

Community Rules: Utilizing Customary Law to Combat Environmental Degradation in the South Pacific

Marissa Cripe*

INTRODUCTION	183
I. CUSTOMARY LAW	185
A. Legal Recognition of Customary Law	188
B. Customary Law and Traditional Resource Management	191
C. Customary Law and the Courts in the South Pacific Islands ...	193
II. SAMOA AND THE FISHERIES ACT	195
III. LOOKING AT PNG'S AND THE SOLOMON ISLANDS'	
ATTEMPTS	198
A. PNG	199
B. Solomon Islands	201
IV. POTENTIAL SOLUTIONS	204
CONCLUSION	205

INTRODUCTION

The South Pacific is home to some of the most biodiverse ecosystems in the world.¹ This rich biodiversity is important to South Pacific island nations for economic and cultural reasons.² Yet, the region is highly vulnerable to

* J.D. Candidate, Washington University in St. Louis School of Law. My experience growing up in Papua inspired my focus on the South Pacific and shaped this note at every step. I hope this note can shine a light on the importance of listening to indigenous peoples. Thank you to the editors of the *Washington University Global Studies Law Review* for their hard work on this note. Thank you specifically to Cassidy Mandelbaum, for her exceptional feedback and guidance throughout the writing and editing process.

¹ Gilianne Brodie et al., *Biodiversity and Conservation in the Pacific Islands: Why Are We Not Succeeding?*, in CONSERVATION BIOLOGY: VOICES FROM THE TROPICS 181, 181 (Navjot S. Sodhi et al. eds., 1st ed. 2013). “The terrestrial diversity and endemism per unit area in Oceania are among the highest in the world, with more than half the diversity in independent, developing island nations.” See also Laurence Cordonnery, *Environmental Law Issues in the South Pacific and the Quest for Sustainable Development and Good Governance*, in PASSAGE OF CHANGE: LAW, SOCIETY AND GOVERNANCE IN THE PACIFIC 233, 234-35 (Anita Jowitt & Jess Newton Cain eds., 2d ed. 2010) [hereinafter Cordonnery, *Environmental Law Issues*].

² “In the past, for many Pacific Islanders [there has been] an intimate linkage to land and sea via cultural protocols such as totems.” Brodie et al., *supra* note 1, at 184. Concerning economic development, the Solomon Islands economic development has been largely based off of logging and fisheries. Joseph D. Foukona & Jaap Timmer, *The Culture of Agreement Making in Solomon Islands*, 86 OCEANIA 116, 116 - 17 (2016); Cordonnery, *Environmental Law Issues*, *supra* note 1, at 233-34.

ecosystem changes.³ Therefore, South Pacific island nations are expected to be some of the first to feel the effects of climate change, despite contributing little to global climate pollution.⁴ The South Pacific and its nations also face other man-made threats to its environment,⁵ such as: unsustainable logging, particularly in the Solomon Islands;⁶ overfishing and other harmful fishing practices (such as the use of dynamite on coastal reefs),⁷ which, in combination with pollution, has led to a significant decline in fish stock;⁸ and the unsustainable use of land.⁹ These types of unsustainable land uses have many impacts, including soil erosion, sedimentation on coral reefs affecting the growth of coral, and the degradation of mangroves due to their misuse as wastelands.¹⁰

Is there a solution to the mounting environmental problems South Pacific Island nations face? One possible solution is greater adoption and use of customary law and traditional knowledge to address environmental issues that fall within their control.¹¹ There are South Pacific island nations currently using customary law and traditional knowledge for resource

3 Brodie et al., *supra* note 1, at 182. The small size of these islands makes their ecosystems fragile; even a slight change can have irreversible consequences. *Id.* An example of this detrimental change is the introduction of the brown tree snake in Gaum. Introducing this species led to the extinction or near extinction of most native vertebrates. *Id.* See also Cordonnery, *Environmental Law Issues*, *supra* note 1, at 234-35.

4 Cordonnery, *Environmental Law Issues*, *supra* note 1, at 234. “Carbon emissions combined across the entirety of the Pacific Islands amount to less than 0.03% of the world’s total... [carbon emissions]”. Kausea Natano, *The Climate Crisis Is Making the Pacific Islands Uninhabitable. Who Will Help Preserve Our Nations?*, TIME (Sept. 28, 2022), <https://time.com/6217104/climate-crisis-pacific-islands-uninhabitable/>. For countries like Tuvalu, it is predicted that their islands will no longer be habitable within the century. Scholars anticipate rising sea levels will infiltrate the aquifers that provide safe drinking water and will cause more intense storms, leading to flooding and destruction of soil and infrastructure. The warming of the ocean is causing the coral to die which affects the fish stock that island nations rely on. *Id.*

5 See generally, Cordonnery, *Environmental Law Issues*, *supra* note 1, 234-37.

6 *Id.* In the Solomon Islands it is not common for logging practices to occur on customary land by multinational companies. *Id.* The regulations created by the Solomon Islands through different logging codes have not been successful. *Id.* Corruption, lack of training, and the nation’s economic reliance on logging all contribute to its failure in creating a sustainable logging industry. *Id.*

7 *Id.*

8 *Id.* Finding sustainability for the fish stocks face similar issues and concerns that logging does. *Id.* The over-exploitation of the marine resources has already affected certain coastal species. *Id.*

9 *Id.* at 235-36.

10 *Id.* at 236. Mangroves are important for protection against natural disasters like cyclones and tsunamis and are “one of the most threatened ecosystems in the Pacific.” Brodie et al., *supra* note 1, at 183-84. Lack of regulation is leading to the disappearance of mangroves. *Id.*

11 There are South Pacific island nations that are already utilizing customary law for resource management. See *infra* Section II. This paper is looking to explore and to see if it can build on what is already in place in the South Pacific and if continuing to use customary law and seeing it as a legitimate source of law will help combat the environmental challenges South Pacific island nations are facing.

management for resource management, regulating practices such as hunting, land use, forest management, and fishing and marine harvesting.¹² This paper looks at the current adoption and use of some of these laws while exploring the possibility of using customary law and traditional knowledge to combat the wider range of environmental crises threatening South Pacific Island nations.

Section I will define customary law and explore its current use by South Pacific Island nations. Section II will examine the particular case of Samoa's use of customary law to help combat the environmental problem of overfishing and marine degradation and explore whether it can be transposed to other South Pacific Island nations.¹³ Section III will look to the case studies of Papua New Guinea's ("PNG") and the Solomon Islands' attempts to use customary law to address their countries' environmental concerns. Finally, Section IV will explore possible explanations for why customary law has worked for some South Pacific island nations and not for others, examining factors such as population size, lack of respect for customs and customary law, lack of accountability once rules and laws are enacted, and economic dependence on natural resources to determine whether the adoption and use of customary law to combat environmental harms is successful. This paper suggests that for environmental and conservation laws to work they must be community-based. This is where customary law plays a crucial role—the local community understands its needs and the resources it must protect better than the outside government,¹⁴ and can therefore better respond to those needs and problems themselves.

I. CUSTOMARY LAW

Customs are norms that are followed by a group of people.¹⁵ Historically, customs have worked similarly to the way laws work: they were rules that those in the community followed and that affected all aspects of community life, but remained unwritten.¹⁶ Customary law, while rooted in past

12 BRENDAN TOBIN, WORLD INTELL. PROP. ORG. & U.N. UNIV., THE ROLE OF CUSTOMARY LAW IN ACCESS AND BENEFIT-SHARING AND TRADITIONAL KNOWLEDGE GOVERNANCE: PERSPECTIVES FROM ANDEAN AND PACIFIC ISLAND COUNTRIES 63 (2008).

13 Cordonery, *Environmental Law Issues*, *supra* note 1, at 244.

14 "Local government is not likely to be implanted as a vibrant part of a polity if it is initiated from sources outside the community, especially if imported council structures are maladapted to grass-roots political culture and interests." Ralph R. Premdas & Jeffrey S. Steeves, *Vanuatu: The Evolution of the Administrative and Political Context of Decentralization*, 4 PUB. ADMIN. & DEV. 231, 231 (1984).

