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Review of the Waigani & Noumea Conventions

17 July 2019

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Abbreviations and Acronyms

Apia Convention	Convention on Conservation of Nature in the South Pacific
Basel Convention	Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal
COP	Conference of the Parties
Dumping Protocol	Protocol for the Prevention of Pollution of the South Pacific Region by Dumping
EIA	Environmental impact assessment
Emergencies Protocol	Protocol Concerning Co-operation in Combating Pollution Emergencies in the South Pacific Region
HNSP Protocol	Protocol on hazardous and noxious substances pollution, preparedness, response and cooperation in the Pacific Region
London Convention	Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter
Noumea Convention	Convention for the Protection of the Natural Resources and Environment of the South Pacific Region
Oil Pollution Protocol	Protocol on Oil Pollution preparedness, response and cooperation in the pacific region
POPs	Persistent Organic Pollutants
PRC	Pacific Regional Centre
Rotterdam Convention	Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade
SCPRC	Steering Committee of the Pacific Regional Centre
SPREP	Secretariat of the Pacific Regional Environment Programme
STAC	Scientific and Technical Advisory Committee
Stockholm Convention	Stockholm Convention on Persistent Organic Pollutants
UNEP	United Nations Environment Programme
Waigani Convention	Convention to Ban the Importation into Forum Island Countries of Hazardous and Radioactive Wastes and to Control the Transboundary Movement and the Management of Hazardous Wastes within the South Pacific Region

Table of Contents

Executive Summary	5
Recommendations	6
Introduction	8
Terms of reference	9
Methodology	10
Overview of the Waigani Convention	11
Overview of the Noumea Convention	16
Analysis	19
Bibliography	30

Executive Summary

This review was commissioned by Secretariat of the Pacific Regional Environment Programme (SPREP) to review both the Waigani and Noumea Conventions¹ based on the following terms:

- evaluate how the Waigani Convention is being implemented at all levels,
- whether its objectives are being met by the actions of the parties,
- the effectiveness of the Secretariat.²

The review is to provide recommendations on ways in which these elements of the Convention can be improved. A survey based on these terms was sent to the parties, partners and the Secretariat in early July 2019. At the time of writing (17 July 2019) no survey results had been returned. At this point, then, this review is primarily based on a desktop analysis, although interviews have been conducted with representatives from SPREP.

The primary finding of this review is one of potential unfulfilled.

Put another way, there is a solid body of work and raft of achievements regarding both Conventions from the Secretariat of the Pacific Regional Environment Programme (SPREP) and an unquantified body of work and unknown set of achievements from the parties. In this respect, there has been systemic under-reporting and a certain lethargy towards implementation either driven, or manifested, by a lack of commitment to fund both Conventions beyond the biennial Conference of the Parties. It is plainly arguable that the objectives of the Conventions are being met, just by the work of SPREP alone; however, the lack of engagement from the parties both skews and undermines this finding.

The good news is that none of this is fatal; in fact, it is argued that the right building blocks are in place. First, there seems to be more than a modicum of goodwill by the parties to the Conventions and those involved. Second, the continuation of a regional approach is appropriate and supported, giving flexibility and autonomy. Third, proper and effective implementation, including awareness raising and reporting, would not be prohibitively expensive. Work under both Conventions could, in fact, be promoted and enhanced by the engagement of a dedicated project officer. The funding of such a position is eminently within the capacity of the parties and this option is strongly recommended both as the simplest solution, and as a demonstration of the parties' commitment and bona fides. This review makes a set of further recommendations to improve the effectiveness of the Conventions that start from this point. They are ideas to prompt discussion, not recommendations to be simply endorsed; it is important that the parties drive the process.

¹ The full name of these Conventions are as follows:

- the Convention to Ban the Importation into Forum Island Countries of Hazardous and Radioactive Wastes and to Control the Transboundary Movement and the Management of Hazardous Wastes within the South Pacific Region (Waigani Convention), and
- the Convention for the Protection of the Natural Resources and Environment of the South Pacific Region (Noumea Convention).

² See Terms of Reference 4 (Objectives).

Recommendations

Resourcing and commitments

Recommendation 1:

That the parties enhance the quantum of their contribution (in accordance with the existing formulas used) as the simplest possible means of demonstrating their commitment to the Conventions and promoting the implementation of the Conventions.

Recommendation 2:

That, in the alternative to recommendation 1, the parties prepare a business case (based on the findings from this review) for enhanced funding from third party donors.

Recommendation 3:

That, in addition to recommendation 1, the parties prepare a business case (based on the findings from this review) for enhanced funding from third party donors which leverages off the parties' own enhanced commitment and contribution.

Project officer

Recommendation 4:

That the parties use the enhanced funds to engage a dedicated project officer to work with the parties on awareness raising, implementation and compliance, including the delivery of national reports and other reporting obligations under both Conventions.

Recommendation 5:

That the dedicated project officer be employed on a rotational basis between Conference of the Parties.

Recommendation 6:

That the dedicated project officer be drawn from PICTS.

Reporting

Recommendation 7:

That the parties award a (non-financial) prize at the Conference of the Parties to the best project/initiative under each Convention based on evidence provided in the written reports.

Recommendation 8:

That a simple one-page template be added to existing reporting frameworks so that parties can nominate their project/initiative.

Conference of the Parties

Recommendation 9:

That the parties return to a rotational system for the hosting of the Conference of the Parties as soon as possible.

