



**ЭКОНОМИЧЕСКИЙ
И СОЦИАЛЬНЫЙ СОВЕТ**

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КОМИССИЯ ПО ПРАВАМ ЧЕЛОВЕКА
Подкомиссия по поощрению и защите прав человека
Пятьдесят пятая сессия
Пункт 5 b) предварительной повестки дня

ПРЕДОТВРАЩЕНИЕ ДИСКРИМИНАЦИИ

**ПРЕДОТВРАЩЕНИЕ ДИСКРИМИНАЦИИ И ЗАЩИТА
КОРЕННЫХ НАРОДОВ**

Постоянный суверенитет коренных народов над природными ресурсами

**Предварительный доклад Специального докладчика Эрики-Ирен А. Даес,
представленный в соответствии с резолюцией 2002/15 Подкомиссии***

1. В своей резолюции 2001/10 Подкомиссия по поощрению и защите прав человека просила г-жу Эрику-Ирен А. Даес подготовить рабочий документ по вопросу о постоянном суверенитете коренных народов над природными ресурсами в связи с ее исследованием, посвященным коренным народам и их связи с землей (E/CN.4/Sub.2/2001/21). Г-жа Даес представила свой рабочий документ (E/CN.4/Sub.2/2002/23) Подкомиссии на ее пятьдесят четвертой сессии.
2. На своей пятьдесят четвертой сессии Подкомиссия постановила назначить г-жу Даес Специальным докладчиком для проведения исследования по этому вопросу на основе подготовленного ею рабочего документа (резолюция 2002/15) и просила ее представить

* Приложение распространяется только на языке его представления.

предварительный доклад Подкомиссии на ее пятьдесят пятой сессии, а окончательный доклад - на ее пятьдесят шестой сессии. Комиссия по правам человека одобрила назначение г-жи Даес в своем решении 2003/110.

3. Настоящий предварительный доклад, который следует рассматривать в комплексе с вышеуказанным рабочим документом, содержит предварительный анализ термина "суверенитет" применительно к коренным народам и природным ресурсам, проведенный в частности, с учетом замечаний, которые были высказаны некоторыми членами Подкомиссии, а также приложение, включающее предварительную избранную библиографию, перечень соответствующих судебных прецедентов и подборку соответствующих норм международного права.

4. Дополнительным свидетельством важности и полезности исследования по вопросу о постоянном суверенитете коренных народов над природными ресурсами служат текущие дебаты вокруг права коренных народов на самоопределение и негативных последствий эксплуатации природных ресурсов на территориях традиционного проживания коренных народов. Соответственно, примирение законных интересов государств с преимущественными и главнейшими правами коренных народов на их природные ресурсы признается многими обозревателями в качестве важнейшего и необходимого шага в деле укрепления прав коренных народов.

5. Дискуссии по вопросу о постоянном суверенитете коренных народов над природными ресурсами проходили в рамках Рабочей группы по коренным народам, Рабочей группы по проекту декларации о правах коренных народов, а совсем недавно - в рамках Постоянного форума по вопросам коренных народов. На протяжении последних двух десятилетий в конференц-залах и залах заседаний Организации Объединенных Наций государства-члены, представители специализированных учреждений и департаментов Секретариата, независимые эксперты, коренные народы и их представители регулярно пытались решить давние споры вокруг земли и ресурсов, с тем чтобы достичь понимания в отношении концепции самоопределения согласно международному праву и установить новые механизмы и методы для сотрудничества в вопросах, касающихся устойчивого развития земель и ресурсов коренных народов.

6. В результате этих важных дискуссий стало ясно, что реального политического и экономического самоопределения коренных народов не удастся добиться до тех пор, пока они не будут правомочны осуществлять контроль над своими землями и территориями, а следовательно, и пользоваться всеми экономическими и прочими благами, связанными с их природными ресурсами. Кроме того, результатом этих дебатов стало растущее признание возможности достижения надлежащего баланса между интересами государств

и интересами коренных народов в контексте поощрения и защиты их прав на самоопределение и на их земли и ресурсы.

