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PRÉVENTION DE LA DISCRIMINATION

**PRÉVENTION DE LA DISCRIMINATION ET PROTECTION
DES PEUPLES AUTOCHTONES**

Souveraineté permanente des peuples autochtones sur les ressources naturelles

**Rapport préliminaire de la Rapporteuse spéciale, Erica-Irene A. Daes, présenté
conformément à la résolution 2002/15* de la Sous-Commission**

1. Dans sa résolution 2001/10, la Sous-Commission de la promotion et de la protection des droits de l'homme a prié M^{me} Erica-Irene A. Daes de rédiger un document de travail sur la souveraineté permanente des peuples autochtones sur les ressources naturelles, en relation avec son étude sur les peuples autochtones et leur relation à la terre (E/CN.4/Sub.2/2001/21). M^{me} Daes a présenté son document de travail (E/CN.4/Sub.2/2002/23) à la Sous-Commission à sa cinquante-quatrième session.
2. À sa cinquante-quatrième session, la Sous-Commission a décidé de nommer M^{me} Daes Rapporteuse spéciale chargée de réaliser une étude sur le sujet en s'appuyant sur son document de travail (résolution 2002/15) et l'a priée de soumettre à la Sous-Commission un rapport préliminaire à sa cinquante-cinquième session et un rapport final à sa cinquante-sixième session. La Commission des droits de l'homme a approuvé la nomination de M^{me} Daes dans sa décision 2003/110.

* L'annexe est publiée dans la langue originale uniquement.

3. Le présent rapport préliminaire, qu'il convient de lire en parallèle avec le document de travail, contient un examen préliminaire du terme «souveraineté», tel qu'il s'applique aux peuples autochtones et aux ressources naturelles, compte tenu, entre autres, des observations de certains membres de la Sous-Commission, ainsi qu'une annexe contenant une bibliographie préliminaire, une liste de cas pertinents et une compilation de normes juridiques internationales pertinentes.
4. L'importance et l'utilité d'une étude sur la souveraineté permanente des peuples autochtones sur les ressources naturelles ont été encore mises en évidence par les débats actuels sur le droit des peuples autochtones à l'autodétermination et les effets négatifs de l'exploitation des ressources naturelles des territoires autochtones. Aussi la réconciliation des intérêts légitimes des États et des droits préalables et primordiaux des peuples autochtones sur leurs ressources naturelles a-t-elle été reconnue par un grand nombre comme étant une mesure essentielle pour la promotion des droits des peuples autochtones.
5. Les discussions sur la souveraineté permanente des peuples autochtones sur les ressources naturelles se sont poursuivies au sein du Groupe de travail sur les populations autochtones, du Groupe de travail chargé d'élaborer un projet de déclaration sur les droits des populations autochtones et, plus récemment, de l'Instance permanente sur les questions autochtones. Cela fait deux décennies que dans les halls et salles de réunion de l'Organisation des Nations Unies des représentants d'États Membres, d'institutions spécialisées, de services du Secrétariat et de peuples autochtones ainsi que des experts indépendants s'efforcent régulièrement de résoudre des conflits anciens portant sur des ressources et des terres, de conclure des accords en matière d'autodétermination dans le cadre du droit international et de créer de nouveaux mécanismes et méthodes pour coopérer dans des domaines relatifs au développement durable des terres et ressources autochtones.
6. Ces discussions importantes ont permis de voir clairement que les peuples autochtones ne pourraient jamais accéder à l'autodétermination politique et économique s'ils n'étaient pas juridiquement habilités à avoir la maîtrise sur leurs terres et territoires et à jouir pleinement des avantages économiques et autres découlant de leurs ressources naturelles. Elles ont permis également de mieux voir qu'un juste équilibre pouvait être atteint entre les intérêts des États et ceux des peuples autochtones dans la promotion et la protection de leurs droits à l'autodétermination ainsi qu'à leurs terres et ressources.
7. En autorisant cette étude, la Commission et la Sous-Commission ont reconnu encore une fois qu'en condamnant les effets destructeurs du colonialisme et de la discrimination dans le monde et en cherchant à y remédier, on pouvait s'acheminer vers des solutions constructives qui renforceraient la paix universelle et garantiraient la pleine égalité et les droits de l'homme de tous les peuples.
8. Conformément au plan de travail énoncé au paragraphe 10 du document de travail, il est peut-être utile de s'attacher à déterminer si le terme «souveraineté» peut s'appliquer aux peuples autochtones et à leurs ressources naturelles au sein d'États indépendants.
9. On peut dire, d'une manière générale, que ce terme, lorsqu'on parle du principe de souveraineté permanente sur les ressources naturelles, désigne le contrôle juridique exercé sur les ressources naturelles ou la gestion de celles-ci, notamment en tant qu'aspect de l'exercice