Recommendation 10:

That the subject-matter of the Conference of the Parties be broadened to include on-site demonstration projects in the host nation under the auspices of the Conventions.

Recommendation 11:

That the agenda for the Conference of the Parties be structured to only include items requiring consideration and decisions (with all other items dealt with out of session).

Scope of the Conventions

Recommendation 12:

That the parties expand the scope of the Waigani Convention to incorporate pollution from plastics.

Recommendation 13:

That the parties consider whether there is the need to explicitly integrate pollution from plastics into the framework of the Noumea Convention.

Recommendation 14:

That both Conventions be amended to simplify the procedures relating to changing the Convention, and adopting Protocols and Annexes including by allowing entry into force of amendments to the Conventions and the adoption of Protocols by definitive signature or, in the alternative, by tacit acceptance.

Introduction

This Report was commissioned by SPREP to review both the Waigani and Noumea Conventions.³ Approval for the review was sought, and given, at the 9th meeting of the Conference of the Parties in Apia, Samoa on 15 September 2017. Specifically, the terms of the review are to:

- evaluate how the Waigani Convention is being implemented at all levels,
- whether its objectives are being met by the actions of the parties,
- the effectiveness of the Secretariat.⁴

The review is to provide recommendations on ways in which these elements of the Convention can be improved.

The review is structured as follows:

- Terms of reference
- Methodology
- Overview of the Waigani Convention
- Overview of the Noumea Convention
- Analysis, including ideas for reform

³ The full name of these Conventions are as follows:

- the Convention to Ban the Importation into Forum Island Countries of Hazardous and Radioactive Wastes and to Control the Transboundary Movement and the Management of Hazardous Wastes within the South Pacific Region (Waigani Convention), and
- the Convention for the Protection of the Natural Resources and Environment of the South Pacific Region (Noumea Convention).

⁴ See Terms of Reference 4 (Objectives).

Terms of reference

The scope of the work is as follows:

- 1) The scope of work covers the following tasks:
 - a. To work with the Noumea and Waigani Convention Parties and their Secretariats along with key stakeholders to define what effectiveness means in terms of its goals and objectives.
 - b. To prepare a detailed survey for the review of the Noumea and Waigani Conventions that will be the basis for determining the degree to which effectiveness has been met. The survey shall:
 - i. be as comprehensive as practicable considering the varying levels of capacity and implementation within Pacific island countries and territories that will take account of the following:
 - a. the various Pacific uniqueness in terms of capacity, geography, and resources with respect to economic, social, and environmental aspect in the implementation of the Conventions;
 - b. emerging environmental challenges and that place additional pressure on the Parties; and
 - c. best international practices in relation to regional seas; and
 - d. the provision of guidance notes for the Parties.
 - ii. provide sufficient detail to enable the Parties to the Conventions to evaluate the effectiveness of their respective Conventions.
 - c. To prepare a summary document of the survey describing the process, background, context, outcomes and recommendations including key issues or problems and the different responses and the reasons for the recommendations providing a score for each Convention in terms of effectiveness.

Methodology

As noted above, the scope of works envisages that the principal mechanism for the review is a survey.⁵ The survey was designed with two key considerations in mind. First, to solicit the greatest possible participation. In this regard, it is noted that the timeframe for finalising the project from the point of engagement to the delivery of a final report was short. Consequently, the timeframe for answering the survey was also brief. On these bases, the survey was kept relatively short with simple, yet reflective, questions. Second, the survey is “bottom-up”, asking participants how they define effectiveness; what evidence they have of effectiveness (or ineffectiveness); and any ideas they may have for improvements.

The survey comprised 30 questions across four parts as follows:

- Part 1: General
- Part 2: Waigani Convention
- Part 3: Noumea Convention
- Part 4: Conclusion

For both Conventions, questions were asked about whether the objectives were being met; the effectiveness of the implementation of the Conventions; and the Secretariat. Evidence was sought in relation to these views, as well as any ideas for improvement.

The survey contained a mix of qualitative and quantitative questions. In regards the latter, a small response rate is expected so valid statistical data may not be possible.

The survey was distributed to the Convention parties, Secretariat and partners on XXX.

At the time of writing (17 July 2019) no survey results had been returned.

The survey is attached as Annexure A.

⁵ See Terms of Reference 5) b. (Scope of Work).

Overview of the Waigani Convention



Photo: Courtesy of SPREP: Participants of the Ninth Meeting of the Conference of the Parties to the Waigani Convention, Apia, Samoa.

Objectives

The key objectives of the Waigani Convention are to:

- reduce or eliminate transboundary movement of hazardous and radioactive waste into and within the Pacific region;
- minimise the production of hazardous and toxic waste in the Pacific region;
- ensure that disposal of such waste is completed in an environmentally sound manner and as close to the source as possible; and
- assist Pacific island countries that are Parties to the Convention in the environmentally sound management of hazardous waste they generate.

Key provisions

Under the Waigani Convention, the parties commit to:

- take all appropriate measures to ban the import and export of hazardous waste to and from the Convention area;⁶
- prohibit dumping of hazardous wastes and radioactive wastes in the Convention Area;⁷

⁶ Waigani Convention, article 4(1).

- ensure that within the areas of their jurisdiction the generation of hazardous wastes is reduced;⁸
- ensure availability of adequate treatment and disposal facilities for the environmentally sound management of hazardous wastes in the Convention Area.⁹

The Waigani Convention is the Pacific region's implementation of the international hazardous waste control regime, being modelled on the Basel Convention. The Basel Convention contemplates the making of regional (and other) agreements¹⁰ and nine (9) such agreements have been made including in Africa, Central America, the Custom Union and the Commonwealth of Independent States.

