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Kava Pirates in Vanuatu?

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Global interest in recreational and therapeutic uses of kava (*Piper methysticum*) peaked in the 1990s at the same time as did concern over "bioprospecting" and even sneakier "biopiracy." Bioprospecting has come to label scientific investigation of new medical, agricultural, and other uses of the world's biota. And biopiracy refers to appropriation of such resources by pharmaceutical and other commercial enterprises, given that many of these plants and animals may already have been known, cultivated, and used for many centuries within folk medical and susbsistence economic systems.

Kava, given its escalating global popularity in the 1990s, became a poster-child plant in serious risk of appropriation by multinational pharmacological corporations. In activist broadsheets, it was listed frequently along with ayahuasca, quinoa, sangre de drago, tumeric, and bitter melon as a plant species *already* pirated by outside interests (International Indian Treaty Council nd:4; Indigenous Peoples' Caucus 1999:2). A position paper presented by the acting director of Fiji's Ministry of Agriculture, Fisheries, and Forests at a 1999 regional workshop on "the protection of plant varieties" under the TRIPS agreement, for example, cited four U.S. patents already claimed on particular kava extracts—one a treatment for hair growth in "mammalian subjects" (Vakabua 1999:2-3). Rumors also circulated that multinational interests were fast establishing kava plantations outside the Pacific Island region—either in Australia or in one or more Central or South American countries. Lebot claims that kava plantations of Hawaiian stock were in fact established in Guatemala and New Caledonia (and perhaps Australia), but all subsequently failed—their failure also connected to the collapse of the global kava market (Vincent Lebot, personal communication). Elsewhere in the 1990s, small farmers in Hawaii, particularly on the Big Island, increased kava plantings although much of their crop is still locally consumed.

The terms "biopiracy" and "bioprospecting" emerged in the context of NGO efforts to protect indigenous rights to their local flora and fauna and knowledge of such. Organizations such as RAFI and GRAIN pursued various avenues in support of indigenous claims to this sort of "cultural property." To combat biopiracy, and to attempt to regulate international bioprospecting, for example, they have turned to language that was first introduced in the World Trade Organization's "Trade-Related Aspects of Intellectual Property Rights" (TRIPS) Agreement of 1994. While Article 27.3(b) allows signatories to choose to *exclude* plants and animals (other than micro-organisms, non-biological and microbiological processes) from patentability, it also permits signatories to choose to protect ownership of plant varieties through patents or through *sui generis* (novel) systems of recognizing intellectual property in these. Activists also sought to strengthen international protection of the cultural and/or intellectual property rights that indigenous peoples have in their local flora, such as kava, by calling for ratification of the U.N.'s Draft Declaration of the Rights of Indigenous Peoples. Its articles recognize indigenous folks' inalienable rights to land and other resources within their territories;

advance concepts of cultural and intellectual property; and call for those wishing to exploit such cultural property to engage in informed consultation with indigenous peoples and to obtain their "participatory consent" (Chernela 2005:14) The Draft Declaration, however, seems destined, at least for the time being, to remain a draft in light of opposition of state governments reluctant to transfer sovereign powers to internal indigenous communities, and opposition from the United States and other powers suspicious of communal, as opposed to individual/corporate, notions of property and of regulation that might impede corporate interests and global trade. To date, only two of the 45 draft articles (both of which affirm the *individual* rights of indigenous peoples) have been provisionally adopted by member states (Chernela 2005:14).

Many have argued that *sui generis* systems to counter biopiracy are needed insofar as existing patent systems recognize individual and corporate property rather than communal or "cultural" rights in traditional plant resources, such as kava. And, moreover, patents expire after some established time period whereas cultural groups may wish to assert their rights to a traditional practice or object in perpetuity. To be sure, such demands for communal rights to cultural property often evoke sweetly romantic notions of customary property and tenure, e.g., "Traditional knowledge is regarded as *common heritage* and not as a commodity to be patented for commercial exploitation...." (Bengwayan 2003:4, my emphasis). Those closer to the ground have documented complicated cultural property and tenure systems that a simple distinction between individual and communal much distorts. In Vanuatu, for instance, families and lineages often claim overlapping "best" rights to this or that kava variety, and would deny a common cultural heritage. There are also (chiefly)-titled versus untitled (and male versus female) claims to use and exchange kava. On Tanna, for example, certain families have the right to exchange specially grown and decorated kava *tapuga* at festivals celebrating boys' circumcisions. Their overlapping claims to this sort of kava would be very difficult to adjudicate, and some *sui genesis* patent system that awarded general rights to kava to all ni-Vanuatu, should one eventuate, could also spark local opposition from regions, kin-groups, and classes jealous of their particular kava claims. (For instance, note another example of global piracy concern from Vanuatu: Peter Ngwele, from Ambae Island, is now attempting to register the name "Bali Hai" which he claims is a female name belonging to his lineage; James Mitchner who, looking east towards Ambae, wrote the first draft of *Tales from the South Pacific* while stationed on Espiritu Santo during WW2 (Binihi 2005).)

