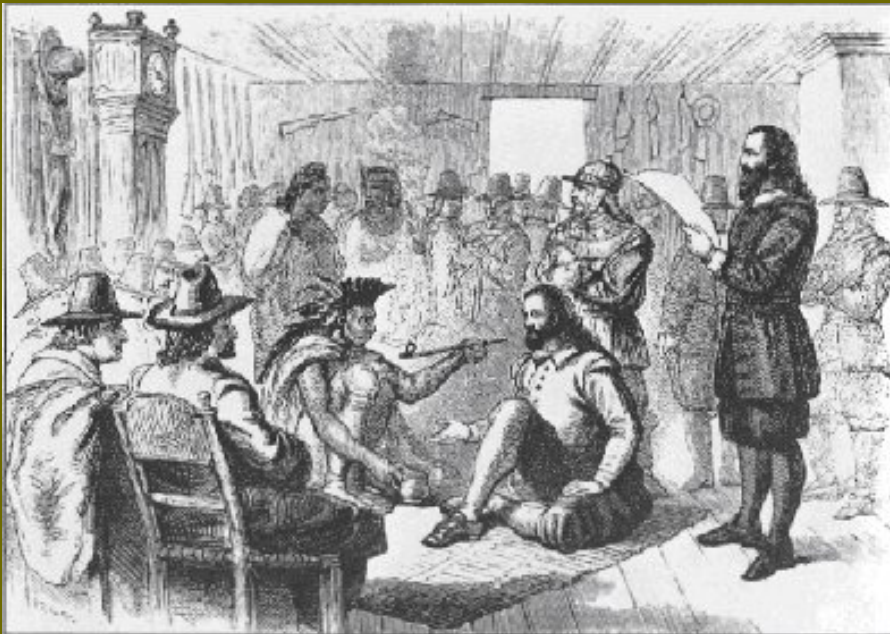




**Forest Peoples
Programme**

In Search of Middle Ground

**Indigenous Peoples, Collective Representation and
the Right to Free, Prior and Informed Consent**



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and Fergus MacKay**

August 2004

**In search of Middle Ground:
Indigenous Peoples, Collective Representation and
the Right to Free, Prior and Informed Consent**

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**Cover: Treaty-making with native 'nations' was an established way
of negotiating with indigenous peoples during the early
phases of colonialism**

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Abstract

Recognition of collective rights, notably rights to common properties or territories, brings indigenous peoples' customary institutions into direct relations with outside interests. New political relations, changing values and market forces create dilemmas for indigenous peoples, especially in choosing between adherence to traditional mechanisms of decision-making and the adoption of new forms of representation. The early experiences of North American indigenous peoples in dealing with European settlers have important lessons for indigenous peoples in other parts of the world today. Drawing on participatory investigations carried out in collaboration with indigenous peoples' organizations in Guyana, India, Venezuela and Indonesia, the paper illustrates both the common problems that indigenous peoples face and the diverse solutions that they have evolved to respond to these challenges. New international laws and standard-setting exercises have widely accepted that indigenous peoples should have the right of free, prior and informed consent to activities planned on their lands. Yet case studies show that consent is frequently engineered and indigenous institutions are out-manoeuvred by competing interests seeking access to indigenous peoples' common resources. Successful outcomes are most often achieved when collective land tenures are secure, when indigenous peoples control the speed and process of negotiation, and deal with outside interests through hybrid institutions, with legal personality, which nevertheless remain underpinned by customary norms, cosmovisions and values.

Keywords: Indigenous Peoples; Collective Rights; Representation; Free, Prior and Informed Consent.

Part 1 Understanding the Middle Ground

Introduction

When colonial entrepreneurs of the 17th and 18th centuries ascended the St. Lawrence to further their trade in Upper Canada, they came with more than just valued industrial goods that the indigenous peoples readily exchanged for furs. They came with their own world view, their own values, norms, laws and customs, their own notions of trade and rules of exchange, their own ideas about land and property. Armed and powerful though they were, their numbers were so few that they could not impose their ways unilaterally. Indeed, as in many other places when Europeans were in the first stages of conquest of the 'New World', the newcomers were there only with the consent of the indigenous peoples.¹ If differences arose, if the settlers and traders misbehaved or offended their hosts, they could be removed.² Negotiated agreements or formal treaties between the settlers and indigenous peoples were thus entered into in order to secure alliances and ensure the perpetuation of trading relations for mutual benefit.

Such an advantage did not last long. Once the traders had established their factories and forts, assembled enough arms and munitions, and secured independent means of food supply, they were able to bargain with the local peoples from positions of greater strength. Trading relations soon became more unequal and this was compounded by devastating epidemics of introduced diseases which reduced native³ numbers and undermined their morale.⁴ However, the colonial powers' range of control over the interior was limited. In French Canada, as in English North America⁵ and Dutch Guyana,⁶ the need for the colonists to show respect to indigenous peoples' claims for autonomy and to govern relations according to custom remained. The ambiguity in this relationship was famously summed up by the British, who treated the Six Nations Confederacy of the Iroquois League as both 'our subjects and allies'.⁷

It is in this sense that Richard White, in his illuminating study of the ambiguous relations between the French and their Algonquian trading partners in Upper Canada, speaks of *The Middle Ground*. In this 'Middle Ground', settlers and indigenous peoples met and 'constructed a common, mutually comprehensible world', in which the institutions of the two groups accommodated each other, found new meanings and established a shared basis for interaction.⁸ 'The Middle Ground depended on the inability of both sides to gain their ends through force'.⁹ The Middle Ground was created because both parties wanted to trade, neither had a monopoly on power, and they had to find mutually intelligible and acceptable means of dealing with each other.

¹ Jennings 1976; Whitehead 1988; Kupperman 2000.

² As happened for example to the first English colony of Roanoke (Rowse 1976; Miller 2000; Milton 2000).

³ The terms 'Indian' and 'native' are used here as terms of respect, not prejudice.

⁴ Delage 1993:79ff.

⁵ Nichols 1998.

⁶ Colchester 1997.

⁷ Jennings 1984.

⁸ White 1991:ix-x.

⁹ White 1991:52.

The Middle Ground in Upper Canada functioned more or less effectively because the French recognized the Indians' authority over their domains - their hunting grounds and wider territories. The French also recognized that the Indians should regulate their own affairs in these areas subject to their own customs and institutions. To maintain their own presence in the area, the French undertook to provide regular 'gifts' to the indigenous peoples – not so much out of largesse, but rather as a form of rent or even tribute to the indigenous authorities.¹⁰

The interactions between the French and the Algonquians were far from perfect. Disputes often arose, notably over the traders' relations with Indian women, specific exchanges, debts, and personal violence, frequently fuelled by the cheap liquor which was an integral part of the trade. An essential element of the Middle Ground was thus the mutual acceptance of means of dispute settlement. The French system of justice, in which retribution for crimes required that individual criminals be punished by the State, fitted ill with the indigenous notion that misdemeanours should be paid for by the group, which had collective responsibility for them. In the Middle Ground, the French acceded to the indigenous notion of collective payment for crimes, while the Algonquians accepted that, for the French to feel that justice had been done, individual perpetrators had to be seen to be punished. With honour satisfied on both sides, disputes could be resolved without recourse to warfare.¹¹



The 'Hiawatha Wampum belt' symbolised the founding of the Five (later Six) Nations Confederacy

Of course, indigenous peoples have found other 'Middle Grounds' before, in their dealings with neighbouring tribes; the establishment of the Six Nations Confederacy of the Iroquois, symbolized through *wampum* belts, the *kula* ring of the Trobriand Islanders of the South Pacific¹² and the *bodong* peace pacts of the Igorots in the Philippines¹³ being famous examples. However, when indigenous peoples treat with industrial societies, they are presented with challenges of a different order: the cultural differences are greater; the highly centralized institutional hierarchies of industrial powers often contrast with their own more egalitarian systems; the way western representatives negotiate using norms and

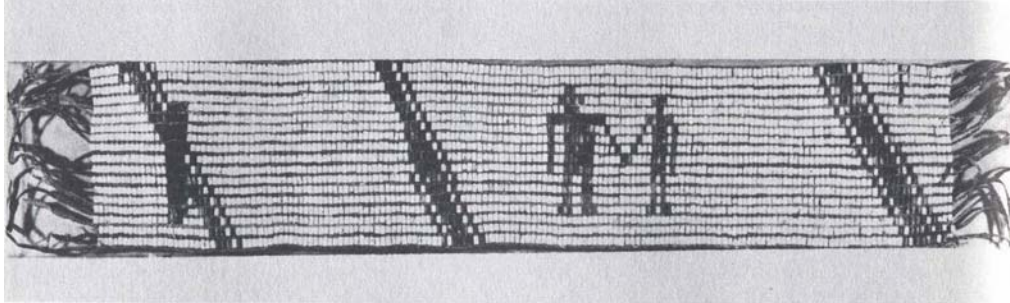
¹⁰ White 1991; Nichols 1998:127.

¹¹ As White (1991) notes, not all disputes were immediately resolved. Outbreaks of warfare did occur.

¹² Malinowski 1922.

¹³ Dozier 1966; Hilhorst 2003.

invoking authorities who are never personally involved in discussions; the extent to which the economic power of industrial societies is underpinned by global markets. All this is of a different order of magnitude to that encountered by previous indigenous systems of trade and exchange.



