

**Notes from the “Developing Effective
Environmental Legislation in the
Pacific Context” Workshop, Suva 24-28
November 2008**

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Please note these notes attempt to provide a summary of the presentations and discussions throughout the five days of the workshop. They should be used as an indication of the information provided and shared. For more detailed information refer to the relevant legislation, and/or the presentations on the workshop CD or contact the speaker directly.

DAY ONE

Opening Remarks:

Richard Pruet, US Embassy Deputy Chief of Mission

“Ambassador McGann was scheduled to open this event but an unexpected complication in his travel arrangements put him in Kiribati until tomorrow, and he cannot be with us this morning.

Please allow me to apologize on his behalf.

Let me begin by thanking you for taking time away from your work to travel here to Suva for this workshop on “Developing Effective Environmental Legislation in the Pacific Context.”

This is a topic of enormous importance throughout the region and, indeed, the World.

It goes to the heart of efforts to protect the environment and to sustainably manage natural resources.

At the same time, it is deeply rooted in central aspects of good governance such as the development of civil society, government capacity, and the rule of law.

Insufficient or ineffective environmental legislation, including laws that are unenforceable, erode the quality of the physical environment and weaken the legitimate authority of the state.

On the other hand, appropriately framed environmental laws help create a framework for effective environmental protection and can promote civic engagement.

The characteristics of such laws are, of course, a topic that you will consider in detail over the course of the week.

Since I know that I'm addressing a room full of lawyers, I won't try to expand too much on it here.

Still, you would all be disappointed if I did not say anything and just turned you loose on the tea, so let me venture these observations:

In the long run, to be effective, environmental laws, like other laws, must be accepted as legitimate by the people to whom they apply, and they must be enforceable.

A country with functioning democratic institutions has an advantage in establishing such laws, since they are enacted by the people's elected representatives.

Even in open democratic systems, however, simply adopting laws is often not enough to secure their implementation and can fall far short of obtaining the intended environmental benefits.

One of the most efficient ways to achieve the objectives of environmental legislation is to enlist the willing compliance of a critical mass of individuals, communities and companies.

The easiest laws to enforce are ones that everyone accepts and understands.

For this reason, wide consultation and direct engagement with affected segments of society can be critical to the success of any measure that has wide application.

This effort requires the full and active engagement of civil society, which has a crucial role to play in promoting environmental protection and prompting environmental action in every country and at every level.

Willing compliance by a majority of stakeholders makes implementation of any environmental law easier, but it is not in and of itself sufficient.

Monitoring is also required, as are enforcement actions.

Consequently, the capability of countries to enforce any given environmental measure has to be a factor that is considered when it is written.

The ability of government agencies to monitor and enforce stringent environmental laws in my own country is a major constraint, as I'm certain it is in yours.

I hope that the next few days will give you an opportunity to explore solutions to these and other challenges that impact legislative responses to environmental issues in your home countries.

Before officially opening this workshop, and turning the podium over to the actual experts, I would like to thank them...

...because the ultimate success of this event will depend, in large measure, on their input.

In addition to the Fiji-based resource people who have so generously given their time and expertise, I would like to single out Clark Peteru from SPREP, Eric Kwa from the University of PNG, and David Farrier from the University of Wollongong, who have all traveled far from home to be here.

I would also like to express the Embassy's appreciation to the US Environmental Protection Agency for making Jessica Kao available for this event.

Although the specific circumstances faced by individual countries as they craft their environmental laws and regulations will differ in their particulars, there are many common themes and shared challenges that all countries must address.

This is true whether they comprise high volcanic islands or low-lying atolls, densely populated coastal cities or remote mountain villages, large immigrant populations or indigenous communities.

In the case of the United States, we have all of these;

Ms. Kao's home office in San Francisco, the headquarters of EPA's Region 9, is responsible for Arizona, California, Nevada and Hawaii, as well as the U.S. Pacific territories. Region 9 captures both the diversity of America's physical and social environments and its deep links to the wider Pacific, including Palau, FSM, and the Marshall Islands.

I hope, therefore, that Ms. Kao's participation in this event will help participants appropriate those lessons from the American experience that are useful to them here.

At the same time, I also hope that her participation will provide an opportunity for the United States to better understand and learn from your experiences, particularly as they apply in areas of the Pacific that are under American jurisdiction or are otherwise associated with the United States.

Finally, I would like to thank the staff of the IUCN Regional Office for Oceania for their hard work in putting this event together.

The United States is a strong supporter of IUCN globally, and deeply values the expertise and skills both of its professional staff and of the many thousands of individuals who participate in its specialist groups.

The IUCN Regional Office for Oceania offers an important new avenue for accessing that pool of talent and for promoting environmental protection and sustainable natural resource utilization in the Pacific.

The expanded presence of IUCN in the region corresponds with an increased emphasis on Pacific environmental concerns on the part of the United States and suggests an obvious partnership.

I am therefore very pleased that we were able to support IUCN's initiative to hold this workshop.

We will look for future opportunities to help strengthen capacity for environmental governance in the region and to continue our cooperation with IUCN in this field.

Please accept my best wishes for your success this week and for your future efforts to develop, as the workshop title says, effective environmental legislation in the Pacific context.

Thank you.

Jeremy Hodges – Deputy British High Commission

(The following notes are paraphrased from Mr Hodges opening comments)

The lack of recycling one of the things that struck me when I first came to Fiji, sometimes legislation is needed to drive these agendas to make sure we make better use of our resources... Interlinkages in the legislative framework are wide reaching for some our countries in our region. Laws are drafted in isolation and other departments are unaware of them. It is quite clear only Attorneys General or Solicitors General offices are only aware of legislation. How can legislators in different departments be aware and factor that into their own drafting legislation? We can't look at environment on its own, all these things have to be considered they are cross cutting issues. Our support for this workshop is an important thing for the UK government to do and I am looking forward to the conversations you will be having.

Ratu Joni Madraiwiwi - Former High Court Judge, Former Vice President, Patron for the Fijian Environmental Law Association.

I am honoured to be present this morning as patron of the Environmental Law Association of Fiji.

This gathering is an important event for a simple reason. You are here to discuss how best our environment can be protected and enhanced through the setting up of effective legal regimes. Our environments sustain us. They are now vulnerable to population pressures, economic development, pollution and climate change. Without appropriate and effective safeguards in place, the future of our region is bleak. The degradation of our marine resources threatens a significant food source and foreign exchange earner. It has serious consequences for tourism, a major source of revenue for our economies. Finally, it

adversely affects the quality of life of Pacific peoples, in terms of living in harmony with nature as our ancestors had done for several millennia.

In devising legal mechanisms to provide the safeguards necessary to protect the environment, it is critical that careful thought is given to the principles underpinning it. It is not simply a matter of adopting legislation from our more developed neighbours. Context is a significant factor. What may work in one country may not necessarily do so in another. The approach has to be an integrated one. 'No man is an island' the poet John Donne said over four centuries ago. That is even more true today. The environment is all our concern for the reasons stated earlier. Although there are technical aspects that cannot be avoided, legislation and regulations must seek to strike a careful balance between legal complexities and ease of comprehension as well as application. Picture this scenario: in many instances courts in remote parts of our islands will be applying these laws to cases before them.

A starting point is recognising the existence of traditional management systems in place and how they might play a part in the scheme. This is not to deny that they have been subjected to enormous pressures, particularly with the advent of the cash economy. It has undermined traditional conservation practices such as bans on harvesting marine resources to allow marine life to be replenished. Having said that, communities themselves have discovered that the judicious application of time honoured practices has provided impressive dividends. If any regulatory system is to work at optimum levels, it should build on what is already in place.

The advantage of a co-operative or complimentary strategy is that it involves the community. However, this should not be restricted to villages and rural settlements but extended to the private sector as well. In the larger Pacific Island economies, they are part of the problem. Punitive measures are necessary but should only be invoked as a last resort. While there is a place for legal sanctions, this must be weighed with the time and expense that is involved. Alternative means have to be considered that achieve the objective in a more cost effective manner. There is a place for sanctions to regulate conduct and provide a detriment to would be offenders. This can sometimes be inadequate as in the case of fines for illegal fishing in the Federated States of Micronesia, the equivalent of one catch.

The reality of Pacific Island countries is that we are under resourced and have real problems with capacity. In some of our smaller neighbours, environmental concerns would have to be dealt with in the existing governmental structures. While the legal issues would be handled by the Attorney-General's office, the practical and

administrative concerns would best be incorporated in all governmental offices because of its relevance to the long term viability of Pacific Island countries. When seen in that light, one better appreciates how fundamental environmental issues are to us.

In drafting environmental legislation, it is not always easy to ensure it is simply expressed and easily understood. Some of the more technical aspects defy that process because of the nature of the subject. But as far as practicable, that should be the objective. What is also useful to bear in mind is that those who enforce these laws must be able to readily grasp their meaning. But legal proceedings should be only as a last resort. Mediation and alternative dispute resolutions are options that ought to be considered as well, if only because they are less time consuming and more cost effective. A combination of approaches is probably the last way forward, because one may work better than another depending on the nature of the problem.

If the legislation is to be ultimately successful, enforcement mechanisms must be effective. Sanctions whether they are in the nature of fines or remedial measures or prohibitions need to be implemented in a timely and efficient manner. The integrity of these legislative measures will depend on this process. It is therefore imperative that the regime in place be they environmental wardens, the police, fisheries officials, prosecutors, the courts, the Attorney General's department and others are properly equipped to perform their roles. This might entail minimal additional expenditure and costs if the environmental aspects were incorporated in their existing responsibilities. In your deliberations, the practical realities that you have to deal with always have to be borne in mind.

The success of these initiatives will depend in good measure on community awareness. Familiarity with environment concerns and the part it is expected to play is vital. Without this involvement, the legislative framework is deprived of the broad reach to make a difference. To this end villages, schools, the churches and civil society organisations must be involved on a continuing basis. This would ensure that there is understanding and acceptance of what is being promoted. The legislation and regulations, or at least their broad objectives have to be translated into the vernacular to enhance local understanding of and familiarity with them. As a general rule, Pacific peoples tend to take their environment for granted without giving it much thought. The connections between the environment and our basic survival are so obvious they are paradoxically not appreciated.

Although this is not directly relevant to what is being considered here, I raise one aspect of the environmental in a global context. We occupy the largest expanse of ocean on planet earth. It boasts untapped

resources in what is humankind's last frontier. In time to come, our success in preserving and enhancing a pristine environment will be negotiable exchange for our role as custodians of this ocean. It is something to think about. In the interim, we have to grapple with the effects of climate change. It will demand of us a unity and strength of purpose that we have never hitherto displayed. I say that because the problem is caused elsewhere and we will only be heard if we stand together. The advent of a new administration in Washington more amenable to multilateralism is a hopeful sign. But even then, the road ahead will be a long and winding one and the outcome uncertain.

As long as you are clear about your objectives, the construction of a structure that is best able to achieve them can then be done. As always, the local context and what is practical must not be lost sight of. The regime that is put in place has to be capable of implementation with minimal additional resources. That is why community involvement and participation is essential. This may ensure that the policing and infringement notification elements are dealt with. The community then feels it has a stake in the process. Environmental issues are about our survival. That is a self-evident but not always obvious fact. Without seeking to inflate your egos, the success of your endeavours is vital for our future. I wish you well.

Pepe Clarke IUCN Regional Oceania Office Legal Advisor – Welcome.

Exercise: A small group discussion in groups of three was conducted with participants asked to list the key environmental issues affecting their country, and how these issues affect the well-being or livelihoods of people in their country.

The whiteboard was used to summarise the key environmental issues and impacts on human well being and livelihoods from across the Pacific. It was noted that these problems are all interlinked.

Mineral extraction/petroleum/ deep-sea mining – leads to displacement of people, pollution, soil erosion.

Over-fishing – loss of income and subsistence, loss of cultural heritage, nutrient increase may lead to fish poisoning.

Forestry – land degradation, water pollution from soil erosion and chemicals, waste production.

Over-harvesting of marine resources e.g. fishing, destructive fishing methods, e.g. dynamite – all affect habitats.

Climate change and sea levels rising – (adaptation and mitigation), loss of land through erosion – can cause other human impacts e.g. people being displaced from their home lands.

Agriculture – fertilisers, clearance of native vegetation can lead to the pollution of rivers and increased nutrient levels in coastal habitats.

Palm oil farming – pesticides affecting water quality impacting on drinking water etc

Population growth and movement – more resources are used, more waste created resulting in pollution. The spread of urban areas and or new villages can also impact on areas of ecosystems that have previously escaped the impact of human activities.

Development (rural and urban) e.g. causeways, wharfs, sea wall, reclamation, tourism development going ahead without permission – development can lead to loss of mangroves (leads to erosion); filling in wetlands for house sites, developing sloping land which if not done properly can impact on water quality from soil erosion.

Waste management – industrial and solid waste (e.g. rubbish and pig waste) can lead to high nutrient levels impacting on coastal areas

Loss of biodiversity – loss of habitat, loss of food sources for other species, loss of cultural heritage e.g. through loss of totems (fiji)

Health impacts – from use of chemicals.

WHY SHOULD WE PROTECT THE ENVIRONMENT?

General discussion:

- recapturing the 'golden age'
- Pacific is the last frontier, there was a time when man and nature was in balance, now we are not
- Future generations of people - to enjoy and benefit and be able to continue to survive and to be able to exist forever e.g. enjoy swimming without being sick, having access to clean safe drinking water and being able to breathe clean air
- Ethical - The rights of the environment, animals, plants etc looking at the inherent value of having an environment but not for humans. (what is the ethical status of the environment) What is our relationship to the environment – are we part of the environment or above it? Is it wrong to wipe-out a species because it is ethically wrong, or because it could impact on humans? The ethical dimension provides a basis from which we as individuals move forward, this is important for a wholistic view of the world. Environmental law suggests you have principles from which you view the world and how you wish to work in it. But ultimately it

comes down to self-interest, we need to balance these with the interests of other people and the environment. Whose interests should be put first?

- Long-term self-interest – what are some of the core elements that we rely on from the environment? Food, aesthetic lifestyle, health and safety. Natural resources provide – environmental services, e.g. water, disposal of our waste and processing of our waste.

The outcome of the discussion is the main thing we need to achieve is a respect for future generations, just as we would've asked from our ancestors. This is the utmost result we need to achieve. We need to consider not just different models, but the real context on how we need to apply the principles in different jurisdictions. For us to reach this respect for future generations is what we should all be working towards. There is no need to argue about other things if we are not striving toward this. Is this unique to the Pacific Islands (future generations)? I don't know if the concept would work in terms of protecting the environment but respect plays an important role in our society, in all spheres, to other people, water, and the atmosphere. We need to develop it in a much more effective way, should incorporate it in our national laws. We are looking at incorporating this in our new waste management Bill, incorporate customary laws into broader national frameworks. Respect maybe a more useful concept rather than inter-generational equity which is the current language in most legislation. Respect is important, e.g. in Cook Islands respect is important because elders are the landowners.

Group exercise:

What is the relationship between environmental protection and economic development and poverty? Is environmental protection necessary or a luxury?

Necessary.

Need to find the right balance between the two, need to be able to progress economically but protect environment for future generations.

David Farrier noted that - Language is extremely important for arguing the need for environmental legislation to the decision makers. For example, we use the language of 'respect' for our elders, 'respect' for future generations, as well as promoting discussion on the fact that natural resources are much broader than minerals, and ecosystem services for waste disposal. We need to meet the decision makers on their own ground. The old language or arguments based on the intrinsic value of the environment is not persuasive

and has been abandoned in Australia. We have to address decision makers in economic terms.