Presumably, cultural property systems could recognize different levels of claim to a plant like kava among members of a community. U.C. Berkeley, for example, has signed an agreement with the government of Samoa to use the gene sequence of Prostratin, a compound extracted from *Homalanthus nutans* (the mamala tree). Although negotiated with the Samoan state (World Trade Organization agreements such as TRIPS presume state-level, as opposed to "indigenous" or popular interests), some royalties will also flow down to villagers "and to the families of healers who first taught ethnobotanist Dr. Paul Alan Cox how to use the plant" (Sanders 2004). However, it is unclear whether *other* Samoan healers also with knowledge of the plant, unknown to Dr. Cox, might assert their own particular claims should the agreement produce any royalties.

Vanuatu, taken as a community and as a nation, does have strong traditional claims to kava. Analysis of the distribution of kava morphotypes and chemotypes has suggested that kava was first domesticated in the northern part of the archipelago (Lebot, Merlin, Lindstrom 1992:53). There has been one important attempt to stake general claims to kava as a sort of Vanuatu cultural property: Vanuatu's Kava Act (No. 7 of 2002), which kava agronomist Vicent Lebot helped draft. This was billeted but not made law by Vanuatu's Parliament (as of 2005), in part because it limited rights to export kava to ni-Vanuatu. Only Vanuatu citizens (or companies 51% owned by citizens) could legally export kava. In late 2005, attempts were underway to remove this provision and resubmit the bill to Parliament. Many in Port Vila, however, continue to support this limitation; they point to equally discriminatory U.S. constitutional restrictions that limit the foreign-born, such as Arnold Swartzenegger, from serving as the American President (V. Lebot, personal communication). The Kava Act, in addition, forbids the exportation of kava propagation material (stumps, shoots, buds, branches, and the like), in order to forestall establishment of plantations of Vanuatu kava outside that country.

Vanuatu, however, is not the only possible claimant to cultural property in kava. Although there is evidence that the plant was first domesticated in northern Vanuatu, it soon spread (in some earlier phase of biopiracy?) to Fiji, much of Polynesia, Pohnpei, Kusaie, and scattered areas of Papua New Guinea. Vanuatu thus lacks the ability to protect access to any but its own kava crop and kava propagation stock—and this ability is limited. The University of Hawaii, for example, has for some years maintained an extensive herbarium of kava varieties, many of which originated in Vanuatu. Attempts have been made elsewhere to divide cultural property royalties among communities that span several countries; see, for example, the San Hoodia Benefit Sharing Trust that will share out royalties derived from obesity treatments based on the appetite-suppressing hoodia plant among San communities in South Africa, Botswana, Namibia, and Angola (Chennells 2003). Chennells, however, says nothing about how funds received by each national group might be further distributed among families and individuals. The Internet, at the moment, is flush with hoodia advertisment, and it is a good guess that income from such sales does not find its way back to southern Africa even though, as one such ad notes, "African Bushmen have used it for centuries" (rapidresponse.directtrack.com/z/19112/CD747). Unlike hoodia, no sustained Pacific-wide effort yet exists to claim kava as a sort of joint Oceanic cultural property or to demand royalty payments from marketers and users elsewhere.

In fact, rather than uniting kava homelands, the plant instead featured in a trade war between Vanuatu and Fiji in 2005. Fiji blocked imports of Vanuatu kava in response to Vanuatu's imposition of import restrictions on Fijian produced cabin biscuits. Vanuatu, like many small countries with limited local markets, occasionally has attempted to protect its nascent industries and manufacturers with tariffs and import restrictions. Fiji, alarmed at losing access to Port Vila's biscuit eaters, retaliated by blocking kava—one of the few items that Vanuatu exports back into Fiji in any quantity. (Vanuatu, in 2004, imported US$1.5 million of biscuits while reportedly exporting some US$3.6-5.0 million worth of kava.) As of August 2005, both countries had retreated, at least slightly, from

this biscuit-kava war. While awaiting Melanesian Spearhead Group mediation, Vanuatu lifted its total biscuit ban but nonetheless still reduced annual imports to 2000 kg and also levied a 50% duty on Fiji biscuits; Fiji also lifted its kava ban, although required that all imported kava be licensed—a new regulation that would apply principally to Vanuatu producers (pidp. eastwestcenter.org/pireport/2005/August/08-18-16.htm).

