

Draft Paper for the 9th Annual BIOECON Conference on ‘Economics and Institutions for Biodiversity Conservation’ Kings College Cambridge 20 – 21st September 2007.

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Paper Title:

Legal and practical issues of the emerging principle of Free Prior Informed Consent for protected area management.

Abstract:

Free Prior Informed Consent (FPIC) it will be argued, is an emerging principle of international environmental law that will play an important role in the ongoing development and management of protected areas (of all categories) for biodiversity conservation. The ‘operationalisation’ of this principle requires a good understanding of the growing body of international law concerned with indigenous peoples land rights, self determination and human rights, and this is presented in the first section of this paper. However knowledge of the present state of international (and national) law where appropriate does not in itself give a guide to the practical application of the concepts. The second section of this paper will therefore examine some of the practical issues that come to the fore when the legal principles are put into practice, often in countries with limited resources. The urgency for a more practical debate is highlighted by the Convention on Biological Diversity (CBD) decisions on Protected Area Management and Access and Benefit Sharing. The paper will conclude by examining the issue of compliance with FPIC in the work of biodiversity conservation agencies, and related bodies, at global, regional and international levels.

Free Prior Informed Consent – An Emerging Principle of International Environmental Law?

1. Introduction

When the Rotterdam Convention¹ came into force in 2004 the concept of State based Prior Informed Consent (PIC) could be said to have become a recognised principle in international law. A number of multilateral environmental agreements (MEAs) have included PIC when dealing with transboundary environmental issues including the movement of potentially hazardous materials, often between developed and developing countries.² The implementation of State orientated PIC raises issues including at what stage prior to importation is consent to be given, the level of ‘information’ required and the questions of language and technical capacity to interpret detailed scientific material, who or what gives consent and what is the role of private parties in this process (Nakagawa, 2004). Whilst PIC is very important the concept is not restricted to inter-state relationships. Increasingly the concept of **Free** Prior Informed Consent (FPIC) has a role in relation to activities planned on territory claimed by indigenous peoples (IPs) in many states of the world. Claims that FPIC (McKay, 2004) has reached the same status as PIC for States will be examined in this paper specifically in relation to land rights, indigenous peoples and protected area management (Anaya, 2004; Colchester & McKay, 2004; FPP, 2004a, b; ILO, 2003; Mehta and Stankovitch, 2003; UN, 2002, 2004a, b).

Understanding the legal status of FPIC is important as it brings together aspects of general international law including state sovereignty, the use of soft law and principles within international environmental law, international and regional human rights law and the customary law of indigenous peoples themselves. Land based resources and their linked property regimes are important to the cultural identity of indigenous peoples themselves as ‘land, territory and resources together constitute an essential human rights issue for the survival of indigenous peoples’ (Stavenhagen,

¹ Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade. Entered into force on 24 February 2004. <http://www.pic.int>

² This follows from an initial UN General Assembly Resolution UNGA Res.37/137 (1983); 1989 Convention on the Control of Transboundary Movement of Hazardous Wastes and their Disposal, Basel, 22 March 1989; International Code of Conduct on the Distribution and Use of Pesticides, FAO Conference, 1985; UNEP London Guidelines for the Exchange of Information on Chemicals in International Trade.

2002). Furthermore the management and utilisation of land based resources, and their biodiversity, are the basis of many disputes involving both private enterprises and state development agencies (Eversole *et al*, 2005). States often claim that development activities, including extractive industries, dams, large scale infrastructure and national parks, are required for nation state development. However this presents challenges to substantive and procedural legal rights of IPs. There is often a level of incompatibility between State rights and those of indigenous peoples (Stavenhagen, 2002).

The development of Principles of International Law are often difficult to follow but Article 38(1) of the International Court of Justice³ identifies the normally accepted areas of documentation that are used in international legal analysis (Gardiner, 2003). This paper will present material from a number of areas to assess the current situation in relation to FPIC for IPs. Firstly a discussion of the 'definition' of indigenous peoples will be presented coupled with an outline of the human right to self-determination. Then a discussion of what FPIC is and why it is important for indigenous peoples. Lastly if FPIC is seen as part of international human rights and international environmental law what are the implications in practice for protected area management, especially if other principles of international law including state sovereignty over natural resources (Birnie & Boyle, 2002; Sands, 2003).

2. Indigenous Peoples and international law

Kingsbury (2001) indicates that there are a number of strands to the different legal claims made by indigenous peoples whilst Anaya (2004, 2005) has indicated that a 'realist approach' be adopted concerning the rights of IPs. It is clear that since the 1970s a 'politics of indigeneity' has emerged which has been linked, to the 'principle that decolonization with self-determination is a moral and legal right that accrues to all peoples' (Stewart-Harawira, 2005) Examining the complexity of arguments about IPs identity and self determination is vital for an understanding of the importance of FPIC to these groups (Pritchard, 1998).

b. Who or what are Indigenous Peoples?

³ Article 38(1) of the Statute of the International Court of Justice www.icj-cij.org

The whole question of 'indigenoussness' carries with it a 'sense of original or first inhabitants' (Thornberry, 2002). Furthermore the impact of 'salt-water colonialism' on understanding of indigenoussness has contributed to a rejection of the term in some area e.g. Asia (Kingsbury, 1998). This has caused significant problems in relation to the Draft UN Declaration on the Rights of Indigenous Peoples.⁴ ILO169⁵ avoids the problems of definition by taking the stand that the use of 'self-identification' of individuals as tribal or indigenous is a fundamental criterion (ILO, 2003; Thornberry, 2002). Definitions are contested, often due to diversity, and definitions by outsiders are often seen as offensive with self-definition being linked to self-determination (McNeish & Eversole, 2005; Mendesohn & Baxi, 1994; Smith, 1999). Certain commonalities in the situation of a wide range of groups include original inhabitants, strong ties to land and territory, non-dominant sector of society, unique ethnic and cultural identities and threats of assimilation. Given what can be at stake in relation to land rights the term 'indigenous peoples' will continue to be used even where it is possibly problematic e.g. in Asia and Africa as it has 'begun to develop important political currency' within a range of diverse groups themselves and within the international community with the creation of the Permanent Forum on Indigenous Issues at the UN.⁶ Perhaps accepting that the term indigenous as an 'autonomous' term within international law standing as a shorthand for the range of peoples' who are often poor and highly marginalised (Alston, 2001; Eversole *et al*, 2005) may be a positive move.

Indigenous Peoples can also be covered by the classical 'minorities' protection e.g. under the Framework Convention on National Minorities in Europe (Weller, 2005). However groups such as the Sami in Norway take the position that where a state has ratified ILO169 it is more appropriate to take action under this as rights concerning 'land and autonomy are stronger than under minority provisions' (Weller, 2005).

This paper will take the term Indigenous Peoples (IPs) to include the wide range of groups within the PFII, the WGIP and have been the subject of attention by UN

⁴ United Nations Declaration on the Rights of Indigenous Peoples (UNDIP), adopted by the Human Rights Council, Resolution 2006/2, 29th June 2006. Adopted by the UN Sub - commission on Prevention of Discrimination and Protection of Minorities by its resolution 1994/45 August 26, 1994. UN Doc E/CN.4/1995/2;

⁵ Article 6 ILO Convention on Indigenous and Tribal Peoples, 1989 (no. 169). www.ilo.org

⁶ See www.un.org/esa/socdev/unpfii/index.html

Human Rights bodies including CERD and HRC.⁷ Any development of FPIC procedures is going to need to define when this 'collective right' **must** be exercised especially where populations of IPs and non-IPs are affected by the same development, but may have different responses to it. Collective rights are often seen as threatening and yet there are times when rights must be exercised by a group for the individual rights e.g. right to language and culture, to be realised.⁸ Collective rights to land are vital especially where '[N]ative people regard themselves as trustees of land for future generations..' (Johnston, 1989). The collective right to land therefore is intimately linked with achievement of basic human rights for indigenous people.

c. Self Determination

Self-determination is seen by IPs as a foundational principle (Anaya, 2004) to achieve their human rights. Arguments for self-determination being a collective right of peoples' rather than States is based on Common Article 1 of the two covenants⁹ as well as on Articles 1 and 55 of the UN Charter.¹⁰ Yet there is a need to reconcile concerns of States regarding territorial integrity and the survival of indigenous peoples (Stavenhagen, 2002, p5)

Self-determination is 'widely acknowledged to be a principle of customary international law and even *jus cogens*, a peremptory norm.' (Anaya, 2004, p97) However self-determination, if conceived only as statehood, has generated a high level of contentious discussion. If 'self-determination comprises a standard of governmental legitimacy within the modern human rights frame'(Anaya, 2004, p104) then it could entail different levels of autonomy based on well differentiated territorial rights.