Jessica Kao – Agrees that not all people will be compelled by the tree-hugger argument, we need to talk to them on their own terms. You have to think about; Am I talking about social stability in some areas? How do you sell your point? One of the least persuasive tools is sermonising the value of the environment, because you need to bring the non-believers into your camp so need to think as broadly as possible.

The discussion touched on the fact that policy-makers are from our communal society and the villages. There is no big difference between a parliamentarian and you sitting in this room. So how do we translate this legislation into a language that links to their minds? Maybe it is to do with good governance, corruption etc. Parliamentarians know the issues so what is his problem?

BREAK FOR LUNCH

Sources of Law in the South Pacific - Dr Eric Kwa, Law School University of Papua New Guinea

1. Constitution – The constitution of a country usually mentions the environment in the preamble, but not in the substance of the constitution. E.g. Solomon Islands took into account the importance of the environment and that the resources belonged to the people. Resources are usually under common law and under the power of the state, so this was a paradigm shift. Unfortunately, the new government will not include this proposal that the environment belongs to the people.
2. Acts of Parliament
3. Sub-national legislation – Do sub-national governments (e.g. provincial or local government) have the power to make laws? For example, in the Australian constitution it lists the powers or responsibilities of federal government, as well as the powers of the states.
4. Custom – this is very important, it has a premium position in the legal system
5. Judicial Precedents
6. MEA – Multi-lateral Environmental Agreement

Doctor Kwa discussed the Ok-Tedi mining case which was settled out of court. In the United States a small group of Bouganvilleans is now studying this case from the perspective of human rights abuses as a result of the

environmental pollution. They argue a loss of rights. The PNG Government is worried about the court case and the judicial precedent it may set.

Climate Change – when developing this law have to refer to the CCC? Papua New Guinea has not played a key role in Kyoto. Has decided to run on its own with RED (reducing of emissions through deforestation) forest reforestation and land degradation. In terms of mitigation and adaptation under Kyoto PNG has not shown a lot of interest.

Custom has been given a prominent position in the legal systems of the South Pacific by being entrenched in most Constitutions. Examples, PNG, Vanuatu, etc (see powerpoint slide)

The constitutions have said yes custom is a social law, the Village Fono Act 1990 etc (see slide) have given weight to the constitutional mandate.

Key issue is integrating customary law principles in formal law. This is our challenge. You are all important players in your own country. The question is where were you born? Because that will tell me the value that you will attach to custom. For example, Port Moresby born people have little appreciation of custom, as they have little contact with customs in villages. You ask yourself, if you are born in the village, we must have some obligation to integrate what we have given to put into the legislation. For example, if you ask two legislative drafters to draft a law to protect a lake you will get two different laws depending on where the drafter is from. If the drafter does not know anything about the customs relating to the lake (e.g. spirits in the lake) he or she will draft a standard environmental law. However the other drafter who is from the area where the lake is located may include local customs in the legislation and there will be two extremes in the bills drafted. We who are drafting laws can find ourselves to be divorced from our own settings, you need your laws to reflect local customs and local principles. In the national context this can be difficult, but there are certain common principles that you find in almost every society in a country. You need to pick up these principles, and should do so quite easily. But this is our challenge. First of all customary place must be recognised. In PNG we are looking at including customary laws and this has been done quite successfully at the local level.

Example: I was asked to draft the Biosafety (?) bill. We were trying to look at field-testing of a new plant that is genetically engineered. We looked at how they would test this on land owned by the traditional landowners. We needed to ask them if they would like to lease their land to scientific studies and explain to them the risks if the gene was unintentionally released and what those risks could mean for their environment and even local people. In a normal western setting you would have a field that is fenced off; in our communities it is difficult, how do you do this? We looked at practices in other jurisdictions but also our cultural settings, so that's an issue we dealt with. And it was quite clear amongst stakeholders about how landholders would deal with this. But supposing the decision makers or legislative drafters did not know this?

Dr Kwa gave another example of how we need to take into account local issues when drafting or implementing environmental legislation. He asked

how it is that policy people and lawyers can explain to village people that by planting trees that could create a “carbon-sink” and create credit for sale as part of a climate change adaptation program? Dr Kwa told the group that he had to abandon the terms that are used in developed countries and use everyday language that would develop a law to implement the credits but not call it credits. He didn’t say credits at all. Dr Kwa asked how do we translate terms like precautionary principles, human rights etc. When talking to local people about a bill that included the term human rights, local people did not understand what this term means, but they understood the term Respect.

It is an exciting journey, and the journey has not ended.

Questions/discussion

Josephine (Samoa) – why not ask for plain language when you draft?

EK – we do use plain legal language now, but there is some very old legal language that is easy to explain in simple terms. Eg what is pro-bono? Lawyers use this term a lot, but other people don’t.

Sandeep Singh (US Embassy) – Asked about laws written in local languages

EK – This is very difficult and the translation can change the meaning.

Q – Whenever we have to enact a law, we have to look around as to what you have in place already. In the region as far as environmental protection is concerned there is a concept called traditional knowledge. Either we have to start from where we are, or we start from the concept of enacting laws. Maori Waitangi treaty is a good example, when English and Maori running side by side we understand it from our own way of looking at it, but when we mix it together with the English way of writing laws we have to be very careful, this is our dilemma and conflict. No one has ever tried to merge the two together.

A – Access benefits sharing agreement for biosafe technology. You need to understand the local concerns, and political leadership in a community. In terms of concerns, e.g. US trying to research in Samoa, national level and local level need to be taken into account. How do you obtain the concerns? National level may say it is ok, but local people have different concerns. How do we protect the Chief? The clan leader must also give their concerns, who has the overriding concerns, the Minister, local government, or community? That is the challenge we have. It is difficult, three levels of government, the clan and in some cases the individual family.

Q – MEA There is a disconnect between what is happening at national, local level?

A – Trade Treaty, The Convention on International Trade in Endangered Species which lots of countries have agreed on, but you can’t implement it. Eg traditional knowledge, only known by a small group of people, how to register it if it is taboo?

David Farrier – Questioned how the concepts developed in an international context can be used locally. For example, “intergenerational equity”; can you

take these terms and put them in national legislation, or is there the possibility of developing Pacific terms to achieve the same end?

Katherine Choules – concepts are often different e.g. customary laws are not about ownership

? Disagree. In Fiji it is always must be reciprocated. This is what developing countries are calling for. In intellectual property terms you take it from public domain to private domain in order to protect it. It is similar to the customary way of protecting. In Fiji legislation recognises communal ownership, this makes it different to the rest. We have to see the similarities between the two concepts because they are complimentary.

Eric Kwa – example reciprocity – Corruption bill in PNG. The definition of corruption was debated if it should go in bill or not. Those against said reciprocity may not be corruption in a traditional society, the chief can collect resources and give it to someone, receiving and giving, or giving and taking, this was a fundamental point we had to address in terms of corruption, what amounts to corruption? If I give \$20 to my uncle from petty cash with the idea to return it to the office later, at what point does it amount to corruption? This is another challenge for us to work through, how to explain this to the western mind. We are not always wrong! Maybe western people are wrong. (Definition was not included in the bill, but agreed it should be defined)

Josephine Stowers-Fiu – Our own culture is understood to us, as respect is the core of our culture, but whether we can use that universally is a big challenge. We are a small fish in a big ocean.

Eric Kwa – western models are failing, not working in the communities, so we need to look at how communities manage resources, there must be an answer in customary law.

David Farrier – corruption is a crucial issue, whenever you raise money westerners believe you are paying for something, but in Australia we are also dipping into this e.g. stewardship where people are paid for looking after the biodiversity instead of practicing agriculture.

Jessica Kao

We know there are in-government problems to do with in context of your country, and we need to figure out how to write the law. What is the purpose of the law, the scope (specific or broad), it needs to be workable too broad and it may lose something, too narrow and it may lose something. It's a balancing act. For example, how do you deal with waste management, a general law, or more specific? How do you ensure coordination between different agencies? In the US we have specific law e.g. Water and Air are separate pieces of legislation. But all legislation may have to deal with certain issues such as biodiversity. There are a lot of ways how to deal with the purpose of the legislation. What are some examples in the Pacific?

In Fiji the EMA covers three things, but also very specific legislation. Don't know how effective it will be only taking effect 2009. Environmental Impact Assessment is also part of the Environmental Management Act. We also have planning legislation.

In PNG there is a new Environmental Policy Act (it merges three acts – environmental governance act, water resources act and environmental planning act). The merger was prompted by an increase in mining activities. Conservation has its own act (5 pieces). There is one general EIA process for mining, and other development.

Environment and Conservation Act includes EIA and biodiversity, pollution is not included. Originally the Act included pollution, but it was removed because state lawyers thought it should be an act on its own, but no legislation has been drafted yet.

Samoa – There is no single piece of legislation to integrate all of environmental sector. MRA bill? We have old Land Survey and Environment Act 1989, Water Resources Act 2008, Spatial Information Agency Bill (should be passed this year) deals with GIS information (used to be survey ordinance), valuation bill, planning legislation (modern) all town and country planning legislation,

Jessica Kao - the US doesn't have planning legislation – not good at this, but good pollution laws.

AFTERNOON BREAK

Overview of legislative process - Clark Peteru, SPREP

- Role of Multilateral Environmental Agreements (MEAs)

We have previously discussed what is law? Depending on what importance your eminence gives customary law, in most cases customary law is only in land tenure.

I believe there is a role for two systems, but we won't see a return to customary law. Foreign affairs and business will use the legal system statute law, but customary law we need to look for enforcement.

Customary law v statute law

Advantage: effective enforcement, public, everyone knows everyone else, cost effective.

Disadvantage; localised specific to specific villages, impermanent could change according to who is the leader, unwritten, application can be variable (no standardisation).

Environmental (statutory) law – has objectives and standards, global rules.

Clark showed a flow chart of the legislative process – Samoa has drafted a legislative handbook and this flow chart is in that handbook.

Basic legislative development process: Department (can include consultation) > Drafter > Minister > Cabinet > Parliament > (Select Committee can invite interested parties to attend) > Parliament three readings > Becomes a law.

Group discussion on the details of the process and where different steps happened for different countries.

Public awareness – important, persuasion rather than enforcement/punishment. E.g. water use in Samoa was free, so this led to a lot of waste, and was bad when droughts came, the government set up a water authority which introduced metering, they involved the community, and explained it was for water conservation, gradually people have come to accept the water meters.

MEA – multilateral environmental agreements

1992 was an important year because of the Earth Summit, that led to serious development of Multilateral Environmental Agreements. These agreements are beginning to drive the agendas for our national laws. Now every year there are new MEAs. Most MEAs have an international component e.g. Share a forest or river or ocean with other countries. Not usually for topics like waste.

Some regulatory regimes may already have a national law but they still need to sign on to the MEA because other countries have and if they don't they may be left out of the decision making process.

Conference of Parties – each MEA is a living document decisions made at each COP. COPs cover: explanations, decisions, protocols, funding mechanisms.

Implementation:

- Legislation;
- Administrative measures;
- Other non-legal means; awareness raising;
- Information on implementing MEAs are available e.g. Guidelines/modules/publications on implementation.

Clark refers to the information that is easily accessible on the SPREP website www.sprep.org

International page - self help page for international agreements (not just Pacific):

Linkages page, shows reports on most of the environmental meetings, whats happening and whats coming up. Also an archive service see “Earth Negotiations Bulletin”

See also UNEP website

And PACLII website

Regional page

Shows e.g. Apia and Noumea Conventions

If multiple international conventions are similar, a country may draft legislation to cover all of them e.g. Tonga Integrated Chemical Conventions Law aim to make it easier to report on multiple agreements.

National page

(Available on your IUCN Disc one Legislation and Readings) summarises legislation for Pacific island countries and gives links.

Emerging Environmental Issues – Group Discussion

(3 or 4 to be discussed on Friday)

A group discussion was held on what the emerging environmental law issues are for the Pacific. They are listed below. A short list of three was later decided by vote.

Climate Change – adaptation

Carbon trading

Invasive species

Traditional knowledge – intellectual property

More effective public consultation and the role of the law reform commission

Incentive based laws

Payment for environmental services

Relationship between planning law and environmental law

Out dated laws – fragmented and overlap

Appropriate enforcement

Deep sea mining – gaps in existing legal framework

Implementing MEAs, how does the concept that MEAs drive national laws work?

Capacity building within government agencies

DAY TWO

Designing Regulation for Sustainability – David Farrier, Institute for Conservation Biology and Law University of Wollongong

David Farrier warned against taking models from other jurisdictions. He suggested looking at the problem in your country and identifying the parameters and designing an appropriate regulation that is customised to your own needs.

Regulation can take two forms:

- Regulating private activity within the community
- Regulating decision-making by government

Today we will focus mainly on regulating private activity

The Pyramid powerpoint slide shows you can get most of your changes you're seeking through education and informal persuasion, without going in hard with absolute prohibition. Most of your work energy should be at the bottom of the pyramid, start there and then work your way up if education does not work.

Command regulation is traditionally state-centred and top-down. It usually involves telling people to stop doing things, rather telling them to do something. Most environmental laws have exceptions and you can get approval to do certain things through permits and licences.

David asked: Why do you want command regulation? To comply with international obligations? I think some of this has been happening in the Pacific. E.g CITES is very directive it tells you to put in command and control regulations.

David showed an example of command and control section of the Environmental Management Act 2005 Fiji. Also shows Cook Islands extract from the Environment Act 2003. Asks is this meant to be enforced or symbolic? It is a very broad prohibition "disturbs any animal or plant". Might be difficult to prove and no exemptions for any circumstances. David's guess is that it has never been used in a prosecution.

You also need to consider who the legislation will apply to, customary landowners or large international corporations. Different tools may be used for different stakeholders. Tools and measures can be tougher with international corporations.

What is the role of prosecution are you going to prosecute everyone, what is your objective to punish or prevent? Can be expensive and do you have the facilities to produce the evidence, e.g. which industry polluted the water in a river? How do you prosecute a corporation do you fine them (a fine maybe

small to them), then close them down, focus on individuals in the corporation or the target the corporation itself?

Rewards can be offered for whistleblowers e.g. in cities legislation.

David discusses a number of other examples of regional legislation highlighting different prosecution clauses. You need to think about who can enforce it, e.g. can a conservation group enforce the legislation?

Responsive Regulation

Responsive regulation is still talking about command regulation but it uses a different way of developing the rules and enforcing them. For example, developing partnerships with local communities, NGOs etc get the regulated population to participate in the law making and enforcement process.

New environmental governance

Discusses collaboration, participation and deliberation learning and adaptation. Have to be careful and include an accountability mechanisms and reporting mechanisms.

At what level do you collaborate – industry will often know more than government departments about technology and what is achievable, but they also have an economic interest that they will protect. But if you get industry to have 'ownership' of the rules they are more likely to comply. May just collaborate at the enforcement level, e.g. in Australia industry is left to report on when they breach the legislation, if they lie to government it is a serious offence and more acceptable in the community to prosecute them straight away.

David talks about Fiji Environmental Management Act clause for environmental management committee to report, but the provision does not say to whom the industry has to report, it needs more work.

Community Conservation Areas

Do you need legislation, what is the role of government? Examples: Cooks, still very top-down because the government environment service starts the process, and doesn't consult before producing draft management plan, then plan goes through government bodies, and then third stage get broad agreement, but this is not language of command and control, its about developing rules together. Later command and control kicks in with officers enforcing the rules. Is this a good idea, would it be better to have villagers enforce it? Paul Lynch discusses Cooks water management scheme that gave locals the power to enforce, if they don't enforce it government officers can then step in.

