



CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW

REDD LEGAL ISSUES: INDIGENOUS PEOPLES AND LOCAL COMMUNITIES

Introduction

This memorandum addresses several questions that have surfaced in discussions on REDD and indigenous peoples. These questions relate to the terminology employed in connection with indigenous peoples and local communities, for example, as well as to available legal tools for cross-referencing international instruments.

Questions

1. LANGUAGE EMPLOYED WITH RESPECT TO THE RIGHTS OF INDIGENOUS COMMUNITIES AND LOCAL COMMUNITIES:

a. Definitions of Sub-national Groups in International Law

International legal instruments use varying terminology to address sub-national groups within independent countries. For example, legal instruments refer to: indigenous peoples; indigenous people; indigenous communities; indigenous populations; tribal peoples; minorities; forest dwellers; and local communities. The use of these terms is usually accompanied with a degree of controversy regarding their meaning. Notwithstanding the particular content of specific terminology, legal instruments often employ broad formulas, such as “indigenous peoples and local communities” or “indigenous and tribal peoples,” in order to secure an *inclusive* approach and cover all relevant individuals and groups.

During the decades of discussion regarding the meaning of these terms, a particularly contentious issue has been the distinction between indigenous people and indigenous peoples. While the term “indigenous people” generally refers to the rights of individuals of indigenous origin, “indigenous peoples” on the other hand also encompasses certain collective rights. This discussion has been contentious in part due to the concern expressed by certain countries that recognition of the right to self-determination of indigenous peoples could lead to claims of secession, thus potentially resulting in political instability and the dismemberment of States. Self-determination, however, also encompasses questions of autonomy, internal self-government, and free and prior informed consent, and thus need not lead to secessionist claims. For this and

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other reasons, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), adopted by the UN General Assembly in 2007, recognizes the collective right to self-determination of indigenous peoples.

Self-determination, however, is not the only collective right that inures to “peoples” under human rights law. The right to culture has individual and collective dimensions, for example. In the particular context of REDD, the right to property, including with respect to land, territory and natural resources, has a clear collective dimension for indigenous and tribal peoples. Therefore, there is increasing consensus that the term “indigenous peoples” is to be preferred over the singular “indigenous people,” given its ability to encompass both individual and collective rights.

Different sources utilize differing terminology. The following examples illustrate the diversity of sources and definitions:

Indigenous peoples

One of the early attempts at a definition of indigenous peoples was offered by Martínez Cobo, the special rapporteur of the UN Sub-Commission for human rights, in his *Study on the discrimination against indigenous peoples*. This study puts forward a “working definition” that has been widely used:

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.

It is readily apparent that this definition does not distinguish between indigenous communities, peoples and nations.

Another definition of indigenous peoples is found in the International Labor Organization’s Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries. ILO Convention 169 applies to “indigenous peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.”¹ Further, ILO Convention 169 provides that “Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.”²

¹International Labor Organization Convention No. 169, Article 1, available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C169>.

² *Id.*

The International Finance Corporation of the World Bank has defined indigenous peoples in its Performance Standard, as follows: “Broadly defined as a distinct social and cultural group possessing [sic] the following characteristics in varying degrees: Self-identification as members of a distinct indigenous cultural group and recognition of this identity by others; Collective attachment to geographically distinct habitats or ancestral territories in the project area and to the natural resources in these habitats and territories; Customary cultural, economic, social, or political institutions that are separate from those of the dominant society or culture; An indigenous language, often different from the official language of the country or region.”³

Notwithstanding these definitions, the prevailing view today is that no formal universal definition is necessary for the recognition and protection of their rights.⁴ UNDRIP, for example, does not include a definition of indigenous peoples. This omission has been justified by the Chairperson - Rapporteur of the UN Working Group on Indigenous Populations (which prepared the draft UNDRIP) Ms. Erica Irene Daes - on the ground that “historically, indigenous peoples have suffered, from definitions imposed by others” and as a result, in certain countries many indigenous peoples have been declassified. She maintains that because of this reason, the members of the Working Group insisted that no indigenous community, organisation, nation or even indigenous person from whatever region should be denied the right to express peacefully and without abuse an opinion or a viewpoint in the sessions of the Working Group. According to her, through this participatory process the Working Group was able to develop the widely accepted comprehensive draft Declaration of Rights of the indigenous Peoples “without feeling a need for elaborating a definition of indigenous peoples.”⁵

Indigenous communities

The UN Conference on Environment and Development resorted to the formula “indigenous people and their communities.”⁶ Agenda 21 uses “Recognizing and strengthening the role of indigenous people and their communities.”⁷ This formulation appears as an attempt to capture the individual and collective dimensions of the rights of indigenous peoples without addressing the legal implications of the term “peoples” in international law.

Local communities

The Convention on Biological Diversity “does not use the term “indigenous peoples,” but refers to them in terms of “indigenous and local communities embodying traditional lifestyles.”