⁷ WGIP: UN Permanent Forum on Indigenous Issues and Working Group on Indigenous Populations; CERD – International Convention on the Elimination of All Forms of Racial Discrimination, adopted by General Assembly Resolution 2106(XX) 21 December 1965 and entered into force on 4 January 1969; HRC: formerly Human Rights Committee of the UN, now refers to the Human Rights Council of the UN.

⁸ Human Rights Committee General Comment No. 23: The rights of minorities (Ar.27): 08/04/94. CCPR/C/21/Rev.1/Add.5

⁹ International Covenant on Economic, Social and Cultural Rights Annex to General Assembly Resolution 2200 A (XXI) of 16 December 1966 (UN Doc. A/6316 (1966) and entered into force on 3 January 1976; , 1966; International Covenant on Civil and Political Rights Annex to General Assembly Resolution 2200 A(XXI) of 16 December 1966 (UN Doc. A/6316 1966) and entered into force on 4 January 1969.

¹⁰ United Nations Charter, 1945

The 1994 Draft Declaration on Indigenous Peoples Article 3¹¹ states that ‘Indigenous peoples have the right to self-determination...’ States see Article 3 as problematic because it may threaten territorial integrity partly due to the historical linkage of decolonisation and self-determination. Australia established indigenous land rights by overturning the concept of *terra nullius* (Gilbert, 2003) and the development of ‘native title’ as a result of the *Mabo*¹² decision, even if this has been somewhat qualified following the *Yorta Yorta* decision (Dorsett, 2005). The difficulties of clarifying land rights in Australia and Canada can be due to issues of third party economic interests which the Crown facilitates through the statutory extinguishment of indigenous rights (McNeil, 2004).

The Inter-American human rights system has taken a strong approach to IPs land rights. In what has been called ‘one of the most important developments in international law today’ (Anaya & Williams, 2001) the Court, in the land mark *Awas Tingni* case, interpreted Article 21 of the American Convention and accepted that ‘the terms of an international human rights treaty have an autonomous meaning, for which reason they cannot be made equivalent to the meaning given to them in domestic law’. It also accepted the evolution of interpretation to ‘current living conditions’.¹³ This judgement has been summarised as ‘the Court held that the American Convention on Human Rights obligates states to recognize and adopt specific measures to protect indigenous peoples’ rights to land and natural resources in accordance with indigenous peoples’ own customary use and occupancy patterns.’ (Anaya & Williams, 2001) Following this judgement the Court has recognised the concept of informed consent for IPs in both the *Dann* and *Mayan* cases.¹⁴

Clarifying effective land/property rights for IPs is the first step towards self-determination and the requirement for consultation/consent (Huff, 2004). For example the European Convention on Human Rights Protocol 1 Article 1 ‘Protection

¹¹ Draft United National Declaration on the Rights of Indigenous Peoples, 1994

¹² *Mabo v State of Queensland (No.2)* (1992) 175 C.L.R. 1

¹³ Inter-American Court of Human Rights, *The Case of the Mayagna (Sumo) Awas Tingni Community v Nicaragua*. Judgement of August 31, 2001 in: *Arizona Journal of International and Comparative Law*, 19, 395-442

¹⁴ *Mary and Carrie Dann v United States*, Case No. 11.140, Report No. 75/02, Inter American CHR (2002); *Maya Indigenous Communities of the Toledo District v Belize*, Case 12.053, Report No. 40/04, Inter-American CHR (2004).

of Property’ allow for the ‘peaceful enjoyment’ of ‘possessions’ such that interferences with this right needs to be justified in relation to the interpretative standards of the European Court of Human Rights which require a clear legal framework and compensation arrangements (Ovey & White, 2002).

d. What is Free Prior Informed Consent and Why is it important to Indigenous Peoples?

A working paper for the Working Group on Indigenous Populations twenty-second session¹⁵ discussed the issue of FPIC and development activities from an Indigenous Peoples perspective.¹⁶ It clearly stated in para 9 that: ‘[T]he principle of free, prior and informed consent is central to indigenous peoples’ exercise of their right to self-determination with respect to development affecting their lands, territories and natural resources.’ The WGIP paper gives a detailed analysis of how Free Prior Informed Consent might be interpreted (see Box 1).

FPIC is a collective right which primarily derives its force from the right of IPs to self-determination (Colchester & MacKay, 2004, Metz, 2006). The concept of FPIC is increasingly acknowledged in international human rights law, even when not stated explicitly – see Box 2. FPIC is intrinsically linked to land rights for IPs where IPs are seen as ‘distinctive communities’ (Steiner & Alston, 2000). This is a different situation to ordinary citizens of a state (IPs may be citizens as well, but the issues of historical sovereignty and colonisation (where appropriate) affect their relationships with a state dominated by non-indigenous people). Citizens of a state have citizen rights to consultation¹⁷ and their elected representatives would be involved in consultation/consent processes. It is not entirely clear how the development of effective participation for national minorities under Article 15 of the FCNM, especially in countries with strong democratic and legal systems, would link to the development of FPIC (Weller, 2005). This indicates that ‘regionalising’ and ‘domesticating’ universal norms is important such that any adaptation of standards should ‘possibly enhance them’ (Thornberry & Estébanez, 2004).

¹⁵ (19- 23 July 2004 – see UN, 2004)

¹⁶ UN Doc E/CN.4/Sub.2/AC.4/2004/4, 8 July 2004

¹⁷ United Nations Conference on Environment and Development, Rio Declaration on Environment and Development, 1992, Principle 10

The breadth of IACHR judgements, UN Treaty body comments, and CBD implementation mechanisms suggests that there is a move towards the establishment of FPIC (or consultation¹⁸) within the legal norms for states, organisations and commercial enterprises engaging with IPs in a range of activities (FPP, 2007). FPIC procedures help to ensure that the IPs themselves are engaged in development processes as equals and are in a position to dictate terms of reference and the pace at which procedures are followed.

2. Issues regarding the application of FPIC for IPs?

If it is accepted that at a minimum there is a strong legal requirement for consultation with IPs (which may be moving in the direction of formal consent at least for those activities which would impact most seriously on the cultural viability of indigenous peoples e.g. resettlement) there are some practical issues that need to be addressed to ‘operationalise’ this. The framing of the extent of FPIC itself, and related jurisprudence, must consider the implications of implementation as well the symbolic rhetoric of a potentially unenforceable judgements. The importance for biodiversity conservation is the need to put into practice, at the grass-roots level, Para 22 of decision VII/28 at the CBD COP7 as well as effect the implementation of Goal 1.1 and in particular Para 1.1.4 (see Box 3). Furthermore some organisations are articulating a number of issues relating to indigenous peoples and biodiversity conservation and the range of issues involved in the establishment and management of protected areas for biodiversity conservation (Beltrán, 2000; Borrini-Freyerabend, 2004; Metz, 2006).

b. State Sovereignty and FPIC

Between 1952 and 1990 the UN General Assembly passed 35 resolutions articulating State sovereignty over natural resources (Schraver, 1997). State sovereignty was articulated in the Rio Declaration.¹⁹ The principle of state sovereignty ‘allows states within limits established by international law to conduct or authorise such activities as they chose within their territories, including activities which may have adverse effects

¹⁸ World Bank OP 4.10, January 2005, Indigenous People para 1 ‘The Bank provides project financing only where free, prior, and informed consultation results in broad community support to the project by the affected Indigenous Peoples.’ This has implications for all World Bank funded programmes, including the GEF.

¹⁹ United Nations Conference on Environment and Development 1992\

on their environment' (Sands, 2003). The States Parties to the CBD as well as work on the non-Legally Binding Instrument for Forestry under the UNFF protect vigorously the Principle of Sovereignty over Natural Resources.²⁰ The question of State sovereignty, unless there is a general acceptance by States that international law sets limits e.g. by accepting the principle of FPIC, can cause significant conflict between IPs and State interests. It is possible that the main reasons why states aim to restrict IPs land rights are due to States desire to retain control over potential valuable resources (Huff, 1999, 2004).

The 'Right to Development'²¹ for people within a country may affect IPs land claims, especially in areas that are favourable for extractive industry and infrastructure development. The New Zealand experience could provide a model for other countries to learn from (Gibbs, 2005).

