

The Crossing Point between REDD and Indigenous Peoples' Stewardship Rights

An Ethical Perspective



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List of Abbreviations and Acronyms

ACHPR	African Commission on Human and Peoples' Rights
ACHR	American Convention on Human Rights
ADB	African Development Bank
ADRDM	American Declaration of the Rights and Duties of Man
AO	Advisory Opinion
AWG-LCA	Ad Hoc Working Group on Long-Term Cooperative Action
CBFF	Congo Basin Forest Fund
CBFF Guidance Notes	CBFF Guidance Notes for Completing of Concept Note
CC	Climate Change
CELDF	Community Environmental Legal Defence Fund
CERD	Committee on the Elimination of Racial Discrimination
CIL	Customary International Law
COP	Conference of the Parties
CPP	Consultation and Participation Plan
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms
FAO	Food and Agriculture Organization
FCPF	Forest Carbon Partnership Facility
FCPF Guidance Note	Forest Carbon Partnership Facility Guidance Note on Consultation and Participation
FPIC	Free, Prior and Informed Consent
FPICon	Free, Prior and Informed Consultation
GC	General Comment
GR	General Recommendation
Handbook	Handbook on Stakeholder Consultation and Participation in African Development Bank Operations
HRC	Human Rights Committee
IACHR	Inter-American Commission on Human Rights

IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
IEL	International Environmental Law
IHRL	International Human Rights Law
ILA	International Law Association
ILO No. 169	International Labour Organization Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries
IPs	Indigenous Peoples
IUCN	International Union for Conservation of Nature
NJP	National Joint Plan
OAS	Organization of American States
OP	Operational Policies
OP 4.10	WB Operational Policy 4.10- Indigenous Peoples
PC	Participants Committee
PCIJ	Permanent Court of International Justice
REDD	Reducing Emissions from Deforestation and Forest Degradation in Developing Countries
REDD+	Reducing Emissions from Deforestation and Forest Degradation in Developing Countries, the Role of Conservation, Sustainable Management of Forests and Enhancement of Forest Carbon Sinks
R-PP	Readiness Preparation Proposal
SBSTA	Subsidiary Body for Scientific and Technological Advice
SESA	Strategic Environmental and Social Assessment
Tabtebba	Indigenous Peoples' International Centre for Policy Research and Education

TAP	Technical Advisory Panel
UNCTs	United Nations Country Teams
UNDG	United Nations Development Group
UNDG-GIPI	United Nations Development Group Guidelines on Indigenous Peoples' Issues
UNDP	United Nations Development Programme
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNEP	United Nations Environment Programme
UNFCCC	United Nations Framework Convention on Climate Change
UNFF	United Nations Forum on Forests
UNPFII	United Nations Permanent Forum on Indigenous Issues
UN-REDD FD	UN-REDD Programme Framework Document
UN-REDD OG	UN-REDD Programme Operational Guidance: Engagement of Indigenous Peoples and Other Forest Dependent Communities
UN-REDD Programme	UN Collaborative Programme on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries
WWF	World Wildlife Fund

1 Introduction

Reducing emissions from deforestation and forest degradation in developing countries (REDD) is a climate change (CC) mitigation mechanism addressing the current environmental crisis by increasing the value of standing forests. Forests are simultaneously the home of millions of indigenous peoples (IPs) who often find themselves in a marginalized position. IPs' rights have been frequently addressed in international and national law by emphasizing their intimate relationship to nature. The relationship could be translated into a stewardship worldview, which provides the ethical dimension of IPs' rights. Hence my choice to frame IPs' rights as stewardship rights. A stewardship framework is particularly relevant in relation to international environmental law. This is because a new ethical approach towards environmental law regulation is gradually emerging and could be detected in some trends in international and national law. It is seen by some commentators¹ as the effective way to manage and response to the current global environmental crisis.

The stewardship framework represents the crossing point between IPs' rights protection and environmental policies. It represents an ethical worldview that could provide a means for reconciling possible conflicts, as well as harmonizing both fields of public international law: international environmental law (IEL) and international human rights law (IHRL) with respect to IPs' rights.

REDD is an example of where environmental policies and IPs' rights could meet, with the possible outcomes of either clash or complementarity. It provides the opportunity for a stewardship ethical worldview, where the environment and IPs' rights are protected simultaneously, to be realized. But is it really this way? Is REDD shaping to be a more tangible realization of the stewardship role of IPs and their rights underpinned by it?

¹ Taylor (1998), throughout the book

2 Defining stewardship

Stewardship is a concept, an ethical worldview, developed in several discourses. Even though there is a degree of overlap, the discourses can be roughly outlined as stewardship in the context of IPs' worldview and their rights, western environmental ethical philosophies, and stewardship as the ethical imperative of some western public policies² or the ethical aspect of sustainability in particular³. A brief discussion of each follows.

2.1 Stewardship as a concept embodying traditional/indigenous environmental ethics

As such stewardship could be expressed in terms of a worldview regarding environmental values and duties⁴. It is a set of values and beliefs relating to the environment⁵ where the resulting relationship has a sustainable character. This sustainable relationship to nature is well documented in many places and can be accepted as the prevailing general situation⁶. Special Rapporteur Daes also highlights that the relationship with the land and all living things is at the core of indigenous societies⁷. Many

² Skene (1999), p.156

³ Tsosie (2009), p.247

⁴ Workineh (2005) p.17

⁵ Ibid.

⁶ Heinämäki (2009), p.67

⁷ Daes, E/CN.4/Sub.2/2001/21, para.13

commentators have stressed that what is common among indigenous communities is the strong connection with their lands and natural resources, as well as respect for nature⁸.

The view shared by most IPs⁹ is that those who destroy their land and resources destroy themselves, as their survival depends on the life of their land. Such a worldview stresses the circular character of life¹⁰ and the indigenous cyclical and holistic understanding of the environment¹¹. Professor Ronald Trosper's model of 'traditional Indian world views'¹² could illustrate some important aspects of traditional beliefs regarding the nature of the relationship between humans and natural environments. The model 'corresponds to central features of indigenous environmental belief systems noted by other scholars' as well¹³. According to it earth is perceived as an animate being; humans are believed to be in a kinship system with other living things; land is perceived to be essential for the identity of people; a concept of reciprocity and balance that extends to relationships among humans, including future generations, and between humans and the natural world is shared¹⁴. As the traditional understanding of the relationship with nature and future generations has such a holistic character, sustainability is seen as 'the natural result, if not the conscious goal, of deeply rooted environmental ethics and traditional land-based economies'¹⁵. Last but not least, a main feature of many indigenous worldviews is the spiritual relationship these communities have with the environment¹⁶.

The above representation's goal is not romanticizing IPs, as they have sometimes made choices contrary to it¹⁷. However, indigenous traditional ethics/lifeways argue for IPs rights and simultaneously could positively influence environmental policy.

⁸ Manus (2005), p.554

⁹ Workineh (2005), p.24: quotes Rose (1999)

¹⁰ Heinämäki (2009), p.5-7

¹¹ Tsosie (1996), p.276-283

¹² Described by Tsosie (1996), p.276-289

¹³ Ibid., p.276

¹⁴ Ibid.; Workineh (2005): regarding the Oromo people in Africa

¹⁵ Tsosie (1996), p.286-287

¹⁶ Cobo, E/CN.4/SUB.2/1986/7/ADD.4 para.196-197

¹⁷ Heinämäki (2009), p.13

The stewardship role of IPs could be seen in their traditional way of life, economy, well-being, cultural identity and traditional ecological knowledge as part of this identity. When referred to ‘rights’, stewardship can be viewed as the ethical imperative of most of those rights, providing further support to them, especially in the context of CC and environmental issues. It could be viewed as an overarching concept arguing for IPs’ rights and simultaneously offering an alternative avenue for the protection of some rights, i.e. re-conceptualizing them. Examples illustrating this are land tenure systems and the incompatibility between classical civil law approach to ownership and land rights of IPs¹⁸. Maoris’ understanding that it is impossible to possess land in the legal sense, as part of their cultural characteristics, illustrates that¹⁹. ‘Human beings belong to the land and not the land to human beings’²⁰. There are suggestions for the development of a stewardship claim for damages suffered by indigenous communities as a result of the impacts of CC²¹. However, some of the proposed solutions to CC could also be problematic. Adaptation and mitigation measures could negatively affect the effective enjoyment of human rights and indigenous environmental interests. REDD is such a mitigation mechanism.

2.2 Environmental ethical philosophies/ecocentrism

Different environmental philosophies, that reflect the core ideas of stewardship, come as alternatives to the prevailing anthropocentric environmental ethic. There are some ethical approaches, which come under the heading of ‘ecocentrism’²². What is common is the concern with wholeness, with relationships between organisms and with the healthy

¹⁸ Kreimer (2003), p.13

¹⁹ Bosselmann (1995), p.130

²⁰ Ibid.

²¹ Rampersad (2009), throughout the article

²² Taylor (1998), p.35, 44 for review

interaction of all components of ecosystems²³. Protection is sought irrespective of species, populations, habitats and ecosystems' instrumental value or importance to humanity²⁴.

The anthropocentric ethic, dominating western thinking and policy, is seen as the root cause for the global environmental crisis as humanity behaves in 'apparent disregard for ecological reality'²⁵. Such a value system reflects a different relationship of human beings with nature, compared to the stewardship worldview. 'In short, it is said that humanity perceives itself as separate from and superior to nature, nature being the dominion of humanity'²⁶. The origins of the anthropocentric ethic are disputed but they are often linked to the Judaeo-Christian religious tradition²⁷. The response to it is the development of a new ecocentric ethic, which relates to traditional worldviews and the perceived stewardship role of IPs. The main features of ecocentrism are²⁸:

- Reflection of the biotic reality of interdependence/interaction and interconnectedness (i.e., the delicate balance of nature; humanity as part of nature, not separate or superior; and the impact of human activity)
- Recognition of the inherent value of nature
- Intergenerational equity (i.e., between all species, not just humanity)
- Recognition of humanity's special relationship with nature.

Prue Taylor offers a basic formulation of stewardship as a concept that 'implies active concern and care, in the interests of all life, not in the superior interests of humanity'²⁹. In this special relationship with nature humanity is viewed as a steward. It has a special role to play not because of any inherent superior interest but because of its ability

²³ Ibid., p.35

²⁴ Ibid., p.35

²⁵ Ibid., p.29

²⁶ Ibid., p.29

²⁷ Ibid., p.29-30

²⁸ Ibid., p.36,43

²⁹ Ibid., p.302

to perform the role- both harm and protect nature³⁰. Stewardship suggests interaction, not imposition of authority. It is proposed that in developing stewardship, we can draw from the experience and meaning given to comparable concepts by IP³¹.

An example of where indigenous environmental ethics meet with changing western attitudes in order to be reflected in a normative act is the New Zealand Resource Management Act 1991³², which includes the Maori concept of 'kaitiakitanga'. It is expressly stated that the concept includes 'an ethic of stewardship'. The same is reflected in the Foreshore and Seabed Act 2004³³. Klaus Bosselmann elaborates on the meaning and defines it as 'managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic and cultural well-being while sustaining the potential of natural and physical resources to meet the reasonably foreseeable needs of future generations.'³⁴ Another example is the inclusion of the Maori word 'Mauri', which has no equivalent in any Western language, and addresses the 'life force' or the 'life principle' signifying the intrinsic value of nature, i.e. value in its own right, which is legally protected. 'Those two concepts are part of the New Zealand legal and administrative system'³⁵.

This shows the importance of such an ethical discussion in the context of international law. Social standards, attitudes and values are reflected in law and are most clearly expressed in environmental programmes and laws³⁶.

Significantly, the anthropocentric ethic has been identified as the prevailing approach in IEL³⁷. Taylor's analysis demonstrates this most clearly in the analysis of the concept of territorial sovereignty. Supporters of ecocentrism claim that the anthropocentric ethic reflected in IEL only perpetuates the environmental crisis and envisaged responses to

³⁰ Ibid., p.303

³¹ Ibid., p.302

³² Public Act No69

³³ Public Act No93

³⁴ Bosselmann (1995), p.133

³⁵ Ibid.

³⁶ Taylor (1998), p.42: quotes Bosselmann

³⁷ Ibid., throughout the book

environmental problems only suppress the symptoms³⁸. They call for an ecocentric paradigm shift where recognition of both human interests and nature's intrinsic value could lead to readjustment of the parameters of decision-making, for making evaluations and resolving conflicts, i.e. leading to balancing conflicting interests³⁹.

In this sense the stewardship framework could provide a way for structuring environmental policy like REDD so that it protects simultaneously the intrinsic value of nature, the rights and interests of IPs inhabiting it, balancing them with the interests of states. Moreover, IPs have traditionally had a balanced relationship with nature, something which is gradually embraced by the wider humanity, signalling a slow change in consciousness⁴⁰, reflected in some legal developments around the world. Furthermore such environmental ethic calls for redefining certain concepts in international law with direct relevance to REDD that are of great significance for both IPs and for states' regulation of environmental issues. Examples (e.g. property rights, state sovereignty) would be discussed below. As proposed by Taylor, ecocentrism can provide a new conceptual foundation for, and be translated into a new principle of IEL⁴¹.

2.3 Stewardship as the ethical imperative of some western public policies or the ethical aspect of sustainability

The third discourse is closely related to the discussion of various environmental ethics. The discussed ethical dimensions sometimes become the ethical imperative of some public policies (even though the meaning does not always coincide) or of legal principles as sustainability, which is evidence in itself of the above mentioned paradigm change. However, such change could be qualified as fragmented. Until today the ethical context of

³⁸ Ibid., p.42

³⁹ Ibid., p.38

⁴⁰ Ibid., p.42, 45

⁴¹ Ibid., p.43

sustainability in the western world is still considered the least developed part of public policy. Political and economic contexts continue to prevail⁴².

These different discourses overlap to the extent that stewardship as a concept signifies the nature of the relationship between human beings and the natural environments, emphasizing their interconnectedness. Sustainability is a main characteristic of the relationship; a guiding principle in international law⁴³, international and national policy development; and an integrated part of traditional way of life of IPs. In the case of IPs, the nature of their relationship with the environment is a core element of their identity⁴⁴. That's an important point because over the past century domestic and international law have addressed the status of IPs and their authority in terms of that relationship⁴⁵.

