

## **1.0 BACKGROUND TO THIS REPORT:**

The Vanuatu Environmental Unit (VEU) is undertaking a capacity building add-on to the National Biodiversity Strategy and Action Planning Project (NBSAP). One priority within the work is protection of the rights of Ni-Vanuatu, innovations and practices relating to biological diversity. The NBSAP Project has information from Regional Networks that have been promoting interest in protection of indigenous rights, including information from a forum held in Vila in 2001.<sup>1</sup> Clark Peteru, a Samoan based lawyer, has provided advice on intellectual property rights within the region.<sup>2</sup> Within Vanuatu, the Vanuatu National Cultural Centre (VNCC) is active in preserving traditional copyright arising out of research activities. In addition, the National Parliament has enacted the Vanuatu Copyright and Related Rights Act No. x of 2000.<sup>3</sup>

### 1.1 METHOD OF STUDY

This Report reviews national legislation, regional model laws relating to the preservation of Traditional Biological Diversity Knowledge and literature reviews related to domestic, regional and international protection of traditional biodiversity knowledge. A list of local legislation and major documents reviewed is annexed to this Report.

The Consultant also met with various persons and stakeholders to obtain current government policies regarding the protection of Traditional Biodiversity Resources. A list of the persons interviewed is annexed to this Report.

### 1.3 TERMS OF REFERENCE

For the initial stage of this Report the Consultant is required to submit a Working Draft of the Report to the NBSAP Project within the VEU. The Working Draft was submitted to the VEU on or about 20 November 2002. The NBSAP Project circulated this Working Draft for review. Feedback was to be provided within 15 working days of the VEU receiving this Working Draft. Written feedback was provided in early 2003.<sup>4</sup>

The Working Draft was accepted by the VEU on or about 20 February 2003. Subsequent discussions between the Project Co-ordinator and the Consultant agreed that the Final Report which was submitted in 24 March 2003, would be treated as a Draft Final to be presented and discussed at the NBSAP meeting scheduled for 17 April 2003. Feedback and comments arising from members of the NBSAP Committee meeting would be incorporated into a Final Report. The Final Report was submitted on 02 May 2003.

The Final Written Report is to include:

- A cover page clearly displaying the title of the Report, the Author, affiliations and date of completion.
- A table of contents
- Acknowledgements
- An executive summary

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<sup>1</sup> Access to Genetic Resources and Benefit Sharing (ASB) National Workshop, Outrigger Conference Room, The Melanesian Hotel, 19-20 April, 2001, Port Vila, Republic of Vanuatu

<sup>2</sup> Peteru, Clark 'Intellectual Property Rights Study: Final Draft' Prepared for the Forum Secretariat, 13 May 1999.

<sup>3</sup> See elsewhere in this Report to see discussion on the status of this Act.

<sup>4</sup> Comments by Jenny White and Katharine Malosu. Further comments provided by Dr. Charles Kick III by e-mail.

- A reference list
- As an appendix to the report, a list of people and organisations contacted in conducting the consultancy and the date of contact.

## 2.0 FINDINGS:

### 2.1 THE EXISTING LEGAL REGIME IN VANUATU

Vanuatu does not have any legislation “in force” to protect expressions of indigenous culture <sup>5</sup>. The implementation of such legislative rights is necessary for developing countries attempting to curb and prohibit activities of bio-piracy. Initial government policy led to the drafting of the Copyright Act, and was largely driven by the government’s intentions to join the World Trade Organisation (WTO). <sup>6</sup> While this piece of law has been passed by national Parliament, it currently awaits the act of gazetting in order to enter into force. <sup>7</sup> The status of this Act and the implications of inactiveness are discussed in detail elsewhere in this Report.

Vanuatu is not a member of the WTO nor a member of the World Intellectual Property Organisation (WIPO). Any decisions to accede to these International Treaties would involve the compliance of intellectual property protection under the Trade Related Aspects of Intellectual Property (“TRIPS Agreement”) or WIPO as the case may be. <sup>8</sup>

Vanuatu has prepared the Trademarks, Patents and Designs Bills. All three Bills were listed for tabling by their respective Ministers during the first Ordinary Session of Parliament in November, 2002<sup>9</sup>. However, due to time constraints the Bills (amongst others) were sidelined in order for Parliament to dispense with its budget session and financial appropriation requirements for 2003. These three Bills may be tabled for their first readings at the First Ordinary Session of Parliament for 2003, which is yet to be scheduled.

Present government policies continue to run towards a national regime governing Intellectual Property Rights (IPR) as a trade related aspect rather than the implementation of Indigenous rights within the arena of IPR. Forum Country Ministers <sup>10</sup> participating in the 6<sup>th</sup> Forum Economic Ministers Meeting held in Port Vila on 3-4 July 2002, recognised the importance of protecting IPR in particular traditional ecological knowledge, innovations and practices as key resources for the region. <sup>11</sup> Participants at this meeting also acknowledged the regional efforts in drafting a Model Law for the Protection of Traditional Ecological Knowledge, Innovations, and Practices (Model Law). This Model Law is discussed later on in this Report.

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<sup>5</sup> Wright, Michael, 'Legislative Initiatives in Vanuatu to Protect Expressions of Indigenous Culture' Prepared for SPC/PIFS/UNESCO Workshop for Legal Experts on the Protection of Traditional Knowledge and Expressions of Culture, Noumea, 26-28 February, 2001.p.1.

<sup>6</sup> Interview with Director of Trade and Industry.

<sup>7</sup> Copyright and Related Rights Act No. x of 2000, Section 45, Parliament of the Republic of Vanuatu. This is also confirmed by the Consultants search of the Vanuatu Governments Official Gazettes for 2000 – 2002. An interview with Angeline Saul of the State Law Office and the subsequent interview with the Director of Trade and Industry confirms the status of this Act.

<sup>8</sup> Regionally Focused Action Plan, Pacific Islands Forum Countries Intellectual Property Development Plan, Revised 8 June 15 2001.,p. 5

<sup>9</sup> Telephone conversation with Angeline Saul of the State Law Office, 18.11.02

<sup>10</sup> The Forum is composed of membership from Vanuatu, Fiji, Solomon Islands, Tonga, Australia, New Zealand, Samoa, Niue, Kiribati, Nauru and Tuvalu.

<sup>11</sup> Forum Economic Action Plan 2002, Press Statement 5802, Sixth Forum Economic Ministers Meeting, 3-4 July 2002, Port Vila, Vanuatu.

Unprecedented for Vanuatu is the Vanuatu National Cultural Research Policy. This Policy advocates the recognition of collective traditional ownership of resources under Ni-Vanuatu culture as opposed to the recognition and implementation of “western” ideals of private ownership advocated by IPR.

The Vanuatu Government has enacted the Environmental Management and Conservation Act No. 12 of 2002 (EMC Act). The EMC Act provides for the establishment of a Biodiversity Advisory Council (BAC). The BAC is responsible for advising the Minister of Lands,<sup>12</sup> who is also responsible for the Environmental Unit, through the Chairperson, on any matter relating to the implementation of the Convention on Biological Diversity and in particular, on matters relating to commercial bioprospecting.

This Report finds that the Government should compliment its existing policy to protect TBK by enacting the Copyrights Act of 2000 the Patents Bill 2003, and draft a Bill for the establishment of a National Scientific Research Council (NSRC).<sup>13</sup> This NSRC with its overall authority to regulate all areas of scientific research including the Protection of TBK is done primarily through the establishment and monitoring Agreements for the sharing of the benefits between the exploiters of the TBK knowledge and the indigenous TBK holders themselves.

## 2.2 INTERNATIONAL BEST PRACTICES FOR PROTECTION OF TRADITIONAL BIODIVERSITY KNOWLEDGE

### **2.2.1 Introduction:**

The protection of knowledge, innovation and practices of indigenous and local communities (TK) is receiving increasing attention on the international agenda in the past decade. Even more significant is the global awareness that traditional “...knowledge and biodiversity are complementary phenomena essential to human development<sup>14</sup>. International debates surrounding the uncertain status of traditional knowledge are ongoing. At the forefront of such debates are the following accepted facts:

- Traditional knowledge plays a key role in the preservation and sustainable use of biodiversity;
- Numerous activities and products based on traditional knowledge are important sources of income, food, and healthcare for large parts of the populations in many developing countries – especially the least developed countries (LDC’S).
- To date the benefits derived from the use of biodiversity and associated traditional knowledge appropriated are highly unbalanced between the developed countries doing the appropriation and the traditional communities involved. Instances of such “bio-piracy” closer

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<sup>12</sup> The Ministry of Lands Geology & Mines and Water Resources (MOL) hosts (among other things) the Department of Lands, The Land Records Office, Department of Land Surveys, Land Referees Office, Department of Geology & Mines and Water Resources, the Land Valuation Unit, the Energy Unit and the Environmental Unit, see Official Gazette No.15 of 17 June 2002 for publication of Ministerial Portfolio’s.

<sup>13</sup> The NBSAP, also produced a Report in February 2002 in line with their project priorities. The Study for the Establishment of a National Scientific Research Council was prepared under contract by a team of consultants - Dr. Charles Kick III and Marie T. Hakwa.

<sup>14</sup> Warren, D.M.1992. Indigenous, biodiversity conservation and development. Keynote address at the International Conference in Conservation of Biodiversity in Africa: Local Initiates and Institutional Roles, 30 August – 2September 1992, Nairobi, Kenya. p.1.

to home are linked to international recognition and exportation of “kava” as a drink and as alternative medicine, and the medicinal uses of “noni”.