If a state did create a strong FPIC procedural right in domestic law which resulted in certain resources being 'off-limits' without IPs consent could this be seen as a 'restraint on trade' and subject to a WTO challenge? This might arise for example if increased costs were incurred e.g. by a foreign private water supply company because the prime site for a new dam was not available due to a FPIC requirement.

b. Free, Prior Informed Consent – to whom does this apply?

Free Prior Informed Consent for Indigenous People is a group right which applies to identified groups in specific situations. It does not reduce the availability of normal citizen rights to consultation, and where property is concerned compensation when the identified requires of the wider community are seen as greater than an individuals (or groups) property rights (Kymlicka, 2000; Ovey & White, 2002).

It is now increasingly recognised that FPIC is applicable to Indigenous Peoples where

'The principle of free, prior and informed consent is central to indigenous peoples' exercise of their right of self-determination with respect to developments affecting their lands, territories and natural resources. The substantive and procedural norms underlying free, prior and informed consent empower indigenous communities to meaningfully exercise choices about their economic, social and cultural development,

²⁰ www.un.org/esa/forests

²¹ UN Declaration on the Right to Development, 1986

particularly in relation to development proposals by States and other external bodies in their ancestral lands and territories (UN 2004a see also UN 1997, 2002).

An important question, especially within Asia, is whether FPIC applies to ethnic and national minorities who would not necessarily be covered under contested definitions of IPs (e.g. in large areas of SE and E Asia) or where States do not recognise any form of ‘self-identification’ as accepted in ILO 169? Aspects of the work of the Committee for Elimination of Racial Discrimination as well as the UN Declaration on Rights of Minorities²² would suggest that the right to FPIC does apply to these groups, especially when they are considered vulnerable.

Other ‘local people’ who are living in or near proposed or existing protected areas would, in an ideal society, have a full range of substantive and procedural rights as citizens (or residents of the State) which would enable them to be engaged in full consultation processes.

c. Who or what ‘gives’ FPIC?

FPIC is a ‘group’ or ‘collective’ right, but this then raises the issue of the relationship between different groups as well as individual rights. Some key issues that are raised in the application of FPIC includes:

- What happens in States which do not recognise IPs/EMs/tribals within their agreed international borders
- How is an effective FPIC process to be defined?
- Does it need to engage all people within the community or ‘representatives’? Do ALL the members of the group need to give consent using simple majority/majority with threshold/ or just representatives? What is the balance between individual and group rights here?
- Level and process of consultations in countries with no civil society or commitment to a free press and other human rights norms.
- How are the relevant groups identified? This is particularly important when there are:
 - Mixed groups/communities with different power relations;

²² United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities. Adopted by the General Assembly resolution 47/135 of 18 December 1992 and Commentary by Asbjorn Eide in E/CN.4/Sub.2/AC.5/2001/2

- Mobile peoples who may use the site intermittently either through fixed patterns or in times of stress.
- How are the processes to be facilitated with mixed groups? Is there a need for an ‘independent third party’? Does each group elect/select representatives for meetings? One cannot assume that relations between different IPs/EMs/local communities is always amicable or that a proposal for a protected area will be seen in the same way by different groups.

d. Issue of tradition, culture and role of women?

Within Box 1 a definition of **free** is given. How far is a FPIC process to go in insisting that this concept is applicable to all individuals within a community group as well as to the group as a whole? This would bring into effect issues of cultural understandings of the rights of women and other vulnerable groups (e.g. caste based issues) and individuals within a community. It may also raise issues of colonialism and paternalism. However in situations of overlapping complex relationships what is the balance between say women’s rights as individual human beings and the collective rights of the group? However here we might take heed of the work on women and social justice by Nussbaum (1999, 2004) who writes:

‘Thus to the extent that we agree to be guided by the written record of a people in asking what we should expect of it, we are agreeing not to take very seriously the possibly quite different voices of those who suffer from the inequalities imposed by that tradition. For example, when we say that a given tradition holds such and such ideas about the role of women, we are just failing to take women seriously, for if we think for a while we can easily see that the tradition that denigrates them was neither written nor freely endorsed by them (Nussbaum, 2004, p154).

e. What are the costs of and the costs of not involving minorities and disadvantaged groups and what is the impact on their livelihood?

Usually a FPIC process will be contested – often by powerful stakeholders. However there is a need to examine the costs of NOT involving people? Are the proposals under consideration for example likely to **produce** poverty? Are they likely to lead to high levels of displaced and unhappy people with demands that are transferred to agencies which were not involved in the process of planning a new Protected Area?

There is also a need to understand that for many poor and marginalised people the 'burden of existence' may restrict the time and resources they have to participate. How can this be factored into the development of a FPIC process? It is also clear that the lack of basic rights fulfilment e.g. to food and water does not remove the obligation to meet other rights e.g. that of FPIC, but it will affect the implementation of that right.

The procedural rights of access to information should be considered as a key element of a FPIC process. This is **NOT** just a case of translation. It also includes the necessary conceptual work to achieve common understandings of the ideas involved in PAM. This work must be undertaken in an open manner and involve key people from the IPs/EM/local community as well as technical specialists and language experts. The development of a shared understanding of concepts (scientific, political and spiritual/spatial) takes time but can help to reduce general misunderstanding and miscommunication in later stages of the process.

f. FPIC as continuing process

For the construction of a dam or a mine often the FPIC is seen as a 'one-off' at the beginning. However when designing and managing a new protected area FPIC itself would only be the first stage of a much wider process, including community management and co-management. Very often designation of a new protected area is based on incomplete information and the very process of going through designation and further development will increase knowledge. Therefore when linking FPIC and participation issues it is vital to understand dynamic ecological processes as well as acknowledging management from uncertainty and to reduce conflict (UN 2004b). It is also possible, provided technical staff are facilitated to understand social processes more fully, that an acknowledgment by the State (or its agencies and INGOs) that not all is pre-known might assist in developing more fair and open discussions on the Protected Area development processes. It may also assist in helping the State (or its agencies and INGOs) to recognise that there are more options in PAM than direct state management and control.

FPIC should therefore be seen as part of the 'total package' of designation, management and monitoring of protected areas. However it does raise the question

of whether consent could be withdrawn at any time, especially if this is a response to a lack of ‘good faith’ operations on behalf of the State or its designated management agencies. What would happen to a site if this was the case – would international donors for example withdraw support and recognition? What ‘sanctions’ if any would be applicable?

3. Procedural Rights, institutions and civil society.

a. Rio Declaration, Principle 10 and the Aarhus Convention

The issue of participation in environmental decision making stems from the ‘World Charter for Nature’.²³ This ultimately led to the formal statement of the ‘Principle of Participation’ in Article 10 of the Rio Declaration, which places ‘public participation is at the heart of implementation of sustainable development at the national level.’ (see also Déjeant-Pons, & Pallemarts, 2002).²⁴ However whilst international treaties e.g. CBD, FCCC²⁵ can lay down principles on public participation the key actor is the State. It must implement and monitor the relevant enabling framework (laws, policies as well as an effective ‘culture of participation’).

On the 17th February 2005 the European Union ratified the Aarhus Convention²⁶ which is the first international binding treaty to focus on the implementation of Rio Declaration Principle 10. The objective of the Aarhus Convention states that:

‘In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision making, and access to justice in environmental matters in accordance with the provisions of this Convention.’

Whilst the main focus of the convention is in relation to the region of the United Nations Economic Commission for Europe (UNECE)²⁷ there is a provision in Article 3.7 that:

²³ World Charter for Nature, UNGA Resolution 37/7, 28th October 1982

²⁴ UN (1997) *Rio Declaration on Environment and Development: application and implementation. Report of the Secretary-General.* Un Doc. E/CN.17/1997/8 10 February 1997, para 64; see also ICJ Advisory Opinion on the Legality of Nuclear Weapons, 8 July 1996. Quoted in Chapter 3,

²⁵ United Nations Framework Convention on Climate Change entered into force on the 21st March 1994.

²⁶ Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, done at Aarhus, Denmark on 25 June 1998 (hereafter Aarhus Convention)

‘Each Party *shall* promote the application of the principles of this Convention in international environmental decision-making processes and within the framework of international organizations in matters relating to the environment.’ (*emphasis added*)

The second meeting of parties to the convention agreed the Almaty Guidelines on Promoting the Application of the Principles of the Aarhus Convention in International Forums concerning the implementation of Article 3.7.²⁸ Do these guidelines have, even at this early stage, the possibility of influencing international decision making by ‘moving towards increased accountability’ (Morgera, 2005)? The purpose of the Almaty guidelines is to ‘promote the application of the principles of the Convention in international forums in matters relating to the environment.’

