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PREVENTION OF DISCRIMINATION

**PREVENTION OF DISCRIMINATION AND PROTECTION
OF INDIGENOUS PEOPLES**

Indigenous peoples' permanent sovereignty over natural resources

Final report of the Special Rapporteur, Erica-Irene A. Daes

Addendum* **

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Annex I

EXAMPLES OF LEGAL REGIMES REGARDING INDIGENOUS PEOPLES AND NATURAL RESOURCES IN VARIOUS PARTS OF THE WORLD

1. This annex provides a brief review of legal arrangements in selected countries in various parts of the world concerning indigenous peoples and their natural resources. The purpose is to illustrate the variety of arrangements and some of the patterns that now exist. These examples are not intended to be fully representative of State practices. Nor are these examples intended to be examples only of good practices or bad. Rather, they are intended to provide a factual setting for this study. This very limited review is also useful in that it tends to demonstrate not only a willingness on the part of States to address the rights of indigenous peoples to their natural resources but also the fact that a wide range of possible measures may be needed to account for the varied needs and circumstances of indigenous peoples and the States in which they live.
2. The recognition and accommodation of indigenous peoples' rights to control and manage their natural resources is not a new idea. Many countries already recognize, to varying extents, the rights of indigenous peoples to own, use, control and manage their natural resources.
3. **Australia.** The Aboriginal and Torres Strait Islander peoples, the indigenous peoples of Australia, have rights to natural resources and lands that are governed by common law, the Native Title Act,^a and separate legislative and other legal schemes in each of the country's states and territories.^b In general, lands and resources are held for the benefit of the Aboriginal and Torres Strait Islander peoples either pursuant to legislation enacted by the various states and territories or pursuant to claims or agreements made under the Native Title Act and its amendments. In general, with very limited exceptions, subsurface resources are reserved by Australian law to the particular state or territory or to the Commonwealth itself, though there is wide variation in the legislation.
4. In practically all cases, the legal title holder under Australian legislation is not the indigenous people or group with traditional ownership interests, but is typically a land council or some other corporate body acting as trustee. For example, in the Northern Territory, the principal mechanism for acquiring and holding Aboriginal land is established by the Aboriginal Land Rights Act 1976 (Cth), which provides that title will be held by Aboriginal Land Trusts, corporate bodies created by the Government.^c These Land Trusts are substantially controlled by the Aboriginal Land Councils, corporate bodies responsible for (among other things) ascertaining and expressing the wishes of the Aboriginal people living in the council area and consulting the traditional Aboriginal owners about land and resource management.^d In Queensland, Aboriginal reserves are held and managed by the Queensland government,^e while some other lands are held for the benefit of Aboriginal communities under the system of deeds of grant in trust - the trustee usually being the relevant community council.^f In Tasmania, Aboriginal land is held in trust and managed by the Aboriginal Land Council pursuant to the Aboriginal Lands Act 1995 (Tas), and this includes some natural resources (minerals to a depth of 50 metres other than oil, atomic substances, geothermal substances and helium).^g

5. The trustee or title-holding body generally has the principal management authority over the natural resources pertaining to the land, not the indigenous owners directly. But, as can be seen in the examples mentioned above, there are important obligations to consult with the relevant Aboriginal peoples, and in some situations the Aboriginal owners appear to have at least a slight degree of control over resource management. In the Northern Territory, the Aboriginal owners of land have a comparatively high degree of control over mining, bearing in mind that the minerals are held by the Crown. An exploration licence may only be granted with the consent of the relevant land council and the Government, or by order of the Governor-General, and mining may only proceed based on an agreement concerning mining activities, rehabilitation, and compensation for damage or disturbance, and other such matters.^h By contrast, in Western Australia, mining on Aboriginal reserved lands may be carried out with the consent of the Minister for Mines, in consultation with the Minister for Aboriginal Affairs, with some consultation with Aboriginal communities.ⁱ Similarly, in Queensland, there is no indigenous control over mining on reserve lands, and community councils have little authority to control mining on lands held by deeds of grant in trust.^j

6. In many situations in Australia, arrangements exist for sharing a part of the revenue from mining or resource extraction with the indigenous owners of the land or with the trustee or the relevant land council. In the Northern Territory, for example, the Aboriginal Land Rights Act provides that an amount equal to the royalties received by the Commonwealth or by the Northern Territory is to be distributed to the Land Councils, to the Aboriginal owners of the land where mining has occurred, and to other affected Aboriginal communities.^k Royalties from mining on the lands of Anangu Pitjantjatjara and Maralinga Tjarutja, to take another example, are required to be divided between the South Australian Government, the Aboriginal community, and a fund maintained by the Government to benefit South Australian Aborigines generally.^l

7. With regard to resource development on lands acquired under the Native Title Act, the Aboriginal and Torres Strait Islander Social Justice Commissioner recently observed that native title parties are given only “a right to be consulted on ways to minimize the impact of the development on native title rights and interests”.^m He decries the lack of indigenous participation in benefits from development, the lack of funds to enable native title holders to function effectively,ⁿ and the failure to vest ownership and management of the natural resources in the traditional owners of the land.^o

8. The **Sami** do not have any legally settled rights to lands or resources in Norway. They have occupied and used lands in Norway since time immemorial, and Norway’s Constitution requires that the State provide the conditions necessary for the Sami to protect Sami language, culture and society.^p Nevertheless, the Government denies Sami claims to lands and resources, and the issues remain unsettled. Pending legislation that would deal with land, resources and governance in the traditional Sami area of northern Norway is strongly opposed by the Sami Parliament.^q

9. The Sami people of Sweden likewise have no defined land and resource rights in Swedish law, though they have historically engaged in and still today engage in reindeer herding over wide areas of land. Legislation has provided for Sami use of certain natural resources in connection with traditional reindeer herding, and the Supreme Court of Sweden has determined that the Sami had fishing rights as well and reindeer herding rights.^r

10. The Parliament of Finland has created a defined Sami Homeland of some 35,000 km² within which the Sami enjoy cultural autonomy.^s The Sami Act 1995 requires the Government to negotiate with the Sami Parliament on a wide variety of matters relating to the Sami Homeland, including the management and use of State lands, applications for mining licences, and a number of other matters affecting the Sami people, their culture and language. This obligation is said to go beyond an obligation to consult, but it does not give the Sami Parliament a veto.^t

11. In the **Russian Federation** there are several federal laws that specifically protect the rights of indigenous peoples. These include: On Guarantees of Rights of Indigenous Peoples of the Russian Federation (Act of 30 April 1999); On Basic Principles of Organizing Communities of Indigenous Peoples of the North, Siberia and the Far East of the Russian Federation (Act of 20 July 2000); and the Territories of Traditional Use of Natural Resource (Act of 11 May 2001). These laws, when read together, form the legal basis for recognizing indigenous peoples' right to land and natural resources within their respective regions in the North, Siberia, and the Far East of the Russian Federation. The 1999 Act specifically recognizes the right of indigenous peoples to traditional enterprises, including reindeer herding (art. 8).^u The 2001 Act has secured for indigenous peoples and their communities the right to establish traditional subsistence territories as the basis for their survival.^v

12. In **Bolivia**, the Constitution reformed in 1994 recognizes the "social, economic, and cultural rights of indigenous peoples that inhabit the national territory, especially those rights related to their aboriginal community lands (*tierras comunitarias de origen*, or TCOs), guaranteeing the sustainable use of the natural resources".^w While article 136 of the Constitution stipulates that the State's public domain still applies to natural forests, subsurface resources and other natural resources, Bolivia's 1996 Forest Law (No. 1700) recognizes that the owners of forest lands have the right to exploit those forests themselves. Specifically, it provides that indigenous peoples within their TCOs (defined by article 41 (5) of Law No. 1715 as the "geographical space" to which they have "traditionally had access")^x are guaranteed exclusive rights to use their forests and pay the lowest fees when extracting timber (see articles 29, 32).^y

13. The Constitution of **Panama** recognizes the right to collective ownership of lands for indigenous peoples in Panama and prohibits the private appropriation of these lands (art. 123). Federal laws that regulate the establishment of *comarcas* (indigenous reserves) have further strengthened indigenous rights to control and benefit from their lands and resources. For example, in 1983 Panama created the Emberá-Wounaan *comarca* of the Darién according to Law No. 22, which establishes that the executive branch will guarantee to the indigenous peoples living within the *comarca* the economic and social benefits that are derived from the exploitation of all natural resources, including subsurface resources (art. 20). Law No. 24 of 1996, establishing the *comarca* Kuna of Mandungandi, stipulates that subsurface rights (albeit property of the State, according to the Constitution) can be exploited according to agreements established by the authorities and communities of the *comarca* (art. 2). In the case of the *comarca* Ngobe-Buglé, the Indigenous Congress is vested with the authority to oversee compliance with different norms and procedures related to natural renewable and non-renewable resources and to attend to the activities of exploration and exploitation of mines, the sea, wetlands, and other fluvial areas in the *comarca* (art. 89 - Executive Decree No. 194, 1999).^z

14. In **Guyana**, section 6 of the Mining Act of 1989 establishes that the State is the owner of all mineral resources of the country and reserves the right to grant mining permits in any region of Guyana. In 1997, however, the Government adopted a new administrative policy on mining that recognizes “the negative impacts” of mining activities on indigenous peoples and stipulates that “recognized Amerindian lands” (titled lands) are exempt from any “survey, prospecting or mineral agreements unless [having] the agreement of the Captain and Council”. While recognized lands represent only a fraction of the indigenous lands within Guyana and the procedures for implementing this law are still forthcoming, the policy represents a recognition by the State of the property rights of indigenous peoples and their right to stop any interference with such ownership interests. The Special Rapporteur particularly notes the Government’s recent issuance of titles to two Amerindian communities pursuant to the State Lands Act.^{aa} This titling represents the largest titling of indigenous lands in the history of the country.

Notes

^a *Native Title Act 1993 (Cth); Native Title Amendment Act 1998 (Cth)*.

^b A comprehensive review of the Australian law in this field is contained in G. Nettheim, G.D. Meyers and D. Craig, *Indigenous Peoples and Governance Structures: A Comparative Analysis of Land and Resource Management Rights*, Aboriginal Studies Press, Australian Institute of Aboriginal and Torres Strait Islander Studies (2002).

^c *Ibid.*, p. 243.

^d *Ibid.*

^e *Land Act 1994 (Qld)*, sections 31, 33.

^f G. Nettheim, G.D. Meyers and D. Craig, *op. cit.*, p. 273.

^g *Mineral Resources Development Act 1995 (Tas)*.

^h Nettheim, Meyers and Craig, *op. cit.*, p. 252.

ⁱ *Ibid.*, p. 288.

^j *Ibid.*, p. 278.

^k *Ibid.*, p. 253.

^l *Ibid.*, p. 261.

^m Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2003 (2004)*, p. 13.

ⁿ *Ibid.*, pp. 13, 17.

^o Ibid., p. 189.

^p Nettheim, Meyers and Craig, op. cit., pp. 213-215, 217.

^q “The Sami of Norway”, a paper prepared and submitted to the Special Rapporteur by the Working Group on Indigenous Populations. Further information is available at the web site of the Sami Parliament, www.samediggi.no.

^r Nettheim, Meyers and Craig, op. cit., pp. 222-226.

^s Ibid., p. 226.

^t Ibid., p. 228.

^u Emma Wilson, “Conflict or Compromise? Traditional natural resource use and oil exploitation in northeastern Sakhalin/Noglikskii district” in Economic Development and the Environment on the Sakhalin Offshore Oil and Gas Fields II, Slavic Research Center, Hokkaido University (1999) at <http://src-h.slav.hokudai.ac.jp/sakhalin/eng/71/wilson2.html>.

^v Ekaterina Khmeleva (Rodnik), Michael Todyshev (RAIPON), “Background Paper: Indigenous Peoples and the Justice System in Russia,” OHCHR Expert Seminar on Indigenous Peoples and the Administration of Justice, Madrid (November 2003), HR/MADRID/IP/SEM/2003/BP.9.

