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UNIVERSITY**

UNU-IAS

Institute of Advanced Studies



**Access & Benefit Sharing,
Traditional Knowledge &
Customary Law Workshop
Cairns, Australia**

21-24 November 2005

Executive Summary

The Pacific Island Workshop on Access & Benefit Sharing, Traditional Knowledge and Customary Law convened in Cairns, Australia, Tradewinds Hotel from 21-24th November, 2005 was sponsored by the Christensen Fund. This workshop was co-organized by the United Nations University Institute of Advanced Studies (UNU-IAS) and the Pacific Regional Environment Programme (SPREP). There were thirty-nine (39) participants ranging from island representatives to observers and staff from UNU-IAS and SPREP.

The key objectives of the workshop were to review the Pacific Islands Global Environment Facility Medium Sized project Proposal on Capacity Building for Access to Genetic Resources and Benefit Sharing, to discuss the role of customary law (CL) and traditional knowledge (TK) in resource management and access to genetic resources and benefit sharing (ABS) in the Pacific.

The workshop ran for three days in a session format with small working groups discussing various issues. The sessions were: ABS, Traditional Biological Knowledge, Customary Law and Environmental Management and the Island Biodiversity Programme of Work (IBPOW) and COP8.

The main outputs of the workshop were:

1. Revision and support of the GEF project Proposal for the Pacific Islands;
2. Terms of reference for a study on Customary Law;
3. A meeting declaration on the issues discussed;
4. Nominations and support for island representatives to attend the Working Group on Article 8j in Granada Spain, January 2005.

Table of Contents

Introduction

Workshop Activities

- Workshop opening
- Election of Chair and Adoption of Agenda
- Overview and Expected Outputs
- Session 1 on Access to Genetic Resources and Benefit Sharing (ABS)
- Introduction to the GEF Proposal
- Small Group Discussion on GEF Proposal
- Day 2: Reporting from small groups on the GEF Proposal
- Session II: Introduction to Traditional Biological Knowledge
- Small groups discussions on traditional knowledge, the model law and CBD's Article 8j WG meeting
- Session 3 on Customary Law, Statutory Law and the Environment
- Summary of regional workshops by the international marine project activities centre
- Small groups discussions on customary law and its role in TK governance
- Session 3 on Island Biodiversity Programme of Work and COP8
- Review of the GEF Proposal revision
- Workshop summary and close

ANNEX 1: AGENDA

ANNEX 2: CLOSING STATEMENT

ANNEX 3: STATEMENT OF EXPENSES

Introduction

The Pacific Region represents one of the most biologically and culturally diverse areas of the planet. The island nations of the region are located within the largest marine ecosystem in the world - the Pacific Ocean. This vast and complex marine system contains a significant amount of the world's cultural and biological diversity, much of which is largely undocumented. For example, there are reported to be over six thousand different languages spoken in Papua New Guinea. Similarly, much of the terrestrial biological diversity of the region is endemic island biodiversity and consequently extremely vulnerable.

This cultural and biological diversity is under threat. A series of factors – including economic growth, population increase, changing social networks, and the impacts of globalization, climate change, unsustainable fishing, and tourism – are leading to a substantial decline in levels of this diversity.

At the same time the Pacific is the region of the world where traditional (or customary) management of natural resources remain most important and this constitutes a powerful tool for involving communities in resource management. Many Pacific island communities have developed management practices based on detailed knowledge of the biology of the species involved and which promote the sustainability of biological resources.

Many government regulations in the Pacific, however, apply management concepts and models that have been developed in other contexts or as general guidelines by international processes. These often do not take proper account of customary practices or traditional knowledge – even though proper investigation may reveal a high degree of congruence between the local customary systems and such models.

As a consequence, much of the knowledge associated with these traditional practices is rapidly disappearing. This in turn leads to an accelerating rate of loss of the biological diversity itself. One powerful mechanism for retaining this knowledge is to develop and reinforce the links between traditional knowledge and the resource management regimes being developed in response to relevant international obligations. For example, within the region eighty percent of land areas and a large proportion of marine areas are the object of traditional systems of management, based on traditional knowledge and tested systems of customary law and practice. However, such resource management systems are in decline. In practice, other decision-making processes and/or national laws increasingly override customary law, thereby undermining community resource management. This deterioration in customary practices is a key driver of biodiversity loss in the region.

There are socio-economic implications to such biodiversity loss. The populations of Pacific Island Countries (PICs) rely heavily on biological resources for their economic, social and cultural wellbeing. This includes the use of natural resources for food, shelter and medicinal purposes further demonstrating dependence upon the natural environment. The culture of all island societies is inextricably linked to the diversity of living species which characterize the different island environments. The depletion of genetic variety particularly in native food plant species as these are replaced with fewer varieties of high yield crops is another major concern. Changing aspirations and expectations of Pacific communities are

leading to national economies becoming increasingly dualistic, with the co-existence of monetary and subsistence economies.