du droit à l'autodétermination¹. Ce principe est issu de la volonté politique d'États émergents de se libérer de l'exploitation abusive de leurs ressources naturelles. Ce genre d'exploitation abusive pourrait priver l'autodétermination de sens dans de nombreuses situations. Ainsi qu'un écrivain moderne l'a souligné:

«Après la Seconde Guerre mondiale, cette situation a poussé les pays en développement et les États nouvellement décolonisés à promouvoir la formulation d'un nouveau principe international reconnaissant et protégeant leurs droits sur leurs ressources naturelles et les richesses de leur propre pays.»².

Dans ce contexte, il est évident que le terme «souveraineté» n'est pas pris dans son sens abstrait et absolu mais désigne le contrôle et les prérogatives exercées sur les ressources dans le cadre de l'autodétermination.

10. Au XVI^e siècle, la souveraineté s'entendait du pouvoir suprême exercé sans restriction au sein de l'État³. À l'époque du *Droit des Nations* de l'influent juriste français, Emmerich de Vattel, au début du XIX^e siècle, le terme n'avait plus ce sens absolu et, en droit international, un «souverain» pouvait être sous la protection d'un autre plus haut placé sans pour autant perdre sa «souveraineté».

11. À notre époque, il est courant de dire qu'aucun État ne jouit d'une souveraineté illimitée et que tous les États sont limités dans leur souveraineté par des traités ou par le droit international coutumier. A. Cassese s'étend longuement sur la question⁴. Ainsi, d'un point de vue juridique, on peut tout à fait employer le terme souveraineté dans le cas des peuples autochtones exerçant leur capacité de gestion, bien que celle-ci puisse être limitée de diverses manières. D'ailleurs, des peuples autochtones ont depuis longtemps été reconnus comme étant souverains par de nombreux pays dans diverses régions du monde.

12. Aux États-Unis, les tribus indiennes ont été reconnues comme étant des entités politiques souveraines dans les années de formation du Gouvernement fédéral. Ces principes ont été pour la première fois invoqués dans leur totalité dans l'affaire *Worcester c. Géorgie*. Cette affaire remonte à l'époque où l'État de Géorgie avait emprisonné plusieurs missionnaires qui vivaient en territoire cherokee, en violation d'une loi de l'État exigeant des non-Indiens qu'ils obtiennent une autorisation du gouverneur. Le juge John Marshall a proclamé ce qui est toujours la loi aujourd'hui aux États-Unis, à savoir que les nations indiennes ont toujours été reconnues comme étant «des communautés politiques distinctes et indépendantes», habilitées, en tant que telles, à exercer des pouvoirs d'autogestion, non parce que le Gouvernement fédéral les leur aurait attribués mais en raison de leur souveraineté tribale originale. Le juge Marshall a déclaré ce qui suit dans l'affaire *Worcester*:

«Selon la doctrine du droit des nations, une puissance faible ne renonce pas à son indépendance, son droit à l'autonomie, en s'associant à une puissance supérieure et en se plaçant sous sa protection. Un État faible ... peut se placer sous la protection d'un autre plus puissant, sans se défaire du droit de s'administrer et sans cesser d'être un État.».