15 Jean G. Zorn, *Custom Then and Now: The Changing Melanesian Family*, in PASSAGE OF CHANGE: LAW, SOCIETY AND GOVERNANCE IN THE PACIFIC 95, 96 (Anita Jowitt & Jess Newton Cain eds., 2010).

16 *Id.*

behavior, is not the law of the past.¹⁷ It is still actively a part of many indigenous peoples' lives.¹⁸

Customary law has been defined in various ways.¹⁹ One definition describes it as:

[A]n established system of immemorial rules which had evolved from the way of life and natural wants of the people, the general context of which was a matter of common knowledge, coupled with precedents applying to special cases, which were retained in the memories of the chief and his counsellors, their sons and their son's sons [sic], until forgotten, or until they became part of the immemorial rules...²⁰

Another definition of customary reads: "a body of rules which have been developed or evolved over time through the practice of specific communities or populations, and which are recogni[z]ed by such communities or populations as having legal effect."²¹ This definition indicates that customary law is a process, rather than something that is strictly defined.²² It takes time for a practice to become a legal custom.²³

Though definitions of customary law vary, there are important commonalities. One is that customary law is community based: there cannot be a customary law without the community's participation.²⁴ Other commonalities include flexibility, adaptability, and legitimacy.²⁵ Like all laws, the people bound by a law must see it as legitimate in order for it to be enforceable

17 TOBIN, *supra* note 12, at 14.

18 *Id.* at 13-14. Customary law still influences community law and life but is at risk of being lost. Loss of customary law is due to globalization, colonization, and other developments in the world that have undermined it. *Id.*

19 *Id.*

20 *Id.* at 22 (quoting RAJA DEVASISH ROY, MINORITY RTS. GRP. INT'L, TRADITIONAL CUSTOMARY LAWS AND INDIGENOUS PEOPLES IN ASIA (Katrina Payne ed., 2005)).

21 *Id.* Other definitions of customary law include the Black's Law Dictionary's definition: "customs that are accepted as legal requirements or obligatory rules of conduct; practices and beliefs that are so vital and intrinsic a part of a social and economic system that they are treated as if they were laws." *Customary Law*, BLACK'S LAW DICTIONARY (7th ed. 1999). See also TOBIN, *supra* note 12, at 23 (viewing customary law as a collective recognition: "...it consists of a group of customs that are recognised [sic] and shared by a collectivity (community, people, tribe, ethnic or religious group, etc.) in contrast with written law emanating from a constituted political authority, and whose application is in the hands of that authority, that is, generally the State.").

22 TOBIN, *supra* note 12, at 22.

23 *Id.*

24 *Id.* Customary law helps to promote community well-being. See *id.* at 26.

25 *Id.* at 25. A multi-country survey done by the International Institute for Environment and Development IIED found three common underlying customary principles among the countries: (1) Reciprocity – "what is received has to be given back in equal measure.", (2) Duality – behavior is not individualistic, and everything has a complimentary opposite, (3) Equilibrium – there must be a balance "in both nature and society." KRYSZYNA SWIDERSKA ET AL., INT'L INST. FOR ENV'T AND DEV., PROTECTING CUSTOMARY RIGHTS OVER TRADITIONAL KNOWLEDGE: IMPLICATIONS OF CUSTOMARY LAWS AND PRACTICES 11 (2006).

and bind the group, the same is true of a customary law's enforceability within a community.²⁶ Customary law is different from positive law, law created by political actors,²⁷ because positive law is connected to State power, while customary law is a "characteristic of societies lacking a State, or it simply operates without reference to the State."²⁸ Under customary law, the people are governed by the customs and dictates of their community rather than the State.²⁹

In the South Pacific, some nations have begun to codify and implement customary law for land management within their borders.³⁰ For example, Vanuatu passed the Environmental Management and Conservation Act in 2002 in an attempt to integrate traditional knowledge into their legal system.³¹ Similarly, Palau has implemented temporary fishing closures to harmonize modern fishing management rules with customary rules in place before Western influence came to the island.³² In Kanaky-New Caledonia, the government has attempted to combine traditional law with the current national law through the Loyalty Islands Environment Charter.³³ The charter is also used to ensure that traditional knowledge and customs are protected and encouraged on a national level.³⁴ The Solomon Islands passed the Western Province Resource Management Ordinance in 1994, seeking to address and empower customary land ownership.³⁵ However, while customary law works well within local communities, it does not always work as well beyond these communities.³⁶

26 TOBIN, *supra* note 12, at 77.

27 *Positive Law*, BLACK'S LAW DICTIONARY (12th ed. 2024).

28 TOBIN, *supra* note 12, at 23 (quoting IDB: Indigenous Peoples and customary Law).

29 *Id.* at 23.

30 *Id.* at 25. "... [U]p to 80% of land and significant marine areas is held under traditional tenure." *Id.* For more information on how customary law is being implemented into national law see Anne Caillaud et al., *Tabus or Not taboos? How to Use Traditional Environmental Knowledge to Support Sustainable Development of Marine Resources in Melanesia*, in 17 SPC TRADITIONAL MARINE RES. MGMT. & KNOWLEDGE INFO. BULL. 14 (2004).

31 Russell Nari, *Merging Traditional Resource Management Approaches and Practices With the Formal Legal System in Vanuatu*, in TABUS OR NOT TABOOS? HOW TO USE TRADITIONAL ENVIRONMENTAL KNOWLEDGE TO SUPPORT SUSTAINABLE DEVELOPMENT OF MARINE RESOURCES IN MELANESIA 15, 16 (No. 17 Dec. 2004).

32 Alma Ridep-Morris, *Traditional Management Of Marine Resources in Palau*, in TABUS OR NOT TABOOS? HOW TO USE TRADITIONAL ENVIRONMENTAL KNOWLEDGE TO SUPPORT SUSTAINABLE DEVELOPMENT OF MARINE RESOURCES IN MELANESIA 16, 17 (No. 17 Dec. 2004).

33 Sarimin Boengkih, *The Loyalty Islands Environment Charter in Kanaky-New Caledonia*, in TABUS OR NOT TABOOS? HOW TO USE TRADITIONAL ENVIRONMENTAL KNOWLEDGE TO SUPPORT SUSTAINABLE DEVELOPMENT OF MARINE RESOURCES IN MELANESIA 18, 18-19 (No. 17 Dec. 2004).

34 *Id.*

35 Reuben Sulu, *Traditional Law and the Environment in the Solomon Islands*, in TABUS OR NOT TABOOS? HOW TO USE TRADITIONAL ENVIRONMENTAL KNOWLEDGE TO SUPPORT SUSTAINABLE DEVELOPMENT OF MARINE RESOURCES IN MELANESIA 20, 21 (No. 17 Dec. 2004).

36 TOBIN, *supra* note 12, at 25.

Though customary law is strong within some indigenous communities, it is not always enough to prevent environmental exploitation.³⁷ This is the result of many challenges in the creation and application of customary law. These challenges include issues such as “changing economic and social realit[ies],” the lack of clarity or formalism in landownership, and jurisdictional limitations in applying such customary laws to those outside the community.³⁸ For example, and as will be discussed in more detail later, Samoan villages have had trouble with those outside the community failing or refusing to respect their local laws.³⁹

There have been discussions on how to strengthen customary law, specifically when it comes to its uses as a resource management tool.⁴⁰ Proposed solutions have included: finding customary land owners (both individuals and groups),⁴¹ identifying where customary law is directly linked to environmental management, finding components of customary law that can help in resource management, and comparing customary laws to local and national laws to find compatibility.⁴² Additionally, for the enforcement of customary law to work, respect and recognition from those outside of the community is required.⁴³ Indigenous communities that have implemented customary laws need the help of their national government to ensure their customs are seen and respected as law.⁴⁴

A. Legal Recognition of Customary Law

Legal recognition of customary law varies.⁴⁵ Customary law can be either enshrined in the Constitution, recognized by the courts, or enacted by statute.⁴⁶ A nation can adopt customary law through regional and international law by adopting it as a part of national law directly or through an act of parliament.⁴⁷ National law may recognize customary law in one of two

³⁷ *Id.* at 26.