³ [http://www.ifc.org/ifcext/sustainability.nsf/AttachmentsByTitle/pol_PerformanceStandards2006_glossary/\\$FILE/Glossary+of+Terms.pdf](http://www.ifc.org/ifcext/sustainability.nsf/AttachmentsByTitle/pol_PerformanceStandards2006_glossary/$FILE/Glossary+of+Terms.pdf)

⁴ http://www.undp.org/partners/cso/indigenous/docs/UNDG_guidelines_on_Indigenous_Peoples_Issues_2008.pdf

⁵ E/ CN.4/Stib.2/AC.4/1995/3, page 3; Tapan K. Bose, Definition and delimitation of the indigenous peoples of Asia, available at <http://www.iwgia.org/graphics/Synkron-Library/Documents/IndigenousIssues/Self-determination/Tapan.bose.doc>.

⁶ UN Doc. A/CONF.151/26 (vol. III), ch. 26; UN Doc. A/CONF.157/24 (Part I).

⁷ Agenda 21, Ch. 26, available at <http://www.un.org/esa/sustdev/documents/agenda21/english/agenda21toc.htm>.

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This phrase is interpreted to include the estimated 1.5 to 2 billion people around the world who have not adopted industrialized practices to exploit agricultural, forest, animal and fisheries resources.”⁸

The World Bank’s International Finance Corporation defines local community in its Performance Standards as a “Community within the project’s area of influence.”⁹

Minorities

The definition of “minorities” has raised and is still raising significant controversy. As of today, no formal, internationally sanctioned definition has been achieved. Some instruments, such as the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (1992)¹⁰ or the Framework Convention for the Protection of National Minorities (1995),¹¹ expressly use the term minorities without defining it.

If no generally accepted definition has been achieved, several authors, including mandate-holders in the UN human rights system, have elaborated working definitions of “minorities”. Francesco Capotorti, a special rapporteur, laid down within the framework of article 27 of the International Covenant on Civil and Political Rights¹² that a minority is:

“a group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members - being nationals of the State- possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their cultures, traditions, religion or language.”¹³

Tribal peoples

⁸ See UNCHR leaflet 10: Indigenous Peoples and the Environment.

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[http://www.ifc.org/ifcext/sustainability.nsf/AttachmentsByTitle/pol_PerformanceStandards2006_glossary/\\$FILE/Glossary+of+Terms.pdf](http://www.ifc.org/ifcext/sustainability.nsf/AttachmentsByTitle/pol_PerformanceStandards2006_glossary/$FILE/Glossary+of+Terms.pdf)

¹⁰ Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, Adopted by General Assembly resolution 47/135 of 18 December 1992, available at http://www.unhcr.ch/html/menu3/b/d_minori.htm

¹¹ Framework Convention for the protection of national minorities, Strasbourg, 1.II.1995, European treaty series 157 available at

<http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=157&CL=ENG>

¹² International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976 available at <http://www1.umn.edu/humanrts/instr/b3ccpr.htm>

¹³ See Francesco Capotorti, *Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities for the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities*, 1977, UN Doc E/CN.4/Sub.2/384/Add.1-7

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ILO Convention 169 references tribal peoples as follows: “Tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations.”¹⁴

Forest Dwellers

The Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the management, Conservation and Sustainable Development of All Types of Forests, concluded at UNCED, uses the term “forest dwellers,” albeit without offering a definition.¹⁵

Given the difficulties associated with building consensus on precise definitions, legal texts as well as international tribunals may utilize terminology that can encompass a broader array of sub-national groups when attempting to provide for broad coverage. For example, the Inter-American Court of Human Rights declared that its jurisprudence regarding indigenous peoples’ right to property is also applicable to tribal peoples because both share similar characteristics, such as: having distinct social, cultural, and economic traditions different from other sections of the national community; identifying themselves with their ancestral territories; and regulating themselves, at least partially, by their own norms, customs, and traditions. In a similar vein, ILO Convention 169 refers to indigenous and tribal peoples, in order to encompass all groups that may exhibit the characteristics described therein. This “inclusive” approach turns the definitional issue into an inquiry over the elements that characterize the sub-national group.

Under this light, given the particular context of REDD, a formulation that would not exclude the rights of local communities or forest dwellers may be preferred to a more narrow definition.

b. Texts Negotiated under the UNFCCC

The UNFCCC is a framework convention establishing the legal basis for international cooperation in the face of climate change (global warming). The Kyoto Protocol to the UNFCCC establishes binding targets for emissions reductions for industrialized countries during the period 2008-2012. After 2012, a new agreement will need to address the question of how to reach the UNFCCC goals. The UNFCCC has been ratified by 192 countries; Kyoto, by 183.

Current negotiations for the new agreement are focusing on the addition of REDD as a method for ~~calculating emissions~~ mitigating climate change. In this context, certain texts produced under the UNFCCC mention local and indigenous communities.

¹⁴ ILO Convention 169, Part I, Article 1, Paragraph 1(a), available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C169>.

¹⁵ See articles 2(d) and 5(a).

