the country);
- are involved to some extent in traditional customary rituals, and usually partake in the important life-cycle customary ceremonies.

Traditional knowledge and traditional cultural expressions, therefore, are the bedrock of cultural identity and community life for the great majority of people. The sustainable use of environmental and genetic resources (the ancestral land and seas, held under customary tenure) is a key expression of the way in which this traditional knowledge and these traditional cultural expressions are embodied in contemporary life.

*Customary law and practices*

Unwritten customary law, practices and protocols remain the main force in sustaining and safeguarding traditional knowledge and traditional cultural expressions (TK/TCEs) and related genetic resources in Vanuatu. As Vanuatu has yet to put in place any intellectual property rights legislation, there is anyway an absence of any other mechanisms for the protection of TK/TCEs. The customary practices regulating the use of TK/TCEs are mediated by elders and other men and women of higher customary status. Certain knowledge and TCEs are important for all members of the community to know and are in effect in the “public domain” within the community. Access to other categories of TK and the right to enact

certain TCEs has to be purchased and earned. Many aspects of this customary regime for access to rights to TK/TCEs are quite similar to the Western copyright system in that these rights have to be paid for.

The customary regime for regulating TK/TCEs works effectively in-country: it is widely respected by the general population and policed and enforced by elders, chiefs and chiefs' councils. Penalties for breaches of law and protocol are extracted and community disapproval of such breaches continues to be a significant deterrent to such actions. The operation of customary law is supported in the Constitution and in other national laws, although a number of court decisions have begun to erode this support.

### *Misappropriation and misuse of TK/TCEs*

There are, of course, continuing instances of misappropriation and misuse of TK/TCEs within and between communities. These continue to be managed within the realm of customary law and there is a general consensus among communities that such cases should not be dealt with by the State's Western law. What communities lack control over (and require assistance with) is instances of the commercial misuse of TK/TCEs and the use of TK/TCEs by outsiders. The following examples of the misappropriation of TK/TCEs elucidate this point:

- 1) *The Nagol or land dive*: The *Nagol* is a TCE of the Sa-language speakers of the south of the island of Pentecost in central Vanuatu. A ritual undertaken mainly to ensure a bountiful yam harvest, the key feature of the *Nagol* is the construction of a tower of sticks from which men jump with vines tied to their ankles. A New Zealand national, Mr A.J. Hackett, acknowledges using the *Nagol* as the inspiration for his creation of bungee jumping, over which he holds the patent. Bungee jumping is now a multi-billion dollar worldwide industry and the communities to whom the *Nagol* belongs feel aggrieved that they do not get a share of any of this money. Two issues further complicate the facts of a lack of Prior Informed Consent (PIC) and benefit sharing in this case: one is that under Western law, Mr Hackett's inspiration from the *Nagol* constitutes the use of an "idea" (which cannot be protected under copyright law) and another is that the communities themselves have not organized themselves into one legal entity which could bring this case to court. At present the Vanuatu Cultural Centre is raising the awareness of these communities about the need to form this legal entity and trying to assist them to do so.
- 2) *Kava*: Kava is a traditional plant medicine first domesticated in Vanuatu (which has more than triple the number of varieties of the plant than exist in any other country). Kava has been heavily commercialized: kava-based products are made by most of the large pharmaceutical companies and can be found in most pharmacies in the countries of the developed world. Certain genetic elements of the kava plant have been patented in Europe. The ability to seek redress for lack of PIC and benefit sharing is complicated once again by the fact that kava is a traditional medicine in at least ten Pacific Island countries and the identification or constitution of one legal "owner" of the TK related to kava's medicinal properties is a huge multilateral task.
- 3) *Ongoing bioprospecting*: Ongoing bioprospecting is undoubtedly the single issue of greatest concern to the indigenous peoples of the Pacific Island when it comes to the misuse and misappropriation of TK/TCEs. The gathering of information about TK related

to genetic resources is happening mostly through research undertaken or facilitated by states ostensibly to assist national development initiatives in the fields of agriculture, health, environmental conservation, fisheries, etc. A lack of awareness on the part of states and local communities as to how such research can lead to the misappropriation of TK related to genetic resources has meant that the community safeguards and national regulatory regimes governing such research are often inadequate to provide proper safeguards against misuse. It is in relation to bioprospecting, therefore, that local communities have the greatest need for capacity building assistance.

