

SECTION 5: INTERNATIONAL CONSIDERATIONS

Tribal, indigenous and local people[s] and communities are being increasingly referred to and considered 'major groups' within international instruments concerned with rights to self-determination, protection of cultural heritage, natural and cultural resources, and development.²⁸⁷ Calls for new partnerships amongst indigenous peoples and governments, non-government organisations and international organisations are also increasingly common. This section reviews some of these relevant instruments and developments. The conventions discussed below have been ratified by Australia, unless otherwise indicated.

Multilateral and Bilateral Conventions

Convention on Biological Diversity (CBD)

The Convention on Biological Diversity came into force in December 1993. Australia is a party to this Convention and has developed a national strategy to implement its provisions. The three central aims of the convention are to protect biological diversity (genetic resources, species and ecosystems); to commit states to use biological diversity sustainably; and to ensure that the benefits arising from the use of genetic resources are shared fairly and equitably.²⁸⁸ States are to manage their biodiversity through national plans which provide for its conservation and sustainable use; developed countries are to assist developing countries to meet their treaty obligations by providing new and additional financial resources, while agreements about access to genetic resources and the transfer of biotechnology are to be promoted. The convention also requires that indigenous peoples' traditional knowledge about the conservation and use of biological diversity be preserved, and that indigenous peoples derive benefit from its use.

Relevant sections of the Convention are as follows:

Preamble:

Recognizing the close and traditional dependence of many indigenous and local communities embodying traditional lifestyles on biological resources, and the desirability of sharing equitably benefits arising from the use of traditional knowledge, innovations and practices relevant to the conservation of biological diversity and the sustainable use of its components,

Recognizing also the vital role that women play in the conservation and sustainable use of biological diversity and affirming the need for the full participation of women at all levels of policy-making and implementation for biological diversity conservation,

Article 8. *In-situ* Conservation

Each Contracting Party shall, as far as possible and as appropriate:

- (a) Establish a system of protected areas or areas where special measures need to be taken to conserve biological diversity;
- (b) Develop, where necessary, guidelines for the selection, establishment and management of protected areas or areas where special measures need to be taken to conserve biological diversity;

²⁸⁷ S.J. Anaya, 'Indigenous Rights Norms in Contemporary International Law', *Arizona Journal of International and Comparative Law*, Vol.8, No.2, Fall 1991, pp.1-39; W.A. Shutkin, 'International Human Rights Law and the Earth: The Protection of Indigenous Peoples and the Environment', *Virginia Journal of International Law*, Vol.31, No.3, Spring, 1991, pp.479-511; S. Bilderbeek and A. Wijgerde, 'Participation on "Major Groups" in the Conference on Biological Diversity: Myths, Practices and Procedures', in A.F. Krattiger, J.A. McNeely, W.H. Lesser, K.R. Miller, Y. St. Hill, R. Senanayake (eds), *Widening Perspectives on Biodiversity*, IUCN-The World Conservation Union and The International Academy of the Environment, Cambridge, 1994, pp.409-414; Economic and Social Council, *Report of the United Nations Technical Conference on Practical Experience in the Realization of Sustainable and Environmentally Sound Self-Development of Indigenous Peoples*, E/CN.4/Sub.2/1992/31/Add.1, May 1992.

²⁸⁸ See generally: L. Glowka, F. Burhenne-Guilmin, H. Synge, J. A. McNeely, et al., *A Guide to the Convention on Biological Diversity*, Environmental Law and Policy Paper No. 30, IUCN, Gland, 1994.

(c) Regulate or manage biological resources important for the conservation of biological diversity whether within or outside protected areas, with a view to ensuring their conservation and sustainable use;

(j) Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices;

Article 10. Sustainable Use of Components of Biological Diversity

Each Contracting Party shall, as far as possible and as appropriate:

(c) Protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements;

Article 11. Incentive Measures

Each Contracting Party shall, as far as possible and as appropriate, adopt economically and socially sound measures that act as incentives for the conservation and sustainable use of components of biological diversity.

Article 15. Access to Genetic Resources

1. Recognizing the sovereign rights of States over their natural resources, the authority to determine access to genetic resources rests with the national governments and is subject to national legislation.