For FPIC to work effectively there needs to be access to documentation and information, but ‘if you do not know what is going on, which documents will you ask to see (Slaughter, 2004)’? How much more difficult is this when dealing with oral cultures with little or no access to materials in their own language, or explanation to marginalised groups within that culture of new concepts and ideas as well as the potential implications. The intrahousehold as well as interhousehold shift in power and income when moving from subsistence to cash based land management has important implications for women and the welfare of those they usually are charged with caring for (Agarwal, 1994). Whilst ‘[h]aving a voice in collective discussions is better than being silenced by exclusion, it does not guarantee that you will be heard (Slaughter, 2004, p151).’ Work on meeting the Aarhus principles could provide an important focus for activities under the rubric of ‘Common but Differentiated Responsibilities’.

b. FPIC application in countries with good institutions and civil society.

The form that a FPIC process would take in a state with good institutions, a good legal framework and where IPs/EMs/Local communities have good organisations

²⁷ At the second meeting of parties to the convention held in Almaty, Kazakhstan, on 25 May 2005, an invitation was extended to States outside the UNECE region to accede to the Convention and pledged their support for the drawing up of appropriate regional instruments.

²⁸ Decision II/4 Promoting the Application of the Principles of the Aarhus Convention in International Forums. ECE/MP.PP/2005/2/Add.5 20 June 2005. Guidelines available from: <http://www.unece.org/env/documents/2005/pp/ece/ece.mp.pp.2005.2.add.5.e.pdf> (Hereafter Almaty Guidelines)

within a wider civil society could be straight forward (Barsh & Bastien, 1997; CBD, 2004a; Colchester & Mackay, 2004). Whilst these processes are still likely to be strongly contested the arguments and processes will be taking place in societies where basic human rights and legal processes are in place. Colchester and Mackay (2004) give details of minimum conditions for states as well suggestions, based on the North American experience, of the key issues that IPs/EMs/Local communities need to address in relation to representation in negotiations.

c. FPIC process in countries without good institutions and civil society.

The above provides a good basis for FPIC but the applicability to States and situations with minimal (or no) recognition of the rights of people within the State to consultations on the creation of new Protected Areas will need to be supported. It is however in States that may be classed as fragile, or marginally fragile (World Bank, 2007) that retain extensive ecosystems with internationally important biodiversity that is unprotected *de jure* or *de facto*. The reality is that in many of these states there are weak governments, lack of attention to basic human rights and poor policy frameworks. Also the citizens of the State, and other people who live within the State often have to battle with the daily reality of poverty and the struggle for existence, 'knowledge deficits', corruption and vested interests in the forest land sector (including protected areas) and little or no civil society and related conditions for a FPIC process to take place in (FERN, 2001). This raises the question of 'compliance' which is further addressed in section 5.

The ILO169 Operational manual (ILO, 2003) indicates that consultations must be entered into in a spirit of 'good faith' and with respect for the principle of 'representativity'. This gives a minimum general context for FPIC processes to take place. The PAM community does not need to re-invent the wheel here and lessons can be learnt from work in relation to PIC in dams and mining (Mehta & Stankovitch, 2003; ELI, 2004) as well as from widespread implementation of Participatory Poverty Appraisal methods and work on policy research with poor people (Koziell & McNeil, 2002; Shanks & Turk, 2003). The COP-7 meeting adopted (in decision VII/16F) the Agwé:Kon guidelines for the '**voluntary** conduct of cultural, environmental and social impact assessments regarding developments proposed to take place on, or

which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities' (CBD 2004a).

If there is no legal or policy framework in place to facilitate FPIC (and wider participation) by IPs/EMs/local communities when undertaking an en assessment for a new PA (or changing the management of an existing area) and the organisational ability of IPs/EMs/local communities is constrained to recognised government organisations or by lack of opportunity for organisation due to geography (spatial distribution), poverty or other reasons what can be done? Obviously this is context sensitive but there is a need to understand the minimum 'due diligence' that would be required to comply with recent developments in international criminal law so that processes were undertaken in 'good faith'.

- Initiation of the process in good time, with adequate resources (including for conceptual and skills development by all stakeholders involved);
- Articulation of the rights and responsibilities of all stakeholders in the process, including an understanding of the needs of the socially marginalised who may have the most to gain (or lose) by the form of management/property rights finally agreed;
- Maintain a flexible and inclusive approach to the decision making processes
- Facilitate 'learning' from best practices within other countries, and enable a 'learning by doing' approach;
- Articulate relevant incentives for operating PAs in a cooperative manner. This could include appropriate funding from international agencies, where applicable;
- Time and timing are critical to a good process. It can take many years from initial survey and identification of the site as important through the development of the legal basis for the site and the setting up of a management board with appropriate finance. One site that the author was involved with has been going through this process for more than 5 years now – a long time for local people who are living in poverty and coping with serious food insecurity issues on a daily basis.
- During the negotiation process how can the site be maintained intact so that legal and illegal hunters/loggers do not 'rape' the site? This may require funding/management arrangements for site protection at an early stage.

- Link positively the process of PA designation link to inputs to improve local livelihoods – including physical infrastructure.

4. FPIC, Biodiversity conservation and rights of non-humans?

FPIC, biodiversity conservation and co-management of protected areas may contain a subtle form of ‘essentialisation’ of IPs. The basis for FPIC is that IPs have a strong cultural ‘embeddedness’ in their natural environment. Is there an assumption that this will always continue and that this linkage itself will always lead to the protection of biodiversity – even those animals which can threaten human life and livelihood (Buege, 1996)? If an area contains the last known population of an endangered species but the area is managed by IPs who do not value that species and there is a strong FPIC in place what, beyond negotiation, can be done to protect that species? Would this be a case where a wider imperative is invoked which could constrain the IPs in the management of their land (much as can happen with private property under individual or wider community ownership) (Johnston, 1989)? A failure to address this question would continue to leave the rights of non-humans off the agenda (Chapin, 2004).

5. Compliance Monitoring

Any attempt to implement FPIC as a pre-requisite for the establishment and recognition of protected areas would require a multifaceted monitoring process. It is well recognised that in terms of trying to secure the active and informed participation of poor people in development processes that existing monitoring processes are inadequate (Hunt *et al*, 2002). It is likely that Guideline 15 from the General Observations of the Draft Guidelines on a Human Rights Approach to Poverty Reduction Strategies would provide some useful inputs into the generation of any legal guidance for FPIC in relation to Protected Areas (Hunt *et al*, 2002). This is an important topic as Para 20 of these guidelines should be borne in mind in relation to any assessment of the level of ‘good faith’ in which a FPIC process is undertaken:

‘The non-realisation of human rights, including the failure to meet an agreed benchmark in relation to a specific right, does not by itself indicate that the duty-bearer has failed to discharge its duty. The non-realisation of rights, including the failure to meet an agreed benchmark, can occur for reasons beyond the control of the duty bearer. **The duty-bearer can be said to have failed to discharge its duty only when it is demonstrated that it did not do everything that it could reasonable have done.** [emphasis added]’

a. FPIC, procedural protocols and criminal negligence?

FPIC procedures are going to be highly context sensitive and will require significant capacity within government agencies, IPs and their representative organisations as well as in the legal system that would supervise and enforce the relevant regulations (Colchester & MacKay, 2004). However outline guidelines can and will be developed based on the involvement of recognised IPs organisations and adopted by international treaties as part of their recommended procedures, including EIA protocols.²⁹ There will need to be clarity about identifying clearly who speaks for a group especially ones with small and dispersed populations (Fabra, 1998). Furthermore there needs to be a greater attention by development agencies working in land management, including the Global Environment Facility (Griffiths, 2005), to adopt the developing legal norms as a principle underpinning their activities. A failure to do so leaves indigenous peoples prone to exploitation and marginalisation by well funded projects, some of which claim to be working for the IPs benefit (World Bank Operations Evaluation Department, 2003).

With the development of the International Criminal Court (Schabas, 2004) individuals may be subject to criminal proceedings for Genocide and Crimes Against Humanity and for complicity in those crimes (Schabas, 2001). The development by sovereign states of legal and administrative frameworks to facilitate FPIC processes with IPs, (with the possibility of international supervision), could then form part of the relevant 'due diligence' processes to limit legal liability whilst ensuring compliance with moral liability frameworks (SustainAbility, 2004).

b. What role for international agencies?