### *Community responses*

Community responses to the misappropriation and misuse of TK/TCEs have come in a number of forms. There is generally a high level of awareness of this issue, which has led many communities to simply refuse to assist or allow research into or enquiry about their TK/TCEs. Another response is that individuals within communities are enticed by monetary gain to divulge certain information relating to TK/TCEs to outside researchers. The national cultural heritage management agency, the Vanuatu Cultural Centre, has been working with communities over many years to raise awareness of the need to promote the customary transmission of TK/TCEs within communities and to protect TK/TCEs from misappropriation. We have found that the most effective means of safeguarding TK/TCEs is for the bearer communities who hold the TK/TCEs themselves to be:

- allowed (encouraged, assisted, facilitated, empowered) to continue to maintain and to revitalise aspects of their traditional culture in their day to day lives, and
- actively involved in defining what aspects of their TK/TCEs they want to safeguard, deciding what measures to take to safeguard the identified TK/TCEs and in the implementation of these measures.

Below I have provided details of four initiatives we are undertaking in Vanuatu to try to achieve these two ends and the lessons these may provide for other countries.

#### *1) Community management of heritage*

In Vanuatu we have developed a program for involving practitioner communities in the management of their own cultural heritage which we call the “community fieldworkers program”. People living in the local community are selected as fieldworkers to represent different cultural groups, and receive training in using notebooks, tape recorders, and still and video cameras to record cultural information. Basic ethnographic fieldwork techniques such as dictionary-making and the recording of genealogies are also learnt, as are the more general aims and methodologies of cultural heritage preservation and development. A particularly important role for fieldworkers is to make their communities aware of their own cultural heritage and the need to safeguard it, as well as to explain the purpose of documentation and the rights of communities over materials recorded. Annually, fieldworkers come together in a workshop to exchange ideas and experiences about the initiatives their communities are undertaking to encourage the maintenance and revitalisation of cultural traditions and these workshops also guide the development of cultural heritage policy at the national level. One of the most common of these initiatives has been the reconstruction and revival of certain rituals from living memory into performance and contemporary life. Another has been the

organisation of community arts festivals which provide an opportunity for the performance and learning of traditional songs, dances, practices and rituals. In a few areas, fieldworkers and their communities have established ‘cultural centres’ which particular cultural communities or clans can use as centres for cultural activities and as storehouses and display areas for aspects of their cultural heritage (including old photographs and written records). All fieldworkers are volunteers – they do their cultural heritage work in the time they have off from their day-to-day lives – and all are also members of the cultural communities they represent, speak the community language and actually live in those communities.

**Governments, academic institutions and non-government organisations all have to recognise that communities are the experts in determining their own cultural heritage needs; accordingly, they need to create organisational frameworks that allow communities to determine policy concerning the safeguarding of their TK/TCEs and cultural heritage.**

### *2) Codes/protocols governing research in communities*

The Vanuatu Cultural Research Policy was developed by the Vanuatu Cultural Centre principally to provide guidelines for research by foreigners (including anthropologists and film-makers) into all aspects of culture and cultural heritage in Vanuatu. In the Policy, “cultural research” is defined as “any endeavour, by means of critical investigation and study of a subject, to discover new or collate old facts or hypotheses on a cultural subject; the latter being defined as any ethnographic or anthropological study, including basic data collection, studies of or incorporating traditional knowledge or classification systems (eg, studies of the medicinal properties of plants, land and marine tenure systems), documentary films, archaeology, linguistics and ethno-historical accounts”. The Policy is implemented by the Cultural Centre under its legislated powers and has provided an effective tool for ensuring local consultation and participation in cultural research activities in the country since its institution in 1995. Its provisions include requirements for:

- a) local community approval of the research project
- b) maximum involvement of community members in the research
- c) full recognition of the collaboration of community members in the research
- d) training for community members in cultural research and documentation skills
- e) provision of a cultural product of immediate benefit and use to the community
- f) deposit of copies of all products of research with the Cultural Centre and the community
- g) making information in all products of research accessible to the community (through, for example, audio tapes or publications in the community vernacular language)
- h) provision of a service of benefit to the nation (to be determined by the Cultural Centre)
- i) respect for traditional copyright protocols

**National mechanisms need to be put in place that complement, support and strengthen community mechanisms (eg, customary law) to control and guide research into TK/TCEs and related genetic resources and provide effective safeguards for TK/TCEs documented by research.**