In Vanuatu (EMCA 2002) they have negotiation right from the beginning, it is not top down. However, there can be problems if locals don't agree to conserve an area. It is hard to get consent from all the landowners, what if one holds out? Any landowner can apply to the Director for cancellation and amendment – is that good? Hard to prosecute customary landowners.

These are exciting pacific solutions, command regulation combined with other things. Its responsive regulation at different levels.

Discussion

Samoa – The Water Resource Management Act 2008 recognises village bylaws for conservation of watershed areas.

Paul Lynch Cooks local guardians (title holders, landowners) have authority to issue a notice against an offender for a fine. If the fine is not paid could go to court.

Environmental planning

Planning may have dropped off the picture in most of the Pacific. Can have area or issue based plans, e.g. geographic or waste plans

Could be a different model to conservation area legislation.

Discussion

The old Fiji legislation controlled development in urban areas, and gives discretion to the director to approve development and no criteria for this approval.

In Samoa considering removing the word urban, so that it would also include rural areas. In practice applies to whole area anyway.

Polluter Pays Principle

A search of the Paclii website couldn't find any specific reference to the polluter pays principle. So the example is the NSW legislation. It promotes the idea of thinking of the full value of the environment. It requires the polluter to pay the cost to the environment rather than the general public. Could make them pay after the event, or use taxes. E.g. in Cooks tourists pay for the carbon they use in the form of a departure tax. However, this could be removed because government doesn't want to give departure tax to the environment. See Departure Tax Act. Problem was that the government required that the department use the departure tax instead of getting its full budget i.e. the tax was not additional to their budget.

Offsets

A development like a tourist resort, will lead to some loss of biodiversity, and the offset system requires them to pay by producing biodiversity elsewhere on another site, so in the end there is no loss. All sorts of scientific things to consider however such as is the site linked to other biodiversity sites to enable movement of species between sites and will there be the same level of biodiversity in the new site to what was in the original site.

Q: How is it followed up? The Developer will pay for someone else to look after the biodiversity area and manage it so it is maintained. Could also get the developer to pay a bond to fund the management.

Does polluter pay principle conflict with the prevention principle? You need to consider that there is a limit to the amount of pollution that can be produced in an area, a cap to emissions, e.g. a limit to how much sulphur dioxide can be emitted and the permits say you can pollute up to 1% of this limit and if you need to pollute more you can buy someone else's permit to increase your own allowable level of emissions. This provides flexibility amongst polluters. It may make it harder for older industrial facilities with bad equipment to be able to meet the new standards if their limit is set below what they would normally emit so these operators may have to leave the industry and sell their permits. While newer industries will find it easier to operate within the cap as they generally use better technology that emits less pollution.

David stated that you need to be careful with designing these systems or the outcome will be that industry makes money out of it, through trading permits, but the objectives of reducing pollution are not achieved.

Economic instruments

David introduced the idea of economic instruments for environmental protection.

He showed a PowerPoint slide with an example from the Cook Islands' Environment Act 2003. He explained that this particular clause is designed to collect revenue not for people to stop using water.

In the case of Fiji, the legislation provides for a Cash bond that developers must pay upfront and this is used should something unexpected happen and remedies need to be taken to clean up a spill, or something similar, and protect the environment.

David Farrier part two

***Regulating Decision-making by Government - David Farrier,
Institute for Conservation Biology and Law University of
Wollongong***

David showed a number of examples of a definition for “sustainable development”. For the Fiji definition he said that it was a good example, but raises scientific questions about what is the “carrying capacity”.

NSW definition – nothing in there about intra-generational equity. I.e. should the community pay or the landowners pay?

Native Vegetation Act NSW, says cannot get approval unless you improve environmental outcomes – how can you do that if you are clearing land? David suggests you could achieve environmental outcomes through offsets. However, he says it is a very complex methodology worked on by ecologists.

Relevant considerations for decisions:

(Samoan example)

This example talks about environmental effects, but doesn't say you have to prepare an EIA or EIS. How do you balance social and economic with environmental effects? What will the courts do if you favour economic and social benefits? There is a likelihood decision makers will be swayed by the development argument.

The Environmental Management Act of Fiji says decision makers must “RECOGNISE and have regard to”... (more importance than consider)... these things are given significance, other considerations are there but lower down in pecking order e.g. Intrinsic value of nature.

Australian examples court cases: court ruled they had to consider the emissions of burning coal in Korea, this didn't stop the mine but had to consider it.

Another example is a court ruling that says you had to also think about housing on low-lying land in terms of climate change and rising sea levels, but higher court overturned it.

Role of the Courts

To what extent do you want the courts involved in decision making? Will they do it better?

Judicial review

Courts make sure decision makers consider factors they need to consider and don't consider factors that are irrelevant. Courts are wary about ruling decisions are manifestly unreasonable.

In Vanuatu; Merit appeal says the court can overrule the Minister or local authority, upon developer appeal, but objectors have no right under this provision. This is a standard provision under planning legislation.

In Fiji anyone can appeal and a tribunal can override Minister or local government. However, no tribunal has been established yet.

In Samoa, appeals can be by anyone who may be affected... any person who made an objection can appeal as they will be affected.

Niue – if you bring an action and you lose you might end up paying costs for the developer too. But this clause protects the objector from paying costs.

Precautionary principle

This is a response to scientists lack of certainty and encourages greater caution in decisions that may affect the environment.

Example of court case in Australia – says if there is some evidence of serious environmental harm, the decision maker must assume the harm will occur unless it can be proved otherwise. It is about transparency,

EIA is an example of preventative legislation, it doesn't stop development going ahead but can be used to minimise the damage.

PANEL DISCUSSION on Public Participation and Environmental Law

Paula Bariamu – CELCOR , Jessica Kao, David Farrier, Pepe Clarke

Each speaker made a short statement.

Jessica Kao – Public participation creates public swell to support the environmental goals that you are trying to achieve. If stakeholders are out of the process you can't expect them to be supportive. Also provides a check and balance. Public participation also provides a transparency that an effective program actually needs, public needs a sense of how we make decisions. Our resources constraints is something we all face so public can be our eyes and ears about where the problems are and what do we need to focus more on.

Pepe Clarke – Access to information is important for effective decision making processes in collaboration with the community. Government can play a great role in facilitating access to information. Public has a right to know what is being done to the environment. Should not be seen as a threat, but an assistance tool. Access to information held by government agencies is a key, e.g. information on pollution discharges. Public has a right to know about that information.

Paula Bariamu – In PNG CELCOR focuses on training and education awareness workshops that gives information to the public to make informed decisions, informed decisions is in our constitution it promotes good governance and transparency. Our different environment laws, have clauses

that require public registers, but public don't know how to access that information if they don't know. So CELCOR tells them how they can access it.

Pepe - Need to strike a balance with the requirements of developers to advertise and consult, to make sure its engaging but also to not preclude smaller developers from complying because of the costs of public engagement.

David – there are different stages at which public participation fits in to the legislative cycle: developing policy, drafting legislation, developing detailed rules and plans, enforcement and applications for approval.

Josephine from Samoa read from S34 Environment Management Act (Fiji) which discusses public participation, and she asks has this methodology been used? Sandeep reports that yes it has whenever there is a development in an area, there are advertisements in paper and people attending consultation. Regulations to the act also provide more detail to the consultation process. A consultant usually calls the meeting, not an independent authority, but government officers can be present. At the end of the EIA process a report is prepared and part of the report is what public participation occurred and what feedback was provided by the community.

Cook Islands – Requires 30 days consultation on developer reports...

The workshop discussed making reports and registers like pollution registers available to the public on-line. In the US and Australia the registers are available online, however there is an argument that some communities don't have access to the internet. Is online access to reports and approvals a tool to improve the quality of public participation?

The workshop had a discussion about product labels that are used to drive consumer demand for healthy or environmentally friendly products. e.g. forest certification, and carcinogenic warning labels in the United States.

Local languages and interpretation are important to consider when consulting with the community and delivering public meetings so that all people can participate in the process.

Radio is also a useful device to spread the word, PNG uses radio. Mostly using pidgeon language.

Kiribati – experience is that after first phase of consultation, only method of communication is papers and radio, no tv, little internet. Once a report is prepared, it has to be displayed, concerns with sensitive information,

Dr Eric Kwa – A new communication tool to emerge is the mobile phone. Now all villages have mobile phones because transmitters are everywhere. We have now discovered, if you don't get information out by radio or newspaper, someone else reads the paper and rings their family with the information. What are the potential's for text messaging? Is this also happening elsewhere?

Samoa – no problems with consultation as Samoa only has 300 villages. There they contact village mayors person that they are coming to promote the subject, but this is very time consuming to visit all villages so another method is to invite all village mayors to a particular site to attend a meeting. Or might go out to certain districts and ensure women’s committees and youth are taking part. Sometimes bring food to encourage people to come.

Pepe – legislation doesn’t refer to traditional lines of communication or that it should be used, might be good reasons, but to not reflect them may be a missed opportunity for more effective public consultation. People may not attend a public meeting but will attend a routine village meeting and the proposal can be placed on the agenda of that meeting.

Tonga – discussed various methods of raising public awareness of environmental issues including visiting villages and providing information, and using radio and television (including half hour panel discussions).

The discussion noted that it depends on the context and reason for your public engagement, because there is a difference between raising public awareness about an issues; and seeking public participation in a focussed way to assist with the decision making process. Public Participation is about giving people the opportunity to provide their input. In case of development, developers should bear the cost of the Public Participation. If its broader consultation about developing a conservation plan than it is more difficult as government would have to pay.

Pepe – where in process for EIA do landowners get to give their consent, or not? Maybe they don’t have full information available to them at some stages.

Would developers pay for government officers to attend public meetings for public consultation? Fijian legislation could be interpreted that way, but is pretty broad interpretation.

Important to consider what form the information is available in, is it genuinely accessible or is it a scientific report that the average person may not understand? The Fijian Environmental Management Act does provide that a plain language report is made available.

Implementation of Environmental Laws - Jessica Kao, Environment Protection Agency, United States of America

Environmental laws are only as good as if you can implement them.

A useful way to think about environmental law is “What can I do about an environmental problem?” “What tools do I have on hand to deal with that problem?”

Standard tools, permits, liability based tools, market based tools, incentive tools and voluntary action.

You must be clear on who has the authority, does it rest clearly with a government entity or is it spread out amongst a number of entities? Is there a mechanism to address overlapping authorities?

Is there a component for capacity building – e.g. training for authorities

Another requirement is for the government authority is where there is any mandatory framework about who can do what when? If they're muddled it is difficult to have proper enforcement

What is the role of the public in enforcement?

Standard based tools, permits to apply standards e.g. water and air quality standards that are enforced through permits.

The three cornerstones are what government, community and industry should do and then decide how to spread your dollar.

What are the motivating factors that will lead people to want to comply with environmental compliance? E.g. deterrents? Economic considerations, psychological social norms e.g. a good corporate image. The idea of being a bad corporate player is important to big companies and embarrasses them. Does this sort of thing influence how local villages or communities feel about a corporation?

In Samoa 80% of land is customary land and companies have to lease the land and in the event there is say a pollution incident it would certainly have a negative reaction in the community. But we haven't had any major incident.

PNG - it is in the own interests of the companies to act environmentally responsible and start on a positive note for new players. They are aware of the history of other large companies in the area such as BHP and Rio Tinto.

Fiji – there are other polluters from government e.g. sewerage and this has been going on a long time, but it still continues

Jessica Kao – how do you plan and target your efforts and resources, how do you prioritise? Such as targetting big polluters first, including government agencies under the Environmental Management Act.

What about a new piece of legislation that has just been published and there is a whole lot of people that will be affected? What are the considerations? We can't do everything, so what are the possibilities? E.g. focus on a specific geographic area such as a watershed?

Sandeep – with Fiji's Environmental Management Act we identified the ecologically sensitive areas and that would become a priority, e.g. threatened species

David – the tax office in Australia announces each year which classes of employees it will prosecute (target for investigation). Is that something you want to do, warn which resource?

In US we do that, and call them "pollution initiatives".

Cook Islands – Earth movers without permits, so we called them all in and asked them to help uphold the law, worked for a while, threatened them with prosecution which was motivating and they complied for a while and then slipped back again. Then that would be a good time to prosecute (David Farrier).

Jessica Kao - Also want to promote compliance, when law is fresh we do an incredible amount of promotion.

Samoa – There is so much that we need to publish and enforce we don't have enough finance.

Jessica Kao – this is the point – how to get the biggest bang for your buck.

Samoa – treat it on a case by case basis

Is that the most effective way to be responsive? Maybe I want to spend a year on promotion – here are the requirements and technology. What is the best way to get the word out?

Eric Kwa – Sometimes you find that some of the standards in the law may not be relevant in five or ten years time. E.g. water quality standards, so companies may be complying with the standard but not the standard that should now be required? Voluntary compliance is an option. For example the public register for pollutants in the US where companies have to list all the chemicals they emit or pollute, it's a way of shaming companies into reducing their waste and complying with legislation.

David - Is prosecution a realistic alternative for any Pacific island country? If you have \$50,000 and maybe three officers.

Pepe – If the government does not have the resources other agencies may have e.g. attorney generals. E.g. fisheries in Fiji, there have been appointment of honorary fish wardens with certain powers including to take to the nearest police station and prosecution carried out by police. One barrier is the relationship between police and fish wardens Police aren't properly trained and don't understand the issues. So within each country there are resources, but there are other barriers and challenges and some interventions that might be useful. E.g. improved and more extensive training for fish wardens, police have no knowledge of fisheries act, magistrates often don't see the fisheries in broader sense and may see it as petty theft. So question is can we do better with what we've got.

David – but fish are easy, a common pool resource, is theft, if you move to industry there are different sets of problems, pollution problems do the police prosecute? Are they going to go in to a government instrumentality and prosecute?

Vanuatu - We have the power to make a stop in the writing but not the power to enter the property. Government officers have the power not the police. If we want to prosecute only prosecutions office can do that, two cases one lost, no consistency in assessment approval process, also agencies don't talk to each other.

Samoa – in our ministry (11 divisions) we deal with land management, environmental conservation, surveys, GIS etc urban management, forestry, renewable energy. All enforcement and compliance provisions arise from an ancient principle act. Different pieces of legislation govern different parts of ministry, we are near completion of a natural resource management deal, now have waste management act. So we still act from old 1989 act which gives officers power to enforce the act, only have 6 conservation officers have to be a police officer with a conservation officer to prosecute. Police don't have any idea of what environmental provisions are. This is a major problem.

Cook Islands – Back to earth mover scenario, don't need a police to go on property Environment officers have enforcement powers and then take to crown law evidence etc. Environmental officers are trained.

PNG – same as cooks, officers collect evidence and pass it on to crown law. Can have private prosecution if you have funds. Doesn't make sense for NGOs to prosecute they don't have the powers to investigate and get evidence.

Discussion on public access to courts, anybody can take action don't need 'standing', some can be nuisance suites.

No class actions in PNG yet people act as a class, they should be given access to the courts to do this.

Paula – CELCOR got standing to take action in the court – asked community to get registered reach a consensus and then go to CELCOR. But taking matters to court is not good as an NGO. CELCOR have lawyers that act on probono.

In US if an NGO prevails in a case, they get reimbursed at attorney general payment levels, if you lose you only incur your own costs. This is how some NGOs in the US become established.

Pepe – Fiji is establishing an Environmental Law Association (launched on 4th December 2008), at the moment running workshops and training, but has the potential to do probono work.