13. Le juge Marshall étaye son point de vue en appelant l'attention sur des exemples d'États européens et cite Vattel dans son avis:

«Un État tributaire ou féodal», dit Vattel, «ne perd pas, par là même, son statut d'État souverain et indépendant, pour autant que son gouvernement conserve son autonomie et autorité souveraine et indépendante».»⁵.

14. La décision rendue par le juge Marshall dans l'affaire *Worcester* s'inscrit dans la ligne des opinions qu'il avait exprimées dans l'affaire *Nation Cherokee c. Géorgie*, portée devant la justice au moment de la promulgation par la Géorgie d'une série de lois qui auraient aboli le gouvernement cherokee. Dans cette affaire, le juge Marshall a écrit ceci:

«Ainsi, une grande partie de la thèse tendant à prouver l'existence des Cherokees en tant qu'État, en tant qu'entité politique distincte, séparée des autres et capable de gérer ses propres affaires et de se gérer elle-même s'est révélée, de l'avis de la majorité de juges, tout à fait convaincante.»⁶.

Les juges ont estimé par ailleurs que les tribus qui résidaient à l'intérieur des frontières des États-Unis n'étaient pas des «nations étrangères» habilitées par la Constitution à engager des poursuites devant la Cour suprême. Cependant, dans l'affaire *Cherokee*, le juge Marshall a effectivement établi les principes de la thèse de la souveraineté des tribus.

15. Aux États-Unis, la loi aujourd'hui reconnaît de nombreux attributs de souveraineté aux gouvernements des tribus indiennes et autochtones d'Alaska, y compris le droit à l'immunité de poursuites. Ce droit à l'immunité souveraine a toujours été appliqué par la Cour suprême des États-Unis⁷. Le terme «souveraineté» est entièrement accepté dans la législation des États-Unis aujourd'hui en ce qui concerne les gouvernements des tribus indiennes et autochtones d'Alaska⁸.

16. Dans l'affaire récente *Mayagna (Sumo) Community of Awas Tingni c. Nicaragua*⁹, la Cour interaméricaine des droits de l'homme a rendu un arrêt très clair, en interprétant le droit de propriété tel qu'il est énoncé à l'article 21 de la Convention américaine des droits de l'homme, en disant que le droit des peuples autochtones sur leurs terres incluait le droit sur les ressources de celles-ci (par. 153) et que ces droits de propriété étaient détenus par la collectivité en tant que telle et conformément à ses propres droit coutumier, valeurs, coutumes et mœurs. Bien que la Cour n'ait pas utilisé le terme «souveraineté», il ne fait pas de doute qu'elle considère que le droit international protège le droit de gestion et de propriété collective de la communauté sur ses terres et ressources. L'extrait ci-après de la décision rendue le montre clairement:

«Étant donné la particularité de l'affaire à l'examen, des précisions doivent être apportées concernant la notion de propriété dans le cas des communautés autochtones. Dans ces communautés, il existe une tradition concernant une forme communautaire de propriété des terres, au sens où la propriété des terres n'est pas individuelle mais plutôt communautaire. Les groupes autochtones, de par leur existence même, ont le droit de vivre librement sur leur propre territoire; les liens étroits qu'ils entretiennent avec leurs terres doivent être reconnus et compris comme étant un élément fondamental de leurs cultures, de leur vie spirituelle, de leur intégrité et de leur survie économique. Pour les communautés autochtones, la relation à la terre n'est pas seulement une question de possession et de production mais un élément matériel et spirituel dont ils doivent pleinement jouir, fût-ce pour préserver leur patrimoine culturel et le transmettre aux générations futures.» (par. 149).

17. La loi nicaraguayenne garantit depuis longtemps l'autonomie des régions indiennes du pays¹⁰. La Constitution nicaraguayenne a également clairement reconnu des formes autochtones d'organisation sociale ainsi que le droit des peuples autochtones à gérer leurs affaires locales ainsi que leurs formes communautaires de propriété, à utiliser leurs terres et à en disposer (voir, par exemple, les articles 5, 89 et 180). Une loi adoptée récemment concernant le bornage et l'attribution des titres de propriété des terres autochtones a reconnu aux communautés indiennes locales le pouvoir de gérer celles-ci¹¹. Ce sont des exemples d'utilisation du terme «souveraineté» dans le langage juridique moderne.