2. Each Contracting Party shall endeavour to create conditions to facilitate access to genetic resources for environmentally sound uses by other Contracting Parties and not to impose restrictions that run counter to the objectives of this Convention.

3. For the purpose of this Convention, the genetic resources being provided by a Contracting Party, as referred to in this Article and Articles 16 and 19, are only those that are provided by Contracting Parties that are countries of origin of such resources or by the Parties that have acquired the genetic resources in accordance with this Convention.

4. Access, where granted, shall be on mutually agreed terms and subject to the provisions of this Article.

5. Access to genetic resources shall be subject to prior informed consent of the Contracting Party providing such resources, unless otherwise determined by that Party.

6. Each Contracting Party shall endeavour to develop and carry out scientific research based on genetic resources provided by other Contracting Parties with the full participation of, and where possible in, such Contracting Parties.

7. Each Contracting Party shall take legislative, administrative or policy measures, as appropriate, and in accordance with Articles 16 and 19 and, where necessary, through the financial mechanism established by Articles 20 and 21 with the aim of sharing in a fair and equitable way the results of research and development and the benefits arising from the commercial and other utilization of genetic resources with the Contracting Party providing such resources. Such sharing shall be upon mutually agreed terms.

Article 17. Exchange of Information

1. The Contracting Parties shall facilitate the exchange of information, from all publicly available sources, relevant to the conservation and sustainable use of biological diversity, taking into account the special needs of developing countries.

2. Such exchange of information shall include exchange of results of technical, scientific and socio-economic research, as well as information on training and surveying programmes, specialized knowledge, indigenous and traditional knowledge as such and in combination with the technologies referred to in Article 16, paragraph 1.²⁸⁹ It shall also, where feasible, include repatriation of information.

²⁸⁹ Art. 16(1) refers to biotechnology, which is defined in Art. 2 to mean 'any technological application that uses biological systems, living organisms, or derivatives thereof, to make or modify products or processes for special use.'

Article 18:

18(4). The Contracting Parties shall, in accordance with national legislation and policies, encourage and develop methods of cooperation for the development and use of technologies, including indigenous and traditional technologies, in pursuance of the objectives of this Convention. For this purpose, the Contracting Parties shall also promote cooperation in the training of personnel and exchange of experts.

The first Conference of the Parties (COP) to the Convention on Biological Diversity was held in the Bahamas in late 1994 and a medium-term work program was agreed for the next three years.²⁹⁰ Policies for the recognition of indigenous peoples' knowledge and the equitable sharing of the benefits deriving from its use are to be discussed in 1996, particularly at the third COP. Coastal and marine biological diversity was one of the themes of the second COP which was held in Jakarta in November 1995.²⁹¹

International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (ICCPR) recognises a number of rights of importance to fisheries and indigenous peoples. Article 27 provides that, in those States in which ethnic, religious or linguistic minorities exist, persons belonging to these minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language. In 1993, the Human Rights Committee which administers the ICCPR adopted a 'General Comment' on Article 27, observing that this right inheres in individual members of minority groups, in addition to other rights in the Covenant. The committee commented:

The enjoyment of the rights to which article 27 relates does not prejudice the sovereignty and territorial integrity of a State party. At the same time, one or other aspect of the rights of individuals protected under that article — for example, to enjoy a particular culture — may consist in a way of life which is closely associated with territory and use of its resources. This may particularly be true of members of indigenous communities constituting a minority . . .

The terms used in article 27 indicate that the persons designed to be protected are those who belong to a group and who share in common a culture, a religion and/or a language ...

Although the rights protected under article 27 are individual rights, they depend in turn on the ability of the minority group to maintain its culture, language or religion. *Accordingly, positive measures by States may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practice their religion, in community with the other members of the group ...*

. . . [S]uch positive measures must respect the provisions of articles 2(1) and 26 of the Covenant both as regards the treatment between different minorities and the treatment between the persons belonging to them and the remaining part of the population. However, as long as those measures are aimed at correcting conditions which prevent or impair the enjoyment of the rights guaranteed under article 27, they may constitute a legitimate differentiation under the Covenant, provided that they are based on reasonable and objective criteria.