Discussion that it is important to have a strong promotional awareness program to assist in compliance. However the point was made that this alone won't always work, also need the threat of enforcement and prosecution such as one big case that has been successful in prosecution to act as a warning to others. Experience shows to not always go after a big fish, can start with small fish and build up an enforcement program. You may not be ready for tackling the big fish.

Question on how you get evidence and were do you test for things like water pollution? Jessica Kao answered saying this goes back to enforceable requirements.

Question on whether Environmental Management Act 2005 in Fiji protects government from liability. There is protection for government officers, but not

clearly government, however other remedies and measures that protect the government.

Pepe – can make a range of other orders too, any remediation work must be done at expense of person or corporation, if don't do remediation work department of environment can undertake the work and invoice the convicted person for recovery of costs.

95% of all cases in US are civil cases, because of broad flexible authorities, criminal cases have to follow specific rules and constraints and protections e.g. right against self incrimination.

Discussion on different jurisdictions and the powers of their enforcement officers.

Remedial notices and stop work orders are also valuable tools, don't always want to prosecute and fine a company, the aim is to protect the environment, not to generate revenue.

How many countries still have a right to private prosecution? This has been divulged in Australia, except maybe in NSW.

Ana Tuiketeti – Solicitor, Department of Public Prosecutions Fiji

There are 17 lawyers in the Suva DPP office, covering different crimes, and three different units. Anna is located under the international unit (a staff of 3) and advises outside ministries and agencies. She does a lot of networking to get evidence.

The DPP encourages encourage prosecution to be the last resort ever because of need for evidence and expert witnesses and copyright and trademark issues. There are 40 acts that deal with litigation covering environmental and coastal agencies, litigation is the main thing. You need expert witnesses, scientific expert witnesses. The DPP is understaffed, by time a case comes in it will probably got to court years later, this affects evidence, could go missing, these are reality of prosecution office.

We have been trying to work with Minister of Environment and tourism to assist them with enforcement.

There has never being any private prosecution in Fiji. Private prosecution can only occur in the Magistrates Court and DPP has right to take it over, if there is not enough evidence the DPP would withdraw and it may not be charged again. Private prosecution is also costly. We try and educate people and make them aware of these facts.

In 2008 February, in the case involving noise from a tennis club, the prosecution failed to prove that the noise pollution was scientifically measured. Anna asks which police officer has this device? The judgement

was unrealistic and they appealed, judge noted concern but said that you need a cross section of community that was affected by the noise pollution. With pollution you do not need scientific evidence, just a cross section of community that you can gauge. This is a breakthrough, judiciary now aware that nothing is just black and white.

A Civil forfeiture fund has been set up, when we prosecute people and they obtain goods from crime we file a claim and seize the property and sell it or auction it and give money to the state. E.g. the house, land, car boat that is bought with money from a crime.

There are forfeiture powers in place for pollution e.g. Of a boat. Could be anything and don't need conviction, can issue order before hand, but for purposes of Environmental Management Act (Fiji) it does need conviction. In a case in the U.S. the DPP got forfeited land but didn't want it and no one else did either because it was so polluted.

Anna – talks about establishing a formal working group. This is a network of agencies that the DPP belongs to to assist it in its duties. Formal working groups can speed up the process of finding evidence and other information, they can do in minutes, what could take one agency weeks. This is because the partners in the working group are aware of the purpose of what you need, this makes enforcement easier. Have also done a lot of work with different NGOs.

Noise pollution – Samoa has a noise level testing machine. The use of standards and choosing standards that are specific are important. Setting particular threshold levels are good for setting certainty for enforcement but you need to be able to test them for prosecution. So this is a problem with lifting standards from other countries e.g. using US EPA standards maybe a good benchmark but can you test for those concentrations or compounds or noise levels.

In the US the EPA was sued to test for industrial stormwater, but it was unreasonable to test every site and didn't have resources to do so, so ended up looking at different mechanisms such as housekeeping at industrial facilities to make sure raw materials don't come into contact with water drains etc to stop chemicals entering runoff.

The DPP has not done any prosecutions under new Environmental Management Act 2005. Has been trying to encourage them to not to prosecute.

Clarified that DPP Fiji don't investigate, only prosecute. Environmental inspectors have to do investigation.

Constructive dialogue is important with DPP, police and inspectors. Lack of confidence could be from lack of experience of legal officers to prosecute or prosecute environmental matters. Allocation of inspection powers between government agencies.

Under CITES scientific authority can appoint another government agency to inspect and enforce. E.g. customs.

DAY THREE

Environmental Impact Assessment: Policy context, key features - Clark Peteru, SPREP

Six typical steps in EIA report.

Clark spoke about the golden era when we lived in balance with nature. Islanders in those times were entirely self-sufficient. However, then the populations were low and the technology was more basic. All this has changed. If Europeans had not come to the Pacific, populations would have increased and there would still have been an impact on the environment. He spoke about the spiritual values that Islanders have - god of the forest, god of the sea and other natural creatures that we worshipped. Now we are overdoing things, culture is working against the environment. Over-fishing etc. In contemporary society, with Christian values, it is a very human centric view of the world and creation is subservient to man. Unfortunately, there are few examples of good stewardship, of managing our natural resources sustainably. We should ask ourselves about the “carrying capacity” of our environment – how sustainable is the environment to our activities can it absorb the impacts that we make upon it? Demand for economic growth means you continue to exploit your environment, and for many of our islands there is not a lot of resources there. For example, the water resource under Tuvalu has been exhausted because it has been overexploited.

SPREP has commissioned the CARDNO Report (A Review of Integrated Environmental Assessment and Planning). It should be on the SPREP website (www.sprep.org) , most countries were visited and a composite report completed.

Why do we need an Environmental Impact Assessment?

Increasing development and pressures, increasing vulnerabilities such as climate change and global change.

EIA began in the United States in the 1969. This was a gift to the world and many countries have adopted it. It is only since the year 2000 in the Pacific that EIA has been formally developed. It was done informally prior to 2000 when foreign aid agencies came in and conducted EIAs on their own projects.

Specialists are needed to conduct the EIA process. The EIA is usually specific to a location, but does not take an overall country perspective or look at the developments broader impact, it is also reactive. SIA is pro-active, you compile all reports and look at a regional basis as to what areas are good for agriculture and which areas are suitable for development. These often require more sophisticated tools but it is good to aim towards this strategic planning.

Is it useful to the Pacific? Yes. For example, Easter Island was a thriving Melanesian society at one stage and was self sufficient – would an EIA have saved them??

Our islands are small, so the impacts are large and noticeable and magnified. E.g. Rapanui (?) deforestation, warfare resulted, whole society collapsed along with the ecosystem, was the extreme deforestation a cultural issue? Many of our islands especially the atolls face similar problems, Samoa population increases, Nieuve has less than 2000 people and still has environmental problems. Humans produce a lot of waste and if you can't deal with it, it becomes a visual and environmental problem.

Clark looks at various definitions of EIA.

He says it makes us look at different ways to lessen the impact of development and human activities.

Clark says you don't want to catch all activities, you just want to focus on big activities, so development is defined in terms of a significant effect on the environment, how widely do you define the environment?

The Six Steps of EIA

1. Screening
2. Scoping
3. EIA report
4. Review of report
5. Approval or not
6. Monitoring and enforcement

Screening – it is like a mini or preliminary EIA to determine if a full EIA is necessary.

Scoping – what do you test or look for as part of the EIA, a site visit is required if it is near a sacred site or protected area, draw up a terms of reference and give it to developer to base its EIA on.

EIA report – the department assesses its reliability, accuracy, bias, and credibility, what impacts will the development have? Are they acceptable? The recommendation on the report is made by the department and given to the decision maker e.g. Minister or Cabinet. Cabinet may decide regardless of the report and recommendation that it still goes ahead due to political circumstances.

David Farrier comments that it could be a decision everyone agrees with e.g. a power station - therefore a socioeconomic decision, its balancing environment against socioeconomic things e.g. a hospital.

Sandeep Singh says you need to do a cost benefit analysis. Pepe Clark says if the approving authority is not entirely unaccountable it is also subject to the rules of administrative law, you still need to take into account certain considerations but not irrelevant matters and it can be appealed in court. In the overwhelming majority of cases it is subject to judicial review, the purpose is informed decision making, so you can still decide upon an environmentally harmful project.

David – the precautionary principle can also be used during the process to say that we have enough evidence (not all of it) that there is likely to have a significant impact on the environment. But agree with Pepe if you could prove that corruption was involved than that is a basis for judicial review, but proving that is difficult.

Pepe – EIA won't deal with corruption but can bring the decision making out into the open, it promotes transparency and public scrutiny.

Paul Lynch Cook Islands – Paul discusses the challenges that are part of a Cost benefit analysis. He says one problem the Cook Islands has run into in the past is to do with the ability of the authority. It is made up of community members and they have a limited ability to weigh the information and may be biased. Paul thinks the EIA could be wider than just the environment, could include cost benefit analysis.

David Farrier – but they are allowed to take other things into account, they can decide it is more important to have a hospital than protect an endangered species. Unless, there is a merit appeal by an objector. Paul, if they bring in these other ideas then they're actually running a risk of having their decision making process overturned. David that's different, if it is a question of significant impact on the environment it's a factual question in the screening step. But the final decision can always take into account socioeconomic impact.

Clark Peteru resumes – throughout the EIA process there is public consultation, for transparency and public input.

Screening – the outcome of the screening process maybe that there is no need for EIA, or that you need further information. Countries can develop a list of activities with or without standards of thresholds that say these activities are, or are not needing an EIA. Alternatively you could develop a geographical list – this would include certain areas that require an EIA e.g. ocean side of island may need an EIA.

Screening – PEAR Preliminary Environmental Assessment Report

Slide showing a continuum of activities, there is a grey area where you need to help developer decide if their activity requires an EIA.

Scoping – this step helps the developer know what to research as part of the EIA. Include public consultation, site visit, report defining what EIA should include, give to developer to fulfill requirements of that report. The Environment definition can be broad so need to decide what it means.

EIA methods – checklists, matrices, networks, etc

Method depends on variety of factors, location and development specific.

Significant impacts? – significant is often not defined, open ended. guidelines on slide.

TOR for conduct of EIA – addresses this list of factors.

DRAFTING A LAW

Do you need an Act or regulation? There are some restrictions when you have a parent Act because of existing definitions. Do you want your regulation to amend another act? But decided not to go that way in case of a court challenge. Looked at country priorities, something specific to your country.

Environmental Impact Assessment Regulations 2008 Revised November 2008 (Nieuwe). Provides for an Environmental Council comprising of different agency representatives to address conflicts between agencies. Definitions: development removed affect on human health and society because we wanted to focus on impacts to the environment. Definition of environment is very wide and broad. (includes definition of Preliminary Environmental Assessment Report (PEAR)).

Exemptions; maintenance to your house, septic tanks, routine maintenance of public infrastructure, bush clearing by a household including clearing for agriculture. Exempted activities still require a development permit.

If not exempt go to Schedule 1, Inclusive and Exclusive list. Then go to Schedule 2 and complete an application form. And conduct a PEAR, act defines what that should include. The next step is the screening process, scoping by department and act has statutory list of what should be included in the EIA report, department reviews EIA, may need external advice and do public consultation. The Environmental Council ?, they report to Cabinet and Cabinet decides whether to approve it or not, then enforcement, inspectors need training on certain powers, offences (court sits only once a year) commissioners meet every three months, so fines fixed at jurisdiction of commissioners (\$1500) but for everyday not paid the fine increases.

CASE STUDY: Kiribati, Farran Redfern

Farran presented his case study on Compliance with Kiribati Environment Act on Environmental Impact Assessment.

The Minister may appoint a person, including a class of persons, as an environment inspector e.g. a police officer but consultation is required.

Powerpoint includes flow chart of the process. The project can be refused without completing a full EIA.

Challenges – include inspectors and officers not understanding engineering drawings; capacity issues – limitation of literature to help set conditions; ineffective public consultation; monitoring and compliance; few private developments – compliance is difficult because nature of work requires a high degree of risk, governments building causeways, sea walls etc.

Complication with land ownership – most land owned by locals not government, landowners don't understand why they have to comply.

Sensitivity - some activities are regulated under the Act but can be very sensitive issues in the community. For example, sand mining is sometimes quite emotional as people need the money from the activity to pay for their food.

Limited enforcement staff – only four environment inspectors are committed to enforcement.

Lack of public awareness – in Kiribati people don't have TV or internet, so it is not easy to reach the other islands.

Narrative standards on emissions – in the Development Act emission standards are in narrative not in scientific terms e.g. noise level is it extreme or not, rather than a level on a noise meter. This makes it hard to provide scientific evidence in court.

Lessons learnt – incorporating EIA into a national project cycle

Use of Foreign Investment Committee – The Committee grants licences to foreign investors to conduct business on the island. Kiribati gave the Committee a compliance report on a Japanese company for the Foreign Investment Committee to consider when the licence comes up for renewal. If compliance is bad the committee may take it into account when issuing a new licence, therefore this process to improve the compliance of foreign companies under the Environment Act.

Terms of Reference for EIA Technical Assistance (e.g. Asian Development Bank)

Incorporating Environment Act requirements in existing procedure – working with land development.

Engaging police in monitoring – this is working well in Kiribati. The Kiribati government officials wrote to senior police officers and met with them and explained the problems that they had had in the past and police monitoring has since improved. The locals respect police more rather than environment inspectors, so it is important for police monitoring to continue.

EIA achievements – New powerhouse produces less pollution.

Way forward – addressing capacity issues, coordination, public awareness, collaboration with other jurisdictions to learn from their experiences and continued legal support. Last few years have had a lawyer sit in the office and

assist in drafting the act and giving advice and this has been very beneficial. Lawyer is a volunteer from Australian Volunteers International.

Acknowledges: IUCN and SPREP for their support for the workshop and other training initiatives.

Questions:

Sandeep – Do you have waste and pollution legislation? I know there is a problem with dumping waste on the beach? And what about beach mining, at an individual household level but still has serious environmental issues, how are you handling these two issues.

A – The Act establishes pollution control. With beach mining we used to inspect known beach mining areas and ask them to go through proper approval process. No specific legislation dealing with beach mining but there are some bylaws made by the councils to control these activities.

Government used to source materials like gravel

Pepe – Can you refuse a proposal without an EIA? Many jurisdictions have land use plans that allow this, but it isn't common. This ability to refuse a proposal without an EIA is useful for sand mining, so without changing legislation you could make a standard decision that all licences for sand mining will be refused. Staff changes in Departments mean that it could be good to develop guidelines and list things that can be covered by conditions (open ended lists) and include this in guidelines, but still need training on writing conditions effectively and appropriately.

How can you work out if an act or piece of legislation is working? David Farrier says its very difficult, how do you measure it , prosecutions could be an indicator of success or failure. Improved environmental indicators is a good indication but we can discuss more later.

CASE STUDY: Cook Islands – Environmental Impact Assessment, Paul Lynch and Vavia Tangatataia

Environment Act 2003 – sets up an environment service and provides advice to the Raratonga Environment Authority EA (authority), most islands have their own authority, some islands have taken the act on because they don't have resources to implement it.

The act and the service have been attacked in the courts, High Court include judges from New Zealand. The Court of appeal has three judges from NZ.

All Members of Parliament sit on the authority together with community leaders and chiefs, but ministerial or political influence is limited. A Minister can't take the decision making process off of the REA.

EIA process is two step phase

1. Screening – is it an EIA or not (S.50)?, assessed by environmental service (Vavia)

Referred to section 50 of the Act highlighting what offences there are for carrying out an activity without written permission from the Authority. It also covers exemptions from the offences for certain activities where the permitting authority is of the opinion that the activity would result in the preservation, restoration, or enhancement of the natural configuration and features of the foreshore or the natural flow of water (S.50 (2)b).