Poor economic performance, fairly rapid population growth and urban drift, rising expectations, and growing inequalities, have contributed to poverty becoming a significant and growing problem in some countries. The Pacific region has an extremely low Human Development Index: an average value of 0.597 for PICs, compared to 0.935 for North America or 0.928 for OECD countries. Increasing poverty has put pressure on traditional mechanisms that have been used to support individuals and families in need and to maintain social cohesion.

The provisions of the Convention on Biological Diversity (CBD) on access to genetic resources and benefit sharing (ABS) and on traditional knowledge (TK) are particularly important to PICs as they offer the possibility of a win-win situation – conserving biological diversity and traditional knowledge and creating opportunities for deriving economic benefits from each country's array of biological resources.

All the countries and territories of the region have legislation in place for the protection of their environment and biodiversity, as well as laws governing forestry, land use and protected areas. In addition, and to varying degrees, countries have also enacted ABS/TK measures. In general though, they still lack efficient institutional and legal arrangements at the national level to protect the environment, ensure sustainable development and promote equitable use of genetic resources and TK.

Environmental legislation in the region has evolved from a complex mix of varying, and often relatively recent, colonial administrations and strong social and cultural values and customs. As noted above, despite their different individual histories and forms of government, Pacific countries share a common tradition of community involvement at the local, national and regional levels and a strong governance base rooted in traditional political systems. The deficiency in much environmental legislation stems from this conflict between a tradition of local customary authority and attempts by government to impose western-style legal frameworks, which tend to centralize authority at the national level.

One result of this conflict is that, even where national laws governing natural resource management do exist on paper, their enforcement at the local level remains weak. Many legislative frameworks are also hampered by lack of information upon which to base decisions, of linkages with other relevant areas of governance, of know-how and the resources needed to ensure adequate implementation. Generally PICs have insufficient resources to monitor the performance of development and environmental management or to police development to ensure compliance with the law.

In the absence of systematic frameworks of national laws and policies to regulate access to genetic resources and the exchange of genetic resources between regional research institutes and those outside the region, ABS procedures vary considerably. Access to and exports of resources are governed by a variety of procedures, with some scientific institutions using Material Transfer Agreements to address benefit sharing issues. For the majority of scientific institutions, however, ABS issues and the potential for securing

national and community rights and benefits are unknown. As a result in many cases genetic resources leave the region without any ABS procedure or agreement, leading to the loss of potential benefits and thus to the foreclosing of national development options.

Given the small size of each PIC, the essentially similar nature of the ABS capacity building needs in each, and the existence of regional networks and institutions that have identified ABS as a key component of implementation of the CBD and capacity building as a regional priority, a regional approach to capacity building is clearly appropriate.

The United Nations University as part of its medium-term programme of collaboration with regional organizations to build capacity to incorporate traditional knowledge and customary law in developing long-term policies and practices for the sustainable management of the Pacific region's natural resources, has already convened two capacity building exercises in the Pacific. The first was for countries of the Melanesian Spearhead Group. It was held at the International Marine Project Activities Centre (IMPAC), Townsville, Australia from 29 March to 02 April 2003 with support of The Christensen Fund. The second workshop was for Micronesian countries. It was hosted by the Government of Palau, UNU-IAS and SPREP and was held from 25-27 May 2004 with funding for this workshop provided by UNEP.

This third workshop involving participants from Pacific Island Countries (PIC) and observers from the region and Australia sought to promote dialogue between senior law and a senior environment officers from each country; experts in customary law and resource management; representatives of indigenous peoples and community organizations; SPREP and/or SOPAC legal officers; representatives of the GEF, United Nations University Institute of Advanced Studies, The Christensen Fund, and the local Cairns Community. The objectives of the workshop included revision of the GEF Medium Sized Project Proposal for the Pacific Islands on Access and Benefit Sharing (ABS), discussion of the role of customary law and traditional knowledge in resource management, discussion of the Island Biodiversity Programme of Work (IBPOW) and the Working Group CBD Article 8j.



Photo 1: Workshop participants, Cairns Australia



Photo 2: Participants in workshop

Workshop Activities

1. Workshop opening

The workshop opened with remarks by the Mayor of Cairns, Mr. Kevin Byrne who encouraged the delegates to pursue good governance in their respective countries. Opening statements were presented by the co-organizers UNU-IAS Senior Research Fellow, Mr. Sam Johnston and SPREP Environmental Legal Adviser, Mr. Clark Peteru.

2. Election of Chair and Adoption of Agenda

Participants nominated Mr. Tepa Suaesi, Principal Terrestrial Conservation Officer from Samoa as the Meeting Chair. The agenda was then adopted by the participants (see Annex 1: Meeting Agenda)

3. Overview and Expected Outputs

The delegates outlined their expectations for the workshop. These expectations and concerns were as follows:

- The meeting should recognize that Traditional Knowledge (TK) is a very sensitive and important issue for most Pacific countries;
- The meeting should recognize that trade and culture are closely related to the workshop issues;
- Several participants are new to the issues thus the meeting should provide clarification and raise awareness;
- The role of women should be acknowledged throughout the meeting and the emerging processes;
- The meeting should recognize that in some countries, sharing of traditional knowledge is not done thus regional strategies for collation and protection may be difficult.
- However participants would like information on TK sharing strategies;
- The meeting should provide clarification on patents and how this will impact TK protection;
- Any recommendations forwarded by the meeting to other bodies should be first circulated to countries.