⁴² Tsosie (2009), p.247-248

⁴³ Voigt (2009), Chapter 6

⁴⁴ Manus (2005), p.554

⁴⁵ Ibid., p.558

3 Introduction to and current normative framework of REDD

After the failure of including avoided deforestation in the Kyoto Protocol, the issue was raised in 2005 by the Coalition of Rainforest Nations led by Papua New Guinea and Costa Rica and included as a key issue on the agenda of the meeting in Bali in 2007⁴⁶. The Bali action plan initiated the launching of a comprehensive process to address enhanced mitigation action, both on national and international level, on CC, including, inter alia, consideration of ‘policy approaches and positive incentives on issues relating to reducing emissions from deforestation and forest degradation in developing countries; and the role of conservation, sustainable management of forests and enhancement of forest carbon stocks in developing countries’⁴⁷. A subsidiary body under the UN Framework Convention on Climate Change⁴⁸ to conduct this process was established: Ad Hoc Working Group on Long-term Cooperative Action under the Convention (AWG-LCA)⁴⁹. Subsequently there were high hopes held that the meeting in Copenhagen (15th session of the Conference of the Parties (COP)), December 2009 would possibly result in ‘the grandest environmental agreement in history’⁵⁰. However, the negotiations did not result in anything solid regulating REDD. The main documents produced, relevant to our discussion, are the Copenhagen Accord⁵¹ addressing more specifically the so called “REDD+” and the work undertaken by the COP at its fifteenth session on the basis of the report of the AWG-LCA under the Convention⁵².

⁴⁶ Powers (2009), p.88

⁴⁷ UNFCCC Decision 1/CP.13, par.1 (b) (iii)

⁴⁸ UNFCCC, 1992-05-09

⁴⁹ Ibid., para.2

⁵⁰ Powers (2009), p.82

⁵¹ FCCC/CP/2009/11/Add.1

⁵² FCCC/CP/2010/2

In a nutshell, REDD is conceived to be a mitigation mechanism in the context of CC whose purpose is to address approximately 20% of the global greenhouse gas emissions due to different forms of deforestation and forest degradation in developing countries such as agricultural expansion, conversion to pastureland, infrastructure development, destructive logging, fires, etc., that is more than the entire global transportation sector, and second only to the energy sector⁵³. As defined by the UN, REDD is "...[a]n effort to create a financial value for the carbon stored in forests, offering incentives for developing countries to reduce emissions from forested lands and invest in low-carbon paths to sustainable development. 'REDD+' goes beyond deforestation and forest degradation, and includes the role of conservation, sustainable management of forests and enhancement of forest carbon stocks."⁵⁴ The measure should be realized with the development and implementation of national programmes or national action plans, thus respecting the principle of sovereignty, and simultaneously respecting international obligations, as well as promoting and supporting certain safeguards⁵⁵. Some of the main issues countries would be dealing with are national forest governance structure, land tenure issues, establishing base reference levels, forest monitoring systems, reporting emissions, sustainable forest management systems. One of the contentious questions is that of the financial mechanism that would be serving REDD, would it be a fund-based mechanism (e.g. Brazil), market-based mechanism (Costa Rica and Papa New Guinea's suggestion) or a combination of both (Norway)?

There are three main multilateral forums currently addressing the issue of REDD: the UN-REDD Programme, the Congo Basin Forest Fund and the Forest Carbon Partnership Facility.

⁵³ UN-REDD Programme Framework Document (UN-REDD FD),p.1

⁵⁴ <http://www.un-redd.org/AboutREDD/tabid/582/language/en-US/Default.aspx>

⁵⁵ FCCC/CP/2010/2, Anex V, para.2

4 Analysis of international human rights law and international environmental law's normative framework: to what extent is the stewardship ethic in protecting indigenous peoples' rights reflected there?

4.1 Why is the relationship with nature so important to IPs? What are its implications for indigenous communities' rights?

Indigenous peoples' intimate relationship with the surrounding environment is at the core of their being. It underpins indigenous communities' survival, development, economy, well-being and cultural integrity. Traditional stewardship worldview is essential as it determines the workings of indigenous societies. IPs depend on the environment for their physical and psychological survival, for their social and economic well-being. Their economic activities, often expressed in subsistence economy, provide for both food/shelter and cultural expression. Such activities are subjected to the stewardship ethic so that indigenous development and well-being do not compromise the harmony with nature. The harmonious relationship with nature is in turn an indicator of a healthy indigenous community. The modes of interaction with nature characterize IPs' culture and lifeways. The accumulation of traditional knowledge (as a cultural expression) is based on that relationship and has helped to either maintain it or to adapt to environmental changes.

The harmonious co-existence with the environment has a fundamental and all-encompassing character for indigenous societies. Many IPs are '...the product of the physical environment in which they live'⁵⁶. They both depend on it and maintain it in a sustainable way as it is the source of their existence. For example, the Inuit have developed

⁵⁶ Inuit Circumpolar Conference Petition to the Inter-American Commission on Human Rights (2005), p.9

an intimate relationship with their arctic surroundings, which allows them to ‘thrive on scarce resources’⁵⁷. It characterizes their culture, economy and identity, making them all dependent on snow and ice conditions⁵⁸. ‘*All aspects of the Inuit’s lives* depend on their culture, and the continued viability of the culture depends in turn on the Inuit’s reliance on the snow, ice, land and weather conditions in the Arctic’ (emphasis added)⁵⁹. Changes in the environment have far reaching repercussions. Thus changes in snow, ice, land and weather conditions (e.g. rising temperatures, thinning ice, thawing permafrost, etc.) have had a ‘domino effect’, negatively impacting various dimensions of Inuit’s lives: undermining safety and quality of traveling and harvesting as vital components of Inuit’s standard of living, subsistence economy, way of life and culture⁶⁰; inability to pass traditional knowledge (e.g. igloo building, weather patterns, food storage), its gradual loss and diminished role of elders in younger generations’ lives⁶¹; changed distribution, reduced quality and availability of game leading to changes in traditional Inuit diet and health risks; mental health effects due to unpredictability and stress⁶² etc.

The above discussion illustrates that the inability to maintain a traditional sustainable relationship with the surrounding environment impacts on a wide range of IPs’ rights. Thus, it is argued that stewardship rights are a broad concept, which extends beyond IP’s environmental interests. Furthermore it covers both substantive and procedural requirements necessary for the realization of IP’s stewardship role. It includes the right to cultural integrity, rights to traditional lands, territories and resources, and a right to development and social welfare in accordance with own aspirations. These rights are made meaningful through the realization of the right to self-determination (in its both political and cultural aspects) and the procedural requirements of active engagement and full participation of IPs in all matters affecting them. The culmination of the procedural aspect

⁵⁷ Ibid.

⁵⁸ Ibid.

⁵⁹ Ibid., p.43

⁶⁰ Ibid., p.25, 66

⁶¹ Ibid., p.56

⁶² Ibid., p.62-63, 71

is expressed in the right to be asked for their free, prior and informed consent (FPIC) in such decisions.

4.2 Stewardship rights of indigenous peoples in IHRL

A stewardship ethical framework for supporting IPs' rights in the context of CC could be argued and inferred from existing public international law regulation, mainly in two of its branches which offer protection of IPs' rights: IHRL and IEL. Such a framework is particularly relevant to the design and implementation of REDD as it brings forward IPs' relationship with forests and forests' value to them.

On a general note, international human rights instruments are of a great importance for the protection of IPs' rights. Protection is provided through three main channels: general, minority protection and specific⁶³. The full range of human rights accrues to IPs based on the general principles of universality, equality and non-discrimination. However, most IHR instruments protect the rights of the individual, which is insufficient for the survival, well-being and dignity of IPs as distinct collectives⁶⁴. Subsequently, there has been a lot of effort (in the international community, UN agencies, the IPs themselves) in promoting the collective rights of IPs which has resulted in the adoption of the UNDRIP.

The second limitation is that IHR law deals with rights of individuals who are members of a non-dominant group endowed with rights considered essential for dominant group members and whose definition and conception is not necessarily compatible with indigenous culture, e.g. property rights and ownership⁶⁵. Another drawback is associated with the minority protection approach. IPs' advocates reject such an approach as they aim at establishing a separate regime for IPs that offers greater legal entitlements⁶⁶.

⁶³ United Nations Declaration on the Rights of Indigenous Peoples (UNGA, 2007-10-2, A/RES/61/295) (hereinafter UNDRIP)

⁶⁴ UN Development Group Guidelines on Indigenous Peoples' Issues (2008) (hereinafter UNDG-GIPI)

⁶⁵ Manus (2005), p.567

⁶⁶ Anaya (2004), p.133

IPs' rights that are underpinned by the concept of stewardship could include a different range of civil and political rights, as well as economic, social and cultural rights. It would be seen that IPs' rights, identity and status revolve around their stewardship role, i.e. their traditional balanced relationship with the environment. This core idea, developed throughout the thesis, is confirmed by the UN Permanent Forum on Indigenous Issues (UNPFII). 'Indigenous peoples have an intricate relationship with their lands, environment, territories and resources. This relationship is the very basis of their economic, social and cultural systems, their ecological knowledge and their identities as distinct peoples'⁶⁷.

4.2.1 Self-determination and various substantive and procedural norms furnishing the right

First and foremost is the right to self-determination contained in art.1 of the UN Charter⁶⁸ and art.1 in both International Covenant on Civil and Political Rights⁶⁹ and International Covenant on Economic, Social and Cultural Rights⁷⁰. It is also expressed as a principle of international law in the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations⁷¹.

Self-determination has been a highly controversial right as states have always been cautious regarding its inclusion, interpretation and the possibility of cession. Hence the preoccupation of states and different bodies to underline that the territorial integrity and political unity of sovereign and independent States cannot be affected⁷². In IPs' views this right is expressed in their desires to determine their own development, well-being and future in accordance with their ways of life and culture⁷³.

⁶⁷ E/C.19/2008/10, para.42

⁶⁸ Charter of the United Nations, 1945-06-26

⁶⁹ ICCPR, 1966-12-16

⁷⁰ ICESCR, 1966-12-16

⁷¹ UNGA Res.2625 (XXV), 1970-10-24

⁷² E.g. CERD GR No 21: para.6; UNDRIP: art.46 (1)

⁷³ UNDG-GIPI, p.14

It is accepted that the right to self-determination in its external dimension (i.e. secession) is accepted in cases of colonial domination, foreign military occupation, and denial of full access to government in a sovereign State or gross and systematic violations of human rights⁷⁴. The right to self-determination, as embodied in art.1, common to the two 1966 UN Covenants on Human Rights, confers on peoples the right to internal self-determination⁷⁵. That is the right to freely determine their political status and freely pursue their economic, social and cultural development (art.1 par.1 ICCPR and ICESCR)⁷⁶. The right is fulfilled within the borders of a State whose government represents the whole of the peoples resident within its territory and their will⁷⁷.

Other commentators do not necessarily distinguish between the two aspects of self-determination. Professor James Anaya, with particular reference to IPs, groups the international norms (in both IHRL and IEL), which elaborate upon the requirements of self-determination into five categories: non-discrimination, cultural integrity, lands and resources, social welfare and development, and self-government⁷⁸.

The non-discrimination norm upholds not just equal rights among individuals but also the right of indigenous groups to maintain and freely develop their cultural identity⁷⁹. The preservation of IPs' culture and historical identity is explicitly made dependent on their relationship with traditional lands and resources, which as a result of still continuing discrimination have been lost to colonists, commercial companies and state enterprises⁸⁰.

The right to cultural integrity could be followed through numerous instruments⁸¹. A provision of special significance to IPs' stewardship rights is art.27 of ICCPR that secures a

⁷⁴ Cassese (2005), p.61-68

⁷⁵ Ibid., p.62

⁷⁶ Note that CERD GR No.21, para.4 refers to political status when it discusses the external aspect of self-determination

⁷⁷ Reference re Secession of Quebec, Supreme Court of Canada, 1998-08-20, para.130

⁷⁸ Anaya (2004), p.129

⁷⁹ Ibid., p.131; CERD GR No.23, para.4; AO of PCIJ on Minority Schools in Albania

⁸⁰ CERD GR No.23, para.3

⁸¹ E.g. ECHR: art.14; Convention against Genocide, art.2; Anaya (2004), p.132-133 for review

right to culture. This is a right cognizable under the Optional Protocol and the respective individual complaints procedure⁸².

The Human Rights Committee (HRC) and the Inter-American Commission on Human Rights (IACHR) of the Organization of American States (OAS) have provided an effective and broad interpretation of art 27, which covers all aspects of an indigenous group's survival as a distinct culture⁸³. Thus culture includes economic and political institutions, land use patterns, as well as language and religious practices⁸⁴. The HRC states that culture may consist in a way of life which is closely associated with territory and use of its resources⁸⁵. This may particularly be true for indigenous peoples⁸⁶.

In its jurisprudence the HRC has interpreted the right to enjoy one's culture to include protection of land rights and use of natural resources, of economic activities (such as fishing and hunting) closely connected with traditional way of life/culture and traditional lands⁸⁷.

The IACHR has also acknowledged the essential character of the relationship of IPs with their ancestral lands⁸⁸. Article 27 of ICCPR is interpreted to cover ancestral lands and incursions on them are equalled to threat to the IPs' well-being, to their culture and traditions. In the Yanomami case (against Brazil) the IACHR invoked the norm in spite of

⁸² HRC General Comment No.23

⁸³ Anaya (2004), p.134

⁸⁴ Ibid.

⁸⁵ HRC General Comment No.23, para.7

⁸⁶ Ibid.