18. En Nouvelle-Zélande, la notion de souveraineté, telle qu'elle s'applique aux peuples autochtones maoris, fait partie du cadre juridique reconnu de l'État. Le Traité de Waitangi, conclu entre la Couronne britannique et les Maoris, est considéré comme le texte fondateur de la Nouvelle-Zélande et ce traité est le témoignage explicite et implicite de la souveraineté des Maoris. La notion de souveraineté maori est désignée par un terme maori, *tino rangatiratanga*. Bien que ce terme et son application fassent souvent l'objet de débats, on peut dire que ce terme signifie *grosso modo* «autorité principale». Ceci est un autre exemple de souveraineté exercée par des autochtones au sein d'un État¹².

19. Au Canada et dans de nombreux autres pays, l'autonomie autochtone est garantie par la loi (au Canada, par la loi sur les Indiens), qui prévoit des degrés divers de contrôle sur les ressources naturelles. De tels régimes de contrôle sur des ressources gérées par des institutions autochtones apportent de nombreux autres exemples de formes de souveraineté autochtone sur des ressources naturelles au sein d'États souverains¹³.

20. Enfin, la Convention internationale de l'OIT n° 169 relative aux peuples indigènes et tribaux (1989), qui a été ratifiée par 17 pays, contient d'importantes dispositions relatives au contrôle exercé collectivement sur les ressources naturelles par les peuples autochtones en tant que peuples. L'article 15 en particulier contient des dispositions relatives aux droits des «peuples» sur leurs ressources naturelles. Le premier paragraphe dudit article s'énonce comme suit:

«1. Les droits des peuples intéressés sur les ressources naturelles dont sont dotées leurs terres doivent être spécialement sauvegardés. Ces droits comprennent celui, pour ces peuples, de participer à l'utilisation, à la gestion et à la conservation de ces ressources.».

Cette garantie limitée en matière de contrôle et d'autorité de gestion reconnue aux peuples autochtones et tribaux au sein des États est une autre forme de souveraineté au sens où l'on entend ce mot actuellement. Cette autorité est également reconnue à l'article 7, qui garantit, entre autres, ce qui suit:

«1. Les peuples intéressés doivent avoir le droit de décider de leurs propres priorités en ce qui concerne le processus du développement, dans la mesure où celui-ci a une incidence sur leur vie, leurs croyances, leurs institutions et leur bien-être spirituel et les terres qu'ils occupent ou utilisent d'une autre manière, et d'exercer autant que possible un contrôle sur leur développement économique, social et culturel propre...».

Il est également fait référence, aux articles 2, 4, 5 et 6, aux «institutions» et «institutions représentatives» des peuples autochtones et tribaux. Ceci précise l'idée que les peuples autochtones et tribaux, au sein des États ayant ratifié la Convention n° 169, jouissent au moins de formes limitées de souveraineté ou de pouvoir de gestion.

21. Enfin, il est utile de ne pas perdre de vue que l'étude approuvée par la Commission et la Sous-Commission a pour objet d'examiner l'application ou la pertinence du principe reconnu de souveraineté permanente des peuples autochtones sur les ressources naturelles. Elle ne présuppose aucune conclusion à cet égard. Le retrait du mot «souveraineté» du principe, reconnu depuis longtemps, de souveraineté permanente exercée sur les ressources naturelles poserait toutefois des problèmes techniques.

