REPORT ON PACIFIC ISLANDS JUDGES SYMPOSIUM ON SUSTAINABLE DEVELOPMENT

By Gregory Rose

The Pacific Islands Judges Symposium on Environmental Law and Sustainable Development was held over three days, 5-7 February 2002. The aim of the Symposium was to bring together judges from the region for information exchange, between themselves and experts in environmental law, and for discussion of potential roles of the judiciary in decision making for sustainable development.

It was one in a series of judicial symposia on environmental law organised by the United Nations Environment Programme (UNEP). Other regions where such symposia have been held include Africa (1995), South Asia (1997), South East Asia (1999), Latin America (2000) and the Caribbean (2001). The series culminated in a Global Judges Symposium held for the World Summit for Sustainable Development in Johannesburg, 18-20 August 2002.

The Pacific Islands Judges Symposium on Environmental Law and Sustainable Development was initiated and supported by UNEP Regional Office for Asia and the Pacific (ROAP), and was sponsored by the Commonwealth Secretariat, South Pacific Regional Environment Programme (SPREP) and the United Nations University (UNU). It was hosted by the Queensland Department of the Premier and Cabinet in Brisbane, Australia.

Attending the Symposium were Chief Justices or their representatives from Pacific Island countries, members of the Australian judiciary, and resource persons from sponsoring international organisations and Australian universities. It commenced informally on the afternoon of day one with presentations of information on current environmental law in Australia, which was delivered at the hotel where participants were accommodated. On the second day, the Symposium was formally inaugurated in the Queensland Parliament's Conference Room (Old Parliament Chambers).

Following inauguration and a keynote address, Pacific Islands regional overviews were presented and Pacific Islands judges exchanged information on current developments in their respective national environmental legal systems. The third day focused on themes of shared regional interest, being the national development of environmental jurisprudence, the implementation of environmental conventions, and the legal tools of environmental democracy. The Symposium concluded with South Pacific judges engaging in a closed working group on capacity building and their adoption in plenary of a Statement of Conclusions and Recommendations.

It is difficult to capture in overviews of the papers the informal exchanges of information between participants and the good spirits of the meeting that contributed so strongly to its success. There was evident excitement at the opportunity to explore with peers the delicate issues of judicial activism. This report ranges across the presentations, seeking to fit them together and draw out some of the observations that were made. A theme that ran throughout was the proper use of 'leeways of choice' that can avail the judiciary with opportunities to promote sustainable development. Examples of these leeways of choice that were discussed included the assessment of environmental impact and risk, assessment of traditional or social values, application of emerging environmental law principles, interpretation of statutory objectives

and standing provisions, and promotion of environmental democracy through the issue of practice directions and awarding of costs. It was apparent that, in the Pacific Islands, there are few cases arising in which judges might use these opportunities. However, the judges present did find both the exploration of these leeways and the information on emerging trends in environmental law to be of value for possible future use.

Sustainable Development and Environmental Enforcement in Australian Law

The presentation and discussion of information on Australian environmental legal systems on day one provided an overview of recent achievements and of current obstacles to their success in promoting sustainable development. The day focused on two themes, (1) legal **definitions** of sustainable development and (2) **enforcement** of environmental laws.

The overview of legal definitions of sustainable development commenced with the Hon. Paul de Jersey AC – Chief Justice of the Supreme Court of Queensland – providing an introduction to the Australian and Queensland environmental legal systems and the role of the judiciary in achieving sustainable development. He addressed in particular the wide provisions for standing, that expand upon common law, for public interest litigants that are set out in the Commonwealth *Environment Protection and Biodiversity Conservation Act* 1999 (s. 475). Concerning Queensland legislation, he pointed out that ecological sustainability is an over arching principle in the *Integrated Planning Act* 1997, where decision makers assessing development applications must obtain the concurrence or advice of referral agencies. Another interesting feature of Queensland legislation was noted as the extension of the duty of care principle beyond people and property to the environment. This general environmental duty to take all reasonable measures to prevent environmental harm is set out in the *Environment Protection Act* 1994 (s. 319). In relation to judicial implementation of the principles of sustainable development and the appropriateness of standing by established law or innovating to implement these principles where they are not yet explicitly enacted by Parliament, His Honour advanced four **prerequisites to judicial innovation**: (1) paramount consequence to society and the rule of law; (2) prevailing acceptance of a need for modification of the law; (3) such modification should be premised on basal values as espoused in earlier judicial decisions; and (4) legislative intervention has failed or is unable to address the matter at hand.[1[1]]