⁸⁷ E.g. Kitok v. Sweden, Communication No.197/1985 (1988), para.9.2 reg. reindeer husbandry; Länsman et al. cases v. Finland, Communication No.511/1992 (1994), para.9.2-9.3 reg. reindeer herding and the quality of the environment associated with it, Communication No. 671/1995 (1996), para.10.2; Apirana Mahuika et al. v. New Zealand, Communication No. 547/1993 (2000), para.9.3 reg. use or control of fisheries constitutes part of Maori culture; Lubicon Lake Band v. Canada, Communication No. 167/1984 (1990), para.32.2,33 reg. coverage of economic and social activities as the Band's survival is closely connected to the sustenance derived from the land; Lovelace v. Canada, Communication No. 24/1977 (1981), para.15 reg. the right to live in a reserve

⁸⁸ Case No 7964 Nicaragua, Inter-Am. C.H.R (1983); Case No7615 Brazil, Inter-Am. C.H.R (1985)

the fact that Brazil was not a party to the treaty⁸⁹. Thus some commentators argue that international practice manifests convergence in opinions and expectations that are in accord with this broad interpretation of the norm of cultural integrity, which can be understood as constituting customary international law (CIL)⁹⁰.

Special rapporteurs (Martin Cobo and Erica-Irene A.Daes)⁹¹ have also stressed the ‘profound relationship’ IPs have with their lands, territories and natural resources. The importance of land and resources to the survival of indigenous cultures ‘follows from indigenous peoples’ articulated ideas of communal stewardship over land and a deeply felt spiritual and emotional nexus with the earth and its fruits’⁹².

Furthermore traditional lands and resources ensure economic viability and development of communities⁹³. IPs cannot be deprived of their own means of subsistence as part of their right to self-determination: they may freely dispose of their natural wealth and resources (art.1 para.2 of ICCPR and ICESCR). Subsequently the concept of property comes in question. As a result of the modern notions of cultural integrity, non-discrimination (between property forms arising from traditional or customary land tenure of IPs and the property regimes created by the dominant society) and self-determination IPs’ land and resource rights are affirmed⁹⁴.

Thus the harmonious relationship of IPs with the environment and its importance to their survival and identity has supported the protection of their rights. It has helped the re-conceptualization of the right to property (at international level) to include IPs land rights regardless of a prior state’s recognition or title within the applicable domestic legal system⁹⁵.

⁸⁹ Anaya (2004), p.134

⁹⁰ Ibid., p.137

⁹¹ Daes, E/CN.4/Sub.2/2001/21, para.12; Cobo, E/CN.4/SUB.2/1986/7/ADD.4 para.196-197

⁹² Anaya (2004), p.141

⁹³ Ibid.

⁹⁴ Ibid., p.142

⁹⁵ Ibid., p. 145-148, 171-footnote 131

The IACHR and the Inter-American Court of Human Rights' (IACtHR) jurisprudence is indicative of such an evolutionary interpretation of the human right to property as contained in art.23 of the American Declaration of the Rights and Duties of Man (ADRDM)⁹⁶ and art.21 in the American Convention on Human Rights (ACHR)⁹⁷. It also points to CIL formation. For instance, in the *Awas Tingni Case* the IACtHR accepted the position of the Commission on the emerging international consensus on the rights of IPs to their traditional lands, which are considered a matter of CIL⁹⁸. The two bodies of the OAS have interpreted the concept of property to include the right of indigenous communities to communal property to traditional lands and the resources found on and within indigenous territories necessary for the survival, development and continuation of IPs' way of life without the necessity of being officially recognized by the State⁹⁹. Based on the interpretation of other international instruments like ICCPR, ILO Convention No.169¹⁰⁰, UNDRIP¹⁰¹ and the extraction of 'general international legal principles' governing interests of IPs¹⁰² the right accrues even in cases where domestic legislation does not recognize it or the State is not a party to the two regional instruments mentioned above but a party to another human rights instrument. They have based their argumentation on 'the close ties of indigenous people with the land' viewed as the 'fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival'¹⁰³. The special

⁹⁶ Adopted by OAS, Bogota, 1948; e.g. *Mary and Carrie Dann v. United States*, IACHR (2002) (hereinafter *Dann Case*); *Maya Indigenous communities v. Belize*, IACHR (2004) (hereinafter *Maya Case*)

⁹⁷ Adopted by OAS, San Jose, 1969; e.g. *Awas Tingni Community v. Nicaragua*, IACtHR (2001) (hereinafter *Awas Tingni Case*)

⁹⁸ See para. 140(d), 146-148

⁹⁹ *Sawhoyamaya Indigenous Community v. Paraguay*, IACtHR (2006), para.128; *Awas Tingni Case*, para.142-149; *Saramaka People v. Suriname*, IACtHR (2007), para. 93-96, 119-123

¹⁰⁰ ILO Convention No 169 concerning Indigenous and Tribal Peoples in Independent Countries (hereinafter ILO No.169), Geneva, 1989-06-27

¹⁰¹ E.g. *Maya Case*, para.118

¹⁰² *Dann Case*, para.130

¹⁰³ *Awas Tingni Case*, para.149; also *Maya Case*, para.120; *Sawhoyamaya Indigenous Community v. Paraguay*, para.131-unique relationship; *Saramaka People v. Suriname*, para.82, 85-profound and all-encompassing relationship to their ancestral lands, 90

significance (material and spiritual) of the land also justifies subordinating private property rights to communal indigenous property in case of a conflict¹⁰⁴.

The stewardship ethical worldview of IPs furnishes all these cultural, land and resources rights and makes it very relevant for the construction of a mitigation measure like REDD whose aim is to protect and sustain forests. Such a framework would give an additional argument for defending rights of IPs in the context of REDD. Indigenous unique forms of cultural expressions that maintain their lifeways, well-being and identity have a character that ‘promotes conservation and environmental protection’¹⁰⁵. Protection and restoration of forests, so that they can be preserved in order to store carbon, coincides with indigenous life patterns, described as ‘environmentally benign’¹⁰⁶. It has been argued that traditional indigenous worldview contains an ethic of sustainability¹⁰⁷ which would provide an argument for protecting indigenous communities’ rights not to be dislocated, to use natural resources for subsistence and shelter, to participate with their traditional ecological knowledge when REDD policies are developed and implemented.

Social welfare and development norms recognize various social welfare rights (e.g. right to health, education, employment and adequate standards of living in ICESCR and UNDRIP), which are connected to the right to development¹⁰⁸. The right to development for IPs implies ‘their right to decide the kind of development that takes place on their lands and territories in accordance with their own priorities and cultures’¹⁰⁹. Thus traditional environmental ethic determines IPs’ ways of development. Additionally the sustainable way of life of IPs is related to the general right to development by the trend of qualifying development as environmentally sustainable. The principle of sustainable development in IEL is considered realizable with the input of IPs and their traditional knowledge and ways of life in harmony with nature. The vital role of IPs is acknowledged in some IHRL and

¹⁰⁴ *Yakye Axa Indigenous Community v. Paraguay*, Inter-Am. Ct. H. R. (2005), para.145-146

¹⁰⁵ Tsosie (2007), p.1668

¹⁰⁶ Manus (2005), p.555

¹⁰⁷ Krakoff (2008), p.893-894

¹⁰⁸ Declaration on the Right to Development, UNGA A/RES/41/128, art.1(1)

¹⁰⁹ UNDG-GIPI, p.12

IEL instruments¹¹⁰. REDD is a mechanism envisaged to address the problem of CC and simultaneously a way of achieving sustainable development.

The norms under the self-government category are of great importance to IPs and the possibility for maintaining and realizing their traditional environmental ethic dictating their ways of life. They have procedural character and give the opportunity for articulating the specificness of living and well-being of indigenous societies. The most eloquent provisions are contained in the ILO No.169 and the UNDRIP.

Self-government is identified as the political dimension of on-going self-determination, signalling that governments are to function according to the will of the peoples they govern¹¹¹. It includes two interrelated spheres of regulation: governmental or administrative autonomy for indigenous communities and effective participation/consultation of these communities in all decisions affecting them¹¹².

The procedural rights that accrue to IPs are closely interrelated. IPs are entitled to develop their own autonomous governance and institutions that are responsive to their specific circumstances¹¹³. In that way IPs can control the development of their distinctive cultures, including their use of land and resources¹¹⁴. Relevant provisions are art.8 (2) and art.9 of the ILO No.169 and art.20, 33, 37 of the UNDRIP. IPs' right to have their own indigenous institutions (political, legal, etc.) and the validity of their laws, traditions and customs recognized¹¹⁵ is part of CIL¹¹⁶.

The participation of indigenous communities in all decision-making processes that might affect them provides the procedural gear, which aims at ensuring traditional worldviews articulation and inclusion in legislation and policy development at international

¹¹⁰ E.g. UNDRIP, preamble; Convention for the Safeguarding of the Intangible Cultural Heritage, 2003-10-17, preamble; Johannesburg Declaration on Sustainable Development, 2002-09-4, para.25; Agenda 21, 1992-06-14, Chapter 26

¹¹¹ Anaya (2004), p. 150

¹¹² Ibid., p.151

¹¹³ Ibid., p.152

¹¹⁴ Ibid., p.152

¹¹⁵ ILO No.169: art.8; UNDRIP: art.5,27,34

¹¹⁶ International Law Association (ILA) (2010), p.14-15

or domestic level. The necessity is dictated by IPs' marginalization. Hence the requirement for consultation. These norms are related to the norms of non-discrimination and of cultural integrity¹¹⁷. HRC's jurisprudence confirms these requirements¹¹⁸. The IACtHR reads several safeguards into the substantive right to property, one of which is effective engagement and consultation, and where applicable, a duty to obtain consent¹¹⁹.

More specifically the right to effective participation includes the right to participate in all decision-making in matters affecting their rights (art.18 UNDRIP; art. 2(1), art.6(1) (b), 7 ILO No.169); in the process of giving due recognition to IPs' laws, traditions, customs and land tenure systems (art.27 UNDRIP); in the process of recognizing and adjudicating the rights of IPs pertaining to their lands, territories and resources (art.27 UNDRIP); in the use, management and conservation of natural resources pertaining to IPs' lands (art.15 ILO No.169). There are two elements to be met so the requirement for effectiveness is fulfilled: procedural (IPs need to be actually able to participate by e.g. providing all relevant information in own language) and substantive (IPs must have the capacity to influence the outcomes of the decision-making processes)¹²⁰.

IPs also have the right to be consulted as to any decisions affecting them, qualified as a norm of CIL¹²¹. Consultation is required regarding legislative or administrative measures that may affect them (art.6(1) (a) ILO No.169-directly; art.19 UNDRIP); regarding projects affecting their lands, territories and other resources (art.32(2) UNDRIP). IPs have the right to decide on their own priorities for the process of development (art.7(1) ILO No.169) and also determine the use of their land, territories and resources (art.32(1) UNDRIP).

¹¹⁷ Anaya (2004), p.155; CERD GR No 23, para.4 (d); HRC GC No 23, para.7

¹¹⁸ *Apirana Mahuika et al. v. New Zealand*, Com No. 547/1993, para.9.5; *Lånsman v. Finland*, Comm. No.511/1992 (para.9.5) and 671/1995 (para.10.4)- consultation and effective engagement of IPs in all decisions affecting the enjoyment of their culture

¹¹⁹ IACtHR: *Saramaka People v. Suriname*, IACtHR, 28 Nov. 2007, para.129-139

¹²⁰ ILA (2010), p.14

¹²¹ *Ibid.*, p.13

Other rights contributing for the meaningful realization of the rights to participation and consultation are the right to be consulted through own representative and decision-making institutions, in accordance with own procedures (art.6(1) (a) ILO No.169; art.18 UNDRIP).

Last but not least is the procedural issue of free, prior and informed consent (FPIC) which has been approached in different ways. Thus, FPIC represents a *process* founded on a rights-based approach that should be set in a national legal and policy framework which respects IPs rights¹²². Consent is seen as the basis for relations between states and IPs¹²³.

The Commission on Human Rights views FPIC as a *principle* and a *collective right*, grounded in several ‘inherent’ substantive and procedural rights: the rights ‘encapsulated’ in the right to self-determination; to IPs’ lands, territories and resources; rights from their treaty-based relationships; right to require that third parties enter into an equal and respectful relationships with them based on the principle of informed consent; procedurally, FPIC ‘requires processes that allow and support meaningful and authoritative choices by indigenous peoples about their development paths’.¹²⁴

The wording of the ILO No.169¹²⁵ and UNDRIP¹²⁶ could be interpreted as FPIC being an objective of consultations entered by IPs. Based on the ILO authorities’ interpretation of ILO No.169, it does not require that consultations lead to agreement with IPs in all instances¹²⁷. Art.16 (2) states the ‘objective of achieving agreement or consent’. The provision interpreted together with the requirement of governments protecting the rights of IPs and guarantying respect for their integrity, points to the conclusion that consultations should lead to decisions that are consistent with IPs’ substantive rights, regardless of the fact whether agreement is achieved or not¹²⁸. The normative requirements

¹²² UN-REDD Programme Guidelines on Seeking FPIC (2010), p.1-2

¹²³ Western Sahara, AO, ICJ, 1975

¹²⁴ E/CN.4/Sub.2/AC.4/2005/WP.1, para.56

¹²⁵ not directly dealing with FPIC

¹²⁶ consultations in good faith in order to obtain IPs’ FPIC: e.g. art.19, 32(2)

¹²⁷ Anaya (2004), p.154

¹²⁸ Ibid.

include full engagement of IPs, existence of procedural safeguards guarantying IP's own decision-making mechanisms, relevant customs, organizational structures, as well as access to information and expertise¹²⁹. Below it would be seen how this requirement has been developed within the UN-REDD Programme.

With regard to UNDRIP, it is arguable whether the state duty to obtain FPIC (art.19) implies a right of veto¹³⁰ or it is a duty to consult in good faith with IPs with the objective of reaching consensus¹³¹. The Commission on Human Rights states that formulating FPIC '... [a]s not constituting an individual 'veto' right confuses collective rights and individual rights, as well as the rights of peoples and the corresponding duties of States. Peoples may not be deprived of their natural resources, nor denied their choices about their economic, political and social development, in the exercise of their rights to self-determination'¹³². Further, development projects affecting IPs' lands and resources should respect the principle of FPIC, which among others includes the choice to give or withhold consent¹³³. This position is widely supported by human rights bodies¹³⁴. The ILA concludes that IPs' right that 'projects suitable to significantly impact IPs' rights and ways of life are not carried out without their FPIC' is part of CIL¹³⁵.