^w Political Constitution of Bolivia, Law No. 1615, art. 171 (1) (6 February 1995) (*unofficial translation*).

^x The National Service Agrarian Reform Law, Law No. 1715 (1996). Law No. 1715 strengthens indigenous rights by formally recognizing the *tierras comunitarias de origen* (TCOs) as a distinct property regime. Article 41 (5) specifically defines the TCOs as “... the geographical spaces constituting the habitat of indigenous and aboriginal peoples and communities, to which they have traditionally had access and where they maintain and develop their own forms of economic, social and cultural organization, so as to ensure their survival and development. They are inalienable, indivisible, irreversible, collective, composed of communities and associations, are not attachable, and are imprescriptible” (*unofficial translation*). See José Aylwin, “El Acceso de los indígenas a la tierra en los ordenamientos jurídicos de América Latina: un estudio de casos”, Volumen II, 10 - CEPAL, Proyecto “Mercado de Tierras Rurales” (August 2002).

^y Byron Real, “Legal Reforms in Bolivia in the 1990s: Challenges and Opportunities for Decentralization, Indigenous Rights and Forest Management”, University of Florida, unpublished thesis, p. 90 (2002); Aylwin, *ibid.*, p. 14.

^z See Aresio Valiente Lopez, *Derechos de los Pueblos Indígenas de Panamá - Serie Normativa y Jurisprudencia Indígenas* (2002).

^{aa} The two land titles were issued to indigenous communities of the Wai Wai and Baramita Caribs. Section 41 of the State Lands Act, “provides for the exercise and enjoyment of Amerindian rights or privileges in relation to State lands”, and section 3 of the Act authorizes the President “to make absolute or provisional grants of any State Lands of Guyana, subject to such conditions (if any) he thinks fit ...”. Tony James, “Indigenous Land Rights in Guyana: Past, Present and Future” presented at Indigenous Rights in the Commonwealth Caribbean and Americas Regional Expert Meeting, Amerindian Peoples’ Association (APA), Guyana (23-25 June 2003).

Annex II

ANALYSIS OF INTERNATIONAL LAW CONCERNING PERMANENT SOVEREIGNTY OVER NATURAL RESOURCES AND INDIGENOUS PEOPLES

1. In its simplest terms permanent sovereignty over natural resources can be understood to mean the right of a nation or people to exercise ownership, control, and management authority over its natural resources (surface and subsurface), in particular as an aspect of the exercise of the right of self-determination. The proposition, and indeed the conclusion of this Special Rapporteur, that the principle of permanent sovereignty over natural resources must now be applied to indigenous peoples, is one that has emerged from international law, particularly the developments in international human rights law concerning indigenous peoples. The following brief analysis will summarize the most important elements of relevant international law.

A. International conventions and declarations

2. Recognition of indigenous peoples' rights over their lands, territories, and resources can be traced back at least as far as 1957, to the adoption of the ILO Indigenous and Tribal Populations Convention (No. 107) - the first comprehensive international instrument setting forth the rights of indigenous peoples.^a Though rightly criticized for treating indigenous peoples as "backward" and having at its core the intent to assimilate indigenous peoples into mainstream society,^b Convention No. 107 did recognize the "right of ownership, collective or individual, of the members of the populations concerned over the lands which they occupy" (art. 11) and affirmed that unless certain conditions existed, the States had the duty to obtain the "free consent" of the indigenous "populations" prior to their removal (art. 12).^c

3. To address the fundamental flaws of Convention No. 107, in June of 1989 ILO adopted Convention No. 169.^d As touched upon above, the Convention affirms indigenous peoples' "rights of ownership and possession ... over the lands which they traditionally occupy" (art. 14 (1)); affirms indigenous rights to the "natural resources pertaining to their lands"; and their right to "participate in the use, management and conservation of these resources" (art. 15 (1)). The Convention further guarantees that indigenous peoples "have the right to decide their own priorities for the process of development" over the "lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development" (art. 7 (1)). While the Convention recognizes the rights of States where they retain ownership of mineral or subsurface resources within indigenous lands, this State right is not expressed in absolute terms. Rather, its exercise is preconditioned on consultation with indigenous peoples and an assessment of the indigenous "interests [that] would be prejudiced" (art. 15 (2)).

4. While Convention No. 169 is the only international convention that specifically deals with the rights of indigenous peoples, other human rights instruments adopted at both the United Nations and at the regional level have since been interpreted to address the rights of indigenous peoples to their lands, territories, and resources. Within the United Nations, for example, article 27 of the International Covenant on Civil and Political Rights protects, among other things, the rights of ethnic, religious or linguistic minorities to enjoy their own culture.

The United Nations Human Rights Committee, in the context of monitoring States parties' compliance with the Covenant, has repeatedly affirmed that article 27 - as applied to indigenous peoples - protects the use of indigenous lands, territories, and resources, as they are inextricably connected to their culture and way of life, particularly in the carrying out of traditional activities (including subsistence activities) and those related to the practice of their religion.^e In its general comment No. 23 (1994), the Committee specifically stated:

“With regard to the exercise of the cultural rights protected under article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.”^f

5. The Committee has also made several observations that associate the rights of indigenous peoples with the right of all peoples under article 1 (2) to freely dispose of their natural wealth and resources. For instance, in its 1999 concluding observations regarding Canada, the Committee acknowledged the conclusion of the Royal Commission on Aboriginal Peoples (RCAP) that “without a greater share of land and resources, institutions of aboriginal self-government will fail”. The Committee emphasized that under article 1, paragraph 2, “the right to self-determination requires, inter alia, that all peoples must be able to freely dispose of their natural wealth and resources and that they may not be deprived of their own means of subsistence”. The Committee recommended that “decisive and urgent action be taken [by Canada] towards the full implementation of the RCAP recommendations on land and resource allocation” and that “the [State] practice of extinguishing inherent aboriginal rights be abandoned as incompatible with article 1 of the Covenant”.^g

6. These concluding observations, as well as the Committee's related observations on Norway and Australia,^h provide some support for the argument that the term “peoples” in paragraph 2 of common article 1 affirms a right not just of the whole people of a State, but also for distinct groups or peoples within the larger population - including indigenous peoples.ⁱ Further support for giving the term “peoples” the wider meaning can be found in a recent decision of the African Commission on Human and Peoples' Rights. In a case involving the Ogoni people of Nigeria, the Commission found that the term “peoples” referred to in article 21 of the African Charter on Human and Peoples' Rights (affirming a right of “[a]ll peoples” to “freely dispose of their wealth and natural resources”) includes a distinct indigenous people within a State and does not refer only to the whole people of the State.^j This decision and the concluding observations of the Human Rights Committee suggest that paragraph 2 of common article 1 also applies to distinct peoples within States - including indigenous peoples.

7. Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination provides, among other things, that “everyone, without distinction as to race, colour, or national or ethnic origin” has the right to “equality before the law” as well as the “right to own property alone as well as in association with others”.^k This right to property is identical to the language appearing in the Universal Declaration of Human Rights (art. 17 (1)). In 1997, the United Nations Committee on the Elimination of Racial Discrimination (CERD) adopted its

general recommendation XXIII in which it called upon States “to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources” and to take steps to return “their lands and territories traditionally owned or otherwise inhabited or used” when they have been taken “without their free and informed consent”.^l CERD has also issued a number of country-specific recommendations that have further elaborated on State obligations under the Convention with respect to indigenous peoples and their lands and territories.^m

8. Most recently, in its concluding observations involving Suriname (March 2004),ⁿ the Committee recommended “legal acknowledgement ... of the rights of Indigenous tribal peoples to possess, develop, control and use their communal lands and to participate in the exploitation, management and conservation of the associated natural resources” (para. 11); it recommended that Suriname take “urgent action” to identify the lands which indigenous peoples within its borders “have traditionally occupied and used” (para. 12), and it clarified that Suriname’s constitutional provision reserving rights to natural resources to the State must “be exercised consistently with the rights of indigenous and tribal peoples” (para. 11). It further called upon the State to establish mechanisms to notify and consult with indigenous peoples prior to the awarding of concessions (“to strive to reach agreements with the peoples concerned”) (para. 13).

9. As shown above, existing international instruments have either expressly affirmed certain indigenous rights of ownership and control over their lands, territories and resources, or through subsequent interpretation, have been found to do so. Furthermore, there are new standards and norms that are being developed within the United Nations and OAS that include detailed provisions recognizing the rights of indigenous peoples to own, use and control the lands, territories and resources that they traditionally used or occupied. These developing instruments are the draft United Nations declaration on the rights of indigenous peoples and the draft American declaration on the rights of indigenous peoples.^o In many ways, both drafts represent some of the many positive developments in existing norms, standards and State practice.

10. While there are several differences between the two drafts, for purposes of this study, it is useful to highlight one in particular. Unlike the draft United Nations declaration, the draft American declaration expressly recognizes that certain States have reserved in their constitutions or other laws ownership of minerals, other resources of the subsoil, or other resources existing within indigenous lands and territories (see article XVIII (5)). This reservation of State ownership of some or all natural resources is not limited to certain States within the Americas, but also exists in a number of other States Members of the United Nations.^p The existence of these provisions creates an important challenge to reconciling the interests of States and the scope of indigenous peoples’ permanent sovereignty over their natural resources.

11. With respect to these reservations of State ownership, two observations may be helpful. The concept of permanent sovereignty over natural resources has always included resources of the subsoil.^q Thus, extension of this right to indigenous peoples - if it is to meaningfully assist in their economic and political self-determination - must in some way address all natural resources - including those of the subsurface. As detailed below, international and domestic case law as well as findings of international monitoring bodies and State practice have already begun to indicate that no distinction should be made with respect to indigenous peoples’ rights to their surface and subsurface resources.^r Secondly, to the extent that States continue to assert

ownership of certain natural resources within indigenous lands and territories, this right must be exercised consistently with the human rights of indigenous peoples.^s This also applies to other provisions of domestic law, such as laws regarding the power of eminent domain, and the assertion by the State of its expropriation powers in the interest of the public. It is a well-recognized principle of international law, that States may not invoke their domestic laws to avoid their international obligations.^t

B. Regional conventions and declarations

12. Several of the most important regional human rights instruments, while not containing provisions that expressly refer to indigenous peoples, have been interpreted to affirm the right of indigenous peoples to their land, territories, and resources. The American Convention on Human Rights (art. 21),^u the American Declaration on the Rights and Duties of Man (art. XXIII),^v and the African Charter on Human and Peoples' Rights (arts. 14 and 21)^w each contain provisions recognizing the human right to property. In the context of interpreting these provisions, the regions' respective international human rights commissions and tribunals have interpreted these provisions to include the collective rights of indigenous peoples to own, use, control, and manage the lands and resources which they have traditionally used or occupied. The following few paragraphs provide a brief summary of these interpretations.

13. For more than 25 years, the Inter-American Commission on Human Rights^x has been studying the situation of the rights of indigenous peoples throughout the Americas. The Commission recognized the profound relationship that indigenous peoples have to their ancestral lands - not just for subsistence but for physical and cultural survival. As a result, the Commission has repeatedly issued reports which have called attention to the abuses that indigenous peoples have suffered with respect to interferences with their lands, territories and resources and has recommended that States take measures to protect and promote indigenous peoples' rights over these.^y It has been within the last three years, however, that the Inter-American system has taken a notable lead in clarifying the rights of indigenous peoples to their lands, territories, and resources in the context of the American Convention on Human Rights and the American Declaration of the Rights and Duties of Man.