His Honour was followed by Bill Crane – Barrister, Deputy Director, Centre for the Legal and Economic Study of Institutions – who considered how the meaning of ecological sustainability, that is set out as a purpose of the Queensland *Integrated Planning Act* 1997, has been considered by the judiciary through a **merit review** system under the Act. He concluded that the judiciary has been wary of applying the concept but that it will in time do so more freely. That conclusion expressly presumed that the concept of sustainable development will in future be used as a common sense tool for assessing the reasonableness of risk in a proposed action. Mr Crane suggested that judges should be enabled to obtain and take note of independent expert evidence in making that assessment.

Professor Doug Fisher - Queensland University of Technology – analysed the role of appellate courts in determining whether decisions subject to **judicial review** meet statutory sustainability criteria. He concluded that, although sustainable development is sometimes articulated as a principle in relevant legislation, Australian judges have treated sustainable development as a policy objective in the legislation and required that administrators properly exercise their procedural duties to adequately consider it as an objective in decision-making. However, Professor Fisher proposed that, where it is clear on the evidence that there is no reasonable basis on which the primary decision could be found to be supporting that objective, then judges may overturn the decision on substantive grounds.

On the theme of enforcement of the law, Mr. Steven Keim - Barrister, Supreme Court of Queensland – considered opportunities for **civil enforcement** and the barriers that individuals face in obtaining access to environmental justice in Australia. He focused on standing for public interest litigants to enable civil

enforcement and examined the trend in statutory departures from the narrow common law doctrine that facilitate this. A problem of the narrow common law doctrine is its reliance on the presence of arbitrary circumstances to support the grant of standing. The prohibitive costs of litigation for public interest were subsequently raised in discussion and the exercise of judicial discretions and use of private and public funding schemes that can assist litigants were raised.

Mr Ralph Devlin - Barrister, Supreme Court of Queensland – went on to consider the application of **criminal enforcement** provisions by environmental agencies. He observed the upward trend in statutory financial penalties, the introduction of imprisonment penalties and the recent imposition of and increasing severity of prison sentences. In discussion it was noted that opportunities for private prosecutions allowed at common law have been limited by interpretations of statues as enabling only public prosecutions. Of other Australian States, participants observed that New South Wales allows private prosecutions but South Australia does not.

Symposium Inauguration and Objectives

The Symposium was formally inaugurated on its second day by Chief Judge Patsy Wolf - President of the District Court of Queensland. A welcome address was presented by Mr. Nirmal Andrews - UNEP ROAP Director. He observed that UNEP's Programme for the Development and Periodic Review of Environmental Law for the first decade of the 21st century (Montevideo Programme III) calls on UNEP to **secure the active involvement of the judiciary**. As the next stage of development in environmental law is to focus on implementation, enforcement and compliance, judicial engagement is critical. The Pacific Islands symposium plays a role in promoting this engagement, together with five other regional symposia, in Africa, the Caribbean, South America, South Asia and South East Asia. He suggested that the Aarhus Convention principles of access to justice, information and public participation, supported at a regional conference in November 2001 in Bangkok, could provide directions for informal common approaches in the judicial development of public environmental rights. Therefore, Mr Andrews invited Queensland to continue its relationship with UNEP in the form of a regional capacity building centre for judicial expertise in environmental law.

Ms Neva Wendt, - Head, Environmental Education, Information and Capacity Building, SPREP - spoke on behalf of the Director of SPREP to welcome participants. Ms Wendt stressed the importance of a relevant and enforceable environmental law framework for issues associated with compliance and enforcement and, in this connection, outlined the legal constitutional and secretariat **roles of SPREP** and the importance of regional seas program to it. She outlined SPREP's role, history and growth since 1982 as an intergovernmental technical organisation responsible for the environmental protection activities of the 21 Pacific Island nations that are small island developing states, supported by four regional developed state members. The essential features of the SPREP Action Plan for Managing the Environment of the Pacific Islands Region 20001-2004 were set out.