United Nations Framework Convention on Climate Change

The UNFCCC does not mention indigenous peoples or local communities. The UNFCCC's glossary does not even include the terms "indigenous people," "indigenous peoples," "indigenous communities," or "local communities". Certain texts negotiated under its aegis, however, do employ the terms "local and indigenous communities". For example, UNFCCC COP13 in Bali adopted a decision on REDD that states:

*"Recognizing also that the needs of local and indigenous communities should be addressed when action is taken to reduce emissions from deforestation and forest degradation in developing countries"*¹⁶

Similarly, agenda item 5 for UNFCCC COP 14 in Poznan, regarding "Reducing emissions from deforestation in developing countries: approaches to stimulate action", recognizes "the need to promote the full and effective participation of indigenous people and local communities, taking into account national circumstances and noting relevant international agreements."¹⁷

Kyoto Protocol

Under the Kyoto Protocol, NGO observers are organized into five constituencies: "business and industry organizations (BINGOs), environmental groups (ENGOS), indigenous peoples organizations (IPOs), local government and municipal authorities (LGMAs) and the research-oriented and independent organizations (RINGOs). The criteria for considering a group of organizations as a constituency include: a critical mass of member organizations; creation of an operative channel (focal point) for communication with the secretariat; distribution of information to members; provision of consolidated/coordinated inputs on issues; and regular participation of the member organizations at sessions. Individual organizations may choose which constituency, if any, they wish to belong to. This choice is neither official nor binding." The concerns of IPOs first gained traction at COP 6. The IPOs were first recognized as a constituency in 2001.

Inter-Governmental Panel on Climate Change

The Inter-Governmental Panel on Climate Change (IPCC) has several glossaries with definitions of indigenous peoples. One states that indigenous people are "People whose ancestors inhabited a place or a country when persons from another culture or ethnic background arrived on the scene and dominated them through conquest, settlement, or other means and who today live more in conformity with their own social, economic, and cultural customs and traditions than those of the country of which they now form a part (also referred to as "native," "aboriginal," or "tribal" peoples)."¹⁸ Another says, "No internationally accepted definition of

¹⁶ Decision 2/CP.13.

¹⁷ <http://unfccc.int/resource/docs/2008/sbsta/eng/l23.pdf>

¹⁸ <http://www.ipcc.ch/pdf/glossary/tar-ipcc-terms-en.pdf>.

indigenous peoples exists. Common characteristics often applied under international law, and by United Nations agencies to distinguish indigenous peoples include: residence within or attachment to geographically distinct traditional *habitats*, ancestral territories, and their natural resources; maintenance of cultural and social identities, and social, economic, cultural and political institutions separate from mainstream or dominant societies and cultures; descent from population groups present in a given area, most frequently before modern states or territories were created and current borders defined; and self-identification as being part of a distinct indigenous cultural group, and the desire to preserve that cultural identity.”¹⁹

2. RECOGNITION OF THE RIGHTS OF INDIGENOUS PEOPLES AND LOCAL COMMUNITIES AND THEIR EFFECTIVENESS:

a. Precedents of Direct Grant of Rights to Sub-national Groups

Several international instruments confer rights directly to indigenous peoples, indigenous communities, local communities, and other sub-national groups. The broad term “instrument” generally refers to any international agreement, including treaties, declarations and resolutions. Treaties are the most influential type of international instrument and frequently place binding obligations on the countries that ratify them.

Although many international instruments only grant inter-State rights and obligations, other instruments focus on granting rights to individuals or groups. Grants of rights to non-state actors can be grants of individual rights guaranteed to each person or collective rights guaranteed to a sub-national group. The main rights which might be applicable in REDD are property rights, rights to free prior informed consent, participatory rights, and the right to self-determination. Although the concepts underlying these rights and the instruments granting them tend to overlap, they are presented here as separate concepts.

Self-Determination.

The right to self-determination is the right to have a say in and influence your own future. This right ~~has~~ can be granted individually to persons or collectively to groups. Some instruments recognizing a right to self-determination include:

- *International Covenant on Civil and Political Rights.* “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.”²⁰

¹⁹ <http://www.ipcc.ch/pdf/glossary/ar4-wg2.pdf>.

²⁰ International Covenant on Civil and Political Rights, Article 1, available at <http://www2.ohchr.org/english/law/ccpr.htm>.

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- *International Covenant on Economic, Social and Cultural Rights*. “All peoples have the rights of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”²¹
- *African Charter of Human and Peoples' Rights*. “All peoples. . . shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and freely pursue their economic and social development according to the policy they have freely chosen.”²²
- *International Labor Organization Convention No. 169*. “Recognizing the aspirations of these peoples to exercise control over their own institutions, ways of life and economic development. . .”²³ The Convention also requires governments to consult with the peoples concerned and encourage full participation.²⁴
- *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)*. “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.”²⁵ “Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.”²⁶

Free Prior Informed Consent

FPIC allows persons and groups to participate in, and even to object, decisions that affect the person or group. FPIC has been articulated as a stand-alone right, as an element of consultations, and as a safeguard in permissible restrictions to the right to property.