- The United Nations Convention in Biological Diversity <sup>15</sup> (CBD) attempts to resolve such imbalances through its principles of Prior Informed Consent and Access Benefit Sharing schemes<sup>16</sup>. Despite these efforts there is yet no agreement as to what is the most appropriate and effective way in achieving the objectives outlined in the CBD.
- The protection of sustainable traditional biological knowledge is imperative in ensuring that any commercial benefits accruing from the harness of such TBK directly benefits the development of its local communities. <sup>17</sup>

**2.2.2 The International Workshop On Benefit Sharing With Indigenous People  
Organised by Centre for Science and Environment, New Delhi, 1996**

**INDIA**

A team of researchers from the National Law School presented their research on the patentability of traditional knowledge systems in India carried out under the supervision of Dr Gopalakrishnan. They identified four categories of traditional knowledge: knowledge that is: (i) commonly known and used, (ii) well-documented, (iii) undocumented, and (iv) known only to individuals. They found that patent protection is unlikely to be feasible for any of these categories and offered instead a number of principles for a *sui generis* system. These included the following: (i) the system must ensure protection of collective property, (ii) it must be sensitive to technological change, (iii) rights need to be vested in a person or collective entity (vi) rights should not be merely rights to property (vii) it cannot have multiple aims. Some people objected to the opinion that a *sui generis* system should not have multiple aims. The beneficiaries of IPR systems should not be the rights-holders alone. Society at large should benefit, too. A system that benefits some innovators while reinforcing socio-economic inequalities or encouraging practices that cause environmental degradation would not be an improvement. <sup>18</sup>

At this Workshop a representative of the Indian Ministry of Commerce explained the government's position at the WTO Committee on Trade and Environment on how to reconcile the CBD with the TRIPS provisions on patents. Firstly, patent applications for inventions based on biological material should indicate the country of origin of the material and disclose fully any relevant traditional knowledge. Secondly, there must be documentary proof that the prior informed consent of the source country and owner of the biological raw material was obtained. The appropriate way to share benefits would be through a material transfer agreement in the case of biological material and information transfer agreements if traditional knowledge is to be exploited. However, he argued that because individuals and communities would be in a weak position to negotiate with multinational companies governments should negotiate MTAs and ITAs on behalf of non-governmental claimants. <sup>19</sup>

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<sup>15</sup> United Nations Convention on Biological Diversity, 1992. Vanuatu ratified the CBD in 1995.

<sup>16</sup> Convention on Biological Diversity 1992. Article 8(j)

<sup>17</sup> Note by the UNCTAD Secretariat, Trade and Development Board Commission on Trade in Goods and Services and Commodities, 5<sup>th</sup> Session, Geneva, 19-20 February, 2002. United Nations Conference on Trade and Development p.1.

<sup>18</sup> Dutfield, Graham, Report and commentary on 'The International Workshop On Benefit Sharing With Indigenous People', Centre for Science and Environment, New Delhi, 28-30 August, 1996.p.1.

<sup>19</sup> Ibid, pp.1,2.

### *PHILIPPINES*

The 1995 Executive Order which prescribes guidelines and establishes a regulatory framework on bioprospecting is a ground breaking law that requires the prior informed consent of local communities for prospecting on their lands. Two types of bioprospecting agreement must be applied for depending upon whether the research is for commercial or non-commercial purposes. Two possible problems with this law highlighted at the Workshop were: (i) that the ostensibly non-commercial nature of academic research financed from commercial sources may be compromised due to this commercial interest in the results of the research; and (ii) that the somewhat bureaucratic nature of the permit application procedure may discourage research that would be beneficial for the Philippines and perhaps encourage unscrupulous bioprospectors to circumvent the procedures and either steal plants or acquire them from a neighbouring country where regulations are less stringent or perhaps non-existent. This points to the need for countries in the region to collaborate to develop common regulations.<sup>20</sup>

### *AFRICAN CENTRE FOR TECHNOLOGICAL STUDIES*

Mr S. Letta of the African Centre for Technology Studies spoke about CBD Articles 8(j) and 10(c), both of which are supportive of the rights of indigenous and local communities. Their weakness, he argued, is that neither of them specifically mention the right of communities to control access to their lands and resources. He suggested that the best way for countries to implement these two sections of the CBD would be for governments to develop appropriate mechanisms to: recognise local peoples' resource ownership rights; require prior informed consent and benefit sharing; involve local people as contractual partners; require benefit sharing to take place in various forms; and facilitate indigenous peoples' participation in decision making.<sup>21</sup>

#### Organisation of African Unity Model Law<sup>22</sup>

The Organisation of African Unity (OAU) has responded to the misappropriation of indigenous knowledge, innovations, technologies and practices of local communities associated with their Biodiversity as well as inequitable sharing of benefits. OAU has drafted a Model Law to legally secure the rights of local communities and peoples - especially farmers and traditional medicine practitioner's rights over their germ plasma. The Draft Model Legislation was tabled for the 68<sup>th</sup> Ordinary session of the Council of Ministers of the OAU held in Ouagadougou, Burkina Faso in June 1998 and was adopted by the Council.

The OAU initiative is an effort to put in place a "sui generis" system of protection of local communities, farmers, and breeders and for the regulation of access of biological resources. The Model Legislation was developed with a view to (amongst other things):

- Prevent the disruption of African rural life and food production which could result from the loss of: Seeds; the foundation of all agriculture Traditional medicinal plants; the basis of health care for majority of African people Natural fibres and colours; the basis of local African art and crafts; and
- Promote and ensure the sharing of the benefits that Biodiversity, knowledge and

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<sup>20</sup> Ibid, p.2.

<sup>21</sup> Ibid,p.3.

<sup>22</sup> TRIPs, Biodiversity and Traditional Knowledge: OAU Model Law on Community Rights and Access to Genetic Resources\* by Prof. J. A. Ekpere\*\* Project Coordinator OAU/STRC, , Lagos, Nigeria, 2000

technologies of Africa's local communities provide to multi-national corporations, mostly from the north.<sup>23</sup>

*TRENDS IN DOCUMENTATION AND COLLECTION OF BIODIVERSITY AND TRADITIONAL KNOWLEDGE*

Dr P. Pushpangadan, Director of the Tropical Botanic Garden Research Institute (TBGRI) made the point that Botanic gardens and genebanks do not hold the full intra-species genetic diversity of plants existing in India. Therefore there is a need for a national inventory to include *all* of the country's genetic diversity. This is of course a monumental undertaking that will take many years to complete. The TBGRI collaborates with an NGO known as Foundation for Revitalisation of Local Health Traditions (FRLHT) to inventory and document plant-based knowledge, and to maintain this knowledge in databases that are available to local communities. The Garden verifies the effectiveness of the knowledge and integrates them into health care programmes. TBGRI works with FRLHT to conserve endangered plants. TBGRI also takes responsibility to ensure that any commercial use of medicinal plants results in equitable benefit sharing. One benefit sharing scheme has already been implemented.

The *Tricophus zelyanicus* is a plant that grows in the South Indian states of Kerala and Tamil Nadu. Its immuno-enhancing, anti-stress and anti-fatigue qualities were well known only to the Kani tribes until a local guide, Mallan Kani, divulged this information to ethnobotanists carrying out a nation-wide ethnobiology survey being co-ordinated by Dr Pushpangadan. Subsequent test demonstrated the plant's efficacy. TBGRI negotiated with a Madras-based drug company, Arya Vaidya Pharmacy to commercialise two herbal formulations derived from the plant. TBGRI filed a process patent and agreed to share the licence fee and royalties 50-50 with the Kani. The benefit for the Kani would be channelled through the Kerala state tribal welfare department. TBGRI has since then been helping Kani communities to cultivate and market *Tricophus*. Two weaknesses with this approach can be identified: (i) benefits do not go directly to the Kani but to the tribal welfare department, and (ii) some Kani communities are in the neighbouring state of Tamil Nadu. Presumably they will not obtain any benefits at all.

**2.2.3 The Biological Diversity Bill No. 93 of, 2000 India**

On 20 April, 2000 India's President gave his recommendation for the introduction of the Biological Diversity Bill under article 117(1) and for consideration under 117(3) of the Indian Constitution. India is effecting its CBD obligations to exercise sovereignty over its biological resources for environmentally sound purposes and legislate national laws to effect the principles of Asses Benefit Sharing, Prior Informed Consent upon Mutually Agreed Terms. Prior to the drafting of the Bill, extensive and intensive consultation process involving the stakeholders. The Bill contains amongst other things the following provisions:

- Regulation of access to biological resources of India with the purpose of securing ABS from the use of and associates knowledge relating the biological knowledge.
- To conserve and sustainable use biological resources.
- To respect and protect knowledge of local communities related to biodiversity.
- Free access to biological resources for use within India for any purpose other then commercial use for Indian people.
- The establishment of the National Biodiversity Authority regulating foreign research bodies or companies seeking any form of IPR's outside India for an invention based on research or information pertaining to a biological resource obtained from India.

<sup>23</sup> <http://www.ictsd.org/dlogue/2000-07-13/ekpere.pdf>

#### **2.2.4 New Rules and Norms for Research**

New rules governing biodiversity research and prospecting are articulated in three primary sources: international treaties;<sup>24</sup> national laws;<sup>25</sup> and self-regulation by professionals.<sup>26</sup> Development of standard terms in contractual agreements has also contributed a baseline for structuring research partnerships.<sup>27</sup> Changes that result from these new rules include the following:<sup>28</sup>

- Biological resources are no longer the common heritage of mankind, but are subject to sovereign rights of nations.
- Biological materials are national patrimony, or heritage, subject to special treatment - they are no longer treated as commodities.
- Research on, and use of, biological materials must be linked to conservation and must respect local groups.
- Prior informed consent must be acquired before undertaking any research - from governments, institutional collaborators and local communities.

If countries conserve their biodiversity, they should benefit from its use; research and commercial product development should 'fairly and equitably' share benefits with countries and communities.

#### **2.2.5 Commonwealth Public Inquiry into Access to Biological Resources in Commonwealth Areas, Australia, 2000**

In 2000, the Commonwealth of Australia set up a Public Inquiry to advise on a scheme that could be implemented through regulations under s.301 of their Environmental Protection and Biodiversity Conservation Act 1999 (EPBC) to provide for the control of access to biological resources in Commonwealth areas. The basic scheme recommended by the Inquiry provides for an access permit and a benefit-sharing contract. Under the scheme a party seeking to access biological resources in Commonwealth areas is required to apply for an access permit. As the regulatory agency under the scheme, Environment Australia would assess the application in consultation with any other relevant Commonwealth Commonwealth agency, and make a recommendation to the Minister for the Environment and Heritage to grant or refuse the permit. While the assessment is under way, the applicant is required to negotiate, with the holder (or owner) of the biological resources, a benefit-sharing contract which covers the commercial and other aspects of the agreement. The contract would be based on a model contract developed and agreed by Governments, industry, indigenous organisations and other stakeholders.

The Minister may issue the permit on being satisfied, among other things that:

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<sup>24</sup> The Convention on Biological Diversity, 1992

<sup>25</sup> Vanuatu Environmental Management and Conservation Act No. of 2002 and Vanuatu Copyrights and Related Rights Act No. x of 2000.