Ms Veronic Wright, - Commonwealth Secretariat Legal and Constitutional Affairs Division – also welcomed participants and outlined the role of the Commonwealth in environmental management capacity building among its members and its application of the principle of common but **differentiated responsibility** for capacity building among its members. She observed that active participation of the judiciary is essential to the proper administration of environmental laws.

Dr Jerry Velasquez - Coordinator, Global Environment Information Centre, UNU – also welcomed participants. He presented a detailed account of UNU work, described below, on producing synergies in the implementation of multilateral environment agreements.

Keynote Address - Judicial Leeways of Choice

The Honourable Judge Christopher Weeramantry - former Vice-President of the International Court of Justice – delivered a keynote address on the twin themes of environment and judicial power. He argued that judicial symposia such of this have a role in sensitizing judges to environmental principles. The existence of the common law proves that judges do make law. The 'leeways of choice' that judges confront are influenced by a judge's personal legal philosophy. Thus, judges have enormous power in setting down guidelines that will influence legislators and administrators in generations to come, due to the current formative stage of environmental law.

There is an ongoing need to reconcile legal tradition with modern circumstances, engaging in the legal task of social engineering. Therefore, environmental law is now starting to draw on the wisdom traditions of non-western customs in developing countries. The Pacific has a rich tradition to draw upon in its customary law. The judiciary can introduce into the western notions of property a responsibility for stewardship and, into corporations law, obligations of social and environmental responsibility. In international law, concepts of obligations erga omnes are being developed and can draw upon a broader conception of obligations to neighbours, analogous to an expanded duty of care.

His Honour noted, however, that the judiciary is going through its own crisis. It is under public scrutiny on grounds of increased aloofness from practical problems. A Code of Judicial Ethics is being developed for African and Asian Committee of Chief Justices to address such concerns. His Honour suggested that UNEP could promote the development of jurisprudence for sustainable development through producing handbooks of environmental law for judges and holding regular national judges' symposia.

Inaugural address – Judges at the Coal Face

His Honour Judge T.J Quirk - President of the Planing and Environment Court of Queensland – delivered an inaugural address concerning the 'coal face' of work in environmental law in the Planning and Environment Court. It has the status of a District Court and commenced work in the mid-1960s. The Court's work has shifted in focus as the successive statutes it administers have moved from requiring consideration of public amenity in town and country planning to consideration of broader environmental impact in integrated planning. The principle of sustainable development was made an express purpose of the *Integrated Planning Act* 1997 (s. 1) and the precautionary principle is an area of international environmental law that has particularly influenced judicial decision-making. The judicial contribution to the implementation of these principles hinges upon the quality of written judgements and, where value judgements are made, these need to be based in common sense, clearly reasoned and dispassionate.

Overview of Challenges of the South Pacific from a regional perspective

Mr. Auapaau Andreas Volentras - Legal Advisor, SPREP - stressed the environmentally vulnerable situation of SPREP small island member countries. The SPREP action plan indicates that their four priorities are nature conservation, pollution prevention, sustainable economic development, and climate change. SPREP **legal capacity building** work is focused on these four priorities. This work is undertaken at global, regional and national levels. At the national level, SPREP prepares model and draft environmental legislation. In relation to global environmental treaties, SPREP provides negotiation and implementation technical assistance and training and regional liaison with treaty secretariats. At the regional level, there are three regional conventions that SPREP is secretariat for and provides model legislation and implementation assistance for: the Waigani Convention on hazardous wastes, that came into force in November 2001; the Apia Convention that is to be amended to move from the protected area concept to conservation management generally; and the Noumea Convention, that is also subject to updating amendments at a meeting of parties in July 2002.

Dr Jacques Mougeot - Legal Advisor, SPREP – addressed the regional challenges to implementation of **environmental treaties**. He noted that the central challenge for SPREP is to address the lack of capacity

for information collection, and the lack of human resources in areas of legal expertise. Late notices of international meetings and lack of feedback from national ministries make it difficult to consult, coordinate and formulate positions on agreements or even to attend international meetings. After an international agreement has been adopted, SPREP member countries may lack the capacity to ratify and implement them. One approach to partially address these problems is to promote more inter-linkages and integration between environmental treaties implementation.