Kava piracy narratives became more complicated when, beginning in 2001, Germany, France, Japan, Switzerland, the UK, Australia, Canada, New Zealand, and Singapore banned sales of kava products following scattered reports of liver damage among heavy users. Kava suddenly lost its cachet as wonder drug, a natural product of tribal wisdom, and the export market collapsed (from $6 million a year to $1.4 million in Fiji, with a similar decline in Vanuatu.) Some blamed the effects of biopiracy here, too, suggesting that devious pharmaceutical companies added dangerous chemicals to their kava concoctions that led to subsequent liver damage in users (Palmer 2002?). Others accused greedy Pacific kava exporters of selling dangerous kava basal stem shavings, or even *Piper aduncum* ('spiked pepper' or 'false kava'), to the hungry world market, cunningly profiting from raising prices for bulk dried kava root. And some have suggested that the pharmaceutical industry itself came to encourage kava bans, realizing growing losses on sales of patented benzodiazepines like Prozac and Valium to European consumers. If this conspiracy theory is even loosely correct, kava would present a case where the pirate booty proved too hot to handle, insofar as kava displaced even more profitable patent drugs in global pharmacies.

In response to these spreading prohibitions on the drug, kava producers (Vanuatu, Fiji, Samoa Tonga) along with European kava marketers formed the International Kava Executive Committee (www.ikec.org) to protest and fight European bans. This helped convince the World Health Organization, in 2003, to recommend the scientific investigation of kava's medical side effects. The IKEC, on its website, also offers a 305 page report that documents and refutes supposed cases of kava-caused liver damage in European consumers (Gruenwald et al. 2003). In May, 2005, Germany did at last revoke its kava ban, accepting that presumed connections between heavy kava use and liver damage were unfounded. German health authorities nonetheless declined to permit kava concoctions back into the market. They currently seek proof that kava products do, in fact, reduce anxiety and treat stress and depression, as advertised (www.cropwatch.org/kavapr.htm). They have invited kava marketers to furnish clinical data about the medical efficacy of specific kava products and will revisit the issue in 2007. [ADD: recent news reports on kava as ineffective in treating anxiety?]

Finally, kava piracy is also complicated by the plant's dual uses as herbal supplement and recreational drug. Kava trades in two different sorts of market. While multinational corporations might indeed pirate and profit from patented kava extracts used in prescribed or over-the-counter concoctions, the recreational market differs insofar as users purchase dried kava root itself (and not kava pills or tinctures), and insofar as they are intensely concerned with the immediate physical effects of their use of the drug. Since kava is a tropical plant, most European, Australasian, and American consumers would find it difficult to grown their own. Commercial enterprises, however (perhaps Big Tobacco, in this case, and not Big Pharma), could nonetheless step in to organize and control a growing global recreation market for the drug—along the lines of production and marketing of other global drug plants such as tobacco, coffee, tea, hops, barley, and grapes.

Vanuatu's Kava Act of 2002 hoped to capture some of the recreational market for kava by requiring producers to label the place of origin and the recognized, local variety of each kava plant sold. The plan was to highlight the "noble" varieties of kava—those varieties with the most powerful, most appreciated recreation impact. The model here is wine (and, more recently, coffee). Although multinational corporations might sell this or that kava-based concoction to treat depression (or even hair loss) without acknowledging kava's Pacific origins or paying royalties to the island communities that originally developed the drug, these communities could still maintain monopolies on high prestige kava varieties sold in the recreational marketplace. Drink a fine Pentecost brew that reflects the fine soils of this island and can grow nowhere else. Or enjoy a kava *Pwia,* a noble variety only available from Tanna. Kava, here, would be marketed like Champagne or Bourdeaux or Port (although the use of many such Geographic Indicators too are also currently in dispute among various signatories of the TRIPS agreement). "Real champagne," of course, comes only from Champagne and recreational consumers

of kava, likewise, might come to appreciate the Pacific roots of their root. Adding exchange value to kava by situating the plant within its "terrain" and customary cultural horizons, might help make the plant more difficult to pirate.

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