The 'Great Treaty Wampum Belt' associated with William Penn's treaty with the Delawares of 1682¹⁴

Today indigenous peoples in many parts of the world are in the process of trying to renegotiate their relations with post-colonial Nation States and with newly invading private sector operators seeking access to the resources on their lands. Using the language of international human rights law, treaty rights and inherent sovereignty they assert their right to self-determination in their dealings with governments and to free, prior and informed consent as expressed through their own representative institutions in dealing with the many other interests seeking access to their lands. In claiming the right to self-determination, few indigenous peoples seek full independence of the Nation States that now encompass them. They accept therefore that they have to find new ways of being recognized by national laws and systems of decision-making without losing their autonomy and their own values. They are, in effect, in search of 'Middle Ground'.

Pontiac's problem

One other lesson from North American history bears re-telling. After the conclusion of the Seven Years War and France's cession of the majority of its North American colonies to the British, the British took over the French trade network and interior forts and tried to redefine their relations with the Indians. They halted the practice of gift-giving, they stopped sales in firearms and munitions to the Indians, thereby making hunting for the peltry that inter-ethnic trade depended on impossible, and they sought to impose their own authority directly on the indigenous peoples, showing little respect for their customs and freedoms. At the same time, white settlement began to spill into and over the Appalachians and Alleghenies into the Susquehanna Valley and down to the Ohio.¹⁵

With their lands being lost to settlers, their trade in jeopardy and the authority of their own chiefs set in doubt, in 1763, Indians over a very wide area from the Susquehanna Valley west to the Great Lakes rose in revolt, in an event questionably celebrated as 'Pontiac's conspiracy'.¹⁶ A large number of the trading forts were taken over by the indigenous

¹⁴ Jennings 1984:246.

¹⁵ Jennings 1988: 441; Dillon 1983:41-48; Nichols 1998:126; Anderson 2000: 617-637.

¹⁶ McEvedy 1988:57.

peoples. Although some indigenous religious leaders sought a rejection of all future trade relations with the Europeans and a restoration of traditions,¹⁷ the main aim of the Indian war leaders was to restore the Middle Ground. They fought to restore their relationship with the French, the trade, the gift-giving and the recognition of their lands and authority. In the end, the British had to accede to most of these demands. Although the British never felt obliged to respect indigenous customs as had the French and were powerful enough to get away with a more arrogant approach, they did issue a (soon violated) Royal Proclamation recognizing the indigenous peoples' exclusive rights to their lands west of the Alleghenies.¹⁸ The revolt collapsed after a year once it became clear that the French cession of Upper Canada to the British could not be reversed.

In negotiating their peace and re-establishing a new 'Middle Ground', the British and indigenous peoples had great difficulty finding a mutually acceptable process for reaching an agreement. British disrespect for respected symbols like *wampum* belts compounded the problem.¹⁹ But the main dilemma for the British was to identify who spoke for the indigenous peoples. Who would express their consent to any newly negotiated agreement? The prominent Ottawa Indian leader, Pontiac, who had led the siege of the fort at Detroit, aspired to the role of mediator on behalf of many and the British acceded to this pretension, vesting him with great authority²⁰ (and later a magnified historical significance), hoping that he could be treated as the recognized leader of all the Indians between the Ohio Valley and the Great Lakes.²¹ In the event, this fiction did not work for either side. The British were obliged to negotiate separate agreements piecemeal with the eighteen 'tribes' involved in the uprising. Pontiac, for his part, ended up being rejected by his own people and was eventually assassinated by a disgruntled Peoria Indian. This tragic end to an inspiring leader was, as White remarks, 'a monument to the limits of chieftainship'.²²

The tale highlights two of the main challenges of the Middle Ground, first, the need for indigenous societies to agree means to represent their own collectivities and, secondly, for *mutually* agreed negotiating processes so that indigenous peoples can treat with industrial societies without being divided and ruled.

Collective Rights

One of the most significant achievements of the international world order of the 20th century has been the evolution of internationally agreed laws regulating human affairs in trade, the environment and human rights. Human rights laws can be interpreted as the outcomes of an effort to agree a set of norms on how human beings should be governed, without invoking the religious beliefs or convictions of any one particular human society in order to justify them.²³ There continues to be dispute about the extent to which such human rights are genuinely universal - the United Nations' draft Universal Declaration of Human

¹⁷ Josephy 1995: 255.

¹⁸ Indigenous lands in Florida, the Caribbean and parts of Lower Canada were also protected by the same Proclamation.

¹⁹ Anderson 2000:623.

²⁰ White 1991: 270.

²¹ Anderson 2000:633; White 1991:296, 306.

²² White 1991: 313.

²³ Human rights establish norms governing the relationship between States and individuals, States and peoples and other collectivities, and, to a certain extent between private persons, including corporate entities.

Rights was originally condemned by the American Anthropological Association as being conceived 'only in terms of the values prevalent in the countries of Western Europe and America'.²⁴ On the other hand, in 1993, 171 countries represented at the Second UN Conference on Human Rights affirmed the Universality of Human Rights, while admitting a proviso on the need to take into account national traditions.²⁵ Whatever their deficiencies in terms of their inspiration and universality, human rights laws nevertheless have provided many indigenous peoples with a set of standards they can appeal to in their quest for justice.²⁶

International human rights laws are often criticized for the undue emphasis they place on individual human rights. However, the elements of human rights law most used by indigenous peoples are those which set out the rights of collectives. Of these, the most fundamental are expressed in common article 1 of the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, which spells out the rights of all peoples to self-determination, to freely dispose of their natural wealth and resources and to be secure in their means of subsistence. Collective rights provisions are also evident in, *inter alia*, the Convention on the Elimination of All Forms of Racial Discrimination, the International Labour Organization's Conventions 107 and 169 on Tribal and Indigenous Peoples, the African Charter on Human and Peoples' Rights, the American Convention on Human Rights, the UNESCO Declaration on Race and Race Prejudice and the Caribbean Charter of Civil Society. The jurisprudence of the international human rights committees, that review implementation of the main human rights instruments, show that these committees interpret these instruments' recognition of collective rights as applying to indigenous peoples, just as they do to other social groups, peoples and collectives.²⁷ These advances in the recognition of the collective human rights of indigenous peoples have been consolidated in the United Nations' draft Declaration on the Rights of Indigenous Peoples and the Organisation of American States' proposed Declaration on the Rights of the Indigenous Peoples of the Americas.

A common experience of indigenous peoples facing the takeover of their lands is the denial of their rights to land, a legal fiction sustained by racial prejudice on the North American frontier until the close of the 19th century and still prevalent in many parts of the world. For example, in denial of his country's own laws, in 1845 newspaper editor John O'Sullivan, puffing the virtues of land settlement in Oregon and California affirmed: 'There is in fact no such thing as title to the wild lands of the new world, except that which actual possession gives. They belong to whoever will redeem them from the Indian and the desert, and subjugate them to the use of man'.²⁸ In fact, many colonial States recognised indigenous peoples' rights in land from the 16th century onwards, even if they overlooked the abuses and subterfuges which led to the denial of these rights in practice.

Today, through their domestic laws and administrative systems, most independent States inhabited by indigenous peoples in one way or another do recognize indigenous peoples' rights, especially with respect to land, although deficiencies in law and practice remain

²⁴ Merry 2001: 33; Dembour 2001; Niezen 2003: 94ff.

²⁵ Tetzlaff 1993:12.

²⁶ MacKay 2001 a, b, c, d, e.

²⁷ Mackay 2003. These committees have also interpreted rights ostensibly vested in individuals as protecting the collective rights of indigenous peoples (for example the right to property in Article 21 of the American Convention).

²⁸ Cited in McLynn 2003:10.

distressing. Moreover, in pressing for recognition of their land rights, indigenous peoples in many countries have been remarkably effective in establishing forms of 'Middle Ground' relating to land rights. Thus, rather than accepting the given norms of national land tenure systems, which tend to parcel up land as the private property of individual land owners, the more progressive land tenure regimes applied to indigenous peoples recognize indigenous land ownership through collective titles, which are inalienable (not transferable to third parties) and are vested in representative institutions of the peoples themselves.²⁹

Many indigenous peoples' notions of their rights in land are very different from those of industrial societies. Commonly, lands are not seen as saleable, individual properties with defined boundaries and titled owners but instead as broad territories to which a people belong and consider theirs through occupation and use, through belief and origin. Boundaries of such lands are not tightly defined by mapped coordinates recorded in anonymous cadastres but are frequently fuzzy edged and shifting, often defined by mythic associations, through contact and negotiation with neighbouring peoples, or marked on the land itself by blazing trees and erecting cairns. 'We do not own the land, the land owns us' has been a common statement of indigenous representatives at international debates.³⁰

States, however, in the exercise of their self-ordained task of regulating access to defined areas of lands by a variety of interests, require greater clarity and indigenous peoples also now seek such clarity in order to defend themselves against these same interests. Maps, long a tool in the hands of colonizers to assert their conquests and jurisdictions, are now also deployed by indigenous peoples and their supporters as a means for asserting and defining land claims. Participatory mapping techniques are very definitely not customary means for defining land rights but, used in the right way, may constitute useful Middle Ground that can permit indigenous peoples to redefine and assert their rights to their territories by placing on maps their own toponymies, histories, knowledge and practice of land occupation and use. Generated in this way, maps become useful tools to negotiate recognition of indigenous peoples' rights to their lands, waters and resources and to their customary laws, which define the way they related to these.³¹

Free, Prior and Informed Consent

Once and if States and indigenous peoples agree to recognize each other's existence and rights, the need remains for mutually agreed processes and points of contact to allow the two to interact. A key principle that has emerged over a very long history in order to ensure these relations remain, as far as possible, equitable and amicable is free, prior and informed consent.