- *UNDRIP*. Any relocation requires “the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where feasible, with the option of return.”²⁷ “States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project

²¹ International Covenant on Economic, Social and Cultural Rights, Article 1, paragraph 1, available at <http://www2.ohchr.org/english/>.

²² African Charter of Human and Peoples' Rights, Article 20, available at <http://www.hrcr.org/docs/Banjul/afchr.html>.

²³ International Labor Organization Convention No. 169, Preamble, available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C169>; see also *Id.* Article 7, 15, 16, and 17.

²⁴ *Id.* Article 6.

²⁵ UNDRIP, Article 3, available at <http://www.un.org/esa/socdev/unpfii/en/declaration.html>.

²⁶ *Id.* Article 18; see also *Id.* at Articles 4, 19, and 32.

²⁷ *Id.* Article 10.

affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.”²⁸

- *International Labor Organization Convention No. 169*. Peoples “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 of . . . plans and programmes for national and regional development which may affect them directly.”²⁹

Right to Land and Territories

Human rights law recognizes the right to land and territories to indigenous and tribal peoples, as an element of the right to property.

- *UNDRIP*. “Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.”³⁰
- *International Labor Organization Convention No. 169*. “[G]overnments 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. . . . The use of the term lands. . . shall include the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use.”³¹ “The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised.”³²
- *International Convention on the Elimination of All Forms of Racial Discrimination*. “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, . . . the right to own property alone as well as in association with others.”³³

Rights to Natural Resources

²⁸ *Id.*, Article 32; *see also Id.* Article 19.

²⁹ International Labor Organization Convention No. 169, Article 7.1, *available at* <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C169>.

³⁰ UNDRIP, Article 26, *available at* <http://www.un.org/esa/socdev/unpfii/en/declaration.html>; *see also Id.* Articles 27-32.

³¹ International Labor Organization Convention No. 169, Article 13, *available at* <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C169>.

³² *Id.* Article 14; *see also Id.* Articles 16-19.

³³ International Convention on the Elimination of All Forms of Racial Discrimination. Article 5(d)(v), *available at* http://www.unhcr.ch/html/menu3/b/d_icerd.htm.

Human rights law also recognizes the right to natural resources in indigenous and tribal peoples lands and territories that are essential to their survival, as an element of the right to property.

- *UNDRIP*. “Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.”³⁴
- *International Labor Organization Convention No. 169*. “The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded.”³⁵
- *Convention on Biological Diversity*. Article 8j. “Each contracting Party shall, as far as possible and as appropriate . . . [s]ubject to national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge innovations and practices.”³⁶

b. “Enforcement”

Several treaties granting rights also establish compliance mechanisms, including independent committees that monitor compliance and implementation of the treaty. Certain compliance mechanisms accept petitions from individuals in connection with violation of rights. Also, human rights treaties frequently require the ratifying countries to enact domestic legislation to ensure that the rights granted are implemented and enforced at the domestic level. Further, certain treaties establish standing courts to hear cases involving human rights violations. Both domestic and international jurisprudence has developed to support the notion that the rights granted are enforceable.

National Enforcement

Enforcement of rights at the national level depends on the extent of recognition of those rights within the jurisdiction in question, as well as available judicial recourse. Certain international instruments, in addition to recognizing rights, also oblige the State to adequately give effect to those rights by taking whatever necessary internal measures. For example, the American Convention on Human Rights provides that, “Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the

³⁴ UNDRIP, Article 26, available at <http://www.un.org/esa/socdev/unpfii/en/declaration.html>; see also *Id.* Articles 27-32.

³⁵ International Labor Organization Convention No. 169, Article 15, available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C169>; see also *Id.* Articles 16-19.

³⁶ Convention on Biological Diversity. Article 8j, available at <http://www.cbd.int/convention/convention.shtml>.

provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.”³⁷ Accordingly, States assume the obligation to structure their domestic legal systems in a way that ensures the effectiveness of the rights recognized in the American Convention.

UNDRIP and ILO Convention 169 have similar provisions in connection with the right land, territories and natural resources. UNDRIP, for example, provides that, “States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.”³⁸ ILO Convention 169 in turn states that, “Governments shall have the responsibility for developing, with the participation of the peoples concerned, coordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity.”³⁹ “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. Adequate procedures shall be established within the national legal system to resolve land claims by the peoples concerned.”⁴⁰

International Oversight Mechanisms

Several legal instruments establish mechanisms, including independent committees, to oversee the implementation of, and compliance with, the instrument in question. For example, the Committee on the Rights of the Child receives and examines reports from State parties regarding their implementation of the Convention on the Rights of the Child. Certain treaty bodies are also empowered to hear individual cases. For example, Protocol 1 to the ICCPR allows the Human Rights Committee to receive individual applications. These international oversight mechanisms provide for a degree of enforcement of rights.