14. The Inter-American Court of Human Rights'^z decision in the *The Mayagna (Sumo) Community of Awas Tingni v. Nicaragua* marks the first instance in which an international human rights court with binding authority has directly addressed the rights of indigenous peoples to their lands, territories and resources.^{aa} The case involved a challenge by a Mayagna Indian community on the Atlantic Coast of Nicaragua to the State's issuance of a logging concession on its traditional territory without their consent. In its 2001 decision, the Inter-American Court found that the human right to property affirmed in article 21 of the American Convention protects the collective rights of indigenous peoples to the lands and natural resources that they have traditionally used and occupied (see paragraph 153 affirming Awas Tingni's rights to lands they "currently inhabit" and Part B, "Oral and expert evidence", describing Awas Tingni's historical use and occupancy of the claimed area). The Court stated that like other international human rights, the right to property has an "autonomous meaning" in international law and is not limited to the meaning given to it by domestic laws (para. 146). In the case of indigenous peoples, their ownership of their lands and resources arises from their own customary laws and traditional practices, not the domestic laws of the States in which they live (paras. 146-151). The

Court stated that “possession of the land should suffice for indigenous communities lacking real title to property of the land to obtain official recognition of that property” (para. 151). In affirming indigenous peoples’ “right to live freely in their own territory” (para. 149), the Court found that Nicaragua violated Awas Tingni’s right to property under the American Convention by granting the concession without its consent (paras. 2, 153).^{bb} Nowhere in the judgement does the Court indicate that any distinction should be made between surface and subsurface resources as regards the rights of the indigenous peoples.^{cc}

15. The Court also found that Nicaragua violated its international obligations to give legal protection to and thereby make effective indigenous peoples’ rights to property by failing to delimit, demarcate, and title Awas Tingni lands. Consequently, the Court ordered Nicaragua to delimit, demarcate and title their lands “in accordance with their customary law, values customs and mores”; to abstain, in the meantime, from carrying out, tolerating or acquiescing in activities that would impair these rights in the meantime; and to establish the legislative or administrative measures necessary to delimit, demarcate, and title all of the indigenous lands in Nicaragua (paras. 151, 153, 164, 173 (2-4)).^{dd}

16. The legal principles established in the *Awas Tingni* case were further elaborated and extended by the Inter-American Commission on Human Rights in the cases of *Mary and Carrie Dann v. United States*^{ee} and *Maya Indigenous Communities of the Toledo District v. Belize*.^{ff} These two cases were based upon the American Declaration on the Rights and Duties of Man (art. XXIII).^{gg} In the *Dann* case, the Inter-American Commission articulated the right to property in the Declaration, as applied in the “context of indigenous communities”, to include “the right of indigenous peoples to legal recognition of their varied and specific forms and modalities of their control, ownership, use and enjoyment of territories and property” and “the recognition of [indigenous peoples’] property and ownership rights with respect to lands, territories and resources they have historically occupied” (para. 130).^{hh} While further affirming the rights and principles articulated by the Court in the *Awas Tingni* case (paras. 116-155), the Commission further concluded that State laws and procedures that discriminate against indigenous peoples by providing for diminished or unequal rights in regard to property ownership are a violation of the Declaration (paras. 139-145).

17. The case of the *Maya Indigenous Communities v. Belize* involved a challenge, among other things, to oil and logging concessions granted by the Government within Maya ancestral lands. In its preliminary report of December of 2003, the Inter-American Commission further affirmed the rights and principles articulated by the Court in the *Awas Tingni* case (paras. 116-155), and found that the “Maya people of southern Belize have a communal property right to the lands that they have traditionally used and occupied, and that the character of these rights is a function of Maya customary land use patterns and tenure” (para. 150). Moreover, the State was found to have violated the Maya property rights by failing to take effective measures to “recognize their communal property right”ⁱⁱ and “delimit, demarcate and title” their territories, and by granting logging and oil concessions to third parties within their lands “without effective consultation with and the informed consent of the Maya people” (paras. 151-152).^{jj} Notably, the Commission was dealing with both logging and oil concessions; its ruling articulated the same rights articulated by the Court in *Awas Tingni* (dealing primarily with a logging concession), and it made no distinction between surface and subsurface rights.

18. The Inter-American system has not been alone in considering indigenous lands, territories and resources. In 2002 the African Commission on Human and Peoples' Rights issued a decision in the case of the Ogoni people in Nigeria that has important implications for indigenous peoples' rights to natural resources.^{kk} This case, which is also discussed below, concerned the military government's abuse of the indigenous Ogoni people in the course of oil development on Ogoni land.^{ll} The Ogoni people were the victims of extensive violence, pollution of their lands, destruction of their homes and other oppressive acts.^{mmm} The African Commission found that the Government had the right to produce oil, but nevertheless, because of the lack of benefits to the Ogoni people and for other reasons, the Commission found that the Government violated article 21 of the African Charter on Human and Peoples' Rights.ⁿⁿ Article 21 provides, among other things, that, "All peoples shall freely dispose of their wealth and natural resources." The clear implication is that an indigenous people has a right to its natural resources (including subsurface resources) even where those resources are claimed and developed by the State.

C. Domestic case law

19. While international instruments, tribunals and commissions have been grappling with and advancing our understanding of the scope of indigenous peoples' rights to their lands, territories and resources, the various domestic courts of the States Members of the United Nations have been making advances as well. In fact, some of the pronouncements of these courts have tracked to varying degrees the indigenous rights being affirmed and developed at the international level. While the limited space provide for this study does not allow a full discussion of this domestic jurisprudence,^{oo} the Special Rapporteur would like to highlight three domestic cases in particular: *Mabo v. Queensland* (No. 2) of Australia,^{pp} *Delgamuukw v. British Columbia* of Canada,^{qq} and the recent *Alexkor Ltd. v. Richtersveld Community and others*^{rr} handed down by the Constitutional Court of South Africa. Each of these cases, while containing its own limitations, has advanced our understanding of indigenous peoples' rights to its lands, territories and resources.

20. In 1992, in *Mabo v. Queensland* (No. 2), the High Court of Australia finally disavowed the doctrine of *terra nullius* and held that the pre-existing rights of aboriginal peoples to their lands and waters survived under common law as "native title".^{ss} Under *Mabo*, the State's power to extinguish native title was confirmed, and the Court held that extinguishment could be accomplished only by legislation, by the alienation of land by the Crown or by the appropriation of the land by the Crown in a manner inconsistent with the continuation of native title.^{tt} Despite its limitations, *Mabo*'s acknowledgment of native or "aboriginal" title was a welcome advance for the rights of indigenous peoples in Australia and, in retrospect, we can see similarities between the *Mabo* judgement and the Inter-American Court's decision in *Awas Tingni*, in which indigenous ownership to their lands and resources was determined to have arisen from the customary laws and traditional practices of the indigenous peoples themselves. In *Mabo*, the court declared that:

"[N]ative title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the Indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs."^{uu}

21. While *Mabo*'s reference to indigenous laws and customs further contributes to our understanding of the law surrounding the right of indigenous peoples to use, own and control their resources, the 1997 decision in *Delgamuukw v. British Columbia* helps to define what resources might be included in this right. Although the Canadian Supreme Court articulated a number of limitations to the aboriginal titles in *Delgamuukw*,^{vv} the Court also made it clear that "aboriginal title encompasses mineral rights".^{ww} This case, therefore, lends further support to the inclusion of subsurface resources in our understanding about the scope of natural resources over which indigenous peoples may have sovereignty (see further paragraphs 82-85).

22. The recent decision of the Constitutional Court of South Africa in *Alexkor Limited and the Government of South Africa v. The Richtersveld Community and Others* (14 October 2003) also addressed the issue of subsurface rights. One of the legal questions before the Court was whether the indigenous people concerned owned the subsurface resources pertaining to their lands prior to 1913, the date of certain legal measures depriving them of certain rights. The Court found that the indigenous Richtersveld Community had a right of communal ownership of the land under indigenous law. The court wrote, "[T]he content of that right included the right to exclusive occupation and use of the subject land by members of the Community. The Community had the right to use its water, to use its land for grazing and hunting and to exploit its natural resources, above and beneath the surface" (para. 62). The court reasoned that not only was ownership of the subsurface established by the indigenous law of the Community, but the resources could not have belonged to anyone if they did not belong to the indigenous Community. Accordingly, the court concluded that ownership of the subsurface vested in the Community (para. 64).

D. Practice of United Nations bodies and other international and intergovernmental agencies

23. An analysis of the status of international law with respect to permanent sovereignty over natural resources and indigenous peoples would not be complete without a brief mention of the developments taking place within various multilateral institutions. While not a direct source of international law, the pronouncements and policies of United Nations bodies and agencies and other intergovernmental organizations created, managed and controlled by States do provide evidence of State practice and thus, to some extent, evidence of emerging customary law regarding the rights of indigenous peoples. UNDP, the World Bank and the Asian Development have active indigenous peoples policies that recognize to varying extents the territorial rights of indigenous peoples (see annex II). For instance, UNDP has its own "Policy of Engagement" with indigenous peoples.^{xx} That policy provides that the UNDP "promotes the recognition of indigenous rights to lands, territories and resources" (para. 29), "recognizes the rights of distinct peoples living in distinct regions to self-determined development and control of ancestral lands" (para. 30), and supports "a multilateral trade system that is sensitive to the rights of indigenous peoples to continue practicing their indigenous sustainable agriculture, resource management practices, traditional livelihoods, especially with regard to food security" (para. 44). The current World Bank policy states that "attention should be given to the rights of indigenous peoples to use and develop the lands that they occupy, to be protected against illegal intruders, and to have access to natural resources (such as forests, wildlife, and water) vital to their subsistence and reproduction".^{yy} The Asian Development Bank's Indigenous Peoples Policy notes that "legal

recognition of ancestral domain and the traditional rights of indigenous peoples over land and resources” is one of the “key issues that should be considered as the Bank addresses indigenous peoples matters, and the continuity and development of indigenous peoples communities ...”.^{zz}

24. Though currently without an indigenous peoples policy, in a limited manner the Inter-American Development Bank has addressed the issue of indigenous peoples and their rights to their lands and resources in its existing strategy documents and its policy on resettlement.^{aaa} At this time, however, it is in the early stages of developing a policy specific to indigenous peoples. The draft profile of the indigenous peoples policy, made public in March 2004, calls for the “[r]ecognition and protection of the rights of indigenous peoples, consistent with the legal framework of the country, to lands and related natural resources” (para. 2.4), and states that:

“For operations that affect territories, lands and natural resources traditionally occupied and used by indigenous peoples, and consistent with national legislation regarding indigenous rights and ecosystem and land protection provisions, the policy will include safeguards for operations that affect territories, lands and natural resources traditionally occupied by indigenous peoples, such as: (a) respect for legally recognized indigenous land and resource rights with due regard to collective and customary rights; (b) implementation of management and benefit sharing or compensation mechanisms in natural resource extraction projects, when appropriate ...”.^{bbb}

Notes

^a Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries (No. 107), adopted 27 June 1957. Convention No. 107 was originally ratified by 27 countries (mostly in the Americas). It now remains in force for only 18 countries. For more information on ILO 107 and 169, see <http://www.ilo.org/public/english/indigenous/background/>.

^b *ILO Convention on Indigenous and Tribal Peoples, 1989 (No. 169): A Manual*, p. 4 (ILO, 2000).

^c Article 12 (1) provides that: “The populations concerned shall not be removed without their free consent from their habitual territories except in accordance with national laws and regulations for reasons relating to national security, or in the interest of national economic development or of the health of the said populations.”

^d Convention No. 169.