The Waigani Convention is also strongly related to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and other matters, 1972 (London Convention).

Importantly, the Waigani Convention requires Parties to set up information, collection and dissemination mechanisms on hazardous wastes. This obligation is tied to, and would enable (if done), SPREP to fulfil its obligations under the Convention articles 9.6 (information sharing and coordination with the Secretariat of the Basel Convention) and 14 (its Secretariat functions generally).¹¹

Articles 16, 17 and 18 of the Waigani Convention set out the rules for amending the Convention, and adoption of Protocols and Annexes, respectively. Article 16 provides that all amendments to the Convention are subject to ratification (or equivalent) of 2/3 of the parties and will only enter into force after ¾ of the parties have deposited an instrument of ratification (and unanimity was not possible). Significant notice needs to be given of any changes. Article 17 is similar in its terms, although entry into force is to be set out in the Protocol itself. Article 18 deals with annexes, which are limited to scientific, technical and administrative matters. It also adopts many of the processes around amending the Convention itself, although entry into force of new annexes is achieved through a tacit acceptance process. This means that an annex (or amendment) will enter into force for all parties that have not lodged an objection after six months.

Scope

The Waigani Convention covers toxic, poisonous, explosive, corrosive, flammable, ecotoxic, infectious and radioactive wastes.¹²

⁷ Waigani Convention, article 4(2).

⁸ Waigani Convention, article 4.4.

⁹ Waigani Convention, article 4.5.

¹⁰ Basel Convention, article 11.1.

¹¹ Waigani Convention, article 7.3.

¹² Waigani Convention, article 2, Annex I.

Status

The Waigani Convention entered into force in 2001. It has been ratified by the following thirteen (13) countries:

- Australia
- Cook Islands
- Federated States of Micronesia
- Fiji
- Kiribati
- New Zealand
- Niue
- Papua New Guinea
- Samoa
- Solomon Islands
- Tonga
- Tuvalu
- Vanuatu.

Nauru and Palau have signed but not ratified whereas France, the Marshall Islands, United Kingdom and the United States of America are eligible to ratify the Convention but have not done so.

Conference of the Parties

The Conference of the Parties (COP) meets biennially, a decision made at its first meeting.¹³

The COP is obliged to Rules of Procedure including financial rules on the scale of contributions of the Parties to the budget.¹⁴

The COP also has a continuing duty to review and evaluate the implementation of the Convention including:

- promoting the harmonisation of legislation, policies, strategies and measures for minimising harm to human health and the environment;
- consider amendments to this Convention, and its annexes, taking into consideration available scientific, technical, economic and environmental information;
- examine and approve the budget prepared by the Secretariat;
- consider and undertake action that may be necessary to achieve the purposes of this Convention in the light of experience gained and developments elsewhere;
- consider and adopt protocols as necessary;
- establish and/or designate subsidiary bodies or agencies as necessary; and

¹³ Waigani Convention, article 13.1.

¹⁴ Waigani Convention, article 13.2.

- determine and adopt appropriate rules and procedures for accepting new Parties.¹⁵

Secretariat

The Waigani Convention establishes a Secretariat (article 14) and SPREP is given this role under article 14.3. The functions of the Secretariat are manifold:

- arrange and service the biennial meetings of the Parties
- prepare the budget of the Conference of the Parties
- prepare and transmit regular hazardous waste reports
- prepare and transmit information from meetings of subsidiary bodies and agencies under the Convention
- ensure coordination with the Secretariat of the Basel Convention and other relevant international and regional bodies
- communicate with the relevant authorities, focal points, intergovernmental and Non-Governmental Organisations established by the Convention
- compile and circulate information concerning approved sites and facilities available for the disposal of hazardous wastes and means of transport to these
- receive and convey to Parties information on sources of technical and scientific expertise, including consultants
- assist Parties in their identification of cases of illegal traffic
- circulate immediately to the Parties information it has received regarding illegal traffic
- cooperate with relevant countries, international organisations and agencies to provide expertise and equipment to assist in the event of an emergency

SPREP must also prepare an annual report on a range of matters related to the Convention (article 14.2). This includes information on:

- the export and import of transboundary movement of hazardous wastes (including quantities, categories, characteristics, disposal methods), disposals which did not go as intended; and reduction efforts)
- implementation measures adopted by Parties
- the effects on human health and the environment from the generation, transportation and disposal of hazardous wastes, including statistics
- accidents occurring during transboundary movements, treatment and disposal of hazardous wastes and on measures undertaken to deal with them
- environmentally sound treatment and disposal options operated by Parties
- measures undertaken by Parties for the development of cleaner production technologies.
- International Law Commission (2006) *Fragmentation of international law: difficulties arising from the diversification and expansion of international law.*

¹⁵ Waigani Convention, article 13.4.

Funding

Contributions from the Parties support the biennial Conference of the Parties. These have been made according to the following; 40% from Australia and New Zealand with all others contributing less than 2%. According to SPREP, the budget is around \$US100,000 to host the Conference of the Parties and related meetings (although there does not appear to be a line item for the COP in the budget).

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Overview of the Noumea Convention



Photo courtesy of SPREP: Participants of the Fourteenth Meeting of the Conference of the Parties to the Noumea Convention held in Apia, Samoa.