<sup>26</sup> For example institutional policies and codes of ethics such as the National Cultural Council Research Policy

<sup>27</sup> VNCC Research Policy Standard Research Agreement, Vanuatu Cultural Council Research Policy and Guidelines, Ralph Reganvanu, 2001.

<sup>28</sup> Gollin, 1999 in Sarah A Laird , 'Introduction from Biodiversity and Traditional Knowledge: Equitable Partnerships in Practice.



- (i) environmental assessment (if required) was undertaken and the process is completed;
- (ii) submissions from persons and bodies identified under s.266 of the EPBC have been taken into account;
- (iii) there is a benefit-sharing contract between the parties which addresses prior informed consent, mutually agreed terms and adequate benefit sharing arrangements, including protection for and valuing of indigenous knowledge and environmental benefits in the areas from which the resource was obtained.

The contract can only take effect if the Minister issues an access permit.

In Short, the inquiry after listening to concerns of traditional owners in the Commonwealth areas, particularly about the misuse of their knowledge of biodiversity, sought to come to terms with the limitations of the existing legal system in protecting and valuing this knowledge. The best protection presently available for the rights of Indigenous peoples to their biological resources and their intellectual property can be achieved through inclusion of appropriate contractual terms. This was considered practical, with further projects aimed at indigenous owners to help them understand and further preserve and protect indigenous knowledge.<sup>29</sup>

### **3.0 REVIEW OF LEGISLATION, DRAFT LEGISLATION, AND RELATED POLICIES IN VANUATU**

#### **3.1 COPYRIGHTS AND RELATED RIGHTS ACT NO. X<sup>30</sup> OF 2000**

The Parliament of Vanuatu sitting in its second ordinary session on Friday 24 November 2000 enacted Vanuatu's Copyright and Related Rights Act (Copyrights Act).<sup>31</sup> The purpose of the Copyrights Act is to provide for the protection of copyright and related rights. The Act was presented before parliament by the then Honourable James Bule, Deputy Prime Minister and Minister of Trade, Tourism and Business Development. The Explanatory Notes by the Minister of Trade, and provided to parliamentarians for the purposes of the first and second readings of the Copyright Act, states that regular copyright protection<sup>32</sup> fail to adequately protect against breaches of expressions of indigenous cultures.<sup>33</sup> There is no elaboration as to the reasons why this is so. Upon reading the Copyright Act in its entirety, it would seem that the fundamental reason is the inability of IPR regulations to adequately address the unique collective ownership of TBK holders in Vanuatu.

##### **3.1.1 Works protected by the Copyright Act**

Part 1 of the Copyright Act deals with the preliminary matters of definitions, and states that *the Act applies to new and existing works*, sound recordings, performances, broadcasts and *expressions of indigenous culture*. Works protected by the sole fact of their creation under the

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<sup>29</sup> Vournard, John, 'Commonwealth Public Inquiry into Access to Biological Resources in Commonwealth Areas, Commonwealth of Australia, 2000.

<sup>30</sup> Copyright and Related Rights Act, 200x section 45 .

<sup>31</sup> Personal Notes: Silas Charles Hakwa former Parliamentarian, Port Vila, Friday 24 November 2000. Hakwa currently runs a private law firm and practices before the local bar.

<sup>32</sup> Such as the minimum requirements stipulated by the World Trade Organizations Trade Related Aspects of Intellectual Property Rights Agreement and USA Copyright and Intellectual Property Rights legislation.

<sup>33</sup> Private Notes of Silas Charles Hakwa, former Member of Parliament, 6 March 1998 to 6 March 2002. Silas C. Hakwa

Copyrights Act is defined under sections 5 & 6 as, original intellectual creation including but not limited to:

- Artistic work
- Literary work
- Dramatic work
- Musical work
- Audio-visual work
- Collective work
- Derivative works, such as translations, adaptations, arrangements and other transformations or modification of works and collection of works, collections of data sets (whether in machine readable or other form), and **collections of expressions of indigenous culture** if the collections are original by reason of the selection or arrangement of their contents.<sup>34</sup>

### **3.1.2 Definition of Indigenous Cultures in the Copyright Act**

The central interest of this paper begins with the definition of the term **“expression of indigenous culture”** under section 1 of the Act.

**“Expression of indigenous culture”** means any way in which indigenous knowledge may appear or be manifested, and includes:

- (a) all material objects; and
- (b) names, stories, histories and songs in oral narratives; and
- (c) dances, ceremonies and ritual performances or practices; and
- (d) the delineated forms, parts and details of designs and visual compositions; and
- (e) **specialised and technical knowledge and the skills required to implement that knowledge, including knowledge and skills about biological resources, biological resource use and systems of classification;**

It is clear from this definition that Traditional Biodiversity Knowledge (TBK) falls within the definition as **“expressions of indigenous culture”**. The Copyright Act utilises the principles of *sui generis*<sup>35</sup> in extending the definition of indigenous expressions to include (amongst other things) traditional biological resources. Part 1 of the Copyright Act further provides at section 3 as follows:

“This Act applies to works, performances, sound recordings, broadcasts and expressions of indigenous culture that:

- (a) are created on or after the commencement of this Act; or
- (b) were in existence before that commencement.”<sup>36</sup>

An area of concern may lie in the subsequent section, section 4 which states that the provisions of the Copyright Act does not affect contracts or agreements made before the commencement of this Act relating to (among other things), expressions of indigenous culture.<sup>37</sup> It was pointed by

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<sup>34</sup> Copyright and Related Rights Act No. x of 2000, Section 6. Parliament of the Republic of Vanuatu.

<sup>35</sup> TRIPS, Article 27.8 (b)

<sup>36</sup> Ibid., Section 3.

<sup>37</sup> Ibid., Section 4.

Charles Kick, that Parliament should amend the Copyright Act to insert a sunset clause so that by (say) 20 years time everyone would be regulated by the Copyright Act.<sup>38</sup>

### **3.1.3 Works not protected by the Copyright Act**

For completion purposes, Section 7 of the Act states that:

“Despite sections 5 and 6, any idea, procedure, system, method of operation, concept, principle, discovery or mere data, (even if expressed, described, explained, illustrates or embodies in a work) is not a work and is not protected under this Act. “<sup>39</sup>

Since the Interpretation section of the Copyright Act<sup>40</sup> including section 3 – the scope of the Copyright Act clearly includes TBK as described in the paragraphs above, it would be inconsistent to construe section 7 as excluding TBK. It might be worth it to amend this section to clearly state this.

### **3.1.4 Offences created in relation to Expressions of Indigenous Culture**

Part 7 of the Copyright Act provides an offence if a person obtains economic benefits,<sup>41</sup> from dealing with expressions of indigenous culture if they are not themselves the owners of that expression. If they are not the owners then they have to have the permission of the custom owners and must also comply with any rules of custom that is applicable for the usage of such expression. The Copyright Act goes further to state that an offence is committed regardless of whether or not any profit was gained by the unauthorised person(s).<sup>42</sup>

Remedies from unauthorised use of indigenous expression of culture lie in civil actions for damages, which can be, initiated either by the custom owners personally<sup>43</sup>, or by the Vanuatu National Cultural Council (VNCC) or the Malvatumauri Council of Chiefs (Malvatumauri) on behalf of custom owners.<sup>44</sup> In the case of dispute as to customary ownership or where the custom owner is not yet identified, the VNCC or the Malvatumauri can institute proceedings as trustee of the custom owners. Any proceeds of this action are used for indigenous cultural development.<sup>45</sup> Any person convicted for breaches of expressions of indigenous culture can be fined for up to VT1,000,000 or 1 year imprisonment or both.<sup>46</sup> It is worth noting that the VNCC and the Malvatumauri have statutory authority to deal with offences, therefore close co-ordination must be provided for in any administrative mechanisms developed by the Ministry of Trade in implementing the Copyright Act.

Part 2 prescribes the economic and moral rights protected by copyright. Part 3 defines the acts that do not constitute infringement of copyright while Part 4 sets out the duration and nature of

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<sup>38</sup> Dr. Charles Kick III, provided helpful comments after the Draft Report was submitted to the Environmental Unit.

<sup>39</sup> The Copyright and Related Rights Act 2000, Section 7.

<sup>40</sup> Ibid., Section 1.

<sup>41</sup> Ibid., Sections 8 and 23(1).

<sup>42</sup> Ibid., Section 41(3) subparagraph (a).

<sup>43</sup> Ibid., Section 42(2)

<sup>44</sup> Ibid., Section 42(3).

<sup>45</sup> Ibid., Section 42(4).

<sup>46</sup> Ibid., Section 41(1).

copyright. Part 5 deals with the protection of performers, sound recordings and broadcasting organisation. Part 6 vests the Supreme Court with the jurisdiction in respect of criminal and civil matters under this Act. Part 7 provides for the special protection of expressions of indigenous culture and Part 8 deals with treaties affecting copyright and provides the Minister of Trade with regulation making powers.

### **3.1.5 Current legal status of the Copyright Act and resulting implications**

The current government policy regarding IPR and related rights such as the protection of TBK are reflected in drafting and enactment of the Copyrights and Related Rights Act, 2000.<sup>47</sup> Although the Copyright Act is enacted it has not yet entered into force.<sup>48</sup> Section 10(2) of the Acts of Parliament CAP [116] states that “*every Act of Parliament shall come into force immediately on the expiration of the date next preceding its commencement*” i.e. upon the date of its publication in the Gazette. For the purposes of this Report the Copyrights Act indicates official Government policy and reasons for delay in gazetting this Act are known only to the Government.

The Ministry of Trade, Industry and Business Development is setting up a committee of key stake holders to develop administrative mechanisms to implement the Copyright Act and confirm an initial budget for the setting up of a registry.<sup>49</sup> This Registry is to be used for the administration of the proposed Trademarks, Patents and Designs Bills which are awaiting tabling at the next Ordinary Session of Parliament, 2003. Details as to where the Registry is to be situated to be effective, and the inter-departmental co-operation required is to be discussed at the committee meetings.<sup>50</sup>

### 3.2 VANUATU CULTURAL RESEARCH POLICY, 2001<sup>51</sup>

Vanuatu National Cultural Centre has developed its own sui generis cultural research policy, which extends to and promotes and protects traditional biological knowledge. The VNCC Research Policy defines “Cultural Research” as being:

"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 anthropological, linguistic, archaeological, historical or related social 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 and studies of introduced knowledge and practice.”