^e For example, see *Bernard Ominayak, Chief of the Lubicon Lake Band v. Canada, Report of the Human Rights Committee*, communication No. 167/1984 (CCPR/C/38/D/167/1984), paras. 3.5, 32.2-33 (May 1990) (finding that State concessions for oil and gas exploitation were destroying traditional hunting and trapping territory of the Lubicon Lake people and thereby violated their right to culture under article 27 by threatening their means of subsistence and their aboriginal way of life); *I. Lansman et al. v. Finland*, communication No. 511/1992

(CCPR/C/52/D/511/1992), paras. 9.2-10.0 (8 November 1994) (finding that article 27 “protect[s] *traditional* means of livelihood” of the Saami and examining whether State quarrying activities threatened reindeer pastures and therefore the Saami’s traditional herding activities); *J. Lansman et al. v. Finland*, communication No. 671/1995 (CCPR/C/58/D/671/1995), paras. 10.1-11 (30 October 1996) (concerned with protection of the traditional activity of reindeer husbandry and the impact of State quarrying on areas traditionally used for herding). See also concluding observations of the Human Rights Committee: Australia (A/55/40, paras. 498-528) (citing concern that State land-use determinations are not adequately considering the “continuation and sustainability of traditional forms of economy of indigenous minorities (hunting, fishing and gathering), and protection of sites of religious or cultural significance ... which must be protected under article 27” and recommending that the State secure article 27 rights by taking steps to “restore and protect the titles and interests of indigenous persons in their native lands”).

^f Human Rights Committee, general comment No. 23 on the rights of minorities (art. 27).

^g See concluding observations of the Human Rights Committee: Canada (CCPR/C/79/Add.105, para. 8) (7 April 1999). See also concluding observations of the Human Rights Committee: Norway (CCPR/C/79/Add.112, paras. 10, 17) (1 November 1999) (acknowledging “ongoing legal reform related to lands and resources in Finnmark and other areas with a Sami population” and calling upon Norway to “report on the Sami people’s right to self-determination under article 1 of the Covenant, including paragraph 2 of that article”); concluding observations of the Human Rights Committee: Australia (A/55/40, paras. 498-528) (noting with concern that Native Title Amendments of 1998 “in some respects limit the rights of indigenous persons and communities, in particular in the field of effective participation in all matters affecting land ownership and use, and affects their interests in native title lands, particularly pastoral lands” and recommending that the “State party ... take the necessary steps in order to secure for the indigenous inhabitants a stronger role in decision-making over their traditional lands and natural resources (art. 1, para. 2)”).

Notably, the Committee on Economic, Social and Cultural Rights has also made the link between indigenous peoples and common article 1, paragraph 2. Within the context of its responsibility for monitoring States parties’ compliance with the International Covenant on Economic, Social and Cultural Rights (ICESCR), in its general comment No. 15 on the right to water (26 November 2002), the Committee stated “taking note of the duty in article 1, paragraph 2, of the Covenant, which provides that a people may not ‘be deprived of its means of subsistence’, States parties should ensure that there is adequate access to water for subsistence farming and for securing the livelihoods of indigenous peoples”.

^h Supra note g.

ⁱ Interestingly, during the drafting of the Covenants, the issue was raised as to whether the meaning of “peoples” in paragraph 2 of article 1 was being given a different interpretation from the one intended in paragraph 1. See Draft International Covenants on Human Rights, Report of the Third Committee (A/3077), para. 65. (The Committee’s report does not elaborate further on this point.)

^j Communication No. 155/96, the Social and Economic Rights Action Center and the Center for Economic and Social Rights/Nigeria, paras. 55-58 (2001) (finding that the State did not protect the rights of Ogoni indigenous peoples under article 21 when it gave “the green light to private actors, and the oil companies in particular, to devastatingly affect the well-being of the Ogonis”). For more on the Ogoni decision, see paras. 71, 89.

^k International Convention on the Elimination of All Forms of Racial Discrimination (1966), adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965, *entered into force* 4 January 1969.

^l General recommendation XXIII (51) concerning Indigenous Peoples (18 August 1997).

^m Decision 2 (54) on Australia (CERD) (A/54/18, paras. 4-11) (18 March 1999) (calling on the State “to suspend implementation of the 1998 amendments” to the Native Title Act, expressing concern about four provisions that “discriminate against indigenous title holders” and noting that amended provisions which “extinguish or impair the exercise of indigenous title rights and interests” may violate Australia’s obligations under articles 2 and 5 of the Convention); concluding observations of the Committee on the Elimination of Racial Discrimination: United States of America (CERD/C/59/Misc.17/Rev.3, para. 21) (2001) (noting with concern that the “the land they [indigenous peoples] possess or use can be taken without compensation by a decision of the Government”; recommending that the State “ensure effective participation by indigenous communities in decisions affecting them, including those on their land rights, as required under article 5 (c) of the Convention”; and drawing particular attention to “the importance of securing the ‘informed consent’ of indigenous communities”). See also discussion regarding CERD’s 2004 concluding observations on Suriname, para. 42.

ⁿ Concluding observations of the Committee on the Elimination of Discrimination: Suriname (CERD/C/64/CO/9/Rev.2) (12 March 2004).

^o Compare United Nations draft articles 25-31 with articles VII, XII, XV, XVIII and XXI of the draft American declaration.

^p See Constitution of Suriname (1987), article 41 (“Natural riches and resources are property of the nation and shall be used to promote economic, social and cultural development. The nation has the inalienable right to take complete possession of its natural resources in order to utilize them to the benefit of the economic, social and cultural development of Suriname”); Constitution of the Philippines (1987), article XII, National Economy and Patrimony, section 2 (“**All lands of the public domain, waters, minerals, coal, petroleum, and other mineral oils, all forces of potential energy, fisheries, forests or timber, wildlife, flora and fauna, and other natural resources are owned by the State. ... The exploration, development, and utilization of natural resources shall be under the full control and supervision of the State.**”); Constitution of the Federal Republic of Nigeria (1999), chapter IV, article 44 (3) (“Notwithstanding the foregoing provision of this section, the entire property in and control of all minerals, mineral oils and natural gas in, under or upon any land in Nigeria or in, under or upon the territorial waters and the Exclusive Economic Zone of Nigeria shall vest in the Government of the Federation and shall be managed in such manner as may be prescribed by the National Assembly.”); Constitution of

Namibia (1990), chapter XI “Principles of State Policy”, art. [Sovereign Ownership of Natural Resources] (“Land, water and natural resources below and above the surface of the land and in the continental shelf and within the territorial waters and the exclusive economic zone of Namibia shall belong to the State if they are not otherwise lawfully owned.”).

^q See General Assembly resolution 3171 (XXVIII), of 17 December 1973, “Permanent sovereignty over natural resources”, para. 1 (affirming the “inalienable rights of States to permanent sovereignty over all their natural resources, on land within their international boundaries as well as those in the sea-bed and the subsoil thereof within their national jurisdiction and in the superjacent waters”. See also *Portugal v. Australia*, case concerning East Timor (30 June 1995) (concerning the rights of Australia to negotiate with Indonesia regarding exploration and exploitation of the continental shelf and *subsoil* of the sea in the Timor Gap).

^r See fuller discussion of the *Awas Tingni* case (involving logging); the *Maya Indigenous Communities* (involving logging and oil concessions); the *Ogoni* case (involving oil exploration); *Delgamuukw* (involving mineral rights); and *Alexkor Ltd.* (involving diamond mining) below.

^s CERD, concluding observations: Suriname, op. cit. and accompanying text (discussing article 41 of the Suriname Constitution, in which all the natural resources are considered to be the property of the nation).

^t Vienna Convention on the Law of Treaties (A/CONF.39/27), art. 27 (23 May 1969) (“A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”).

^u Adopted at the Inter-American Specialized Conference on Human Rights, San José, 22 November 1969.

^v Approved by the Ninth International Conference of American States, Bogotá, 1948.

^w African Charter on Human and Peoples’ Rights.

^x American Convention on Human Rights, art. 41 (calling on the Commission to “promote respect for and defense of human rights” and to “make recommendations to the governments of the member states, when it considers such action advisable, for the adoption of progressive measures in favour of human rights within the framework of their domestic law and constitutional provisions as well as appropriate measures to further the observance of those rights”).

^y See *Maya Indigenous Communities of the Toledo District v. Belize*, case 12,053, Preliminary Report No. 96/03, para. 114 (24 October 2003):

“The Commission, through its reports on individual petitions and on the general situation of human rights in member states, as well as in its authorization of precautionary measures, has pronounced upon the necessity of states to take the measures aimed at restoring, protecting and preserving the rights of indigenous peoples to their ancestral

lands. It has also held that respect for the collective rights of property and possession of indigenous peoples to the ancestral lands and territories constitutes an obligation of OAS member states, and that the failure to fulfil this obligation engages the international responsibility of states.” (footnotes omitted)

See also *Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin*, OEA/Ser.L/V/II.62, doc. 26, pp. 112-127 (1984) (discussing adverse impacts resulting from the resettlement of Miskito communities and addressing Miskito claims to their ancestral lands); *Report on the Situation of Human Rights in Ecuador*, OEA/Ser.L/V/II.96, doc. 10, rev.1, chap. IX (24 April 1997) (addressing the situation of indigenous peoples in the Oriente - in particular, the impact of oil exploration and development conducted in indigenous lands, calling upon the State to restrict settlers and resolve pending land claims over title, use and control of indigenous lands, and noting that “[f]or many indigenous cultures, continued utilization of traditional collective systems for the control and use of territory are essential to their survival, as well as to their individual and collective well-being. Control over the land refers both to its capacity for providing the resources which sustain life, and to ‘the geographical space necessary for the cultural and social reproduction of the group’”).); *Report on the Situation of Human Rights in Peru*, OEA/Ser.L/V/II.106, doc. 59, rev., chap. IX (2000) (discussing failure of State to restore community property and resolve indigenous land claims); *Inter-American Commission on Human Rights - OAS Resolution No. 12/85, Yanomami, Brazil* (5 March 1985), found in “*the Situation of the Human Rights of Indigenous Peoples*”, OEA/Ser.L/V/II.108, doc. 62, pp. 125-137 (20 October 2000) (addressing adverse impacts to the health and culture of the Yanomamis resulting from the incursion of third parties, relocation of communities, and the introduction of diseases and recommending that the State take measures to resolve these issues - including measures to demarcate and title indigenous lands).

^z The Inter-American Court interprets and applies the American Convention on Human Rights. See Statute of the Inter-American Court of Human Rights, adopted by the General Assembly of the OAS at its Ninth Regular Session, resolution No. 448, art. 1 (October 1979). If the Court finds that a country has violated the Convention, it can order a remedy, including compensation. American Convention on Human Rights, art. 63, *supra* note 93. For this reason, the Court’s decision establishes legal obligations that pertain to all countries that have agreed to be bound by the American Convention on Human Rights. The decision also directly establishes obligations for all the other countries that are members of the OAS. This is because the decision interprets rights and obligations that are affirmed in both the American Convention and in the American Declaration on the Rights and Duties of Man, and the Declaration applies to all OAS member countries. See Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights, Advisory Opinion OC-10/89 (14 July 1989), Inter-American Commission on Human Rights (Ser. A), No. 10 (1989) at paras. 43-45.

^{aa} The 1975 International Court of Justice’s (ICJ) opinion in *Western Sahara* perhaps marked one of the first instances in which an international court recognized some form of indigenous interests in their land. *Western Sahara*, 1975 ICJ 12 (1975). The ICJ rejected the doctrine of *terra nullis* to extinguish the land rights of nomadic [indigenous] peoples of Western Sahara

having a “social and political organization” and affirmed that the doctrine could only be applied where the territory in question “belong[ed] to no-one” and found that this was not the case at the time of colonization by Spain. 1975 ICJ at 37-39.

^{bb} See also Inter-American Commission Report No. 27/98 (3 March 1998) finding that: “the State of Nicaragua is actively responsible for violations of the right to property, embodied in article 21 of the Convention, by granting a concession to the company SOLCARSA to carry out road construction work and logging exploitation on the Awas Tingni lands, without the consent of the Awas Tingni Community”.