Overview of the State of Environmental Law in the South Pacific Region

Professor Ben Boer - University of Sydney - observed that **National Environmental Management Strategies** were prepared for twelve Pacific Island countries in the early 1990s, including reviews of their natural resources management legislation. General findings were that there are wide discrepancies between countries in terms of environmental legislation and implementation. For example, forestry legislation is widely flouted in the Solomon Islands. Foreign legislative approaches are often superimposed in the South Pacific context. For example, as USA Trust Territories, the Federated States of Micronesia and the Marshall Islands have had environmental legislation from the 1980s, while French territories reflect the approaches of metropolitan France. However, recognition of local customary rights is critical to the success of environmental laws and need to be incorporated. Professor Boer considered that further capacity building is essential and that it would be useful to assess Pacific Island legislation on a comparative basis with international principles. He informed participants that, later in 2002, such a comparison will be commenced, examining the Rio Principles of public participation, environmental impact assessment, access to information, access to justice, precautionary principle.

Professor David Farrier - University of Wollongong – observed that regional environment legislation tends to be ad hoc, as proposals for integrated holistic approaches languish for being too complex and resource demanding. For the most part, current regional legislation and proposals for new legislation simply require environmental impact assessment for proposed activities with significant impact or for scheduled activities such as tourism, public works or heavy industry (e.g. Papua New Guinea and Kiribati). A shortcoming of this approach is that it does not take into account cumulative impact. Further, the approach is reactive and not oriented towards integrated planning, or even town and country planning, which is forward oriented. In Fiji and Tonga, proposals to incorporate **strategic land planning** processes in environmental legislation have been considered but have not been enacted. In Samoa, strategic land use planning legislation is currently being developed. Once regulation seeks to direct future land use, it confronts customary landholding interests and faces problems politically and constitutionally. An approach to managing this dilemma is the model in the Cook Islands for voluntary agreements between government and customary land holders that establish a management plans and are supervised by the High Court. Such agreements could provide for payment or services to landholders for providing land management services. In relation to enforcement of environmental laws, Professor Farrier noted that it is questionable whether there is a significant role for citizen suits in South Pacific Island countries, although public standing is provided for in Niue. Active community consultation through strategic land planning processes, rather than passively inviting community comment, might be an appropriate way forward.

Mr. Tagaloa Enoka Puni – Judicial Education Fellow, Pacific Judicial Education Programme, Fiji - described **traditional Pacific island enforcement mechanisms** relevant to environmental law. He observed that the traditional perception of the environment is one of either full exploitation or full integration. Traditional governing structures are communal and based on family and village chiefs. Enforcement mechanisms are community consensus, prohibitions or taboos, and sanctions or penalties implemented through the governing structures. Communal management and projects are a traditional approach but are eroding in the wake of commercialization. Legislative and judicial interventions need to be sensitive to the cultural and spiritual roles of land. Excluding Papua New Guinea, there are 1,559 judicial officers in all Pacific Islands: 1,941 are lay judges; 19 have legal certificates; and 49 have a law degree. The training needs for Pacific Islands judicial officers are therefore basic, e.g. learning how to

read.

Pacific Islands Environmental Law – National Legal Systems

The Pacific Island judges present delivered presentations on the challenges and recent trends in the development of environmental jurisprudence in their respective countries.

For the **Federated States of Micronesia**, the Honourable Justice Martin G. Yinug observed that federal environmental law prevails where matters of inter-state commerce are involved. In most cases, state legislation governs environmental concerns. However, a recent question as to federal constitutional power to regulate the marine environment was resolved in favour of federal jurisdiction outside 12 nautical miles within the exclusive economic zone (EEZ) and state jurisdiction within. There is little environmental litigation, about five federal cases, perhaps reflecting little interest in enforcing environmental legislation. However, an interesting case in connection with coral reef destruction recently involved the determination of environmental values. Judge Yinug noted that it is important for judges to evaluate the weight of ecological sustainability in balance with the competing interests of developers and that, to assist in this task, there are opportunities to provide assistance to Pacific Islands judges in environmental evaluation techniques.