³⁸ *Id.* at 77.

³⁹ Ueta Fa’asili & Luliaa Kelekolo, *The Use of Village By-laws in Marine Conservation and Fisheries Management*, SPC TRADITIONAL MARINE RES. MGMT. AND KNOWLEDGE INFO. BULL. #11, Sept. 1999, at 7.

⁴⁰ TOBIN, *supra* note 12, at 77-83.

⁴¹ When it comes to customary land ownership most land is jointly owned and for most of the islands, who owns the land is not written down. D.E. Paterson, *Some Thoughts About Customary Land*, 5 J. S. PAC. L.1 (2001).

⁴² TOBIN, *supra* note 12, at 77.

⁴³ *Id.*

⁴⁴ “National laws which seek to protect language, traditions and customs can help to guarantee collective rights in a manner which supports enforcement of customary law.” *Id.* at 27.

⁴⁵ *Id.* at 29.

⁴⁶ TOBIN, *supra* note 12, at 29.

⁴⁷ *Id.*

ways.⁴⁸ The first is generic recognition, which has two principal forms: constitutional recognition and legislative recognition.⁴⁹ The second is “discrete recognition,” meaning “statutes that recogni[z]e a specific role for customary law.”⁵⁰ Discrete recognition can span a wide range of issues including land rights, family law, the authority of chiefs and elders, and dispute resolution.⁵¹

Constitutional recognition refers to the explicit acknowledgment of customary laws within a country’s constitution.⁵² Papua New Guinea,⁵³ Samoa,⁵⁴ Vanuatu,⁵⁵ and Palau⁵⁶ all recognize customary law in their

48 *Id.*

49 *Id.* “This approach [‘leaving the definition of specific norms to the customary regime’] has been followed in the Constitutions of Papua New Guinea (Sch. 2.1), Solomon Islands (Sch. 3[2]), Vanuatu (s. 95 [3]), Federated States of Micronesia (art. V. 1), Marshall Islands (art. X.1) and Cook Islands (s. 66A [3]).” *Id.*

50 *Id.* at 29.

51 *Id.* at 29-30.

52 *Id.* at 29.

53 *See* CONSTITUTION OF THE INDEPENDENT STATE OF PAPUA NEW GUINEA 1975. Recognition, etc., of custom.

1. Subject to Subsections (2) and (3), custom is adopted, and shall be applied and enforced, as part of the underlying law.
2. Subsection (1) does not apply in respect of any custom that is, and to the extent that it is, inconsistent with a Constitutional Law or a statute, or repugnant to the general principles of humanity.
3. An Act of the Parliament may-
 - a. provide for the proof and pleading of custom for any purpose; and
 - b. regulate the manner in which, or the purposes for which, custom may be recognized, applied or enforced; and
 - c. provide for the resolution of conflicts of custom.

Id. at Sch.2.1.1.1.

54 Whether custom will be used in the law is a decision for the government and judiciary. TOBIN, *supra* note 12, at 9. *See also* CONSTITUTION OF THE INDEPENDENT STATE OF SAMOA 1962:

“Law” being in force in Samoa; and includes this Constitution, any Act of Parliament and any proclamation, regulation, order, by-law or other act of authority made thereunder, the English common law and equity for the time being in so far as they are not excluded by any other law in force in Samoa, and any custom or usage which has acquired the force of law in Samoa or any part thereof under the provisions of any Act or under a judgment of a Court of competent jurisdiction.

Id. at Art. 111(1).

55 CONSTITUTION OF THE REPUBLIC OF VANUATU 1980:

(1) Where, consequent on the provisions of this Chapter, there is a dispute concerning the ownership of alienated land, the Government shall hold such land until the dispute is resolved.

(2) The Government shall arrange for the appropriate customary institutions or procedures to resolve disputes concerning the ownership of custom land.

Id. at Art. 78.

56 CONSTITUTION OF PALAU 1981:

The government shall take no action to prohibit or revoke the role or function of a traditional leader as recognized by custom and tradition which is not inconsistent with this Constitution, nor shall it prevent a traditional leader from being recognized, honored, or given formal or functional roles at any level of government.

Id. at Art. 5, § 1.

A Council of Chiefs composed of a traditional chief from each of the states shall advise the President on matters concerning traditional laws, customs and their

constitutions. For example, the Vanuatu Constitution recognizes customary law when it concerns traditional resource management.⁵⁷ It allows communities flexibility on how to govern certain issues such as the delimitation of protected areas, definition of permitted activities, sanctions, and enforcement mechanisms.⁵⁸ In Palau, courts are becoming part of customary law in dispute resolution.⁵⁹ Chiefs in Palau are being involved in the legislature and state government.⁶⁰

Under legislative recognition, courts may be required to look at customary law when deciding their cases.⁶¹ For example, in Samoa, customary law is only constitutionally recognized through acts of parliament or court decisions.⁶² In Fiji, customary law recognition goes through parliament.⁶³

Countries of the South Pacific islands have a hierarchy of laws.⁶⁴ At the top of the hierarchy is the constitution, followed by statutes, regulations, by-laws, case law, with customary law at the bottom.⁶⁵ Customary law is applied in varying degrees throughout the South Pacific.⁶⁶ In the Federated States of Micronesia, customary law is integrated in the national decision-making process.⁶⁷ Chiefs are able to play an active role in decision making, and are given the opportunity to make sure that customs are upheld within the nation's policies.⁶⁸ The Marshall Islands also include chiefs in the

relationship to this Constitution and the laws of Palau. No person shall be a member of the Council of Chiefs unless he has been appointed and accepted as a chief in a traditional manner, and is recognized as such by the traditional council of chiefs of his state. No chief shall serve in the Council of Chiefs while serving as a member of the Olbiil Era Kelulau or the cabinet.

Id. at Art. 8, § 6.

⁵⁷ CONSTITUTION OF THE REPUBLIC OF VANUATU 1980, Art. 78.

⁵⁸ TOBIN, *supra* note 12, at 9.

⁵⁹ *Id.*

⁶⁰ *Id.*; CONSTITUTION OF PALAU 1981, Art. 5, § 1, Art. 8, § 6.

⁶¹ TOBIN, *supra* note 12, at 29. Legislative recognition can pertain to a wide range of issues that customary law touches on including "rights over land, marine areas, and biological resources." *Id.*

⁶² *Id.* at 30. Fiji is similar to Samoa with using acts of parliament or court decisions to constitutionally recognize customary law. *Id.*

⁶³ *Id.* at 30.

⁶⁴ *Id.* at 63.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 63.

⁶⁸ Yap, an island in Micronesia, has four branches of government - the executive, the legislative, the judicial, and traditional chiefs. *Id.* The Constitution of the Federated States of Micronesia explicitly states the importance of including village chiefs in decision making and making sure that they are recognized. CONSTITUTION OF THE FEDERATED STATES OF MICRONESIA 1978. "Nothing in this Constitution takes away a role or function of a traditional leader as recognized by custom and tradition, or prevents a traditional leader from being recognized, honored, and given formal or functional roles at any level of government as may be prescribed by this Constitution or by statute." *Id.* at Art. V, §. 1. "The Congress may establish, when needed, a Chamber of Chiefs consisting of traditional leaders from each state having such leaders, and of elected representatives from states having no traditional leaders.

national legislature and state government.⁶⁹ Although customary law sits at the bottom of the hierarchy of law in the South Pacific, it exerts a strong influence over rights to land and marine areas that are under traditional tenure.⁷⁰

B. Customary Law and Traditional Resource Management

South Pacific island nations already use customary law and work with local communities for resource management.⁷¹ For example, Vanuatu has used customary law to manage fish stocks.⁷² Vanuatu integrated traditional knowledge into their legal system with the Environmental Management and Conservation Act (2002).⁷³ Similarly, in Palau, chiefs have put *Buls* (moratoriums) on fishing during spawning season to allow fish stock the opportunity to replenish.⁷⁴ An important aspect of successful traditional resource management, is cooperation and assent among multiple communities to agree and comply with these *Buls*.⁷⁵

There are three pillars of traditional resource management.⁷⁶ The first is traditional tenure, which is the land owned by local communities and villages.⁷⁷ The second is the traditional knowledge these communities have about the land.⁷⁸ The third is having customary law that is used to help

The constitution of a state having traditional leaders may provide for an active, functional role for them.” *Id.* at Art. V, §. 3.