### *3) Community management of resources*

It is in the area of environmental management and conservation that state policies in Vanuatu utilise customary law and practices to the greatest extent. Almost all resources in

the country are managed by communities using systems of customary tenure. When Vanuatu enacted its first national environmental legislation in 2002, it accorded a significant role to customary systems of management and their managers, namely communities and their leaders, chiefs. For some years prior to this, the Cultural Centre had been undertaking research on traditional marine tenure systems, to document how they worked and also why their use in certain communities was effective and in others not. This research was undertaken as part of a cooperative management approach, involving the exchange of knowledge between Western-trained marine biologists and community members expert in traditional knowledge. This approach has worked well to enhance community management capacities, value traditional practices and document important data. In addition, the research has come up with important insights into the way customary management regimes function and produced advocacy tools which are now being used at the community level to encourage the continued respect for these tradition-based management regimes. Now that our legislation has come into being, it supports the power of communities, through their chiefs, to manage their resources as they see fit and according to their customary systems. Legislation that specifically empowers chiefs has also been enacted in the fields of near-shore fisheries management, healthcare and the administration of justice. Vanuatu's new intellectual property rights legislation (yet to come into effect) also defers to customary law in dealing with traditional knowledge.

**Communities have existing capacities in self-government and the management of resources: Governments need to recognise these capacities, protect and support them in legislation and policy and assist communities to enhance these capacities as part of their sustainable development.**

#### *4) Community-directed education*

A recent initiative bringing together the Cultural Centre and the Departments of the Environment and Education (and assisted by UNESCO) aims to develop mechanisms for the inclusion of TK/TCEs within the formal schooling process. A primary objective is to value TK by presenting it on an equal footing with outside (Western) knowledge in the syllabus. Teaching TK will necessarily involve breaking down the division between the classroom and community, involving community members as educators and developing an attitude among students, teachers and community members that encourages transmission of TK both in the classroom and in the home. The project builds on the experience of existing community schools which have already adopted this approach to transmit their own culture. This project aimed at the national level is only in the very early stages of conception, but work to collect and collate information on traditional resource management knowledge and practice is already well advanced in other research conducted by the Cultural Centre and the Department of the Environment and is now being used to develop literary materials to bolster the work of teachers and community educators.

**Increasing input of community values into the curriculum and process of schooling is required if schools are not to continue simply being tools for the alienation of young people from their own societies. State education policies need to promote the greater control and input of communities into what is taught in schools, especially in the years of basic education.**

*Needs and expectations / Lessons for the Intergovernmental Committee*

Based on our national experience in Vanuatu, the following recommendations are made to the Intergovernmental Committee for the more effective safeguarding of TK/TCEs at the national and the international level:

- 1) Any national, regional or international regime for the protection of TK/TCEs must be based upon and conform to existing customary laws and practices
- 2) Any laws or policies developed nationally (in any area) need to be culturally sensitive in recognizing and conforming to customary law
- 3) The operation of customary law must be strengthened and enhanced. This can be achieved by assisting communities to revitalize or build their own capacities for self-governance and also by assisting communities to create institutions and regulatory regimes which can be brokers or intermediaries between communities and outsiders (particularly in relation to monitoring and regulating the use of their TK/TCEs)
- 4) National policies need to strengthen the transmission of TK/TCEs within communities: in particular, traditional territories (land and seas) need to be made available to communities, schools within communities need to involve the communities in teaching their own children and teaching TK and community values, and communities need to be given control over (and the capacity for) management of their own cultural heritage
- 5) WIPO must assist communities to “track” patent applications over TK-derived “innovations” to their source: more research needs to be undertaken on the link between field research in communities and patent applications over findings arising from this research. This research will facilitate the development of better safeguarding mechanisms for TK/TCEs. WIPO should assist in the development of model agreements that can be used by communities to ensure field research does not result in the misappropriation of TK/TCEs
- 6) WIPO must promote legal recognition at international and national levels of:
  - a) the collective and ancient “authorship” of TK/TCEs
  - b) traditional rights over TK/TCEs being held in perpetuity
  - c) the equivalent value of orally-held knowledge and documented knowledge
- 7) With regard to point 6(c) above, WIPO should assist in the development of model protocols for the recognition of oral law that are acceptable under international intellectual property law (in particular the recognition of prior knowledge held orally). There is an urgent need to “shift the burden of proof” from communities holding TK/TCEs to those wanting to obtain intellectual property rights over “innovations” deriving from TK/TCEs
- 8) WIPO should provide financial and technical assistance to communities attempting to build their own capacities to safeguard their TK/TCEs (*sui generis* regimes)
- 9) WIPO should provide financial and technical assistance to communities attempting to take cases of misappropriation of TK/TCEs to court.

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