Visit to the Republic of Palau, May 2012

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The following are observations/recommendations on possible ways forward for Palau in pursuing ratification and implementation of the Nagoya Protocol on ABS (NP), made on the basis of the meetings and discussions held during the visit with:

- President
- Vice President
- Minister for Infrastructure, Industry and Communication
- Minister of Cultural Affairs
- Minister for Education
- Minister of Justice
- Director of the Bureau of Agriculture
- Director of Bureau of Marine Resources
- Vice President of the Palau Community College
- Traditional Council of Chiefs
- Minister of Foreign Affairs
- Palau Conservation Society (PCS)

The Secretariat of the CBD has a useful webpage on the ratification process at the international level - www.cbd.int/abs/becoming-party. However, this process should not be confused with the processes that the Republic of Palau requires at the domestic level. Both are necessary for the acceptance of the Protocol as legally binding in Palau.

1. Identify the research permitting authorities and amendments needed to achieve NP compliant documentation

- clarify resource ownership/authority to permit access
  - to biological resources to be used as genetic resources
  - to traditional knowledge associated with genetic resources

We note that several institutions hold authority to grant access to genetic resources, including the Bureau of Marine Resources, the Bureau of Agriculture and the Bureau of Arts and Culture. Existing permit processes should be reviewed to make sure the rights of resource owners to give permission for access are integrated into the permit, and all elements required by the Protocol are included.

Requirements related to the prior informed consent of indigenous and local communities (ILC) may to be addressed at the State level - as national permits are conditional on a State permit being issued prior to research - and it would be advisable to examine State arrangements to assess compliance with these obligations. As State permit processes are a required part of the process, they need to be documented on the ABS Clearing-House.

We undertake to provide an analysis of the application forms for these permit systems against Protocol requirements - additional analysis will be required of the legislative basis for issuing permits. We would be very happy to do such analysis on an informal basis if we have access to the relevant legislation. Verification by Attorney-General's Office should be sought.

If required, permit processes should then be amended to require agreement of the applicant to 'mutually agreed terms'. We recommend that the Attorney General Office undertakes to check whether existing legislation allows for the required amendments.

The existence of mutually agreed terms is necessary for permits to be recognised by other Parties to the Protocol [in compliance with NP, Article 6].

2. Develop standard terms and model agreement for mutually agreed terms

A proposed way forward is to convene a national process to develop, in consultation with all relevant institutions and stakeholders, a standard template of mutually agreed terms.

Key issues to be addressed in MAT [see NP, Article 6(g)]

- Reporting requirements (frequency, to whom, usefulness)
- Change of intent (incl. non-commercial to commercial)
- Transfer to third parties
- Intellectual properties rights
- Research participation, training and transfer of technology (non-monetary benefit-sharing [Annex of the NP])
- Dispute resolution and settlement
- Termination conditions / consequences of breach of contract

Agreement by the applicant to these standard terms would then be made a condition for the grant of a permit.

Such standard terms would be the simplified measure that NP, Article 8(a) requires. If an application warrants a more considered approach, because of clear commercial intent or complexity, a specific set of terms should be negotiated. For example, an explicitly commercial proposal (such as that conducted for pharmaceutical research) should not use the standard terms, but an agreement tailored to consideration of intellectual property rights, royalty or milestone payments, and benefits related to commercialisation.

A model should be developed as a basis for non-standard agreements, to be used for complex or commercial applications and where the non-commercial intent of the researcher changes.

It is recommended that a particular agency be tasked with the negotiation of non-standard terms in consultation with the inter-institutional committee, preferably an agency with experience in developing agreements with the private sector. [Department of Infrastructure, Commerce and Industry?]

An inter-institutional committee would be responsible for the development of standard terms, the development of a model non-standard agreement, guidance for the negotiating agency in the negotiation of non-standard agreements, and for their periodical review.

3. Designate the National Competent Authority/Authorities, which issue(s) permits [see NP, Article 13]

The following options exist:

- Assign existing research permitting authorities - as long as there are no gaps in coverage.
- Any gaps may require an additional permit system, or amendment to existing legal requirements.

- Assign only one NCA, e.g. the Department for Environment, which would have all research permitting responsibility, possibly with a requirement to consult with the relevant institution currently responsible for research permitting.
- Risk of duplication of functions in this option, and this would need to be closely monitored. Resistance from relevant agencies might be expected in any restructure of responsibility.
- Establish a specially convened inter-institutional committee to assess and decide on permit applications.
- Risk of lengthy disputes and long decision making processes due to lack of a clear definition of responsibilities, low participation or participation of alternates lacking the appropriate decision making authority.

Recommendation: the first option entails the least disturbance to existing arrangements, ensures full participation of all stakeholders through the establishment and review of standard terms, ensures consultation on non-standard terms, and allows a streamlined administrative process.

4. Designate an 'ABS NFP' - a national focal point [NP, Article 13].

The role of this person is to be a single point of contact for liaison with the SCBD; and a single point of contact for potential users of GR/aTK as required by the NP.

In addition the NFP will be responsible for the submission of permits/MAT to the ABS-CH, which become thereby Internationally Recognized Certificates of Compliance.

To ensure that permits/MAT of the different permit agencies are channeled through the ABS NFP, their signature could be required on the MAT to make them effective.

Responsibility for contract management and monitoring the agreements made with researchers needs to be determined. As reports on the use of resources from Palau would come to the ABS NFP, the contract management function could be considered as part of its responsibilities. Alternatively, the ABS NFP could disseminate such information to relevant agencies.

5. Designate a checkpoint [NP, Article 16].

A checkpoint needs to be an institution that has, or can easily acquire information on the use, in Palau, of genetic resources from other places. Possible candidates would be the Coral Reef Research Foundation, the National Museum, the PCC (department overseeing research - education?).

The role of the checkpoint is to provide information to the ABS NFP on whether foreign resources used in Palau have been obtained legally - i.e. with PIC and MAT from the provider country - and on the use of those resources in Palau.

It is important to note that it is not the nationality of the researcher that is important - the question is 'where' research occurs. It is **research conducted in Palau** that needs to be monitored, by whatever nationality of researcher (e.g. by a visiting researcher from the US)

This information would be provided to the ABS NFP, to disseminate this information to counterpart ABS NFPs in relevant provider countries and to the ABS Clearing-House.

Legislative underpinning:

- An offence to use resources (GR and aTK) in Palau for R&D that have not been obtained in accordance with requirements of provider country (as notified on the CHM). [NP, Articles 14 and 15]

- An offence to take biological resources without PIC and MAT, noting existing permit requirements as exemptions. [see NP, Article 6] [May be covered by existing requirements]
- An offence to access TK for the purposes of R&D without PIC and MAT of the community [see NP, Article 7] [Is this already covered by existing regulations administered by the Bureau of Arts and Culture? State law?]
- The establishment of Competent National Authority or Authorities, and the ABS National Focal Point

6. Further Issues

Clarify the interaction between NP and IT: Guidance on what resource and proposed uses fall under the jurisdiction of which regime – possibly not relevant if or as long as Palau holds no *ex situ* collections under its jurisdiction. However, a clear understanding within the administration is required, with need therefore for specific awareness raising and clarification.

Provide flexibility to allow for future institutional change - possibly a facility for recognition of other permit regimes. Examples might include movement of functions or responsibilities within government, legislative amendments to permit regimes, or development of other categories of access/research permit in the future. The inter-institutional committee would be an appropriate mechanism to review the effectiveness and functionality of the established ABS system periodically, e.g. annually.