⁶⁹ TOBIN, *supra* note 12, at 31.

⁷⁰ *Id.* at 30.

⁷¹ *Id.* at 63.

⁷² *Id.*; See also Donna Llewellyn, *Customary law on Malo, South Santo, Vanuatu, and the Protection of the Marine Environment*, in TABUS OR NOT TABOOS? HOW TO USE TRADITIONAL ENVIRONMENTAL KNOWLEDGE TO SUPPORT SUSTAINABLE DEVELOPMENT OF MARINE RESOURCES IN MELANESIA 22-23 (No. 17 Dec. 2004).

⁷³ Before western countries came to Vanuatu, the country had direct resource management and indirect resource management. Caillaud et al., *supra* note 30, at 15.

Direct management occurred as a result of direct observations (and a perception of a change in resource status, or degradation of ecosystems), which led to decisions to take relevant, corrective action (e.g. declaring a ban – taboo or tabu). Indirect management had a more spiritual and cultural basis, and conservation measures were established via ritual and initiation ceremonies. Indirect resource management practices included the establishment of taboo sites, and taboos imposed by customs following particular events such as an epidemic, a murder, or a pig killing ceremony. Direct practices included periodic taboos imposed by chiefs or landowners, and symbolized by recognized markers.

Id.

See also Environmental Management and Conservation Act [Cap 283], Part 4, §§ 35-40 (Vanuatu 2002).

⁷⁴ TOBIN, *supra* note 12, at 63. Restrictions are known as tabus, taboos or buls. *Id.*

⁷⁵ *Id.* Before the west the villages each had village councils who were in charge of managing the public land. Caillaud et al., *supra* note 30, at 16.

⁷⁶ TOBIN, *supra* note 12, at 33.

⁷⁷ *Id.* This includes marine areas as well. *Id.* at 21.

⁷⁸ *Id.* at 33.

preserve the land.⁷⁹ Traditional resource management is at risk of being lost due to the decline of traditional knowledge.⁸⁰ Traditional knowledge is at risk due to an increase of western influence, educational systems that denigrate traditional knowledge as inferior to western knowledge,⁸¹ farmers moving towards “monoculture farming techniques,” failure to transmit traditional knowledge through generations, and loss of indigenous languages.⁸² If we want good and meaningful ways to protect the environment, we should be listening to and learning from those who intimately know the land.

When traditional knowledge is lost, we lose valuable resource management solutions.⁸³ In Kanaky-New Caledonia, before western nations took over the island, the indigenous communities had already created sustainable management techniques for fishing.⁸⁴ The connection between land and traditional knowledge is so closely related that the impact of lost land on traditional knowledge is essentially cyclical.⁸⁵ The loss of land contributes to the decline of knowledge, resulting in more loss of land as the knowledge and connection to the land weakens.⁸⁶ Traditional knowledge, then, is

79 *Id.* at 64. (“...[C]ustomary law defines the way TK [traditional knowledge] is used to manage resources with the areas of traditional tenure.”).

80 *Id.* at 65.

81 Traditional knowledge is not inferior and can be helpful for education and for finding a “sustainable community resource management model.” Caillaud et al., *supra* note 30, at 15. This has been shown through Vanuatu and their attempts to integrate traditional knowledge into their legal system for sustainable resource management. *Id.*

82 TOBIN, *supra* note 12, at 19.

83 *Id.* at 65. This article touches on traditional knowledge in the framework that it relates to customary law. An important conversation is taking place regarding protecting traditional knowledge and the definition of traditional knowledge. *Id.* at 16. The definition of traditional knowledge depends on the purposes for which international organizations are using that traditional knowledge. *Id.* at 17. For example:

[W]ith regard to [traditional knowledge] related to the environment[,] representatives of indigenous peoples in the Andean region have defined this as including “...all the knowledge, indigenous peoples possess from their relations and practices in the environment which are transmitted from generation to generation, usually by word.. This knowledge is intangible and integral to all ancestral knowledge and practices, constituting the intellectual cultural heritage of indigenous peoples...”

Id. Using this definition to show that traditional knowledge can help in “natural sciences; rituals, songs, dances and rhythms; crafts, ceramics and conservation of ecosystems; knowledge of plants and animals; among others.” *Id.* at 17-18. Another example is the definition of traditional knowledge by the Council of Yukon First Nations for environmental purposes: “the accumulated body of knowledge, observations and understandings about the environment, and about the relationship of living beings with one another and that environment, that is rooted in the traditional way of life of First Nations.” *Id.* at 18.

84 Boengkih, *supra* note 33, at 18-19.

85 Brodie et al., *supra* note 1, at 183.

86 Traditional knowledge is not being passed down from generation to generation. TOBIN, *supra* note 12, at 65. Urbanization has led to indigenous people losing their connection (bond) with nature, and the concept of being stewards of the earth is being lost in the younger generations. Brodie et al., *supra* note 1, at 184.

essential to stopping the loss of biodiversity in the South Pacific islands.⁸⁷ Culture is lost when land is lost.⁸⁸

South Pacific island nations' use of customary law for community resource management has been implemented for marine conservation.⁸⁹ In Vanuatu, the Fisheries Act acknowledges customary land owners and requires that they be consulted when there is an area that is going to be declared protected.⁹⁰ In Fiji, local communities, government agencies, and non-governmental organizations have come together to create "locally managed marine areas" to help protect the ecosystem.⁹¹ Local community engagement "results in sustainable development in coastal communities, and encourages better understanding of customary management in socioeconomic terms," benefitting resource management goals.⁹² Given customary law's potential in addressing environmental conservation, it is important to understand how to ensure customary law's successful implementation.⁹³

C. Customary Law and the Courts in the South Pacific Islands

Courts in the South Pacific have been reluctant to apply custom.⁹⁴ This hesitancy stems from judicial disdain for custom,⁹⁵ a continuation of past colonial attitudes,⁹⁶ lack of training within the common law tradition about how to apply unwritten custom,⁹⁷ ambiguity over which custom to apply

87 Brodie et al., *supra* note 1, at 184.

88 Tarcisius Tara Kabutaulaka, *Rumble in the Jungle: Land, Culture and (Un)sustainable Logging in Solomon Islands*, in *CULTURE AND SUSTAINABLE DEVELOPMENT IN THE PACIFIC* 88, 89 (Antony Hooper ed., 2005). Tradition is a way of doing things that are connected to the past. *Id.* For indigenous people, land is not just there for economic gain; it is culturally significant as well. *Id.* at 92. "...[F]or those of us for whom ties to land consist of casual contacts with small and often infrequently tended suburban gardens, one of the more difficult exercises in imagination is to conceive of the relationship between rural communities and the lands and the resources that they consider theirs." *Id.*

89 TOBIN, *supra* note 27, at 9. "In South Pacific Island countries up to 80% of the land and significant marine areas and the resources they contain are subject to traditional tenure and are largely governed by traditional resource management strategies based on customary law."

90 Llewellyn, *supra* note 72, at 22-23.

91 Alifereti Tawake and Silika Tuivanuavou, *Community Involvement in the Implementation of Ocean Policies: The Fiji Locally Managed Marine Areas Network*, in *TABUS OR NOT TABOOS? HOW TO USE TRADITIONAL ENVIRONMENTAL KNOWLEDGE TO SUPPORT SUSTAINABLE DEVELOPMENT OF MARINE RESOURCES IN MELANESIA* 26 (No. 17 Dec. 2004).

92 *Id.*

93 *Id.* at 63-64. Examples of this are: New Zealand's 1996 Fisheries Act; the *Blue Mud Case* in which the Australian High Court "recognised [sic] the rights of aboriginal peoples over coastal areas from the high to low tide mark;" and Vanuatu's Fisheries Act, which states that "customary owners of marine areas be consulted prior to declaring an area protected under the act."