For **Fiji**, the Honourable Judge Michael Scott suggested that the environmental ethic of Fiji islanders was very relaxed but that, as developmental circumstances change, the damage that is being done as a consequence is grave. The growth of tourism with its jerry building and environmental demands, and convenience foods packaging, has made litter the major environmental problem, in addition to commercial logging, fishing and phosphates from sugar plantations. Although legislation governs relationships in theory, in practice it is difficult, expensive and complicated to litigate or prosecute. This is because evidence laws are outdated, court delays endemic, the public is ill-informed, and scientific evidence is effectively unavailable. Additional difficulty is faced by prosecutors from the relevant department who have little court experience. Only one environmental prosecution has been undertaken (for an oil spill) and it was unsuccessful. An environment department was established in 1990 and occupies two rooms. There are 54 separate laws that cover the environment, implemented by different agencies. A national sustainable development bill has been abandoned as a too complicated foreign template although a new bill is being drafted. Judge Scott considered that there is some opportunity for judges to promote environmental awareness simply by adding a bit of environmental colour to their judgements and in conversations with their peers.

For **Kiribati**, Mr. David Lambourne - Commissioner of the High Court – described the *Environment Act* 1999 and *Environment Regulations* 2001, which set elaborate standards but for which there is no implementation capacity. There are no grass roots environmental organisations. Nevertheless, an environmental case brought by Barnaba people against the British government for the honouring of commitments for rehabilitation of the island was lost, although 10m pounds was given ex gratia.

For the **Marshall Islands**, the Honourable Chief Justice Charles Henry described the major problems of trash, litter and sewage disposal. As an ex-trust territory, its environmental laws are adopted from the USA, are relatively sophisticated and address a range of issues including environmental impact assessment, wildlife management and pollution prevention, the latter with emphasis on radioactive contamination issues. Standing is open and public defender assistance for access is available. However, customary land title issues obstruct action being taken that would affect land rights. The High Court is empowered to substitute its own environmental protection standard when it considers that the government standard is insufficient and Marshallese judges are relatively well informed and diligent in environmental matters. However, His Honour observed that it would be difficult for a judge to become deeply involved in environmental advocacy and to also hear environmental cases. As an activist judge is poorly regarded, judicial opportunities to promote sustainable development are limited to being aware and sensitive to the

issues.

For **Palau**, the Honourable Chief Justice Arthur Ngiraklsong, noted that Palau's constitution imposes an obligation on government to take positive action to protect the environment and specifically restricts international arrangements to use, store or ship harmful substances, such as nuclear or hazardous materials. An Environmental Quality Protection Board is established and there is a major Palau Conservation Society. Under Executive Order, a National Environmental Protection Council was established to consider sustainable development issues. Statute law enshrines the right to a healthy environment and anyone has standing. However, the Board has never initiated a damages action and nobody litigates as there are few environmental complaints, despite the current construction of golf courses, hotels and roads. This is because the law in itself cannot address environmental problems. Popular understanding and action is needed. This can occur in Palau, where, for example, the public did rise up and defeat a proposal to construct a major gas port.

For **Samoa**, the Honourable Chief Justice Patu Falefatu Maka Sapolu observed that the Samoan *Land Surveys and Environment Act* 1989 is central, setting up a government department, a board and a fund. The department commenced with two people and now has twenty. The fund ensures that foreign donor funds are kept separate from other government funds. Section 94 provides that the environmental parts of the Act prevail over any other Act. A new draft environment Bill is designed to ensure the effective implementation of environmental laws by establishing a separate Environment and Conservation Authority, with inspectors and broader powers, more severe penalties, criminal and civil proceedings, and greater independence than the current Act. Biodiversity prospecting for scientific or commercial purposes is covered in the proposed regulations. A new Ports Authority Act makes it an offence for pollution of ports by harmful substances. However, his Honour explained that there is little environmental work for judges. Only three civil cases of real environmental value have been heard, which enunciate principles of private nuisance: one concerning the operations of a poultry farm and two concerning nuisance by noise. Two prosecutions for the use of pesticides to catch shrimps in a water dam have also been heard. Thus there is a lack of judicial experience and expertise. Most judges did not study environmental law during their school days. There are no environmental texts or law reports and judges have had few opportunities to deal with environmental litigation of any significance. To promote understanding of judges and knowledge of practitioners, it may be necessary to purchase environmental texts and reports and to develop environmental law courses and to pursue environmental courses at the University of the South Pacific in Vanuatu.