Objectives

The key objectives of the Noumea Convention, as part of the Regional Seas Programme, is to “address the accelerating degradation of the world’s oceans and coastal areas”. It seeks to do this through:

- preventing, reducing and controlling pollution from any source;
- ensuring sound environmental management and development of natural resources.

Key provisions

Under the Noumea Convention, the Parties commit to:

- endeavour to take all appropriate measures to prevent, reduce and control pollution from any source;
- ensure sound environmental management and development of natural resources, using the best practicable means at their disposal and in accordance with their capabilities.¹⁶

¹⁶ Noumea Convention, article 5.

The Noumea Convention reflects the general approach underpinning UNEP's Regional Seas Programme – a regional Convention, associated Protocols on specific problems and Actions Plans as a key implementation mechanism. The scope of the Convention deals with pollution from vessels, land- and airborne-based sources, sea-bed activities and mining; disposal and storage of wastes; testing of nuclear devices; co-operative emergency measures; biodiversity conservation and protected areas; EIA; and technical assistance and co-operation.

Articles 23, 24, 25 and 29 of the Noumea Convention establish the procedures for amendments to the Convention, and adoption of Protocols and Annexes. Amendments to the Convention or the adoption of Protocols can be sought by 2/3 of the parties and will enter into force with ¾ consent. Amendments to the Convention and Protocols are subject to ratification (or equivalent) by the parties. Annexes can be adopted by a ¾ majority, although parties may state a reservation to the Annex, or amendment.

Status

The Noumea Convention entered into force in 1990. It has been ratified by the following twelve (12) countries:

- Australia
- Cook Islands
- Federated States of Micronesia
- Fiji
- France
- Marshall Islands
- Nauru
- New Zealand
- Papua New Guinea
- Samoa
- Solomon Islands
- United States of America

Two additional Protocols – namely, the Dumping Protocol¹⁷ and the Emergencies Protocol¹⁸ – have been ratified by eleven (11) of these countries. Australia has only ratified the Emergencies Protocol.

As for the Dumping Protocol, an amendment has been proposed which is not yet in force.

As for the Emergencies Protocol, two new Protocols have been put forward on oil and hazardous and noxious substances which will supersede it once in force. These are the Protocol on Oil Pollution preparedness, response and cooperation in the Pacific region (Oil

¹⁷ Protocol for the Prevention of Pollution of the South Pacific Region by Dumping.

¹⁸ Protocol Concerning Co-operation in Combating Pollution Emergencies in the South Pacific Region.

Pollution protocol) and the Protocol on hazardous and noxious substances pollution, preparedness, response and cooperation in the Pacific region (HNSP Protocol).

Conference of the Parties

Secretariat

Until 1998, the previous Secretariat was the South Pacific Commission.¹⁹ SPREP was part of the Commission until it left in 1992, becoming an independent inter-governmental organisation with the signing of the Agreement establishing SPREP in 1993.

Under this Agreement, SPREP took on Secretariat functions for the Noumea Convention,²⁰ as well as any future Conventions for the protection of the environment²¹ (which would later encompass the Waigani Convention).

Funding

Contributions from the Parties support the biennial Conference of the Parties. These are made according to the following formula; 20% from Australia, France, NZ and USA. All others contribute 2.5%. The budget is around \$30,000 US to host the Conference of the Parties with contributions of around \$US14,000 in 2017-18 and \$US15,700 in 2018-19.

¹⁹ See Noumea Convention, article 2.

²⁰ Agreement establishing SPREP, article 7(2)(b).

²¹ Agreement establishing SPREP, article 7(2)(c).

Analysis

This review derives from a decision made at the 9th meeting of the Conference of the Parties in Apia, Samoa on 15 September 2017. Under the Waigani Convention, the COP has a continuing duty to review and evaluate its. This duty includes considering and undertaking action that may be necessary to achieve the purposes of this Convention in the light of experience gained and developments elsewhere.²² A similar obligation can be found under the Noumea Convention.²³ Although the two Conventions are quite different, it makes sense for the purposes of this review to deal with them together.

At the time of drafting, no surveys had been received in relation to the review. The following analysis is therefore necessarily brief. It should also be noted that the analysis is based on the period since 2010 – that is, as derived from the Reports since 11th Meeting of the Noumea COP and the 6th Meeting of the Waigani COP in August 2012.²⁴

A desktop analysis reveals that there have been significant outputs achieved under both the Noumea and Waigani Conventions since 2010.

Achievements

In terms of the Noumea Convention, this work has been across the subject-matter and scope of the Convention – namely, pollution from vessels, land-based sources, sea-bed activities and mining; disposal and storage of wastes; biodiversity conservation and protected areas, EIA, and technical assistance and co-operation.²⁵ Importantly also, this work has had focus with particular emphasis on pollution from vessels and protected areas initiatives since 2010, as well as vital work on EIA and the emerging area of deep sea mining. The achievements under the Noumea Convention are set out in Annexure B.

Consistent with its knowledge-sharing rationale, several publications have also been produced pursuant to the Noumea Convention contributing to an understanding of the issues faced by the region but also often serving as templates and models for other Pacific countries. These include EIA Guidelines for Coastal Tourism Developments, a literature review of marine debris pollution; State of the Environment Reporting in Samoa; information about the Protected Areas Portal; and a gap analysis for Reception Port facilities in Apia, Noumea, Port Moresby and Suva. Annexure C contains examples of these publications.