Although the CBD strongly reiterates the Principle of Sovereignty over Natural Resources there are States that do want to move more participatory processes in relation to the establishment of protected areas. They often do not have the resources (finance, skilled staff, knowledge as well as current legal framework). There is then an argument that the international community has a duty under the principle of

²⁹ CBD COP7, Decision VII/16F. Akwé:Kon /Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessment regarding Developments Proposed to Take Place on, or which are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities

'Common but Differentiated Responsibilities' to assist these willing states develop and implement appropriate mechanisms to enable FPIC and participatory processes to be undertaken.

Who or what agency is likely to monitor FPIC processes and provide (if required) a process of appeal? Most countries do not allow individual/group appeal to the UN Human Rights treaty bodies so would they agree to any process which allowed the IUCN to monitor these processes under oversight of the CBD COP? If so how would this be funded and managed? In relation to the protection of biodiversity what lessons can be learnt from other sectors (Mehta & Stankovitch, 2003)? It is possible that, in time the States report processes, with minority reports from civil society, might provide a mechanism for peer review of processes and provide a mechanism for support in areas of dispute.

What role do international IPS organisations, NGOs, IUCN and other non-state parties have in moving the idea of FPIC forward? Perhaps they should work towards a situation where international recognition of and funding for new protected areas be conditional on the effective implementation of a FPIC process with relevant external monitoring.

6. Conclusion

The development of FPIC for IPs is an interesting, and important, application of legal rules and principles emerging at the intersection of international human rights law (self-determination, non-discrimination), international law (sovereignty and rights to natural resources), international environmental law (Principles 10 and 17 of Rio Declaration), and the wider implications of CBD Article 8j. The creative utilisation of legal structures by indigenous peoples in a variety of settings is instructive in itself. The intersection between human rights and land management is fraught with many different understandings and value judgements about the most appropriate way to contribute to weak or strong sustainable management regimes (Beckerman, 1994; Common, 1994; Dobson, 1998).

Despite positive judgements from the IACHR on IPs land rights and a strong commitment to the principle of FPIC by indigenous peoples themselves which is

supported in important reviews of intrusive development projects³⁰ it is too early to say that FPIC is a ‘settled’ principle of international law. States practice lies too far away from acceptance, as does the postponement by the United Nations General Assembly on adoption of the UN Draft Declaration on Indigenous Peoples Rights.³¹ ILO169, the only binding treaty on IPs, talks primarily of consultation with the commentary (ILO 2003) indicating that IPs do not have a ‘right of veto’ when consultations have been carried out in good faith.

FPIC challenges the overwhelming authority of the State in the management and disposal of natural resources – often to meet wasteful short term objectives or to prop up corrupt states and military organisations (Global Witness, 2004). Table 1 highlights some key differences between PIC for States and FPIC for IPs and shows the different roles played by the State. The development of an international legal framework that would include FPIC as a principle of international human rights law and its integration into the procedural processes of C/S/EIAs³² for activities funded by IFIs³³ and ODA³⁴ would be a significant step forward, although one that is being resisted strongly by the World Bank (Griffiths, 2005). Whilst IPs have been good at achieving international recognition for their unique position in the final analysis FPIC would need to be incorporated into domestic legal frameworks to link human rights, environment and economic development (Huff, 1999). Whilst the concept of consent is in itself important for peoples looking for self determination, the use of effective, good faith consultation as put forward in ILO169, may in the short term, bring important benefits to many communities that are economically marginalised and are in danger of being overwhelmed by migration of majority populations as well as inappropriate, and culturally damaging development activities³⁵ as well as to prevent the development of inter-ethnic conflicts (Martínez, 2004).

³⁰ Dams and Development: A new framework for decision-making. The Report of the World Commission on Dams. Earthscan, London (2000). <http://www.dams.org/>; Striking a Better Balance. The World Bank Group and Extractive Industries. Full reports and World Bank Management response available through <http://www.worldbank.org>

³¹ See <http://www.un.org/esa/socdev/unpfii/en/declaration.html>

³² Cultural/Social/Environmental Impact Assessments

³³ International Financial Institutions

³⁴ Official Development Assistance

³⁵ As Melvyn C. Goldstein (1997) has put this in relation to Tibet the question ‘pits the right of a “people” (Tibetans) to self-determination and independence against the rights of a multiethnic state (the People’s Republic of China) to maintain what it sees as its historic territorial integrity’. Page ix in *The Snow Lion and the Dragon. China, Tibet, and the Dalai Lama*. University of California Press.

If FPIC gave the ‘power of veto’ to IPs it could be argued that this would ‘deny the equal status of communality and sociality. There may be exceptional circumstances in which sociality will be able to assert a stronger claim’ (Johnston, 1989). The on-going development of jurisprudence from the IACHRs, UN bodies and domestic courts will show both where this procedural right is going and the boundaries of both the right itself and the subsequent responsibilities it imposes on states, development agencies, private businesses and Indigenous Peoples themselves.

Acknowledgments

This paper is based on a draft initially written whilst working for FFI Vietnam and supplemented by studies for an LLM Human Rights Law at the University of Strathclyde. I wish to thank colleagues over the years for their support through discussions and reading of drafts. My thanks also to the ethnic minority communities of northern Vietnam who showed, despite remoteness and poverty a real desire to try new approaches to forest management and biodiversity conservation.

Box 1: Analysis of Free, Prior Informed Consent³⁶

The principle of free, prior and informed consent contains the elemental terms 'free', 'prior', 'informed' and 'consent' which need to be interpreted in order to operationalize the concept:

Free: It is a general principle of law that consent is not valid if obtained through coercion or manipulation. Whilst no legislative measure is foolproof, mechanisms need to be established to verify that consent has been freely obtained.

Prior: To be meaningful, informed consent must be sought sufficiently in advance of any authorization by the State or third parties or commencement of activities by a company that affect indigenous peoples and their lands, territories and resources.

Informed: A procedure based on the principle of free, prior and informed consent must involve consultation and participation concerning the proposed development in a form which is both accessible and understandable to the affected indigenous peoples(s)/communities regarding, inter alia:

- The nature, size and scope of the proposed development or activity;
- The duration of the development (including the construction phase) or the activity;
- The locality of areas that will be affected;
- A preliminary assessment of the likely impact of the development
- The reasons/purpose for the development;
- Personnel likely to be involved in both construction and operational phases (including local people, research institutes, sponsors, commercial interests and partners – as possible third parties and beneficiaries) of the development process;
- Specific procedures the development or activity would entail;
- Potential risks involved (e.g. entry into sacred areas, environmental pollution, partial destruction of a significant site, disturbance on a breeding ground);
- The full implications that can realistically be foreseen (e.g. commercial, economic, environmental, cultural);
- Conditions for third-party involvement;
- Provision of misleading or false information should result in a penalty or denial of consent for the proposed development to proceed.

Consent: this involves consultation about and meaningful participation in all aspects of assessment, planning, implementation, monitoring and closure of a project. As such, consultation and meaningful participation are fundamental components of a consent process. There may also be negotiation involved to reach agreement on the proposal as a whole, certain components thereof, or conditions that may be attached to the operationalization of the principle of free, prior and informed consent. At all times, indigenous peoples have the right to participate through their own freely chosen representatives and to identify the persons, communities or other entities that may require special measures in relation to consultation and participation. They also have the right to secure and use the services of any adviser, including legal counsel of their choice.

Para 20, UN Doc E/CN.4/Sub.2/AC.4/2004/4

Box 2: Key Documents giving support to IPs FPIC³⁷

- **ILO169:** Articles 16(2) consent in relation to relocation whilst Articles 6, 7 and 15 refer to consultation³⁸;
- **UN Draft Declaration on IPs:** Articles 10, 12, 20, 27 and 30;³⁹
- **CERD General Recommendation 23:** ‘no decisions directly relating to their rights and interests are taken without their informed consent.’⁴⁰
- **HRC General Comment 23:** Article 27 - there are rights that are ‘in community with other members of the group’ (para 6.2); para 7 requires ‘positive legal measures... to ensure the effective participation of members of minority communities in decisions which affect them.’⁴¹
- **HRC GC12:** ‘Article 1 enshrines an inalienable right of all peoples’ and the right of peoples to ‘dispose of their natural wealth and resources’⁴²
- **Convention on Biological Diversity:** Article 8(j) and subsequent work on access and benefit sharing⁴³ – including the Bonn guidelines⁴⁴, adoption of the Akwe-Kon guidelines for C/S/EIA processes and protected area management.
- **Inter –American Commission on Human Rights:** *Awas Tingni, Maya and Dann* cases;
- **CESCR:** Concluding observations on Columbia in 2001⁴⁵
- **Canadian Supreme Court:** *Delgamuukw v British Columbia* giving a duty of consultation⁴⁶
- **Australian High Court:** *Mabo* concerning development of native title
- **World Commission on Dams**
- **WB Extractive Industries Review**⁴⁷
- **Forest Stewardship Council:** Principle No. 3.1⁴⁸

³⁷ Based on MacKay, 2004.