<sup>47</sup> Personal Interview with Director of Trade and Industry George Manueri, Environmental Unit Conference Room, 31 December 2002.

<sup>48</sup> Consultants search of the Vanuatu Governments Official Gazettes for 2000 – 2002 confirms that the Copyrights and Related rights Act 2000, has not been gazzetted.

<sup>49</sup> Personal Interview with George Manueri and Timothy William Cici, Environmental Unit Conference Room, 31 December, 2002.

<sup>50</sup> At the time of the interview, the Consultant could not verify dates of up coming Committee meetings from the Department of Trade.

<sup>51</sup> A Sui Generis mechanism regulating traditional or customary copyright systems used by the National Cultural Council in vetting all cultural research in Vanuatu.

The VNCC research policy further confers “traditional rights” to indigenous Ni-Vanuatu. It explains this right as:

“the traditional right of individuals and communities to control the ways the information they provide is used and accessed. *The issue of traditional copyright arises when individuals or communities either own or are the custodians of specialised (and usually tabu) knowledge* and its communication. This knowledge can include names, designs or forms, oral traditions, *practices and skills.*”

In short, the VNCC research policy which has been in application since 1995<sup>52</sup> and further amended in 2001, acknowledges Indigenous sovereign rights over their traditional cultural as well as biological resources. Thus any cultural research activity involving these processes or data is automatically subject to Traditional Copyright Agreements that contain access benefit provisions.<sup>53</sup>

As far as administration goes, this seems to duplicate the authority granted to the Biodiversity Advisory Council under Part 4 of the Environmental Management and Conservation Act (“EMC”) and would also duplicate work allocated to the proposed VNSRC. For activities that involve cultural and traditional biological knowledge, co-ordination between the BAC and the VNCC and/or the VNSRC and the VNCC would be required.

### 3.3 THE PATENTS BILL, 2003

The Patents Bill provides for the granting and registration of patents. It also sets out the rights deriving from such registration and prescribes for the protection of these rights. In addition, it recognises indigenous knowledge and prescribes for the regulation of such knowledge. The Flow chart in Annexure 2 illustrates the basic legislative procedures involved when the Registrar sees that an application for registering a Patent in a particular innovation or creation involves or is based upon traditional biological knowledge.

Two areas of concern in implementing this Bill is that while it recognises the ownership of TBK by indigenous owners, the period of benefits obtained by the TBK holders is restricted to 20 years while the Patent is valid. Thereafter, that particular innovation or creation enters the public domain and is freely available for public usage. (Refer to the Model Law discusses later on in this Report for an alternative recognition of ‘perpetual ownership by TBK holders over their TBK’.) Secondly, there is a valid concern that the advisory body involved in vetting all Patents containing TBK i.e. the Vanuatu National Council of Chiefs (Malvatumauri) – lacks the capacity to effectively guard the rights of TBK holders. The ability to produce Agreements involving equitable sharing of benefits arising from the exploitation of a TBK is often legal and technical in nature. Feedback provided from the NBSAP Committee meeting, suggest that procedures of vetting applications that contain TBK elements should also include the Vanuatu National Cultural Council as well. This would also be a similar procedure provided for in the Copyrights Act – which is discussed above.<sup>54</sup>

<sup>52</sup> Reganvanu Ralph, Presentation at the Half-Day Forum on the Establishment of a National Scientific Research Council, held in Port Vila, 7<sup>th</sup> November, Minutes, 2002, at p.4.

<sup>53</sup> <<http://artalpha.anu.edu.au/web/arc/vks/contre.htm>>

<sup>54</sup> National Biodiversity Strategy and Action Planning Project Advisory Committee consists of representatives from various stakeholders and Government agencies who meet on a regular basis to guide the work of the Project. This particular meeting was held at the The Rossi Conference room, Port Vila, 17 April 2003.

### 3.4 THE ENVIRONMENTAL MANAGEMENT AND CONSERVATION ACT NO. 12 OF 2002

The EMC Act provides for the conservation, sustainable development and management of the environment of the Republic of Vanuatu, and the regulation of related activities including:

- The establishment of an Environmental Register;<sup>55</sup>
- Development of national environmental policies;
- Mandatory Environmental Impact Assessment procedures for all project, proposals and development activities that affect or may affect the environment;<sup>56</sup>
- Establishment of a Biodiversity Advisory Council to manage bio-prospecting applications; and
- Creating offences for non-compliance with provisions of the Act and establishes liability for corporate directors for offence committed in the name of any company.

Part 1 of the of the EMC Act defines bio prospecting as **“any activity undertaken to harvest or exploit all or any ... (a) samples of genetic resources; (b) samples of derivatives of genetic resources; and (c) the knowledge, innovations and customary practices of local communities associated with those genetic resources, for the development of research, product development, conservation, industrial or commercial application, and includes investigative research and sampling,** but does not include customary uses of genetic resources and derivatives.”<sup>57</sup>

#### **3.4.1 Biodiversity Advisory Council**

The Biodiversity Advisory Council’s (BAC) statutory functions include:

- Providing advises on any matter relating to the implementation of the Convention on Biological Diversity;
- Providing advices to the Minister on matters relating to commercial bio prospecting;
- The vetting of all bio prospecting applications (which must under go the procedure outlined in Part 3 for EIA’s); and
- Recommendations to the Minister after receiving the final EIA.

The Report further finds that the BAC is a key body assisting in the regulation of TBK arising out of bioprospecting activities within Vanuatu. The administrative mechanisms are set out under the under sections 32 to 36 of the EMC Act.

Section 33 broadly defines the function of the BAC as being **“responsible for advising the Minister, through the chairperson, on any matter relating to the implementation of the Convention on Biological Diversity and, in particular, on matters relating to commercial bioprospecting.”**

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<sup>55</sup> Environmental Management and Conservation Act, National Parliament of Vanuatu, Port Vila, Vanuatu, November 2001. section 10,

<sup>56</sup> Ibid., section 15.

<sup>57</sup> Ibid, section 3.

Section 35(2) states that all applications for bioprospecting must include amongst other things **“a description of the nature of any biological resource or traditional knowledge that is to be investigated.”**<sup>58</sup>

Section 36(3) states that before the BAC makes recommendation to the Minister (the Minister grants all permits for bioprospecting activities), it must satisfy itself that:

**“a legally binding and enforceable contract is concluded with custom landowners, or any owner of traditional knowledge, concerning:**

- (i) ***rights of access***
- (ii) **rights of acquisition of any biological resource or traditional knowledge;**
- (iii) **appropriate fees, concessions or royalties that will be charged for any research, or the acquisition of any biological resource or traditional knowledge, or for any commercial benefit that may be obtained;...**<sup>59</sup>

The role of the BAC is central to the discussion of TBK protection in Vanuatu. Studies undertaken for the proposed Vanuatu National Scientific Research Council (VNSRC) <sup>60</sup> legislation suggest that to avoid duplication of roles, bioprospecting should be exempted from the jurisdiction of the proposed VNSRC. It is also advisable to make the relevant amendments to the VNCC Research Policy – to exclude bioprospecting activities from the jurisdiction of the VNCC. For the avoidance of doubt, the VNSRC remains the ‘parent’ body governing all research activities and promotes the national science policy determined by the Government. (Refer to page 21 and Annexure 2 for flow charts illustrating the regulation of TBK within Vanuatu. )

### 3.5 NATIONAL WORKSHOP ON ACCESS TO GENETIC RESOURCES AND BENEFIT SHARING (ABS), 19-20 APRIL 2001, PORT VILA

The participants of the National Workshop on Access to Genetic Resources and Benefit Sharing held on the 19<sup>th</sup> and 20<sup>th</sup> of April 2001 in Port Vila agreed (amongst other things) to the following recommendations:

- Vanuatu affirms its sovereign right to its biological and genetic resources as provided for under the Convention on Biological Resources (CBD).
- The people of Vanuatu affirm their customary right to their biological and genetic resources.
- The recognition of the ownership of biological and genetic resources should be based on customary tenure, as provided for in the land tenure provisions of the Constitution, and
- The need to establish a national programme to raise public awareness on matters relating to policies, guidelines, codes of ethics, ownership, access to genetic resources, benefit sharing and the importance of biological and genetic resources.

<sup>58</sup> The Environmental Management and Conservation Act, section 35(2) para (f).

<sup>59</sup> Ibid, section 36(3) para (i),(ii) and (iii).

<sup>60</sup> Kick, Charles and Hakwa Marie *A Study of the Establishment of a National Scientific Research Council for Vanuatu*, Vanuatu Environmental Unit, February 2002.

### 3.6 FORUM ON THE ESTABLISHMENT OF A VANUATU NATIONAL SCIENTIFIC RESEARCH COUNCIL (V.N.S.R.C), PORT VILA <sup>61</sup>

The participants of the half day forum in Port Vila, reached consensus that a VNSRC is needed for Vanuatu. <sup>62</sup> The discussion at this forum was based on a Study of the establishment if a National Scientific Research Council for Vanuatu (Study) <sup>63</sup> prepared by a team of Consultants contracted by the VEU. The Forum endorsed the recommendations of the Study that the main role and function of the VNSRC was two-fold in that it would set the scientific research policy to safeguard Vanuatu's interests and developments and also implement mechanisms by way of Research Agreements between researcher institutions and Indigenous Ni-Vanuatu to include Prior Informed Consent and Access and Benefit Sharing provisions including the protection of TBK. The VNSRC was to act as an umbrella body, regulating all scientific research activities in Vanuatu. All other scientific committees set up under an Act or on an ad hoc basis must affiliate themselves to the NSRC. The Study highlighted financial concerns as the main area of concern in implementing a VNSRC Act. <sup>64</sup> The Study recommended that in the interim an ad hoc Scientific Research Committee should be appointed by the Prime Minister. The Secretariat consisting of a Director would be hosted by the VEU to handle a limited volume of applications and undertake a few of the other responsibilities of a VNSRC.

For the purposes of this Report is seen that the VNSRC plays the central role in the regulation of TBK in that it is the only body vested with the authority to standardise and regulate Research Agreements. All its affiliates must incorporate these standard provisions in all their research agreements. In the interim, it is essential that the ad hoc Scientific Research Committee is vested with the power to monitor all research agreements ensuring that they incorporate adequate provisions of Prior Informed Consent and Equitable Benefit Sharing provisions, where a particular research application involves TBK.