^{cc} The topic of indigenous peoples’ rights to subsurface resources was recently discussed at a 4 March 2004 general hearing before the Inter-American Commission on Human Rights regarding “New Developments in Law, Policy and Jurisprudence Related to Indigenous Peoples and Extractive Industries”. During the hearing, one of the presenters, Eduardo Nieva, a Diaguita indigenous lawyer from Argentina, highlighted the *Awas Tingni* Court’s failure to make a distinction between subsurface and surface rights within the context of article 21 of the American Convention. See Eduardo Nieva, “*Ponencia sobre las Industrias Extractivas en Territorios Indígenas y la Legislación Internal en las Americas - Derecho de Consulta y Participación. Consentimiento previa, libre e informado*” Inter-American Commission on Human Rights, General Hearing, pp. 7-8 (4 March 2004 - Washington, D.C.). In doing so, Mr. Nieva went on to say that given the reasoning of the Court’s ruling, his people have rights to their subsurface resources. He argued that the Court clearly stated that the collective rights of indigenous peoples to their property arose from their own customs and laws and then stated that “according to the cosmovision of my people and the laws of my community, we do not distinguish between surface and subsurface. Both are part of our *pachamama* (mother land).” In his oral presentation during the same hearing, Fergus Mackay, a Maori lawyer, further supported this argument and explained that the same was true for his people. The Inter-American Commission on Human Rights applied the principles of the *Awas Tingni* decision in the subsequent *Maya Indigenous Community* case, where subsurface and surface rights were at stake. (See text, paragraph 70.)

^{dd} Interestingly, the Court acknowledged the existence of laws in Nicaragua that already recognized the communal property rights of indigenous peoples within Nicaragua - including certain autonomy rights (paras. 150, 152-153). Nevertheless, the Court did not state that its ruling would have been otherwise in the event that the internal laws of Nicaragua did not have such recognition. In fact, to the contrary it made it clear that the rights of indigenous peoples arose from their own customary laws and practices irrespective of entitlements afforded by domestic laws. This was affirmed in the case of the *Maya Indigenous Community*, *infra* para. 70, in which the Inter-American Commission reached the same decision despite the lack of internal laws within Belize recognizing communal property rights. Moreover, the *Awas Tingni* court made it clear that the existence of such internal laws was not sufficient to comply with a State’s obligations under international human rights law. The State must also make these rights effective and see to their promotion and protection. Paras. 173 (1)-(2). Hence the order to demarcate and title. Paras. 153, 173 (3).

^{ee} *Mary and Carrie Dann v. United States*, Case 11.140, Report No. 75/02 (27 December 2002).

^{ff} Maya Indigenous Communities, *supra* note y.

^{gg} Neither the Government of Belize nor the Government of the United States has ratified the American Convention and thus, both cases before the Inter-American Commission involved the rights articulated in the American Declaration as adopted by the Ninth Conference of American States (1948).

^{hh} For its findings in this case, the Commission relied on, among other things, several of its earlier country reports, its earlier *Dann* case, the *Awes Tingni* case, CERD's general comment XXIII, ILO Convention No. 169, and the United Nations and OAS draft declarations on the rights of indigenous peoples.

ⁱⁱ As noted previously, unlike the laws of Nicaragua, the laws of Belize do not recognize the rights of indigenous peoples over their lands, territories and resources.

^{jj} As a result of its findings, the Commission's final recommendations closely tracked those found in the *Awes Tingni* case (see *Maya Indigenous Communities*, paragraph 190) and notably added a request that the State "repair the environmental damage" caused by the logging concessions within the Maya's territory (para. 190 (3)).

^{kk} Communication No. 155/96.

^{ll} *Ogoni*, paras. 2-3, 7-9.

^{mm} *Ibid.*, pp. 50, 62.

ⁿⁿ *Ibid.*, paras. 58, 69.

^{oo} One such case that deserves at least passing attention is the *Samata* Judgment of 1997 from India. *Samata v. State of Andhra Pradesh*, Supreme Court of India (11 July 1997) at www.mmpindia.org/samatha%20vs%20AP.htm. In this case an NGO working in the scheduled area of Andhra Pradesh filed suit against the Andhra Pradesh government when it leased tribal lands in scheduled [indigenous] areas to private mining companies. The court ruled in favour of the NGO and, in a historic ruling, declared that government is a "person" under the relevant law and that all lands leased to private mining companies in the scheduled areas were null and void. The State has responded by arguing for an amendment to the Fifth Schedule of the Indian Constitution that provides protection to tribal people living in Scheduled Areas. For more information about this case and subsequent events, see www.indiatogether.org/campaigns/schedule5/intro.htm.

^{pp} 175 C.L.R. 1 (High Ct. of Aust. 1992).

^{qq} 3 S.C.R. 1010 (1997), 153 D.L.R. (4th), 193 S.C.C. (Can. 1997).

^{rr} Constitutional Court of South Africa - CCT 19/03 (14 October 2003).

^{ss} *Mabo*, 175 C.L.R. at 2 (Mason and McHugh JJ.) and 38-41, 51-54, 61-63, 83 (Brennan J.).

^{tt} Ibid., at 2 (Mason and McHugh JJ.) and 73-83 (Brennan J.). In response to the uncertainty caused by *Mabo*, the Government enacted the Native Title Act 1993 enabling indigenous people throughout Australia to claim traditional rights to unalienated land. Later, in *Wik v. Queensland* the High Court found that pastoral leases (government granted interests in vast areas of land), did not necessarily extinguish native title. *Mabo* and *Wik* then led to the enactment of the Native Title Amendment Act in 1998 which may be exercised to extinguish indigenous or native title. The Committee on the Elimination of Racial Discrimination has found various provisions of this amended Act discriminatory. See Committee on the Elimination of Racial Discrimination, Decision (2) 54 on Australia, A/54/18, para. 21 (18 March 1999). For a full discussion of *Mabo*, *Wik* and the subsequent native title acts, see Way, Frith, "Governance Structures for Indigenous Australians on and off Native Title Lands, Discussion Paper 4, AUSTLII at www.austlii.edu.au/au/special/rsjproject/rsjlibrary/arccrp/dp4.html.

^{uu} Ibid., p. 64.

^{vv} Chief Justice Lamer describes the character of an indigenous community's title based upon historical possession as being merely a burden on the underlying title of the Crown and not equivalent to fee simple title. *Delgamuukw*, 3 S.C.R. 1010 at para. 145. Lands held by aboriginal title are inalienable except to the Crown. *Id.* at 129. More important, the right held by the indigenous community is, by definition, limited as to the uses to which the land and resources can be put. Land held by aboriginal title in Canada cannot, be "used in a manner irreconcilable with the nature of the claimants' attachment to those lands". *Id.* at para. 125. For instance, lands historically used for hunting cannot be used so as to destroy their use for hunting, and so forth. *Id.* at paras. 125-132. These appear to be major limitations on the rights of ownership that are required to be protected by the American Declaration and the American Convention.

^{ww} Ibid., para. 122 ("On the basis of *Guerin*, aboriginal title also encompass mineral rights, and lands held pursuant to aboriginal title should be capable of exploitation in the same way, which is certainly not a traditional use for those lands").

^{xx} UNDP and Indigenous Peoples: A Policy of Engagement (2001).

^{yy} *World Bank Operational Directive 4.20*, para. 15 (a) (September 1991). During the past three years the World Bank has been consulting with indigenous peoples in order to revise this policy. During this process indigenous peoples have expressed concern about the manner in which the consultation processes have been carried out as well as the failure of the existing and revised policy to fully acknowledge all of the rights of indigenous peoples over their lands, territories and resources as currently recognized by international law.

^{zz} Asian Development Bank, Policy on Indigenous Peoples (1998).

^{aaa} Inter-American Development Bank, Strategies and Procedures on Socio Cultural Issues as Related to the Environment, p. 4 (1990) (providing general principles to guide the bank, which recognize "the individual and collective right of indigenous populations ... [to] ... possession and property of the lands they traditionally inhabit and the natural resources found there

within”); IDB, Operational Policy 710 on Involuntary Resettlement, “Indigenous Communities” (1998) (providing that the Bank will “only support operations” involving resettlement of indigenous communities when, among other conditions, the “customary rights will be fully recognized and fairly compensated” and the “people affected have given their informed consent ...”).

^{bbb} *Profile, Operational Policy on Indigenous Peoples* (13 February 2004) as endorsed by the Policy and Evaluation Committee of the Board of Directors on 11 March 2004 (a body consisting of State delegates) available at: http://www.iadb.org/sds/ind/site_401_e.htm. The profile contains a number of positive measures that can assist in protecting indigenous peoples rights over their natural resources. However, there appears to be a possible subordination of the property and resource rights of indigenous peoples to domestic laws (see paragraphs 2.6 (3) and 2.7 (3)), although paragraph 2.4 provides that the principles articulated in the policy should be “consistent with ... the evolving national and international legal framework on indigenous rights”. If the final policy were to limit indigenous human rights by domestic legal frameworks, this would be inconsistent with international human rights law.

Annex III

A. RELEVANT CONCLUSIONS, GUIDING PRINCIPLES AND RECOMMENDATIONS FROM THE WORKING PAPER ON INDIGENOUS PEOPLES AND THEIR RELATIONSHIP TO LAND

1. Indigenous peoples have a distinctive and profound spiritual and material relationship with their lands and with the air, waters, coastal sea, ice, flora, fauna and other resources. This relationship has various social, cultural, spiritual, economic and political dimensions and responsibilities.
2. Historically, indigenous peoples in most parts of the world have been deprived of their lands and resources in whole or in part through many unjust processes, including military force, unlawful settlements, forcible removal and relocation, legal fraud and illegal expropriation by the Government.
3. Indigenous societies in a number of countries are in a state of rapid deterioration and change due in large part to the denial of the rights of the indigenous peoples to lands, territories and resources.
4. Aboriginal title, by which indigenous land is in many cases held, is often subject to the illegitimate use of State power to extinguish such title, in contrast to the legal protection and rights that, in most countries, protect the land and property of other citizens. This single fact probably accounts for the overwhelming majority of human rights problems affecting indigenous peoples.
5. In those countries with a body of law concerning indigenous peoples, the most significant problems arise because of discriminatory laws and legal doctrines that are applied regarding indigenous peoples, their lands and resources.
6. The failure of States to implement or enforce existing laws for the protection of indigenous lands and resources is also a widespread problem.
7. The expropriation of indigenous lands and resources for national development is a growing and severe problem. Development projects are frequently undertaken on indigenous lands and territories without indigenous consent or even consultation.
8. Other significant problems that have been identified are: programmes to allot indigenous lands to individuals; settlement programmes on indigenous lands; the practice of requiring that indigenous land be held in trust by the State; programmes that use indigenous lands as collateral for loans; adverse management of sacred and cultural sites by States; the failure of States and others to protect the environmental integrity of indigenous lands and resources; and failure to accord indigenous peoples an appropriate right to manage, use and control development of their lands and resources.

9. It is important that practical effect be given to the spirit and intent of treaties and agreements concerning lands and resources. This requires a willingness by the parties to act as equal partners, not adversaries, as well as a clear understanding by all parties of the spirit and intent of treaties and agreements concerning lands and resources.
10. In many countries, there is a need for general or framework legislation to recognize and give legal protection to indigenous lands and resources. In some countries, there is a need to reform the relevant sections and clauses of the Constitution in order to achieve a desirable level of legal protection for indigenous lands and resources.
11. The draft United Nations declaration on the rights of indigenous peoples, of which I have the honour and responsibility of being the main drafter, as adopted by the Sub-Commission on the Promotion and Protection of Human Rights, presents an opportunity for States to adopt an important international instrument reflecting a broad consensus among indigenous peoples and experts about indigenous land and resource rights.