The International Labor Organization Constitution, Article 24 also establishes a mechanism to secure compliance and enforcement. Non-State actors can inform the ILO that a member state is not complying with an ILO convention. A committee will investigate the complaint and report its results to the Governing Body which can require the state to take remedial action.⁴¹ In the context of indigenous peoples’ lands, cases have been brought by organizations from, inter alia, Denmark, Mexico, Bolivia, Colombia, Ecuador, and Peru.⁴²

International Courts and Tribunals

³⁷ American Convention on Human Rights, Article 2, available at <http://www1.umn.edu/humanrts/oasinstr/zoas3con.htm>.

³⁸ UNDRIP, Article 26, available at <http://www.un.org/esa/socdev/unpfii/en/declaration.html>.

³⁹ International Labor Organization Convention No. 169, Article 2, available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C169>.

⁴⁰ *Id.* Article 14; see also *Id.* Articles 16-19.

⁴¹ International Labor Organization Constitution, Article 24, available at <http://www.ilo.org/ilolex/english/iloconst.htm>.

⁴² See generally, Marcos A. Orellana, Indigenous Peoples, Mining, and International Law, January 2002 No. 2.

The regional basic human rights conventions in Africa, Europe and the Americas establish standing Courts to hear individual cases and issue binding judgments. The existence of human rights tribunals thus provides another forum to secure enforcement of rights, provided that rules of admissibility have been met. The decisions of the regional human rights courts have also exerted a significant influence in the shaping and progressive development of the law, in connection with the rights of indigenous and tribal peoples, as well as minorities.

Evolving Jurisprudence

- *Free Prior Informed Consent.* In 2003, the Committee on the Elimination of Racial Discrimination censured Ecuador because the government's consultation with indigenous communities regarding resource use on their lands was insufficient. In 2002, the Committee censured Botswana because the government failed to get prior informed consent before relocating indigenous communities. The Inter-American Court of Human Rights, which interprets the American Convention on Human Rights, found a violation of indigenous communities' land rights when governments failed to get prior informed consent before granting logging access to outsiders.⁴³
- *Right to Land and Natural Resources.* The *Case of the Saramaka People* decided by the Inter-American Court of Human Rights concerned logging and mining concessions awarded by Suriname on territory possessed by the Saramaka people, without their full and effective consultation.⁴⁴ The Court examined the rights of tribal peoples in international law and concluded that the members of the Saramaka people have a right to use and enjoy the natural resources that lie on and within their traditionally owned territory that are necessary for their survival. The Court also declared that the State may restrict this right by granting concessions for the exploration and extraction of natural resources only when such restriction does not deny the Saramaka's survival as a tribal people. In this respect, the State must abide by three safeguards: first, effective consultations in every event, and free, prior and informed consent in connection with development and investment projects having major impacts; second, a sharing of benefits derived from development plans, and; third, prior and independent environmental and social impact assessment.
- The Inter-American Court of Human Rights has routinely found that both the private property of individuals and communal property of the members of indigenous communities are protected by Article 21 of the American Convention on Human Rights." The Court explicitly observed that its consistent jurisprudence is, "based upon the special relationship that members of indigenous and tribal peoples have with their territory, and on the need to protect their right to that territory in order to safeguard the physical and cultural survival of such peoples."⁴⁵

⁴³ http://www.ciel.org/Publications/PIC_PerraultOliva_Apr05.pdf

⁴⁴ *Case of the Saramaka People v. Suriname, Judgment (Preliminary Objections, Merits, Reparations, and Costs)* <http://www.corteidh.org>. Inter-American Court of Human Rights, November 28, 2007.

⁴⁵ *Id.*

c. “General Acceptance of the Rights”

The basic human rights treaties are widely accepted. For example, the International Covenant on Economic, Social, and Cultural Rights, with 160 parties; the International Covenant on Civil and Political Rights with 164 parties. Other instruments have also received wide support; UNDRIP for example was adopted by the General Assembly with 143 nations supporting it. The Convention on Biological Diversity, cited above with regard to the rights of local communities, has 191 parties.

Other treaties may have a smaller number of ratifying parties but are ratified by important States in the topical area. For instance, International Labor Organization Convention No. 169 only has 20 parties, but those countries have significant indigenous populations.

Regardless of whether an instrument is or is not generally accepted, the rights recognized by it may enjoy international recognition, independently of the status of the instrument. For example, a country might recognize a specific norm but not generally accept the instrument for other reasons. This being said, even when a principle or right is established as customary international law, the principle or right might not be opposable to a country which has persistently objected to it.

Possible Objectors. United States, Canada, New Zealand, and Australia voted against UNDRIP, the only objectors out of 147 voting countries.⁴⁶ Despite the Declaration’s granting of the right of participation, local and indigenous communities have largely felt excluded from the negotiations concerning REDD at the UNFCCC.⁴⁷ At the 14th Conference of the Parties of the UNFCCC, many had expected the Draft Conclusions of Agenda Item 5 (Reducing emissions from deforestation in developing countries: approaches to stimulate action) to include a reference recognizing the rights of indigenous peoples. Although it did recognize the value of encouraging participation by indigenous peoples, it “removed any references to rights of indigenous peoples and the UNDRIP.” The removal of the reference to rights was fought for by the USA, Australia, Canada, and New Zealand – the same states which declined to adopt the UNDRIP in the UN General Assembly during 2008.⁴⁸

Despite the United States and Canada’s opposition to the UNDRIP, they are members of the eight-country Arctic Council. The Arctic Council includes Permanent Participants which are six international organizations representing indigenous peoples, and the Council has an Indigenous Peoples’ Secretariat. The Arctic Council is the first intergovernmental group to give this influential of a status to indigenous organizations and to guarantee indigenous input into

⁴⁶ UN adopts Declaration on the Rights of Indigenous Peoples, 20 September 2007; <http://www.bicusa.org/en/Article.3495.aspx>.