For the **Solomon Islands**, the Honourable Chief Justice Albert Palmer observed that the *Environment Act* 1998 passed into law in 1999 but will not be effective until the end of the current inter-ethnic tension. It consolidates previously fragmented environmental laws and prevails over other legislation. Standing is based on conservative common law standards and costs remain a barrier. The two types of land holding are registered: lands located with in towns (10%) and customary lands (90%). Environmental management of customary lands is in the hands of landholders. Across natural resources sectors, however, various levels of environmental regulation have been achieved. The Gold Ridge mining operation is successfully regulated by an Act administered by Department of Mines. Foreign fishing vessels from Taiwan and Japan are relatively well policed. On the other hand, forests have not been so successfully administered by the Department of Forests as low impact sustainable harvesting is impossible due to the difficulty of felling and, while indigenous title holders fight for title to obtain the royalties, there are many breaches of conditions but few complaints. His Honour considered that there is a high level of environmental concern and protectiveness in the Solomon Islands but that it is easily compromised by financial circumstances.

For **Tonga**, the Honourable Justice Ford observed that a new *Environment Act* and department (9 staff and part timers) was established in 2001 giving focus and a 6-fold increase in resources to environmental management work. The most striking environmental challenges are combating litter and solid waste disposal. A solid waste management facility was approved in 2001. However, there is no national public

rubbish collection scheme and little environmental awareness. There is no land management legislation and title is extremely complex. All land is owned by the king and divided into 32 estates for nobles, allocations are made to commoners and leases to foreigners. This private ownership was recently reflected in large scale mangroves were clearance around Nuku Alofa lagoon, impacting on fish breeding on Tonga Tapu. Tonga's Cabinet has since approved a conservation plan to address this problem.

For **Vanuatu**, the Honourable Chief Justice Vincent Lunabeck noted that, as for many South Pacific attendees, the symposium was the first environmental law conference he ever attended. There is an environmental law course available at the University of the South Pacific Law School in Vanuatu, where a conference on environmental law will be held on 25 July 2002. However, there is a need there for further environmental law materials and funding.

For **Australia**, the Honourable Justice Murray Wilcox - Federal Court - and Honourable Justice Paul Stein - Court of Appeal of New South Wales - discussed the roles of specialist environment courts in implementing sustainable development. It was argued that specialist courts are more finely attuned and speedier than general courts in addressing environmental questions but are more independent and immune to political pressure than are tribunals. The Land and Environment Court for the jurisdiction of New South Wales was focussed on, where public interest environmental litigation and wide standing provisions had failed to 'open the floodgates' into the court. This is because many barriers to access to justice remain, such as costs, security for costs, undertakings as to damages. The Court has, however, attempted to reduce procedural formalities that are cumbersome and to utilise alternative dispute resolution.

Recent Trends in the Development of Environmental Jurisprudence

A wide range of panelists presented perspectives on recent international developments in environmental jurisprudence. Professor Ben Boer described three cases that demonstrate judicial creativity in fashioning **innovative environmental principles**: *Opposa v Secretary for Environment* (Philippines) concerned logging licenses and introduced into jurisprudence at the national level the rights of future generations to a healthful ecology. In the *New Delhi Garbage* case (India), the constitutional right to life was referred to in issuing court orders requiring the State to implement its laws by appointing personnel to enforce municipal waste laws. In *Mehta v Union of India* (India), concerning acid rain eroding the marble of the Taj Mahal, the Supreme Court introduced the precautionary principle and polluter pays principle to impose broad and detailed orders for the abatement of acid rain.

Judge Scott Fulton – USA Environmental Appeals Board – described the **management of environmental cases** in USA courts and tribunals as an increasing number of `parties seek to challenge or enforce a plethora of regulations. In relation to challenges, he observed the importance of the judiciary in protecting the integrity of regulatory decision making from political pressures. In relation to enforcement, he stressed the importance in compliance behaviour theory of early active enforcement to encourage the vast majority of those affected to comply. The creation of specialist tribunals has been necessary to help carry the litigation burden. He detailed administrative tools used to manage environmental litigation before the Environmental Appeals Board, such as reviews that are limited to the record and preclude additional evidence, exhaustion of earlier opportunities to challenge standard setting decisions, and judicial deference to prior technical decisions. In the area of liability, in a recent Superfund hazardous waste case it was found that liability was strict, joint and several, and proof of causality was simplified so that a breach of regulations is sufficient to presume causation. He noted that gaps and uncertainties in the expression of legislative will and in application of common law principles are appropriate opportunities for judicial activism.