7. Санкционировав настоящее исследование, Комиссия и Подкомиссия еще раз признали тот факт, что на основе осуждения негативных последствий колониализма и дискриминации во всем мире и попыток ликвидировать эти последствия можно выработать конструктивные решения, которые позволят укрепить мир во всем мире и гарантировать полное равенство и права человека для всех народов.

8. В свете плана работы, содержащегося в пункте 10 рабочего документа, очевидно, было бы полезно рассмотреть вопрос о применимости термина "суверенитет" к коренным народам и их природным ресурсам в рамках независимых государств.

9. Значение этого термина в контексте принципа постоянного суверенитета над природными ресурсами можно в целом определить как законный государственный контроль над природными ресурсами или право распоряжаться ими, что, в частности, является одним из аспектов осуществления права на самоопределение¹. В основе этого принципа лежит политическое стремление новых государств быть свободными от несправедливой эксплуатации своих природных ресурсов. Во многих случаях такая несправедливая эксплуатация может лишить концепцию самоопределения ее реального значения. Как отметил один современный писатель:

"После второй мировой войны эта ситуация заставила развивающиеся страны и новые государства, избавившиеся от колониального ига, добиваться развития нового международного принципа, признающего и защищающего их права на свои природные ресурсы и богатство в их собственных странах²".

В этом контексте становится ясно, что термин "суверенитет" предполагает не какое-то абстрактное и абсолютное понятие, а государственный контроль и право распоряжаться ресурсами в рамках осуществления права на самоопределение.

10. В XVI веке термин "суверенитет" означал высшую власть в государстве, для которой не существовало никаких ограничений³. Однако к моменту появления работы *"The Law of Nations"* (*"Право наций"*) влиятельного французского юриста Эмрика де Ваттеля в начале XIX века данный термин уже не имел этого абсолютного значения и в сфере международного права было признано, что "суверен" может находиться под защитой другого, более могущественного суверена, не теряя своего "суверенитета".

11. В наши дни часто отмечается, что полного суверенитета не имеет ни одно государство и что все государства ограничены в своем суверенитете договорами и нормами обычного международного права. Этот вопрос подробно обсуждается в работе А. Кассеса⁴. Таким образом, с точки зрения правовых принципов ничто не препятствует использованию термина "суверенитет" применительно к коренным народам, действующим в порядке осуществления своей правомочности в вопросах управления, хотя эта правомочность может быть ограничена в различных аспектах. Так, суверенитет коренных народов давно признается многими странами в различных районах мира.

12. В Соединенных Штатах индейские племена признаются в качестве суверенных политических субъектов со времен образования федерального правительства. Эти принципы впервые были полностью изложены в решении по делу *Вустера против штата Джорджия*. Суть этого дела состояла в том, что власти штата Джорджия арестовали нескольких миссионеров, которые проживали на территории племени чероки в нарушение закона этого штата, требующего от лиц неиндейского происхождения получить соответствующее разрешение у губернатора штата. Судья Джон Маршалл, ставший автором концепции, которая является законом в Соединенных Штатах и по сей день, отметил, что индейцы всегда признавались как "отдельные, независимые политические общины" и как таковые они правомочны осуществлять право на самоопределение не в силу какого-либо делегирования полномочий со стороны федерального правительства, а в силу изначального суверенитета их племен. Судья Маршалл заявил:

"Согласно утвердившейся доктрине права наций, более слабая власть, присоединяясь к более сильной власти и принимая ее защиту, не лишается своей независимости, своего права на самоопределение. Слабое государство... может встать под защиту более сильного государства, не теряя права осуществлять управление и не прекращая быть государством".

13. В поддержку своей позиции судья Маршалл ссылается на европейские примеры и в своем заключении цитирует Ваттеля:

"Государства, платящие дань, и подчиненные государства, по словам Ваттеля, как таковые не прекращают быть суверенными и независимыми государствами, пока самоуправление и суверенная и независимая власть остаются в руках государства⁵".