#### **3.6.1 Scientific Advisory Council**

This is important, in light of the general powers granted to the Vanuatu Agricultural Research and Technical Centre (the Centre) under its own Act of the same name <sup>65</sup> (VARTC). The VARTC does not specifically address this concern. <sup>66</sup> Section 4 of the VARTC Act merely grants wide powers for the Centre to do all things necessary in connection with its function to arrange for scientific research to be undertaken on behalf of the Centre by any person or body. It also has the further obligation to co-operate with other organisations and authorities in the co-ordination of scientific research to specifically prevent overlapping; and for the effective use of its facilities and staff. The Centre is governed by a Board <sup>67</sup>. This Board has the power to set up a

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<sup>61</sup> Minutes of the Forum: Vanuatu National Scientific Research Council (VNSRC) Establishment, Melanesian Hotel, Outrigger Conference Room, Port Vila, 07 November, 2002

<sup>62</sup> Ibid.,p.11.

<sup>63</sup> Kick, Charles & Hakwa, Marie, 'Study of the establishment if a National Scientific Research Council for Vanuatu' Final Report, Environment Unit of Vanuatu, February 2002.

<sup>64</sup> Ibid, pp.28-29.

<sup>65</sup> Parliament of Vanuatu, Vanuatu Agricultural Research and Technical Centre Act No.15 of 2002.

<sup>66</sup> Refer to the powers of the Biodiversity Advisory Council set up under the EMC Act discussed in 3.5.1 of this Report.

<sup>67</sup> Ibid, section 16.



Scientific Advisory Council (SAC)<sup>68</sup> to provide advises on particular matters or classes of matters relating to the functions of the Centre.

It is important to note at this pint that when Vanuatu ratified the CBD in 1993 it obligated the Government to pass national legislation that promotes the preservation of TBK. In the scheme of things, the SAC will be required by law to affiliate itself to the VNSRC under the proposed VNSRC Act. (Refer to diagram on page 21).

#### **4.0 REGIONAL POLICIES RELATING TO THE PROTECTION OF TBK**

##### **4.1 UNITED NATIONAL DEVELOPMENT PROGRAMME CONSULTATIONS ON INDIGENOUS KNOWLEDGE AND INTELLECTUAL PROPERTY RIGHTS**

The Final Statement from the United National Development Programme (UNDP) Consultations on Indigenous Knowledge and Intellectual Property Rights, Suva, in April 1995 states (amongst other things) that:

- We the participants at the Regional Consultation on Indigenous People's Knowledge and Intellectual Property Rights...
- Declare the right of indigenous peoples of the Pacific to self-governance and independence and *ownership of our lands, territories and resources as the basis for the preservation of indigenous peoples knowledge,*
- Declare that *indigenous peoples are willing to share our knowledge with humanity provided we determine when, where and how it is used.* At present the international system does not recognise or respect our past, present and potential contributions.
- *Condemn attempts to undervalue indigenous peoples traditional science and knowledge,*
- Condemn those who use our biological diversity for commercial purposes without our full knowledge and consent.

This Regional Consultation also proposed the following plan of action:

- Initiate the establishment of a treaty declaring the Pacific Region to be a life-forms patent free zone.
- *Call for a moratorium on bio prospecting in the Pacific and urge indigenous peoples not to co-operate in bio prospecting activities until appropriate protection mechanisms are in place.*
- *Commit ourselves to raising public awareness of the dangers of expropriation of indigenous knowledge and resources.*
- Recognise the urgent need to identify the extent of expropriation that has already occurred and is continuing in the Pacific.
- Urge governments who have not signed the General Agreement on Tariffs and Trade (GATT) <sup>69</sup> to refuse to do so, and encourage that government who have already signed to protest against any provisions, which facilitate the expropriation of indigenous peoples' knowledge and resources and the patenting of life forms.

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<sup>68</sup> Ibid, section 24.

<sup>69</sup> The GATT rules are now replaced by with TRIPS. See Annexure 3 (page 30), for a discussion of TRIPS and its implication for Developing States.

4.2 SYMPOSIUM ON THE PROTECTION OF TRADITIONAL KNOWLEDGE AND EXPRESSIONS OF INDIGENOUS CULTURE IN THE PACIFIC ISLANDS <sup>70</sup>

At the Symposium,<sup>71</sup> Mr Clark Peteru made a presentation on the protection of plant genetic resources. The debate following his presentation at that time surrounded the following issues:

- Economic benefits
- Control of research and ethical concerns
- Legal protection of Biodiversity and other possible solutions <sup>72</sup>

4.3 MODEL LAW FOR THE PROTECTION OF TRADITIONAL ECOLOGICAL KNOWLEDGE, INNOVATIONS AND PRACTICES ACT 200X

The Model Law for the Protection of Traditional Ecological Knowledge, Innovations and Practices, (“ML”) has been developed through the collaboration of the Australian Government, WIPO and the Pacific Islands Forum Secretariat (PIFS).

The Draft ML was forwarded to the State Law Office in early 2002 for consideration. A consultant, Richard Hurfold contributed general comments on the ML and forwarded the same to the PIFS. There are indications that a revised ML has been prepared after receiving other comments on the Draft ML by other countries in the Pacific Region. <sup>73</sup> The State Law Office had not received a copy of this revised ML when this Report was being finalised. The ML comprises of 18 sections. The ML is to provide a basis for all countries in the region in drafting their national legislation’s to protect TBK innovations and practices.

**Table1: The main Strengths and Weakness of the Model Law.**

<b>STRENGTHS OF THE ML:</b>	<b>WEAKNESSES OF THE ML:</b>
<b><u>ESTABLISHMENT OF TBK REGISTRY:</u></b>	
Prevents unauthorised use of traditional ecological knowledge, innovations and practices to ensure equitable sharing of benefits derived from the use of such knowledge, innovations and practices.	The ML does not provide adequate administrative mechanisms needed to prevent unauthorised use of TBK. Each government has to put these administrative mechanisms into place to maintain a national register.
National Registry to be set up. Non- registration does not affect ownership over TBK.	The ML provides that the regional Co-ordinator is to put into place rules to establish and maintain the Regional Register. The ML also extends the authority of the Regional Co-ordinator to identify a Disputes Resolution Procedure for multiple regional claims over TBK. The ML as a Regional Treaty will need to provide more detail for the practical administration of the Regional Registry – especially a Disputes Resolution Procedure. The Criteria in establishing a valid claim must be clearly stated from the onset.
A Regional Registry is established with a regional co-ordinator to maintain the Register.	
Register has 3 principle roles	
- To serve as prima facie evidence of ownership of the TBK registered.	
- To serve as prior art, which might be used to challenge patent applications.	

<sup>70</sup> 15-19 February 1999, Secretariat of the Pacific Community Noumea, New Caledonia

<sup>71</sup> Organised by the Secretariat of the South Pacific Community and United Nations Education, Scientific and Cultural Organisation , 1999 in Noumea.

<sup>72</sup> Report of Meeting: Symposium on the Protection of Traditional Knowledge and Expressions of Indigenous Cultures in the Pacific Islands, Noumea 15-19 February, 1999, the Secretariat of the Pacific Community, New Caledonia.pp.16-18.

<sup>73</sup> E-mail from Clark Peteru, 25 March 2003.

- To promote conservation of TBK.

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DISPUTES RESOLUTION OVER CLAIMS OF TBK:

The respective court system or alternative tribunal in each country determines TBK disputes.

Part 6 of the Model Law deals with how a claimant can prove their ownership i.e. declaration of acknowledgement in a form or manner valid by its customs and practices that they have been using. Upon providing such proof the claimant(s) shall be considered owners of the TBK.

Proving customary ownership over TBK involves the disputing claimants relaying the use of that particular TBK by their respective ancestors. For example, claims over disputed customary land involves the claimants describing their respective family tree and movement over land before the Land Tribunal – presided over by area custom chiefs. How would one prove usage of TBK in circumstances where the practice is secret for example?

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TBK IN THE PUBLIC DOMAIN PROTECTED:

The ML applies to all traditional ecological knowledge whether in the public domain or not. Section 10 of the ML makes it an offence to use knowledge (including knowledge in the public domain) unless prior informed consent has been obtained and an access and benefit-sharing agreement is in place. The ML suggests a selective approach in establishing such rights – especially focusing on immediate cases of misappropriation and commercial abuse.

This provision is in direct conflict with IPR laws in developed countries and the policies being pursued by WIPO and WTO's TRIPS.

National administrative mechanisms to implement this provision could prove difficult – especially in pursuing international companies to obtain compliance. Perhaps a sunset clause is preferable where Agreements involving commercial use of TBK prior to enactment of the ML at the national level must bring themselves into compliance within (say) 5 years.<sup>74</sup>

A regional Model Law may not be as effective as say an International Treaty for monitoring and compliance purposes.

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NATURE OF OWNERSHIP OF TBK:

The ML provides that all traditional ecological knowledge, innovations and practices are owned in perpetuity<sup>75</sup> by;

- a group or an individual;
- the National government in a trustee role where ownership is in dispute;
- the National Government in a trustee role where ownership is not known;
- the Regional Co-ordinator in a trustee role where ownership is in dispute and the claimants are from different countries;
- the Regional Co-ordinator in a trustee role where ownership is unknown and the knowledge, innovation or practise is shown to originate from different countries.

NB: For Vanuatu, individual ownership of TBK would be unlikely, even if only there is only one survivor of a particular clan or nakamal, customary ownership is peculiarly communal in essence. A custom owner is never the “owner” merely a custodian.<sup>77</sup>

Once again the ML leaves administrative mechanism to the discretion of individual country members to design and implement through their own national legislation.

Section 8(1) states that ownership right over TBK is inalienable and non-transferrable and is in addition to any other rights available under existing intellectual property laws but where there is an inconsistency with the intellectual property laws, the intellectual property laws shall, to the extent of the inconsistency, be void.<sup>76</sup> This is a significant difference and a strong stance for the developing countries on the issue of TBK.

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<sup>74</sup> E-mail from Charles Kick,

<sup>75</sup> Model Law, Section 5(1) subparagraphs (a) –(c)

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OFFENCES CREATED UNDER ML:

Section 6 (2) protects against the wrongful and false claims by making such an act an offence under the ML.

Section 10 prohibits the unauthorised use of TBK for commercial purposes.