⁴⁷ http://unfccc.int/files/methods_science/redd/application/pdf/final_version_redd_and_communities_briefing.pdf.

⁴⁸ http://unfccc.int/files/meetings/cop_14/press/application/pdf/climate_change_talks_end_with_progress.pdf; Victoria Tauli-Corpus, International Human Rights Day 2008: A Sad Day for Indigenous Peoples, TEBTEBBA (Indigenous Peoples' International Centre for Policy Research and Education), UN Permanent Forum on Indigenous Issues (Dec. 2008), available at <http://www.iwgia.org/sw31946.asp>.

Arctic Council work.⁴⁹ This apparent recognition by the United States and Canada of the right to participation could undermine their objections in this respect.

3. LEGAL RELEVANCE AND LIMITATIONS OF CROSS-REFERENCING INTERNATIONAL INSTRUMENTS REGARDING THE RIGHTS OF INDIGENOUS AND LOCAL COMMUNITIES

a. What is the impact of introducing into the UNFCCC a cross-reference to an international instrument?

Cross-reference establishes a certain degree of interaction between the treaty where the cross-reference occurs and the referenced treaty. Cross-referencing can achieve several objectives, including amending an existing treaty, defining the scope of the treaty, or enhancing the authority to the treaty. The objective pursued by the cross-reference will determine where and how the cross-reference is made. In turn, the impact of the cross-reference will be determined by where in the treaty and how the cross-reference is made. Generally, the following options for cross-referencing can be identified.

Preamble

Several treaties allude to other treaties in their preamble. For example, the Convention on the Conservation of Antarctic Marine Living Resources of 1982 (CCAMLR), refers to the Antarctic Treaty.⁵⁰ Similarly, the Energy Charter Treaty (ECT), signed in 1994, references several treaties, such as the United Nations Framework Convention on Climate Change (UNFCCC), the UN Treaty on the Non-Proliferation of Nuclear Weapons (NPT) and the General Agreement on Tariffs and Trade (GATT).⁵¹

Despite their commonality, the CCAMLR and the ECT use different approaches to cross-referencing in the preamble. The ECT alludes to the various treaties in their entirety, thus emphasizing their global significance, while the CCAMLR refers to specific dispositions of the Antarctic Treaty. For example, the CCAMLR's preamble directly refers to article IX, paragraph 1(f) of the Antarctic Treaty. Those provisions are directly related to the purpose of the CCAMLR treaty, as they concern "the preservation and conservation of living resources in Antarctica."

Cross-referencing treaties in preambles usually aims at, and has the effect of, assisting with the interpretation of a treaty. By referring to existing treaties, the Parties will indicate the instruments they have taken into account in their negotiations. Given its emphasis on treaty interpretation, cross-referencing in a preamble does not establish legally binding obligations. For this latter effect to occur, cross-referencing needs to be made within the operative clauses of the

⁴⁹ <http://www.arcticpeoples.org/arctic-council/>.

⁵⁰ The Convention on the Conservation of Antarctic Marine Living Resources, CCAMLR, 1982 at preamble, available at http://www.ccamlr.org/pu/e/e_pubs/bd/pt1.pdf,

⁵¹ Energy Charter Treaty, ECT, 1994, English version available at http://www.encharter.org/fileadmin/user_upload/document/EN.pdf

treaty. Nevertheless, cross-referencing treaties in the preamble is not devoid of importance to threading coherence and mutual supportiveness to the interaction of various international instruments, given the importance of the interpretative process in ascertaining meaning of legal texts.

Definition of terms

It is not unusual for treaties to define the legal terms they use. At times, the definition of terms is done by cross-referencing other treaties. For example, article 1(1)(c) of the Agreement for the implementation of the provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the conservation and management of straddling fish stocks and highly migratory fish stocks,⁵² relies on the definition of “sedentary species” provided in article 77 of the UN Convention on the Law of the Sea⁵³ in order to define the meaning of term “fish.”