94 Zorn, *supra* note 15, at 97.

95 *Id.*

96 *Id.*

97 Not all judges are native to the country they are working in. As an expat, they may be unsure if what they are applying is really custom. *Id.*

(customs are living and evolving law),⁹⁸ and the introduction of another legal system.⁹⁹ Before colonialism, legal systems were completely based on custom.¹⁰⁰ With the introduction of colonialism, legal systems composed of courts and legislatures were created.¹⁰¹ This new legal system meant that people could go to the newer system if they did not like the outcome of the customary system, leading to the continual undermining of customs.¹⁰² For example, if there is a disagreement under customary law, resolution would involve a compromise between the parties, whereas formal judicial courts create winners and losers.¹⁰³ The party with the potential of winning everything may avoid customary laws all together and go straight to court.¹⁰⁴

Even with this general resistance to apply custom, some judges have tried to incorporate custom within their current legal system.¹⁰⁵ For example, in PNG, a judge created a test for when a practice becomes a custom that can be applied to a case.¹⁰⁶ The case that created the test involved a couple, where the husband was claiming that he and his wife were married under customary law.¹⁰⁷ The first element of the judge's test was that the custom had to be "clearly recognised [sic] by everyone."¹⁰⁸ In PNG, there are currently three recognizable ways to know someone is married: (1) traditional custom,¹⁰⁹(2) through the church via the Marriage Act,¹¹⁰ and (3) a civil marriage registrar via the Marriage Act.¹¹¹ If the judge were to add a fourth way for a marriage to be recognized in PNG, the custom would have had to be widely recognized before the judge accepted it.¹¹² The second element of the test was for the court to consider the "far reaching consequences" of accepting this custom as law before allowing it power within the courts.¹¹³ The judge reasoned there are consequences to marriage, which is why marriage should not be something that is easily assumed by law.¹¹⁴

98 *Id.*

99 *Id.* "The villages of the Pacific went from being separate, sovereign entities to being less parts of larger political entities."

100 *Id.* at 97.

101 *Id.*

102 *Id.* at 98.

103 *Id.* at 98.

104 *Id.*

105 *Id.* at 98-99.

106 Zorn, *supra* note 15, at 101-03; *Re Thesia Maip and s42(5) of the Constitution; Application of Thesia Maip* [1991] PNGLR 80 (Papua N.G.).

107 Zorn, *supra* note 15, at 100-03.

108 *Id.* at 101-02.

109 *Id.* at 102.

110 *Id.*

111 *Id.*

112 *Id.*

113 Zorn, *supra* note 15, at 102. Is this too high of a bar to reach?

114 *Id.*

In the Solomon Islands, the High Court in *John To 'ofilu v. Oimae* denied the reasoning of the Magistrate's Court and how they used customary law, agreeing instead with the Local Court's original decision that the bride's family had to return the whole bride price.¹¹⁵ This case involved the bride price between two families.¹¹⁶ Before the marriage, the bride became pregnant from another man and the bride's father was aware, yet they did not tell the groom or the groom's father.¹¹⁷ The groom's father sued the bride's father and the Local Court decided the case on the custom that both parties are supposed to divulge all relevant and important information when they are negotiating the bride price.¹¹⁸ Finding the bride's father did not meet custom, the Local Court held for the groom's father.¹¹⁹ The Magistrate Court judge rejected the Local Court's customary reasoning, but still used customary law to govern how he ruled.¹²⁰ Disputes that are settled by custom usually involve multiple rules that can be applied in the case.¹²¹ Here, the Magistrate Court judge, in a manner similar to an elder or clan leader, used the rules as "markers" instead of as guidelines in deciding the case.¹²² When the case reached the High Court, the judge agreed with the Local Court and their outcome but decided the case with only one rule, as is the way under common law.¹²³

II. SAMOA AND THE FISHERIES ACT

Samoa has used customary law to help regulate the environmental problem of overfishing and marine degradation through village by-laws.¹²⁴ Destructive practices, like poisoning fish and using explosives to effectively catch fish, have destroyed the once untouched marine ecosystems.¹²⁵ The creation of the village by-laws started in the 1980s when coastal villages noticed a serious decrease in their catches.¹²⁶ These low catches raised major concern among village *fonos*.¹²⁷ *Fonos* used local media to raise awareness of this problem.¹²⁸ They raised awareness on the prohibition of using

115 *Id.* at 104-06.

116 *Id.* at 104.

117 *Id.*

118 *Id.* at 104.

119 Zorn, *supra* note 15, at 104.

120 *Id.*

121 *Id.* at 105.

122 *Id.*

123 *Id.*

124 Cordonnery, *Environmental Law Issues*, *supra* note 1, at 244; *see also* Fa'asili & Kelekolio, *supra* note 38, at 7 (1999).

125 Fa'asili & Kelekolio, *supra* note 39, at 7.

126 *Id.*

127 Cordonnery, *Environmental Law Issues*, *supra* note 1, at 244 (*Fonos* are a council of village chiefs); Fa'asili & Kelekolio, *supra* note 39, at 7.

128 Fa'asili & Kelekolio, *supra* note 39, at 7.

explosives as a method of fishing, and prevented neighboring villages from fishing in their waters.¹²⁹ There were penalties for both members of the local communities and outsiders who broke the rules.¹³⁰ Members of the community had to pay a fine while members of neighboring communities were threatened with legal action.¹³¹ However, where rules enacted by village *fonos* contradicted national law, the *fonos* could not take court action against neighboring villages who broke their rules.¹³²

The Fisheries Division of Samoa noticed the success that village *fonos* were having and saw the benefit of using their methods.¹³³ In response to the *fonos* success and their trouble with enforcement against outside offenders, the Fisheries Division legalized the village rules through the Fisheries Act in 1988.¹³⁴ The Fisheries Act involved consultation with local communities and their leaders about the conservation and management of fisheries.¹³⁵ The Fisheries Act also contained provisions that allowed villages to add their own by-laws if they related to conservation and management.¹³⁶

Village Fisheries by-laws are “village rules that have been prepared in accordance with relevant provisions of national Fisheries Legislation and are accorded legal recognition in the courts of law.”¹³⁷ These by-laws can relate to any provision in the Fisheries Legislation as long as they relate to conservation and management.¹³⁸ What is arguably the most important

129 *Id.*

130 *Id.*

131 *Id.*

132 *Id.*

133 *Id.*

134 Fa’asili & Kelekolio, *supra* note 39, at 7; Fisheries Act, 1988 (Samoa) Part II, Article 3, Sections §§ 4(a) – (h) of the Act discuss village by-laws and the process of getting them signed by the Chief Executive Officer. *Id.* at part II, art. 3, §§ 4(a)–(h).

135 Fisheries Act (Samoa), part II, art. 3, § 2(c). (“The general functions of the Chief Executive Officer are . . . to consult with fishermen, industry and village representatives, concerning conservation, management and development measures for fisheries.”).

136 Fa’asili & Kelekolio, *supra* note 39, at 8. According to the Fisheries Act:

The Chief Executive Officer has such powers, rights and authorities as may reasonably be necessary or expedient to carry out the Chief Executive Officer’s functions, and in particular may . . . in consultation with fishermen, industry and village representatives, prepare and promulgate by-laws not inconsistent with this Act for the conservation and management of fisheries[.]

Fisheries Act (Samoa), part II, art. 3, § 3(d).