Notes

- ¹ Voir N. Schrijver, *Sovereignty over Natural Resources* (Cambridge Univ. Press, 1997).
- ² J. Warden-Fernandez, «The Permanent Sovereignty Over Natural Resources: How It Has Been Accommodated Within the Evolving Economy», *CEPMLP Annual Review 2000*.
- ³ L. Oppenheim, *International Law* (8^e éd., 1955), p. 120 à 122.
- ⁴ Antonio Cassese, *International Law* (Oxford University Press, 2001), p. 91 et suiv.
- ⁵ *Worcester c. Géorgie*, Cour suprême des États-Unis, 31 U.S. (6 Pet.) 515, 8 L.Ed. 483, 1832, p. 559 et 560. Voir également Felix Cohen, *Handbook of Federal Indian Law*, United States Printing Office, Washington, 1945, p. 122 et 123.
- ⁶ *Nation Cherokee c. Géorgie*, Cour suprême des États-Unis, 30 U.S. (5 Pet.) 1, 8 L.Ed. 25 (1832), p. 16.
- ⁷ Voir *États-Unis c. United States Fidelity & Guaranty Co.*, 309 U.S. 506 (1940); *Santa Clara Pueblo c. Martinez*, 436 U.S. 49 (1978).
- ⁸ Voir D. H. Getches, C. F. Wilkinson et R. F. Williams, Jr., *Cases and Materials on Federal Indian Law*, 1998.
- ⁹ Cour interaméricaine des droits de l'homme, arrêt du 31 août 2000 (série C, n° 79).
- ¹⁰ Voir la loi n° 28 «Loi sur l'autonomie des régions de la côte atlantique nord du Nicaragua», publiée dans *La Gaceta*, n° 238, 30 octobre 1987.
- ¹¹ Voir la loi 445, publiée dans *La Gaceta*, n° 16, 16 janvier 2003 (*Ley 445, Ley del Régimen de la Propiedad Comunal de los Pueblos Indígenas y Comunidades Étnicas de las Regiones Autónomas de la Costa Atlántica y de los Ríos Coco, Bocay, Indio y Maíz*).
- ¹² Pour un examen plus approfondi, voir G. Nettheim, G. Meyers et D. Craig, *Indigenous Peoples and Governance Structures*, 2202, p. 119 à 162, et M. C. Blumm, «Native Fishing Rights and Environmental Protection in North America and New Zealand: A Comparative Analysis of Profits à prendre and Habitat Servitudes», *Wisconsin International Law Journal*, vol. 8, n° 1, 1989, p. 30 à 32.
- ¹³ Voir Nettheim, op. cit.

Annex

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

I. SELECTED BIBLIOGRAPHY

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II. EXCERPTS FROM RELEVANT UNITED NATIONS RESOLUTIONS

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

"I

"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 co-operation 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 co-operation 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.”

A comprehensive list of relevant United Nations resolutions will be provided in the final report.

III. RELEVANT CASES

A. Permanent Court of International Justice

Portugal v. Australia (30 June 30 1995) (dissenting opinions by Judges Skubiszewski and Weeramantry).

B. Inter-American Court of Human Rights

Case of the Mayagna (Sumo) Community of Awas Tingni v. Nicaragua (Inter-American Court of Human Rights, 31 August 2002) (Series C, No. 79).

C. Inter-American Commission on Human Rights

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

D. United Nations Human Rights Committee

Ominayak, Chief of the Lubicon Lake Band v. Canada (communication No. 167/1984 (1990)).

E. United States of America

Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831).

Johnson v. M'Intosh, 21 U.S. (Wheat.) 543 (1823).

Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1995).

Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

United States v. United States Fidelity & Guaranty Co., 309 U.S. 506 (1940).

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

IV. 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 co-operation, 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 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 sub-surface 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 (Banjul Charter 1981)

“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 practiced 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.”

Charter of Fundamental Rights of the European Union

“Article 17

“1. Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under conditions provided by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for general interest.”

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.”

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.”

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.”

Proposed 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 archeological 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 nonmembers; 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 favorable 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.”

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 para. 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 para. 15 (c)).”

V. OTHER

Inter-American Development Bank, on-line Databank of Indigenous Legislation in Latin America, Sustainable Development Department (established Winter 2003).
http://www.iadb.org/sds/ind/site_3152_e.htm.