Scope

A treaty’s scope may be defined with the help of another treaty. For example, the Kyoto Protocol to the UNFCCC refers to the Montreal Protocol on Substances that Deplete the Ozone Layer in order to determine its scope.⁵⁴ Article 2 of the Kyoto Protocol refers four times to the Montreal Protocol, stressing that the Kyoto Protocol regulates the emission of greenhouses gases that are not regulated by the Montreal Protocol. For example:

“1. Each Party included in Annex I, in achieving its quantified emission limitation and reduction commitments under Article 3, in order to promote sustainable development, shall:

- (a) Implement and/or further elaborate policies and measures in accordance with its national circumstances, such as:
- (ii) Protection and enhancement of sinks and reservoirs of greenhouse gases not controlled by the Montreal Protocol, taking into account its commitments under relevant international environmental agreements; promotion of sustainable forest management practices, afforestation and reforestation;”

This type of provision establishes a real interaction between the two treaties. In order to fully determine the impacts of a cross-reference relating to the scope of the treaty, it is important to ascertain the scope and coverage of the referenced treaty.

At least two legal consequences flow from this type of cross-reference, as illustrated by this example. First, by excluding the Montreal Protocol from its scope, the Kyoto Protocol delineates the difference of the two instruments and allows for their complementary application, thus enhancing potential synergies and effectiveness. Second, by defining its scope in light of

⁵² Agreement for the implementation of the provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the conservation and management of straddling fish stocks and highly migratory fish stocks, UN doc. A/ CONF 164/37, available at http://www.un.org/Depts/los/convention_agreements/texts/fish_stocks_agreement/CONF164_37.htm

⁵³ The United Nations Convention on the Law of the Sea, LOSC,1982, article 77 available at http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf

⁵⁴ Kyoto Protocol, 1992, article 2, available at <http://unfccc.int/resource/docs/convkp/kpeng.pdf>

the Montreal Protocol's coverage, the Kyoto Protocol does not import obligations from the Montreal Protocol. In other words, this type of cross-reference relating to scope does not render the obligations in the Montreal Protocol legally binding upon the Parties to the Kyoto Protocol.

Cross-referencing a Legal Obligation

A cross-reference can also have the aim and effect of importing a legal obligation from the referenced instrument, or defining an obligation's content in relation to the obligations contained in the referenced instrument. For example, CCAMLR article III directly refers to the Antarctic Treaty, with the objective of making certain provisions of the referenced treaty legally binding on CCAMLR parties:

“The Contracting Parties, whether or not they are Parties to the Antarctic Treaty, agree that they will not engage in any activities in the Antarctic Treaty area contrary to the principles and purposes of that Treaty and that, in their relations with each other, they are bound by the obligations contained in Articles I and V of the Antarctic Treaty.”

Accordingly, article III of the CCAMLR prevents contracting parties from doing anything “contrary” to the Antarctic Treaty, regardless of whether or not they are parties to the Antarctic Treaty. Moreover, article III directly provides that contracting parties are “bound by the obligations contained in articles I and V of the Antarctic Treaty.” Clearly, this provision (cross-reference) has the aim and effect of importing a legal obligation into CCAMLR from the Antarctic Treaty. It achieves this effect by the use of explicit language to the effect, including reference to particular provisions in the referenced instrument.

Other examples use less direct and explicit language to cross-reference obligations and standards. The United Nations Convention on the Law of the Sea (LOSC), for instance, utilizes an open-textured formulation to define the duties of vessels and aircraft in transit in international straits:

2. Ships in transit passage shall:

- (a) comply with generally accepted international regulations, procedures and practices for safety at sea, including the International Regulations for Preventing Collisions at Sea;
- (b) comply with generally accepted international regulations, procedures and practices for the prevention, reduction and control of pollution from ships.

3. Aircraft in transit passage shall:

- (a) observe the Rules of the Air established by the International Civil Aviation Organization as they apply to civil aircraft; state aircraft will normally comply with such safety measures and will at all times operate with due regard for the safety of navigation;⁵⁵

These provisions do not cross-reference a specific provision from another treaty, and nevertheless have a similar legal effect: LOSC imports generally accepted international regulations, procedures and practices for safety at sea (*e.g.*, SOLAS) and for the prevention,

⁵⁵ The United Nations Convention on the Law of the Sea, LOSC, 1982 (article 39(2), available at <http://www.un.org/Depts/los/index.htm>)

reduction and control of pollution from ships (*e.g.*, MARPOL). These regulations, procedures and practices become binding on LOSC Parties, regardless of whether LOSC Parties have also ratified SOLAS or MARPOL.

Replacing a treaty with another treaty

Cross-referencing can pursue the objective of amending or replacing a treaty. The following two examples illustrate where international conventions have had the legal consequences of replacing a treaty with a new one. The International Convention for the Prevention of Pollution from ships of 1973 has been replaced by its Protocol of 1978.⁵⁶ The convention of 1973 is now known as the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto (MARPOL).⁵⁷ The second example concerns the rights of indigenous peoples. In 1989, the International Labour Organization's Convention on Indigenous and Tribal Peoples in Independent Countries (ILO 169/1989) replaced the former ILO Convention for the "Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries," ILO 107/1957. ILO Convention 169 article 36 explicitly reads, "This Convention revises the Indigenous and Tribal Populations Convention, 1957." This cross-reference has the aim and effect of replacing Convention 107 with Convention 169.

b. Which legal instruments could be referenced by REDD and why?

Determining which treaty could be referenced by a future REDD legal instrument will depend on the kind of legal impacts sought. The framework elaborated above provides some options for cross-referencing.