**B. GUIDING PRINCIPLES FROM THE WORKING PAPER ON
INDIGENOUS PEOPLES AND THEIR RELATIONSHIP
TO LAND**

12. The rule of law must be rigorously established and maintained in every country with respect to indigenous peoples and their lands, territories and resources. Remedies for indigenous peoples and individuals must be available and legally enforceable. The rule of law is the establishment and consistent application by the State and its citizens of just, democratically adopted laws, including international human rights and humanitarian law.
13. All State and international actions and legal measures in regard to indigenous lands, territories and resources must meet the standard of fundamental fairness for all indigenous and non-indigenous parties, and all such actions must be characterized by justice in historical, political, legal, social and economic terms.
14. All State and international actions and legal and administrative measures in regard to indigenous lands, territories and resources must be non-discriminatory in their application and effect and must not subject indigenous peoples or individuals to any disadvantage or adverse consequence as compared to non-indigenous persons in the State.
15. All State and international actions and legal measures in regard to indigenous lands, territories and resources must assure that all indigenous peoples have lands, territories and resources sufficient to assure their well-being and equitable development as peoples.
16. All State and international actions and legal measures in regard to indigenous lands, territories and resources must recognize the right of self-determination of indigenous peoples and conform with the obligation to deal with the appropriate indigenous institutions of government and the obligation to respect the right of indigenous peoples to control and protect their own lands, territories and resources.

17. All State and international measures that may affect indigenous lands, territories and resources, even indirectly, must provide for the full and direct participation of all affected indigenous peoples in the decision-making processes.
18. States must respect and protect the special relationships that indigenous peoples have to lands, territories, and resources, particularly sacred sites, culturally significant areas, and uses of resources that are tied to indigenous cultures and religious practices.
19. All State and international actions and legal measures in regard to indigenous lands, territories and resources must as a practical matter be fully accessible to indigenous peoples, and adequate technical and financial resources must be available to assure that such measures, decisions and processes can be used effectively by them.
20. All State and international actions and legal measures in regard to indigenous lands, territories and resources must be carried out in the context of full respect for all the human rights and fundamental freedoms of indigenous peoples, particularly the minimum standards set forth in the draft United Nations declaration on the rights of indigenous peoples, ILO Convention No. 169 and the draft American declaration on the rights of indigenous peoples.

C. RELEVANT RECOMMENDATIONS FROM THE WORKING PAPER ON INDIGENOUS PEOPLES AND THEIR RELATIONSHIP TO LAND

21. Countries where such legislation does not exist should enact legislation, including special measures, to recognize, demarcate and protect the lands, territories and resources of indigenous peoples in a manner that accords legal protection, rights and status at least equal to those accorded other lands, territories and resources in the country.
22. Such legislation must recognize indigenous peoples' traditional practices and law of land tenure, and it must be developed only with the participation and free consent of the indigenous peoples concerned.
23. Special measures regarding indigenous land and resources must not deprive indigenous peoples of legal rights with respect to land and resources that other groups and individuals in the country enjoy.
24. Within the legal context of each country, consideration must be given to the need to reform the relevant portions of the Constitution in order to assure the necessary level of legal protection for indigenous lands and resources and particularly to assure that indigenous rights to lands and resources are not subject to invasion or diminution by the Government.
25. Governments should formally renounce discriminatory legal doctrines and policies which deny human rights or limit indigenous land and resource rights. In particular, they should consider adopting corrective legislation, constitutional reforms or corrective policies, as may be appropriate, within the International Decade of the World's Indigenous People, regarding the following:

- (i) The doctrines of discovery and *terra nullius*;

- (ii) The doctrine that indigenous communities do not have the capacity to own land or to own land collectively;
- (iii) The doctrine that indigenous land, title or ownership may be taken or impaired by the State or third parties without due process of law and adequate, fair and just compensation;
- (iv) Doctrines or policies that indigenous lands must be held in trust regardless of the will of the indigenous peoples concerned;
- (v) Doctrines and policies that unilaterally effect an extinguishment of indigenous land rights, title or ownership;
- (vi) Policies which exclude some indigenous peoples from the land claims processes established by the State.

26. Countries must abjure power with respect to indigenous peoples, their lands and resources that is not limited by respect for human rights and rights generally applicable in the country.

27. Rights and property protections must not be diminished or denied on the ground that title or other interest is held in common or held by an indigenous people or group rather than by an individual.

28. Governments are encouraged to consider the establishment and use of impartial mechanisms, including international mechanisms, to oversee and facilitate fair and equitable resolutions of indigenous land and resource claims and the implementation of land agreements.

29. Governments, in consultation with indigenous peoples, should establish fair procedures for reviewing, and taking corrective action in, situations in which indigenous land or resources have been taken or rights to them extinguished through past processes which are claimed or are found to be fundamentally unfair or discriminatory.

30. In consultation with indigenous peoples, States should each consider creating a permanent capital fund which will generate sufficient funds for the purpose of compensating indigenous peoples for the past taking of their lands and resources, where return of the lands and resources or provision of equivalent lands and resources is not possible.

31. Effective measures should be provided by States for implementation, amendment and enforcement of land settlements and agreements, and for dispute resolution.

32. States and intergovernmental bodies, including organs and bodies of the United Nations system should identify means for meeting the serious needs for training, education and financial and technical resources so that indigenous peoples may enter negotiation processes fully informed and technically equipped with respect to the whole spectrum of implications of land rights negotiations. Training and education should also figure prominently in agreements negotiated.

33. The United Nations and its specialized agencies should consider providing technical assistance, when necessary, to States and to indigenous peoples to contribute to the resolution of land claims and other land and resource issues.
34. Indigenous peoples should participate in decision-making and policy-making regarding land, resources and development at the international, regional, national and local levels.
35. Governments, in consultation with indigenous peoples, are encouraged to develop processes, standards and methods for coexistence and the co-management of lands and resources, with a view to accommodating indigenous peoples' traditional practices and law of land tenure.

Annex IV

SELECTED BIBLIOGRAPHY, UNITED NATIONS RESOLUTIONS, RELEVANT CASES AND LEGAL STANDARDS CONCERNING INDIGENOUS PEOPLES' PERMANENT SOVEREIGNTY OVER NATURAL RESOURCES

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B. EXCERPTS FROM RELEVANT UNITED NATIONS RESOLUTIONS

General Assembly resolution 1803 (XVII) of 14 December 1962, entitled "Permanent sovereignty over natural resources"

The General Assembly,

...

Declares that:

1. The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned,
2. The exploration, development and disposition of such resources, as well as the import of the foreign capital required for these purposes, should be in conformity with the rules and conditions which the peoples and nations freely consider to be necessary or desirable with regard to the authorization, restriction or prohibition of such activities,
3. In cases where authorization is granted, the capital imported and the earnings on that capital shall be governed by the terms thereof, by the national legislation in force, and by international law. The profits derived must be shared in the proportions freely agreed upon, in each case, between the investors and the recipient State, due care being taken to ensure that there is no impairment, for any reason, of that State's sovereignty over its natural wealth and resources,
4. Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such

measures in the exercise of its sovereignty and in accordance with international law. In any case where the question of compensation gives rise to a controversy, the national jurisdiction of the State taking such measures shall be exhausted. However, upon agreement by sovereign States and other parties concerned, settlement of the dispute should be made through arbitration or international adjudication,

5. The free and beneficial exercise of the sovereignty of peoples and nations over their natural resources must be furthered by the mutual respect of States based on their sovereign equality,

6. International cooperation for the economic development of developing countries, whether in the form of public or private capital investments, exchange of goods and services, technical assistance, or exchange of scientific information, shall be such as to further their independent national development and shall be based upon respect for their sovereignty over their natural wealth and resources,

7. Violation of the rights of peoples and nations to sovereignty over their natural wealth and resources is contrary to the spirit and principles of the Charter of the United Nations and hinders the development of international cooperation and the maintenance of peace,

8. Foreign investment agreements freely entered into by or between sovereign States shall be observed in good faith; States and international organizations shall strictly and conscientiously respect the sovereignty of peoples and nations over their natural wealth and resources in accordance with the Charter and the principles set forth in the present resolution.

General Assembly resolution 3201 (S-VI) of 1 May 1974, entitled “Declaration on the Establishment of a New International Economic Order”

4. The new international economic order should be founded on full respect for the following principles:

...

(e) Full permanent sovereignty of every State over its natural resources and all economic activities. In order to safeguard these resources, each State is entitled to exercise effective control over them and their exploitation with means suitable to its own situation, including the right to nationalization or transfer of ownership to its nations, this right being an expression of the full permanent sovereignty of the State. No State may be subjected to economic, political or any other type of coercion to prevent the free and full exercise of this inalienable right;

(f) The right of all States, territories and peoples under foreign occupation, alien and colonial domination or apartheid to restitution and full compensation for the exploitation and depletion of, and damages to, the natural resources and all other resources of those States, territories, and peoples;

...

(h) The right of the developing countries and the peoples of territories under colonial and racial domination and foreign occupation to achieve their liberation and to regain effective control over their natural resources and economic activities.

**General Assembly resolution 3281 (XXIX) of 12 December 1974
entitled “Charter of Economic Rights and Duties of States”**

Article 2

1. Every State has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources, and economic activities,

...

Article 16

1. It is the right and duty of all States, individually and collectively, to eliminate colonialism, apartheid, racial discrimination, neo-colonialism and all forms of foreign aggression, occupation and domination, and the economic and social consequences thereof, as a prerequisite for development. States which practice such coercive policies are economically responsible to the countries, territories and peoples affected for the restitution and full compensation for the exploitation and depletion of, and damages to, the natural and all other resources of those countries, territories and peoples. It is the duty of all States to extend assistance to them.

C. RELEVANT CASES

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Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

D. INTERNATIONAL LEGAL STANDARDS

The following compilation of standards and materials is comprised of the most relevant portions of various legal instruments, draft legal instruments and other relevant materials. It contains only the main or most important legal materials that pertain to indigenous peoples and their natural resources.

Universal Declaration of Human Rights

Article 7

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Article 17

1. Everyone has the right to own property alone as well as in association with others.
2. No one shall be arbitrarily deprived of his property.

International Convention on the Elimination of All Forms of Racial Discrimination

Article 5

In compliance with the fundamental obligations laid down in article 2 of this Convention, States parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights.

...

- (v) The right to own property alone as well as in association with others ...

International Covenant on Civil and Political Rights

Article 1

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

Article 27

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

International Covenant on Economic, Social, and Cultural Rights

Article 1

(Same as ICCPR above.)

International Labour Organization Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries (1989)

Article 4

1. Special measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned.
2. Such special measures shall not be contrary to the freely-expressed wishes of the peoples concerned.
3. Enjoyment of the general rights of citizenship, without discrimination, shall not be prejudiced in any way by such special measures.

Article 6

1. In applying the provisions of this Convention, Governments shall.
 - (a) Consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly;
 - (b) Establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them;
 - (c) Establish means for the full development of these peoples' own institutions and initiatives, and in appropriate cases provide the resources necessary for this purpose.

2. The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.

Article 7

The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.

Article 13

1. In applying the provisions of this part of the Convention Governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.

2. The use of the term lands in articles 15 and 16 shall include the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use.

Article 14

1. The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognized. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect.

2. Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession.

3. Adequate procedures shall be established within the national legal system to resolve land claims by the peoples concerned.

Article 15

1. The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources.

2. In cases in which the State retains the ownership of mineral or subsurface resources or rights to other resources pertaining to lands, Governments shall establish or

maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.

Article 16

1. Subject to the following paragraphs of this article, the peoples concerned shall not be removed from the lands which they occupy.

2. Where the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent. Where their consent cannot be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned.

3. Whenever possible, these peoples shall have the right to return to their traditional lands, as soon as the grounds for relocation cease to exist.

4. When such return is not possible, as determined by agreement or, in the absence of such agreement, through appropriate procedures, these peoples shall be provided in all possible cases with lands of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. Where the peoples concerned express a preference for compensation in money or in kind, they shall be so compensated under appropriate guarantees.

5. Persons thus relocated shall be fully compensated for any resulting loss or injury.

Article 17

1. Procedures established by the peoples concerned for the transmission of land rights among members of these peoples shall be respected.

2. The peoples concerned shall be consulted whenever consideration is being given to their capacity to alienate their lands or otherwise transmit their rights outside their own community.