4. Session 1 on Access to Genetic Resources and Benefit Sharing (ABS)

Clark Peteru of SPREP and Luigi Guarino Plant Genetic Resources Adviser Secretariat of the Pacific Community (SPC) presented on Access and Benefit Sharing in the Pacific Region. Luigi Guarino's presentation was entitled "*The International Treaty on Plant Genetic Resources for Food and Agriculture*". He examined the background to negotiations; the objectives and scope of the Treaty; the key elements; status of ratification in the Pacific; the next steps; and the standard Material Transfer Agreement (SMTA).

Brendan Tobin of UNU-IAS presented on "*International ABS Governance*". He looked at the Convention on Biological Diversity, ABS and the Bonn Guidelines; differences of interpretation from industrialized countries to biodiversity rich countries; the elements of International Regime; and the ABS Capacity Building Action Plan.

The Chair decided to focus on the GEF Proposal for discussion in the working groups as most of the participants were unfamiliar with the CBD's ABS Working Group. The participants who were involved in the process noted the need for 'training of island

negotiators' from the Pacific and more collaboration in preparing positions for the different international environmental negotiations.

5. Introduction to the GEF Proposal

Sam Johnston (Senior Research Fellow, UNU-IAS) presented the Pacific Medium Sized Project Proposal. He focused on: outlining the draft project activities; where the project was in development and what was required to advance the project. Most of the representatives were not fully aware of the project however Samoa and Fiji were quite familiar with the project and had already provided letters of support for the project. The document presented had been through one round of country reviews in February 2005. The changes suggested by the countries from this time had been incorporated in the document presented by Mr. Johnston.

6. Small group discussion on GEF Proposal

Participants formed three working groups and sought to:

1. Identify the priority issues to be addressed by the GEF Proposal for a Pacific ABS Medium Sized Project;
2. Process: How the project should be implemented.

7. Day 2: Reporting from small groups on the GEF Proposal

The small groups identified the following as priority issues for the GEF Proposal:

1. Awareness building and information dissemination at the country level;
2. Toolkits for engaging the communities;
3. Ownership of genetic resources should be considered in Pacific ABS Projects;
4. Clear modalities for any ABS capacity building activity especially regional and national activities;
5. There is majority country support for the project proposal;
6. Lack of national resources for implementation of ABS capacity building activities;
7. Emphasis on national and local capacity building;
8. Policy guidelines to update national legislation;
9. Institutional capacity building;
10. Training on good governance including good environmental governance;
11. Support for advocacy at the grassroots level;
12. Sustainability indicators;
13. Continuous coordination support from regional organizations.

The small groups identified the following processes for project implementation:

1. Regional collaboration inclusive of SPREP and University of South Pacific;
2. Ongoing training and national workshops;
3. Review of existing policies and regulations;
4. Raising of ABS profile with policy decision makers;
5. There should be a clear progression of activities;
6. Monitoring and evaluation of the project and countries progress in developing policy and legislation;
7. There should be a review of existing country legislation, related activities and model laws in the countries at the start of the project
8. Project should provide expert assistance to countries.

8. Session II: Introduction to Traditional Biological Knowledge

Clark Peteru made a brief presentation on place traditional knowledge has in Pacific culture. He indicated that traditional knowledge has always been an integral part of Pacific Islands culture however much of the knowledge is in danger of being lost. Aroha mead of 'Call of the Earth' discussed the work that has been ongoing on Article 8(j) of the CBD. She outlined the positions that small islands (SIDS) and indigenous peoples have taken in the negotiations. She also encouraged the Pacific Islands to send representatives to the Fourth Meeting of the Ad hoc Open-ended Inter-sessional Working Group on Article 8(j) and Related Provisions of the CBD 23 - 27 January 2006 in Granada, Spain.

Representatives from Papua New Guinea and Vanuatu gave general presentations on the importance of traditional knowledge in their countries.

Brendan Tobin then followed with a more detailed discussion of the WIPO process. He looked at TRIPS and Human Rights; the internal & external threats to TK; regional and national TK laws; and source country TK regulation with recognition that national protection may be insufficient. He noted that there are conflicts to be resolved in development of TK law. These include conflicts of perception on what is TK, differing legal visions, conflicts between rights and interests and reality and expectations. On international protection, Mr. Tobin noted the work done in WIPO IGC - draft policy objectives and principles for "a shared international perspective" on TK protection. He noted that issues being discussed in that fora includes: misappropriation, compensatory liability, disclosure of origin, and IPR clauses for contracts. The presenter also emphasized the importance of informed participation noting that rights over TK arise due to ancestral rights not from any act of government; the issue is one of cultural respect/understanding more than a technical legal challenge; participation ensures informed process and higher possibility of effective implementation; national participatory processes are required to inform positions for international negotiations; and there are multiple customary law systems and work is needed to identify the underlying principles.

