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Vanuatu
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The Price of Tourism: Land Alienation in Vanuatu

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Introduction

What is J4P?

Justice for the Poor (J4P) is a global research and development program aimed at informing, designing and supporting pro-poor approaches to justice reform. It is an approach to justice reform which:

- *Sees justice from the perspective of the poor/marginalized*
- *Is grounded in social and cultural contexts*
- *Recognizes the importance of demand in building equitable justice systems*
- *Understands justice as a cross-sectoral issue*

In recent years, Vanuatu's economy has advanced significantly reaching nearly 7% growth in 2005 after more than a decade of stagnation. However, this growth is not having the impact on the lives of most ni-Vanuatu that one might hope. Driven mainly by foreign investment in the areas of tourism, financial services and land development, it is expatriates who are primarily reaping the gains of business development. This lack of inclusive development is becoming an alarming source of growing economic inequalities, dispossession and potentially disruptive social trends. Yet, ni-Vanuatu are not inherently opposed to 'community-sensitive' development that can generate employment opportunities and income sources for the population. While economic growth is clearly desirable, an urgent policy

imperative exists to ensure that Ni-Vanuatu become equal participants in these developments and the subsequent benefits.¹

This briefing note focuses specifically on some of the challenging effects of foreign investment on the dynamics of land use and ownership in Vanuatu. Conflicts about land are potentially explosive and recent historical events in Fiji, Solomon Islands and Papua New Guinea have shown the urgency of designing effective long-term policy responses to these sensitive issues.

* The author would like to thank Caroline Sage and Pamela Dale for their assistance in editing the note.

¹ Cox, M., Alatoa H., Kenni L., Naupa A., Rawlings G., Soni N. , Vatu C., Sokomanu G., Bulekone V. 2007. "The Unfinished State: Drivers of Change in Vanuatu".

Country Context

The governance system of Vanuatu, often described as inherently fragmented and patronage-based, reflects the legacy of a dual colonial system attempting to govern myriad complex systems of traditional structures¹. With more than sixteen changes in government in the years following independence in 1980, political instability presents an additional challenge to sustaining reform efforts.

Geographical constraints further inhibit the state's capacity to govern, making traditional service delivery prohibitively costly. Vanuatu's approximately 215,000 inhabitants are dispersed among 80 islands and share a diverse linguistic and cultural heritage – living under both Christian values and *kastom*² beliefs, and speaking over 100 local dialects. Formal institutions have limited reach outside the capital, in

the absence of which traditional and informal institutions, including chiefs, churches and social networks continue to perform governance functions at the community level. Despite colonial and religious influences, *kastom* continues to carry considerable respect and authority across Vanuatu society and despite its diversity is seen as a unifying factor establishing national identity. Clan and family relationships play a significant role in alleviating hardships through access to communally-owned resources and *kastom*-based norms which delineate support of the needy as a social responsibility.

¹ From 1906 -1980 Vanuatu was under the administration of the Anglo-French Condominium, dominated by rivalry between the two parties.

² *Kastom* is the mixture of social structures, values, and practices perceived as traditional in Vanuatu.

Land 'Sales' for Petty Cash



*"Land to the Ni-Vanuatu is everything they have, it embodies their link to their past, their present and their future. It contains everything they do in life, that is, their daily interactions and their beliefs...Not only it is sacred, but it totally contradicts the imported notion of 'ownership' of land. Land is for the people and it is in custody for future generations".**

Land is arguably the key asset that identifies family, clan and lineage in Vanuatu. It is an asset that possesses great cultural value and is also the main subsistence and livelihood source for most rural communities in Vanuatu. Land is also subject to the most common and persistent types of disputes.

The process of land alienation has a long history in Vanuatu. The first land boom occurred in the 1860s with the establishment of European cotton plantations on the islands of Efate and Epi. Land development intensified over the next two decades, leading to the alienation of most of northwest Efate. Acceleration in agricultural development in subsequent decades and investment-driven land development for expatriate residential purposes led to the alienation of over a third of the country's land, with more ni-Vanuatu losing access to their traditional lands.¹

Land loss was a unifying factor and mobilizing force for the independence movement. Following independence in 1980, the new Constitution restored the perpetual land rights of indigenous custom owners and their descendants, providing that the rules of custom form the basis of land ownership and use in Vanuatu.² While freehold titles were cancelled and land formally restored to local populations, titles of European planters were automatically replaced by long-term leases to accommodate foreign interests. What was originally intended as an interim arrangement to secure the rights of those whose titles were abolished at independence quickly became the norm for the negotiation of new leases over customary land.³ As a result, land alienations have emerged again on a scale that threatens the livelihoods of ni-Vanuatu and the country's stability as a whole.