3. Persons not belonging to these peoples shall be prevented from taking advantage of their customs or of lack of understanding of the laws on the part of their members to secure the ownership, possession or use of land belonging to them.

Article 18

Adequate penalties shall be established by law for unauthorized intrusion upon, or use of, the lands of the peoples concerned, and Governments shall take measures to prevent such offences.

Article 19

National agrarian programmes shall secure to the peoples concerned treatment equivalent to that accorded to other sectors of the population with regard to:

- (a) The provision of more land for these peoples when they have not the area necessary for providing the essentials of a normal existence, or for any possible increase in their numbers;
- (b) The provision of the means required to promote the development of the lands which these peoples already possess.

African Charter on Human and Peoples' Rights

Article 14

The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.

Article 20

- 1. All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.
- 2. Colonized or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community.
- 3. All peoples shall have the right to the assistance of the States parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural.

Article 21

- 1. All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.
- 2. In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.
- 3. The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international economic cooperation based on mutual respect, equitable exchange and the principles of international law.

4. States parties to the present Charter shall individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to strengthening African unity and solidarity.

5. States parties to the present Charter shall undertake to eliminate all forms of foreign economic exploitation particularly that practised by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources.

Article 22

1. All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.

2. States shall have the duty, individually or collectively, to ensure the exercise of the right to development.”

Convention on Biological Diversity

Article 3. Principles

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

Framework Convention on Climate Change

[Preamble, para. 8] Recalling also that States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

American Convention on Human Rights

Article 21. Right to property

1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.

Vienna Convention on Succession of States in respect of Treaties

Article 13

The present Convention and permanent sovereignty over natural wealth and resources

Nothing in the present Convention shall affect the principles of international law affirming the permanent sovereignty of every people and every State over its natural wealth and resources.

American Declaration on the Rights and Duties of Man

Article XXIII. Right to property

Every person has a right to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home.

Stockholm Declaration

Principle 21

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

Rio Declaration

Principle 2

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

Committee on the Elimination of Racial Discrimination

General recommendation XXIII (51) on the rights of indigenous peoples, adopted on 18 August 1997

1. In the practice of the Committee on the Elimination of Racial Discrimination, in particular in the examination of reports of States parties under article 9 of the International Convention on the Elimination of All Forms of Racial Discrimination, the situation of

indigenous peoples has always been a matter of close attention and concern. In this respect the Committee has consistently affirmed that discrimination against indigenous peoples falls under the scope of the Convention and that all appropriate means must be taken to combat and eliminate such discrimination.

2. The Committee, noting that the General Assembly proclaimed the International Decade of the World's Indigenous People commencing on 10 December 1994, reaffirms that the provisions of the International Convention on the Elimination of All Forms of Racial Discrimination apply to indigenous peoples.

3. The Committee is conscious of the fact that in many regions of the world indigenous peoples have been, and are still being, discriminated against and deprived of their human rights and fundamental freedoms and in particular that they have lost their land and resources to colonists, commercial companies and State enterprises. Consequently the preservation of their culture and their historical identity has been and still is jeopardized.

4. The Committee calls in particular upon States parties to:

(a) Recognize and respect indigenous distinct culture, history, language and way of life as an enrichment of the State's cultural identity and to promote its preservation;

(b) Ensure that members of indigenous peoples are free and equal in dignity and rights and free from any discrimination, in particular that based on indigenous origin or identity;

(c) Provide indigenous peoples with conditions allowing for a sustainable economic and social development compatible with their cultural characteristics;

(d) Ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent;

(e) Ensure that indigenous communities can exercise their rights to practice and revitalize their cultural traditions and customs and to preserve and to practice their languages.

5. The Committee especially calls upon States parties to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories. Only when this is for factual reasons not possible, the right to restitution should be substituted by the right to just, fair and prompt compensation. Such compensation should as far as possible take the form of lands and territories.

6. The Committee further calls upon States parties with indigenous peoples in their territories to include in their periodic reports full information on the situation of such peoples, taking into account all relevant provisions of the Convention.

Human Rights Committee

General comment No. 23 on article 27 (fiftieth session, 1994)

3.2 The enjoyment of the rights to which article 27 relates does not prejudice the sovereignty and territorial integrity of a State party. At the same time, one or other aspect of the rights of individuals protected under that article - for example, to enjoy a particular culture - may consist in a way of life which is closely associated with territory and use of its resources. This may particularly be true of members of indigenous communities constituting a minority.

7. With regard to the exercise of the cultural rights protected under article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.

Draft United Nations declaration on the rights of indigenous peoples

Article 3

Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Article 10

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

Article 12

Indigenous peoples have the right to practice and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artifacts, designs, ceremonies, technologies and visual and performing arts and literature, as well as the right to the restitution of cultural, intellectual, religious and spiritual property taken without their free and informed consent or in violation of their laws, traditions and customs.

Article 13

Indigenous peoples have the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of ceremonial objects; and the right to the repatriation of human remains.

States shall take effective measures, in conjunction with the indigenous peoples concerned, to ensure that indigenous sacred places, including burial sites, are preserved, respected and protected.

Article 21

Indigenous peoples have the right to maintain and develop their political, economic and social systems, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities. Indigenous peoples who have been deprived of their means of subsistence and development are entitled to just and fair compensation.

Article 25

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual and material relationship with the lands, territories, waters and coastal seas and other resources which they have traditionally owned or otherwise occupied or used, and to uphold their responsibilities to future generations in this regard.

Article 26

Indigenous peoples have the right to own, develop, control and use the lands and territories, including the total environment of the lands, air, waters, coastal seas, sea-ice, flora and fauna and other resources which they have traditionally owned or otherwise occupied or used. This includes the right to the full recognition of their laws, traditions and customs, land-tenure systems and institutions for the development and management of resources, and the right to effective measures by States to prevent any interference with, alienation of or encroachment upon these rights.

Article 27

Indigenous peoples have the right to the restitution of the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, occupied, used or damaged without their free and informed consent. Where this is not possible, they have the right to just and fair compensation. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status.

Article 28

Indigenous peoples have the right to the conservation, restoration and protection of the total environment and the productive capacity of their lands, territories and resources, as well as to assistance for this purpose from States and through international cooperation. Military activities shall not take place in the lands and territories of indigenous peoples, unless otherwise freely agreed upon by the peoples concerned.

States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands and territories of indigenous peoples.

States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.

Article 29

Indigenous peoples are entitled to the recognition of the full ownership, control and protection of their cultural and intellectual property.

They have the right to special measures to control, develop and protect their sciences, technologies and cultural manifestations, including human and other genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs and visual and performing arts.

Article 30

Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands, territories and other resources, including the right to require that States obtain their free and informed consent prior to the approval of any project affecting their lands, territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources. Pursuant to agreement with the indigenous peoples concerned, just and fair compensation shall be provided for any such activities and measures taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

Article 31

Indigenous peoples, as a specific form of exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, including culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resources management, environment and entry by non-members, as well as ways and means for financing these autonomous functions.

Draft American declaration on the rights of indigenous peoples

Article VII. Right to cultural integrity

1. Indigenous peoples have the right to their cultural integrity, and their historical and archaeological heritage, which are important both for their survival as well as for the identity of their members.
2. Indigenous peoples are entitled to restitution in respect of the property of which they have been dispossessed, and where that is not possible, compensation on a basis not less favourable than the standard of international law.
3. The States shall recognize and respect indigenous ways of life, customs, traditions, forms of social, economic and political organization, institutions, practices, beliefs and values, use of dress, and languages.

Article XIII. Right to environmental protection

1. Indigenous peoples have the right to a safe and healthy environment, which is an essential condition for the enjoyment of the right to life and collective well-being.
2. Indigenous peoples have the right to be informed of measures which will affect their environment, including information that ensures their effective participation in actions and policies that might affect it.
3. Indigenous peoples shall have the right to conserve, restore and protect their environment, and the productive capacity of their lands, territories and resources.
4. Indigenous peoples have the right to participate fully in formulating, planning, managing and applying governmental programmes of conservation of their lands, territories and resources.
5. Indigenous peoples have the right to assistance from their States for purposes of environmental protection, and may receive assistance from international organizations.
6. The States shall prohibit and punish, and shall impede jointly with the indigenous peoples, the introduction, abandonment, or deposit of radioactive materials or residues, toxic substances and garbage in contravention of legal provisions; as well as the production, introduction, transportation, possession or use of chemical, biological and nuclear weapons in indigenous areas.
7. When a State declares an indigenous territory as protected area, any lands, territories and resources under potential or actual claim by indigenous peoples, conservation areas shall not be subject to any natural resource development without the informed consent and participation of the peoples concerned.

Article XV. Right to self-government

1. Indigenous peoples have the right to freely determine their political status and freely pursue their economic, social, spiritual and cultural development, and accordingly, they have the right to autonomy or self-government with regard to inter alia culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resource management, the environment and entry by non-members; and to determine ways and means for financing these autonomous functions.

Article XVIII. Traditional forms of ownership and cultural survival. Rights to land, territories and resources

1. Indigenous peoples have the right to the legal recognition of their varied and specific forms and modalities of their control, ownership, use and enjoyment of territories and property.

2. Indigenous peoples have the right to the recognition of their property and ownership rights with respect to lands, territories and resources they have historically occupied, as well as to the use of those to which they have historically had access for their traditional activities and livelihood.

3. (i) Subject to 3 (ii), where property and user rights of indigenous peoples arise from rights existing prior to the creation of those States, the States shall recognize the titles of indigenous peoples relative thereto as permanent, exclusive, inalienable, imprescriptible and indefeasible.

(ii) Such titles may only be changed by mutual consent between the State and respective indigenous peoples when they have full knowledge and appreciation of the nature or attributes of such property.

(iii) Nothing in 3 (i) shall be construed as limiting the right of indigenous peoples to attribute ownership within the community in accordance with their customs, traditions, uses and traditional practices, nor shall it affect any collective community rights over them.

4. Indigenous peoples have the right to an effective legal framework for the protection of their rights with respect to the natural resources on their lands, including the ability to use, manage, and conserve such resources; and with respect to traditional uses of their lands, interests in lands, and resources, such as subsistence.

5. In the event that ownership of the minerals or resources of the subsoil pertains to the State or that the State has rights over other resources on the lands, the Governments must establish or maintain procedures for the participation of the peoples concerned in determining whether the interests of these people would be adversely affected and to what extent, before undertaking or authorizing any programme for planning, prospecting or exploiting existing resources on their lands. The peoples concerned shall participate in the benefits of such activities, and shall receive compensation, on a basis not less favourable than the standard of international law for any loss which they may sustain as a result of such activities.

6. Unless exceptional and justified circumstances so warrant in the public interest, the States shall not transfer or relocate indigenous peoples without the free, genuine, public and informed consent of those peoples, but in all cases with prior compensation and prompt replacement of lands taken, which must be of similar or better quality and which must have the same legal status; and with guarantee of the right to return if the causes that gave rise to the displacement cease to exist.

7. Indigenous peoples have the right to the restitution of the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, occupied, used or damaged, or when restitution is not possible, the right to compensation on a basis not less favourable than the standard of international law.

8. The States shall take all measures, including the use of law enforcement mechanisms, to avert, prevent and punish, if applicable, any intrusion or use of those lands by unauthorized persons to take possession or make use of them. The States shall give maximum priority to the demarcation and recognition of properties and areas of indigenous use.

**Consolidated text of the draft [American] declaration
prepared by the Chair of the Working Group**

Article III

Within the States, the right to self-determination of the indigenous peoples is recognized, pursuant to which they can define their forms of organization and promote their economic, social, and cultural development.