Discussion that this provision is very powerful.

Paul notes that there has been some problems as to how define “enhancement and natural flow of water”.

2. S.36 If activity needs an EIA, sections 36 (3) – (4) show what it should include.

Weakness is that consultants churn out the same report for each project, just change the name.

Public consultation is ineffective as the report is an engineering report and too difficult to read. The Cook Islands is now asking developers to summarise in plain English what the technical report means. They must also place the report in village stores etc and make a notice for the local paper Maori and English.

Rarotonga Beach Resort Case Study – includes a groin structure going out from resort into the lagoon. Engineering report was made available to department, but also asked for an independent review of the report by a local engineer on our behalf. So decided based on review the project did not need to go through the full EIA process. Took it through S.50 and to REA and the Authority approved it under S.50. The Department therefore gave approval and the developers went ahead with the construction of the rock groin. The purpose of the rock groin is to capture the sand. Afterwards the local landowners took the Department to court for granting the permit without going through the full EIA process. The Court case turned on the meaning of “significant environmental impact”. The Court said you also had to take into account aesthetics. The Judge didn’t like the groin aesthetically and believed it blocked public access to the beach and found against the REA. Judge tried to overrule the REA decision, and this was appealed. The decision was reversed by three judges of the High Court who agreed that the Chief Justice got it wrong. They decided that a judicial review is not a merits appeal this is where the Chief Justice got it wrong. (He had also wanted to add his own conditions). The case is still in appeal and it is back to the REA.

What was the motivation of the landowners? Paul believes there was a conflicting interest by a consultant who has developed blocks to be put in the lagoon to disburse energy from waves. This consultant has been funding the objection by the landowners.

Should the REA looked for an alternative to the rock groin e.g. the comparative advantages of using the blocks or the groin?

Pepe – observes the significant environmental impact is a challenge and also flexible criteria. He suggests the Department develop internal guidelines to guide that discretion and further suggests reference be made to the significant body of case studies from around the world on what is “significant”. It is important at the legislative drafting stage of criteria for merits and judicial review that this is clearly defined or understood. Jurisdictional fact cases suggest that if a decision of law about who exercises jurisdiction (REA or NES) than that decision about jurisdictional fact may be subject to judicial review by the courts. E.g. Threatened species

If you create too many authorities with jurisdiction, you disperse the powers and get conflicts.

Paul – this court decision could have a big impact on Environment Service as \$50,000 has to come out of its budget, but still is up for removal.

The Cook Islands learned from this case study that that stakeholder consultation is important - maybe more should have been done? So the Cook Islands undertook a process to show that consultation took place before it went to court. Authorities reaffirmed their decisions made under s.50 and the court case went ahead. Question the role and ability of community boards or authorities in making these decisions, they are planters, fisherman etc? The Chief Justice believed that the board had not exercised its discretion and could've made a different decision to what the REA had recommended. It came down to the minutes that were taken and minutes only showed s.50 approved, not that s.36 was considered. That's what the judge decided was crucial.

Lesson there is that you go through the process and make sure that you document that you have considered all necessary considerations including the environment.

Something as simple of a checklist could have helped show that all things were considered e.g. S. 36, S.50 etc

People supporting the community board could've supported them more.

CASE STUDY: Vanuatu: Environment Management and Conservation Act, Trinison Tari Acting Head of Environment Unit

It took seven years to develop the Environment Management and Conservation Act. It had a lot of consultation with the relevant stakeholders, was passed in 2002 and gazetted within 10 months.

Vanuatu needs the act to protect and conserve the environment for all the people. It provides a framework to manage risks, mandates the development of stand alone regulations etc

Trinison's presentation focused on EIA section. S.12 Activities subject to EIA, s.13 activities not subject to EIA.

Shows a flow-chart of how the process is undertaken. All government agencies have the right to do the preliminary assessment because the Environment Department is not experts in all areas of development.

If a development requires a full EIA - government provides the terms of reference, if another agency provided the screening process they must forward it to the environment unit. Consultant will do the EIA and the report goes to the Environment Department for review by an advisory board (6 people) that decides on approval. If rejected write to Minister and advise of the decision. May ask for more specific information.

Applications to date:

General tourism developments over 100

Forestry 5

Mining 2

Hydropower 2

Industry, wharf roads airstrip 20

Residential subdivision, applying strata title 30

Fresh water fisheries 5

Environment cases –

2 prosecuted under Environment Management and Conservation Act

1 prosecuted under CITES

Trinison showed a number of photos as examples of development that is being undertaken.

Issues and challenges:

Some people don't understand what EIA is and why it is necessary.

Some developments have commenced prior to getting approval because they believe they leased the land before the act came into affect.

Money versus time – developers know EIA is costly, and consultants given short timeframes to undertake EIA, this is conflict of interest.

Not all government acts are consistent with EIA and so the Environment Management and Conservation Act is not given full effect

Lessons learnt

EIA is perceived as a process to control development

Need more education and awareness of the process

Need to establish standards on various environmental aspects

Some consultants do not produce quality reports

Weakness in prosecution office dealing with environment cases

Need to build capacity of environment officers in undertaking scientific analysis. (see ppt slide for full list and details)

Q: Are consultants registered with Department of Environment and does the Department only allow registered consultants to undertake the EIA report?

A: Same process in Vanuatu

Pepe – There needs to be a credible threat that the Department will remove a Consultant from the list if they don't meet the necessary standards.

Pepe – interesting to see that Legislation in Vanuatu EIA has a role in other government agencies, this is a good use of resources and expertise in other agencies. Similar in Cook Islands.

David Farrier – some legislation has a general provision that every Government Department whenever giving an approval has a duty to consider environmental factors in its decision making. That's an extremely important long term provision, even if there is no expertise in that department at the moment, in the long run the environment should be considered in all decision making processes, not just in an isolated little unit of government.

Pepe – Fiji's Environmental Management Act deals with this directly, the Department of Environment has a legal power to require the CEO of any Ministry, Department or legal authority to specifically establish units of environment management and each unit must consist of employees who can effectively assess EIA. This is a very interesting provision and significant implications for budgeting for those departments. Not sure how it will work on the ground but it is good the Act makes this provision. The issue of where you spread the responsibility and who has the expertise is important. In PNG there is a more centralized approach because they want to make sure the EIA process is done properly.

Pepe - Terms of Reference, can be covered partly in legislation, and also the Department can put in additional issues to be considered and these may be developed internally within the department and over time. There are different ways of defining terms of reference and may be appropriate to develop them differently for different circumstances and countries.

David – quality of EIS, alternative is to charge the developer and the department hires the consultant. Another approach is the courts have been involved in determining whether the EIA is of a good enough quality.

Pepe – most EIA processes provides for the authority to ask for more information. Also need to be careful when including statutory time limits, if you are allowed to ask for more information but cant stop the clock on the deadline for the application to be assessed you run into a conflict so just be conscious of it.

Philippe Gerbeaux, Chief Technical Advisor, IUCN

Philippe gives notice that New Caledonia will be hosting a conference on “The Integration of Custom in the Drafting of Environmental Law: Elements from the Pacific islands and elsewhere” 26-28 October 2009.

In New Caledonia they are starting to put together all the information that local people have and working towards rewriting their laws in preparation for autonomy.

The Conference is expected to include discussion groups of thematic areas customary laws in management of conservation areas in the Pacific. It is unclear if only in French or in French and English. 2nd thematic international standards to recognize customary laws and practices, role of customary laws at legal table, and comparative studies in developing environmental standards, and challenges for integration into environmental Legislation. (See attached call for papers)

Pollution Control and Waste Management - Jessica Kao, Environment Protection Agency, United States of America

Identify source and type of pollution

Choose proper control management tool

Choose appropriate approval systems and related mechanisms to achieve goals

Consider economic instruments

Sometimes pollution is not suitable to a permit system, so you need to be creative and curb some of pollution problems that don't lend themselves to permitting or standards.

Sources of pollution:

- Some identifiable vs diffuse sources (runoff from ag land)
- Continuous (eg sugar mill) vs episodic sources
- Fixed vs mobile sources

- New vs existing

Types of pollution

- Air
- Water
- Solid Waste
- Unsafe products
- Unsafe handling

Control and management tools

- Technology based standards – eg tech control
- Ambient standards
- Performance based standards
- Product based standards
- Treatment, storage and disposal standard
- Procedural standards or protocols
- International standards

(not mutually exclusive can be used together) can be behaviour modification

Approval systems and related mechanisms

- E.g. permitting or licensing schemes - If using these systems make sure you incorporate some kind of procedural mechanism for record keeping, self monitoring, reporting, site access, certification etc
- Certification – use a form and ask people to sign it that it is true and correct makes it harder for people to lie about the content of their application.
- Approval systems

Require upfront planning and targeting – start with lowest hanging fruits, most basic pollutant parameters, established and simple testing or monitoring protocols.

Flexible and adaptable – individual or group/sector permits, single media or multimedia permits, contents can include limits, compliance schedules, pollution prevention measures, self monitoring record keeping and other associated mechanisms, can be updated renewed revoked. Need to have clearly articulated requirements. Can give permit holders schedule of conditions so that within three years 'x' number of conditions will be met. Periodic conditions e.g. covering waste every three months etc

Approval system is an efficient way of bringing a large number of pollution sources into the regulatory system. It is also a very open and public system. All a concerned person has to do is to look up the permit to see the conditions that apply to it, it's a simple document instead of going through the law to see if they comply.

Approval system is efficient way to target enforcement - e.g. target people who play around with their data, may only be a small fine but others will see you are serious about enforcement.

Approval systems, coupled with reporting, monitoring and enforcement, can be cost-effective in achieving compliance.

Economic instruments – incentives and disincentives

- Pollution trading – Eliminate economic incentives to pollute
- Subsidies

CASE STUDY: Waste Management Bill Samoa, Josephine Stowers-Fiu

The Bill has gone through two stages, still have to go through final consultations with villages.

Focuses on management of solid waste, hazardous waste and substances.

Current situation – the agency responsible for waste is a Division of the Environment Unit. Consideration should be given to the nature of the entity of the Government which administers these functions in the future.

Laws which are the basis of administrative responsibility for environment protection matters. A consultant did a review of all the relevant laws prior to drafting the bill. Looked at principle act Lands Surveys and Environment Act 1989, which has been amended three times, and administers natural resources and environment ministry.

Substance of relevant provisions:

Since 2004 the Planning Urban Management Agency regulates planning and management of urban areas (maybe extended to rural areas)

Laws of particular relevance to waste

- Police offences ordinance: range of criminal offences, throwing rubbish, burning litter, dead animals, night soil, creating noise pollution, removing sand, boulders or stone from foreshore or streams, placing poisons to be a danger to animals or humans, polluting water.
- International conventions relevant to waste and chemicals and other pollutants.

No applicable law to these conventions in Samoa as yet except for National Waste Management Policy 2001.

Key features

- Includes standards relating to waste management practices and facilities and the Division of Environment responsible for monitoring and enforcement.
- Public health standards set by and responsibility to Ministry of Health

Permit

Service providers must be licensed

Relevant clauses includes definition of hazardous waste, waste (does not include human waste except sludge) and clause for registration and licensing of waste operators.

Haven't specified polluter pays principle, but have made relevant clauses e.g. user pays principle with special waste related levies but still in bill form so not sure if it will remain after consultation.

Another clause is an audit of waste (periodically)

Implementation of relevant international conventions

Regulation of incineration of wastes

Village and community by-laws – good way for community to work together with Ministry. Encourages consultation on development of by-laws with immediate and neighbouring villages.

Ministry may devise, approve, implement or participate in programs relating to the regulation of wastes and the promotion of proper waste management practices in Samoa.

Questions

Q: Who is currently responsible for managing waste? A: all Ministries but could create a separate entity.

Q: Do you have municipality? A: we have villages but not local or district governments, each village may have different rules from another village.

David – did you think about separating waste and pollution management? A: There are some provisions made to control pollution such as looking at certain substances and effects to human health, so standards drafted for different ministries. Ministry of Health is responsible for medical waste and Ministry of Agriculture is responsible for herbicide pesticide waste, water pollution is covered under the new water resource management act. Air pollution is still being considered.

Q: This seems more focus on solid waste? A: Looking at preparing legislation to manage other types of pollution including greenhouse gas emissions.

Pepe – if other ministries are responsible for certain types of waste are they aware of the environmental impacts of that waste? In circumstances when different ministries have responsibilities and there are overlapping or conflicting issues e.g. health and environmental issues to consider.

Eric Kwa - One of the issues over the past few days has been need for different agencies to meet regularly to discuss issues and to put this requirement to meet into the legislation. Sandeep – we have this in the EMA called the environment council and they meet two times a year. EK this is good but you need to have meetings at a lower level, at the officer level, heads of departments won't agree.

There is also provision for recycling, and will also have provision enforced on all licensed providers to comply with planning, environmental and occupational health and safety laws including recycling.

And provisions for differential charging economic incentives to reduce waste s.39 waste fees at different levels and different sites and size of receptacles.

Kiribati has a container deposit legislation system to encourage recycling. Importer pays 6c, the person returning the item gets 5c back and processor gets 1cent plus whatever they get for selling the materials to be recycled.

Environment Management Act (Waste and Pollution Control) Fiji – Pepe Clarke, Legal Advisor IUCN

The Environment Management (waste management and pollution regulations) Act 2005 (Fiji).

Establishes a legal framework for EIA

Has waste disposal and recycling permits administered by Department of Environment - applies to commercial and industrial facility including government and an individual.

Sugar mill, gravel quarry, backyard motor mechanic would all fall under the act, this raises questions of enforcement capacity.

Waste definition is also quite broad and doesn't make mention of international conventions but includes litter garbage, solids etc

Pollutant definition also defined broadly and includes exhaust gases.

10 different types of permits are set out in the Act.

Discussion on legislation and practicalities of recycling batteries and the obligation of the importer and seller of batteries. How do you get all batteries back? Fiji currently requires importers to set up recycling centres, but can't guarantee all batteries come back. US is looking at a similar scheme to recycled bottles to encourage consumers to return batteries.

Discussion of permits, and offences for not complying. Max penalty \$100,000 and maybe subject to inspection and may have to take action to rectify the damage. Department will progressively engage with a wider range of facilities.

Discussion of compliance and enforcement and triggers for inspection.

Two different types of standards – general and stricter standards for areas of environmental sensitivity

Penalties \$100,000, \$250,000 and/or 3 years imprisonment, etc

David - Everyone should think about other enforcement measures apart from compliance?

Pepe – Public participation in relation to waste and pollution management, these provisions don't require public participation, may enquire, but no legal requirements for it. Even for significant polluters no requirement for public notification prior to issuing a permit. If no formal notification downstream users may need assistance from NGOs etc to comment on the process, because if permit issued may allow pollution to continue. So no accountability when pressure on government agencies to allow facilities to continue.

Natural Resource Management – Dr Eric Kwa, University of Papua New Guinea

Will discuss issues, not laws.

1. What are they? (natural resources)
2. Who owns it? E.g. Who owns the lake? If common law no one owns it, but talk to community person – I grew up near this lake and swam in it – is my lake...
3. What are the benefits? (of developing a natural resource) look at various levels of benefits and categories when drafting laws
4. Sustainability? Very important for island communities
5. Participation?
6. Role of stakeholders?

In PNG natural resources includes minerals, petroleum, gas, marine products, timber, water fauna and flora.