Key achievements of the Waigani Convention include close co-operation between the Waigani Convention and its parent, the Basel Convention; strengthened relationships with

²² See Waigani Convention, article 13 generally and 13.4(d) specifically.

²³ See Noumea Convention, article 22.1.

²⁴ The SPREP website contains reports from Waigani COP 6, 7, 8 and 9 as well as Noumea COP 11, 12, 13 and 14. No other reports have been made available.

²⁵ See articles 6, 7, 8, 10, 11, 13, 14, 16, 17 and 18.

the Asia-Pacific Basel Regional Centre at Tsinghua University in China; a closer alignment between Waigani-Basel regional programme and the SPREP Programme on Waste and Pollution; and training initiatives such as the Pacific Regional Training Workshop on Joint Implementation of the Waigani, Basel, Rotterdam and Stockholm Conventions in 2011 and on the Minamata Convention in 2015.

In recent years, other significant initiatives include the innovative GEFPAS project on the management of used oil in relation to the Stockholm Convention and the PacWaste²⁶ project to improve hazardous waste management in the Pacific in the areas of asbestos, healthcare waste and e-waste.

Unfortunately, as set out in detail below, the lack of national annual reporting by the parties under both the Waigani and Noumea Conventions means that local initiatives are not highlighted or even accounted for. This means that nations cannot showcase any of their innovative and successful ideas undertaken within the framework of the Conventions nor can these ideas be used, rolled out or adapted in other areas of the Pacific.

One foundation question is whether these achievements can be attributed to the regional approach signified by the Waigani and Noumea Conventions. Flowing directly from this, is whether they could have been achieved anyway, or to better effect, in another way, such as under the auspices of the Basel Convention.²⁷ A similar fate was suffered by the Convention on Conservation of Nature in the South Pacific (Apia Convention) which was suspended in 2006 as it was not deemed to be adding value to more general obligations under the Convention on Biodiversity Conservation.

A regional approach

There are clear arguments for and against a regional approach.

Pros

Flexibility

A regional approach allows for flexibility and nuance, promoting a more targeted response to environmental problems and their resolution.²⁸ This targeted approach echoes sentiments expressed in the Brundtland Report in 1983 and is a direct reflection of the rationale underlying the Regional Seas Programme established by UNEP in 1974.

In this regard, it can be noted that the Waigani Convention does differ in important respects from its parent, the Basel Convention – namely, it covers radioactive wastes and its

²⁶ See <https://www.sprep.org/gefpaspops/about-gefpas-pops>

²⁷ Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal.

²⁸ Bodansky D (2010) *The Art and Craft of International Environmental Law*, Harvard University Press at location 2404 of 4844; Sands P, Peel J, Fabra A and MacKenzie R *Principles of International Environmental Law* at pp 82 and 124.

territorial coverage includes each Party's Exclusive Economic Zone (out to 200 nautical miles from shore).²⁹

There is clear support for the Waigani Convention with it being seen by David Sheppard as “a very important legally binding mechanism for tackling one of the biggest issues that our countries face in the Pacific.”³⁰ The Sustainable Development Goals Partnership Platform also notes that:

There are many reasons why the Waigani Convention is important for the region:

- it provides an effective protective mechanism to stop waste traders from making the Pacific an international waste dump
- it will prevent ships from using the Pacific as a highway for hazardous waste
- it will create a regional mechanism to facilitate the cleanup of hazardous and radioactive wastes in the region.

The major benefit of the Convention is the establishment of a system to prevent hazardous and radioactive waste entering or being dumped in the region. A significant but less tangible direct benefit is the reduced risk from a hazardous or nuclear waste disaster. Parties are able to feel more secure in the knowledge that the risk of a shipping disaster is far less likely.”³¹

Progressiveness

Sands and Peel have noted that regional approaches have facilitated some of the more progressive developments in international environmental law.³² In combination with an impressive track record, these arguments have a compelling flavor:

The Pacific region has been particularly active in developing international treaty rules prohibiting the presence of radioactive materials and the use of driftnet fishing practices in the region, both of which may now reflect rules of customary law for that region.³³

Autonomy

²⁹ The Basel Convention extends only to the outer boundary of each Party's territorial sea (out to 12 nautical miles from shore).

³⁰ See <https://www.sprep.org/news/waigani-convention-hazardous-waste-management-opens-today>

³¹ <https://sustainabledevelopment.un.org/partnership/?p=7456>.

³² Sands P, Peel J, Fabra A and MacKenzie R (2018) Principles of International Environmental Law, 4th edition at p 940.

³³ Sands P, Peel J, Fabra A and MacKenzie R (2018) Principles of International Environmental Law, 4th edition at p 124.

The Regional Seas programmes – by definition – give more flexibility than a one-size-fits-all approach. Moreover, UNEP co-ordinates 18 Regional Seas programmes globally. Of these, 7 are administered by UNEP, 4 are independent programmes and 7 are non-UNEP administered programmes. The Regional Seas Programme in the Pacific is administered by SPREP (a non-UNEP administered programme). This affords an additional degree of autonomy, although it also means less resourcing from UNEP (see below).