With regard to the exercise of the cultural rights protected under Article 27, *the committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, specially in the case of indigenous peoples.* That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. *The enjoyment of those rights may require positive legal measures of protection and measure to ensure the effective participation of members of minority communities in decisions which affect them ...*

The Committee concludes that article 27 relates to rights whose protection imposes specific obligations on States parties. The protection of these rights is directed to ensure the survival and continued development of the cultural, religious and social identity of the minorities concerned, thus enriching the fabric of society as a whole . . . States parties, therefore, have an obligation to ensure that the exercise of these rights is

²⁹⁰ See generally: 'Biodiversity Conference: Gains and Setbacks', *The Network*, No. 42, January 1995, p.1.

²⁹¹ United Nations Environment Program, Convention on Biological Diversity: Report of the Second Meeting of the Conference of the Parties to the Convention on Biological Diversity, Second Meeting, Jakarta, 6-17 November 1995, UNEP/CBD/COP/2/19, Distr. General, 30 November 1995.

fully protected and they should indicate in their reports the measures they have adopted to this end (emphasis added).²⁹²

This comment is consistent with the committee's earlier interpretation of article 27 in the case of *Bernard Ominayak, Chief of the Lubicon Lake Band v. Canada*.²⁹³ Other human rights cases are also relevant. For example, in 1985 the Inter-American Commission on Human Rights found that international law recognised the right of ethnic groups to the special protection of the use of their languages, the practice of their religion, and the preservation of their cultural identity. This was violated when the Brazilian Government built a road through Yanomami lands.²⁹⁴ The Commission has also found that the Nicaraguan Government should accommodate Miskito Indians' land rights and political structures to better protect their cultural integrity.²⁹⁵ In *Kitok v. Sweden* the Human Rights Committee found that although the regulation of an economic activity is usually a domestic State matter, 'where that activity is an essential element in the culture of an ethnic community, its application to an individual may fall under Art. 27'.²⁹⁶

Following Australia's accession to the First Optional Protocol of the ICCPR, which became effective in late 1991, written communications about alleged violations of the ICCPR can be communicated by aggrieved individuals or their authorised representative to the United Nations Human Rights Committee, if all domestic remedies have been exhausted.²⁹⁷ States Parties to the Covenant are also required to produce 5-yearly reports on domestic compliance with the Convention for consideration by the Human Rights Committee.

Convention on the Elimination of All Forms of Racial Discrimination

Australia ratified the Convention on the Elimination of All Forms of Racial Discrimination (CERD) in 1975 and has partially implemented its obligations in domestic law through the *Racial Discrimination Act 1975 (Cwlth)*. Article 1 of the Convention defines 'racial discrimination' as 'any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life'. Article 1(4) provides that special measures 'taken for the sole purpose of securing adequate advance of certain racial groups or ethnic groups or individuals requiring such protection ...' does not constitute racial discrimination 'provided, however that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved'.

States Parties to the CERD are obliged to make regular reports on domestic compliance every two years, and additional reports when requested by the United Nations Human Rights Committee on the Elimination of

²⁹² '(Provisional) General Comment on Article 27 of the Covenant on Civil and Political Rights, Text adopted by the Committee at its 1314th meeting on 6 April 1994, Future CCPR/C/21/Rev.1/Add.5, 7 April 1994.

²⁹³ In 1990, the Human Rights Committee upheld a complaint brought by Bernard Ominayak, the Chief of the Lubicon Lake Band in Alberta, Canada, that the Canadian government had infringed the Band's minority rights to culture, religion and language protected by Article 27 of the ICCPR. The Canadian Government had leased under a forest management agreement all but 25 square kilometres of the tribe's traditional hunting and trapping lands for a commercial timber project. The Committee found 'that the rights protected by Article 27, include the rights of persons, in community with others, to engage in economic and social activities which are part of the culture of the community to which they belong' and that 'Historical inequities ... and certain more recent developments threaten the way of life and culture of the Lubicon Lake Band, and constitute a violation of article 27 as long as they shall continue: *Communication No. 167/1984, Bernard Ominayak, Chief of the Lubicon Lake Band v. Canada* (views adopted on 26 March 1990 at the thirty-eighth session).