The presentation concluded noting that issue is one of cultural respect/understanding more than a technical legal challenge; there is a need for an ample participatory process prior to adoption of a regime; imaginative use of intellectual property can support rights over TK but is not without problems; there is the need to revisit the concept of the public domain; equity should be redrawn to reflect a pluralistic vision of ethics; and a paradigm shift from protection to strengthening of TK systems of innovation is needed.

Clark Peteru discussed the Draft Pacific Model Law on for the Protection of Traditional Knowledge and Expressions of Culture approved by an SPC Working Group of Legal Experts in June 2002. A few participants were familiar with the draft and the presenter noted that all countries were aware of the draft. He noted that is for guidance of individual countries and as yet it has not been endorsed by all Pacific Islands.

9. Small groups discussions on traditional knowledge, the model law and CBD's Article 8j WG meeting.

The discussions of the small groups were guided by the following questions:

1. What levels of protection for traditional knowledge exist in your country at:
 - a) Village and local levels?

- b) National level?
2. Are there impediments/barriers in your country to enacting the Model Law? What are they?



Photo 2: Aroha Mead in discussion with a small group member on traditional knowledge

The output from the small groups is as follows:

Level of TK protection

1. All countries have customary law except FSM. FSM has a national inventory of plants;
2. At the national level Kiribati, Samoa and Vanuatu have several laws and bills
3. In some jurisdictions there are laws which could be adapted e.g. many land and natural resources laws in the Pacific can protect TK;
4. There is the Vanuatu Cultural Centre which regulates access and what can be taken out of the country; and the 2002 Environmental. Management Act;
5. Different levels of protection for different types of knowledge (common, sacred knowledge or food, medicines, clothing);
6. Best protection is awareness;
7. At the local level protection comes down to leadership from the church, family elders, community and district leaders;
8. At the national level there are cultural authorities.

Comments on the Model Law

1. Definitions are useful;

2. Article 7 may be problematic as it is contrary to customary law practices which are against writing down;
3. Some countries afraid it might adversely affect their relationship with WTO and trading partners;
4. There may be an inconsistency between CBD Art 16, TRIPS and Art. 3 of the Model Law;
5. Model Law with a 'supremacy clause' may require rephrasing;
6. The model law may be considered another *sui generis* system;
7. Fear of a harmonized approach;
8. Writing down customary law is not the answer;
9. Need an expanded explanatory memorandum.

Recommendations relating to 8j WG

1. Continue discussion of *sui generis* regimes as the only way to protect TK;
2. SPREP can prepare a briefing document for ABS WG on TK;
3. Countries are interested in attending Article 8j meeting: Kiribati, Nauru, Niue, Australia;
4. SPREP can facilitate a preliminary meeting of the Pacific before the Article 8j meeting;
5. A training of negotiators program would be useful.

10. Session 3 on Customary Law, Statutory Law and the Environment

Brendan Tobin made brief remarks on the work being done on customary law in Peru. He noted that interfaces between customary law and national law and policy and also with international law is needed. The often uncodified nature of customary law proves to be a challenge when trying to integrate it into national legislation. However, it was noted that customary law has played a significant role in natural resource management.

Clark Peteru also presented on customary law. He looked at Hierarchy of Laws which ranges from: Constitution, Statute law, Delegated legislation, Regulations, Village by-laws, Administrative order, Common law, Torts (nuisance, negligence, riparian rights, etc) and customary laws (fishing, hunting, littering). He also noted several questions which arise when discussing or applying customary law. They include: Who makes each law?; Is it recorded?; Can it be changed? It was noted that for natural resource management and allocation of property rights, conflicts sometimes arise between national policies and customary practices.

Yoli Tomtavala of the University of South Pacific Law School made the key presentation in this session on customary and statutory law. His presentation focused on Customary Laws in Pacific Island Countries & their Implications for the Access & Benefit Sharing Regime. The presentation was made according to the following outline:

1. Overview of Customary Laws in contemporary Pacific Island Countries
2. Legal Recognition of Customs as Law
3. Role of Traditional Authorities in Modern Legal Systems
4. Bioprospecting Provisions in National Laws
5. Issues & Themes for the Future.

The definition of customary law as viewed by the presenter is: Definition: 'Customary Laws' comprise of *usages, traditions, institutions, practices* or *values* of those who live in societies which we refer to as 'customary societies'. These shape the conduct of members, ensures order & continuity, etc. He noted that customary law has several components: *Usage* refers to the way something is used or done; *Tradition* means custom or belief that existed for along time; and *Institution* is defined as custom that is considered important or is a typical feature of a society because it has existed for a long time; *Practices* are what people do regularly; *Values* are principles or beliefs that people have which shape how they live their lives; and possibly *knowledge*, and *innovation*. Customary law also has the following features:

It is -

1. Unwritten
2. Informal, absence of mechanisms to confer legal status on particular acts
3. Spontaneous, most customs or practices change in response to changing circumstances
4. Conservative, most concepts of CL based on notions from the past (patriarchy)
5. Status-based
6. Own enforcement mechanisms, such as self-help, reciprocity, shaming & third party intervention (chiefs, etc).