Cons

Fragmentation

Flexible and targeted responses may create their own problems, contributing to fragmentation,³⁴ duplication,³⁵ conflict and even ‘treaty congestion’ through:

a multiplicity of ‘separate negotiating fora, separate secretariats and funding mechanisms, overlapping provisions and inconsistencies between agreements, and severe demands on local capacity to participate in negotiations, meetings of parties and associated activities’.³⁶

Capacity and resourcing

At the regional level, there is frequently a need for services. In this regard, there is little doubt about the need for the services provided by the Secretariat. In fact, a review of COP and related reports since 2010 shows requests for the following:

- simplifying the reporting forms in order to make reporting easier for Parties (Samoa)
- support with reporting (Tuvalu and Kiribati)
- advice on the benefits of being Party to the convention (representative for Polynesia)
- information about funding opportunities and timeframes (representative of Melanesia)
- assistance for safely handling and removing asbestos, support in finalizing its Draft National Chemical Management Plan, and assistance with finalising its draft used oil regulations (Fiji)
- support in developing its Draft National Chemical Management Plan (Tuvalu, Niue and Kiribati)

³⁴ See International Law Commission (2006) *Fragmentation of international law: difficulties arising from the diversification and expansion of international law*; Shaw MN (2017) *International Law*, 8th edition at p 47; Bodansky D (2010) *The Art and Craft of International Environmental Law*, Harvard University Press at location 2404 of 4844.

³⁵ Bodansky D (2010) *The Art and Craft of International Environmental Law*, Harvard University Press at location 2404 of 4844.

³⁶ Sands P, Peel J, Fabra A and MacKenzie R (2018) *Principles of International Environmental Law*, 4th edition at p 935.

- assistance with the development of a Pollution Act and relevant legislation that allows Parties to meet their obligations under the Waigani Convention (Solomon Islands, Papua New Guinea and Tuvalu)
- support for national training on hazardous waste and the Waigani Convention and support for seeking funding opportunities and how to access them (Tuvalu, Niue and Tonga)
- assistance with Waigani Convention training and securing funding to help implement its NIP (Solomon Islands)
- regional or national training on MEAs (all parties)
- assistance on legislation review and development regarding chemicals and hazardous waste (Kiribati)
- technical assistance to prepare regulations on hazardous substances (PNG)
- technical assistance to verify audit findings, and move forward with management (Vanuatu, Samoa and Fiji)
- assistance in helping countries to develop relevant policies (Tuvalu)
- assistance in the area of e-waste, Waigani Convention implementation and broadening its National Waste Management Strategy to incorporate hazardous waste and wastewater (Federated States of Micronesia)
- assistance in State of the Environment Reporting (Samoa)
- support for integrating the Waigani Business Plan into national plans (Tuvalu).

However, of course, regional parties often suffer from limited capacity. This has been noted by commentators,³⁷ but is also a recurring theme in the reports from the COP and related bodies such as the Scientific and Technical Advisory Committee (STAC) and the Steering Committee of the Pacific Regional Centre (SCPRC). Some examples suffice:

The Secretariat in presenting the update informed the Parties that it could not implement much of the work given the difficulty it had in securing resources from donors. The Secretariat could provide technical assistance, but the Parties need to take advantage of bilateral and global funding opportunities available to them. The Meeting was invited to note the reports of the Secretariat and to provide feedback where necessary.³⁸

Responding to a query from Fiji on the status of work on management of used oil in the Pacific, the Secretariat advised that little has progressed due to the challenge of lack of personnel.³⁹

The Chair noted that it is clear there is a need for more resources and action on this activity.⁴⁰

³⁷ Sands P, Peel J, Fabra A and MacKenzie R (2018) *Principles of International Environmental Law*, 4th edition at p 151.

³⁸ Report of work done since STAC3, 2010 at paragraph 16.

³⁹ Report of work done since COP5, 2010 at paragraph 20.

⁴⁰ Report of work done since COP5, 2010 at paragraph 23.

As the Director General of SPREP, Mr Kosi Latu, has observed:

One of the main challenges for the Noumea Convention parties is the fact that they've been able to undertake certain targeted initiatives on a very small shoestring budget. It's always a challenge and it's not just something that relates to the Noumea Convention. Funding is always an issue but I'm sure they will be looking at building on the achievements of the past in terms of going forward.⁴¹

In fact, it is also true to say that the effectiveness of the STAC and the SCPRC has been limited:

The Secretariat clarified that the two committees were set up to help with the implementation of the two Conventions. It further explained that parties needed to re-look at how these two conventions can be implemented effectively and reiterated the need for support to this effect through improvement of the functions of the STAC and the SCPRC. It advised that based on the terms of reference of the committee, the Steering Committee had been largely ineffective in doing its job but encouraged the meeting that it was something to note, and use as a basis to start improving and making the SCPRC more effective in the implementation of the Basel and Waigani Convention. The meeting acknowledged that the SCPRC (and the STAC) were currently ineffective and needed to be improved.⁴²

The effectiveness of the STAC and SCPRC – including instances where it has been inoperative⁴³ - has been put before, and/or considered at, several COPs.⁴⁴ Insufficient resources has been identified as a contributing factor in this regard.⁴⁵

The ineffectiveness of STAC and SCPRC is of concern given their fundamental role in assisting the Secretariat in relation to implementation – as has been noted:

At the STAC-5 meeting under Agenda Item 11 on Improving the function of the STAC, the discussions on the role of the STAC highlighted that it was established to assist the work of the Secretariat in pursuing the implementation of the Convention, specifically by:

- (a) examining the information provided by the Parties on the measures adopted to implement the Convention.