Today, many land leases are undertaken without the custom owners' full understanding of the land's market value, and while legal, are often arguably concluded under unfair conditions. Leases are generally granted for 75 years (the life of a coconut palm)⁴ for a single, up-front cash payment (versus annual rent) set far below reasonable commercial rates. In the absence of savings traditions, the funds are often rapidly consumed.

Many entrepreneurs arguably take advantage of locals' limited knowledge of the law by constructing contracts that only allow

indigenous owners to recover their land at the end of the lease if they compensate the leaseholder for all improvements made. Most ni-Vanuatu are unlikely to be able to cover the cost of even a small establishment, let alone a luxury resort. The abuse of the Strata Titles Act⁵ in its application to rural subdivision of undeveloped land has further liberalized the market, essentially paving the way to a permanent alienation of land in Vanuatu. In these cases, entrepreneurs quickly sell off land to third-party buyers for large profits, often frustrating disputes over the original sale of the land. As a result, about 90% of coastal Efate Island is reported to have been alienated, with foreign investment properties enclosing the foreshore and blocking coastal access for communities. Some developments have raised fences and gates to keep indigenous land owners from accessing their property. This form of development has become a source of tensions between ni-Vanuatu and expatriates, posing significant threat to social cohesion and stability.

These different tensions over land transactions are often exacerbated by disputes over the underlying title (or even the concept of title⁶), and the legal powers and responsibilities of the customary owners. The plethora of diverse inheritance practices and land ownership and usage customs, according to which rights are passed down orally from generation to generation, often trigger both intra- and inter-community disputes. In such cases, the right of granting a lease in exchange of instance cash can be hotly disputed.

It is reported that in many cases, an individual (oftentimes allegedly the community chief or a 'custom owner' who has only a marginal right to that label) negotiates a lease with a developer, whose authority to deal with the land is later contested. According to the law as interpreted by the courts, the validity of the lease is not affected by the associated land dispute. While the Department of Lands is charged with assisting owners in the negotiation process and ensuring that transactions are not prejudicial to the interests of the custom owners, the affected community and the country⁷, the 'landowner' often chooses to divert from this procedure and settle directly with the

developer, thus monopolizing the lease benefits and undermining any rights of the rest of the community (such as usage rights) based on a more communal and subsistence notion of property. In addition, the Minister of Lands has been given broad discretion to approve leases where land rights have been contested. This power has allegedly been misused, leading to serious corruption claims, that the ministry was signing leases on behalf of custom owners without any real input from them.⁸ It is reported that 22% of the rural leases entered into on Efate until the end of 2001 were signed by the Minister.⁹ Following recommendations of the 2006 Land Summit, a temporary moratorium on the validation of new leases over disputed land was enforced.

Management of Land Disputes

Land is a particularly contentious issue in and around urban areas, where a wave of rural-urban migration has led to a new urban poverty. Informal housing has sprung up around Port Vila and Louganville in desperately overcrowded areas lacking basic services such as sanitation and clean water. Migrants bring different, often conflicting *kastom* traditions and practices, causing social fragmentation and placing further strains on local services. Tensions over land rights among local owners and migrants from other islands are posing considerable risk to social cohesion. The dynamics in these areas are somewhat reminiscent of inter-ethnic disputes in urban areas in the Solomon Islands, indicating the potential for escalated conflict if not addressed.

Faced with unprecedented challenges and social risks, state institutions often turn to traditional authorities, which in many respects are deemed by the public to be superior to those of the state, to exercise conflict resolution functions. Chiefs continue to be the main local level authority, dealing with dispute resolution and decision-making over community affairs. The National Council of Chiefs (Malvatumauri) enjoys legitimacy among both local communities and state authorities, and has successfully intervened to resolve conflicts among island groups.¹

With respect to land dispute settlement, the new Constitution provides that the government "shall arrange for the appropriate customary institutions or procedures to resolve disputes concerning

* Joel Cimo. 2005. "Report of the National Review of the Customary Land Tribunal Program in Vanuatu", Vanuatu Cultural Center.

¹ Cox et al, 2007.

² Article 73 and 74 of the Constitution.

³A Supreme Court decision in 1995 found that while the Constitution prohibited the sale of land, there was no restriction on granting long-term leases, even if that would deprive the indigenous owners of their land for several generations. See Supreme Court of Vanuatu, *Trethan Constructions and Trevor Hannam and Claude Mitride v Philip Malas and Loken Malas* 1995.

⁴Land Leases Act 1983.

⁵The original purpose of the Strata Titles Act 2000 was to issue titles to units and buildings, not to subdivide rural land and on-lease it to other buyers. See Lunay, Fingleton, Mangawai, Nalyal and Simo. 2007. "Review of National Land Legislation, Policy and Land Administration".

⁶ In particular, there is still uncertainty around the nature of custom ownership, i.e. whether it is group- or individual-based.

⁷ Article 79 of the Constitution.

⁸ Cox et al, 2007.

⁹ Farran, Sue. 2002. "Myth or Reality: Case Study of Land Tenure in Efate, Vanuatu".