Mr. Mark Christensen – Oceania Chair, Commission for Environmental Law, World Conservation Union – described the environmental law capacity building work of the **IUCN Commission for Environmental Law in the Pacific** region. The Commission is deepening its partnership with SPREP. He suggested that

accommodating traditional or indigenous values or evaluating the environment (particularly acceptable thresholds of risk) in an impact assessment review, are arts that entail judicial leeways of choice.

Mr. Manjit Iqbal – Legal Officer, Division of Policy Development and Law, UNEP – described the **UNEP Programme** for the Development and Periodic Review of Environmental Law for the first decade of the 21st century. It emphasises improvement of the effectiveness of environmental law, sector management of environmental resources and issues arising from the relationship between environmental law and other fields. Concerning the effectiveness of environmental law, UNEP focuses on capacity building through development of legislation and policies, holding of national consensus workshops to build platforms for reform, training and awareness building, such as a biennial two-week Global Training Program held in Nairobi and the judicial symposia series. Mr Iqbal listed several examples of UNEP environmental law capacity building in the Pacific.

Mr. Lal Kurukulasuriya - UNEP ROAP Environmental Law and Policy Programme – traced the international development of environmental law and discussed the status of the **Rio Declaration principles**. The 27 principles can be conceptually divided into three categories: (1) crystallised customary law, (2) emerging international law and (3) policy guidelines. For some principles, their categorisation is clear although it is controversial for some others. Emerging (category 2) are the principles of precaution, polluter pays, common but differentiated responsibility, inter-generational equity, and public participation, as well as sustainable development itself. He described ways that these principles have been incorporated into treaties and treated by the International Court of Justice. In national laws in South and South East Asia, these principles have also found form in constitutions, framework legislation and judicial pronouncements. To promote their judicial acceptance, UNEP plans further work to foster a more informed and active judiciary.

Implementation of Multilateral Environmental Conventions in the Pacific Region

Mr. Seth Osafo - Senior Legal Adviser, Climate Change Secretariat - outlined the potential impacts of climate change, and described relevant provisions of the Climate Change Convention and **Kyoto Protocol**. In particular, the Protocol's compliance regime was examined. It creates a Compliance committee comprised of two branches: facilitation and enforcement. The Facilitation Branch will provide advice and assistance, complementing the Protocol's 'multilateral consultative process'. The Enforcement Branch will have a quasi-judicial function in declaring non-compliance, developing corrective action plans, and determining penalties such as additional emission reductions or suspension from the Protocol's flexible implementation mechanisms. An appeal can be made from the Enforcement Branch to the Conference of Parties.

Dr Jerry Velasquez - Coordinator, Global Environment Information Centre, UNU addressed national and regional approaches to **synergies and coordination** among multilateral environment agreements. This will be a focus for consideration at the World Summit on Sustainable Development in Johannesburg in August 2002. He identified three issues: first, the explosion of environmental concerns generating almost 300 global treaties since 1972; second, the linkages between various sustainable development issues highlighted through globalisation processes; and third, the lack of effective implementation of Agenda 21 due to neglect of challenges of national implementation. Commonly contributing to national implementation difficulty is fragmentation of responsibility, vertically and horizontally, across government. He provided various examples of coordinated approaches to strengthening implementation using multi-stakeholder partnership and participation, such as by forming national committees, and capacity building in training, education and awareness raising. An unusual example of multi-stakeholder partnership is the Waigani Convention, which regionally implements the Basel Convention by banning the importation of hazardous wastes into the South Pacific.

The Honourable Judge Christine Trenorden – Environment Resources and Development Court of South

Australia - introduced the theme of **environmental democracy**, based on access to justice, access to information and public participation. These objectives are set out in the Agenda 21, the Rio Principles and the Aarhus Convention. She observed that judges have novel opportunities to promote implementation of these tenets environmental democracy, such as by interpreting standing provisions widely, specifying information to be provided to the court and to all parties, by making appropriate awards on costs or by having a weekly afternoon sitting to address public interest environmental matters. Judge Trenorden's court, the South Australian Land, Environmental and Natural Resources Court, sits in an informal atmosphere, not robed and often not in a courtroom. Alternative dispute resolution procedures are utilised, its practice is simplified and procedural formalities reduced. Its registry dispenses informal advice and its specialist members are Commissioners who provide expertise in technical matters. It can also refer out technical matters for expert report or receive journal articles as evidence to reduce costs and simplify evidence. Her Honour noted that Pacific Island traditional custom is impossible to prove by the usual evidentiary rules and, therefore, adaptation of those rules is required to receive evidence of traditional customs.