This is not a new concept and was an integral element in the negotiated settlements that characterised the Middle Ground in the 17th century. The principle of consent was not only observed in direct contact situations but was enshrined in some of the early 'charters' issued by colonial powers to ventures seeking to establish 'plantations' (colonies) in the 'New World'. For example, the ill-fated 'Company of Scotland Trading to Africa and the Indies', which later sought to establish a Scottish colony in the Darien isthmus, was authorised by Act of Parliament and with the assent of the Crown to plant colonies, build cities, towns or forts, with the consent of the natives of such places. The charter likewise

²⁹ Colchester 2001.

³⁰ Cf Samson 2003:57ff.

³¹ Brody 1981; Poole 1995; Eghenter 2000; Chapin and Threlkeld 2001; Griffiths 2002; Colchester 2004.

empowered the company to make treaties of peace and commerce with the 'native princes, governors and rulers of the land they settled'.³²

Today, decisions about when, where and how to exploit natural resources are normally justified in the national interest and the 'greater good', which is generally interpreted as the interest of the majority. The result is that the rights and interests of unrepresented groups, such as indigenous peoples and others, will often be subordinated to the majority interest; conflict often ensues and the rights of indigenous peoples are often violated and disregarded.

As the report of the Extractive Industry Review, recently commissioned by the World Bank, has observed 'when a company is granted the legal right by a government to exploit resources in certain territories, locals and indigenous peoples may be evicted from their traditional lands or lose access to land that may hold cultural and survival significance to them. When this happens without talking to and receiving the consent of those who live there, it can result in a breakdown of communities and cultural norms, as well as cutting people off from their livelihood'.³³

The 1993 Vienna World Conference on Human Rights declared that, 'While development facilitates the enjoyment of all human rights, the lack of development may not be invoked to justify the abridgement of internationally recognized human rights'.³⁴ In contemporary international law, indigenous peoples' have the right to participate in decision making and to give or withhold their consent to activities affecting their lands, territories and resources or rights in general. Consent must be freely given, obtained prior to implementation of activities and be founded upon an understanding of the full range of issues implicated by the activity or decision in question; hence the formulation: free, prior and informed consent.

Observing that indigenous peoples have and continue to suffer from discrimination, and 'in particular that they have lost their land and resources to colonists, commercial companies and State enterprises',³⁵ the Committee on the Elimination of Racial Discrimination called upon states-parties to 'ensure that members of indigenous peoples have equal rights in respect of effective participation in public life, and that no decisions directly relating to their rights and interests are taken without their informed consent'.³⁶

In 2001, the UN Committee on Economic, Social and Cultural Rights noted 'with regret that the traditional lands of indigenous peoples have been reduced or occupied, without their consent, by timber, mining and oil companies, at the expense of the exercise of their culture and the equilibrium of the ecosystem'.³⁷ It then recommended that the state 'ensure the participation of indigenous peoples in decisions affecting their lives. The Committee

³² Prebble 2002:27.

³³ EIR 2003: 18-19.

³⁴ *Vienna Declaration and Programme of Action*, adopted by the World Conference on Human Rights on 25 June 1993, Part I, at para. 10. UN Doc. A/CONF.157/23, 12 July 1993.

³⁵ *General Recommendation XXIII (51) concerning Indigenous Peoples*. Adopted at the Committee's 1235th meeting, 18 August 1997. UN Doc. CERD/C/51/Misc.13/Rev.4, at para. 3.

³⁶ *Id.*, at para. 4(d).

³⁷ *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Colombia*. 30/11/2001. E/C.12/Add. 1/74, at para. 12

particularly urges the State party to consult and seek the consent of the indigenous peoples concerned³⁸

The Inter-American Commission on Human Rights (IACHR) has found that Inter-American human rights law requires 'special measures to ensure recognition of the particular and collective interest that indigenous people have in the occupation and use of their traditional lands and resources and their right not to be deprived of this interest except with fully informed consent, under conditions of equality, and with fair compensation.'³⁹ The IACHR stated that this right is part of a number of 'general international legal principles applicable in the context of indigenous human rights.'⁴⁰

Most recently, the IACHR stated that

Articles XVIII and XXIII of the American Declaration specially oblige a member state to ensure that any determination of the extent to which indigenous claimants maintain interests in the lands to which they have traditionally held title and have occupied and used is based upon a process of fully informed consent on the part of the indigenous community as a whole. This requires, at a minimum, that all of the members of the community are fully and accurately informed of the nature and consequences of the process and provided with an effective opportunity to participate individually or as collectives. In the Commission's view, these requirements are equally applicable to decisions by the State that will have an impact upon indigenous lands and their communities, such as the granting of concessions to exploit the natural resources of indigenous territories.⁴¹

Crucially, in this case, the IACHR observed that Inter-American human rights jurisprudence "has acknowledged that the property rights of indigenous peoples are not defined exclusively by entitlements within a state's formal legal regime, but also include that indigenous communal property that arises from and is grounded in indigenous custom and tradition."⁴² This is important because free prior and informed consent is dependent on clear recognition and protection of indigenous peoples' rights, particularly to lands territories and resources traditionally owned or otherwise occupied and used. Without full recognition of indigenous peoples' territorial rights, it will not provide the protection is it designed to provide.

Indigenous peoples' right to free and informed consent is also embraced in the draft declarations on the rights of indigenous peoples now pending at the UN and OAS. Though still preliminary, these declarations are increasingly cited as expressions of principles of customary international law. Article 30 of the UN draft Declaration provides that

Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands, territories and other resources, including the right to require that states obtain their free and informed consent prior to the approval of any project

³⁸ *Id.*, at para. 33.

³⁹ Inter-American Commission of Human Rights, *Report N° 75/02*, Case N° 11.140, Mary and Carrie Dann (United States), Dec. 27, 2002. OEA/Ser.L/V/II.116, Doc. 46, at para. 131. See, also, in accord, *Report No. 96/03, Maya Indigenous Communities and their Members (Case 12.053 (Belize))*, 24 October 2003, at para. 116.

⁴⁰ *Id.*, at para. 130. (footnotes omitted).

⁴¹ *Report No. 96/03, Maya Indigenous Communities and their Members (Case 12.053 (Belize))*, 24 October 2003, at para. 141 (footnotes omitted).

⁴² *Id.*, at para. 116 (footnotes omitted).

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

The approach adopted by the respective instruments above is consistent with the observations of the UN Centre for Transnational Corporations in a series of reports that examine the investments and activities of multinational corporations on indigenous territories.⁴³ The final report concluded that multinational companies' 'performance was chiefly determined by the quantity and quality of indigenous peoples' participation in decision making' and 'the extent to which the laws of the host country gave indigenous peoples the right to withhold consent to development....'⁴⁴

A 2001 UN workshop on indigenous peoples and natural resources development reiterated and elaborated upon this conclusion, stating in its conclusions that the participants, which included industry representatives:

recognized the link between indigenous peoples' exercise of their right to self determination and rights over their lands and resources and their capacity to enter into equitable relationships with the private sector. It was noted that indigenous peoples with recognized land and resource rights and peoples with treaties, agreements or other constructive arrangements with States, were better able to enter into fruitful relations with private sector natural resource companies on the basis of free, prior, informed consent than peoples without such recognized rights.⁴⁵

The recent UN Sub-Commission on the Promotion and Protection of Human Rights' *Norms on Transnational Corporations* similarly state that:

Transnational corporations and other business enterprises shall respect the rights of local communities affected by their activities and the rights of indigenous peoples and communities consistent with international human rights standards.... They shall also respect the principle of free, prior and informed consent of the indigenous peoples and communities to be affected by their development projects.⁴⁶

The principle of free, prior and informed consent for indigenous peoples has also been accepted by a number of sectoral standard-setting processes, which set out 'best practice' norms for private sector and non-governmental agencies. The Forest Stewardship Council (FSC), for example, requires logging companies to 'recognize and respect the legal and customary rights of indigenous peoples to own, use and manage their lands, territories and resources'. It also requires that 'indigenous peoples shall control forest management on their lands and territories unless they delegate control with free and informed consent to

⁴³ The CTC reported to the Working Group four times: proposing methodology, and a draft questionnaire for distribution to Indigenous Peoples (UN Doc. E/CN.4/Sub.2/AC.4/1990/6); a preliminary report (UN Doc. E/CN.4/Sub.2/1991/49); a report focusing on the Americas (UN Doc. E/CN.4/Sub.2/1992/54) and; a report focusing on Asia and Africa, summarizing the findings of all reports and making recommendations "to mitigate the adverse impacts of TNCs on indigenous peoples' lands, and increase indigenous peoples' participation in relevant government and TNC decision-making." (UN Doc. E/CN.4/Sub.2/1994/40).

⁴⁴ *Report of the Commission on Transnational Corporations to the Working Group on Indigenous Populations*. UN Doc. E/CN.4/Sub.2/1994/40, at para. 20.

⁴⁵ *Report of the Workshop on Indigenous Peoples, Private Sector Natural Resource, Energy, Mining Companies and Human Rights*. Geneva, 5-7 Dec. 2001. E/CN.4/Sub.2/AC.4/2002/3, 17 June 2002, at 3.