²⁹⁴ C. Cline, 'Pursuing Native American Rights in International Law Venues: A Jus Cogens Strategy After *Lyng v. North West Indian Cemetery Protective Association*', *The Hastings Law Journal*, Vol. 42, January 1991, pp.591-633 at pp.623-4.

²⁹⁵ Anaya, 'Indigenous Rights Norms in Contemporary International Law', p.18.

²⁹⁶ Robinson, 'The Sealord Fishing Settlement', p.575.

²⁹⁷ Justice E. Evatt, *et. al.*, *Internationalizing Human Rights: Australia's Accession to the First Optional Protocol*, Centre for Comparative Constitutional Studies, Melbourne, n.d.

Racial Discrimination. The Committee may also consider communications by other States parties, and from individuals, or groups of individuals concerning alleged violations of the treaty.²⁹⁸

United Nations Convention on the Law of the Sea

Under the United Nations Convention on the Law of the Sea, which entered into force in November 1994, neighbouring states' traditional fishing rights and interests are to be respected in archipelagic waters. For example, Article 51 provides:

An archipelagic State shall respect existing agreements with other States and shall recognize traditional fishing rights and other legitimate activities of the immediately adjacent neighbouring States in certain areas falling within archipelagic waters. The terms and conditions for the exercise of such rights and activities, including the nature, the extent and the areas to which they apply, shall, at the request of any of the States concerned, be regulated by bilateral agreements between them. Such rights shall not be transferred to or shared with third States or their nationals.²⁹⁹

UNCLOS does not specifically protect the rights and interests of indigenous peoples, except in Part XI where the exploitation of the sea-bed mineral and others resources, as part of the common heritage of mankind, should be:

carried out for the benefit of mankind as a whole, irrespective of the geographical location of States, whether coastal or land-locked, and taking into particular consideration the interests and needs of developing States and of peoples who have not attained full independence or other self-governing status recognized by the United Nations in accordance with General Assembly resolution 1514 (XV) and other relevant General Assembly resolutions.³⁰⁰

Convention on the Rights of the Child

Article 30 of the Convention on the Rights of the Child provides that 'In those States in which ... persons of indigenous origin exist, a child...who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language'.

Conventions for the protection of migratory species

A number of conventions exist for the protection of migratory species. The Convention on the Conservation of Migratory Species of Wild Animals (the Bonn Convention) (1979) (with appendices as amended 1985, 1988), entered into force on 1 November 1983. It provides for contracting parties to make agreements to restore the conservation status of migratory species listed in appendices to the Convention.³⁰¹ The Convention requires parties to prohibit the taking of species listed in Appendix 1 to the Convention, except in limited circumstances. Exceptions are permitted where:

- c) the taking is to accommodate the needs of traditional subsistence users of such species.

The object of the Convention is to restore listed species to a favourable conservation status, and to maintain that restoration with good management: Article V Range states for migratory species are encouraged to enter into agreements to establish mechanisms to implement the treaty, to monitor its effectiveness, and to prepare reports for the Conference of the Parties, amongst other things. Other measures to be undertaken by parties to the Convention include a periodic review of the conservation status of the migratory species concerned and the identification of the factors which may be harmful to that status; coordinated conservation and management plans; research into the ecology and population dynamics of the migratory species concerned, with special regard to migration; the exchange of information on the migratory species concerned, information exchange and

²⁹⁸ Australia, Aboriginal and Torres Strait Islander Social Justice Commission, *First Report: 1993*, Australian Government Publishing Service, Canberra, 1993, p.89, 103-105.

²⁹⁹ See also articles 46,47 regarding baselines.

³⁰⁰ Article 140.

³⁰¹ See Article I of the Convention for definitional provisions.

conservation and, where required and feasible, habitat restoration and provision; elimination of, to the maximum extent possible, or compensation for activities and obstacles which hinder or impede migration; prevention, measures based on sound ecological principles to control and manage the taking of the migratory species; procedures for coordinating action to suppress illegal taking; and making the general public aware of the contents and aims of the Agreement.