³⁸ ILO169

³⁹ Draft Declaration *supra* n4

⁴⁰ CERD General Recommendation No. 23: *Indigenous Peoples: 19/08/97* para 4(d)

⁴¹ Human Rights Committee, General Comment 23

⁴² Human Rights Committee General Comment No. 12: The right to self-determination of peoples (Art 1), 13/03/84

⁴³ Laurel A Firestone (2003). You Say Yes, I Say No; Defining Community Prior Informed Consent under the Convention on Biological Diversity. *Georgetown International Environmental Law Review* 16:1 171-207

⁴⁴ Bonn Guidelines

⁴⁵ UN Doc E/C.12/1/Add.74, para.12

⁴⁶ *Delgamuukw v British Columbia*, 3 SRC (1997)

⁴⁷ Striking a Better Balance,

⁴⁸ FSC Council Principles and Criteria http://www.fsc.org/en/about/policy_standards/princ_criteria ; Chris Tollefson (2004). Indigenous Rights and Forest Certification in British Columbia. In: John J. Kirton and Michael J. Trebilcock (Eds). *Hard Choices, Soft Law. Voluntary Standards in Global Trade, Environment and Social Governance*. Ashgate.

Box 3:

Extracts from Decision VII/28, COP7 CBD Kuala Lumpur, February 2004

Para 22 of decision VII/28:

'Recalls the obligations of Parties towards indigenous and local communities in accordance with Article 8(j) and related provisions and notes that the establishment, management and monitoring of protected areas should take place with the full and effective participation of, and full respect for the rights of, indigenous and local communities consistent with national law and applicable international obligations;'

Goal 1.1

'to establish and strengthen national and regional systems of protected areas integrated into a global network as a Contribution to globally agreed goals'

Para 1.1.4

*'by 2006, conduct, **with the full and effective participation of indigenous and local communities and relevant stakeholders**, national-level review of existing and potential forms of conservation, and their suitability for achieving biodiversity conservation goals, including innovative types of governance for protected areas that need to be recognized and promoted through legal, policy, financial institutional and community mechanisms, such as protected areas run by government agencies at various levels, co-managed protected areas, private protected areas, **indigenous and local community controlled areas.**'*

Table 1: Some examples of legal differences between State PIC and IPs FPIC

Topic	Access to Genetic Resources⁴⁹	Protected Area Development⁵⁰
Who is seeking the right to FPIC?	States, and IPs, from companies, research institutes etc Note: A State might give PIC for use of genetic resources within its jurisdiction but this does not mean IPs have.	IPs from the State usually as the State usually designates new protected areas – even if supported by international NGOs and organisations.
Legal Focus	Usually State but could be IPs if approved by State. International law and IPR important.	Domestic law – property rights and regimes and questions of State ‘Ownership’ of natural resources and/or recognition of traditional land rights.
Recognition in wider international law	Article 15 CBD ⁵¹ – State Sovereignty and PIC. Bonn Guidelines. ⁵² IPs feel often not recognised even though an important area in CERD GC23 and other bodies. Issues of international patent law.	<i>In-situ</i> conservation and Article 8(j) ⁵³ although protected areas and local people linkages are controversial. Sites usually within a states borders, but transboundary areas are a possibility.
Wider Linkages	WIPO, TRIPS, and potential conflicts in WTO links	CBD recognises State sovereignty over natural resources, ⁵⁴ but IPs right to FPIC increasingly recognised in relation to land rights. ⁵⁵
Focus	Prevention of exploitation and movement out of the country of potentially beneficial material. Rights to ‘things’ – plants animals, knowledge.	Achieving consensus/consent by a State on actions which affect livelihoods/culture of IPs. Issue of land rights & self determination
Information, disclosure & dissemination	Information for decision making requirements – similar to the Rotterdam Convention ⁵⁶ for hazardous material. Quality of information and capacity to handle it by developing states?	Rio Principle 10 important ⁵⁷ . State duty with respect to citizens. Ability of people to receive, digest and comment on information. Link to wider human rights agenda of free association etc.

⁴⁹ Based on ‘Facilitating Prior Informed Consent in the context of Genetic Resources and Traditional Knowledge’ dated May 19, 2004 from IUCN.

⁵⁰ CBD, Decision VII/28, COP7, Para 22.

⁵¹ CBD, Article 15 (1) & (5) in CBD (2003). Handbook of the Convention on Biological Diversity, 2nd Edition. CBD, UN, UNEP. See also <http://www.biodiv.org>

⁵² CBD (2002) Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization.

⁵³ CBD Article 8(j)

⁵⁴ CBD, Article 3

⁵⁵ S. James Anaya & Claudio Grossman (2002). The Case of Awas Tingni v Nicaragua: A New Step in the International law of Indigenous Peoples. *Arizona Journal of International and Comparative Law* 19: 1 – 15

⁵⁶ Rotterdam Convention, *supra* n1

⁵⁷ Rio Declaration, *supra* n53

	Commercial confidentiality and unforeseen developments. State capacity to evaluate information?	
Enforcement?	States – but international enforcement difficult unless use ICSID	Variable depends on access to effective judicial systems as well as political power and clear land rights.
Consultation/Consent	Moving from ‘consultative’ to consent for States. How far would a State veto count in relation to the WTO?	Variable status e.g. WB consultations ⁵⁸ , ILO 169 ⁵⁹ ‘good faith’ consultation, Draft UN Convention ⁶⁰ consent. Is there a ‘right to veto’ and if so what about rights of non-humans?
Benefit & timing?	Dealing with potential future benefits which are difficult to quantify. Benefit sharing – State and/or local communities.	Dealing with current inputs into livelihoods and cultures and continuing access to that benefit stream as well as new ones.
Procedural requirements	Complex even between States and companies. IP involvement etc requires separate but linked processes. Transparency e.g. for payments systems see EITI ⁶¹ .	Costs of undertaking FPIC processes as well as availability of suitable trained personnel and legal system if required. Use of appropriate guidelines e.g. Akwe:Kon ⁶²
Resources required/	Who bears costs? High transaction costs for contracts with often unknown or unquantified benefits.	Costs – usually from State or international NGOs/organisations. Consensus building and development of long term on-site benefits.

⁵⁸ World Bank, *supra* n51

⁵⁹ ILO169, *supra* n.17; ILO Manual, *supra* n18 pp15 - 17

⁶⁰ Draft Declaration, *supra* n16

⁶¹ Extractive Industries Transparency Initiative, <http://www.eitransparency.org/index.htm>