4.2.2 Visiting some international instruments

ICESCR deals with individual second-generation rights, which could be more directly associated with IPs' relationship with the environment as they focus on rights associated with property transactions, agriculture and religious expression¹³⁶. The greatest

¹²⁹ Ibid.

¹³⁰ Supported by art. 10, 29(2), 32(2) UNDRIP

¹³¹ ILA (2010), p.14-15

¹³² E/CN.4/Sub.2/AC.4/2005/WP.1, para.47

¹³³ Ibid., para.57

¹³⁴ Ibid., e.g. para.15; CERD GR No.23, para.4(d)

¹³⁵ ILA (2010), p.51

¹³⁶ Manus (2005), p.579

disadvantage comes from the lack of the collective dimension necessary for IPs' rights assertion.

The ILO No.169, offers strong support for IPs' stewardship rights. Its preamble language points at recognizing the worth of indigenous cultural identity. This identity is explicitly associated with indigenous environmental ethics, i.e. the Convention acknowledges the indigenous and tribal contributions to the 'ecological harmony of humankind'. The importance of the environment and its resources are brought forward and indigenous peoples' survival and identity are made dependent on them¹³⁷. Art.13 and art.23 are relevant here.

The Preamble also recognizes 'the aspirations of these peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the States in which they live'.

Other rights, which could be inferred from other international instruments, based on the importance of the stewardship ethical framework for traditional indigenous groups' survival and identity, are explicitly formulated here. Such are the right to participate in the development of programmes that could affect indigenous environmental interests: art.7 and art.15; the rights of ownership and possession over traditional lands and natural resources with a requirement for procedures to resolve land claims: art.14-15; recognition of indigenous land tenure systems: art.16-17 (1). The ILO No.169 also requires a kind of affirmative measures 'for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned' (art.4, par.1).

All that said, when it comes to IPs' rights to natural resources pertaining to their lands, the wording of ILO No.169 is somehow weak and ambiguous. IPs have the right to participate in the use, management and conservation of these resources (art.15). The value of safeguarding those rights is reduced by the word 'participate'¹³⁸. Wherever states have retained ownership over resources, they need to consult IPs as regards exploration and exploitation of those resources but are not mandated to include IPs in sharing benefits of

¹³⁷ Manus (2005), p.596

¹³⁸ Schrijver (2008), p.316

these activities ('wherever possible' art.15 (2)). Additionally relocation of peoples is made conditional on a provision (art.16) that provides 'some ambiguous and escape clauses'¹³⁹ (e.g. public inquiries necessary to ensure effective representation of the peoples concerned are to be included 'where possible').

On the regional level the European Convention on Human Rights¹⁴⁰ does not deal with IP issues. The ACHR and the ADRDM have been briefly addressed above through the IACHR and IACtHR's jurisprudence. In the African region the term 'indigenous people' has been a hotly contested issue, which has met a lot of resistance from governments. Very few African countries recognize the existence of IPs within their borders, and even fewer in their national constitutions or legislation¹⁴¹. However, there are some positive developments, even on land rights issues¹⁴². Tanzania, Mozambique¹⁴³ and Uganda¹⁴⁴ are examples of recognizing community tenure rights. The Central African Republic is the first African Member State to ratify the ILO No.169¹⁴⁵.

The UNDRIP is a culmination in the development of IPs' rights protection. It brings forward the importance of collective rights for IPs and it constitutes 'the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world'¹⁴⁶. Formally, the UNDRIP cannot be considered as a binding legal instrument¹⁴⁷, a position supported by Norway who explicitly states that IPs' rights to land are defined by

¹³⁹ Ibid.

¹⁴⁰ Adopted 1950-11-04

¹⁴¹ African Commission on Human and Peoples' Rights (ACHPR) (2006), p.19
<http://www.achpr.org/english/Special%20Mechanisms/Indegenous/ACHPR%20WGIP%20Report%20Summary%20version%20ENG.pdf>

¹⁴² Ibid., p.20

¹⁴³ Hatcher (2009), http://www.rightsandresources.org/documents/files/doc_1474.pdf

¹⁴⁴ <http://www.rightsandresources.org/blog.php?id=535>

¹⁴⁵ http://www.ilo.org/global/What_we_do/InternationalLabourStandards/WhatsNew/lang--en/WCMS_126250/index.htm

¹⁴⁶ UNDRIP art.43

¹⁴⁷ ILA (2010), p.43

ILO No.169¹⁴⁸. However, it's been stated that “‘declaration’ is a solemn instrument resorted to only in very rare cases relating to matters of major and lasting importance where maximum compliance is expected”¹⁴⁹. Certain key provisions can be reasonably regarded as constituting CIL¹⁵⁰. CIL has to main elements: State practice (also expressed in communicative behaviour among authoritative actors)¹⁵¹ and the corresponding opinion that the practice amounts to law (*opinio juris*)¹⁵². In modern international law it is increasingly accepted that those elements do not necessarily have to be withdrawn from concrete events¹⁵³. Thus multilateral forums could be a source of practice that builds customary rules. Additionally, UN General Assembly resolutions are used as evidence of CIL¹⁵⁴. The UNDRIP had 143 votes in favour, 4 against and 11 abstentions. Australia and New Zealand have reversed their positions and declared support for the Declaration, while the USA has expressed willingness to review its position.

CIL rights are the right to self-determination, autonomy or self-government (expressed in right to consultation and effective participation in all matters affecting IPs), cultural rights and identity, land and resource rights as well as reparation, redress and remedies¹⁵⁵. Such position is supported by international and domestic practice and the necessary *opinio juris*¹⁵⁶. Supporting arguments could be withdrawn from international bodies’ jurisprudence¹⁵⁷ and documents, statements of authoritative state actors either

¹⁴⁸ UNPFII, E/C.19/2010/12/Add.6-Annex I

¹⁴⁹ E/3616/Rev. 1, para.105

¹⁵⁰ ILA (2010), p.43

¹⁵¹ Anaya (2004), p.62

¹⁵² ICJ Statute, art.38; Cassese (2005), p.156

¹⁵³ Anaya (2004), p.62

¹⁵⁴ Legality of the Threat or Use of Nuclear Weapons, AO, ICJ, 1996, para.70 (evidence of formation of *opinio juris*)

¹⁵⁵ Anaya (2009), p.100-101; ILA (2010), p.43

¹⁵⁶ *Ibid.*; ILA (2010), p.49-51

¹⁵⁷ HRC, IACHR, IACtHR reviewed in section 4.2

through different human rights reporting procedures on domestic initiatives¹⁵⁸ or within the context of different multilateral discourses¹⁵⁹.

With regard to multilateral discourses, the president of the working group on the OAS Draft declaration on the rights of IPs, confirms the existence of a core consensus by comparing proposals of IPs and States' representatives with the procedures surrounding the drafting of the UNDRIP and the ILO No.169¹⁶⁰. The consensus is further strengthened by the vast support of the UNDRIP by African countries where the issue of 'indigenous peoples' in general has been highly contentious¹⁶¹. Anaya, Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, declares the Declaration as the 'global common understanding about the minimum content of indigenous peoples' rights'¹⁶².

The Declaration affirms the right to self-determination in art.3, based on the common art.1 of the two Human Rights Covenants. Provisions regulating the matter are art.3-4, 18-19, 23 and 32. It provides extensive protection of IPs' land and resource rights: art.10, 20, art.25-30. The UNDRIP acknowledges the stewardship ethic by ensuring the right of indigenous communities to maintain and strengthen their spiritual relationship with their lands, territories and resources pertaining to them, as well as the right to uphold their responsibilities to future generations in this regard¹⁶³. It recognizes the right of IPs to own control and develop their lands and the rights to own, use and manage the natural resources on those lands¹⁶⁴. States should establish mechanisms to guarantee those rights. They need to give legal recognition and protection to these lands, territories and resources IPs traditionally owned, occupied or otherwise used or acquired¹⁶⁵.

¹⁵⁸ HRC and CERD (within the UN system); ILO No.169

¹⁵⁹ For review see Anaya (2004), p.70-72

¹⁶⁰ Ibid., p.66, p.87: footnote115

¹⁶¹ E.g. AO of ACHPR on the UNDRIP, May 2007

¹⁶² Anaya (2009), p.108

¹⁶³ UNDRIP art.25

¹⁶⁴ Ibid., art.26

¹⁶⁵ Ibid.

Self-determination is also realized through the right to development, which implies that IPs have the right to decide on their own development priorities and strategies¹⁶⁶. This means that they have the ‘right to participate in the formulation, implementation and evaluation of plans and programmes for national and regional development that may affect them’¹⁶⁷. Thus indigenous communities determine the development and use of their lands, territories and resources¹⁶⁸. IPs also have the right to be secure in the enjoyment of their own means of subsistence and development¹⁶⁹.

Furthermore, self-determination expression is envisaged through the principle of FPIC, through full and effective participation of and consultation with IPs prior to any actions that may affect them. FPIC is required prior to the approval of any project affecting their lands and resources¹⁷⁰, prior to adopting and implementing legislative or administrative measures that may affect them¹⁷¹, in cases of relocation¹⁷². The previous discussion on self-government and procedural norms is relevant here.

4.3 Stewardship rights of indigenous peoples in IEL and some trends reflecting such an ethical dimension

IEL has been described as weak in comparison to IHRL labelled ‘robust’¹⁷³. Despite such a categorization, there are still some elements relevant to our discussion. The main weakness of IEL’s regulation of IPs’ rights comes from the fact that most of the provisions are contained in non-binding declarations and statements of states, making them hardly enforceable.

¹⁶⁶ Ibid., e.g. art.23

¹⁶⁷ UNDG-GIPI, p.15

¹⁶⁸ UNDRIP art.32 (1)

¹⁶⁹ Ibid., art.20

¹⁷⁰ UNDRIP art.32(2)

¹⁷¹ Ibid., art.19

¹⁷² Ibid., art.10

¹⁷³ Posner (2007), p.1927

4.3.1 Principles of IEL

The stewardship environmental ethics expressed in the sustainable close relationship of indigenous communities with natural environments could be partially identified in some of the principles of IEL. Those are mainly the principle of sustainability/sustainable development and the equitable principle of intergenerational equity. However, general principles have the disadvantage of not giving rise to particular state obligations unless they are specified in particular instruments at the international and national level.

The principle of sustainability/sustainable development dominates international activities in the field of environmental protection since the end of the 1980s¹⁷⁴ even though the term has been practiced ‘long before the modern debate of the 1980s’¹⁷⁵. This principle shows a change in thinking about human beings and nature. ‘Caring for the Earth’ expresses an aim of securing a commitment to a new ethic of sustainable living¹⁷⁶. Sustainable development is seen as improving the quality of human life while living within the carrying capacity of supporting ecosystems¹⁷⁷. However, the meaning of sustainability was ‘downplayed’ in the Brundtland Report¹⁷⁸ where the definition of sustainable development did not require new ethic¹⁷⁹: ‘development that meets the needs of the present without compromising the ability of future generations to meet their own needs’. The core idea of the principle of sustainability (which is the conceptual core of sustainable development) is that human beings’ survival ‘depends on the ability to respect and maintain

¹⁷⁴ Kiss&Shelton (2007), p.97

¹⁷⁵ Bosselmann (2008), p.5

¹⁷⁶ Caring for the Earth: a Strategy for Sustainable Living by IUCN, UNEP and WWF, Gland, Switzerland (1991)

¹⁷⁷ Ibid., p.10

¹⁷⁸ Report of the World Commission on Environment and Development: Our Common Future, World Commission on Environment and Development A/42/427, June 1987

¹⁷⁹ Bosselmann (2008), p.1

the Earth's ecological integrity'¹⁸⁰. This original meaning of the concept of sustainable development was reflected in the Earth Charter¹⁸¹ and the new IUCN Programme 2009-2012¹⁸² where the intrinsic value of nature is recognized, as well as the importance of ecosystem health as underlying human well-being¹⁸³. Such essence lies at the heart of the stewardship ethic of indigenous communities. 'Various environmental ethicists have shown that the social and economic activities of traditional societies correspond to many key goals of sustainability'¹⁸⁴. That is also confirmed by the definition of the Maori 'kaitiakitanga' cited above. The connection between sustainable development as a principle of modern international law and the traditional ancient societies ways of life is confirmed by the Separate Opinion of Judge Christopher Weeramantry to the ICJ's 1997 Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)¹⁸⁵.

However, the principle of sustainable development contains in itself a lot of tensions between the anthropocentric ethic and the stewardship ethic of IPs. The 1992 UN Conference on Environment and Development and its instruments largely stay away from the new ethic¹⁸⁶. For instance, the Rio Declaration¹⁸⁷ preserves the tension between an 'opening' to the recognition of the 'integral and interdependent nature of the Earth, our home'¹⁸⁸, overlapping with traditional environmental ethics, and a preservation of the anthropocentric ethic aggressively affirmed by the statement that 'human beings are at the centre of concerns for sustainable development'¹⁸⁹.

Some of the features of the concept of stewardship could be detected in the principle of intergenerational equity. As interpreted by Kiss and Shelton the principle of

¹⁸⁰ Ibid., p.2

¹⁸¹ <http://www.earthcharterinaction.org/content/pages/Read-the-Charter.html>

¹⁸² http://www.iucn.org/about/work/global_programme/

¹⁸³ Bosselmann (2008), p.2

¹⁸⁴ Workineh (2005), p.27

¹⁸⁵ Bosselmann (2008), p.3

¹⁸⁶ Ibid., p.2

¹⁸⁷ Rio Declaration on Environment and Development, Rio de Janeiro, 1992-06-13

¹⁸⁸ Ibid., preamble

¹⁸⁹ Ibid., principle 1

intergenerational equity rests on the facts that (1) human life emerged, and is dependent upon, the earth's natural resource base, making it inseparable from environmental conditions, and (2) human beings have the capacity to alter that environment¹⁹⁰. Thus, very closely to the description of IPs as 'guardians of nature' who have both rights and obligations¹⁹¹, the principle implies that present generations, viewed as trustees of nature, have beneficial rights, as well as trustee obligations to conserve natural and cultural resources and heritage so that future generations could satisfy own needs and values, and have access to them¹⁹².