The determination of ownership resolves issues relating to:

- rights
- prior informed consent (PIC)

- control (management)
- benefits (monetary and non-monetary)
- monitoring (accountability and transparency)

For example deep sea mining in PNG, who owns those resources, can island owners say we own the minerals and should have benefits, but state may claim jurisdiction, or local government so I have the right... Who gives the consent?

Cook Islands manganese deep sea mining, an activist came to Cooks to get chiefs to declare they had the rights to it not government, but this had no legal standing but could've been used by person to try and sell it on futures market (he may have been a conman).

Another example is airspace, Maoris tried to say it was there airspace and we need to be paid. It is an issue of sovereignty.

We need to know who owns the resources so we know who gets what and who manages it.

What are benefits? Following issues need to be addressed:

- Who gets what? – developer, resource owners, state, local governments, other partners. What if building a wharf on tribal land? Does the owner get benefits for the public accessing his/her land? What about a resort – are you going to give traditional land owners preference for employment at resort?

So we need to look at an equitable package in the Bill.

- Who pays for what?
- How much benefits should be paid?
- Who manages the benefits?
- When does the benefit end?

For example benefits of fisheries does it go to community, or state?

Sustainability

What is the balance between development and environmental protection?

We can make money for our islands and create jobs, but to what extent to do we allow impact on the environment.

Dr Kwa tells of a project with Australian lawyers, the lawyers told PNG that because their developers had put in \$300m they should get the required permits, but PNG lawyers said its our resources so you do what we say. There was a breakdown in negotiations. Eric sat at table to negotiate and gave the lawyers an 'exam' to see if they pass the test, this changed the

mood at the negotiation table and began negotiations and the Australian lawyers ended up accepting certain conditions on their permits.

Sustainability is also about sustaining way of life and cultures.

Participation:

Who can participate in the process?

How can they participate in the process?

If you don't involve them in the beginning the mine shuts down, local landowners will shut it down, and millions would be lost.

Government complains about engagement and want it done quickly, I have experienced this before drafted a bill and put it through parliament in 6 weeks. The bill related to indigenous people of Port Moresby and consultation could've opposed the bill, so in the interest of indigenous people we had to do it quietly, it passed in parliament by a majority of votes. We need to recognize the indigenous people, their rights their reef etc. Another Bill is into its 5th year waiting for it to go to parliament. Keeping a bill secret could risk a petition and have the act repealed.

All PNG documents are open to the public and they are invited to attend. Try as much as possible to engage everyone.

If you involve general public in public participation it can also aid monitoring and enforcement as public members may then report issues such as polluting activities.

CASE STUDY: Water Management Act 2008 (Samoa) – Josephine Stowers-Fiu

Ownership of the resources is an important point and needs to be properly clarified and explained. We went through this process for the Water Resources Management Act.

Prior to this Act there was no independent authority for the management of the resource.

Background – Afulilo is a major water supply in Samoa, provides about 40% of our hydropower in Samoa. (photo included showing lack of water), Afiamalu – poor quality and supply, Vaisigano photo dry creek bed, Not sure if this is result of drought, but have instances when water completely runs out. Past three months also of power cuts because water supply is running short and/or completely out of water. Drinking water – can be rationed throughout the country. Water meter system does not cover 100% of country, but more than 50% of the country. So people with meters more likely affected by rations. More people getting water tanks.

Water Management Act has come around at the right time. Have been able to justify the importance of managing water sustainably.

The legislation establishes the Water Resource Division to sustainably manage water resources.

Challenges – fragmented control, management and protection, competing and conflicting demands (SWA, EPC etc) conflict with authority for distribution of water and that that provides electricity.

Insufficient knowledge and understanding, social and environmental impacts of developments, poor water quality, excessive demand on water supply, lack of community understanding, limited community involvement.

Water Resources Division – in charge of sustainable development and management of water resources. Lists objectives and functions.

Strengthen control, management and protection of water resources:

Encourages EIA, minimize development

Key features:

Introduces new licensing regime to regulate taking of water and its related activities. Introduces effective planning.

Recognizes current roles.

Rights to control and manage the water resource: covers individuals, authorities that use water, and environmental water provisions.

Prior to the passing of the Act there were a lot of misconceptions about water ownership. Under the Samoan constitution it equally gives to Samoan and English translations, but English prevails, when introduced to parliament there was an error in the translation of the Act as to ownership of water – this got lots of media coverage. The Government had to go back to parliament, the problem was not interpretation but the translation of the legislation. This was a major drawback that caused the delay in approving the legislation.

Section 4 provides for management defines sustainable development, powers to monitor and enforce, application of precautionary principle. David notes that it is a very dramatic and stronger definition of the precautionary principle.

Provisions for EIA's plans to be consistent with the water resources management plan. It brings in all relevant agencies to coordinate a water management plan for Samoa. E.g. Forestry permits must comply with management plan.

Provision for protection and management of watershed areas.

Powers of Minister are described, these help to manage and protect the water resources including approvals for taking of water. Quantity and quality of water included. Ordering activities to cease.

Community involvement in water management – very successful villages and communities are given powers to make bylaws to protect water resources. Procedures are similar to those to protect fisheries on village fisheries or reefs.

Minister may convene a water resources forum to facilitate community involvement and provide information (haven't done this yet) but necessary to get full support of our villages.

Provision for fees set by the Minister, application fees, licence fees, fees for taking of water, special fees regarding pollution, special fees to villages when water taken under a licence or permit from the village supply ensures community benefit.)

Discussion – on Precautionary Principle only comment about if you are certain what happens.

DAY FOUR

Personal highlights so far

PNG - Mining not water resource management

Kiribati – WE don't have a Waste Management Act, so think this is something we would like to draft.

Nauru – We are a small country so biggest concern we have and what I have got from workshop is to target waste management first before environmental management. Focus on something achievable.

Samoa (Josephine) – Learnt a lot this week, the EMA act of Fiji has opened up my understanding of what we still need to consider in our own legislation, made me identify some gaps that we still need to address and think it is a good model for us in terms of drafting legislation. Other good lesson is EIA, case study from Cook Islands role of courts in terms of considering decisions. Also in Vanuatu, the EIA process whether it addresses good governance, is complex, may need to streamline look at it more effectively and involve the public and strategic planning is also another field that is a highlight and need to consider more.

Samoa (Uaine) – Learnt about the top down model, very interesting, start from international and then to country, but in Pacific way one of the problems is bottom up. What I see is Pacific need to learn to address the problem, through policy and legislation, that's the main thing I can see from this workshop. Need to match international obligations. We developed climate change policy after a lot of research and bring problems into strategy and now trying to set up the appropriate legislation and apply penalties and rewards. Need to strengthen bottom up approach.

Vanuatu (Louis) – I learnt about taxes and get percentage for environment. I learned how you draft a bill and questions what you should ask yourself, and bill has to protect the people and the developer. Employment act, not sure if there was consultation or not, but didn't see the opportunity to protect the employer, are increasing severance payment and did not see the employer has budgeted for first amount.

PNG (Paula) – Two things stood out for me, day two the drafting of environmental regulations and I'm not involved in that so it was good opportunity for me to learn, also EIA process and case studies from Cooks, Kiribati and Vanuatu stood out a lot.

(Fiji) Lai – Presentations from countries – Kiribati and Cook Islands, even though mostly related to environment but also to private sector development. Overall a learning process and thank you.

Eric Kwa – two things amaze me a lot of good things happening but very little sharing of the data amongst us, maybe something for IUCN, SPREP showed us, but interlinkages between us sharing experiences, sending an email, this is striking thing that has popped up. Secondly the subject areas, I was taken aback, climate change did not feature prominently and I was thinking that is most important thing here and think we should discuss this it is very important globally and regionally. Trying to understand why this is, are we not confident because we don't understand it? Need a follow up workshop, from what I learned in Suva this is what I have done and learnt.

Vanuatu (Trinison) – I have been to many workshops in the region, this is the first of its kind that is such an important workshop because never been to one that is on environmental workshop. Beginning to ask the question why SPREP never organised something? SPREP was doing workshops in early 90s, but we've come along way since then. Two things I can apply back home we are in the process of amending our legislation and other thing is presentations from Fiji and Samoa particularly on Waste Management Bill.

Cook Islands (Vaiva) – EIA process, Kiribati case study and Vanuatu and how they carry out the process back home.

Cook Islands (Paul) – emphasis on consultation involvement and engagement in our communities, big eye opener for me, if I had not come to this workshop the legislation I would've developed would be different to how I would do it now, I will try not to draft in isolation and look at consequences both economic and social and look at broader consequences and won't be rushing into legislation. From a broader view just to meet with everyone and see whats going on in the Pacific, some of us have common challenges some leading on certain things and some are behind, e.g. Samoa leading on water management, has given me a great overview. Enjoyed David's presentation on encouraging people to comply not just big stick. Motivating people to comply rather than just say there is the law look out. Learnt that we can tap into SPREP's expertise and networking between countries. Want a participant list with emails to continue talking between each other.

Sandeep - impressed with what's happening with individual countries, when we drafted EMA we didn't look at other Pacific countries, take my hat off to Samoa, enjoyed presentation by Kiribati and a lot of things that we can learn from Cooks, think we should document the lessons learnt. Need to look at traditional way of doing things and incorporate into legislation. Learned command and control approach is not best way.

Jessica Kao – first and foremost coming from US, I speak for myself, Pacific island countries this an incredible experience for me, when I read about climate change and raising sea level now it seems real for me, and for environment protection its not an intellectual experience incredible educational experience for me. Pacific island countries have no margin of error when it comes to natural resource management , landownership issues and the idea of traditional law and the idea of using your existing traditional structures is fascinating, some procedural difficulties that you encounter from not having infrastructure e.g. illiteracy and not having communications, very touched that Pacific is in a new stage of NRM law, very frustrating there are a lot challenges but also very exciting a lot of interesting ideas being brought in e.g. precautionary principle, very fresh thinking, also noticed a lot of similarities (e.g. interagency collaboration different ideology how do you bring people together and move forward) land management issues we continue to struggle with it, we've moved beyond EIS process so we're fighting decision making process, the fight has moved on, very surprised how you can exercise your legal authorities. I com from a vibrant enforcement background and compliance program, very important, you can do all the compliance education you want but comes a time when you have to say you do this or else.

David – my highlight is you, I've been working in Pacific for many years since 90s when served apprenticeship with Mary, but coming back now the sophistication of the audience and discussion, the more lawyers and non lawyers your interest and attention, that's incredible, also your confidence, enforcement still a big issue you're at the first stage, thinking about the issues rather than just following western examples, corn beef salesman and environmental law salesman walking around , now you're making it your own, massive progress since 90s, now we're really seeing islands having the confidence to develop their own approaches. Specific provisions which I'm going to use when I'm teaching s.50(2) of Cooks legislation meaning word of enhancement what does that mean, precautionary principle in Samoa it gets boring because they trot out the same words, never seen any country to have confidence or temerity to take such a strong approach. Emerging case law in Cooks, Clark's SPREP website on legislation, I'll be sending him some stuff to put on there.

CASE STUDY: Papua New Guinea Environmental Impact Assessment Process, John Caine

Outlined the department and divisions, five pieces of legislation deal with conservation issue.

Environmental legislation (1) was three now, just Environment Act 2000.

The Act allows for 5 matters of national importance in decision making.

Activities below level 3 (waste etc) given permits, level 2 and 3 is mining higher level activities. Level 1 are activities currently happening but required to have a permit. Its small scale industries level 1.

S.51 of the Act gives provision for EIS process, notice of intention for preparatory works, director determines category 1,2,3, developer submits preliminary report, director accept report, developer completes EIS, EIS review: internal, public consultation, expertise review, academia, Director recommends EIS to environmental council (new concept) Minister approves in principle on council's advice. Once approval given, developer has to apply for a permit.

Environment Management Program – once developer has a permit, this is a tool with developer to manage the project, they write it up, we review it and make sure they capture all activities especially to do with permit conditions.

EMP Table of contents, as an example of what the document might look like, Developer involved in writing it up so he knows the rules himself, need to have a system.

Site inspection and monitoring – an environment monitoring officer is permanently based on project site to carry out monitoring and reporting on the project's environmental performance. This is for selective mines only.

Mining company required to submit quarterly reports, environment committee meetings on quarterly basis which is a kind of monitoring mechanism, landowners are represented on the committee if they see something that the mine is doing wrongly they can bring it to the committee.

Independent monitoring – to address alleged bias from the government, independent consultant may undertake environmental baseline surveys, environmental audits, environmental investigations into allegations of non compliance.

Authorised officers – the Act gives authorisation and powers.

Showed photos of river dredging necessary because Ok Tedi mine has caused a lot of sediment to go down the river. And photo on right is dredging material taken from river, 200metres across, photo taken from the air.

Rehabilitation photo a pit converted into a dam and all vegetation replanted. Progressive rehabilitation.

Way forward – DEC to become an authority (to gain greater independence), restructure in progress, developing a new policy on mine tailings.

Note that the flow diagram in the presentation suggests the approval is assumed, however projects can and are refused.

How do you tackle small and medium enterprises and their pollution?

Discussion on codes of practices, voluntary and mandatory.

Still have not developed guidelines for the EIA process.

In Australia there are Federal Government guidelines on what significant impact is, sectoral impacts (e.g. mining).

What level of guidelines do you want? Enforced via courts or informal?

Kiribati -Need guidelines for consistency and transparency so really support that.

David – is it possible under legislation to charge the facility for your enforcement and compliance activities e.g. when you do monitoring? A: They provide logistical support, flights, accommodation, transportation to site etc Many times landowners see this as the government siding with the developer. We call this regulatory capture, concern or perception that regulatory body is in bed with the developer.

Biodiversity Conservation and the Law in the Pacific Islands - Pepe Clarke, Legal Advisor IUCN

Laws in region have focussed on particular species, but one of the greatest threats is to habitat.

Refers to Solomon Islands Wild Birds Protection Act 1914, includes word 'take' this term has been expanded to include habitat destruction elsewhere in the world. Similar Act in Fiji, and Vanuatu (1962) which included enforcement by voluntary game wardens, PNG Fauna Protection and Control Act 1966 – doesn't cover plants, Marshall Islands Endangered Species Act 1975 – legislation includes context to the legislation (Nitijela is the legislature) unusual but makes it clear why the law exists. International trade (Fauna and Flora) Act 1979 PNG, applies to CITES species and all other species unless exempted from the Act similar Act in Vanuatu – Endangered and Protected Species Act 2002 Fiji - an example of vagueness S.23. The Department of Environment has read this clause as stating that having possession *for sale* is an offence, not just having possession. However, it is clear to Pepe that it is also just the act of having possession that should be an offence. This raises a question of how you can express things more clearly. E.g. by listing a set of offences rather than expressing them in a long wordy sentence.

Habitat protection

In Cooks EA makes specific reference to the habitat and is reinforced by regulations on individual islands. Raises issues for lawyers of “mens rea” have to determine if its knowledge or negligence.

Discussion about how to charge someone who does not know they've committed an offence if they are ignorant of endangered species?

Vanuatu ECA allows for conservation of community areas, not as top down.

Community is asking if they protect areas, what do they get out of it?

SPREP study to align protected areas with conservation and sustainable development, study done in 1990s. Need to think more creatively on how to get conservation areas on private or traditional land.

Discussion on payment for conservation. In Fiji has been some payment to local people for protecting an area from logging. Payments are ongoing, whereas logging is a once off and there is the perception that there is more money (particularly short term) from logging.

Nature Conservancy program – offers for sale the development value of land to people willing to promise not to develop that land, farmers can continue to farm the land sustainably. In Australia the Nature Conservancy has actually bought sections of land to conserve, the land is held in private hands and may include a house but the owners have to promise not to develop and a caveat is put on the land so that it will always be conserved even if it changes hands.