⁴⁶ *Commentary on the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, UN Doc. E/CN.4/Sub.2/2003/38/Rev.2, 2003, para. 10(c).

other agencies'. The FSC applies the same principle to plantation companies operating on indigenous lands.⁴⁷

Likewise the World Commission on Dams, after detailed consultations with indigenous peoples,⁴⁸ recommended that in future all dam building should observe strong principles. The Commission noted:

Public acceptance of key decisions is essential for equitable and sustainable water and energy resources development. Acceptance emerges from recognizing rights, addressing risks, and safeguarding the entitlements of affected people, particularly indigenous and tribal peoples, women and other vulnerable groups. Decision making processes and mechanisms are used that enable informed participation by all groups of people, and result in the demonstrable acceptance of key decisions. Where projects affect indigenous and tribal peoples, such processes are guided by their free, prior and informed consent.⁴⁹

The Commission furthermore noted that:

Free, prior and informed consent (PIC) of indigenous and tribal peoples is conceived as more than a one-time contractual event – it involves a continuous, iterative process of communication and negotiation spanning the entire planning and project cycles... Indigenous and tribal peoples are not homogeneous entities. PIC should be representative and inclusive. The manner of expressing consent will be guided by customary laws and practices of the indigenous and tribal peoples and by national laws. Effective participation requires an appropriate choice of community representatives and a process of discussion and negotiation within the community that runs parallel to the discussion and negotiation between the community and external actors.⁵⁰

Similar principles have also been recommended by the Extractive Industries Review (EIR), which was commissioned by the World Bank to recommend the form of future Bank engagement in the sector. Like the WCD, the EIR heard detailed testimony from indigenous peoples and commissioned a detailed study of the way extractive industries had and should relate to indigenous peoples.⁵¹ In its final report to World Bank President, James Wolfensohn, the EIR concluded that 'indigenous peoples and other affected parties do have the right to participate in decision-making and to give their free prior and informed consent throughout each phase of a project cycle.' It also noted that 'there are real issues that need to be worked out to make free prior and informed consent a clearer and more effective tool. These should be worked out in cooperation with bodies that have expertise in indigenous peoples' issues, such as the U.N. Permanent Forum on Indigenous Issues, which has established a working group on the topic.'⁵² The Final Report further recommends that it is 'necessary to include covenants in project agreements that provide for multiparty

⁴⁷ www.fsoax.org ; Colchester, Sirait and Wijardjo 2003; Collier 2004.

⁴⁸ Colchester 1999.

⁴⁹ WCD 2000:xxxiv.

⁵⁰ WCD 2000:281.

⁵¹ Colchester, Tamayo, Rovillos and Caruso 2003.

⁵² EIR 2003: 58. The PFII has not in fact established a WG on FPIC, but has recommended to ECOSOC that it finance the establishment and operation of such a WG.

negotiated and enforceable agreements that govern various project activities, should indigenous peoples and local communities consent to the project.⁵³

Some of the international development agencies have also recognized the principle of prior and informed consent in policies relating to indigenous peoples. In its policy paper 'The UNDP and Indigenous Peoples: a policy of engagement' the UN Development Programme accepts the principle of free, prior and informed consent noting this is 'consistent with United Nations covenants'. The Inter-American Development Bank has accepted that indigenous peoples should not be relocated without their consent to make way for development projects. The European Union through its resolution on 'Indigenous Peoples' accepts their 'right to object to projects', which the European Commission specifies includes the principle of free and informed consent.⁵⁴

Since 1996, conservation bodies such as the World Conservation Union, the Worldwide Fund for Nature and the World Parks Congress have been progressively adopting and developing norms recognizing indigenous peoples' rights, including the right to free, prior and informed consent in the establishment of protected areas on their lands.⁵⁵ The Convention on Biological Diversity, which protects the use of the traditional knowledge of 'indigenous peoples and local communities embodying traditional lifestyles' under article 8j, interprets this as requiring their free, prior and informed consent. The secretariat of the Convention reports that, as of December 2000, this principle has already been accepted into law and practice in 62 countries.⁵⁶ At the 7th Conference of Parties to the Convention it was agreed 'best practice' that all resettlement for the creation of protected areas should be subject to the free, prior and informed consent of affected communities.⁵⁷

Despite these gains, resistance to acceptance of these norms continues, notably by the World Bank. The Bank rejected the proposals of the World Commission on Dams as unworkable and World Bank lawyers have rejected appeals by indigenous peoples to incorporate this principle into their revised Operational Policy on Indigenous Peoples. In rejecting the principle, the Bank argues that free, prior and informed consent is not enshrined in international law, is inconsistent with national laws in many developing countries and is impracticable to implement.⁵⁸ The remainder of this article examines these latter assertions by: examining how the principle of free, prior and informed consent is applied in some countries; reviewing the obstacles to its implementation; and recommending means of overcoming them.

⁵³ The principle of free, prior and informed consent for indigenous peoples was also endorsed by the Mines, Minerals and Sustainable Development process run by the International Institute for Environment and Development and the World Business Council for Sustainable Development (MMSD 2003).

⁵⁴ Griffiths 2003: 28, 29, 46, 62.

⁵⁵ Colchester 2004b.

⁵⁶ UNEP/CBD/WG8J/INF/1, 27 November 2001, paragraph 11.

⁵⁷ UNEP/CBD/COP/7/21

⁵⁸ Debate between indigenous peoples and the World Bank on this issue is continuing.

Part 2 The Middle Ground and the Implementation of FPIC: national realities

*Guyana*⁵⁹

The Middle Ground in Guyana has a long and chequered history. The original Dutch settlements, established in the early 17th century on the coast, were built up around a trade with the indigenous peoples in valuable timbers, oils, dyes and foodstuffs. The Dutch secured their tenuous presence by recruiting Carib allies to hold the balance of power against Spanish colonies in Trinidad and Venezuela. Early records show how the colonials recognised the leaders of the 'Indian' 'nations' as 'kings' and they signed formal treaties with them to secure their trade.

In the early 18th century the Dutch expanded their presence into the interior by establishing trading forts manned by 'postholders' and distributing gifts to the chosen leaders of the indigenous nations they identified there.⁶⁰ The 'Amerindians', as they came to be known, were recruited as a 'bush police' to capture 'red slaves' and recapture runaway black slaves which had been imported to work the newly established plantations on the coast. Amerindian leaders, chosen by the Dutch from among several candidates put forward by the indigenous peoples, were formally recognised by the Dutch as 'Owls' and they were given silver collars, wide-brimmed hats and silver-knobbed canes as symbols of their office.⁶¹ As products of the Middle Ground, the 'Owls' were intermediaries between the Dutch traders and their own peoples, who continued to rule themselves according to their own customs.

The transfer of control of the Guyana colonies to the British in the early C19th did not change this system. Under the British, the 'Owls' were renamed 'Captains', and 'Sub-Captains' were appointed to assist them in their duties. The Captains were appointed in public ceremonies at which they were given written and signed 'Commissions' charging them with promoting *'the welfare and well-being of the Indians thus placed under your protection'*. The British puzzled over which laws should obtain in the communities – customary law or British law – and, from 1834 onwards, resolved the ambiguity in a practical way by giving the Captains the powers of rural Constables.

The duties of the Captains/Constables were quite onerous. Their principal task was to act as a liaison officer between the British and their own people. They had to function as census-takers, act as minor justices of the peace to preserve law and order, control crime and feuds, organise the capture of runaway slaves, supply labour for visiting expeditions, negotiate wages, mediate trade arrangements, solicit medical assistance and encourage attendance at mission schools and churches. By the early C20th, the Captains were issued with uniforms to give them greater authority.⁶²

In one respect the British system of recognised 'Captains' differed from the Dutch appointment of 'Owls'. At least during the late C19th, it became the norm for the colonial state to recognise the Amerindians' own choice of Captain and during the 20th century, as

⁵⁹ This section is substantially drawn from Colchester, La Rose and James 2001.

⁶⁰ Menezes 1977; Whitehead 1988; Benjamin 1992; Colchester 1997

⁶¹ Menezes 1979

⁶² Menezes 1977.

democratic principals were globalised, the idea that Captains were the elected representatives of their communities became general (although not recognized in law).

After World War II, the ideals of representative democracy became further established. Government surveys revealed the shocking state of morale and health, and administrative neglect, in the Amerindian communities and strongly recommended the setting up of Village Councils. By establishing these Village Councils, the government aimed to strengthen Amerindian participation in development, hasten Amerindian integration into the national mainstream and provide greater checks and balances on the powers of the Captains. The measure was introduced at the same time as the colonial government embarked on a conscious policy of interior development and the concentration of dispersed Amerindians into larger, centralised and colonially administered settlements under the direct supervision of British District Officers.

Village Councils provided a means by which the previous leaders of smaller settlements and dispersed households could be given a formalised role in decision-making. In 1951, Ordinance 22 was passed formally recognising the authority of Village, Area and District Councils and by 1955 the first experiments in establishing these Councils, later to become general, were begun in the Upper Mazaruni.⁶³ The Councils were empowered to levy taxes, enact rules and regulations for a number of prescribed purposes and to hold hearings and levy fines for non-compliance with the rules and regulations.