137 Fa’asili & Kelekolio, *supra* note 39, at 7.

138 A few examples of the type of regulations implemented include “restriction of the sizes of fish and shellfish . . . , bans on certain types of fishing gear and methods, allocation of fish quotas, restriction of mesh sizes for nets and fish traps . . . and closure of fishing seasons or areas to allow fish to reproduce.” *Id.*; See also Fisheries Act (Samoa), part II, art. 3, § 2(c); part II, art. 3, § 3(d); and part II, art. 4, §§ 4(a)–(h).

aspect of these by-laws is that they apply to all citizens, not just members of the village who created the by-laws.¹³⁹

The process of creating a by-law starts when a village *fono*, who is the highest village authority, seeks to promote a village rule to a by-law.¹⁴⁰ This leads to a discussion among village chiefs on what rules they want introduced to the Fisheries Division to become by-laws.¹⁴¹ Once the village chiefs decide on what rules to promote, a village representative goes to the Fisheries Division.¹⁴² The village representative and Fisheries Division will discuss the rules presented, giving the Fisheries Division an opportunity to give their suggestions on the rules.¹⁴³ The Fisheries Division will then re-draft the by-laws.¹⁴⁴

Once the consultation stage has been finished, the drafted by-laws are sent to the Attorney General for a final check and approval.¹⁴⁵ If the Attorney General approves the by-laws, they are written into a proper legal form and returned to the Fisheries Division where the Director of the Ministry of Agriculture, Forests, Fisheries and Meteorology signs them.¹⁴⁶ After signing, the by-laws will be officially published in the Government Gazette.¹⁴⁷ The by-laws will also be published in local communities.¹⁴⁸ It is important for the neighboring communities to get a copy of the by-laws, as they are the ones most likely to breach them.¹⁴⁹ There is a minimum fourteen-day requirement before the by-laws may be enforced.¹⁵⁰ The last and most

139 Fa'asili & Kelekolio, *supra* note 39, at 7. A full list of the different regulations and actions that villages in Samoa have taken along with the percentage of villages that follow regulations can be found in Table 1 of Fa'asili and Kelekolio's paper. *Id.* at 8.

140 *Id.* at 8.

141 Rules must relate to a conservation or management provision. *Id.*

142 *Id.*

143 Some rules that are presented may contradict with other already existing laws. *Id.* This consultation with the Fisheries Division allows for the opportunity for any issues with the rules to be ironed out. *Id.*

144 *Id.*

145 Fa'asili & Kelekolio, *supra* note 39, at 8.

146 *Id.*; Fisheries Act (Samoa), part II, art. 3, § 4(a).

147 Fa'asili & Kelekolio, *supra* note 39, at 8. "With respect to by-laws under this section, the following provisions shall apply... [they] shall be published in the Gazette and in a newspaper circulating in Samoa." Fisheries Act (Samoa), part II, art. 3, § 4(b).

148 Fa'asili & Kelekolio, *supra* note 39, at 8.

With respect to by-laws under this section, the following provisions shall apply... (c) [they shall] come into force on a day fixed in the by-law, which day must not be earlier than 7 clear days after the date of publication in the Gazette; (d) any by-law may in like manner be altered or revoked; (e) any by-law affecting or applying to the conservation and management of fisheries in lagoon waters shall be issued to the Pulenuu of adjacent villages at least 7 clear days before it shall come into force.

Fisheries Act (Samoa), part II, art. 3, §§ 4(c)–(e).

149 Fa'asili & Kelekolio, *supra* note 39, at 8.

150 After the by-laws have been officially published, they can still be amended or revoked by the village *fono*. *Id.* "For the purposes of subsection (4), 14 days' notice in writing shall be given of the prosecution's intention to adduce the said certificate in any proceedings brought under this section." Fisheries Act (Samoa), part II, art. 4, § 5.

crucial step to this process is the enforcement of the by-laws.¹⁵¹ Villages will enact different ways to ensure that their village by-laws are not breached.¹⁵² If a member of the village breaches a by-law, their penalty will be a traditional fine.¹⁵³ If an outsider of the village breaches a by-law, then the penalty must be settled in court.¹⁵⁴

While the use of village by-laws has been largely successful in Samoa, it has encountered problems.¹⁵⁵ One obstacle has been that internal disputes among village *fonos* can hinder the effective enforcement of by-laws.¹⁵⁶ Government entities moving too slowly to enforce the by-laws when outsiders breach them also presents a difficulty in meaningful enforcement.¹⁵⁷ When the government is too slow to act, it leads to an ineffective system of enforcement, leaving villages stuck with the same issue they had before the Fisheries Act was enacted.¹⁵⁸ Another problem is the cost of advertising the by-laws.¹⁵⁹ It can be expensive for the Fisheries Division to advertise them to all the village communities to make sure that everyone is on notice.¹⁶⁰

To supplement the Fisheries Act, in 1995 the Samoan government, with the aid of Australia, created the Fisheries Extension and Training Project.¹⁶¹ The goal of this new program was “to seek a community-developed Fisheries Management Plan from each participating village community.”¹⁶² The project has seen sixty-seven villages create their own Village Fisheries Management Plan and the creation of fifty-seven new fisheries by-laws.¹⁶³

III. LOOKING AT PNG’S AND THE SOLOMON ISLANDS’ ATTEMPTS

When looking at Samoa and their success with using customary law to help manage their fishing resources, cooperation can be seen between the local community and the national government.¹⁶⁴ The Samoan government,

151 Fa’asili & Kelekolio, *supra* note 39, at 9.

152 *Id.*

153 *Id.*

154 *Id.*

155 *Id.*

156 *Id.*

157 Fa’asili & Kelekolio, *supra* note 39, at 9.

158 Delay in the government processing leads to a delay in being able to effectively enforce the by-laws when an outsider breaches the laws, which can at times lead to physical force. *Id.*

159 *Id.*

160 *Id.* at 9-10.

161 Ueta Fa’asili & Autalavou Taua, *Review of the Village Fisheries Management Plan of the Extension Programme in Samoa, Secretariat of the Pacific Community* 3 (2001).

162 *Id.* at x.

163 *Id.*

164 Fa’asili & Kelekolio, *supra* note 38, at 7-9.

as evidenced through the Fisheries Act and the Fisheries Extension and Training Project, has shown that it is committed to community engagement and involvement to solve the imminent environmental crisis of declining fish stocks.

In Samoa, the creation of a village by-law starts with a community discussion of what rules should be made into national laws.¹⁶⁵ Even when the by-law process moves to the Fisheries Division's evaluation of the laws, there is still open communication between the community and the government.¹⁶⁶ The importance of open dialog from start to finish and the active involvement of the people of Samoa cannot be understated in the success of Samoa's village by-laws.¹⁶⁷ It takes local knowledge to be aware of local problems and traditional knowledge to know how to solve the problems unique to the region. Therefore, South Pacific island nations are often best served when they enshrine local customs, using traditional knowledge, into federal laws like Samoa has done.

Using customary law to conserve the environment and stop the exploitation of natural resources can work,¹⁶⁸ but there must be respect for custom and traditional thinking, which has been lost with the proliferation of colonization and Western ideologies.¹⁶⁹ A traditional practice that works is only so effective if it is not recognized by national law.¹⁷⁰ Fortunately, numerous countries are fighting back to ensure that they do not lose valuable traditional knowledge.¹⁷¹ Involving local communities in sustainable resource management discussions is why I believe Samoa has been successful so far; the ground Samoa has gained in this area is due to utilizing the knowledge and skillsets of the local people to protect and manage its natural resources.

A. PNG

While Samoa has been successful in creating environmental policies, nations like PNG and the Solomon Islands have not seen a similar level of success. PNG has implemented legislation such as "the Land Act of 1996, the Environment Act (2000), [the] Forestry Act (1991), [the] Mining Act

¹⁶⁵ *Id.* at 8.

¹⁶⁶ *Id.*

¹⁶⁷ "Involving indigenous peoples and local communities at the earliest stages of policy and legislative development can help to ensure that the role of customary law is fully taken into consideration." TOBIN, *supra* note 12, at 27.

¹⁶⁸ *Id.* at 27-28.

¹⁶⁹ *Id.* at 65-66.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 25. For example, in Vanuatu, they are changing their education system to help combat and reverse the negative views the west has implemented that looks down and disrespects indigenous culture and history. *Id.* at 27.

(1992), and the Oil and Gas Act (1998)”¹⁷² to help conserve its biodiversity.¹⁷³ However, these policies have not been successful.¹⁷⁴ In their 2004 study, Genolagani and Henao, in their 2004 study, labeled the acts “not appropriately decentrali[z]ed.”¹⁷⁵ The challenge, though, is deciding the correct way to decentralize, especially in a country that is as culturally diverse as PNG. PNG is home to 800 languages and 2,000 different cultures.¹⁷⁶ In Samoa, though, 96% of those who live on Samoa identify as Samoan.¹⁷⁷ This monoculturalism could be a reason why Samoa is able to implement successful environmental policies with relative ease.