The presenter noted that there are certain customary law concepts that are relevant to genetic resources and ABS. These include: Identity - birth determines 'belongingness' (status), rights & obligations in group & entitlement to resources of family or social group; and Family & Group Rights - an individual belongs to different levels of social strata: family, age-group, gender, village, clan, tribe, etc. For legal recognition of customs as law several options were proposed. These include:

1. **Replace** customs with new norms based on new values
2. **Reform** some parts of customs and leave others intact
3. **Conserve** the essence of certain customs
4. **Respect or recognise** the continuing autonomy of indigenous people.

On respect or recognition of customary law it was noted that the most recent Pacific Constitutions refer to customs or traditional values & institutions and affirm the desirability for their continued recognition. However in practice, laws facilitating these are few & the scope for recognition is limited in terms of subject matters and legal conditions.

There are two discernible approaches to legal recognition in terms of subject matters: a) Generic recognition b) Discrete subject matters. For generic recognition - where customs are recognised as a wider source of laws, two approaches are employed:

1. **Approach 1:** Constitutional recognition by reference, where customs or customary laws are recognised by Constitutions but leave the specific norms or contents to be provided by the customary systems - This approach followed in the Constitutions of PNG (Sch 2.1), Solomon Islands (Sch 3[2]), Vanuatu (s.95 [3]), FSM (art. V.1), Marshall Islands (art. X.1) and Cook Islands (s. 66A [3]).
2. **Approach 2:** Legislative recognition that in civil & criminal cases courts can recognise customs concerning a wide list of subject matters (PNG, Solomon Islands, Tuvalu & Kiribati) , Criminal cases (penalty, state of mind of a person, reasonableness of an act or an excuse). E.g. Laws of Kiribati Act, sch 1 cl 4:

ownership, possession or utilization of rights over native land or the produce of native land; hunting or gathering from native land; ownership by custom or rights in connection with any sea or lagoon area, inland waters or foreshore or reef, or in or on the seabed; ownership by custom of or rights to water; birth of the adoption of a person; rights of married persons or right of a member of a family to support by other members of that family; right to the custody or guardianship of infants, etc.

All of these customary issues are relevant to ABS and the fact that the courts are obliged to take them into account means that they exist in customary law.

1. **Discrete recognition** - statutes recognise customary laws for specific subject matters. Land: Customary land tenure systems (use, holding of and transfer of interests in customary land) are protected in virtually all Pacific Island states. Restrictions alienation of customary land and freehold tenure is abolished in some states. Specialised bodies are created to administer or to deal with disputes concerning them.
2. **Personal and Family Arrangements:** concerning marriage, divorce, adoption, succession to property, titles, etc. have been recognised in *toto* in some countries and only partially in others.
3. **Authority of Chiefs and Elders:** Some countries recognise chiefly and other traditional authorities for purposes of decision-making in affairs of state.
4. **Order and Dispute Settlement:** Community-based mechanisms for dispute settlement created in the nature of 'village', 'island' or 'local' courts in many countries.

These two approaches have implications for an ABS regime. It can be seen that constitutions or legislation in many PICs either generally recognize CL or discrete subjects thereof which relate to ABS (customary land, families, traditional authorities). However there are the problems of too many conditions for enforcement, and the legislation is too general and vague. The presenter noted that in fact the current laws are incapable of supporting the ABS regime envisaged under CBD and the Bonn Guidelines.

On the Role of Traditional Authorities in Dispute Settlement, the presenter noted the following: In customary societies, different types of authorities are recognized with roles for governance & dispute settlement in their communities (family heads, pastors, chiefs, etc). Legal systems of PICs treat these in three main ways: a) tolerate but control if necessary, b) re-constitute as part of the formal court structure, or c) recognize existence formally. It was noted that where 'developments' are likely to take place, disputes to resource rights proliferate. Within an ABS regime, often disputes can be about ownership of resources or entitlement to share in the benefits. Courts in many PICs are stretched to their limits so utilising customary systems may be the preferred approach.

On Bioprospecting Provisions in National Law it was noted that there is the Cook Islands *Environment Act 2003*, in which there is no express mention of bioprospecting but such reference can be issued as regulations under Act. There is also the Fiji Islands *Environment Management Act 2005*. Vanuatu has an *Environmental Management and Conservation Act 2002* - S. 2: "bioprospecting means any activity undertaken to harvest or exploit all or any of the following: a) samples of genetic resources; b) samples of any derivatives of genetic resources;"

The presenter identified the following issues for future consideration:

1. Indigenous & local populations in PICs have CLs relating to ABS;
2. These CLs not adequately catered for in current regimes on recognition of customs by formal laws;
3. Need for specific & clearer recognition of these by formal laws.;
4. These can be done by regulations or new laws.