In 1976 the roles of the Amerindian Councils were reaffirmed with the revision of the *Amerindian Act 1951*. In addition to their former duties, Amerindian Councils became the owners of Amerindian titled lands. Lands were vested in the Councils to be held in trust for the benefit of their communities. In 1990, the authority of Amerindian Captains to act as justices of the peace was also reaffirmed under the *Miscellaneous Enactments (Amendment) Act*.⁶⁴

The British had made recognition of Amerindian land rights, a condition of the granting of Independence to Guyana (1966). An Amerindian Lands Commission was accordingly set up that year. It reported in 1969. It noted that the indigenous peoples, whom it had managed to talk to, had made requests for recognition of their rights to 43,000 square miles, slightly more than 50 per cent of the country. However, the Commission recommended that 128 indigenous communities receive title to 24,000 square miles on the grounds that the areas requested by the Amerindians were "excessive and beyond the ability of the residents to develop and administer."⁶⁵ By 2003, a total area of some 9,000 square miles had been handed out to some 76 communities, leaving some 50 communities still without any land security and the great majority of communities with title to only small portions of the lands they occupy and use.

In outline, the current law in Guyana prevents small-scale and medium-scale mining on Amerindian lands.⁶⁶ Moreover, it is government policy that large-scale prospecting and mining should only go ahead on Amerindian titled lands with the agreement of the Captain and Council.⁶⁷ Furthermore, the procedures governing such agreements, are set out in

⁶³ For a discussion and more detailed references see Colchester 1997:126-139.

⁶⁴ UMADC, APA and FPP 2000:14.

⁶⁵ ALC 1969:77.

⁶⁶ Greater details of the situation are set out in Colchester, La Rose and James 2001:19-21.

⁶⁷ GoG 1997.

Section 19(1)(b) of the Amerindian Act, which authorizes the Village Council, not the Captain alone, to make decisions about the use, management and regulation of titled lands. The approval of the majority of the Village Council is required for such agreements in accordance with the procedures set out in the *Amerindian District, Area and Village Council (Conduct of Business) Rules, R. 3/1959*. These rules, made under section 19(2) of the Amerindian Act, require *inter alia* that:

- All decisions be made in public meetings of the Village Council.
- Notice of such meetings be sent to all Council members and the public at least three days before the meeting takes place
- That there must be 51% of the Council present for a quorum.

Additional Middle Ground is also in the process of being established in Guyana consequent to a revision of the Constitution and an ongoing revision of the Amerindian Act. The Constitution establishes an Indigenous Peoples Commission to have oversight of human rights issues related to Amerindians, and also recognizes a National Toushaos Council, made up of all the elected Amerindian Captains, which serves as an additional process of mediation between the indigenous peoples and the government.

In sum, although significant legal and practical issues remain to be worked out, most notably and importantly over the extent of Amerindian lands, the basis already exists in Guyana for the implementation of the principle of free, prior and informed consent.

*Indonesia*⁶⁸

In Indonesia, a composite State assembled in the 1940s from the disparate colonial possessions in the Dutch East Indies, the Middle Ground has a very varied history. The Dutch ruled their Indonesian subjects through a mix of direct and indirect rule. In Java they closely administered native affairs right down to the village level⁶⁹ but in most of the so-called 'Outer Islands', they recognised the authority of native rulers, although their rule over the forested interiors of areas such as Borneo was anyway weak,⁷⁰ and only gradually sought to formalise the application of customary law. The Dutch also ruled through legal dualism: the (largely commercial) affairs of Europeans were ruled through colonial laws developed on the basis of Roman-Dutch law, while the affairs of natives were ruled through native courts, which administered customary law (*adat*).⁷¹

The Middle Ground offered by this recognition of customary rulers and customary law tightened as the Dutch administration strengthened its grip: native courts were increasingly subject to regional courts presided over by Dutch judges who specialised in administering formalised versions of *adat* and appeals could be made to appellate courts that were run by professional native lawyers with only tenuous links to the customary laws of the communities. Nevertheless, outside Java, the principle that customary communities had the 'right of allocation' over their customary lands continued to be recognised throughout the period of Dutch rule.⁷²

⁶⁸ Most of this section is drawn from Colchester, Sirait and Wijardjo 2003.

⁶⁹ On Java, the Dutch early assumed direct authority in Batavia but recognised the authority of the Sultan of Yogyakarta right up until Independence. The *desa* administrative system was imposed throughout Java in the early 19th century (Burns 1999).

⁷⁰ Sellato 2001.

⁷¹ Hooker 1978.

⁷² Ter Haar 1948; Holleman 1981; Burns 1999; Lev 2000.

Adat became a symbol of newly emerging Indonesian identity and, as nationalist movements grew, was asserted as a repudiation of Dutch rule.⁷³ Accordingly, following the Indonesian Declaration of Independence in 1945, the new Constitution affirmed *adat* and recognised the rights of self-governing communities.⁷⁴ Despite this recognition, the State moved progressively to diminish these communities' autonomy and the scope of *adat*. Regional *adat* courts were gradually abolished in the 1960s and 1970s.⁷⁵ In 1979, under the autocratic rule of President Suharto, a Local Administration Law was passed which imposed a unified system of administration right down to the village level, thereby occluding customary institutions. The Act was repealed in 1999, but not before great damage to customary institutions had been done.⁷⁶

Effective recognition of customary rights in land has also been seriously deficient. The Basic Agrarian Act does recognise the principle of customary rights in land and provides for collective tenures but these are interpreted as weak rights of usufruct. Moreover, these tenures are subordinated to an unusual degree to State interests. Furthermore, the regulations necessary to recognise collective tenures have never been developed, so formal recognition, titling and registration of collective rights has never been carried out.⁷⁷ On top of this, over 70% of Indonesian territory has been classified as 'forests' and is thus subject to the Basic Forestry Law. According to the law, areas defined as 'State forest lands', in which *adat* is recognised, deny proprietary rights. The law also limits the ways customary rights of use and access are recognised. However, the process of forest gazettelement under the Forestry Law has been carried out deficiently, meaning that few rights have actually been extinguished by the assertion of the jurisdiction of the forest department.⁷⁸

With the fall of Suharto, a forceful popular movement of self-defined indigenous peoples sprang up in Indonesia⁷⁹ demanding recognition of customary rights and institutions – in effect calling for the restoration of the Middle Ground that had been destroyed by the centralist and integrationist impositions of Suharto's 'New Order' regime. In 1999, in a celebrated statement to the press, the movement issued a challenge to the new government: 'if the State will not recognise us, we will not recognise the State'.⁸⁰ In response to this and other pressure from civil society, the subsequent reformist governments have undertaken several moves to increase regional autonomy and recognise indigenous rights. These moves include a series of laws granting greater autonomy to district administrations and creating the possibility for the recognition of new forms of self-governing local authorities based on custom. Constitutional amendments recognised the rights of self-governing communities. A National Assembly Decree (TAP MPR IX/2001) instructed the legislature to draw up a new

⁷³ Burns 1989; Lev 2000.

⁷⁴ Lynch and Harwell 2002.

⁷⁵ Lev 2000: 51.

⁷⁶ Jatiman 1995; Roedy 1996; Safitri and Bosko 2001; Lynch and Harwell 2002; Colchester, Sirait and Wijardjo 2003.

⁷⁷ Barber and Churchill 1987; Wright 1999; Colchester, Sirait and Wijardjo 2003.

⁷⁸ Colchester, Sirait and Wijardjo 2003.

⁷⁹ The self-defined movement has adopted the term *masyarakat adat* (peoples governed by custom). The movement uses the term 'indigenous peoples' in international discourse, a term the government now also applies to the same peoples in its international reports (Colchester, Sirait and Wijardjo 2003).

⁸⁰ AMAN, ICRAF, FPP 2003.

law recognising customary land rights.⁸¹ Legal analysts note that through the National Environmental Law, the Vulnerable Families and Populations Law and by virtue of Indonesia's ratification of the Convention on Biological Diversity and the Convention for the Elimination of All Forms of Racial Discrimination, Indonesia has also accepted the principle of free, prior and informed consent.⁸² Notwithstanding these advances, at the national level the government has moved tardily to enact laws and regulations to give effect to these reforms in practice, but in a number of districts local legislative acts (*Perda*) have been passed recognizing customary institutions, establishing community forests and supporting community rights in land.⁸³

In 2000, a joint investigation carried out by the national indigenous organization (AMAN), the World Agroforestry Centre and the Forest Peoples Programme examined through community-level dialogues the obstacles and solutions to representation, recognition of customary institutions and thus adequate expression of free, prior and informed consent. A conclusion of both this and a subsequent study carried out to look into the obstacles and possibilities to timber certification in Indonesia, is that while free, prior and informed consent is legally required in Indonesia and while customary community institutions remain vigorous and identifiable in some areas (and are attenuated and weak in others), the latter are insufficiently recognised and secured in the law. Legally binding negotiated settlements between the private sector and communities can be achieved through notaries but for such a process to become both more generalised and accepted further legal reforms are necessary.⁸⁴ The Middle Ground that was established under the Dutch and notionally strengthened at independence has been so weakened by subsequent centralist interventions that new measures are now required before it can function again effectively.