International influence on PNG’s policies may also be an obstacle to their environmental efforts.¹⁷⁸ For example, PNG’s Mining Policy was funded by the World Bank.¹⁷⁹ When looking specifically at land management, one possible reason for the lack of success might be the structure of landownership. In PNG, 97% of the land is customarily owned, which cause complicated and confusing negotiations in land deals.¹⁸⁰

Another possible reason PNG does not have successful programs is because of the lack of accountability and enforcement for violations of environmental legislation.¹⁸¹ Ultimately, however, the root of these obstacles for PNG can be found in colonialism.¹⁸² Instead of looking to its people and local communities, the PNG government used legislation drafted by countries like Britain and Australia and prescribed them onto their own country.¹⁸³ How do Britain and Australia know what PNG’s needs are if they are

172 Lucy EJ Woods, ‘*Beautiful Legislation*’ Fails to Protect PNG’s Environment, *Landowners*, MONGABAY (Feb. 14, 2019), <https://news.mongabay.com/2019/02/beautiful-legislation-fails-to-protect-pngs-environment-landowners/>.

173 Caillaud et al., *supra* note 30, at 28-29.

PNG is a biodiversity “hot spot” and has the second largest diversity of species in the Pacific. With 40,000 km² of reefs and a natural forest land cover of almost 77%, it hosts 7% of the world’s species of plants and terrestrial life forms. PNG’s natural habitats are as beautiful as they are diverse, including beaches and ridges, swamps, lowlands, foothills and mountains. It is estimated that approximately 60% of PNG’s plants are endemic. The country hosts 20,000 plant species, 800 species of corals, 304 mammal species and 733 species of birds.

Id. at 28.

174 *Id.* at 28-29.

175 *Id.* at 29.

176 *Id.*

177 Chara Scroope, *Samoan Culture: Core Concepts (2017)*, CULTURAL ATLAS, <https://culturalatlas.sbs.com.au/samoan-culture/samoan-culture-core-concepts> (last visited Mar. 23, 2024).

178 PNG has an abundance of natural resources that have international mining companies coming to its country to profit off of its natural resources. *Id.* at 29.

179 Caillaud et al., *supra* note 30, at 29.

180 Woods, *supra* note 172. Traditional land is divided among clans and families and the “communal, family-based land tenure system is ‘very complex.’” *Id.*

181 *Id.*

182 *Id.*

183 *Id.*

not on the ground like local communities are? Due to this unsuitable influence, PNG has struggled to implement successful environmental policies that decentralize the control of the land and give the local government and communities more power.¹⁸⁴

B. Solomon Islands

The Solomon Islands' economy is dependent on logging.¹⁸⁵ Logging companies are able to operate with nearly no scrutiny, which means the few regulations that the Solomon Islands have put into place are often disregarded.¹⁸⁶ Deals created between customarily-owned landowners and logging companies are viewed as dishonest.¹⁸⁷ In the Solomon Islands, the concept of naturalizing wealth is seen within the logging industry and the politicization of logging.¹⁸⁸ With the introduction of commercial logging, landownership represented huge financial opportunities.¹⁸⁹ Starting in the 1960s, the state took on the role of being the mediator between logging companies and landholders.¹⁹⁰ Consequently, the Solomon Islands turned to foreign investors and began to vet potential corporations, squeezing out the landowners' role in the process.¹⁹¹

In 1996, the Parliament passed the Forest Resources and Timber Utilisation Act [Cap. 40], which allowed the harvest of timber on customary or private land with a license obtained through the Timber Rights Application Process.¹⁹² Courts have distinguished customary ownership of trees and

184 Caillaud et al., *supra* note 30, at 29.

185 Peter Dauvergne, *Weak States and the Environment in Indonesia and the Solomon Islands* 11 (Res. Mgmt. in Asia-Pacific Project, Working Paper No. 10, 1997).

186 *Id.* at 10.

187 Foukona & Timmer, *supra* note 2, at 2. The ability to log unregulated coupled with the greed have led to the Solomon Islands seeing valuable forests exploited. *Id.* at 116. Starting in the 1960s the state took on the role of being the mediator between logging companies and landholders. *Id.* at 118.

188 *Id.* Naturalizing wealth is the concept that nature not labor can give a nation wealth. *Id.*

189 *Id.*

190 *Id.*

191 *Id.*

192 *Id.* at 121-22; *see also* Forest Resources and Timber Utilisation Act [Cap 40], § 5 (Solomon Islands 1996).

Licence to fell trees for milling or sale

5. - (1) Upon an application made to the Commissioner of Forest Resources for the grant of a licence authorising the felling of trees upon and the removal of timber from –

(a) any public land, land in which the Government holds a freehold interest in land or leasehold interest in land, land leased by or on behalf of the Government, land in respect of which the Government has a profit to fell and take away trees, and any land contiguous or island adjacent to such land; or

(b) any land, not being customary land, or land to which paragraph (a) applies; and

(c) any customary land, when such felling and removal are the subjects of rights granted under an agreement duly approved by the Minister under Part III,

customary ownership of lands.¹⁹³ Area Council Provincial Executives let Solomon Islanders know if they have any timber rights and convene any other timber hearings, but there is no clear legislative framework to figure out if someone has timber rights.¹⁹⁴ Landowners are not the ones who make the deal with logging companies; instead, there is a broker who makes the agreement and ensures that it is fulfilled.¹⁹⁵ This arrangement means that landowners not involved in the contract do not know what is in it.¹⁹⁶ They additionally do not know that it is the broker's responsibility to hold the logging companies accountable.¹⁹⁷ When landholders on Mailata, the most populous island in the Solomon Islands, were asked how they felt about logging agreements, they expressed resentment and said they saw the agreements as broken promises by investors and logging companies.¹⁹⁸

In the Solomon Islands, an integral issue the country faces is a lack of power and capacity to ensure the enacted regulations are followed.¹⁹⁹ This is largely due to the government weakening policies that may negatively impact corporate profit.²⁰⁰ Foreign companies have taken advantage of this lack of accountability by continuously ignoring regulations.²⁰¹ Comparing the Solomon Islands' circumstances and their attempts at regulation to Samoa and the village by-laws framework, it is clear that what is missing in the Solomon Islands is communication with local communities. When it comes to negotiating land rights, the landowners themselves are not involved in the negotiations and do not have the ability to know what is in the contracts.²⁰²

and upon payment of the prescribed fees for the grant of such licence, the Commissioner of Forest Resources may either accept the application or reject it: Provided that no such application shall be rejected without hearing the applicant, if he so desires, and without communicating to him the reasons of such rejection.

Id.

193 Foukona & Timmer, *supra* note 2, at 121. Essentially what this means is that the trees and the land were bifurcated. *Id.* The trees on the land could be sold while the land was still held by the original landowners. *See also* Forest Resources and Timber Utilisation Act [Cap 40], § 8(3) (Solomon Islands 1996). Under § 8(3) there has to be a discussion between the landholder and the applicant wanting to harvest the timber to see if the landholder is willing to give up their timber rights to the applicant. *Id.*

194 Foukona & Timmer, *supra* note 2, at 122.

195 *Id.* at 121-22.

196 *Id.* at 122.

197 *Id.*

198 *Id.* at 121.