11. Summary of regional workshops by the international marine project activities centre

Clive Wilkinson presented on his proposals on Traditional Law and the Environment for Countries and States of the Melanesian Spearhead Group. He noted that his project seeks to Demonstrate where traditional & customary management practices recognized in national laws; Increase community, government and NGO skills to identify traditional practices of conservation and exploitation and use them; Determine strategies to recognise traditional access to marine resources benefit sharing; Determine how to use research data in policy and law formulation; Design principles & draft traditional aspects into policy and law (all levels); and Develop collaborative projects for 'Melanesian' sub-region to build capacity to better manage their coastal resources. Fifteen case studies were conducted for PNG, Palau, Vanuatu, New Zealand, Australia, Fiji, New Caledonia, Timor Leste, Solomon Islands, and Samoa. Presently impact has developed several follow on proposals. These include:

1. Status of Traditional Knowledge, Laws and Customs of the Melanesian Sub-region Pertinent to Environmental Conservation and Management;
2. Key Melanesian Species and Ecosystems for Conservation;
3. Capacity Building and Education in Traditional Knowledge in Melanesia ;;
4. International Opportunities for Traditional Knowledge Activities in Melanesia;
5. Improving Environmental Governance in the Melanesian Sub-Region;
6. The Linkage Between Protected Areas and Traditional Knowledge;
7. A Centre for Traditional Knowledge and the Environment Research and Training; and
8. A Network for Greater Recognition of Traditional Knowledge and Laws in Coastal and Marine Conservation in Melanesia.

12. Small groups discussions on customary law and its role in TK governance

The small groups convened to discuss customary law and its role in TK governance and to suggest terms of reference for a regional study on customary law. The collective output of the groups is as follows:

Customary Law and its role in TK Governance

1. Establish a Council of Traditional Leaders and ToR regarding ABS/TK and assist them in contributing to regulations under relevant legislation;
2. Provide guidelines on how to deal with access questions;
3. There is uncertainty about whether Customary Law should be written down as a written code cannot capture all elements. In new Zealand an attempt was made which eventually focused on core values;

4. Desktop and field studies are needed on Customary Law as it is practiced and described;
5. Studies on the relationship between customary law and the common law are needed;
6. A study of how customary law relates to traditional knowledge (synergies and conflicts) is needed.

Terms of reference for a regional study of customary law:

1. Identify synergies and conflicts;
2. Use local consultancy teams of mixed expertise who understand how the Pacific systems work;
3. A thorough stakeholder analysis and consultation is needed;
4. Give early notification to stakeholders of their projected involvement in the process;
5. An in-depth process is needed;
6. The interface between international, national and customary law should be explored;
7. Study results should be circulated to several government departments in each country.

13. Session 3 on Island Biodiversity Programme of Work and COP8

This session involved a presentation and questions and answers by Kate Brown from the SPREP office. The presentation began with a brief history of the Island Biodiversity POW. CBD Open-Ended Inter-Sessional Meeting on MYPOW of the COP up to 2010, March 2003, identified island biodiversity as new in depth area. Conference of the Parties, Kuala Lumpur, February 2004 adopted Multi-Year Programme of Work (MYPOW) up to 2010. Island biodiversity is the new item for in depth consideration and Ad Hoc Technical Expert Group (AHTEG) was formed to prepare the POW. At Subsidiary Body on Scientific, Technical and Technological Advice - SBSTTA 10, February 2005, Bangkok, the Liaison Group revised the draft POW and adopted a draft POW as a recommendation to COP 8. On the question of why an IBPOW is needed the presenter noted that Island people rely on biodiversity, Islands' biodiversity is globally significant, Islands are most vulnerable, Islands are different from continents, Islands provide opportunities, and Cooperation is essential.

The presenter noted that the POW deals with island biodiversity in integrated way, it applies to all islands, it creates new political and ecological connections and partners and provides an opportunity to focus resources. The five goals of the programme of work are: a) Conservation of Island Biodiversity b) Sustainable Use of Island Biodiversity c) Address the Threats to Island Biodiversity d) Benefit-sharing and Maintenance of Island Genetic Resources e) Increasing Capacities and Financing for the Implementation of the Programme of Work on Island Biodiversity. It was proposed that countries and partners can contribute to the process by identifying glaring omissions, suggesting improvements, supporting its adoption at COP8, and participate in its implementation. The next step identified was a Regional preparatory meeting March 1st to 3rd, Nadi, Fiji.

On COP8 the presenter noted that there are several issues. These include: an increasing agenda complexity, and funding concerns for extra national participants. The region proposes a Practitioner dialogue through a 'Pacific island biodiversity champions' programme. At the High level Segment of COP it there is a proposal to Launch the 'Micronesian Challenge' co-sponsored by the Government of Palau.