Article XVIII. Right to environmental protection

1. Indigenous peoples have the right to live in harmony with nature and to a healthy and safe environment, which are essential conditions for enjoyment of the right to life, to their spirituality, and to collective well-being.
2. Indigenous peoples have the right to conserve, restore, make use of, and protect their environment, and to the sustainable management of their lands, territories, and resources.
3. Indigenous peoples have the right to be informed and consulted with respect to measures that may affect their environment, as well as to participate in actions and decisions that may affect it.
4. Indigenous peoples have the right to participate fully in the formulation, planning, organization, and implementation of government programmes and policies to conserve and exploit their lands, territories, and resources.
5. Indigenous peoples have the right to assistance from their States for the purpose of protecting the environment, and from international organizations, in keeping with the procedures established in the national legislations, and without discrimination.
6. The States shall prohibit, punish, and prevent, in conjunction with the indigenous authorities, the introduction, abandonment, or deposit of radioactive materials or waste, or toxic substances or waste, in violation of legal provisions in force; as well as the production, introduction, transit, possession, or use of chemical, biological, or nuclear weapons on indigenous lands and territories.
7. When the State declares an indigenous territory to be a protected area or subject to wildlife reserve conditions and in the case of lands and territories claimed by indigenous peoples, the conservation areas shall not be subject to any natural resources development without the informed participation of the peoples concerned.

Article XII. Right to cultural identity

1. Indigenous peoples have the right to their cultural integrity and to their historical and ancestral heritage, which are important for their collective continuity, and for their identity and that of their members and their States.
2. Indigenous peoples have the right to restitution of the property that is part of that heritage of which they have been dispossessed, or, when restitution is not possible, to fair and equitable compensation.
3. The States shall guarantee respect for and non-discrimination against the indigenous ways of life, world views, usages and customs, traditions, forms of social organization, institutions, practices, beliefs, values, dress, and languages.

Article XX. Right to self-government

1. Indigenous peoples, in the exercise of the right to self-determination within the States, have the right to autonomy or self-government with respect to, inter alia, culture, language, spirituality, education, information, means of communication, health, housing, employment, social well-being, maintenance of community security, family relations, economic activities, administration of land and resources, environment and entry of non-members; and to determine the ways and means of financing these autonomous functions.
2. Indigenous peoples have the right to participate without discrimination in decision-making at all levels, in relation to matters that may directly affect their rights, lives, and destiny. They may do so either directly or through their representatives elected by them in accordance with their own procedures. They also have the right to maintain and develop their own indigenous decision-making institutions; and to equal opportunity for gaining access to and participating in all national institutions and forums.

Article XXIV. Traditional forms of property and cultural survival. Right to land, territory, and resources

1. Indigenous peoples have the right to the recognition of their property rights and ownership rights with respect to the lands and territories that they historically occupy, as well as the use of the lands to which they have traditionally had access for carrying out their traditional activities and for sustenance, respecting the principles of the legal system of each State. These rights also include the waters, coastal seas, flora, fauna, and all other resources of that habitat, as well as their environment, preserving these for themselves and future generations.
2. Indigenous peoples have the right to legal recognition of the various and particular modalities and forms of property, possession, and ownership of their lands and territories, in accordance with the principles of the legal system of each State. The States shall establish the special regimes appropriate for such recognition, and for their effective demarcation or titling.

3. The rights of the indigenous peoples to their lands and territories they occupy or use historically are permanent, exclusive, inalienable, imprescriptible, and inalienable.
4. The titles may only be modified by mutual agreement between the State and the respective indigenous peoples, with full knowledge and understanding by their members with respect to the nature and attributes of that property and of the proposed modification. The agreement by the indigenous people concerned shall be given following its practices, usages and customs.
5. Indigenous peoples have the right to attribute ownership within the community in accordance with the values, usages, and customs of each peoples.
6. The States shall take adequate measures to avert, prevent, and punish any intrusion or use of such lands, territories, or resources by persons from outside to claim for themselves the property, possession, or right to use the same.
7. In case the property rights over the minerals or resources of the subsoil belong to the State, or it has rights over other resources existing in the lands and territories of the indigenous peoples, the States shall establish or maintain procedures for the participation of the peoples concerned for determining whether the interests of those peoples would be prejudiced and to what extent, before undertaking or authorizing any programme involving prospecting, planning, or exploitation of the resources existing on their lands and territories. The peoples concerned shall participate in the benefits of such activities, and receive fair compensation for any harm they might suffer as a result of such activities.
8. The States shall provide, within their legal systems, a legal framework and effective legal remedies to protect the rights of the indigenous peoples referred to in this article.

Article XXV. On transfers and relocations

1. The States may not transfer or relocate indigenous peoples without their free, genuine, public, and informed consent, unless there are causes involving a national emergency or other exceptional circumstance of public interest that makes it necessary; and, in all cases, with the immediate replacement by adequate lands of equal or better quality and legal status, guaranteeing the right to return if the causes that gave rise to the displacement cease to exist.
2. Compensation shall be paid to the indigenous peoples and to their members who are transferred or relocated for any loss or harm they may have suffered as a result of their displacement.

Article XXVI. Indigenous peoples in voluntary isolation

1. Indigenous peoples in voluntary isolation have the right to remain in that condition and to live freely and in accordance with their ancestral traditions.
2. The States shall adopt adequate measures to protect the territories, environment, and cultures of the indigenous peoples in voluntary isolation, as well as the personal integrity of their members. These measures shall include those necessary to prevent intrusion into their territories.

Agenda 21

Chapter 26. Recognizing and strengthening the role of indigenous people and their communities

Basis for action

26.1 Indigenous people and their communities have an historical relationship with their lands and are generally descendants of the original inhabitants of such lands. In the context of this chapter the term “lands” is understood to include the environment of the areas which the people concerned traditionally occupy. Indigenous people and their communities represent a significant percentage of the global population. They have developed over many generations a holistic traditional scientific knowledge of their lands, natural resources and environment. Indigenous people and their communities shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination. Their ability to participate fully in sustainable development practices on their lands has tended to be limited as a result of factors of an economic, social and historical nature. In view of the interrelationship between the natural environment and its sustainable development and the cultural, social, economic and physical well-being of indigenous people, national and international efforts to implement environmentally sound and sustainable development should recognize, accommodate, promote and strengthen the role of indigenous people and their communities.

26.2 Some of the goals inherent in the objectives and activities of this programme area are already contained in such international legal instruments as the ILO Indigenous and Tribal Peoples Convention (No. 169) and are being incorporated into the draft universal declaration on indigenous rights, being prepared by the United Nations Working Group on Indigenous Populations. The International Year of the World's Indigenous People (1993), proclaimed by the General Assembly in its resolution 45/164 of 18 December 1990, presents a timely opportunity to mobilize further international technical and financial cooperation.

Objectives

“26.3 In full partnership with indigenous people and their communities, Governments and, where appropriate, intergovernmental organizations should aim at fulfilling the following objectives:

(a) Establishment of a process to empower indigenous people and their communities through measures that include:

- (i) Adoption or strengthening of appropriate policies and/or legal instruments at the national level;
- (ii) Recognition that the lands of indigenous people and their communities should be protected from activities that are environmentally unsound or that the indigenous people concerned consider to be socially and culturally inappropriate;

- (iii) Recognition of their values, traditional knowledge and resource management practices with a view to promoting environmentally sound and sustainable development;
- (iv) Recognition that traditional and direct dependence on renewable resources and ecosystems, including sustainable harvesting, continues to be essential to the cultural, economic and physical well-being of indigenous people and their communities;
- (v) Development and strengthening of national dispute-resolution arrangements in relation to settlement of land and resource-management concerns;
- (vi) Support for alternative environmentally sound means of production to ensure a range of choices on how to improve their quality of life so that they effectively participate in sustainable development;
- (vii) Enhancement of capacity-building for indigenous communities, based on the adaptation and exchange of traditional experience, knowledge and resource-management practices, to ensure their sustainable development;

(b) Establishment, where appropriate, of arrangements to strengthen the active participation of indigenous people and their communities in the national formulation of policies, laws and programmes relating to resource management and other development processes that may affect them, and their initiation of proposals for such policies and programmes;

(c) Involvement of indigenous people and their communities at the national and local levels in resource management and conservation strategies and other relevant programmes established to support and review sustainable development strategies, such as those suggested in other programme areas of Agenda 21.

Activities

26.4 Some indigenous people and their communities may require, in accordance with national legislation, greater control over their lands, self-management of their resources, participation in development decisions affecting them, including, where appropriate, participation in the establishment or management of protected areas. The following are some of the specific measures which Governments could take:

(a) Consider the ratification and application of existing international conventions relevant to indigenous people and their communities (where not yet done) and provide support for the adoption by the General Assembly of a declaration on indigenous rights;

(b) Adopt or strengthen appropriate policies and/or legal instruments that will protect indigenous intellectual and cultural property and the right to preserve customary and administrative systems and practices.”

World Bank Operational Directive 4.20 (September 1991)

(Note: The World Bank is in the process of revising Operational Directive 4.20)

Contents

15. The development plan should be prepared in tandem with the preparation of the main investment. In many cases, proper protection of the rights of indigenous people will require the implementation of special project components that may lie outside the primary project's objectives. These components can include activities related to health and nutrition, productive infrastructure, linguistic and cultural preservation, entitlement to natural resources, and education. The project component for indigenous peoples development should include the following elements, as needed:

(a) Legal Framework ... (ii) the ability of such groups to obtain access to and effectively use the legal system to defend their rights. Particular attention should be given to the rights of indigenous peoples to use and develop the lands that they occupy, to be protected against illegal intruders, and to have access to natural resources (such as forests, wildlife, and water) vital to their subsistence and reproduction;

...

(c) Land Tenure. When local legislation needs strengthening, the Bank should offer to advise and assist the borrower in establishing legal recognition of the customary or traditional land tenure systems of indigenous peoples. Where the traditional lands of indigenous peoples have been brought by law into the domain of the State and where it is inappropriate to convert traditional rights into those of legal ownership, alternative arrangements should be implemented to grant long-term, renewable rights of custodianship and use to indigenous peoples. These steps should be taken before the initiation of other planning steps that may be contingent on recognized land titles.

Preparation

17. If it is agreed in the IEPS (Initial Executive Project Summary) meeting that special action is needed, the indigenous peoples development plan or project component should be developed during project preparation. As necessary, the Bank should assist the borrower in preparing terms of reference and should provide specialized technical assistance (see paragraph 12). Early involvement of anthropologists and local NGOs with expertise in matters related to indigenous peoples is a useful way to identify mechanisms for effective participation and local development opportunities. In a project that involves the land rights of indigenous peoples, the Bank should work with the borrower to clarify the steps needed for putting land tenure on a regular footing as early as possible, since land disputes frequently lead to delays in executing measures that are contingent on proper land titles (see paragraph 15 (c)).

UNDP and Indigenous Peoples: Policy of Engagement (2001)

29. Through its human rights approach to development and governance, and working together with Governments, CSOs and IPOs, UNDP promotes the recognition of indigenous rights to lands, territories and resources; laws protecting indigenous lands; and the inclusion of indigenous peoples in key legislative processes. As embedded in the Charter of the United Nations and in international law, these activities will in no way threaten the preservation of the security and territorial integrity of States.

...

30. The UNDP Human Rights Policy recognizes the rights of distinct peoples living in distinct regions to self-determined development and control of ancestral lands. This embraces a concept of development that incorporates indigenous peoples' own aspirations, spirituality, culture, social and economic aims.

...

44. Consistent with its work on trade and sustainable human development, UNDP will support a multilateral trade system that is sensitive to the rights of indigenous peoples to continue practicing their indigenous sustainable agriculture, resource management practices, traditional livelihoods, especially with regard to food security.

Asian Development Bank, Policy on Indigenous Peoples (1998)

Operational approaches

Key issues that should be considered as the Bank addresses indigenous peoples matters, and the continuity and development of indigenous peoples communities, include (i) legal recognition of ancestral domain and the traditional rights of indigenous peoples over land and resources, (ii) recognized legitimacy of the indigenous social and legal institutions of indigenous peoples, and (iii) recognition of the right of indigenous peoples to direct the course of their own development and change.