Peninsular India

Adivasi ('aboriginal people') are estimated to make up some 7% of the population of India. These 70 million people speak some 200 distinct languages and are concentrated in the 'tribal belt' of central India, with a second concentration in the North East. These areas also contain the majority of the remaining forests of the country. Historically treated as exotic beings outside the caste system and Hindu pollution laws, they continue to suffer severe discrimination and socio-economic marginalization.⁸⁵ British efforts to abolish village autonomy and introduce *zamindari* (tax-gathering landlords) into tribal areas in the C18th and early C19th led to tribal rebellions in West Bengal, Bihar and Jharkhand.⁸⁶ The British responded by removing *zamindari* and passing Land Settlements aimed at securing tribal tenure in parts of these areas.⁸⁷ In other areas, the colonial government used considerable violence to crush indigenous resistance and impose forestry laws which limited rights in forests.⁸⁸

⁸¹ Colchester, Sirait and Wijardjo 2003.

⁸² Anon. 2004.

⁸³ Colchester, Sirait and Wijardjo 2003.

⁸⁴ AMAN, ICRAF, FPP 2003; Colchester, Sirait and Wijardjo 2003.

⁸⁵ Morris 1982; Gadgil and Guha 1993; Von Fuhrer-Haimendorf 1982.

⁸⁶ Moser 1982.

⁸⁷ Poffenberger and McGean 1996.

⁸⁸ Guha 1991.

The 1874 Scheduled District Act kept substantial *adivasi* areas outside the normal administration. Later, the administration classified most *adivasi* as 'Scheduled Tribes' and established 'Scheduled Areas' designed to protect them from incursions but also granting colonial administrators considerable discretionary powers over the same areas.⁸⁹ The 1901 Land Revenue Code similarly prevented the sale of tribal land without permission of the Collector. Land outside these 'areas' was alienable.⁹⁰ The paternalistic policy continued after independence coupled with measures of positive discrimination. Two separate 'Schedules' were elaborated: the 5th Schedule for tribes in Peninsular India and 6th Schedule for tribes in the North East.⁹¹ A number of higher educational places and positions in the legislatures are reserved for *adivasi* in proportion to their numbers in each state. Although, India has also ratified ILO Convention 107, which recognises *adivasi* rights to the collective ownership of their traditional lands, no legal measures have been taken to promote collective titling in Peninsular India.

In the mid-19th century, the British reclassified large areas of India as 'forests' subject to new Forest Acts and under the control of Forest Departments.⁹² 'Forests' now encompass some 22% of the country and include the traditional lands of millions of tribal people. Nineteenth century British administrators argued about whether to recognise tribal peoples as having 'rights' or 'privileges' in forests. The later Forest Acts recognised only privileges and subsequent regulations and administrative decisions progressively eroded these privileges – effectively rendering these people landless.⁹³ Since independence, an estimated 600,000 tribal people have also been displaced by protected areas.⁹⁴ Recent programmes of Joint Forest Management do not modify tenure and have been criticised for further impoverishing *adivasi*.⁹⁵

In Central India, the British administration promoted registers of individual land title (*patta*), with all other lands being considered 'wastelands' and thus Crown lands. Collective land ownership was not recognised, except in Chota Nagpur, and 'wasteful' forms of land use – such as hunting and shifting cultivation – were not considered a basis for land ownership. Since independence, protection of tribal farmlands was limited to 'Scheduled Areas' and only unevenly extended to other tribal landholdings.⁹⁶ Market pressures, usury, bureaucratic obstacles and lack of education have combined to deprive many tribals of their lands. *Benami* transfers – in which lands are informally passed to non-tribals by indebted tribals – have effectively alienated much land even in protected blocks.⁹⁷

India's move to independence was inspired by the principle of *swaraj* (self-rule), which the charismatic leader of the movement, Mahatma Gandhi, conceived in terms of a confederation of autonomous villages. After independence, however, the principle was only partly put into effect. The constitution enshrined the principle of the *panchayati raj* (village rule) but British laws relating to land, forests and land acquisition went unrepealed or were

⁸⁹ IAITPTF 1997.

⁹⁰ Lynch and Talbot 1993.

⁹¹ The administrative and tenurial provisions in 6th Schedule areas are distinct and not treated further here.

⁹² Guha 1991; Viegas 1991

⁹³ Gadgil and Guha 1993

⁹⁴ PRIA 1993

⁹⁵ Griffiths and Colchester 2000.

⁹⁶ Fuchs 1973; Ghuriye 1980; Lynch and Talbot 1993; Mahapatra 1994.

⁹⁷ Von Fuhrer-Haimendorf 1982.

even entrenched, meaning that the central administration retained control of the essential elements of livelihoods. In the same way, the first Prime Minister of India, Jawaharlal Nehru, spoke eloquently of the need to 'approach the tribal people with affection and friendliness and come to them as a liberating force...(t)he government of India is determined to help the tribal people grow according to their own genius and tradition,'⁹⁸ but at the same time he embarked on a development model inspired by soviet-style central planning, in which large-scale dams, which he hailed as the 'Temples of Modern India', were prominent.⁹⁹ Between 1951 and 1995, some 12 million *adivasi* were forcibly displaced from their lands to make way for development only a third of whom were resettled. The socio-economic and cultural impacts of this model of development have been severe.¹⁰⁰

As a result of sustained advocacy in the legislature, the constitutional provision granting autonomy to villages, according to the principle of *swaraj*, was extended under the 1996 Panchayats (Extension to Scheduled Areas) Act to allow for 'tribal self-rule' at the local level, giving greater authority to *adivasi* themselves to control activities within their *panchayat* (village level sub-district or 'parish'). The Act has, to date, only been weakly applied in lands that fall within the jurisdictions of forestry departments under the Forestry Acts. Its relation to the Land Acquisition Act, which allows the expropriation of tribal lands in the 'national interest', with nugatory compensation, is also still disputed. Despite its weaknesses and uncertainties, the Act does authorise the *gram sabha* (village assemblies), which are made up of all enfranchised adults, to make decisions on behalf of the village through mechanisms of participatory democracy.¹⁰¹ The Act empowers the *gram sabha* to safeguard and preserve the traditions of the people, community resources and customary modes of dispute resolution. The *gram sabha* is also identified as having control of minor minerals and non-timber forest products and to act as the interlocutor for the villages in key interactions with the national society and private sector. The State has the obligation to consult the *gram sabha* over proposed development projects and resettlement schemes.¹⁰²

In sum, in Peninsular India the principle of self-rule is constitutionally recognised and extended to indigenous peoples ('scheduled tribes'). Although national laws do not provide secure rights to customary lands, in contravention of India's international legal obligations under ILO Convention 107, the laws do recognise the autonomy of tribal villages. This authority is recognised as exercised by a hybrid institution (the *gram sabha*), which represents communities in negotiations with outsiders. The principle of free, prior and informed consent is not yet accepted by the government but mechanisms for exercising this right already exist.

Venezuela¹⁰³

During the colonial period, most of the indigenous peoples in what is now Venezuela, were considered subjects of the Spanish Crown. Treated as legal minors and wards of the State, their development and welfare was entrusted to the care of religious missions which were authorised to have jurisdiction over their affairs. Indigenous peoples' customary rights in land were not afforded legal protection, except for a limited number of communities, such

⁹⁸ Nehru 1952.

⁹⁹ D'Monte 1984.

¹⁰⁰ Sharma 1990; Viegas 1991; Fernandes 1992.

¹⁰¹ Pathak and Gour-Broome 2001.

¹⁰² Sarini 1997.

¹⁰³ This section derives substantially from Colchester, Silva Monterrey and Tomedes 2004.

as the Kariña of Estado Anzoategui, which were granted *titulos coloniales* to small areas around their most long standing settlements.

Although the leaders of the independence movement, such as Simon Bolivar and Simon Rodriguez, called for measures to respect the rights of indigenous peoples, in fact the post-independence period saw an intensification of pressure on Indian lands leading to massacres and dispossession.¹⁰⁴ No new measures to recognise indigenous lands were introduced, while the colonial titles were largely ignored. However, with the departure and expulsion of the missions which had remained loyal to the Crown, the southern part of the country remained sparsely populated and many of the indigenous peoples *de facto* retained their autonomy. Gradually, frontier pressure from ranchers extended pressure on the indigenous peoples in the *llanos*,¹⁰⁵ but in the forested zones further south most indigenous peoples were left substantially undisturbed except for the unregulated depredations during the rubber boom.¹⁰⁶ This situation did not change markedly until the middle of the 20th century.¹⁰⁷

Despite its weak implementing capacity, the government pursued an integrationist policy towards indigenous peoples. Missionaries were again encouraged to administer indigenous communities under the 1911 *Ley de Misiones* (still unrepealed) which formalised their powers. Areas occupied by indigenous peoples were treated as *tierras baldias* (unoccupied State lands).¹⁰⁸

In 1960, Venezuela adopted a new Constitution, Article 77 Clause 2 of which affirmed that the 'law establish a special system (*regimen de excepción*) as required to protect the Indians and permit their incorporation into the life of the Nation.' The *regimen de excepción* was encouraged through Decreto 283 of 1963, which requires the provision of bilingual intercultural educational systems in indigenous communities. As regards land, Article 2 of the Agrarian Reform Law of 1960 explicitly:

Guarantees and acknowledges to the indigenous population that it may actually keep its communal or extended family condition, without diminishing the rights which belong to them as Venezuelans, in accordance with the above sections, the right to have the benefit of the lands, woods and waters that they occupy or which belong to them in those places where they habitually dwell, without prejudice to their incorporation into the national life as conforms with this and other laws.