Some commentators contend that the principle appears to be anthropocentric as the focus is on equity among generations of the human species¹⁹³. Some interpretations of the theory of intergenerational equity imply a kind of intergenerational equity between all species¹⁹⁴.

The principle of state sovereignty, while not reflecting the stewardship ethic, is directly relevant to the possibility of realizing the stewardship role of IPs and their rights. It's considered as one of the most important customary principles in IEL¹⁹⁵. The Stockholm Declaration¹⁹⁶ formulates it as the sovereign right of states to 'exploit their own resources pursuant to their own environmental policies,' as long as they do not 'cause damage to the environment of other states or of areas beyond the limits of national jurisdiction.' Thus traditional communities become to a great extent dependent on the sovereign will of the state and the corresponding principle of non-intervention. As a consequence indigenous groups' rights over their traditional lands, territories and resources are threatened as they are usually based on customary use.

¹⁹⁰ Kiss&Shelton (2007), p.106

¹⁹¹ Heinämäki (2009), p.68

¹⁹² Kiss&Shelton (2007), p.106

¹⁹³ Taylor (1998), p.281

¹⁹⁴ Ibid., p.282

¹⁹⁵ Sands (1994), p.342; e.g. Convention on Biological Diversity (hereinafter CBD), 1992-06-5, art.3

¹⁹⁶ Adopted 1972-06-15

The principle of sovereignty and its interpretation is essential to the development of REDD. The highly contested nature of forests is revealed by the lack of international consensus on global forest treaty and the adoption of the Forest Principles¹⁹⁷. Unlike ‘climate’ and ‘biodiversity’, forests were not considered a ‘common concern of mankind’¹⁹⁸. Instead ‘their sound management and conservation is of concern to the Governments of the countries to which they belong’ (Preamble (f)). Principle 2 (a) explicitly states the sovereign and inalienable right of governments to utilize, manage and develop their forests. In the UNFCCC forests are explicitly mentioned in the context of promoting sustainable management and conservation¹⁹⁹. However, the principle of sovereignty is reaffirmed with regard to exploitation of natural resources and international cooperation to address CC²⁰⁰. Such a background creates conditions for a serious threat of IP’s stewardship rights.

On the other hand, there are some developments pointing towards re-conceptualization of the principle. Its gradual transformation is reflected by the adjectives attached to it. Claims to ‘permanent’, ‘full’, ‘absolute’ and ‘inalienable’ sovereignty over natural resources are slowly being replaced by demands for ‘restricted’, ‘relative’ or ‘functional’ sovereignty²⁰¹. Such a trend can be revealed by a few developments in international law that have direct impact on the protection of IPs’ stewardship rights.

Modern international law includes as its subjects not just States but also individuals and peoples holding rights and obligations at the international level as well as ‘humankind’²⁰². Respectively, the permanent sovereignty subjects have moved from ‘peoples and nations’ and ‘underdeveloped’ countries to ‘developing countries’ to finally only States²⁰³. Such an orientation is countervailed by an increasing number of State

¹⁹⁷ Adopted 1992-06-13

¹⁹⁸ Sands (1994) , p.326

¹⁹⁹ Art.4 (1)(d)

²⁰⁰ UNFCCC preamble, para.8-9

²⁰¹ Schrijver (2008), p.2

²⁰² Ibid., p.7-8; e.g. UNFCCC, preamble

²⁰³ Ibid., p.8,27

obligations when exercising the permanent sovereignty over natural resources²⁰⁴. Examples are: exercising sovereignty in the national interest and for the well-being of States' peoples, including IPs within their territories, hence respect for the rights and interests of (indigenous) peoples and humankind as a whole (based on the principle of intergenerational equity)²⁰⁵. The emergence of such obligations can be related to the increasing attention the international community has been paying to the plight of IPs to the extent that they have been given status of 'emerging' subjects of international law²⁰⁶ and to the fact that matters that have usually been regarded as falling within the exclusive internal jurisdiction of States, have been moved to the international plane and made, 'in some situations, matters of international concern, interest, responsibility and character'²⁰⁷.

With the adoption of the UNDRIP, IPs have been endowed with extensive rights to land and resources. However, these rights are still exercised on the base of internal self-determination, the 'decisive authority as regards use and exploitation of indigenous lands and their natural resources ultimately rests with the State'²⁰⁸.

4.3.2 IEL instruments containing provisions relevant for IPs rights' protection

The 1972 Stockholm Declaration could be characterized as weak. It does not explicitly refer to IPs but contains provisions aimed at 'peoples' and 'communities'²⁰⁹.

As a whole, the Stockholm Declaration has rather anthropocentric orientation in contrast with the stewardship ethic: 'Of all things in the world, people are the most precious'²¹⁰. The environment is still a utility for the man²¹¹. The Stockholm Declaration

²⁰⁴ Ibid., p.8,28

²⁰⁵ Ibid., p.8,26-27,317

²⁰⁶ Ibid., p.318

²⁰⁷ UNDRIP, preamble

²⁰⁸ Schrijver (2008), p.319

²⁰⁹ Para.7; also para.2, principle 15

²¹⁰ Para.5

also refers to the principle of intergenerational equity²¹² and the principle of state sovereignty discussed above.

The World Charter for Nature²¹³ addresses the sustainability principle and a holistic concern for all ecosystems, organisms and species when utilized by man (principle 4), while in para.5 it affirms the intergenerational equity principle. However, it does not underline the importance of the environment to the cultural survival and identity of IP, and to other indigenous rights.

The Brundtland Report (the Report) pays specific attention to IPs' situation and their rights within the context of sustainable development. The stewardship framework can be recognized in the acknowledgement that traditional lifestyles, characterized by living in harmony with nature and by environmental awareness, can offer modern society valuable lessons in sustainable management of resources in complex ecosystems such as forests among others²¹⁴. The Report calls for recognition and protection of IPs' traditional rights to land and other resources 'that sustain their way of life', of indigenous institutions and the right to participate in 'formulating policies about resource development in their areas'²¹⁵.

The Rio Declaration on Environment and Development: Principle 22 underlines the need to recognize and support the identity, culture and interests of IP in recognition of their 'vital role in environmental management and development because of their knowledge and traditional practices'.

Agenda 21 explicitly recognizes the importance of IPs' relationship to the surrounding environment, its sustainable character, and that it furnishes their rights and well-being²¹⁶. The document basically supports the UNDRIP.

The Convention on Biological Diversity contains provisions recognizing the importance of indigenous knowledge, practices and experience, embodying traditional

²¹¹ Para.1

²¹² Principle 1

²¹³ Adopted 1982-10-28, preamble

²¹⁴ Chapter 4 para.71,74,75

²¹⁵ Para.75

²¹⁶ Para.26.1, 26.3(iv)

lifestyles, and respectively the role of IPs in the conservation and sustainable use of biological diversity²¹⁷. However, the sovereign rights over biological diversity are vested in the State, which is to exercise them on behalf of its citizens and peoples²¹⁸.

The UNFCCC does not address IPs.

4.3.3 Domestic and international trends reflecting the stewardship ethic

It is evident that there are some trends, which signal a reflection of changing consciousness of humanity. This shift has influenced the content and methodology of IEL and is demonstrated by the use of ‘intergenerational equity’, ‘intrinsic values’ and ‘ecosystem protection’ in a number of international instruments²¹⁹.

At the domestic level New Zealand’s environmental legislation that incorporates reference to intrinsic values of ecosystems (1986 Environment Act, 1987 Conservation Act: laying the foundations of ecocentric legislation²²⁰), as well as to ‘an ethic of stewardship’, is an example²²¹.

The 2008 Constitution of Ecuador marks a milestone in that respect. It is the first in the world that recognizes legally enforceable rights of Nature, or ecosystem rights²²². The Constitution codifies a ‘new system of environmental protection based on rights’²²³.

At the international level, the World Charter for Nature first introduces the ethic of ecocentrism, where humanity is the steward²²⁴. It sets an ethical framework regarding

²¹⁷ Preamble, art.8, art.10 and art.18

²¹⁸ Schrijver (2008), p.317

²¹⁹ Taylor (1998), p.298

²²⁰ Bosselmann (1995), p.130

²²¹ NZ Resource Management Act 1991; 2004 Foreshore and Seabed Act

²²² Chapter 1, <http://celdf.org/section.php?id=177>

²²³ CELD, <http://celdf.org/section.php?id=42>

²²⁴ Para.2

human interaction with nature and asserts that every form of life should be respected regardless of its utility to humans²²⁵.

The changing consciousness of humanity is further demonstrated by the Earth Charter seen as an ‘ethical framework for a just, sustainable and peaceful future’ whose two main principles are ‘respect and care for the community of life and ecological integrity’²²⁶.

The intrinsic value of the environment, including ecosystems and species, is also expressed for example in the Bern Convention on the Conservation of European Wildlife and Natural Habitats²²⁷, in the CBD’ preamble.

In conclusion, when reviewing the gradual adoption and interpretation of international instruments, both in IHRL and IEL, we could notice a positive development in the world’s community attitude towards IPs and their rights. There’s been a growing awareness of the value of the distinctive way of life and cultural identity of indigenous communities and the worth of its preservation. States have expressed their appreciation of indigenous ecological knowledge and its importance as a source for achieving environmental sustainability. There’s been an increasing recognition of the unique relationship of traditional groups with their natural environments, which constitutes a basis for IPs’ lives, well-being and the enjoyment of all the following human rights. The rights to self-determination and to effective engagement prove vital for that. Thus indigenous worldview and stewardship ethic could fortify the realization of IPs’ rights in the context of CC and the international attempts to mitigate its effects. Significantly, their stewardship role, expressed in their relationship to lands, territories and resources, has been used as the main support for their rights. Additionally such ethic coincides with a slowly changing attitude towards environmental protection and development. REDD represents the crossing road of all those issues that could be harmonized by a stewardship ethical framework.

²²⁵ Par.3; principle 1,2

²²⁶ Bosselmann (2008), p.2

²²⁷ Adopted 1979-09-19, preamble

5 Discussion of possible impacts of REDD. The other side of the coin

5.1 Impacts of REDD

The idea of including REDD in a post-Kyoto period as a mitigation response to CC has generated a lot of discussions regarding the possible impacts of such an action. The discourse has been pretty active around one of its main stakeholders, i.e. indigenous peoples. The general framework for economic and social consequences of response measures is reflected mainly in art. 2, 3 and 4 of the UNFCCC.

REDD regulation could intersect with various IPs' substantive and procedural rights. One of the major issues is land tenure systems existing in developing countries and the traditional marginalization of IPs regarding their land and resource rights²²⁸. Land tenure is closely related to the right to carbon and the right to benefit sharing. REDD policies basically seek to provide financial incentives for the conservation of forests and the carbon stocks contained in them, rewarding those who hold the rights to the carbon stocks²²⁹. Thus, who the legitimate owner of forests and of the contained carbon stocks is, becomes a fundamental question²³⁰. IPs' rights to traditional lands, territories and resources are largely customary. Often national policies on forests do not recognize IPs' right to control, own and manage their forests²³¹. Examples are the Central African Republic²³², Guyana and the Democratic Republic of Congo²³³.

²²⁸ UN-REDD FD, p.4

²²⁹ Woodburne&Nelson (2010), p.2

²³⁰ Ibid.

²³¹ Tebtebba press statement, 2009-06-11

http://www.indigenousclimate.org/index.php?option=com_content&view=article&id=55&Itemid=59

²³² Woodburne&Nelson (2010), p.3

²³³ Griffiths&Martone (2009), p.22

Land tenure is closely related to benefit sharing. Income generated by REDD would unlikely accrue to IPs if their customary land and resource rights are not respected. The same is valid for inclusion in forest management and rewards for traditional sustainable practices. In that respect, existing payment for environmental services programmes have had some positive effects (e.g. Mexico) but in general benefits for communities have tended to be low (e.g. Bolivia, Belize)²³⁴. Such trend is supported by evidence from carbon market avoided deforestation and afforestation projects in Mozambique and China²³⁵. In China a reason was unresolved property rights disputes²³⁶.

There is also evidence from the Congo Basin that conservation programmes often undermine communities' customary forest rights because they are prevented from using their traditional land by 'conservation rules enforced by paramilitary guards'²³⁷. Evictions and loss of ancestral land witnessed in some conservation programmes (e.g. Uganda²³⁸) impact on a series of IPs' rights: e.g. the right not to be deprived of own means of subsistence, right to culture, right to property and the right to freely practice religion²³⁹.

IP' procedural rights to participation and consultation and the principle of FPIC form a big part of discussions around REDD. As it will be seen they are often used as a validation of developed REDD policies. REDD regulations (mainly in the UN system) aimed at capacity building of local communities (e.g. through provision of on-going, objective, timely and complete information; of technical and legal support; of training) are necessary for the meaningful realization of these procedural rights. However, evidence disclose that policies have often been developed with minimal or no consultation with forest peoples²⁴⁰.

²³⁴ Ibid., p.27

²³⁵ Ibid., p.28

²³⁶ Ibid., p.29

²³⁷ Woodburne&Nelson (2010), p.3

²³⁸ Colchester et al. (2008), p.11

²³⁹ E.g. Endorois in Kenya, ACHPR, 276/2003, para. 187, 173, 205,207

²⁴⁰ Dooley et al. (2008), p.9

Respect for the principle of FPIC and its elements could avoid negative outcomes seen in some voluntary carbon-offset plantation schemes in Ecuador. IPs there were disadvantaged due to lack of information²⁴¹. Importantly, projects substantially affecting IPs' rights negatively cannot be conducted without their FPIC.²⁴²

On the other hand, REDD conservation programmes have attracted substantial attention to forests and their inhabitants and have the potential to positively affect IPs. Their purpose to increase the value of standing forests, as opposed to logged timber, could address a 'traditional' source of encroachment on IPs' land and resource rights, i.e. logging companies. REDD programmes could be used 'towards securing the rights of IPs living in forests and rewarding their historical stewardship role...'²⁴³ Thus REDD could be a tool of addressing long standing issues important for securing IPs' rights: land and forest tenure and governance reforms; secure tenure and respect for customary/community land and resource rights²⁴⁴; effective engagement. Clarity regarding rights to forestland and the legal rights and responsibilities of landowners is affirmed as a vital pre-requisite for effective policy and enforcement; allocation of property rights should be 'regarded as just by local communities'²⁴⁵. The Stern Review states that local communities in Latin America and South Asia have been increasingly involved in the ownership and stewardship of forests.