⁶² CBD *supra* n59

REFERENCES

- Agarwal, Bina (1994).** *A Field of One's Own. Gender and Land Rights in South Asia.* Cambridge University Press.
- Anaya, S. James (2004) (2nd Edn.).** *Indigenous Peoples in International Law.* Oxford University Press.
- Anaya, S. James (2005).** Indigenous Peoples and Rights over Lands and Natural resources: Toward a Realist Trend. *Colorado Journal International Environmental Law and Policy* 16:237
- Anaya, S. James & Claudio Grossman (2002).** The Case of Awas Tingni v Nicaragua: A New Step in the International law of Indigenous Peoples. *Arizona Journal of International and Comparative Law* 19: 1 – 15
- Anaya, S. James & Robert A. Williams, Jr. (2001).** The protection of Indigenous Peoples' Rights over Lands and Natural Resources Under the Inter-American Human Rights System. *Harvard Human Rights Journal* 14, 33 - 86
- Alston, Philip (ed) (2001).** *Peoples' Rights.* Oxford University Press
- Barsh, Russell Lawrence and Krisma Bastien (1997).** *Effective Negotiation by Indigenous Peoples: an action guide with special reference to North America.* International Labour Office, Geneva.
- Beckerman, W. (1994).** 'Sustainable Development': Is it a Useful Concept? *Environmental Values* 3: 191 – 209;
- Beltrán, J. (Ed.) (2000).** *Indigenous and Traditional Peoples and Protected Areas: Principles, Guidelines and Case Studies.* IUCN, Gland, Switzerland and Cambridge, UK and WWF International, Gland, Switzerland. Xi + 133 pp [Pre-publication]
- Birnie, Patricia & Alan Boyle (2002) (2nd Edn).** *International Law & The Environment.* Oxford University Press.
- Borrini-Freyerabend, G., A. Kothari, & G. Oviedo (2004).** *Indigenous and Local Communities and Protected Areas. Towards Equity and Enhanced Conservation.* Guidance on Policy and practice for Co-managed Protected Areas and Community Conserved Areas. World Commission on Protected Areas (SCPA) Best Practice Protected Areas Guidelines Series No. 11. IUCN.
- Buege, D.J. (1996).** The Ecologically Noble Savage Revisited. *Environmental Ethics.* 18: 71 - 88
- CBD (2002).** Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization.
- CBD (2003) (2nd Edn).** *Handbook of the Convention on Biological Diversity.* CBD, UN, UNEP. See also <http://www.biodiv.org>
- CBD, (2004).** *Article 8(j): Traditional Knowledge, Innovations and Practices. Article 8(j) after COP-7.* Downloaded from www.biodiv.org/programmes/socio-eco/traditional/akwe.asp?print+1 on 23/05/2004
- CBD (2004a).** COP7, Decision VII/16F. Akwé:Kon /Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessment regarding Developments Proposed to Take Place on, or which are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities
- CBD (2004b).** COP 7, Decision VII/28, Protected Areas (Articles 8 (A) to (E))
- Chapin, Mac (2004).** *A Challenge to Conservationists.* WorldWatch Institute <http://www.worldwatch.org>

- Colchester, Marcus and Fergus MacKay (2004).** *In Search of Middle Ground: Indigenous Peoples, Collective Representation and the Right to Free, Prior and Informed Consent.* Paper for 10th Conference of the International Association for the Study of Common Property, Oaxaca, August 2004
- Common, M.S. (1996).** Beckerman and his Critics on Strong and Weak Sustainability: Confusing Concepts and Conditions. *Environmental Values* 5: 83 – 88;
- Déjeant-Pons, M. & M. Pallemarts (2002).** *Human rights and the environment.* Council of Europe publishing. <http://book.coe.int>
- Dobson, A. (1998).** *Justice and the Environment. Conceptions of Environmental Sustainability and Dimensions of Social Justice.* Oxford University Press, Oxford. 280 pp.
- Dorsett, Shaunnagh (2005).** An Essay on Jurisdiction, Jurisprudence, and Authority: The High Court of Australia in *Yorta Yorta* (2001). *Northern Ireland Legal Quarterly* 56(1) 1 - 20
- ELI – Environmental Law Institute (2004).** *Prior Informed Consent and Mining. Promoting the Sustainable Development of Local Communities.* Environmental Law Institute, Washington. Downloadable from: www.elistore.org
- Eversole, Robyn, McNeish, John-Andrew & Alberto D. Cimadoamore (2005).** *Indigenous Peoples and Poverty. An international Perspective.* Zed Books.
- Extractive Industries Transparency Initiative,**
<http://www.eitransparency.org/index.htm>
- Fabra, Adriana (1998).** Indigenous Peoples, Environmental Degradation, and Human Rights: a Case Study. Chapter 12 in: Alan Boyle & Michael Anderson (eds). *Human Rights Approaches to Environmental Protection.* Clarendon Press, Oxford.
- FAO (1985).** International Code of Conduct on the Distribution and Use of Pesticides
- FERN (2001).** *Forest of Fear. The Abuse of Human Rights in Forest Conflicts.* FERN, Moreton-in-Marsh, UK.
- Firestone, Laurel A (2003).** You Say Yes, I Say No; Defining Community Prior Informed Consent under the Convention on Biological Diversity. *Georgetown International Environmental Law Review* 16:1 171-207
- Forest Stewardship Council Principles and Criteria**
http://www.fsc.org/en/about/policy_standards/princ_criteria
- FPP (2004a)** *Indigenous peoples' right to free prior and informed consent & the World Bank's Extractive Industries Review.* March 2004. Downloadable from www.forestpeoples.gn.apc.org
- FPP (2004b).** *Indigenous Peoples' Rights, State Sovereignty and the Convention on Biological Diversity.* Downloaded from www.forestpeoples.gn.apc.org on 22 March 2004
- FPP (2007).** *Indigenous Peoples' Rights and Transnational and Other Business Enterprises: A review of International Law and Jurisprudence.* A submission to the African Commission on Human And Peoples' Rights. May 2007. Forest Peoples Programme.
http://www.forestpeoples.org/documents/law_hr/af_com_ip_rights_submission_may07.pdf
- Gardiner, Richard K. (2003).** *International Law.* Pearson Longman.

- Gilbert, Jérémie (2003).** The Treatment of Territory of Indigenous Peoples in International Law. Chapter 7 in: Joshua Castellino & Steve Allen. *Title to Territory in International Law. A Temporal Analysis*. Ashgate.
- Gibbs, Meredith (2005).** The right to development and indigenous peoples: Lessons from New Zealand. *World Development* 33(8):1365-1378
- Global Witness (2004).** *Taking a Cut. Institutionalised Corruption and Illegal Logging in Cambodia's Aural Wildlife Sanctuary*. A Report for Global Witness. November 2004. <http://www.globalwitness.org>
- Goldstein, Melvyn C. (1997).** *The Snow Lion and the Dragon. China, Tibet, and the Dalai Lama*. University of California Press
- Griffiths, Tom (2005).** *Indigenous Peoples and the World Bank: experiences with participation*. Forest Peoples Programme. <http://www.forestpeoples.org>
- Griffiths, Tom (2005).** *Indigenous Peoples and the Global Environment Facility (GEF). Indigenous Peoples' experiences of GEF-funded Biodiversity Conservation – A Critical Study*. Forest Peoples Programme. <http://forestpeoples.org>
- Huff, Andrew (1999).** Resource Development and Human Rights: A Look at the Case of the Lubicon Cree Indian National of Canada. *Colorado Journal of International Environmental Law and Policy* 10, 161
- Huff, Andrew (2004).** Indigenous Land Rights and the New Self-Determination. *Colorado Journal of International Environmental Law and Policy* 126, 295
- Hunt, Paul., Nowak, Manfred. & Siddiq Osmani (2002).** *Draft Guidelines on a Human Rights Approach to Poverty Reduction Strategies*. Paper for Expert Seminar organized by the Office of the High Commissioner for Human Rights, 19 – 20 June 2002, Geneva.
- ILO (1989).** International Labour Organisation, Convention on Indigenous and Tribal Peoples, 1989 (no. 169). www.ilo.org
- ILO (2003).** *ILO Convention on Indigenous and tribal peoples, 1989 (No. 169): A Manual*. International Labour Office, Geneva, 2003
- International Court of Justice Statute** www.icj-cij.org
- IUCN (2004).** Access and Benefit sharing issues based on 'Facilitating Prior Informed Consent in the context of Genetic Resources and Traditional Knowledge' dated May 19, 2004
- Johnston, Darlene M. (1989).** Native Rights as Collective Rights: A question of Group Self-Preservation. *Canadian Journal of Law and Jurisprudence* 2(1) 19-34
- Kingsbury, Benedict (1998).** "Indigenous Peoples" in International Law: A Constructivist Approach to the Asian Controversy. *American Journal of International Law* 92: 414-457
- Kingsbury, Benedict (2001).** Reconciling Five Competing Conceptual Structures of Indigenous Peoples' Claims in International and Comparative Law. Chapter 3 in: Philip Alston (ed) *Peoples' Rights*. Oxford University Press.
- Koziell, Izabella & Charles I. Mc Neill (2002).** *Building on Hidden Opportunities to Achieve the Millennium Development Goals: Poverty Reduction through Conservation and Sustainable Use of Biodiversity*. IIED & UNDP Equator Initiative.
- Kymlicka, Will (ed) (2000).** *The Rights of Minority Cultures*. Oxford University Press
- Martínez, Miguel Alfonso (2004).** *Indigenous Peoples and Conflict Resolution*. UN Doc E/CN.4/Sub.2/AC.4/2004/2