"People are influenced by foreigners and start selling their land because they think it's easy big bucks. But in the future, they are going to have no land and neither are their children." **

ownership of custom land".² To this end, the Government passed the 2001 *Customary Land Tribunal Act*, establishing tribunals that build on existing *kastom* structures to manage ownership and land boundary issues. In acknowledgement of the diverse traditions in Vanuatu, the country has been divided into custom areas and sub-areas. Pursuant to the legislation the composition of land tribunals varies according to the location of the land and number of villages involved, and involves village chiefs and elders. Appeals from tribunals are reviewed by a higher land tribunal, be it a single/joint sub-area/custom area land tribunal. Jurisdiction over a final appeal lies within the island land tribunal.

The law prescribes that the land tribunal must determine the rights of the parties in accordance with custom, but parties may at any time try to reach an amicable agreement, and the tribunal must encourage and facilitate such efforts.³ Subject to the rights of appeal and rehearing, the decision of a customary land tribunal is final. However, a decision can be challenged in the Supreme Court if the tribunal did not follow the procedure set out in the *Customary Land Tribunal Act* or was decided by an unqualified tribunal member.

While the Act sets out a clear framework for the composition and functions of the land tribunals, a national review completed in 2005 found that their operation remains limited, perceptions of their legitimacy vary, public awareness of the system is low and lack of confidence is common. In addition, the credibility of the tribunals is often contested by

Management of Land Disputes, Continued



*"In the islands, if someone steals from your garden, or someone beats up his wife, you go to your chief. If they can't sort it out we go to the Nakimal (meeting house) and talk about the problem and find some solution. That is an ongoing part of the community life, and very important or society would break down."****

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chiefs who feel that their authority is being undermined through the imposition of new community structures over traditional layers of authority.⁴ Disputes also arise over the legitimacy of the chiefs called to preside over the tribunal.⁵

A further problem arises with respect to the capacity of traditional authorities to deal with the more serious land disputes outlined in this paper. With the advance of foreign investment and rapid urbanization, communities in Vanuatu face a range of social challenges, virtually unknown and not dealt with by *kastom* before, to which chiefs have little capacity to respond. This creates a vacuum between the state and the *kastom*; if mechanisms for dealing with the resolution of new (modern) disputes

are not designed (capacity provided), there is a danger that those tensions may escalate.

**Kim Thomas, "Vanuatu: Islands of Sunshine and Shadows". *The Press, Saturday, 6 October 2007*

¹ The Constitution also provides the National Council of Chiefs with a "general competence to discuss all matters relating to custom and tradition" (Art. 30(1)).

² Article 78(2) of the Constitution.

³ Customary Land Tribunals Act 2001.

⁴ Joel Cimo. 2005. "Report of the National Review of the Customary Land Tribunal Program in Vanuatu", Vanuatu Cultural Center.

⁵ Arguably, there has been a recent proliferation of chiefly titles, which has resulted in the diminution of respect for chiefs and contestations over power and authority. In 2006, the National Council of Chiefs Act provided for an administrative structure of the National Council of Chiefs and for its role in registering island and urban councils of chiefs, but its attempt in identifying rightful chiefs appears to have exacerbated the problem.

The Way Forward

The upsurge in land alienation triggered the convening of the 2006 Land Summit on the initiative of the National Council of Chiefs. The Summit, held under the theme *Sustainable Land Management and Fair Dealings to Ensure Progress with Equity and Stability*, provided an opportunity for a range of stakeholders to discuss the most pressing land issues and solicit a broad-based agreement on a set of recommendations that would feed into the development of a National Land Policy and land administration system. Among its resolutions are: strengthening group customary ownership and participation of all members of the group in the decision-making process about their land; removing Minister's authority to approve leases over disputed land and imposing temporary moratorium over lease granting; ensuring public access to the sea; ensuring government's unbiased role as intermediary in negotiations between the parties; and increasing public awareness of land rights and laws.¹

The Summit has provided a political opening for new thinking on land reform issues. The resolutions represent an attempt to return control over land to custom landholders and create spaces for more equitable negotiation between communities and foreign investors. The challenge in the coming years is to translate these resolutions into effective practical solutions that reflect the culture, values and preferences of ni-Vanuatu, while providing security for investment opportunities.

The World Bank's *Justice for the Poor* program and AusAID are currently exploring ways of supporting ongoing policy reform at the national level with a view to informing the promotion of more effective and equitable dispute resolution processes in Vanuatu.

***Kim Thomas. "Vanuatu: Islands of Sunshine and Shadows". *The Press, Saturday, 6 October 2007*.

¹ Lunnay, Fingleton, Mangawai, Nalyal and Simo. 2007. "Review of National Land Legislation, Policy and Land Administration", Attachment 1. Interim Transitional Strategy and Future Plans to Implement the Resolution of the National Land Summit 2006.