14. Решение судьи Маршалла по делу *Вустера* согласуется с мнениями, выраженными им первоначально в решении по делу *народа чероки против штата Джорджия*, которое

было связано с принятием в этом штате ряда законов, предполагавших ликвидацию власти чероки. В решении по этому делу судья Маршалл отметил:

"Итак, большая часть аргументации, доказывающей, что чероки имеют признаки государственности, признаки индивидуального политического общества, отдельного от других, способного вести свои собственные дела и управлять собой, по мнению большинства судей, была совершенно справедливой⁶".

Далее суд признал, что племена, проживающие в пределах границ Соединенных Штатов, не являются "иностранными нациями" с конституционным правом обращаться в Верховный суд. Но в решении по делу *чероки* судья Маршалл действительно заложил принципы доктрины суверенитета народов, ведущих племенной образ жизни.

15. Сегодня в Соединенных Штатах закон признает за властями индейцев и коренных народов Аляски многие атрибуты суверенитета, включая право на суверенный иммунитет от судебного преследования. Право суверенного иммунитета неизменно подтверждалось Верховным судом Соединенных Штатов⁷. Термин "суверенитет" полностью признан сегодня в законе Соединенных Штатов применительно к властям индейцев и коренных народов Аляски⁸.

16. В своем недавнем решении по делу *общины авас тингни народности маягна (сумо) против Никарагуа*⁹ Межамериканский суд по правам человека, толкуя право на имущество, закрепленное в статье 21 Американской конвенции о правах человека, четко отметил, что права коренных народов на их земли включают права на ресурсы этих земель (пункт 153) и что эти права собственности принадлежат общине как коллективной структуре и осуществляются в соответствии с ее собственными нормами обычного права, ценностями, обычаями и нравами. Хотя Суд и не использовал термин "суверенитет", решение однозначно предполагает, что международное право защищает верховное или коллективное право общины на землю и ресурсы. Нижеследующая выдержка из решения поможет четко понять это:

"Учитывая особенности рассматриваемого дела, требуется внести ряд разъяснений в отношении концепции собственности в коренных общинах. Среди коренных народов традиционно существует общинная форма коллективной собственности на землю, которая предполагает, что право владения землей принадлежит не отдельному человеку, а группе лиц и их общине. Коренные группы уже в силу самого факта своего существования имеют право жить свободно на своей собственной территории; необходимо признавать наличие тесных связей коренных народов с землей и понимать их как фундаментальную основу их культуры, их

духовной жизни, их целостности и их экономического выживания. Для коренных общин связи с землей - это не просто вопрос владения и производства, а духовный элемент, которым они должны пользоваться в полной мере, что является необходимым даже для сохранения их культурного наследия и передачи его следующим поколениям" (пункт 149).

17. Закон Никарагуа давно предусматривает автономию индейских регионов страны¹⁰. Конституция Никарагуа также четко признает традиционные формы организации общества, а также право коренных народов самостоятельно вести свои дела на местном уровне, поддерживать свои общинные формы собственности и пользоваться своей землей, в частности в статьях 5, 89 и 180. В недавно принятом законодательстве по вопросам демаркации земель коренных народов и соответствующих прав собственности закреплено признание властных полномочий местных индейских общин¹¹. Все это конкретные примеры одной из форм "суверенитета", как он понимается в современной правовой доктрине.

18. В Новой Зеландии концепция суверенитета применительно к коренным народам маори является частью официальной правовой системы государства. Договор Вайтанги между британской короной и маори рассматривается как основополагающий документ Новой Зеландии, и этот договор прямо и косвенно предусматривает суверенитет маори. На местном языке концепция суверенитета маори известна под названием "*тино рангатиранганга*". Хотя этот термин и его применение зачастую вызывают споры, его значение в общем смысле можно определить как "главенствующая власть". Это другой пример формы суверенитета коренных народов, которая признана и действует в государстве¹².