Preamble

The object and purpose of the future REDD instrument should be considered in order to determine which instruments could be cross-referenced in its preamble. The UN-REDD programme aims "at tipping the economic balance in favour of sustainable management of forests so that their formidable economic, environmental and social goods and services benefit countries, communities and forest users while also contributing to important reductions in greenhouse gas emissions."⁵⁸ At least two broad clusters of issues are involved in this formulation, namely: the rights of communities and forest users and the sustainable management of forests.

⁵⁶ The International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 Relating thereto (MARPOL) available at http://www.imo.org/Conventions/contents.asp?doc_id=678&topic_id=258

⁵⁷ Cite Magraw ###

⁵⁸ See the UN-REDD Programme- Fund official website available at <http://www.undp.org/mdtf/un-redd/overview.shtml>

In this light, international instruments concerning the rights of communities and forest users could be cross-referenced in the REDD-instrument's preamble. For example, the preamble could refer to the two universal human rights covenants, *i.e.*, the International Covenant on Civil and Political Rights,⁵⁹ and the International Covenant on Economic, Social and Cultural Rights.⁶⁰ Reference to these broadly ratified treaties would anchor the vocabulary of the REDD legal instrument in widely accepted human rights norms. In addition, the preamble could refer to certain instruments elaborating on the particular rights of indigenous peoples, tribal peoples and local communities, such as ILO Convention 169, the UN Declaration on the Rights of Indigenous Peoples, and the Convention on Biological Diversity.

Definition of terms

The challenges involved in threading coherence in international law can be illustrated by the potential difficulties associated with the definition of legal terms. Since a REDD instrument has the potential to affect the rights of indigenous peoples, tribal peoples and other local communities, two basic options stand out in regard to definitional terms: (1) a REDD instrument could elaborate its own definitions; and (2) a REDD instrument could include cross-references to definitions in other instruments.

In regard to option 2 above, a REDD instrument could rely on the already agreed definitions of indigenous peoples and tribal peoples in ILO Convention 169, which addresses that subject-matter in certain detail. Article 1 of the ILO reads as follows:

1. This Convention applies to:

- (a) Tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;
- (b) Peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present State boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.

2. Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.

On the other hand, this definition may not be acceptable to UNFCCC Parties, or to the indigenous peoples in independent countries. In such case, the elaboration of a tailored definition for the purposes of a REDD-instrument could be preferred.

Cross-referencing a legal obligation

⁵⁹ International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976 available at <http://www1.umn.edu/humanrts/instree/b3ccpr.htm>

⁶⁰ International Covenant on Economic, Social and Cultural Rights, *available at* http://www.unhcr.ch/html/menu3/b/a_ceschr.htm

The determination of which particular legal norms could be imported into a REDD instrument requires careful consideration. Two observations follow in this regard.

First, generally speaking, two broad concerns relating to REDD's potential negative impacts on the rights of indigenous and tribal peoples and local communities have been raised. First, the concern that rights to land may be compromised; second, the concern that REDD policies and measures may be adopted without adequate consultations, including free and prior informed consent (FPIC). In order to address these two concerns, a cross-reference to obligations in human rights instruments safeguarding the right to property (including land and natural resources) as well as participatory rights (access to information, consultations and FPIC) could be explored.

A second general observation relates to the question of *what* could be imported into a REDD instrument. In this vein, generally speaking, three options avail:

- *a cross-reference to a whole instrument.* This option could overreach, because importing a whole instrument would encompass issues not directly related to REDD.
- *a cross-reference to generally accepted norms.* This option could address the particular concerns presented by a REDD instrument, while at the same time allowing for evolving normative developments. Still, it would suffer from a certain degree of indeterminacy.
- *a cross-reference to particular provisions in specific instruments.* Cross-referencing specific provisions could address the particular concerns that arise in connection with the potential impacts of REDD. For example, the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) adopted by the UN General Assembly in 2007 contains particular provisions on the right to land (articles 25-29) and on participatory rights (article 32):

Article 26

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

Article 32

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.
3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

Finally, another option is to elaborate original language that reflects the main elements of provisions found in other instruments, without the need for importing the other instrument. This technique has the advantage of avoiding inconsistencies while allowing for tailored approaches. This technique does not involve direct cross-referencing.

c. What is the legal consequence of cross-referencing for UNFCCC Parties that are not a party to the referenced instrument?

The analysis above shows the different impacts of cross-referencing. Generally, the legal consequence of cross-referencing for UNFCCC Parties will depend on how it is made and what is cross-referenced. If the cross-reference concerns the preamble, the referred instrument will assist in the interpretation process. If the cross-reference concerns scope, the referred instrument will not become binding on UNFCCC Parties, but it will define the scope of the REDD instrument. If the cross-reference concerns definitional terms, those definitions will become binding on UNFCCC Parties, regardless of whether they are or not a party to the referred instrument. Finally, if the cross-reference imports legal obligations, those obligations will bind UNFCCC Parties, regardless of their acceptance of the referred instrument.

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