The Model Law states clearly that any persons who uses any TBK and uses a false attribution of ownership for that TBK is guilty of an offence which is subject to criminal sanctions of up to 3 months imprisonment.<sup>78</sup> Similarly, any distortion, mutilation of derogatory action in relation to a TBK is a criminal offence.<sup>79</sup>

The ML is silent as to who would prosecute these. National governments would have to indicate the office responsible for carrying out these prosecutions to deter frivolous and false claims.

Breaches of the provision of the ML is subject to criminal and civil sanction.<sup>80</sup> But how does is this applied in practice to offenders that flea the country? Extradition of an offender is only possible if there is an existing Extradition Treaty between the countries concerned.

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COMMERCIAL USAGE OF TBK:

The ML provides that PIC and ABS agreements are mandatory before any person can use TBK for commercial purposes.

Practically, in cases of multiple owners of TBK throughout the region, the ML does not specify how royalty payments are to be made and just how the royalty is calculated.

How beneficial are ABS agreements in reality? Kava for example is in popular demand in the USA. Americans pay between \$ 253 and \$2,486 per kilo of kava root. It is estimated that although kava prices are high across the Pacific, and the kava trade is hyped as a model for ABS, kava farmers only receive between 0.25% and 2.5% of the proceeds from the booming kava sales in the North.<sup>81</sup>

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AMENDMENTS TO EXISTING IPR LAWS:

The Model Law sets out the relevant amendments that need to be made to existing Patent, Copyright, Trademarks and Designs Statutes in each country as follows:

- all overseas applicants wishing to register a patent in Vanuatu for example, must provide clear evidence to the Patent Office, that if the invention for which the patent is being sought has used or was based upon TBK, that the applicant had obtained prior informed consent of the owner of that TBK. If the Patent Office later finds out that no such prior informed consent was granted then it has the power to revoke such patent being registered.<sup>82</sup>
  - Section 15 provides that existing IPR laws must be amended to reflect indigenous ownership over TBK within the public domain and section 17 states that application of PIC and ABS is a crucial component to be added if not already provided for.
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<sup>76</sup> Model Law, Section 8(1) sub-paragraph (a)

<sup>77</sup> See Vanuatu Supreme Court Decision, Obed Toto v. Philip Pasvu for a discussion on the definition of "customary land ownership".

<sup>78</sup> Model Law Section 8(1) subparagraph (c)

<sup>79</sup> Model Law, Section 8(1) subparagraph (d)

<sup>80</sup> Model Law, Section 8(2)

<sup>81</sup> <[http:// www.infoe.de/home/Biodiversity+for+sale:=Dismantaling+the=hy...](http://www.infoe.de/home/Biodiversity+for+sale:=Dismantaling+the=hy...)>

<sup>82</sup> Model Law, Section 14 (a), (b).

**5.0 DISCUSSION AND RECOMMENDATIONS**

Biodiversity research and Biodiversity prospecting are the activities requiring strict regulation and adequate means for monitoring by Government Agencies or bodies in order to safeguard the rights of Indigenous Ni-Vanuatu against the exploitation of their TBK. For Vanuatu the EMC Act provides for the protection of Biodiversity, its conservation and its regulation under the advisory function of the BAC. The Parliament is also in the process of passing legislation in relation to registration of Patents. The Study regarding the establishment of the VNSRC accompanies a Ministerial Discussion paper which needs to be raised with the Minister for Lands prior to tabling at a Council of Ministers meeting.<sup>83</sup>

**5.1 ANALYSIS OF INTERNATIONAL BEST PRACTICES**

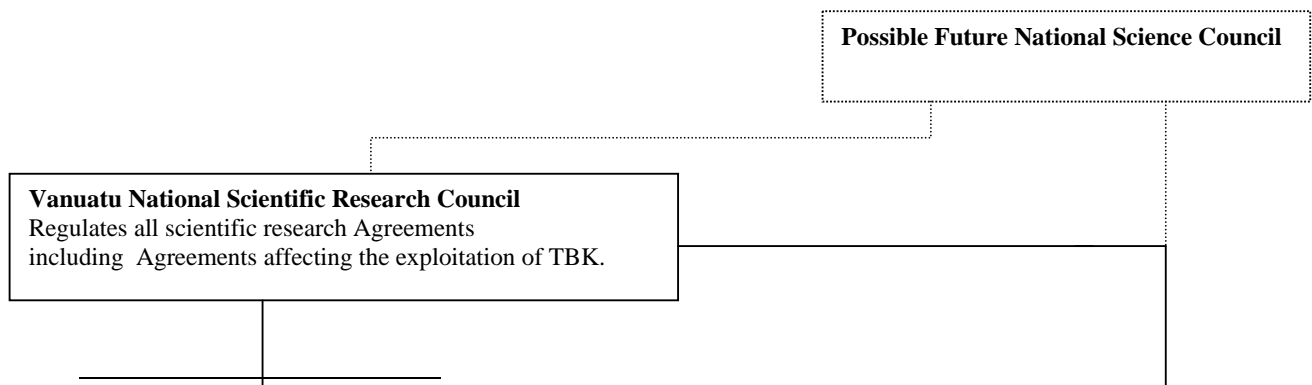
International developments in producing regimes that effectively address the issue of TBK protection for TBK holders or owners discussed earlier on in this Report indicate that normal IPR laws are inadequate. There is a two pronged approach in applying national government control or regulation of TBK within their own states. The first is to adapt the Agreements between those wishing to exploit the TBK and the TBK holders themselves. The Exploiters must show evidence of Prior Informed Consent from TBK holders and there must be an Equitable benefit sharing Agreement between the parties. Secondly, the establishment of a TBK Registry to create TBK databases to easily monitor and facilitate development in the commercial use of TBK.

**5.2 VANUATU'S OPTIONS**

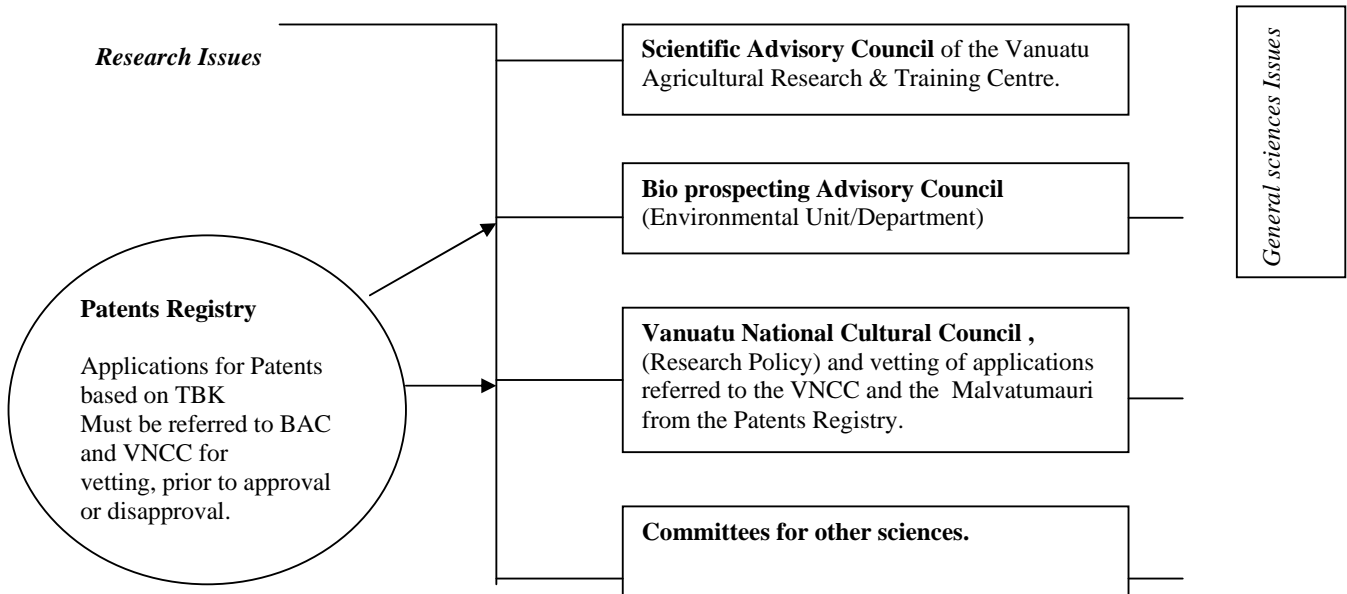
Current developments within Vanuatu are already underway to create a strong legal framework to protecting and regulating the exploitation of TBK in the best interests TBK holders. Within the centre or top of this framework is the proposed VNSRC who will regulate all scientific research Agreements. The diagram below shows the basic relationship and linkages between existing and ad-hoc scientific committees or councils with the VNSRC once it has been properly established.

The issues that are of immediate concern are the implementation of interim measures to monitor and regulate these research agreements to ensure that TBK holders interests are protected at all times.

**Model for Managing Scientific Research, Agreements and Priorities in Vanuatu**



<sup>83</sup> Comments by Head of VEU, Ernest Bani at the NBSAP Advisory Committee meeting 17 April 2002, The Rossi Conference Room, Port Vila.



### 5.3 RECOMMENDATIONS

It is recommended that while the process of setting up an interim Scientific Research Committee, to regulate scientific research (for areas which have not yet been regulated for) and research agreements for all scientific areas that have not been specifically legislated for, certain steps can be taken within the existing legislation's to preserve TBK for TBK holder.

1. The Patents, Trademark and Designs Bills and the Copyrights Act should be amended to provide for perpetual ownership of TBK by TBK holders;
2. A Ministerial Order to grant to the Environmental Unit the authority to act as a Registry of TBK, until such time as the ad hoc Scientific Research Committee is set up and can take over that particular role as recommended in Phase 1 of the Study.<sup>84</sup>
3. That the Patents Bill is amended prior to its tabling in Parliament to identify the BAC including the Director of the VNCC instead of the Malvatumauri National Council of Chiefs<sup>85</sup> to vet all Patent registration applications involving or incorporating TBK. This Copyright Act should also be amended to this end to eliminate duplicacy.
4. The VARTC Act needs to be amended to include a provision that clearly states that all research activities undertaking and/ or authorised by the Centre, which involves TBK, must be subject to principles of Prior Informed Consent and an equitable benefit sharing agreement between researchers and owners of the relevant TBK. Where it is not possible to identify TBK holders or there is a dispute, the Minister for Environment or the NSRC will need to act as trustee and collect funds on behalf of the TBK holders. This rational

<sup>84</sup> Kick & Hakwa pp. 31-32.