Such a path is chosen by the UN where a human rights-based, participatory and culturally sensitive approach is advocated, and the UNDRIP is used as a minimum yardstick for evaluating REDD policies and instruments.

²⁴¹ Griffiths&Martone (2009), p.28

²⁴² ILA (2010), p.51

²⁴³ UNPFII, E/C.19/2008/13, para.44

²⁴⁴ Griffiths (2007), p.16

²⁴⁵ Stern Review (2006), p.541

5.2 The other side of the coin

An essential point to be addressed is that by grounding IP's rights protection in their unique relationship with the environment, such protection would accrue only to those indigenous societies who have preserved their traditional lifeways. Those who have chosen to move from subsistence to market-based economies would lack the necessary rationale. Additionally, some traditional activities, like the slash and burn agriculture, could clash with the purpose of REDD. In the past, such practice was conducted in a careful, small-scale, rotational manner, which ensured relative sustainability²⁴⁶. However, 'more recent forest clearances are often carried out on a much larger scale and aim to establish permanent agriculture'²⁴⁷. The CBD art.10(c) is applicable here: traditional practices need to be compatible with conservation and sustainable use of resources. As a result communities could be offered alternative livelihoods.

Additionally, what if the principle of FPIC is followed and the right to withhold consent is exercised because IPs prefer the fast way of providing income through *large-scale* timber selling or any other way of unsustainable use of resources? If IPs' rights have been supported through their intimate relationship to and sustainable use of the natural environment, where they are holders of both rights and *obligations*, such a possibility should not fall within their rights' purview. Moreover, 'the right to self-determination must be understood in the context of common responsibilities for maintaining the health of our ecological systems, which know no jurisdictional boundaries'²⁴⁸.

²⁴⁶ <http://rainforests.mongabay.com/0804.htm>

²⁴⁷ UNEP, FAO, UNFF, *Vital Forest Graphics* (2009), p.21

²⁴⁸ Richardson (2001), p.11

6 Indigenous peoples' rights and their consideration in the existing REDD framework

6.1 Developments under the UNFCCC

In the Copenhagen Accord there's a general recognition of the need to establish a mechanism such as REDD-plus due to the crucial role of REDD and the need to enhance removals of greenhouse gas emissions by forests²⁴⁹. There's no elaboration on issues related to IPs and their rights. Those are broadly addressed in several decisions of the COP: Decision 1/CP.13; 2/CP.13; 4/CP.15. Those provisions concentrate on:

- Possible economic and social consequences of REDD²⁵⁰ and the requirement to address the needs of IPs when undertaking such actions²⁵¹
- The need for full and effective engagement of IPs in monitoring and reporting activities is recognized, as well as the contribution of their knowledge in those processes²⁵². That engagement is reduced to 'effective' in para.3.

The wording of the second methodological issue has been criticized as insufficient for the protection of IPs rights. Tebtebba has commented on the Final Document agreed upon under the Subsidiary Body for Scientific and Technological Advice (SBSTA)²⁵³ that traditional knowledge and reporting and monitoring should be linked to the respect and

²⁴⁹ Para.6

²⁵⁰ 1/CP.13- para.1 (b) (vi)

²⁵¹ 2/CP.13- preamble, para.10

²⁵² 4/CP.15: preamble, para.5

²⁵³ FCCC/SBSTA/2009/L.9 reflected in Decision 4/CP.15

protection of the rights of IPs because methodological issues cannot be delinked from the issue of rights of IPs to their lands, territories and resources and their FPIC as otherwise the outcomes could be negative (witnessed in Peru and the US-Peru Free Trade Agreement finalized without the consent of IPs, resulting in indigenous territories being affected)²⁵⁴. The Chair of the UNPFII Victoria Tauli-Corpuz has also expressed concerns for the removal of any reference to the rights of IPs and the UNDRIP²⁵⁵.

The AWG-LCA responsible for elaborating upon the REDD mechanism has presented its work to the 15th COP but it's not adopted yet. The text suggested for negotiations broadens the IPs rights regulation and makes important contributions. However, it could be generally classified as a rather cautious approach, still preserving the tensions between state sovereignty and IPs' stewardship rights.

The protection provided is in the form of safeguards that should be 'promoted and supported' when undertaking activities contributing to mitigation actions²⁵⁶. First, the knowledge and rights of IPs should be respected, taking into account relevant international obligations and national circumstances and laws²⁵⁷. Importantly, the safeguards should be realized by taking into consideration that the General Assembly has adopted the UNDRIP. Another safeguard is the full and effective participation of IPs in such activities²⁵⁸. A step forward is the fact that participation is not limited only to monitoring and reporting (as in 4/CP.15). Thus involvement is required throughout the whole process. States are to develop national strategies and action plans that address, among others, the safeguards in para.2 and that ensure the full and effective participation of relevant stakeholders, IPs being one of them²⁵⁹. Additionally, actions should aim not just protection and conservation of forests and their ecosystem services but also enhancing other social and environmental benefits²⁶⁰.

²⁵⁴ http://www.indigenousclimate.org/index.php?option=com_content&view=article&id=55&Itemid=59

²⁵⁵ Ibid., regarding the Draft Conclusions on Agenda Item 5: FCCC/SBSTA/2008/L.2

²⁵⁶ FCCC/CP/2010/2 Annex V, para.2

²⁵⁷ Ibid., para.2(c)

²⁵⁸ Ibid., para.2(d)

²⁵⁹ Ibid., para.7

²⁶⁰ Ibid., para.2 (e)

One of the suggestions involves direct reference to the UNDRIP and reflects the stewardship role of IPs, i.e. those benefits need to take into account the sustainable livelihoods of IPs and their interdependence on forests²⁶¹. Thus possible harmonization of forest protection and stewardship rights of IPs could be achieved.

Tension between states' sovereignty and the possible realization of IPs rights could be detected in the regulation. On the one hand, the principle of sovereignty is clearly affirmed²⁶². On the other, when developing national forest governance structures and national forest monitoring systems, states must ensure they are 'transparent'²⁶³. The monitoring systems need to report on the safeguards in para.2.

6.2 UN-REDD Programme (The Programme)

This multilateral forum for advancing the idea and realization of REDD is of great significance. Its main purposes are capacity building, knowledge and experience accumulation so that such initiation turns out to be successful. The other outcome sought by the Programme is REDD's inclusion in a post-2012 regime by making the UNFCCC COP negotiators 'feel comfortable' with it²⁶⁴.

The Programme could be considered as an advancement of IPs rights underpinned by the stewardship rationale. It's a collaborative programme that 'will be guided by the five inter-related principles of the UNDG'²⁶⁵. Two of them are of particular importance: human rights-based approach to programming, with particular reference to the UNDG-GIPI, and environmental sustainability. The main IPs issues in the Programme could be grouped in three broad areas, which are guided by both general UN principles and UN-REDD

²⁶¹ Ibid., footnote 3

²⁶² Ibid., para.1(d), para.2(b)

²⁶³ Ibid., para.2(b), para.5(c)

²⁶⁴ UN-REDD FD, p.5

²⁶⁵ Ibid., p.7

principles guiding UN-REDD Programme activities that may impact the rights of IPs. The main IPs' issues are:

- A rights-based approach to programming, i.e. harmonizing REDD programmes with the realization of the rights of various stakeholders, including IPs. All REDD activities must adhere to the UNDRIP, UNDG-GIPI and the ILO No.169²⁶⁶. In this respect IPs unique identity and relationship with nature is affirmed. On p.4 the Framework Document of the Programme states explicitly that forests, in addition to their economic value, provide a wide range of cultural services and traditional values
- A participatory approach to programming, i.e. an active involvement of IPs in the design and implementation, monitoring and evaluation of REDD activities, which ensures their rights' protection. That means that broad representation of IPs must be ensured at all stages of the UN-REDD Programme activities, following the UNDG-GIPI²⁶⁷. Transparency and access to information is also required. Significantly the principle of FPIC is recognized and should be applied. Consultations with IPs should be a 'component of an overall and on-going process based on FPIC'²⁶⁸. Consultation can be central in a variety of activities, e.g. designing land and forest policy with IPs²⁶⁹. Other examples of the participatory approach are IPs' representation at the Policy Board of the Programme where decisions on National Joint Programmes (NJP) are taken with the full members' consensus²⁷⁰; involvement in the establishment of REDD payment distributions at IPs level²⁷¹; effective participation of local communities in land use decisions²⁷²
- Recognition of IPs marginalization in the larger societies. Awareness is raised that 'if REDD programmes are not carefully designed, they could marginalize the landless and

²⁶⁶ UN-REDD Operational Guidance: Engagement of Indigenous Peoples and Other Forest Dependent Communities (hereinafter UN-REDD OG) , part 2, point1

²⁶⁷ Ibid., part.2, p.8

²⁶⁸ Ibid., Annex 1

²⁶⁹ Ibid.

²⁷⁰ UN-REDD Programme Rules of Procedure and Operational Guidance, 1.2.4,1.6

²⁷¹ UN-REDD FD, p.11

²⁷² Ibid., p.4

those with informal usufructual rights and communal use-rights²⁷³. In that sense, one of the support functions of the three UN agencies (UNDP, UNEP and FAO) at the international level is to address land tenure issues through the encouragement of institutional reform, government willingness and community engagement in REDD-relevant land, ecosystem and development planning²⁷⁴.

The UNDG-GIPI explicate the most important stewardship rights of IPs. They set out a broad normative, policy and operational framework for implementing a human rights-based and culturally sensitive approach to programming (from development to evaluation) when addressing the specific situation of IPs. These guidelines recognize the vital importance of collective rights for IPs for they are necessary for their survival as distinct human groups²⁷⁵. The minimum standard of collective rights includes IPs' rights to their lands, territories and resources that they have traditionally occupied and used, to maintain their cultures, to recognition of their distinct identities, to self-government and self-determination, and to be asked for their FPIC in decisions that may affect them²⁷⁶. The collective rights recognize the right to the IPs' collectively held traditional knowledge as well²⁷⁷.

Key human rights principles applicable in the programming process²⁷⁸ are also relevant for the realization of IPs rights. Examples include the principle of interrelatedness of rights, which in the context of REDD stresses the importance of traditional land to IPs and the realization of their rights: with the recognition of land as an essential spiritual and economic element to indigenous communities, comes the recognition that if indigenous communities are deprived of their land, their integrity is affected, which in turn impacts the

²⁷³ Ibid.

²⁷⁴ Ibid., p.17

²⁷⁵ UNDG-GIPI, p.10

²⁷⁶ Ibid.

²⁷⁷ Ibid., p.15

²⁷⁸ UN Common Understanding on the Human Rights Based Approach to Development Cooperation, UNDG (2003)

realization of other human rights²⁷⁹. The principle of participation and inclusion has come to mean not just mere consultation, but it should lead to ‘concrete ownership of projects’ by IPs²⁸⁰. Thus the principle of FPIC is an integral part of the human rights-based approach²⁸¹.

The UNDG-GIPI express the traditional environmental ethic of stewardship and use it as a basis for clarifying the guiding principles when dealing with IPs issues withdrawn from existing regulation (mainly UNDRIP, ILO No.169). Thus, when dealing with land, resource, environmental, traditional knowledge and intellectual property rights of IPs, the following is underlined: cultural and spiritual dimensions for IPs of lands, territories and natural resources linked to their existence, ways of life, economic sustainability and identity; the key role of IPs as guardians of natural environments as they respectfully maintain them for future generations through their traditions; the value of indigenous sustainable management of natural resources; the fact that ‘indigenous laws, beliefs and customs provide the framework for harmonious relation between IPs and their environments’²⁸²; the value of IP’s knowledge, intangible heritage and cultural expressions for a sustainable future; the definition of a healthy indigenous community as one in which ‘the community as a whole enjoys harmonious relations with its environment’²⁸³.

Importantly these guidelines proclaim guiding principles that are significant for the realization of the stewardship role of IPs and their rights: IPs’ lands and territories should be recognized, demarcated and protected from outside pressures; state’s recognition of indigenous management systems; recognition of traditional land tenure rights; recognition of IPs’ rights to natural resources pertaining to their lands even if resource rights legally belong to the State; right to FPIC to any activity affecting indigenous communities’ lands, territories and resources and to benefit-sharing arrangements when State-owned resources are explored or exploited; respect for IPs’ right to resources necessary for their subsistence and development ; recognition of and respect for the spiritual relationship of IPs to their

²⁷⁹ UNDG-GIPI, p.27

²⁸⁰ Ibid.

²⁸¹ Ibid.

²⁸² Ibid., p.19

²⁸³ Ibid., p.18-21

lands and territories; recognition of and respect for the value of their traditional lifestyles and environmentally sustainable practices for the conservation and sustainable use of biological diversity, including their rights to benefit sharing; full participation in the definition and implementation of plans and policies related to CC impact mitigation; recognition of the rights to control, own and manage traditional knowledge, including the right to benefit from it; the right to freely pursue their economic, social and cultural development, to be secure in the enjoyment of their own means of subsistence and to determine priorities and strategies for the development or use of their lands, territories and natural resources²⁸⁴.

The Guidelines provide implications for UN Country Teams (UNCTs) for mainstreaming and integrating IPs' issues during different stages of the programming process, and importantly at country level²⁸⁵. The UNCTs need to ensure IPs' effective participation. UNCTs also need to be culturally sensitive, open and respectful to 'world views and understandings of well-being, including the significance of the natural world and the need to be in harmony with it'²⁸⁶. These cultural specifics need to be 'understood and linked to universal human rights principles in order to address inequalities and to achieve positive outcomes...'²⁸⁷ Thus, IPs environmental ethics need to be incorporated in REDD programming so that the full range of their rights could be protected.

The provisions of the UNDG-GIPI could be seen as a realization of art.41 and art.42 of the UNDRIP regarding promoting respect for and full application of the provisions of the Declaration.