Pepe – discussed a number of examples in Fiji where landowners are getting payment to preserve the land e.g. Rivers Fiji and Sovi Basin. (include slides in cd of presentations)

PNG – TNC trying to apply the same model by the US (as mentioned by Jessica earlier). It wont work in PNG as landowners are impatient and you cant sell the land, can only lease it to the government cannot lease it from landowners unless you are a landowner yourself. So we develop community based laws that protect areas, with a landowners approach TNC and TNC assist them. NGO's provide medical facilities, aid post, small meals, and assist them in creating market for their products. So trying to develop local environment protection laws. The other areas NGOs work in is conservation covenant, success in one area for 20 years. They refused logging in the courts have developed at a smaller scale but have sustained their forest. In another area they have offered scholarships in the area for training to become nurses and teachers. NGOs provide scholarships while waiting for government to declare those areas conservation areas. It is very difficult in PNG because 97% of land is owned by communities. Whatever agreements you make, the kids may comeback after school and if they were not part of the negotiations to the agreement they may dispute the contract and won't honour it. For this reason the government is trying to make this law.

Climate change – in PNG its difficult to talk to them in their language, they get excited about the money, so we try to talk to them about conservation first but not about economic development because their expectations are raised and can risk the conservation.

EIA – even if you protect individuals and parts of habitats it doesn't address issue outside conservation areas, you need to manage at a landscape scale, land use planning is essential but EIA can provide an important role.

CASE STUDY: Vietnam, Bernard O'Callaghan IUCN Programme Coordinator

Biodiversity law in Vietnam

Vietnam wanted it to clarify national laws:

Protected Area System – doesn't work well

Access and Benefit Sharing

Other local and national issues

Very few countries have legislation that enact the CBD convention

Law was endorsed last week and should come into operation early next year.

UNDP and US Aid provided resources to help develop the law.

There was a process of consultation with the government and international workshop held last year.

Vietnamese Population 118million people, PNG is 50% bigger than Vietnam.

Looked at incorporating poverty alleviation into the legislation, and other specialist areas.

Provisions that have been incorporated into the legislation

- Management of protected areas – fisheries working with environment and forestry for integrated system
- Exploitation and utilisation of natural ecosystems outside protected areas e.g. forest wetland
- Protection of wild animals and plants

Photo of Javan rhinoceros (now extinct)

- Developing a priority list of protected species
- Trade issues
- Conservation and storage of genetic resources (don't believe this got through into the law)

(Ex-situ means in zoos, in-situ means in protected areas)

- Benefit sharing from use of genetic resources – means if traditional knowledge can go to business than funds can go to local people (not sure if this got into the Act) eg if a plant ointment is useful for treating a skin condition and is sold to the Body Shop.
- Management of genetically modified organisms and their products - concern about these issues e.g. piranha like fish being introduced for aquaculture purposes
- State management on biodiversity

Milestones and plan for completion and submitting to bio laws – approved in November 08

Summary

Law approved and signed, however many articles were dropped.

Vietnam follows French system, very high level law but not a lot of detail, details come out later in sub-degrees later to support the law. Lot more work to do.

It was a good learning opportunity for government.

Pepe – language approach in Vietnam? The law is in Vietnamese, and Vietnamese one is the only one that has status, but English one is available.

Red book how do you get it? - specific guidelines for the Redbook to be done and very defined categories of what is an endangered species it is a separate to CITES it is not binding, no requirement, it's a voluntary list designed to highlight endangered species. Not done by IUCN, but by your own country's experts. CITES is species threatened by trade, REDlist is all endangered species.

Discussion of native animals that are destructive to the environment or to humans.

Consultation included international experts, was actually far too many experts and stakeholders.

\$70,000 budget from IUCN, government had own money to develop legislation.

...

LEGISLATIVE DRAFTING HANDBOOK (Samoa) - Josephine Stowers-Fiu

Key features:

Done in conjunction with Parliament, first of its kind in Pacific and should be a tremendous tool in the environment field as to how to formulate drafts of legislation and other types of tools.

One week training after launch two months ago.

Key features:

Some of the laws drafted based on models from other jurisdictions and disregarded other traditional matters.

Page 8: Flow chart:

First step Ministry instructs the drafter, drafter prepares draft bill, ministry approves draft bill and conducts consultation, drafter incorporates changes and improves bill, Ministry approves and takes it to Cabinet for approval. Other steps involved during the process. If it goes to Cabinet and cabinet approves it it goes to Parliament, Clerk is responsible for translating the bill from English to Samoan, if there is an inconsistency in interpretation the English language version prevails. Three Parliamentary readings, goes to Select Committee, approved after third reading becomes an Act and goes to Head of State for assent. If Cabinet does not approve the bill it goes back to Ministry for further changes etc.

Must be an appropriate person of Ministry to be a coordinator of the project (of formulating a draft Bill).

Consultant must have a proper workstation in the office for the duration of the project.

Identify all stakeholders and give them an idea of the scope of the project.

Guidelines include getting contract for the consultant prepared.

Need to liaise with the Ministry of Finance, particularly when donors are helping to develop the Bill.

Page 19: refers to different laws that need to be considered and the background of the subject matter. If to do with landowner must get background to cultural structures.

Drafters from all over the world come into Samoa to draft our laws and it is very important for any person drafting environmental law to understand how the system works in that particular area.

Important that drafter has all updated legislation.

Paul shared Cook Islands Legislative Process – there is a similar drafting process to that outlined in Samoan handbook.

Insight into the Practical Challenges of Drafting Environmental Regulations - Nick Barnes, Munro Leys

Nick was hired to draft the Environmental Management Act 2005 (Fiji). His firm responded to an advert in the paper, and consequently won the tender process.

It is based largely on NZ Land Resources Act and other places

It is a good piece of legislation but doesn't always match what happens on the ground. For example, EIA must be completed within 30 days, which is unrealistic. So via regulations he tried to give the process more time. Stretched out screening process so that as much information as possible was included in this stage, so that by the time the EIA process begins you already have a lot of information.

One of the problems with the drafting process was that the Department of Environment didn't know what it wanted, it had no basic policies to implement into legislation. So Munro Leys developed that policy and took it to the Department as the first step in the consultation process, then to public after that. Another problem, was the lack of resources in the Department, staff leaving etc. Lack of resources and lack of any clear policy direction were the two biggest challenges.

Nick felt that the drafting was driving the policy and that is not how it should be done, you should know your policy before you draft the legislation. However, Fiji wanted the legislation done quickly.

There was a limited budget, so limited the consultation to two stakeholder consultations, minimal one-on-one face to face consultation.

The Department didn't understand the consultation process, it believed they had to accommodate everyone's point of view and this is unreasonable. If Drafters believe in certain provisions they don't have to change them for the sake of stakeholders who are protecting their own interests and not necessarily those of the environment.

The regulations may need to be amended once the department realises the kinks that are in there and because it is brand new no one really understands how it is going to work.

Greater clarity at the outset of what was required would have made the job easier.

Is there a timeframe that the environment department has to respond to the application? A: Yes has to deal with it within 30 days. Q: What happens if they don't? A: You tell me!

Drafting timeframes into legislation, if you have stakeholders pushing for this, need to clearly define in legislation what happens if department doesn't make a decision within that timeframe. Generally it is considered a refusal of the

application. Timeframes are very problematic for environmental legislation, needs to be defined clearly.

Kiribati – In our provisional act that had a timeframe of 15 days, it's a challenge for us to meet this deadline, it is not practical.

Pepe – observation on timeframes, use can be challenging for agencies but important part of industry acceptance, if there are no timeframes or the processing of applications takes longer than it should there will be increasing resistance from industry to the process and eventually calls to have the process and legislation watered down. So you need to strike a balance.

DAY FIVE

Legal Principles for Legislative Drafting – Daiana Buresova, Pacific Islands Forum Secretariat

Forum secretariat not responsible for environmental law, but will touch on technical aspects of legislative drafting.

Good preparation is vital and continually going over drafts and getting feedback is important.

Policy formulation and consultation with stakeholders:

- A law reform commission (in Fiji mandated by statute, Cooks have passed a bill to have a Law Commission same role as a law reform commission). Very useful vehicle for formulating policies for complex legislation. For example, Family Law Act was required to go to the Commission because they had funds to undertake comprehensive consultation, community levels, NGOs and a cross section of views. Works on premise that it must be initiated by Government.
- A sponsoring government agency. Most Pacific Island environmental legislation has come in since 2000. A lot of the legislation was initiated by government agencies and then consultants drafted it. Consultants often don't understand the issues on the ground and do things in isolation. Very pleased to see the Samoan Legislative Drafting Handbook.
- A special body that may be tasked by the Government of the day to investigate a controversial issue of public interest. For example, the spate of buses that have caught on fire, an awful accident in Singatoka where a number of people lost their lives. So sometimes government of the day may investigate loopholes in the law, solutions like improving registering process for buses to control standards of buses on the road. (Pepe example National Environment Council of Fiji endorsed the establishment of a technical advisory committee on protected areas

and part of terms of reference is the need for protected areas in Fiji and the scope and content of that legislation. It is an advisory body to the NEC.)

- Lobbyists and civil organisations
- Paul mentioned that an individual actually drafted a law that is about to be passed by Parliament in Cooks.
- Now we are seeing non lawyers writing laws because its cut and paste, a member of parliament with an agenda will push it through. My issue is that these laws are not scrutinised by the process.
- Daiana - this is why we have a checks and balance process, laws need to go thru cabinet before parliament so there is a filtering process
- Eric Kwa when it is initiated by someone else it doesn't go through this process
- Private bills aren't necessarily getting through, but are used to initiate debate.
- David – it is certainly case in Australia that Private Members Bills don't get through
- Daiana it differs from jurisdiction to jurisdiction, we don't permit private people bills in Fiji.
- Apart from the legislative agenda the process can be dictated by a number of terms: urgency and nature of legislative proposal; the capacity of the people mandated to formulate policy and the subsequent financial implications. Very important to scrutinise your policy, how will you make your law work etc. Sometimes to solve a problem you don't need a new law, or to amend a law, but you need to set up the right procedures to ensure the current law works. There is a misconception out there that law will solve all the ills of the world. That is so not true. You need to make the law work, need stakeholders on side and government on side to make it work.

Preparation of Drafting instructions

- drafting instructions can be in a number of forms: background research paper, a draft bill with an explanatory note (need to scrutinise the provisions of a draft bill and make sure it is relevant to your country, do you need to revise your existing structures or can you use them as they are), background research paper.
- what is wrong with current law, why isn't it working, can we improve the process supporting the law, what is the cost factor for implementing the bill?

What is the current problem what is the current law, are there shortcomings with the law, what is the experience in overseas jurisdictions? Looking overseas is useful but don't necessarily import

everything they do because we don't have the people, time or money. But can take bits of overseas law and tailor it for your own use.

Principles of statutory interpretation

What is the purpose of statutory interpretation?

Cook Islands – an example of an unsuitable bill adopted from overseas is the Disaster Management Bill that was taken from Victoria Australia. It called for all sorts of committees we didn't have the people to fill the committees, we ended up sacking the consultant and slashing the bill back to the basics.

David – this comes back to the basic idea that draftspeople aren't meant to make policy.

Daiana - Often the difficulty is working with government agencies who don't have the capacity, so we are asked for the policy and we tell them we don't have background in that area, we say it is not our intention to develop the policy you need to give us drafting instructions. Bigger jurisdictions its very clear, smaller jurisdictions it is not, we don't have the people. Government Ministries have lost sight of what their role is.

Trinison – Also a problem on the other side lawyers should do some awareness raising in government agencies about how the process works.

Daiana – agree, there is need for education.

David – there is an assumption that this is legislation and lawyers develop legislation. That shouldn't be happening if there are resources. Its the environment units that need to develop the policy.

Paul – depends on Ministry too, some equipped to develop their own policies.

David – In Australia there are no specific jobs for drafters, policy makers draft the law.

Daiana – it is crucial to make cost effective laws, so they don't sit on the shelf

When the bill goes to cabinet there is a requirement that they consider the economic benefits, but it is not a significant consideration.

In Cooks before it goes to Cabinet it has to be signed off by key Ministries and can be refused at this stage.

Samoa – that's why I mentioned yesterday that it is important to work closely with Ministry of Finance because aid is used to develop the legislation.

Back to Principles

Fundamental tools for drafters are interpretation act and constitution.

Principle canons on legislative construction

When looking at a provision look at it in its entirety take a holistic view

Scientific context – e.g. gases act, they left gas without definition as scientific people will be using it

Motor vehicle – includes, motorcycle and moto-truck these are separate classes of motor vehicles

Constitutional requirements

Supreme law of the land and how laws are created

Reaffirms three branches, executive, legislature and judiciary

Sets out procedures for making a law.

Bill of rights chapter – bills drafted need to use this as a yardstick to make sure its appropriate and within the law

Legislative requirements

Preparation

Planning – your bills

Next year scholarships offered for legislative drafting course that Douveri runs at USP.

Drafting and refining drafts

Plain language drafting – move to draft more plainly

Points to bear in mind

Always draft in the active voice

Remove the superfluous, grammar is crucial, don't beat around the bush get to the point

Keep in mind interpretation act, constitution and other written law

EXERCISE

Fire services Bill – rearrange clauses into a logical order based on.

Part 1 – Preliminary

Part 2 – Establishment of Fire Service

Part 3 – Powers of Fire Service

Part 4 – Investigations and enquiries

Part 5 – Offences

Part 6 – Miscellaneous

Particular discussion on the process for the Minister's power to make regulations, must ensure that the regulations go through Cabinet as a checking mechanism.

Pepe – seems to be a trend that drafters develop a basic act and leave the detail and specific procedures set out in the regulations. Why?

Daiana – Yes, if you set all procedure in the Act there is little room for manouvre and can be restrictive

David – Aust legislation is becoming more and more detailed because of the courts and people go to court a lot.

Daiana – but also because you have a number of institutions in place, we don't, so the need to be prescriptive is not necessary

David – can see court cases down the line so maybe drafters will have to become more careful with drafting, but not sure at this stage that you need that. Courts in Pacific are not engaged in environmental matters yet.

Daiana - I prefer the NZ way of drafting, not as prescriptive and they have captured the way of plain language drafting very well. Throughout the world NZ is one of the best and I commend you to read some of it it is excellent. If you put through too much procedure in the Act you have to go through parliament to change it, but with regulations you can change it, but there is a flaw with that as there isn't the checks if you do it through the regulations and there is the risk of litigation. Need to balance this.

Natural Resource Management: Legislations, Economic Instruments and Effectiveness - Dr Padmar Narsey Lal, Senior Advisor in Environmental Governance, IUCN

EBI – Economic Based Instruments

Reasons for using economic instruments:

* NRM objective: change peoples behaviour to produce desired outcomes.

* Based on assumption that people will only change behaviour if it benefits them

NRM based incentives instead of command and control instruments – carrot rather than stick

More effective than the stick approach

- relying on what motivates individuals
- less administrative costs
- less monitoring and compliance costs

Efficient all costs and benefits are internalised

Traditional instruments – command and control legislative, issues with C&C (prescriptive, onus on government)

EBI or incentive based instruments

Common types: pollution tax (pay for damage, pay for full cost of activity) , performance bond (deposit e.g. an ecotourism resort needs pontoons so they pay performance bond of \$5m if something happens enough for partial rehabilitation, never enough to cover cost of damage), deposit – refund (in Suva no deposit refund, e.g. refund on bottles to encourage recycling say 5cent per bottle)

User fees (if you benefit from using a resource you pay for it e.g. entry fee to national park but what are you paying for?), payment of PES - nature provides us with good services e.g. protection against cyclones, mangroves protect against storm surges, catchment services of capturing water, most of us don't pay for these services so PES how can you protect your environment by making people who benefit from the service pay for it (re-compensation for lost ES if you cause damage you pay for it)

Creation of property rights and outcome through cap and trade

All this based on assumption you have a market. CC talking about creating a new market, go on internet and see who is willing to sell carbon.