- McKay, Fergus (2004).** Indigenous Peoples' Right to Free, Prior and Informed Consent and the World Bank's Extractive Industries Review. *Sustainable Development Law and Policy* 4: 43- 65
- McNeil, Kent (2004).** The Vulnerability of Indigenous Land Rights in Australia and Canada, *Osgoode Hall Law Journal* 42, 271-301
- McNeish, John-Andrew and Robyn Eversole (2005).** Introduction: indigenous peoples and poverty. Chapter 1 in: Eversole, Robyn, McNeish, John-Andrew & Alberto D. Cimadoamore. *Indigenous Peoples and Poverty. An international Perspective.* Zed Books.
- Mehta, Lyla & Maria Stankovitch (2003).** *Operationalisation of Free, Prior Informed Consent.* Prepared for Thematic Review 1.2. Dams, Indigenous Peoples and Vulnerable Ethnic Minorities. See www.dams.org
- Mendelshohn, Oliver & Upendra Baxi (1994).** *The Rights of Subordinated Peoples.* Oxford University Press, Delhi.
- McNeish, John-Andrew & Robyn Eversole (2005).** Introduction: indigenous peoples and poverty. Chapter 1 in: **Eversole, Robyn, McNeish, John-Andrew & Alberto D. Cimadoamore.** *Indigenous Peoples and Poverty. An international Perspective.* Zed Books.
- Metz, Shannah (2006).** *Prior Informed Consent and Protected Areas. Case Study: Cordillera del Cóndor, Ecuador.* Center for International Environmental Law (CIEL), Washington.
- Morgera, Elisa (2005).** An update on the Aarhus Convention and its Continued Global Relevance. *RECIEL* 14(2) 138 - 147
- Nakagawa, Melanie (2004).** Overview of Prior Informed Consent from an International Perspective. *Sustainable Development Law and Policy* 4: 4-7
- Nussbaum, Martha C. (1999).** *Sex and Social Justice.* Oxford University Press, New York. 476 pp.
- Nussbaum, Martha (2004).** Women and theories of global justice: our need for new paradigms. IN: Chatterjee, Deen K. (Ed). *The Ethics of Assistance. Morality and the Distant Needy.* Cambridge University Press, Cambridge. 292 pp.
- Ovey Clare & Robin C.A. White (2002) (3rd Edn).** *European Convention on Human Rights.* Oxford.
- Pritchard, Sarah (ed) (1998).** *Indigenous Peoples, the United Nations and Human Rights.* Zed Books.
- Robinson, Nicholas A. (1993).** *Agenda 21: Earths Action Plan.* IUCN Environmental Policy & Law Paper No. 27. Oceana Publications Inc.
- Rotterdam Convention on the Prior Informed Consent Procedure** for Certain Hazardous Chemicals and Pesticides in International Trade. Entered into force on 24 February 2004. <http://www.pic.int>
- Sands, P. (2003) (2nd Edn).** *Principles of International Environmental Law.* Cambridge University Press.
- Schabas, William A. (2nd Edn) (2004).** *An Introduction to the International Criminal Court.* Cambridge University Press.
- Schabas, William (2001).** Enforcing international humanitarian law: Catching the accomplices. *IRRC* 83, No. 842, 439-459
- Schrijver, Nico (1997).** *Sovereignty over natural resources. Balancing rights and duties.* Cambridge.
- Shanks, E. & C. Turk (2003).** Refining Policy with the Poor: Local Consultations on the Draft Comprehensive Poverty Reduction and Growth Strategy in Viet

- Nam, *Policy Research Working Paper 2968*, East Asia and Pacific Region, Poverty Reduction and Economic Management Sector Unit, World Bank.
- Slaughter, A-M (2004).** *Disaggregated Sovereignty: Towards the Public Accountability of Global Government Networks.* Government and Opposition 1159-190
- Smith, Linda Tuhiwai (1999).** *Decolonizing Methodologies. Research and Indigenous Peoples.* Zed Books
- Stavenhagen, Rodolfo (2002).** *Human rights and indigenous issues.* UN Doc E/CN.4/2002/97 4 February 2002,
- Steiner, Henry J. & Philip Alston (2000) (2nd Edn).** *International Human Rights in Context. Law, Politics, Morals.* Oxford University Press.
- Stewart-Harawira, Makere (2005).** *The New Imperial Order. Indigenous Responses to Globalization.* Zed Books
- SustainAbility Ltd. (2004).** *The Changing Landscape of Liability. A Director's Guide to Trends in Corporate Environmental, Social and Economic Liability*
- Thornberry, Patrick (1991).** *International Law and the Rights of Minorities.* Clarendon Press, Oxford.
- Thornberry, Patrick (2002).** *Indigenous peoples and human rights.* Manchester University Press
- Thornberry Patrick and Maria Amor Martin Estébanez (2004).** *Minority rights in Europe.* Council of Europe Publishing
- Tollefson, Chris (2004).** Indigenous Rights and Forest Certification in British Columbia. Chapter 4 in: John J. Kirton and Michael J. Trebilcock (Eds). *Hard Choices, Soft Law. Voluntary Standards in Global Trade, Environment and Social Governance.* Ashgate
- UN (1945).** United Nations Charter
- UN (1966a).** International Covenant on Economic, Social and Cultural Rights
- UN (1966b).** International Covenant on Civil and Political Rights
- UN (1983).** UN General Assembly Resolution UNGA Res.37/137 (1983);
- UN (1984).** Human Rights Committee General Comment No. 12: The right to self-determination of peoples (Art 1), 13/03/84
- UN (1986).** UN Declaration on the Right to Development
- UN (1989).** Convention on the Control of Transboundary Movement of Hazardous Wastes and their Disposal , Basel, 22 March 1989
- UN (1992).** United Nations Conference on Environment and Development, Rio Declaration on Environment and Development
- UN (1992).** *United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.* Adopted by the General Assembly resolution 47/135 of 18 December 1992 and Commentary by Asbjorn Eide in E/CN.4/Sub.2/AC.5/2001/2
- UN (1994).** Draft UN Declaration on the Rights of Indigenous Peoples Adopted by the UN Subcommission on Prevention of Discrimination and Protection of Minorities by its resolution 1994/45 August 26, 1994. UN Doc E/CN.4/1995/2
- UN (1997).** *General recommendation No. 23: Indigenous Peoples* Committee for the Elimination of Racial Discrimination. .
- UN (2002).** *Indigenous Issues. Human Rights and indigenous issues. Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, Mr. Rodolfo Stavenhagen, submitted pursuant to Commission resolution 2001/57.* E/CN.4/2002/97 4 February 2002

- UN (2003a).** Human Rights Committee General Comment No. 23: The rights of minorities (Ar.27): 08/04/94. CCPR/C/21/Rev.1/Add.5
- UN (2003b).** Norms on the responsibility of transnational corporations and other business enterprises with regard to human rights. UN Doc E/CN.4/Sub.2/2003/12/Rev.2 26 August 2003
- UN (2004a).** *Preliminary working paper on the principle of free, prior and informed consent of indigenous peoples in relation to development affecting their lands and natural resources that would serve as a framework for the drafting of a legal commentary by the Working Group on this concept submitted by Antoanella-Iulia Motoc and the Tebtebba Foundation.* E/CN.4/Sub.2/AC.4/2004/4
- UN (2004b).** *Review of Development Pertaining to the promotion and protection of the rights of indigenous peoples, including their human rights and fundamental freedoms. Indigenous peoples and Conflict Resolution.* Working paper submitted by Mr. Miguel Alfonso Martinez. E/CN.4/Sub.2/AC.4/2004/2
- UNEP (1987).** London Guidelines for the Exchange of Information on Chemicals in International Trade
- Weller, Marc, (ed) (2005).** *The Rights of Minorities. A Commentary on the European Framework Convention for the Protection of National Minorities.* Oxford University Press.
- World Commission on Dams (2000).** *Dams and Development: A new framework for decision-making. The Report of the World Commission on Dams.* Earthscan, London <http://www.dams.org/>
- World Bank (2001).** *Striking a Better Balance. The World Bank Group and Extractive Industries.* <http://www.worldbank.org>
- World Bank (2005).** World Bank Operational Policy 4.10, Indigenous People
- World Bank (2007).** *Global Monitoring Report 2007. confronting the Challenges of Gender Quality and Fragile States.* www.worldbank.org/gmr2007
- World Bank Operations Evaluation Department (2003).** *Implementation of Operational Directive 4.20 on Indigenous Peoples: An Independent Desk Review.* Report No. 25332, January 10, 2003