<sup>85</sup> Section 29(3) grants the Minister a discretionary power, in consultation with the Director of VEU to appoint up to 5 additional members to the BAC for the multi disciplinary nature of work undertaken by the BAC. A representative of the Malvatumauri can in this way also be appointed to join the Committee for these specific tasks when they come before the BAC.

derives from the definition of Bioprospecting and the powers granted to the BAC and the Minister to regulate bioprospecting activities under the EMC Act as follows:

The EMC Act defines bio prospecting as **“any activity undertaken to harvest or exploit all or any ...(a) samples of genetic resources;(b) samples of derivatives of genetic resources; and (c) the knowledge, innovations and customary practices of local communities associated with those genetic resources, for the development of research, product development, conservation, industrial or commercial application, and includes investigative research and sampling,** but does not include customary uses of genetic resources and derivatives.”<sup>86</sup>

Finally, the VNSRC is to established as a body corporate with legal standing to act on behalf of TBK holders when identified for scientific research which does not all within the scope of bioprospecting. The proposed VNSRC Act will need to specify its scope of work clearly in relation to the BAC to avoid overlapping.

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<sup>86</sup> Ibid, section 3.

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Wright, Michael, 'Legislative Initiatives in Vanuatu to Protect Expressions of Indigenous Culture' Prepared for SPC/PIFS/UNESCO Workshop for Legal Experts on the Protection of Traditional Knowledge and Expressions of Culture, Noumea, 26-28 February, 2001.

**ANNEXURE 1: LIST OF PERSONS INTERVIEWED**

<i>Name and Organisation or Department:</i>	<i>Date of Interview:</i>
Angeline Saul Michael Wright, State Law Office, Legal Drafting Section	11 October 2002 – 2p.m.
Telephone conversation with Angeline Saul	18 November 2002 - 9.00 a.m
Telephone Conference with Angeline Saul	25 March 2003 – 8.00a.m
Telephone Conference with Jane Bani	19 December 2002 – 9.00 a.m

Legal Drafting Officer, State Law Office

Silas Charles Hakwa  
Private Practitioner and former MP of  
Parliament 1998-2002

3 January 2003 – 11.00 a.m.

Clark Peteru  
Samoan Lawyer and Author of various IPR  
Articles relating to the Pacific Region

25 March 2003 – e-mail received.

Director of Trade, Industry and Business  
Development George Maniuri and Timothy  
William Sisi,

Environmental Unit Conference Room,  
31 December, 2002 – 10.00 a.m

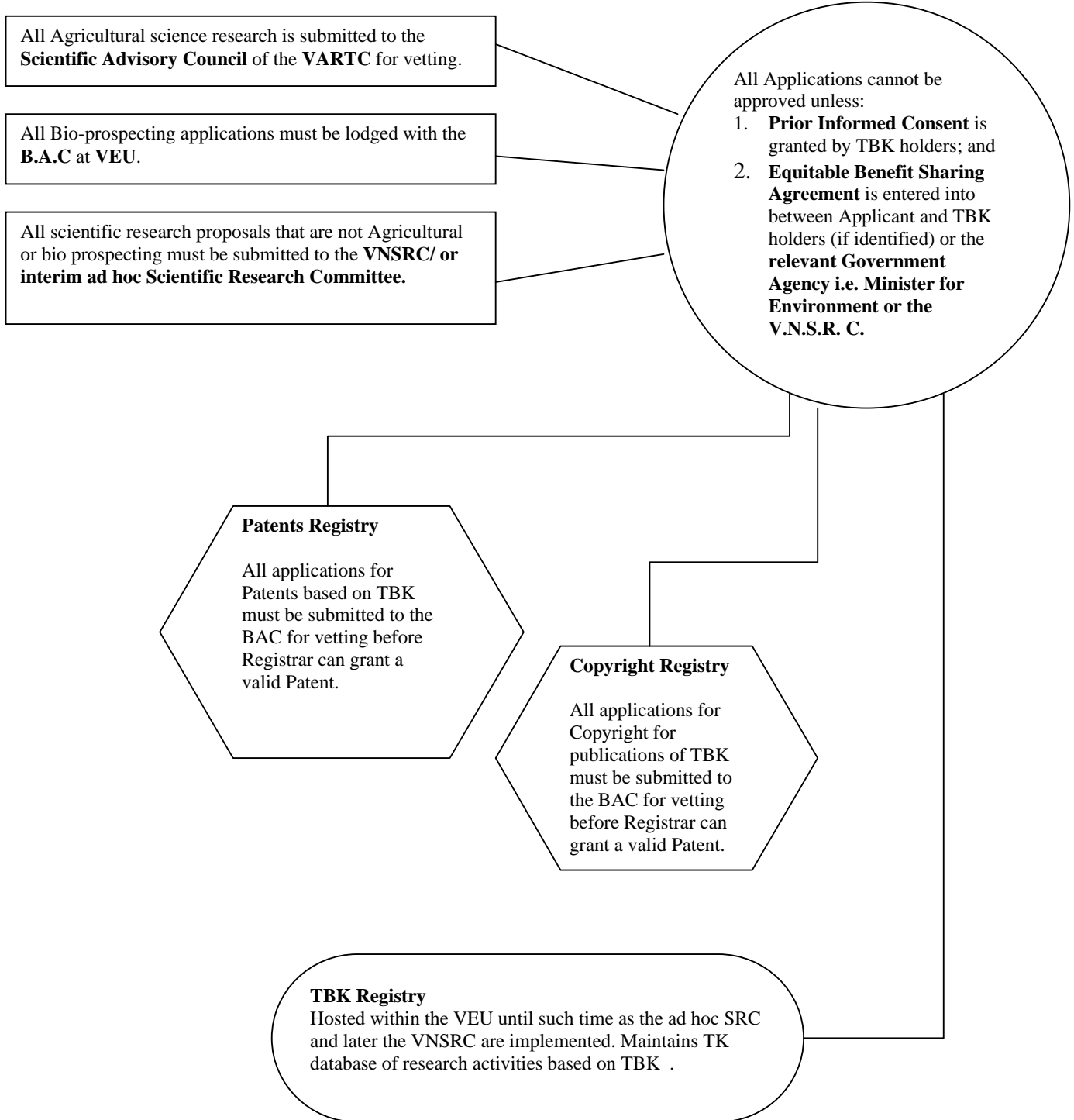
Ernest Bani (Head of VEU), Russel Nari  
(VEU), Donna Kalfatak, (NPSAP Project Co-  
ordinator), Katharine Malosu (VEU) Matt  
Temar (LUPO, Lands Department), Raph  
Reganvanu, Abel Tapisue (Consultant FSP  
Vanuatu), Tom Kalo (Department. Of Trade),  
Leimon Kalomor (Forestry Department); Sam  
Channel (Botonist – Forestry); Kaltuk Kalomor  
(Quarantine).

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NBSAP Advisory Committee meeting, Rossi  
Conference Room, 17 April 2003. 0900a.m. –  
11.45a.m.



**ANNEXURE 3: RESEARCH PROPOSALS THAT INVOLVE TBK AND BIOPROPECTING APPLICATIONS**



### **ANNEXURE 3: INTERNATIONAL CONVENTIONS REGULATING INTELLECTUAL PROPERTY IN RELATION TO BIOLOGICAL RESOURCES.**

#### TRADITIONAL KNOWLEDGE & SUSTAINABLE DEVELOPMENT

The International community has recognised the value of participatory approaches to decision-making for sustainable approaches to development. During the past decade a rapidly growing set of evidence indicates a strong relationship between indigenous knowledge and sustainable development. “Serious investigation of indigenous ethnobiological/ethnoecological knowledge is rare, but recent studies...show that indigenous knowledge of ecological zones, natural resources, agriculture, aquaculture, forest and game management, to be far more sophisticated than previously assumed. Furthermore, this knowledge offers new models for development that are both ecologically and socially sound.”<sup>87</sup>

#### TRADITIONAL KNOWLEDGE & PRINCIPLES OF ACCESS BENEFIT SHARING

The most glaring conflict between rich and poor over intellectual property comes from the misappropriation of ‘traditional biological knowledge’ such as ancient herbal remedies that find their way into high priced western pharmaceuticals without the consent of, or any compensation to the people who have used them for generations.<sup>88</sup> The most significant implication of the CBD is that restrictions on access to genetic resources are now legitimised.<sup>89</sup> The CBD also takes important position on three economic questions. Nations are to have sovereign rights over their genetic resources; access, “where granted” is to be on mutually agreed terms and conditions and subject to the “prior informed consent” of the nation involved.<sup>90</sup>

As a result of Vanuatu’s ratification of the CBD the government through the NBSAP within the Vanuatu Environmental Unit is in the process of implementing amongst the other Articles aforementioned, Article 8(j).

#### THE CONVENTION ON BIOLOGICAL DIVERSITY – VANUATU’S OBLIGATIONS

The Convention on Biological Diversity was signed in 1992, was another result of increasing concerns growing around the preservation and the sustainable use of Biodiversity. The Convention was opened for signature on 5 June 1992 at the United Nations Conference on Environment and Development, (UNCED), also called the Rio “Earth Summit”, and entered into force on 29 December 1993. By early 2000, 177 countries had ratified the convention including Vanuatu<sup>91</sup>. A few countries, including the USA, have not ratified the CBD.

The CBD defines biological diversity as the “variability among living organisms from all sources including, inter alia, terrestrial, marine, and other aquatic ecosystems and the ecological

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<sup>87</sup> Posey, Darrel A and William Balee, eds, 1989 Resource Management in Amazonia: Indigenous and Folk Strategies. Advances in Economic Botany, Vol.7. Bronx: New York Botanical Garden.

<sup>88</sup> [http://www.economist.com/science/display.cfm?story\\_id=1325219](http://www.economist.com/science/display.cfm?story_id=1325219)

<sup>89</sup> Barton, John, H. Biodiversity at Rio, November 1992 p.775

<sup>90</sup> CBD Article 15.