Initially, some land titles were given out to indigenous persons as individuals and later, modelled on a notion of cooperative farming whereby lands were entrusted to peasant enterprises (*empresas campesinas*) – a model that bore little relation to *campesino* reality in Venezuela - provisional collective titles were granted to indigenous enterprises (*empresas indígenas*). Many of these titles embraced quite small parcels of land and failed to encompass the much wider areas used by indigenous peoples for hunting, fishing, gathering and for their mobile systems of rotational farming. After being criticised for 'peasantising' the indigenous peoples, the indigenous lands programme of the National Agrarian Institute (IAN), began to hand out provisional titles to more adequate areas,

¹⁰⁴ Morales 1994.

¹⁰⁵ Henley 1982.

¹⁰⁶ Friel 1924

¹⁰⁷ Coppens 1980, 1983, 1988.

¹⁰⁸ Coppens 1971.

though still through the imposed institutional structure of *empresas indígenas*, which did not correspond closely to existing indigenous institutions.¹⁰⁹ Between 1972 and 1982, 152 provisional collective land titles were handed out to indigenous communities in 7 states, but very few were converted into definitive titles by the Ministry of Agriculture and Livestock Husbandry, owing to pressure from competing interests.¹¹⁰ In 1984, a land conflict between the Piaroa Indians and a rich cattle rancher escalated into a national scandal and IAN's indigenous land titling programme was halted due to political pressure from landowners.¹¹¹ It was not until December 1990, therefore that Venezuela formally recognised ILO Convention 107, Article 11 of which explicitly recognised indigenous peoples' collective rights of ownership of the lands they have traditionally occupied.¹¹² However, during the 1990s no further moves were made to give effect to this law through a revival of land titling.

During the 1990s, indigenous peoples mobilized across the country to press for a more effective recognition of their rights. Indigenous representatives were elected through national congresses of indigenous peoples to the Constitutional Assembly, which reviewed the country's constitution and which gave detailed consideration to indigenous peoples.

In March 2000, the renamed Bolivarian Republic of Venezuela adopted a new Constitution which

recognises the existence of indigenous peoples and communities and their social, political and economic organization, their cultures, manners and customs, languages and religions, as well as their habitat and aboriginal rights over the lands which they have ancestrally and traditionally occupied and which are necessary to develop and guarantee their ways of life. The National Executive has the corresponding duty, with the participation of the indigenous peoples concerned, to demarcate and secure their collective ownership rights to their lands, which will be inalienable, unmortgageable, not subject to distraint and untransferable...'
(Article 119).¹¹³

The Constitution likewise recognises the right of the indigenous peoples to maintain and develop their identities, cultures, cosmovisions, values, spirituality, sacred sites and languages (Article 121) and to maintain and promote their own economic practices based on reciprocity, solidarity and exchange and their traditional productive activities (Article 123).

In December 2000, Venezuela formally passed a law in the National Assembly adopting the International Labour Organization's Convention # 169 on Tribal and Indigenous Peoples.¹¹⁴ Among the most important obligations this law places on the State are the following:

- Consult indigenous peoples through their representative institutions (Article 6.1a)
- Establish means for the full development of these peoples' own institutions and initiatives, and in appropriate cases provide the resources necessary for this purpose (Article 6.1c).
- Respect their right to decide their own priorities (Article 7.1).

¹⁰⁹ Arvelo Jimenez 1972; 1980; 1982; 1992; Arvelo-Jimenez et al. 1971.

¹¹⁰ Clarac 1983.

¹¹¹ Colchester 1984.

¹¹² Colchester 1995.

¹¹³ *Constitución de la República Bolivariana de Venezuela*, 24 de marzo de 2000.

¹¹⁴ *Ley Aprobatoria del Convenio 169 de la OIT* Publisher in the Gaceta Oficial No. 37.305, on 17 October 2001. The ILO was officially informed of this ratification in May 2002.

- Take measures, in co-operation with the peoples concerned, to protect and preserve the environment of the territories they inhabit (Article 7.2).
- Apply national laws with due regard to customs or customary laws (Article 8.1).
- Respect their right to retain their own customs and institutions (Article 8.2).
- Respect customary systems for dealing with offences to the extent these are compatible with internationally recognised human rights (Article 9.1).
- Respect the special importance of these peoples' relationship with their lands or territories for their cultures and spiritual values and for the collective aspects of this relationship (Article 13.1).
- Recognise their rights of ownership and possession of the peoples concerned of the lands which they traditionally occupy (Article 14.1).
- Take special measures to identify these areas and guarantee effective protection of their rights of ownership and possession (Article 14.2).
- Establish adequate procedures to resolve land claims (Article 14.3).
- Safeguard their rights, including their rights of use, management and conservation, to the natural resources in their lands and territories (Article 15.1).
- Respect customary procedures for the transmission of land rights among members of these peoples (Article 17.1).
- Establish adequate penalties for unauthorised intrusion upon their lands (Article 18).

In accordance with the new Constitution and in partial compliance with the State's obligations¹¹⁵ with respect to land under ILO Convention 169, in May 2001, the Venezuelan Congress also adopted a law regarding the demarcation and securing of indigenous peoples' lands and 'habitats'.¹¹⁶ The law has the aim of demarcating and securing indigenous peoples' rights to the collective ownership of their lands as enshrined in the Constitution (Article 1). These lands are defined as physical and geographical spaces ancestrally and traditionally occupied and used in a shared manner by one or more indigenous communities and one or more indigenous peoples (Article 2). The authority to oversee this process is entrusted to the Ministry of the Environment (Article 3). The law also establishes a National Commission for the Demarcation of the Territories and Lands of Indigenous Peoples and Communities made up of 8 indigenous persons and 8 representatives of State bodies to review land demarcations and recommend the granting of titles. Once approved by the Ministry, land claims are to be submitted to the Procuraduría General de la República for the issuance of collective title which is then to be registered in the national land cadaster (Article 12).

Furthermore, in practice, the judiciary and national government has increasingly recognized the principle of consent in its dealings with indigenous peoples. A step towards this principle was established in 1995, when the Supreme Court upheld an appeal from indigenous peoples to declare unconstitutional the proposed imposition of administrative municipalities on the State of Amazonas. In making this judgment, the Supreme Court ruled that, given the Constitutional *regimen de excepción* and the inalienable rights of indigenous peoples to their lands, their full participation in the promulgation of laws affecting them was required. In such participation, the importance of 'the expression of the

¹¹⁵ In further fulfillment of Venezuela's obligations under ILO 169, the National Assembly is also in the process of a second reading of a new Organic Law on Indigenous Peoples and Communities. A bill on Indigenous Education and Use of their Languages is also under consideration.

¹¹⁶ *Ley de Demarcación y Garantía del Habitat y Tierras de los Pueblos Indígenas*. The term 'habitats' was chosen to refer to indigenous peoples' territories as the term 'territories' is already used in Venezuela as an administrative designation applied to areas under the direct jurisdiction of the Federal Government rather than the authority of States, which enjoy a greater degree of self-governance.

indigenous peoples' will should not be underestimated'.¹¹⁷ Indeed, as part of the *regimen de excepción*, under Special Decree No. 250 of 1951, all access to indigenous areas is subject to permit, issued by the Government's Indigenous Affairs Bureau. Since the 1995 Supreme Court judgment, the Bureau has required indigenous peoples' consent, expressed through their own institutions, as a condition for issuing such permits.

In sum, Venezuelan law now recognises the rights of indigenous peoples to the collective ownership of their lands and 'habitats', through the provision of collective title to be vested in their own representative institutions. The principle of consent has also begun to be recognised as an important (if not fully obligatory) requirement. Imprecisions in the law remain about exactly which indigenous institutions should be vested with rights over lands and habitats and to negotiate with outsiders. Hopefully, these will be clarified in the next few months as the land demarcation process gets underway.

These four examples have been gone into in some detail to show how the Middle Ground evolves and can be used as the basis for negotiated agreements between developers and indigenous peoples. Based on government recognition of the distinctiveness of indigenous societies and concerted pressure by indigenous peoples themselves, States may reshape their constitutions, laws, policies and practices to provide a measure of autonomy to indigenous peoples to control their lands and lives.

¹¹⁷ Bello 1999:76-77.

Part 3 Consent procedures

Engineering consent

The Middle Ground is not without risks, the main one being that the terms of engagement are one-sided and decision-making that is apparently shared is in fact dominated by one party. Indeed, ever since Roman times, imperial interests have favoured mechanisms of indirect rule, not as a way of ensuing equity but as the optimum means of imposing their will.¹¹⁸ As Niccolo Machiavelli advised:

When states newly acquired have been accustomed to living by their own laws, there are three ways to hold them securely: first, by devastating them; next, by going and living there in person; thirdly, by letting them keep their own laws, exacting tribute, and setting up an oligarchy which will keep the state friendly to you... *A city used to freedom can be more easily ruled through its own citizens... than in any other way.*¹¹⁹

Even where nominal 'agreements' have been required for development projects to go ahead state and private sector interests have frequently pressured indigenous peoples into acceptance of deals.