19. В Канаде и во многих других странах предусмотрено самоуправление коренных народов (в Канаде оно предусмотрено Законом об индейцах), предполагающее различные степени контроля над природными ресурсами. Такие режимы контроля над ресурсами со стороны органов управления коренных народов служат дополнительными примерами различных форм суверенитета коренных народов над природными ресурсами в рамках суверенных государств¹³.

20. Наконец, важные положения о контроле над природными ресурсами со стороны коренных народов в их коллективном качестве как народов содержатся в Конвенции Международной организации труда о коренных народах и народах, ведущих племенной образ жизни в независимых странах, 1989 года (№ 169), которая ратифицирована сегодня 17 странами. В частности, статья 15 предусматривает право "народов" на их природные ресурсы. Пункт 1 гласит:

"1. Специальные меры принимаются для охраны прав соответствующих народов на природные ресурсы, относящиеся к их землям. Эти права включают право указанных народов на участие в пользовании и управлении этими ресурсами и в их сохранении".

Эта ограниченная гарантия правомочности в вопросах контроля и управления со стороны коренных народов и народов, ведущих племенной образ жизни, в рамках государств является другой формой суверенитета в нынешнем понимании этого термина. Эта правомочность дополнительно признается в статье 7, которая гарантирует, в частности, следующее:

"1. Соответствующие народы имеют право решать вопрос выбора собственных приоритетов для процесса развития в той мере, в какой он затрагивает их жизнь, их верования, институты, духовное благополучие и земли, которые они занимают или используют каким-либо иным образом, и право осуществлять контроль, по мере возможности, за собственным экономическим, социальным и культурным развитием...".

В статьях 2, 4, 5 и 6 также упоминаются "институты" и "представительные институты" коренных народов и народов, ведущих племенной образ жизни. Это дополнительно подкрепляет то понимание, что коренные народы и народы, ведущие племенной образ жизни, в рамках государств, ратифицировавших Конвенцию № 169, пользуются по крайней мере ограниченными формами суверенитета или правомочности в вопросах управления.

21. Наконец, полезно вспомнить о том, что исследование, санкционированное Комиссией и Подкомиссией, имеет своей целью изучить вопрос о применимости или актуальности установленного принципа постоянного суверенитета над природными ресурсами в отношении коренных народов. Оно не предполагает вынесения какого-либо заключения по этому вопросу. Вместе с тем исключение слова "суверенитет" из уже давно установившегося принципа постоянного суверенитета над природными ресурсами привело бы к концептуальным проблемам.

Примечания

- ¹ См. в целом 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* (8th ed., 1955), pp. 120-122.
- ⁴ Antonio Cassese, *International Law* (Oxford University Press, 2001), pp. 91ff.
- ⁵ *Worcester v. Georgia*, Supreme Court of the United States, 31 U.S. (6 Pet.) 515, 8 L.Ed. 483, 1832, pp. 559-560. См. также Felix Cohen, *Handbook of Federal Indian Law*, United States Printing Office, Washington, 1945, pp. 122-123.
- ⁶ *Cherokee Nation v. Georgia*, Supreme Court of the United States, 30 U.S. (5 Pet.) 1, 8 L.Ed. 25 (1832), p. 16.
- ⁷ См. *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506 (1940); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).
- ⁸ См. в целом D.H. Getches, C.F. Wilkinson and R.F. Williams, Jr., *Cases and Materials on Federal Indian Law*, 1998.
- ⁹ Inter-American Court of Human Rights, judgement of 31 August 2000 (Series C., No. 79).
- ¹⁰ См. в целом Закон No. 28 "Положение об автономии регионов северного атлантического побережья Никарагуа", в издании *La Gaceta*, No. 238, 30 October 1987.
- ¹¹ См. Закон 445 в издании *La Gaceta* No. 16, 16 January 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 Более подробно см. G. Nettheim, G. Meyers and D. Craig, *Indigenous Peoples and Governance Structures*, 2202, pp. 119-162, и 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, № 1, 1989, pp. 30-32.
- ¹³ См. в целом 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

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E. United States of America

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

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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 inalienable.

“(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.