<sup>91</sup> Ratification in 1995.

complexes of which they are a part; this includes diversity within species, between species and of ecosystems.<sup>92</sup>

Vanuatu's obligations under the CBD include:

- The conservation of biological diversity, the sustainable utilisation of its components and the fair and equitable sharing of the benefits arising out of the utilisation of genetic resources.
- Contracting parties are to "respect, preserve and maintain knowledge, innovations and practices of Indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity; and
- To promote the wider application of TBK with the approval and involvement of the holders of such knowledge, innovations and practice and encourage the equitable sharing of the benefits arising from the use of such knowledge, innovations and practices.<sup>93</sup>

Those two articles emphasise the need for protection of Biodiversity and the recognition of traditional knowledge. If they are effectively applied and implemented, they can have major consequences for the access to genetic resources.

The CBD recognises "the sovereign rights of States over their natural resources", and that "the authority to determine access to genetic resources rests with the national governments and is subject to national legislation"<sup>94</sup>. It means that governments are responsible for their resources together with their sustainable conservation, and that they can decide whether or not they will allow collection of resources on their territories.

Under the CBD Vanuatu is obligated to create conditions to facilitate access to genetic resources.<sup>95</sup> "The access, where granted, shall be on mutually agreed terms".<sup>96</sup> "Access to genetic resources shall be subject to Prior Informed Consent (PIC) of the Contracting Party providing such resources, unless otherwise determined by that Party ".<sup>97</sup> The latter provision indicates that parties have to be aware and agree with the terms under which resources are accessed and /or taken away.

The Convention asserts, in article 16 that Intellectual Property Rights must not conflict with the conservation and sustainable use of Biodiversity: "The Contracting Parties, recognising that patents and other Intellectual Property Rights may have an influence on the implementation of this Convention, shall co-operate in this regard subject to national legislation and international law in order to ensure that such rights are supportive of and do not run counter to its objectives." Articles 15 and 16 are now subject of negotiations, as they involve rights and duties that should be enforced. However, laws regulating Intellectual Property have other priorities that may be hindered by such articles.

### **Limitations of the CBD**

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<sup>92</sup> Article 2, Convention on Biological Diversity, 5 June 1992.

<sup>93</sup> CBD. Article 8(j)

<sup>94</sup> Ibid. Article 15

<sup>95</sup> Ibid. Article 15.2

<sup>96</sup> Ibid. Article 15.4

<sup>97</sup> Ibid. Article 5.5

Parties with genetic resources collected originally from other Parties before the entry into force of the Convention are not obliged to share the benefits derives from their use with the latter. They can choose to do so. Parties with pre-existing collections have the sovereign right to control access to them to ensure benefit sharing.

The CBD is nowadays seen as the main text in the field of Biodiversity. Contracting parties meet within the Convention of the Parties (COP), to discuss further implementation of the articles.

#### WIPO

The World Intellectual Property Organisation (WIPO) started in 1970, and turned into a specialised agency of the United Nations (UN) in 1974, with the mandate to administer Intellectual Property matters recognised by the Member States of the UN. It focuses on the promotion of Intellectual Property Rights throughout the world and international regulation and co-operation in that field. WIPO administers Unions and Treaties in the field of Intellectual Property, such as the Paris Union, the Berne Union and UPOV. Part of WIPO's work concentrates on helping developing countries with international standards of IP protection. Since the 1980's, seven High Level Meetings (HLM) of Forum Island Countries (FIC) Officials – including Vanuatu, have been held under the auspices of WIPO. The objectives of the HLM is to create awareness of the need for intellectual property protection and to discuss ways of assisting member countries in developing IPR systems.<sup>98</sup>

#### TRIPS

The WTO-TRIPs Agreement (TRIPS) came into force by 1995, only a few years after the US request of defining Intellectual Property as a trade-related issue. The US claimed that low standards of IP protection formed a non-tariff barrier and thus hindered free trade, which is in turn prohibited by the WTO. The US also claimed that they were losing a huge amount of royalties due to the exclusion of biological resources from Intellectual Property laws.<sup>99</sup>

TRIPs defines the minimum standards of protection for Intellectual Property Rights. Members are thus free to define higher standards than TRIPs does.<sup>100</sup> Interesting is also that whereas other agreements of the WTO focus on what members may not do, TRIPs says what should be done.

While Vanuatu has enacted its own Copyright legislation and is in the process of tabling its Trademarks Bill, it does not have any Patents laws in force. Patents protect ideas and their expression within new products and processes. TRIPs require patents “in all fields of technology”. They confer the inventor of new process and/or product exclusive monopoly rights with regard to its economic exploitation for periods up to 20 years. After 20 years, the invention moves to the public domain.

The TRIPs Agreement requires that no invention should escape patent protection. However, any member country may exclude plant varieties from patent protection by providing an effective *sui generis* system of protection”.<sup>101</sup>

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<sup>98</sup> Regionally Focused Action Plan, p. 3.

<sup>99</sup> Le Roy, p. 34.

<sup>100</sup> All 135 WTO members must implement the Agreement. Developed countries were required to comply with all the provisions by 1 January 1996. Developing countries and countries in transition need to have it implemented by the year 2000, least developed countries (LDC's) by the year 2005. These transition periods may nevertheless not be used to reduce the level of protection (the so-called non-backsliding argument).

*Sui generis* means “system of its own kind”, that is in this case plant variety-specific. Although a clear definition is lacking in the TRIPs text, the *sui generis* system provides the opportunity to build a specific legal system, eventually based on other concepts than the patent system - it can roughly be defined as another kind of IPR for plant varieties.

### **Implications of Trips for developing country members**

The major implication of TRIPs is seen in Article 27(1) which states that the criteria for a patent claim for an invention are :

- It must be new
- Involve an inventive step and
- Be capable of industrial application.

Implicit in these requirements is that there must be an identifiable inventor. This definition almost immediately dismissed the knowledge systems and the innovations of indigenous peoples and farmers because they innovate communally and sometimes intergenerational.<sup>102</sup> TRIPs takes no account of the knowledge systems of the indigenous peoples which is an organised, dynamic system of investigation and discovery that is of critical value to the sustainable maintenance of the earth diversity.

With the fact that TRIPs requirements for patent claims stated above, are a replication of US patent law it is no surprise that it effectively denies the recognition and values knowledge systems of indigenous communities. In this case it can be argued that biopiracy of traditional knowledge is justified.<sup>103</sup>

It is to be noted that protection of Intellectual Property has traditionally fallen under the domain of national legislation, whereas it now is a matter of international agreements. Developments in that field are unprecedented. The existing national laws have now to be adapted in such a way that the TRIPs' minimum standards are met. As TRIPs provisions are in fact the copy of already-existing legislation in industrialised countries, legislation in those countries conforms to the Agreement. In most developing countries though, where IP protection was basic or not existing at all, legislation has to be “upgraded” to meet the minimum standards of TRIPs.<sup>104</sup>

In conclusion, TRIPs seems to formalise the trend in which intellectual property rights confer private, individual and exclusive ownership of life forms. On the other hand, the CBD recognises the role and achievement of local and indigenous communities in the conservation of biological diversity and considers biological resources as proper areas for establishing and ensuring collective community rights.<sup>105</sup>

<sup>101</sup> (Article 27.3(b))

<sup>102</sup> <http://www.undp.org/tcdc/bestprac/social/cases/03-biodiversity.htm>

<sup>103</sup> Ibid.

<sup>104</sup> Le Roy, Adrian, In *Between Biodiversity Conservation and Intellectual Property Rights: An Analysis of the economic motives of TRIPs and the implementation of sui generis*, Thesis Paper, November 2000, Wageningen University, Netherlands.p.38.

<sup>105</sup> Prof. J.A. Ekpere ,'Discussion paper presented at an ICTSD Multi-Stakeholder Dialogue on Trade, Environment and Sustainable Development', Libreville, Gabon, July 13 14, 2000 p.2.



The IUPGR was adopted by the Conference of the FAO in 1983, as a non-legally binding instrument. It was the first international instrument that sought to regulate the conservation and the sustainable use of genetic resources. Vanuatu is a member of the FAO's Commission on Genetic Resources for Food and Agriculture (CGRFA).

The objective of the Undertaking is to “ensure that plant genetic resources of economic and/or social interest, particularly for agriculture, will be explored, preserved, evaluated, and made available for plant breeding and scientific purposes <sup>107</sup>. In this same article, it is stated that PGR are a “heritage of mankind” and consequently “should be available without restriction”. The idea of “heritage of mankind” has undergone some criticism, being that if humanity inherited resources, then they should be accessible to everyone, thereby passing over the sovereign rights of states over their resources. This is in direct contrast with Article 8(j) of the CBD. When the FAO's CGRFA adopted the IUPGR in 1983, negotiations have been underway to bring the IUPGR's provisions in harmony with that of the CBD.

#### FARMERS' RIGHTS

A second annex (C5/89) concerned the concept of Farmers' Rights, stating that farmers have *a priori* rights to the materials their ancestors have developed since time immemorial and must be rewarded for their activities and conservation of genetic resources. The international community through the FAO Conference endorsed this annex in 1989; it meant a major step forward in the recognition of the contribution of farmers, thereby challenging the view that genetic resources are only developed within the formal sector <sup>108</sup>. If breeders have rights over their varieties, then farmers should also be taken into account as key participants to that process.

The third annex reaffirmed the sovereignty of nations over their natural resources, and the agreement to create a fund in order to implement Farmers' Rights. It focuses on the need to preserve the resources, to regulate their access, use and exchange, and to respect the ones who elaborated them over the past years. It also urges for international co-operation in these fields.

The IUPGR is still referred to as a more or less successful first attempt to regulate the access and use of genetic resources. It especially emphasised on the efforts to rebalance North (resource-poor, but financially rich) and the South (resource rich but financially weak). Today, efforts are made to push the concept of Farmers' Rights and to include such a provision in national laws. <sup>109</sup>

#### THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

The Universal Declaration of Human Rights stating that all people on earth are born “free and equal in dignity and rights”. <sup>110</sup> All people also have the rights to “the protection of the moral and

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<sup>106</sup> <[http://www.ukabc.org/iu\\_article.pdf](http://www.ukabc.org/iu_article.pdf)>

<sup>107</sup> UPOV Article 1

<sup>108</sup> Cooper D, The International Undertaking on Plant Genetic Resources, in Plant Genetic Resources, vol2, nr2, Basil Blackwell, Oxford, UK and Cambridge, MA, USA, 1993

<sup>109</sup> Le Roy, Adrian, p.40.

<sup>110</sup> Universal Declaration of Human Rights , Article 1

material interests resulting from scientific, literary or artistic production of which he or she is the author".<sup>111</sup>

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<sup>111</sup> Universal Declaration of Human Rights, Article 27