Accessing Legal Information in the Internet Age

Ms Robyn Blake – Director, Pacific Legal Information Institute – and Mr. Philip Chung – Executive Director, Australasian Legal Information Institute – conducted a useful demonstration session on electronic access to databases containing national environmental laws. Their two institutes are building a body of Pacific Islands law that includes treaties, national statutes and judgements. The emerging database is located on the Internet (http://www.paclii.org/) and is internationally linked, extending beyond the region.

Closing Session

Pacific Island judges participated in a closed Working Group on capacity building needs and opportunities for judges in the region. They then reported back to the Plenary with conclusions and recommendations that was read out to the meeting (Attachment A). They considered the symposium to have been a valuable information sharing opportunity and identified specific needs for regional environmental law capacity building. Ms Veronic Wright and Mr. Lal Kurukulasuriya each thanked to all participants and formally closed the symposium.

Statement of Conclusions and Recommendations

Adopted at the

Pacific Island Judges Symposium on Environmental Law and Sustainable Development

The Pacific Island Judges Symposium on Environmental Law and Sustainable Development was held in Brisbane, Queensland, Australia from 5 to 7 February 2002. The Symposium was sponsored by the United Nations Environment Programme (UNEP), the Commonwealth Secretariat (ComSec), the South Pacific Regional Environment Programme (SPREP) and the United Nations University (UNU) and hosted by the Queensland Department of the Premier and Cabinet.

The Agenda for the Symposium is attached at Annex 1 and the list of participants is attached at Annex 2. Papers delivered at the Symposium have been distributed separately and an overview report of the proceedings together a full compilation of the papers delivered will be published separately from this Statement of Conclusions and Recommendations.

1. We, the Pacific Island Judicial participants in the Pacific Island Judges Symposium on Environmental Law and Sustainable Development, express here our sincere appreciation to Premier Peter Beattie and the

Government of Queensland for hosting this Symposium and sharing with us the Parliamentary premises.

2. We also express our appreciation to the United Nations Environment Programme (UNEP), the Commonwealth Secretariat (ComSec), the South Pacific Regional Environment Programme (SPREP) and the United Nations University (UNU) for their efforts in organising this event.

3. Our thanks are also given to the resource persons attending, particularly our fellow judges, who have given their time and expertise generously to support the Symposium.

4. The Symposium on Environmental Law and Sustainable Development has been a valuable experience from which we have benefited, through the exchange of information, establishment of networks and the consideration of emerging issues in the judicial application of legal concepts for sustainable development.

5. We recognise the widespread regional need for continued strengthening of the capacity of judges, lawyers, enforcement officers and non-governmental organisations to promote the implementation of environmental laws at the national and international levels through domestic compliance and enforcement regimes.

6. Pacific Island regional judiciary would benefit from continued capacity building and the Symposium on Environmental Law and Sustainable Development has sharpened our appreciation of this in respect of the following specific needs:

- The provision and dissemination of environmental law materials, such as comparative case law compilations,
- Exchange of information, particularly on issues of regional concern, such as the application of customary law and land tenure rights,
- Strengthening of expertise through training programmes focused on judicial application of principles of environmental law,
- Extending and deepening networks for mutual support between Pacific Island regional and other judges, on matters such as judicial philosophy and ethics in adjudicating environmental issues,
- Preparation and distribution of handbooks that provide guidance on principles of environmental law and their application for the use of Pacific Island judges, lawyers, enforcement officers and non-governmental organisations.

7. Having regard to the leadership currently being provided by the Queensland Government we would encourage that the momentum it has generated be maintained through the identification of an appropriate educational institution that could serve as a regional centre to carry on the continuing work of capacity building described above, in cooperation with SPREP, UNEP, ComSec, UNU and others.

[1[1]] Citing Chief Justice Beverly McLachlin ‘The Supreme Court and Public Interest’ (2001) 64 *Saskatchewan Law Review* 309, 318-319.