199 Dauvergne, *supra* note 185, at 10.

200 *Id.*

201 *Id.*

202 Foukona & Timmer, *supra* note 2, at 122. The agreement between the broker and the logging company is called a Technical and Management Agreement. *Id.* Because it is a contract between the broker and the logging company, and the landowners are not a party they are not allowed to enforce it. *Id.*

An example of the importance of communicating with and using local knowledge is seaweed farming in the Solomon Islands.²⁰³ The country saw an economic opportunity in seaweed farming and targeted landholders who had reefs where seaweed grew well.²⁰⁴ The Malaita Fisheries Division was the governmental body in charge of buying and exporting the seaweed.²⁰⁵ The national government, though, did not provide a market for seaweed.²⁰⁶ Under the Fisheries Act 1998, the Malaita Fisheries Division was “responsible for proper management and further development of fisheries in Malaita Province.”²⁰⁷ Because of the lack of direction from the government, farmers ended up organizing themselves and worked out a more transparent system that was not tied to brokers and investors.²⁰⁸

Certain international organizations like WorldFish are focusing on the community to help combat the environmental challenges that South Pacific islands face.²⁰⁹ WorldFish created a report for the Solomon Islands under the concept of Community-Based Resource Management (“CBRM”).²¹⁰ For South Pacific islands to have effective legislation to protect the environment, information must be accessible to all communities.²¹¹ Being transparent helps identify problems, which leads to better decision making.²¹² Additionally, regulations are ineffective if unknown.²¹³ The challenge that faces countries like PNG and the Solomon Islands is diversity.²¹⁴ Having a large number of communities, all with their own unique cultures, makes it difficult to have a uniform approach.²¹⁵ Local communities and village

203 *See id.* at 123.

204 *Id.* The seaweed farming program was run by the Ministry of Fisheries and Marine Resources. *Id.*

205 *Id.*

206 *Id.* The Government did not provide information about the costs of seaweed farming nor adequate guidance. *Id.*

207 *Id.*; Fisheries Act (Solomon Islands), § 9. “Subject to sections 3 and -7, each provincial government shall be responsible for the proper management and development of the reef, inshore and freshwater fisheries within its provincial waters.” *Id.*

208 Foukona & Timmer, *supra* note 2, at 124.

209 HUGH GOVAN & GREGORY BENNETT, WORLD FISH, TOWARDS SUSTAINABLE RESOURCE MANAGEMENT IN WESTERN PROVINCE: CAPACITY, POTENTIAL THEORY OF CHANGE AND STRATEGIES FOR IMPLEMENTATION OF COMMUNITY-BASED RESOURCE MANAGEMENT (CBRM+) IN WESTERN PROVINCE 6 (2014).

210 “[CBRM] is a Solomon Islands approach to providing essential information and support to communities in order to promote wise resource management decisions, and build links between communities and government.” *Id.* at 6.

211 *Id.* at 7.

212 *Id.*

213 *Id.*

214 The Solomon Islands have 73 active languages. *What Languages Are Spoken in Solomon Islands?*, WORLD ATLAS, <http://worldatlas.com/articles/what-languages-are-spoken-in-solomon-islands.html> (last visited Mar. 9, 2025). PNG has 800. Caillaud et al., *supra* note 30, at 29.

215 GOVAN & BENNETT, *supra* note 209, at 6.

leaders know what is best for their communities, and they should be involved in all stages of legislative proposals.²¹⁶

Samoa has done well with their use of community involvement, traditional knowledge, and custom.²¹⁷ In contrast with countries like PNG and the Solomon Islands, Samoa's successful legislation relies on local community communication, specifically with those who have intimate knowledge of what is happening on the ground.²¹⁸ Enshrining customary law and traditional knowledge in national legislation should be the end goal for countries that want to protect their vital yet fragile ecosystems.

IV. POTENTIAL SOLUTIONS

Is there a solution to South Pacific island nations' issues with trying to protect their land? The international world has attempted to help in its own way through the enactment of the United Nations Convention on the Law of the Sea (UNCLOS).²¹⁹ The UNCLOS specifically addresses coastal states and their obligation to provide proper conservation measures and guard against over-exploitation.²²⁰ The UNCLOS also obliges coastal states to optimize their living resources.²²¹ This means that if the state alone cannot hit the total allowable catch (TAC) mark for fish, they must allow other states to come in to meet it.²²² This raises the question of whether the South Pacific should be relying on an international community more concerned

216 "[S]upport the assumption that communities may identify problems, agree to take action and act - all without outside intervention, though this process does most likely require access to information and ideas that facilitate problem identification and determining potential solutions." *Id.* at 9.

217 See discussion *infra* Section II.

218 See discussion *infra* Section II.

219 Laurence Cordonnery, *Legal Developments in the Conservation and Management of Highly Migratory and Straddling Fish Stocks in the Western and Central Pacific Ocean*, in *PASSAGE OF CHANGE: LAW, SOCIETY AND GOVERNANCE IN THE PACIFIC* 251, 253 [hereinafter Cordonnery, *Legal Developments*]. This convention is rules governing the use of the ocean and its resources. *Id.*

220 U.N. Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397., part V, art. 61.2.

Article 61 Conservation of the living resources:

2. The coastal State, taking into account the best scientific evidence available to it, shall ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not endangered by over-exploitation. As appropriate, the coastal State and competent international organizations, whether subregional, regional or global, shall cooperate to this end.

Id.

221 Cordonnery, *Legal Developments*, *supra* note 219, at 254.

222 *Id.*

with the economics than the protection of the natural resources when it comes to land management.²²³

There has also been an attempt of “intra-regional cooperation” between the South Pacific island countries.²²⁴ For example, the MTC²²⁵ is a list of rules for foreign fishing vessels that are in exclusive economic zones of Forum Fisheries Agency Convention member states.²²⁶ The Regional Register keeps track of fishing vessels and their statuses.²²⁷ If a vessel falls out of good standing, they are denied access to the EEZs of FFA states.²²⁸

Overall, the South Pacific and its island nations are largely at the mercy of the rest of world. However, any work, whether it be local or international, that can help make sure that their natural resources are not lost at an unnecessarily rapid rate is worth the time and effort.

CONCLUSION

Ultimately, when national governments respect village customs, there can be a reduction in environmental harms such as those caused by over-fishing. Customary law and traditional knowledge may be key to protecting the incredibly important and vulnerable ecosystems in the South Pacific, and countries must be willing to recognize and respect them to reap those benefits. For the indigenous populations of the South Pacific, the environment is more than a way to make money; it is essential to the many local cultures and religions of the region.²²⁹ To protect the land, those who are the most deeply connected to it need to be actively involved in the legislation being passed. Protecting the land protects the millions of people who call the South Pacific home and their unique cultures.²³⁰ These countries need to listen to their indigenous peoples, need to listen to the community leaders, and make sure that any regulation that is passed is community-focused. In order for this concept of turning towards community-focused legislation and customary law to work, there must also be an effort to make sure that the customs and traditional knowledge are preserved across generations.

223 “[F]or many of the PICs, tuna is not just a resource; it is the only resource that sustains their economies.” *Id.* at 252. The economics of the ocean cannot be understated but focusing on the economics and seeing the ocean as a potential money maker will not help protect the valuable marine resources nor will it help the nations that are facing very real environmental threats.

224 *Id.* at 256.

225 Minimum Terms and Conditions.

226 Cordonnery, *Legal Developments*, *supra* note 219, at 256-57.

227 *Id.* at 257.

228 *Id.* This is effective in keeping vessels compliant with fishing laws. *Id.*

229 Woods, *supra* note 172.

230 TOBIN, *supra* note 12, at 27. “Involving indigenous peoples and local communities at the earliest stages of policy and legislative development can help to ensure that the role of customary law is fully taken into consideration.” *Id.*

Viewing customary law as a legitimate source of law is a positive step towards protecting against the loss of this traditional knowledge.

The South Pacific is more than an Instagram-worthy vacation spot or a destination wedding, it is home to beautiful and rich cultures. The nations and islands of the South Pacific are important to the world we live in. And for all their importance, they are fragile in equal part. The work these countries have done to protect their land has borne fruit, but they alone cannot fight the looming challenges of rising sea levels and subsequent loss of land and resources. To protect this integral region, world leaders need to take the South Pacific seriously and listen to them and their peoples' traditional knowledge.²³¹

231 While not discussed directly, I think it is important to note that not every country in the South Pacific is free from the grips of colonialism. According to the UN there are six non-self-governing territories: French Polynesia, New Caledonia, American Samoa, Guam, Pitcairn Islands, and Tokelau. This does not include Pacific Islanders who are minorities in their own countries and whose traditions and culture are at risk of being lost. *Non-Self-Governing Territories*, UNITED NATIONS, <https://www.un.org/dppa/decolonization/en/nsgt> (last visited Apr. 5, 2025).