²⁸⁴ Ibid., p.18-20, 23

²⁸⁵ Ibid., p.6

²⁸⁶ Ibid., p.4

²⁸⁷ Ibid., p.29

6.3 The Forest Carbon Partnership Facility (FCPF) and the World Bank (WB)

The FCPF, whose trustee is the WB, assists developing countries in their efforts to reduce emissions from deforestation and forest degradation by providing value to standing forests²⁸⁸, by building developing country's capacity and developing methodological and policy framework that provides incentives for the implementation of REDD programmes²⁸⁹. It becomes operational in June 2008. It's a two-part facility: Readiness Mechanism and Carbon Finance Mechanism with a current focus on the former.

After analysing the FCPF's documents, one can draw the conclusion that IPs' rights and interests are mainly protected through ensuring an effective and meaningful process of consultation and participation.

Thus at the international level IPs have the status of official observers within the governance structure of the FCPF: the Participants Assembly and the Participants Committee²⁹⁰. However, their rights are significantly reduced, compared to the UN-REDD Programme, as IPs have no voting rights, contrary to the recommendation of the UNPFII²⁹¹. Additionally, indigenous experts have been included in most Independent Ad Hoc Technical Advisory Panels (TAP) who review the preparatory work of the REDD Country Participants²⁹².

The main framework for the protection of Forest-Dependent Indigenous Peoples' rights could be extracted from the principles and objectives of the FCPF Charter, which are elaborated upon by other documents. One of the FCPF's objectives is to test ways 'to sustain or enhance livelihoods of local communities and to conserve biodiversity'²⁹³. In pursuing its objectives the FCPF has to be guided by several relevant principles:

²⁸⁸ FCPF 2009 Annual Report

²⁸⁹ FCPF Charter, preamble (a)

²⁹⁰ Ibid., Section 10.1, art.10; Section 11.7 (a), (b) and (d)

²⁹¹ E/c.19/2008/10, para.88

²⁹² FCPF 2009 Annual Report, point1.4.1

²⁹³ FCPF Charter, art.2, section 2.1(c)

- Respect for the REDD Participant Country’s sovereign right and responsibility to manage its own natural resources²⁹⁴.
- Compliance with the WB’s Operational Policies (OP) and Procedures (the Safeguard Policies in particular), ‘taking into account the need for *effective participation* of Forest-Dependent Indigenous Peoples ... in decisions that may affect them, *respecting their rights under international law and applicable international obligations*’²⁹⁵ (emphasis added).
- Maximization of ‘synergies with other bilateral and multilateral programmes on REDD’²⁹⁶. Collaboration with other partners in REDD countries, especially the UN-REDD Programme and its high standard of protection, can be potentially beneficial for IPs.

The principle regarding stakeholder effective participation, has received a more detailed attention in the FCPF Guidance Note on Consultation and Participation (2009-05-06, FCPF Guidance Note) and the FCPF Readiness Preparation Proposal (R-PP) Template (2010-01-28). Stakeholder consultation and participation is qualified as ‘critical to the effective implementation of REDD’²⁹⁷. It’s a continuous process throughout the formulation and execution of REDD policies and programmes²⁹⁸. The decision-making process needs to be inclusive, transparent and accountable, by incorporating the experience and the knowledge of IPs²⁹⁹. Thus countries are required to provide evidence of ‘meaningful initial consultations’ and to include a Consultation and Participation Plan (CPP) in their R-PP for the later phase (after funding)³⁰⁰.

Additionally, three of the principles for effective consultation and participation should be stressed. First, there is the recognition of diverse stakeholders and strengthening

²⁹⁴ Ibid., art.3, section 3.1(a)

²⁹⁵ Ibid., art.3, section 3.1(d)

²⁹⁶ Ibid., art.3, section 3.1(f)

²⁹⁷ FCPF Guidance Note, art.1

²⁹⁸ Ibid., art.4

²⁹⁹ Ibid., art.2 (a),(b); art.5

³⁰⁰ FCPF R-PP Template, Component 1b.Rationale, Guideline 3

the voice of vulnerable groups, especially IPs³⁰¹. IPs' vulnerable position due to their customary land and resource rights and their incompatibility with national laws is noted. Thus the FCPF requires the assessment of land use, forest policy and governance to be consulted upon during the formulation phase of the R-PP and/or to be consulted upon as part of the CPP³⁰². Clarifying rights to lands and carbon assets, including community rights is critical and should be conducted in accordance to the WB OP 4.10 on Indigenous Peoples³⁰³. This policy calls for the recipient country to engage in a process of free, prior and informed consultation (FPICon), and the Bank provides financing only where FPICon results in broad community support to the project by the affected IPs³⁰⁴. Significantly, there's an explicit reference to the UNDRIP and the expectation that countries that signed the Declaration would adhere to the principles of FPIC. It appears that there are different standards established for different countries. However, the almost universal support for the UNDRIP points to the higher standard of FPIC.

The second principle links the consultation process to the planning and decision-making processes³⁰⁵. Thus 'it should be clearly, publicly documented how views gathered through the consultation process have been taken into account and where they have not, explanations provided as to why they were not incorporated'³⁰⁶. The effectiveness of this principle is dependent on the third principle: 'mechanisms for grievance, conflict resolution and redress must be established and accessible during the consultation process and throughout the implementation of REDD policies and measures'³⁰⁷. However, it is still up to national governments to make them meaningful. The 2010 World Resources Institute's review of the latest submitted R-PPs is not positive: establishing a grievance/dispute resolution mechanism (used as a criterion for stakeholder participation in REDD+ planning

³⁰¹ FCPF Guidance Note, art.6(e)

³⁰² FCPF R-PP Template, Component 2a.Guideline 3

³⁰³ FCPF Guidance Note, art.6(e)

³⁰⁴ Ibid., Box1 on p.3

³⁰⁵ Ibid., art.6(f)

³⁰⁶ Ibid.

³⁰⁷ Ibid., art.6(d)

and implementation) has not been addressed in the R-PPs of Argentina, Nepal and Tanzania³⁰⁸.

Another important issue is that the FCPF has to be guided by the WB's Safeguard Policies, also called environmental and social due diligence framework for the FCPF. Those policies are designed to 'avoid, limit and/or mitigate harm to people and the environment'³⁰⁹. Thus environmental and social assessments 'help minimize or eliminate harm, or duly compensate negative consequences if these are inevitable'³¹⁰. The policies most relevant for REDD are those on IPs, Forests, Involuntary Resettlement, Use of Country Systems³¹¹. Those are visited in Sections 7.3-7.4.

In conclusion, in spite of some improvements in the regulatory framework of the FCPF, the meaningful implementation of the provisions is dependent on national governments' will and the FCPF's review of REDD countries' proposals. Even though the WB's Safeguard Policies need to be complied with, there are questions posed regarding their effective application. The Participants Committee (PC) determines whether the R-PP provides a sufficient basis to proceed with funding³¹². It is its responsibility to review and assess the R-PPs on the basis of set criteria³¹³ taking into account the review by the TAP³¹⁴ and the preliminary findings from the WB's due diligence³¹⁵. However, Guyana, Panama and Indonesia were 'approved' before safeguards run through³¹⁶. Those countries have a history of non-compliance with either the WB OP (Guyana, Panama subject to an

³⁰⁸ <http://www.forestcarbonpartnership.org/fcp/node/282>

³⁰⁹ FCPF R-PP Template, Component 2d.

³¹⁰ Ibid.

³¹¹ <http://go.worldbank.org/WTA1ODE7T0>

³¹² Resolution PC3/2009/1 art.1 (b) (iii)

³¹³ Program Document FMT 2009-1-Rev.4

³¹⁴ TAPs provide critical analysis, see joint statement of Global Witness et al. regarding the DRC's R-PP, 2010-03-15, <http://www.redd-monitor.org/2010/03/16/ngo-statement-raises-concerns-about-democratic-republic-of-congos-readiness-preparation-proposal/#more-4316>

³¹⁵ Resolution PC3/2009/1, art.1(b) (i)

³¹⁶ Colchester (2009), <http://www.redd-monitor.org/wordpress/wp-content/uploads/2009/07/Safeguarding-rights-in-the-FCPF.pdf>

Inspection Panel claim over poor compliance with Bank safeguards in a WB land titling project), or their international human rights obligations towards their IPs, particularly land rights or the right to consent, proved in the reports of both the Human Rights Committee (Indonesia) and the Committee on the Elimination of Racial Discrimination (Guyana, Indonesia)³¹⁷. The UN CERD specifically raises concerns about a draft regulation on REDD in Indonesia but the law was passed without being corrected³¹⁸.

6.4 Congo Basin Forest Fund (CBFF)

The CBFF was established in June 2008 and is hosted by the African Development Bank (ADB). Its strategic goal is to alleviate poverty and address climate change through reducing the rate of deforestation³¹⁹.

The CBFF and the ADB do not provide substantial protection for IPs' rights. Land and resource rights are nowhere to be mentioned. Useful provisions can be withdrawn through categorizing IPs as 'communities dependent on forest resources', 'forest dependent people'³²⁰ or 'poor and marginalized groups', also called 'primary stakeholders'³²¹. The term IPs is used only when it refers to 'inalienable rights regarding their culture and livelihood strategies that are supportive of sustainable forest management', as well as to capacity building and provision of information³²². Thus provisions, contained in both CBFF regulation and ADB's rules and policies³²³, can be categorized in three groups:

³¹⁷ Press Statement of FPP et al., 2009-03-23,

http://www.forestpeoples.org/documents/asia_pacific/indonesia_cerd_response_press_rel_mar09_eng.pdf

³¹⁸ Colchester (2009)

³¹⁹ CBFF Framework Document, p.3

³²⁰ CBFF Guidance Notes for Completing of Concept Note (2009) (CBFF Guidance Notes), p.2

³²¹ Handbook on Stakeholder Consultation and Participation in ADB Operations (2001) (hereinafter Handbook), point 2.2.1

³²² CBFF Guidance Notes, p.2-3

³²³ ESA Procedures for ADB's Public Sector Operations (2001); Integrated ESIA Guidelines (2003) and the Handbook, made applicable by the CBFF Operational Procedures' preamble (2009)

- Provisions aiming to reduce poverty
- Provisions aiming to achieve sustainable development through sustainable forest management
- Provisions regulating the ADB's cross-cutting theme of participation referring to the goal of actively involving project stakeholders that implies sharing of information and control over various initiatives, decisions and/or resources.

Particularly, the process for project selection is based on a 'two-levels criteria system'³²⁴. The first-cut appraisal involves evaluation of the main criteria, one of which is conformity with the main overall objectives of the CBFF. The objectives are: slow the rate of deforestation, reduce poverty amongst forest communities and show clear understanding of the context and stakeholders³²⁵. Understanding of the context can be expressed in a demonstration of how stakeholders have been consulted on the development of the concept³²⁶.

The second-cut appraisal focuses on criteria such as: positive impacts on projects' beneficiaries and partners and assessment of environment/social risks and appropriate mitigation³²⁷. Projects eligible for funding '...shall, *as much as possible*, be carried out in cooperation with local beneficiaries and stakeholders'³²⁸ (emphasis added).

Thus the CBFF supports efforts that transform the current forest sector and which aim at pro-poor community forestry, which supports improvement in the welfare and quality of life of communities dependent on forest resources; that recognize the importance of subsistence use of forest products for forest dependent people and target those vulnerable groups whose livelihoods are supportive of sustainable forest management or such are promoted; that lead to the emergence of a strong community based forest

³²⁴ CBFF Framework Document, point 2.3.5

³²⁵ Ibid., point 2.3.3 (i)

³²⁶ <http://www.cbf-fund.org/cn/proposals/criteria.php>

³²⁷ CBFF Framework Document, point 2.3.5

³²⁸ CBFF Operational Procedures: 6.2 Project Eligibility: 6.2.2(iv)

enterprise sector³²⁹. Additionally the CBFF's management is results-based. So the achievement of the CBFF's goals and objectives is evaluated against certain indicators: e.g. increase in incomes for forest people, 'doubling of community-owned and administered forest land in the Basin, subject to ... positive economic, social and environmental impact assessment³³⁰.

This summary, however, shows that all efforts are largely dependent on national governments' will and national legislation: e.g. community based forestry is possible 'where legislation permits'³³¹; projects carried out in cooperation with stakeholders as much as possible³³²; in the participatory approach, which is supposed to be mainstreamed in development by the ADB, the Bank's staff has only an advocate's role, national legislation being the yardstick³³³; major constraints to participatory approach quoted by Bank's staff are government reluctance to it and excessive government control over selection of participants³³⁴.

³²⁹ CBFF Guidance Notes, p.2-3

³³⁰ CBFF Operational Procedures, Annex 2

³³¹ CBFF Guidance Notes, p.3

³³² CBFF Operational Procedures, point 6.2.2

³³³ The Handbook: 3.1.7

³³⁴ Ibid., point 3.2.4

7 REDD safeguards and developments signalling a more visible implementation of stewardship rights of IPs

7.1 The push from multilateral institutions for the UNDRIP's implementation

Within the context of REDD we see that multilateral forums push towards the Declaration's implementation. The AWG-LCA draft contains explicit reference to it. Even though the language is rather weak, respect for IPs' rights should be realized by taking into consideration the adoption of the UNDRIP. The UN-REDD Programme declares the Declaration a minimum standard for IPs' rights protection, used as an evaluation tool for the Programmes's activities, and a pre-requisite for the approval of national programmes³³⁵. This is an important point with regard to the FCPF as one of the principles of the fund is harmonization with other programmes on REDD. Significantly the FCPF makes the UNDRIP the standard for those countries that have signed it.

7.2 Effective engagement of indigenous peoples as key stakeholders as a prerequisite for the approval of REDD programmes and plans

Another development which contributes to the realization of the stewardship rights of IPs is ensuring indigenous communities' involvement in the whole process of REDD programmes. The soundest development is witnessed in the UN-REDD Programme and the FCPF.