⁴¹ Lolani A (2017) "Convention exists to protect Pacific" Samoa Observer 15 September 2017 at: <https://www.samoaoobserver.ws/category/samoa/11098>

⁴² SCPRC-3 Meeting Report at paragraph 42.

⁴³ SCPRC3 Meeting Report at paragraph 41.

⁴⁴ See Waigani COP 6, Agenda item 8; Waigani COP 7, Agenda item 5; Waigani COP 8 Agenda item 5 and Waigani COP.

⁴⁵ Report of STAC 6 at paragraph 60.

- (b) working with the Secretariat to develop plans, programs and measures related to the technical and scientific aspects of the Convention.
- (c) providing guidelines and standards for the environmental sound management of hazardous wastes.
- (d) assisting in creating coordination between the Waigani and the other regional and global Conventions.⁴⁶

Moreover, this general lack of capacity and implementation problems take place in a context where there are significant challenges faced by the region:

Challenges faced by the region are complex and immense, and often implementation of the Conventions by Parties of the region is often either non-existent or only partial. Essential improvements are needed across the region in terms of human resources; improved expertise and knowledge, including legal expertise; increased financial support; increased capacity to conduct trainings ('train the trainers'); improved judicial capacity; improved awareness within relevant National authorities (Ministries and their specialized department/agencies, customs officers, etc); and increased political willingness, from the relevant national authorities, to prioritise the Chemicals and Waste agenda, and therefore the Conventions implementation.⁴⁷

Lack of capacity has real impacts, adversely affecting implementation and compliance.⁴⁸ One area where the lack of resourcing has clearly impacted on implementation is in the area of reporting. For example, article 7.3 of the Waigani Convention requires Parties to set up information, collection and dissemination mechanisms on hazardous wastes to enable the Secretariat to fulfil its obligations under the Convention.⁴⁹ In 2004, the Waigani COP adopted the recommendation that Reporting and Transmission of Information forms should be filled out annually by Parties and submitted to the SPREP in its role as the Secretariat. The Parties were further requested to begin reporting under the Waigani Convention starting at the 2004 calendar year. The same meeting also approved Guidance Elements for Detection, Prevention and control of Illegal Traffic in Hazardous Wastes and the Form for confirmed cases of Illegal Traffic.⁵⁰

⁴⁶ Waigani COP 8, Agenda item 5 at paragraph 3.

⁴⁷ Pacific Regional Centre for Training and Technology Transfer for the Joint Implementation of the Basel and Waigani Conventions (2014) Business Plan 2014-2015 presented at COP 7 to the Waigani Convention at p 20 of the Report. Similar sentiments were echoed by the Secretariat: see STAC-4 Meeting Report at paragraphs 89-90.

⁴⁸ See Report of work done since STAC 3, 2010 at paragraphs 26 and 41.

⁴⁹ See articles 9.6 (Illegal traffic) and 14 (Secretariat).

⁵⁰ See Agenda Item 5.2(iii) at Waigani COP 9, 15 September 2017 at paragraphs 2 to 4.

Similar obligations arise under the Noumea Convention. These reports are routinely not completed.⁵¹ Notable exceptions have been Vanuatu and Australia in 2012,⁵² Cook Islands for the period 2012-2016 and Australia and New Zealand in 2015.⁵³

As the Secretariat and others have noted, the lack of reporting is no coincidence:

The Secretariat advised that lack of resources and reporting mechanisms are related. There is no strong funding instrument for the Waigani Convention, resulting in lack of access to technical expertise and capacity building for countries. Most countries lack the human and technical resources to complete their reports.⁵⁴

Also, as noted above, lack of resources means the other enabling bodies – such as SCPRC and STAC - cannot perform their functions properly and enable the Parties to implement the Conventions as intended.

The lack of reporting is clearly a problem under both Conventions. It becomes particularly crucial when the very basis of the Convention is to share information, knowledge and expertise - as is the case with the Noumea Convention and as noted on the SDGs Partnerships Platform:

The Convention for the Protection of Natural Resources and Environment of the South Pacific Region (the Noumea Convention) is a knowledge sharing mechanism that promotes the implementation of the obligations under its framework to take all appropriate measures to prevent, reduce and control pollution from any source and to ensure sound environmental management and development of natural resources, using the best practicable means at their disposal and in accordance with their capabilities.*[emphasis added]*

Expanded scope

Considering the constantly changing nature of environmental issues, there is an argument that the scope of the Conventions be expanded. There is a great deal of merit to this, particularly, say, given the attention to pollution caused by plastics in recent years. Plastics are not currently covered by either the Waigani or Basel Conventions, although the Basel Convention did recognise them as hazardous wastes at its March 2019 meeting. Similarly, the Sustainable Development Goals Partnerships Platform has suggested:

⁵¹ As ascertained from Noumea COP 11, 12, 13 and 14 Country Reports and Waigani COP Reports 6, 7 and 8 dating back to 2012. Waigani COP 9 contained a paper noting the lack of reporting: see National reporting (Agenda item 5.2(iii)).

⁵² See Report on work done since COP5, 2010 at paragraph 50.

⁵³ See COP 9 for Waigani. SPREP has advised that Parties will occasionally deliver oral reports with the promise to follow up with a written report, but the latter rarely, if ever, happens.

⁵⁴ Report of work done since COP5, 2010 at paragraph 22. See also Report of work done since STAC 3, 2010 at paragraph 20 (PNG perspective).