The presenter raised several pacific Islands concerns on the GEF and the IBPOW. These included:

1. Concerns about the capacity of the GEF to fund the Programme of Work particularly the impact of the Resource Allocation Framework
2. No indication is given in the literature to date that there are mechanisms within the resource allocation framework to allow for a specific 'window' to be made available for the implementation of the forthcoming POW on Island Biodiversity.
3. Pacific Islands leaders should be encouraged to "facilitate international financing for sustainable development, biodiversity and environmental protection and climate change in the Pacific including through the Global Environment Fund; and
4. Guidance should be given to the GEF and development partners to fund the POW implementation (including the need for a dedicated window under the biodiversity portfolio with more flexible implementation guidelines).

14. Review of the GEF Proposal revision

Sam Johnston presented a revised list of activities for the GEF Proposal based on earlier comments of the participants. In open discussions participants noted that:

1. A work-plan is needed and a clearer progression of the steps leading to each output;
2. What would happen after the project and how can resources be identified;
3. A regional network would help keep the process going;
4. Each country needs a concrete output;
5. Assistance to disseminate information to local communities is needed; and
6. Clarification on who are beneficiaries of the project is needed.

15. Workshop summary and close

The Chair presented a draft meeting declaration which was commented on by the participants. The indicated several points for clarity which were subsequently addressed by the Chair and SPREP. The finalized statement (ANNEX 2) was then circulated post workshop to the participants.

ANNEX 1
Access & Benefit Sharing, Traditional Knowledge & Customary Law Workshop
Cairns, Australia, 21-24 November 2005

AGENDA

TIMES	TOPIC	SPEAKERS
Monday 21 November	ABS	
0830-900	Registration	
900-945	Workshop opening <ul style="list-style-type: none"> • Mayor of Cairns • Opening Statements: SPREP; UNU-IAS; The Christensen Fund 	Clark Peteru; Sam Johnston; Henrietta Marrie
945-1030	Morning Tea	
1030-1100	<ul style="list-style-type: none"> • Election of Chair • Adoption of Agenda • Overview and expected outputs • Introductions and delegates' views on main issues they wish to see discussed during the week 	Chair Clark Peteru Chair
1100-1300	SESSION 1: ABS <ul style="list-style-type: none"> • Introduction to ABS in the region • Introduction to the ABS Working Group process & issues for WG4 • Identification of issues for discussion 	Clark Peteru & Luigi Guarino Brendan Tobin Chair
1300-1430	Lunch	
1430-1445	Samoa	Tepa Suaesi
1445-1500	Introduction to the GEF Proposal	Sam Johnston
1500-1730	Small group discussion on Priority issues for the GEF Proposal	
1800	Reception	
Tuesday 22 November	TRADITIONAL BIOLOGICAL KNOWLEDGE	
0845-900	Recap	
900-930	Report back on <ul style="list-style-type: none"> • ABS WG issues and • Recommendation for the GEF Proposal 	
930-1030	<i>SESSION 2: Introduction to TBK</i> <ul style="list-style-type: none"> • Introduction to TK issues and work done on TK in the region 	Clark Peteru

	<ul style="list-style-type: none"> • Introduction to Article 8(j) WG and SCBD Questionnaire 	Aroha Mead
1030-1045	Morning Tea	
1045-1200	<ul style="list-style-type: none"> • PNG experience • Vanuatu experience • WIPO process • Introduction to Model Law • Identification of issues for discussion 	<p>Vele Ila'ava</p> <p>Ernest Bani</p> <p>Brendan Tobin</p> <p>Clark Peteru</p> <p>Chair</p>
1200 – 1300	Lunch	
1300-1515	<p><i>Small group discussions</i></p> <ul style="list-style-type: none"> • Local protection of TK • TBK Model Law • 8(j) Process 	
1515 –1530	Afternoon Tea	
1530-1700	<ul style="list-style-type: none"> • Report back by small groups and recommendations 	
Wednesday 23 November	Day 3 CUSTOMARY LAW & ENVIRONMENTAL MANAGEMENT	
0845-900	Recap	
900-1030	<p>SESSION 4: CUSTOMARY LAW, STATUTORY LAW AND THE ENVIRONMENT</p> <ul style="list-style-type: none"> • Introduction • Customary law v statutory law • Regional workshops • Identification of issues for discussion 	<p>Brendan Tobin, Clark Peteru</p> <p>Yoli Tomtavala</p> <p>Clive Wilkinson,</p>
1030-1100	Morning Tea	
1020-1200	<p>Small group discussions on</p> <ul style="list-style-type: none"> • Customary law and its role in TK governance • ToR for a regional study on customary law 	

	Report back and recommendations	
1200 – 1300	Lunch	
1300-1400	<i>SESSION 3: IBPOW & COP8</i> Input into IBPOW	Kate Brown
1515 –1530	Afternoon Tea	
1530-1700	Discussion of GEF Proposal	
Thursday 24 November	Day 4 CONCLUSION	
0830-1000	<i>Summary of workshop and confirmation of recommendations</i>	

ANNEX 2

Workshop on Access and Benefit Sharing, Traditional Knowledge and Customary Law, 21-24 November 2005, Cairns, Australia

CLOSING STATEMENT

From the 21-24 of November 2005, government and community representatives of Pacific Island countries and a number of observers met in Cairns for a Workshop on Access to Genetic Resources, Traditional Knowledge and Customary law, organized by the United Nations University, Institute of Advanced Studies (UNU-IAS), and the Pacific Regional Environmental Program (SPREP) in association with the Pacific Islands Forum Secretariat. The Meeting was organized with the support of The Christensen Fund, the Government of Australia, UNDP and UNEP.