For example, the James Bay Cree informed the World Commission on Dams that they negotiated the James Bay and Northern Quebec Agreement of 1975 under the duress of continuing destruction of their lands and the courts' and governments' refusal at the time to acknowledge their aboriginal and constitutional rights. As evidence of this duress, they point to articles in the Agreement, insisted upon at the time by Hydro-Quebec, that provide that the Crees shall in the future not raise sociological impacts on their people as grounds for opposition to further hydro-electric projects in their lands. Prof. Peter Cumming of York University describes the agreement as "a forced purchase," and the Canadian Royal Commission on Aboriginal Problems and Alternatives wrote that:

it would be most difficult to avoid the conclusion that the Aboriginal parties ... were repeatedly subjected to inappropriate, unlawful coercion or duress. ... These actions were incompatible with the fiduciary obligations of both governments and substantially affected the fundamental terms of the 'agreement' reached.¹²⁰

The World Commission on Dams also heard a number of other complaints about Government manipulation of consultation processes to try to engineer the result that they sought. A spokesperson for the Himba pastoralists, threatened with the loss of core parts of their grazing lands to the Epupa Dam, noted how the government was attempting to gerrymander administrative and electoral boundaries in the area and thus overcome resistance. In 1997, heavily armed Namibian police attempted to prevent the Himba speaking to their lawyers and only after the latter obtained a court order from the High Court were the people able to meet their legal advisers again without fear of harassment and intimidation. Similarly, the meeting heard how in Manitoba in Canada, government agencies had changed the rules for voting in communities to ensure consent to rehabilitation packages linked to the Churchill-Nelson River Diversion Project. Pressure has likewise been placed on the Pewenche people to accede to the Ralco dam on the Bio Bio

¹¹⁸ Faulkner 2004:25-36.

¹¹⁹ Machiavelli 1513:16 (emphasis added).

¹²⁰ Cited in Colchester 2000:35.

river in Chile. Construction of the Ralco dam went ahead even though the project lacked the authorisation of the government agency responsible for indigenous affairs. Two directors of the agency were threatened with dismissal for opposing the resettlement plan.¹²¹

Similarly, the research carried out for the World Bank's Extractive Industry Review, showed how legal provisions in the Philippines, designed to protect indigenous peoples from the negative impacts of mineral development on ancestral lands, have been regularly abused by mining companies. Under Filipino law, the principle of free, prior and informed consent is established under both the Indigenous Peoples Rights Act 1997 (IPRA) and the 1995 Mining Code. Under pressure from the mining industry, the implementing rules and regulations of IPRA have been repeatedly changed, to weaken the means affected communities have of legally defending their rights. The time for lodging appeals has been reduced while no improvements have been made in transparency to allow communities to ascertain company claims regarding the achievement of free, prior and informed consent.

Different communities report militarization of isolated communities as a recurring element in engineering consent. Extractive industries have consciously manipulated communities, introducing factionalism, dividing communities and promoting individuals, who may have no traditional authority as leaders, to represent the communities. The illusion of free, prior and informed consent is thus achieved by the exclusion of the majority of community members from effective participation in decision-making. Reports suggest traditional leaders may be ignored or displaced where they oppose mining. Communities report the widespread use of bribes and gifts and unregulated and questionable patronage by companies over prominent individuals/decision-makers within their communities.¹²² Encouragingly, in a case brought by indigenous peoples in Mindanao in the southern Philippines, the Filipino Supreme Court recently found that major provisions of the Mining Act are unconstitutional.¹²³

Ways Forward: making free, prior and informed consent 'operational'

The Middle Ground is not a comfortable place. Rather it is a legal, administrative and conceptual buffer zone between very different cultures. States that reject the Middle Ground, must either back off from these areas and leave the indigenous peoples to be sovereign or seek to enforce their own norms in defiance of the wishes of the peoples who live there. The disastrous consequences of this widely rejected model of imposed development have been too well documented to bear repetition here. Likewise, indigenous peoples that reject the Middle Ground must either reject the States which seek to encompass them or accept assimilation into national societies on terms that are not their own. The Middle Ground offers an alternative negotiated process in which each side both rejects seeking to impose its will through violence and agrees on the need to maintain relations according to mutually agreed processes and norms.

Making the Middle Ground a safer place for indigenous peoples to negotiate and secure agreements in line with international human rights principles, including the right to free, prior and informed consent, will require action from States, private sector operators and

¹²¹ Statements to the WCD Joint Consultation on '*Dams, Indigenous Peoples and Ethnic Minorities*', Geneva, 31 July-1 August 1999 cited in Colchester 2000:36.

¹²² Caruso et al. 2003:78-79.

¹²³ 'Anti-Mining Movement in the Philippines Scores a Point', *Third World Network Features*, April 2004. To the dismay of indigenous Filipinos and environment organisations, the Supreme Court finding has now been appealed by the Department of the Environment and Natural Resources.

from indigenous peoples themselves. Minimum standards that should be accepted by governments and the private sector to enable fair exercise of the principle of free, prior and informed consent include the following:

- Government policies and laws should be adopted and applied which recognise indigenous peoples' rights and promote cultural diversity, territorial management and self-governance, including recognition of the rights of indigenous women
- Clear recognition of indigenous peoples' ownership and other rights to their lands, territories and resources traditionally owned or otherwise occupied and used
- No imposed deadlines, use of coercion or other forms of manipulation
- Legal recognition of the peoples' own representative institutions, and means for them having legal personality
- Clear and acceptable mechanisms for the participation of Indigenous Peoples in decision-making
- Timely provision of information in the right forms and the right languages
- Open and joint consideration of proposals and alternatives before embarking on negotiations for any specific project or plan
- Provisions for the costs of indigenous peoples obtaining independent legal counsel and technical advice on social and environmental issues related to proposed developments
- Detailed, open and participatory environmental and social impact assessments, which should include respect for and use of indigenous knowledge, establishment of sound and agreed base line data, joint assessment of risks and open consultations with all affected groups¹²⁴
- Culturally appropriate mechanisms to ensure the participation of marginalised groups within indigenous societies such as women and children, the elderly and those who are illiterate
- Early and iterative negotiations between developers and affected peoples
- Staged processes which allow plenty of time for indigenous peoples to consult among themselves and reach conclusions according to their own mechanisms of decision-making
- Agreements which provide enforceable contracts, mechanisms for the arbitration of disputes, and joint implementation and remedial measures, without demanding the surrender of rights.
- Joint monitoring and evaluation making full use of indigenous knowledge
- Benefit sharing options including revenue sharing or joint ownership schemes.
- Mechanisms to ensure the transparent and equitable administration of funds for community benefit
- Capacity building of indigenous peoples' institutions
- Establishment of independent regulatory oversight mechanisms to ensure compliance
- Mutually accepted arbitration processes for the resolution of ensuing disputes
- Mutually agreed, formal and legally enforceable contracts, binding on all parties and enforceable through the national courts¹²⁵

As for the indigenous peoples that opt into this Middle Ground, a key lesson is that they need to agree among themselves on the representative institutions that will negotiate on their behalf, and decide in advance how these institutions will be held accountable to the other members of their societies during negotiations. North American Indigenous Peoples have a long experience of formalised negotiations with non-indigenous agencies. A study

¹²⁴ Detailed proposals are made in the Akwe:kon Guidelines which were endorsed by the 7th Conference of Parties to the CBD (UNEP/CBD/COP/7/21:260-278).

¹²⁵ Summarized from Colchester 2000; Colchester, La Rose and James 2001; Caruso et al, 2003.

carried out for the International Labour Office offers the following key pieces of advice, based on a review of these experiences:

- Mobilize your community's own technical capacity (for example traditional ecological knowledge) and ensure that indigenous 'experts' participate directly in planning and evaluating each step of the negotiations.
- Ascertain where you need outside technical expertise and secure it from individuals whose loyalty to the community and its goals is assured.
- Organize community meetings and build consensus around a negotiating plan, which includes clear and specific needs, goals, strategies and acceptable tactics.
- Identify all the relevant parties, the needs of their leaders and constituents and the strategies and tactics they have used in previous negotiations.
- Carefully identify the real decision-makers for every other party, and ensure that they will be involved in negotiations.
- Identify similar negotiations and agreements elsewhere that may be put forward as precedents.
- Select your own negotiators through a public process, designed to ensure the full participation and, as far as possible, consensus of all parts of the community.
- Try to build a team of negotiators which reflects the diversity of skills and viewpoints that exist within the community.¹²⁶

Since the late 1990s, the World Bank has instigated four international consultation processes,¹²⁷ all of which have recommended that the World Bank should uphold the principle of free, prior and informed consent in its safeguard policy on indigenous peoples. The World Bank has rejected these proposals on the grounds that it is not feasible for the Bank, borrower governments or client companies to 'operationalise' it. This study suggests otherwise. FPIC is not only possible to operationalise but has been an accepted principle in negotiations between indigenous and industrial societies for hundreds of years. The Middle Ground, that is opened up by recognition of the principle of Free, Prior and Informed Consent, is contested space, but the alternatives are not only more conflictual but their imposition constitutes an abuse of internationally recognised human rights.

¹²⁶ Barsh and Bastien 1997:40.

¹²⁷ These are the World Commission on Dams, the Extractive Industries Review and two rounds of consultation with indigenous peoples on the proposed revision of the World Bank's safeguard policy on indigenous peoples.

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New international laws and standard-setting exercises have widely accepted indigenous peoples' right to free, prior and informed consent to activities planned on their lands. Yet development agencies dispute that this is practicable. However, the principle has a long history, being integral to treaty making with indigenous nations in the colonial era.

Case studies show that consent is frequently engineered and indigenous institutions are out-manoeuvred by competing interests seeking access to indigenous peoples' common resources. Drawing on participatory investigations carried out in collaboration with indigenous peoples' organizations in Guyana, India, Venezuela and Indonesia, this paper illustrates both the common problems that indigenous peoples face and the diverse solutions that they have evolved to respond to these challenges.

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