UN-REDD Programme is guided by the human rights-based and participatory approaches. It requires an overall and on-going process of consultation based on the

³³⁵ UN-REDD OG: point 3.2 (9)

principle of FPIC. Thus National Joint Programmes would be supported only if the requirements of the UN-REDD Programme regulative framework are followed. As the UNDRIP is the established standard for UN activities within the REDD Programme, it is possible to discern a tendency of permeating the shield of state sovereignty, at least for those countries who declare the Declaration to be an aspiration only. If nothing else, the push from UN agencies to comply with it can lead to increasing state practice contributing to the further shaping of the contours of the customary norms regarding IPs' rights. There are various built-in safeguards, which aim at ensuring the necessary level of engagement. Such are: submitting consultation evidence, the so called minutes of a 'validation meeting' in order the draft NJP to be endorsed by the Technical Secretariat for approval by the Policy Board³³⁶; the consultation and engagement strategy should be documented as an annex to the Programme Document³³⁷; outcome documents from consultation should be circulated and made accessible to IPs' organizations for an assessment of their accuracy³³⁸; NJPs are encouraged to assess the impact of UN-REDD Programme activities on IPs' rights 'as contained in the UN Declaration prior to taking decisions on such activities, strictly following FPIC procedures'³³⁹; importantly, the Resident Coordinator is made responsible for ensuring that the NJP abides by the 'UN's Standards and Declarations'³⁴⁰; establishing a complaint mechanism to ensure that 'activities supported by the UN-REDD Programme do not result in violation or erosion of the rights of IPs'³⁴¹. The last three examples extend beyond IP's rights that have procedural character. They cover their substantive rights as well.

There are some positive developments within the FCPF as well. Briefly, some of the advancing key principles are: direct reference to UNDRIP and adherence to the FPIC

³³⁶ UN-REDD OG: point 3.2(2); UN-REDD Rules of Procedure and Operational Guidance: point 2.3

³³⁷ UN-REDD OG: point 3.2(3)

³³⁸ Ibid., point 3.2(7)

³³⁹ Ibid., point 3.2(6)

³⁴⁰ Ibid., point 3.2(9)

³⁴¹ Ibid.

principle by signature countries³⁴²; transparency on how views generated during consultation have been incorporated, and if not, why³⁴³; and complaints and redress mechanisms requirement³⁴⁴. In practice, it is up to the quality of the assessment of the R-PP by the Participants Committee on the basis of established criteria, one of which is stakeholder consultation and participation³⁴⁵. During this activity the PC should take into account the review of the TAP and the findings from the WB's due diligence, i.e. compliance with safeguard policies³⁴⁶. Those two reviews are important, as the ensuing recommendations need to be dealt with explicitly by the respective country before the R-PP reaches the PC³⁴⁷.

7.3 The issue of Free Prior Informed Consent. What would FPIC imply for REDD? Implications in the scenario of lack of indigenous peoples' consent

The sources which explicitly mention FPIC³⁴⁸ refer to it as a right or a principle. As seen, its specific content could be interpreted differently. It could be said that the highest standard of IPs' rights protection through the realization of the principle of FPIC is established within the UN-REDD Programme, which should adhere to the UNDRIP. Its meaning is spelled out in several documents³⁴⁹. Thus the consent process has two main elements: consultation in good faith and full and equitable participation. It's conducted through IPs' freely chosen own representatives and customary or other institutions. The process may include the option of withholding consent. This standard is also expected to be

³⁴² FCPF Guidance Note, art.6(e)

³⁴³ Ibid., art.6(f)

³⁴⁴ Ibid., art.6(d)

³⁴⁵ Res PC3/2009/1, art.1(b) (i); FMT 2009-1-Rev.4, art.23

³⁴⁶ Ibid. art.1 (b) (i); art.17

³⁴⁷ FMT 2009-1-Rev.4, art.15

³⁴⁸ E.g. to some extent ILO Conv. No169 art.6-8, art.15-16; the UN-DRIPS art.10, 19,32; CERD GR 23, para.16 ; UNDG-GIPI; UNGA Res 60/142, 2005; Saramaka People v. Suriname, IACtHR, para.134-136

³⁴⁹ E.g. UN-REDD OG, Part 2, point 2; E/C.19/2005/3, UNPFII

followed within the FCPF by countries that endorsed the UNDRIP³⁵⁰. Such distinction points to a possible interpretation of having two different regimes: the one established in the WB' safeguard³⁵¹ and the one in the UNDRIP. The most contentious element is the meaning and implications of 'consent' and 'broad community support'. The key provisions of OP 4.10 define free, prior and informed consultation (FPICon) in good faith and informed participation through culturally-appropriate and collective decision-making process that must result in broad community support in order to be financed by the Bank³⁵². However, such consultation does not constitute a veto right for individuals or groups³⁵³. The meaning of broad community support is not explicitly stated. Additionally, the assessment of such support seems to be the prerogative of the Borrower and the Bank only. There's no built-in grievance/complaints/mediation mechanism for addressing disputes about the existence of broad community support in the initial project discussions³⁵⁴. Generally, it is difficult to conclude that FPIC is equivalent to FPICon resulting in broad community support³⁵⁵. Such a conclusion is confirmed by the fact that within the UN-system, the principle includes the option of withholding consent, while within the FCPF, such an option is not envisaged. The developments under the UNFCCC depend very much on how strong the link to the UNDRIP would be.

Even if we argue that certain core of the UNDRIP has turned into CIL, the contours of the customary norms are not very clear, especially with regards to the right to say yes or no. Practice is mixed. Some states (including some that voted for UNDRIP like Sweden) have expressly stated that FPIC does not include a veto right³⁵⁶. On the other hand, the

³⁵⁰ FCPF Guidance Note, art.6(e)

³⁵¹ WB OP 4.10-Indigenous Peoples, July 2005 (OP 4.10)

³⁵² OP 4.10: para.1, footnote 4, 6 (c), 10-informed participation is omitted compared to the definition of FPICon in the footnote to para.1, 11

³⁵³ Ibid., footnote 4

³⁵⁴ MacKay (2005), p.85, provisions for the later stages of the project (Indigenous Peoples Plan) available: Annex B, para.2(h)

³⁵⁵ Ibid., p.89

³⁵⁶ Anaya (2009), p.70, 82-92: reproduced statements; however, 'persistent objector' interpretation is possible

Philippines Indigenous Peoples Rights Act, 1997 defines FPIC the ‘consensus/consent of indigenous peoples determined in accordance with their customary laws and practices’³⁵⁷.

In conclusion, even if the right to veto is not included, the respective projects and policy developments should be consistent with the substantive rights of IPs most of which have customary character, as well as the procedural right to full and effective participation/engagement in all matters affecting them. The importance of those rights’ recognition is demonstrated in the case of Guyana, for instance. FPIC applies only to “‘recognized’ or titled lands thereby excluding approximately three-quarters of the lands traditionally owned and presently claimed by indigenous people”³⁵⁸.

7.4 Social/Cultural and Environmental Impact Assessments (UN-REDD Programme, the WB Safeguard Policies)

The social/cultural and environmental impact assessments are intended to work as a safeguard that aims at ensuring IPs’ rights protection. They could also be seen as part of the FPIC or consultation, and more specifically part of the ‘informed’ element. In order for the consultation process to be informed, it should provide information on the preliminary assessment of the likely economic, social, cultural and environmental impact³⁵⁹.

Thus UN-REDD Programme Staff has several duties prior to organizing consultation, one of which is assessing the need for ‘independent social/cultural and environmental assessments prior to project implementation to safeguard against potential negative effects on Indigenous Peoples, their communities and livelihoods’³⁶⁰. The issues, which need to be considered and addressed in these assessments include customary rights of IPs pertaining to ancestral domains, lands or territories; the cultural and spiritual values that IPs attribute to them; sacred sites; IPs’ natural resource management practices and systems; human rights

³⁵⁷ MacKay (2005), p.86

³⁵⁸ Ibid., p.89

³⁵⁹ UNDG-GIPI, Box 2, p.30

³⁶⁰ UN-REDD OG, Annex 1

assessment; and the legal situation of land tenure and government recognition of indigenous territories'³⁶¹. Additionally, the UNDG-GIPI contain a reference to the Akwe: Kon Voluntary Guidelines for the conduct of cultural, environmental and social impact assessments. These guidelines recognize the stewardship role of IPs. Indigenous communities' cultures and knowledge are 'deeply rooted in the environment on which they depend'³⁶². They are 'guardians of a significant part of the planet's terrestrial biodiversity' as IPs have used it in a sustainable way for thousands of years³⁶³.

The FCPF also addresses the issue by requiring social and environmental considerations to be incorporated into the REDD+ strategy-making process (a Strategic Environmental and Social Assessment (SESA)) and compliance with the WB's Safeguard Policies³⁶⁴. Thus countries should undertake analytical work, identifying key social and environmental issues associated with the drivers of deforestation, including those linked to the Bank's safeguard policy³⁶⁵. 'Diagnostic work should cover issues such as land tenure, sharing of benefits, access to resources, likely environmental and social impacts of REDD+ strategy options'³⁶⁶.

OP 4.10 has an essential role to play. According to it the social assessment is undertaken only after the Bank's screening has determined that IPs are 'present in, or have collective attachment to, the project area'³⁶⁷. Subsequently the Bank's conclusion is largely based on its own will and interpretation. Another danger for IPs' rights lies in the fact that the Bank can choose to rely on the country's own system for the identification of IPs³⁶⁸. IPs are only 'consulted' by the Bank³⁶⁹ during screening. The elements of the social

³⁶¹ Ibid.

³⁶² Akwe:Kon Guidelines, 2004, p.4

³⁶³ Ibid., p.4-5

³⁶⁴ FCPF R-PP Template, Component 2d; Note FMT 2010-16, para.5

³⁶⁵ Note FMT 2010-16, para.1(a)

³⁶⁶ Ibid.

³⁶⁷ OP 4.10, para.9

³⁶⁸ Ibid., para.8

³⁶⁹ Ibid.

assessment³⁷⁰ positively focus on issues such as traditionally owned or customarily used or occupied land and territories, natural resources on which IPs depend, recognition of the close ties of IPs to land and resources³⁷¹. However, the assessment is based only on FPICon, without explicitly stating that it needs to result in broad community support. Also when the Bank decides on its support for a project, it needs to ascertain whether there's broad community support for it. This is done based on the social assessment, among others³⁷². The elements of the social assessment only indirectly concern assessing broad community support³⁷³. Another gap is that even though the social assessment should be publicly disclosed, the policy does not contain explicit mechanism through which IPs may raise concerns about it³⁷⁴.

Overall, the FCPF and the Bank's safeguards have the potential of ensuring IPs' stewardship rights protection. The realization of this potential is largely dependent on the way the regulative framework is implemented by the staff (the PC, the technical advisory panels, the WB's working group teams) and the level of cooperation and good will of countries.

7.5 UN Permanent Forum on Indigenous Issues: Well-being indicators

Another positive development observed within the UN system and applicable to the UN-REDD Programme is the acknowledgment of the distinctive worldviews of IPs, which need to be taken into consideration when assessing the effectiveness of development programmes. Thus monitoring and evaluation of programmes should be 'participatory and be adapted to capture indigenous perceptions through their own analytical perspective'³⁷⁵. UN Country Teams need to use human rights based approaches indicators in order for the

³⁷⁰ Ibid., Annex A

³⁷¹ Ibid., Annex A, para.2(b), (d)

³⁷² Ibid., Annex A, para.11

³⁷³ MacKay (2005), p.85

³⁷⁴ Ibid., p.84

³⁷⁵ UNDG-GIPI, p.36

indicators to be effective with respect to IPs³⁷⁶. The UNPFII has conducted workshops for the identification of indicators of development and well-being for IPs in accordance with their own aspirations. Some main issues around which indicators were developed are health of ecosystems, ownership, access and use of lands and natural resources, migration and indigenous governance systems³⁷⁷. Examples of indicators are: per cent of IPs' owned land; IP's inclusion, participation and employment in ecosystem management; number and effectiveness of consultations implementing FPIC with indigenous community members and representatives³⁷⁸.

³⁷⁶ Ibid.

³⁷⁷ UN-REDD OG, p.15

³⁷⁸ E/C.19/2006/CRP.3, UNPFII

8 Conclusion

REDD is an initiative whose goal is to respond to the global environmental crisis of climate change. Such a programme directly affects the indigenous communities traditionally occupying the valuable resource of forests. An essential feature of addressing the status and rights of IPs in international law is the recognition of the importance of the profound sustainable relationship they have with the surrounding environment. It is situated at the core of IPs' survival and well-being. Their distinctive stewardship role furnishes both their substantive and procedural rights. IPs' stewardship role and their rights underpinned by it are best expressed in the UNDRIP. It seems that the extensive protection provided there is slowly turning to be the standard for IPs' rights protection. This process is unevenly advanced in the three main REDD multilateral forums (UN-REDD Programme, FCPF and CBFF) and the one that is still under negotiations (under the UNFCCC). As seen in the preceding discussion, the UN system takes the lead in realizing the stewardship role of IPs, further strengthening the process of customary norms crystallization. The FCPF and the CBFF follow. The reviewed positive developments and established safeguards, which permeate the principle of state sovereignty, contribute to the more tangible realization of the rights characterized by the stewardship ethical dimension. However, in many instances, state sovereignty 'remains the cornerstone of the world's legal heritage'³⁷⁹.

A possible limitation to this thesis could be identified through the prism of positivism where legal systems are characterized as formalistic due to the 'separation between morality and law'³⁸⁰. However, it is my belief that ethical considerations should be a part or dimension of law.

³⁷⁹ Bosselmann (2008), p,4

³⁸⁰ Ibid., p.13

9 Desirable legal developments

The concept of state sovereignty expressed in sovereignty over natural resources and in regulating ‘internal’ matters is slowly changing to accommodate some matters, which are of international concern. Subsequently, the plight of IPs and the global environment have become a concern of the international community. REDD is a mechanism that combines both. The suggested stewardship ethical framework is seen as an answer to successfully address both issues. If we see law as ‘both purely reflecting and actively influencing the way in which society operates’³⁸¹, REDD is such an opportunity. It could adopt the so-called evolving consciousness and harmonize IP’s rights (and their corresponding duties as stewards) with an ecological approach to environmental regulation where the state is a trustee³⁸².

³⁸¹ Ibid., p.135

³⁸² Ibid., p.169-173

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