The Meeting was organized to discuss issues relating to the development and implementation of national and regional Access and Benefit Sharing (ABS) law and policy, protection of Traditional Knowledge (TK) and the role of customary law in ABS and TK Governance. Working Group sessions were held to consider these issues in detail and prepare proposals for national, regional and international action to enhance the development of relevant measures on ABS and TK.

- The Meeting discussed in detail a GEF Proposal for a capacity building project, which was widely supported. Participants discussed the need to find an optimum balance between national, sub-regional and regional activities and while recognizing the value of strengthening regional institutions to support national processes stressed the importance of building the awareness and capacity of communities. The Working Groups stressed the need for increased awareness building at the national level on ABS and TK issues.
- The Meeting also considered a draft Model Law for protection of traditional ecological knowledge, developed and supported by SPREP by the Pacific Islands Forum Secretariat. The proposal was given wide support with a proviso that the development of any database of traditional knowledge should only hold information voluntarily submitted by the relevant custodians of traditional knowledge, and subject to strict conditions of confidentiality.
- The Working Groups highlighted the importance role of customary law and practice for securing appropriate and effective regulation of ABS and associated TK.
- The Islands Biodiversity Program of Work (IBPOW) developed in response to the call by COP7 of the CBD was presented by SPREP which is facilitating regional input. Activities under the IBPOW relating to ABS were highlighted and feedback requested from member countries. Participants noted the importance of ensuring the consistency between ABS activities under the IBPOW and any other regional ABS programme.

The Meeting encouraged supported the actions of UNU-IAS and SPREP in promoting regional capacity building initiatives and called for their continued and increased efforts to promote awareness building and participative processes for development of ABS and TK law and policy.

Participants also suggested expansion of participation to include Pacific Island territories and other island communities such as Rapa Nui (Easter Island) and West Papua (Irian Jaya).

In closing the participants stressed support for:

- the GEF ABS Proposal and called for its urgent submission to the Global Environmental Facility
- the Model Law on TK protection and its submission to the highest levels of regional and national decision-making;
- increased efforts at all levels to highlight the importance of customary law and practice for ABS and TK governance. In particular participants called for preparation of in-depth studies of traditional decision making authorities, customary law and practice and their relationship to national and international law and policy. Detailed terms of reference for such work were prepared by the Working Groups and are attached as an Annex.

The participants welcomed the opportunity to gather for this workshop and strongly supported increased work on ABS and TK issues with a particular call that such work include greater opportunities for national-level activities on these themes. They further encouraged involvement at upcoming Meetings of the ABS and 8(j) Working Groups as well as the WIPO Intergovernmental Committee.

ANNEX 3

STATEMENT OF EXPENSES

Grant Amount from the Christensen Fund: US\$ 75,000

Academic Officer: Sam Johnston

Dates: 11/21-24/ 2005

General Expenses Breakdown:	Amount (AUD)	Amount (USD)	Remarks (requirements, suggested vendors, etc)
Travel for participants	A\$55,353.13	\$41,650	Flight Centre
DSA for participants		\$28,148	
Travel & DSA for IAS staff members		\$8,172	
<i>Sub-total (Travel):</i>		<i>\$77,970</i>	
Coffee/tea/milk/sugar (coffee break)	A\$1,650	\$1,242	Tradewinds hotel
Vennue (meeting room only)	A\$1,060	\$798	Tradewinds hotel
Data Projector	A\$600	\$451	Tradewinds hotel
AV Hire (microphones)	A\$1,000	\$752	Tradewinds hotel
Flower	A\$50	\$38	Tradewinds hotel
Wireless LAN	A\$80	\$60	Tradewinds hotel
Photocopying	A\$120	\$90	Tradewinds hotel
Courier	A\$207	\$156	Tradewinds hotel
Courier		\$233	DHL
Reception	A\$2,710	\$2,007	SEVICHE
Money insurance		\$334	U.S.I.A.
Miscellaneous (stationery, copy, etc.)	A\$508	\$364	Various
<i>Sub-total (General):</i>		<i>\$6,524</i>	
TOTAL:		\$84,494	

Remarks, if any: \$: Australia dollar (AUD1.329/USD1.00)

Submitted by: Nobu Kawade

Date:

ANNEX 3
**Workshop on Access and Benefit Sharing, Traditional Knowledge
and Customary Law, 21-24 November 2005, Cairns, Australia**

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