Want to use market mechanisms to deliver positive environmental outcomes.

Licence fees - can be admin or EBI

Resource rents/tax – e.g. forestry pay tax, tax or economic instrument depends on structure

Garbage collection and disposal fees – pay for service a clean environment

What is difference between an economic instrument and a tax? Tax – per unit of output e.g. per unit of pollution, in traditional sense is a revenue raising measure, but can also reduce a bad behaviour if set at a higher level, however if you don't set at a high enough level pollution continues and revenue is raised

Economic instrument – an instrument, can be a tax, but is used not to raise money but to bring about positive change to environment

Resource rent

Key principles

Fair returns to resource owners :

- market based rent

Public's rights to resource rent (when state owns the resource)

Royalty /resource tax

Market price – someone producing good and someone willing to buy it, could be monopoly not a fair price

Market based rent – lots of suppliers and lots want it, fair market rent, balanced (not a monopoly)

Compensation for losses

Polluter pays: pollution tax; re-compensation for reclamation

Beneficiary pays: park entry fees, PES

Challenges:

Buyers and sellers known and get together

Know the rightful owner of the resource to trade; landowner is known issue with customary land? Who is rightful owner that you should talk to today/tomorrow? E.g. Vanuatu, Solomans, PNG, chiefs make deals but someone comes in afterwards and demands a fee. If you don't know who rightful owner is market based instrument won't work.

Property rights is clear: ownership or custodianship, use rights, use and disposal rights.

Property to be traded is clear – ITQs , ITEs, pollution emission rights – CERs. E.g. in Australia water entitlements that can be traded, or a fishing quota that can be sold to another person (started talking about using this in Pacific).

Clarify owners – create and assign ownership

Customary ownership, decision management rights

Equitable benefit sharing arrangements amongst the members

Problems when poorly defined

NLTA in Fiji, ALTA and rent sharing and conflict

Vanuatu – recent land summit – locking out, rent sharing and conflicts

Marine resource tenure – Fiji

Mangrove reclamation and compensation

E.g. Mangroves – ownership poorly defined, do traditional Fijians own coastal resources including mangroves? Or is it owned by state? In fisheries legislation custodianship is recognised, need permission to fish. Mangrove reclamation encouraged by government, compensation not adequate for native landowners

Returns to resource owners – market rent

How to determine market rent? Need to replicate market mechanisms for administrative process or it won't work

If land historically used for e.g. tourism, you can determine how much it is worth, so landowner gets his/her return; or you can outright negotiate

When markets don't exist have to come up with some mechanism for how to determine the value of the land

How do you apply this to an ecosystem? E.g. Water. Ecosystem service (Costa Rica) landowners asked not to farm in catchment (pollution resulted) so landowners negotiated with water supply agency. They said we want this much money (compensate for loss of farming), are you willing to pay \$10,000 to stop me from farming? Negotiate the foregone earning or opportunity cost.

Payment of ecosystem services, what are you paying for and who do you pay?

Theoretically all ecosystem services if externality is to be internalised

Scientific knowledge what and how; relationship between charge and the service

Needs sellers of services and buyers

We didn't know about carbon sequestration 10 years ago, now we know our forests are worth more, also medicinal purpose.

Another example mangroves, previously considered firewood value, but not of protection from storms or the nursery for fishes.

Legal perspective need to have a better understanding of a system as a whole, or work with scientists to make sure you have information.

Will payment be sufficient to offset the foregone use value: how to determine the economic value of ecosystem services: valuation and opportunity costs

Who gets the payment? Who is willing to buy who is willing to sell, how is payment distributed?

PES

Need a good knowledge base, scientific and relationship between charge and the service

Need sellers of services and buyers

Lease cost adminv systems build on existing arrangements

Economic valuation, different approaches valuation, opposite cost (easiest to work out but be mindful of fact over time this could change so value could increase)

Lots of speculators in market making lots of money, and landowners not making benefit of this. Need to be aware of market place and create a fair return to landowners.

Compensation: foregone earnings

Mangrove reclamation

Which ecological services

Value of recompense

Depends of the property rights and powers to enforce

Fixed amount easy to levy and recover

Tax - Per unit amount you need to be able to monitor to get right amount of money so you need a system in place

Still need a legislative framework in which the market operates so that there is something to fall back on if it doesn't work.

When designing need to be mindful of what you're designing it for and what is the existing system and how does it work do you need a new system etc

Mississippi delta soy farmers: Paid to not farm – how much will you pay them? Small payments made, not enough to make them stop farming, carbon trade added some money, duck hunters paid them more, added up enough to stop farming

Do we also need to change our lifestyle? Sustainable development should be a way of life a philosophy so that we can carry on. Everyone has a responsibility of care to our mother earth. Not just economic ideology.

Holistic understanding of system as a whole, nature of humans, economy and duty of care and embracing Sustainable development philosophy

Traditional Knowledge and Relationship with Legal Frameworks - Douveri Henao, Pacific Islands Forum Secretariat

We are perhaps the first nation in the world to embark on this, it is historical and international organisations are looking at us.

Knowledge Chart

Knowledge: something that occurs between a human being's ears,

Traditional usage – modulated certain practices for conservation, medicinal hearing they used their knowledge in a traditional context

Commercialisation trade – markets and products, knowledge sold e.g. laptops sold around the world, knowledge as a transaction device, knowledge applied in different facets

International trade: selling and buying of goods, services and intellectual property. Tangible goods and intangible services, enables a trade. Intellectual property is not a good or service but your knowledge. E.g. laptop useless without a windows software program to use it.

WTO has a rules based system governing the multilateral trading system

These are in the area of trade of goods GATT, trade in services general agreement on trade in services and trade related aspects on intellectual proeprty rights TRIPS

The objective is to promote trade between members in a rules based system so that nationals may access markets based on key principles of Most Favoured Nation and National Treatment.

Need a level of stability and predictability, and remove discrimination of countries.

IPR – Intellectual Property Rights, need to be facilitated in a legal system, must protect the economic right that IP advocates for.

Knowledge as a product of a transaction in trade

Copyright - creativity (e.g. artistic works) publishing aspects of creativity

Industrial property - high end of areas of knowledge base, look at patterns such as IP that developed the microchip. Level of rights different and higher. Patents, trademarks are key features in IP

Knowledge manifests itself in goods and services and increases price of goods and services.

Licensing arrangements –everytime you buy a product with a IP aspect you pay a licensing fee on the knowledge to the owner of the knowledge. E.g. everytime music is played publicly, the facility playing the music must pay a copyright fee to the musician playing the music or who wrote the music.

Recognition of custom law –

Traditional knowledge –

Use of knowledge in indigenous settings:

Medicinal

Socio-economic areas

Environmental areas

Ornamental, artistic, entertainment

Security

Traditional Knowledge and IPR in international trade

The nature of the multilateral trading system advocates for transactions of goods, services and IPR

Traditional Knowledge must then be seen in light of these three groupings

Traditional Knowledge in goods; Traditional Knowledge in services;
Traditional Knowledge in IPR;

Qualifying factor which is not only legal in nature, but also commercial in nature

Legal nature will only come into light if there is an economic benefit to it

Benefits can be monetary or non-monetary

Showed three photos:

Example: a cure for tuberculosis after identifying a produce that cured a cough, this knowledge could only be transferred if the food on the fire was consumed by the fire.

Owner of the knowledge in this case was the woman (her lineage), the two men were collectors, the woman made the solution

Village only gave knowledge because the scientist in the team had lineage to the woman in the tribe and she exposed the knowledge.

Traditional Knowledge and law is the combining of two different worlds into one strand.

Challenges

Differing views on ownership and recognition, whose knowledge in the tribe is it, one person or the tribe or a family?

Differing views on enforcement – to protect tribe, lineage, university and scientist that refine knowledge?

Need to marry custom law into a legal system, but what should legal system look like?

What is access benefit sharing of genetic resources, traditional knowledge and scientific knowledge?

Three aspects of access:

Physical knowledge

Scientific knowledge

Traditional knowledge

Physical/scientific knowledge – may be owned by a scientist in the event he dives and finds a sponge and analyses it and no one else knew about the sponge or what its ingredients could result in.

Capacity building –

Key features of ABS under international law

Law of the sea convention – marine scientific research must continue; consent

International treaty plant genetic resources for food and agriculture – looks at multilateral access (e.g. these crops for everyone because holds 80% of food security for the world)

Benefits sharing provisions identified in the standard material transfer agreement SMTA.

Genetic resources =

Coral colonies

Forging a relationship in ABS

Africa is running dry of its resources, Caribbean doesn't have anything, we identified that we have a lot of resources and could use this as a major incentive of economic growth. In Europe the leaders decided against reaching an agreement because they did not accept the level of risk when the Pacific? PNG did not have legal systems to protect those resources.

How are benefits going to be shared in country?

Developed a schedule if an ABS emerged, international agreement would show how that procedure would look like.

PNG – forced researchers to collaborate with local researchers and get a deal for local people, e.g. scholarship for tertiary education

What legislation are people using to control bio-prospectors?

Annex 5 of CITES to allow home country to populate ? , threw everything in PNG in annex 5, to protect biodiversity from international trade. Procedures in annex 5 must have transfer agreement to export plant or animal out.

Not all countries have CITES

Other tools could use border controls legislation

But these are bandaid approaches need specific legislation to deal with Traditional Knowledge and protection of it.

Debate must be in benefit aspect sharing of it, in the collaboration.

Model laws have been developed by SPREP and SPC will use these as first phase of assisting countries and you can adjust them. Palau has just put it through their congress, may not have consulted.

PNG also derived a lot of components of SPREP law.

Sea Bed Mining - Dr Eric Kwa, University of Papua New Guinea

Not promoting the company, but this is a good awareness raising issue about Nautilus what it has been doing in PNG.

Nautilus mining – first deep sea bed mining company in the world, and PNG first country that has allowed it.

Presentation is included in the CD.

Hydrothermal vents – are where cooled off material coming off volcano in the sea, the cooled off material includes gold and other minerals and materials.

The company argues environmental impacts are minimal

Found basically along the fault lines.

In PNG Nautilus has 18 mining exploration licences

Currently doing sampling, have applied for an EIA and are undergoing this process now, have recently submitted an EIA report, hope next year to be in production.

A surface vessel sends down a machine with a hand like mechanism to pick up samples.

Will take material onboard a ship and process it on land, probably at Rabau (?).

Pepe – most legislation does not include the sea bed, PNG has it in their act

Eric – when they applied a committee looked at science, and a biodiversity group looked at conservation side of it. The Mining Act defines land as including the sea, so Mining Department took control of the process, environment and science committee sits in mining dept, department issued permit, we looked at Nautilus proposal and realised they would collect biological samples deep in the ocean, according to CITES Act the Department is supposed to issue permits to take samples and take it to US and UK for assessment, our committee held department down on samples, and pinned down Nautilus on sampling wouldn't give go ahead until this done, looked around for example of Material Transfer agreement. Government interested in samples because they may not have seen the species before. Company did

not want Minister to sign, (in PNG head of state has power to make regulations) they said it has to be head of state they were afraid that the government would break the agreement. Dispute over dispute resolution mechanism, PNG made them agree to the in-country mechanisms but still had to have head of state sign the agreement. PNG didn't want to use UN dispute resolution system because it is too expensive for country to afford. Still awaiting signoff it is in Attorney Generals office, but company has started work and implementing agreement. EIS must also be made available to the university.

Community argues that environmental impact, includes territorial waters, ez and cz. Nautilus drawn boundaries two metres from the reef because customary owners would have claimed ownership of the reef and would have had to include them in the discussions. Mining areas are away from the reef. What about small islands? Nautilus now talking to those small islands, but rest of mainland people were complaining about participation because they thought they had a right to be involved in the process. But Nautilus excluded reef owners. Now major argument environmental impacts, the local people say when you pluck off the chimney (hydrothermal vent) what are the consequences on the environment? Scientists say top layer of water is warm, bottom cool and densities different, the question is at what level does the ship sends liquid waste back into the sea and is it at the right temperature for that level of water? Scientists say you have to discharge water back at certain level where it won't cause a disturbance and it could also be warmer water and this will affect ecosystem and the water will be murky water. Report may end up going to international review.

[Desalinisation of waste water?]

Fishing industry now concerned because they have a right to fish in the area. Government didn't see that as an issue when they issued the licence. Also fish must be from clean water for contracts.

Government can withdraw licences!

PNG gave a mining permit to explore to an Australian company for mining exploration on the Kokoda Track, the Australian Government complained, the company had spent \$2m doing exploration, Australian government said we will give you \$15m for conservation and as a world heritage are – PNG said ok and revoked the mining licence.

Q: If they have an exploration permit – do they necessarily get a licence? A: That is the practice yes.

Clarification – permit exploration does not require an EIS.

Key questions for companies that may require sea bed mining, does your current environment impact legislation and mining legislation include the sea bed? Or do you have mining legislation?

EIS problems are mandatory timelines, 30 days may be sufficient to deal with a new Mcdonalds but not for a new activity like sea bed mining.

Suspect Nautilus is double dipping, looking for minerals and biological chemical products from marine life. Similar thing happened in US found an oil or something, from similar ecosystem. PNG was aware of this and made sure scientists were on hand and that they must share all information and must be notified before they transfer the material overseas to another country. Also asked for young PNG to go and study with them and get Masters and keep an eye on what they are using the information for.

Three mining companies in Cooks doing public meetings and meeting with government. Committee set up and world bank funding to set up deep sea bed mining framework, but long way off to PNG, (PNG also says its long way off, don't have policy just using mining act). Cooks don't have any legislation dealing with deep sea mining.

Q: Why objecting to deep sea bed mining? A: Lack of participation of local communities because it does cover large area of water so will impact in some way, but government says it is in open sea. I'm more worried about the tuna and ecosystems we have no other data. NGOs set up a network and communicating with partners overseas and are feeding back the information back to PNG. NGOs are well informed and have models that show impact.

Climate Change and the Law - Pepe Clarke, Legal Advisor IUCN

Pacific Island framework for climate change does include reference to role of law but doesn't deal with it specifically

Priorities

- Improve the effectiveness of existing laws and policies environmental protection, assessment and planning laws
- Establishment of legal and institutional arrangements for accessing existing and emerging international mechanisms
- Developing new laws policies and institutions which effectively respond to the scale and uncertainty of climate change impacts
- Promoting the integration of community level adaptation planning and action with national law and policy

Need to look at new approaches for environmental management that look at climate change

How do we change rules over time to respond to new or developing impacts of climate change?

Also displacement of people, equity, land tenure and management of conflict

SPREP have recommended strongly that communities be at the heart of climate change adaptation in the Pacific.

If there are going to be radical changes to our environment what are the adaptation responses we need achieve?

Interesting work being done in US by environment institute, important innovative work but application to pacific context is limited. Here in room we have leading environmental lawyers in the room so this is, important for discussion next time we meet.

Out of our discussion this week that when you return you consider some things we have covered in consultation with your colleagues and prepare a list of priorities for developing and implementing environmental legislation in your country.

Email to pepe.clarke@iucn.org by Friday 12 December.

Will also share this list through email list, it is important for US Embassy and IUCN to identify needs and areas of collaboration.