Membership and scope of the Noumea Convention need further development to strengthen efficacy of the Convention for environment action in the Pacific.⁵⁵

Notwithstanding the cogency of these arguments, it is not clear that there should be expansion at present. On the one hand, there are still a considerable number of administrative issues that need to be worked through around capacity building and resourcing for both Conventions and, for the Noumea Convention, there is still an amendment to the Protocol for the Prevention of Pollution of the South Pacific by Dumping as well as two other Protocols – namely, the Oil Pollution Protocol and the HNSP Protocol – that are yet to enter into force. On the other hand, plastics is a topical issue, adversely affects the Pacific and could re-mobilise and re-energise the parties in their commitment to protect the environment in the Pacific. In the end, these latter arguments are the more compelling.

In addition to expanding the scope, it is suggested that procedural changes also need to be made to enable such expansion. In this respect, it is noted that the provisions for amending the Conventions and related instruments are outdated, convoluted, confusing and inflexible (see above under key provisions). Parties have noted that these provisions impose a high administrative burden while they have also been described as a “significant disadvantage” in terms of protecting the environment in the Pacific. This is particularly so because of the relationship between the Conventions and other international instruments, such as the Basel, Stockholm, Rotterdam and London Conventions – for example, if major amendments are made under these Conventions, the paralysing effect of the procedural requirements above means that the parties cannot easily act quickly and flexibly to ensure consistency and topicality.

Ideas for reform

In this absence of any completed surveys, this section is necessarily brief. It is crucial that the parties themselves contribute ideas for reform to demonstrate their commitment to the implementation of the Conventions but also, more importantly, to begin to take ownership of the Conventions. The recommendations are put in this spirit – that is, of hopefully generating discussion and further ideas.

While this review has shown some of the barriers in place for effective implementation, it also seems to be the case that the parties could do more – for example, the reporting obligations under both Conventions are not particularly onerous. One COP Report captures a representative from Samoa eloquently summing this up:

The representative of Samoa drew attention to paragraph 16 of the report noting that Parties need to look at ways of addressing the issue of lack of financial resources. She also referred to paragraph 35, observing that the Waigani Convention has been around for several years and Parties have experience with other

⁵⁵ <https://sustainabledevelopment.un.org/partnership/?p=7453>

international instruments, therefore Parties should be in a better position now to submit reports.⁵⁶ *[emphasis added]*

This observation hints at some of the evident frustration that perhaps lies beneath the lack of implementation of the Conventions. At the same time, this frustration appears to be more about opportunities spurned, rather than any rancour or bad faith. It is unfortunate that the good works of the parties in implementing the Conventions are not evident through the national reports, and that there is no cogent evidence base about illegal trafficking from which to plan a response.

It is also unfortunate that the parties will not commit funds to implementing the Conventions beyond attendance at the biennial meetings. To state the obvious, this severely limits implementation and engagement in broader processes (such as the current call for case studies as part of the Regional Seas Programme and the establishment of post-2020 marine biodiversity goals).

Enhanced financial contributions would go a long way to demonstrating the bona fides of parties and the strength of their commitments to the protection of the Pacific environment. A foundational recommendation to this effect appears below. Furthermore, to state the obvious, an enhanced financial commitment from the parties is the simplest way of sourcing funds and implementing the Convention. This commitment should still be within the existing formulas developed around contributions.

So, where to from here? Based on the analysis above, this review recommends as follows:

Resourcing and commitments

Recommendation 1: That the parties enhance the quantum of their contribution (in accordance with the existing formulas used) as the simplest possible means of demonstrating their commitment to the Conventions and promoting the implementation of the Conventions.

Recommendation 2: That, in the alternative to recommendation 1, the parties prepare a business case (based on the findings from this review) for enhanced funding from third party donors.

Recommendation 3: That, in addition to recommendation 1, the parties prepare a business case (based on the findings from this review) for enhanced funding from third party donors which leverages off the parties' own enhanced commitment and contribution.

Project officer

Recommendation 4: That the parties use the enhanced funds to engage a dedicated project officer to work with the parties on awareness raising, implementation and compliance, including the delivery of national reports and other reporting obligations under both Conventions.

⁵⁶ Report of work done since COP5, 2010 at paragraph 21.

Recommendation 5: That the dedicated project officer be employed on a rotational basis between Conference of the Parties.

Recommendation 6: That the dedicated project officer be drawn from PICTS.

Reporting

Recommendation 7: That the parties award a (non-financial) prize at the Conference of the Parties to the best project/initiative under each Convention based on evidence provided in the written reports.

Recommendation 8: That a simple one-page template be added to existing reporting frameworks so that parties can nominate their project/initiative.

Conference of the Parties

Recommendation 9: That the parties return to a rotational system for the hosting of the Conference of the Parties as soon as possible.

Recommendation 10: That the subject-matter of the Conference of the Parties be broadened to include on-site demonstration projects in the host nation under the auspices of the Conventions.

Recommendation 11: That the agenda for the Conference of the Parties be structured to only include items requiring consideration and decisions (with all other items dealt with out of session).

Scope of the Conventions

Recommendation 12: That the parties expand the scope of the Waigani Convention to incorporate pollution from plastics.

Recommendation 13: That the parties consider whether there is the need to explicitly integrate pollution from plastics into the framework of the Noumea Convention.

Recommendation 14: That both Conventions be amended to simplify the procedures relating to changing the Convention, and adopting Protocols and Annexes including by allowing entry into force of amendments to the Conventions and the adoption of Protocols by definitive signature or, in the alternative, by tacit acceptance.

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