Under the China and Australia Migratory Birds Agreement (the CAMBA Convention) agreed between the Australian Government and the Government of the People's Republic of China, and the Japan and Australia Migratory Birds Agreement (the JAMBA Convention), agreed between the Government of Australia and the Government of Japan in 1974, each party, under Article II, is to prohibit the taking of migratory birds and their eggs. Exceptions are permitted in accordance with the laws and regulations in force in each country in listed circumstances.

International Labour Organisation Conventions No. 107, 169

Australia has not ratified either of these Conventions. ILO Convention 107 — the Indigenous and Tribal Populations Convention — was adopted in 1957, but in the mid-1980s the ILO Governing Body agreed to revise the Convention, as it had come to be seen as too assimilationist, outdated, and had not recognised adequately continuing customary laws and practices.³⁰² ILO Convention 169 — the Convention Concerning Indigenous and Tribal Peoples in Independent Countries — was developed to overcome the shortcomings of the 1957 Convention. The Aboriginal and Torres Strait Islander Commission has determined that ratification of the Convention is desirable but recommended further consultation with indigenous communities, which was underway in 1996. The Joint Parliamentary Committee on Foreign Affairs, Defence and Trade recommended ratification in 1992.³⁰³ Australia's ratification policy and practice is that ratification will only occur where the law and practice in all relevant jurisdictions is in compliance with the Convention in question and when all State and Territory Governments have formally agreed to ratification (except where the subject matter falls exclusively within Commonwealth jurisdiction).³⁰⁴

Some of the articles of ILO Convention 169 which would be relevant to the development of an Aboriginal and Torres Strait Islander Fisheries Strategy, refer to the protection of human rights, cultures and environment of the peoples concerned (Arts. 2-4), while others are as follows:

Article 7:

1. The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programs for national and regional development which may affect them directly.

...

Article 13:

In applying the provisions of this Part of the Convention governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.

2. The use of the term 'lands' in Articles 15 and 16 shall include the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use.

³⁰² Commonwealth Dept. of Industrial Relations, *ILO Convention 169 — Indigenous and Tribal Peoples 1989, Draft Commonwealth Law and Practice Report*, Canberra, 1995, pp.1-2.

³⁰³ Australia, Parliament, Joint Committee on Foreign Affairs, Defence and Trade, *A Review of Australia's Efforts to Promote and Protect Human Rights*, Australian Government Publishing Service, Canberra, 1992, p.38.

³⁰⁴ Australia, *Status of ILO Conventions in Australia 1994*, Department of Industrial Relations, Canberra, December 1994.

Article 14:

1. The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect.
2. Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession.
3. Adequate procedures shall be established within the national legal system to resolve land claims by the peoples concerned.

Article 15:

1. The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources.
2. In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programs for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.

Article 23:

1. Handicrafts, rural and community-based industries, and subsistence economy and traditional activities of the peoples concerned, such as hunting fishing, trapping and gathering, shall be recognised as important factors in the maintenance of their cultures and in their economic self-reliance and development. Governments shall, with the participation of these people and whenever appropriate, ensure that these activities are strengthened and promoted.
2. Upon the request of the peoples concerned, appropriate technical and financial assistance shall be provided wherever possible, taking into account the traditional technologies and cultural characteristics of these peoples, as well as the importance of sustainable and equitable development.

The draft Commonwealth law and practice report refers to the following legislation and policy initiatives as indicative of either full compliance by the Commonwealth, or moves toward substantial compliance over time, with these Articles: *Aboriginal and Torres Strait Islander Commission Act 1989 (Cwlth)*, State and Territory compliance is yet to be determined.

Torres Strait Treaty

The Torres Strait Treaty³⁰⁵ delimits the boundaries between PNG and Australia regarding the territorial sea, the continental shelf and the extended fishing zone; establishes a Protected Zone within which marine resources are managed, taking into account the needs of 'traditional inhabitants', and provides for fisheries management, marine environmental protection, the exploitation of mineral resources and the protection of maritime relics.

Under Article 12, the parties are required to allow the traditional practices of the communities to continue in the Protected Zone, including free movement and the lawful traditional activities. That Article provides:

Where the traditional inhabitants of one Party enjoy traditional customary rights of access to and usage of areas of land, seabed, seas, estuaries and coastal tidal areas that are in or in the vicinity of the Protected Zone and that are under the jurisdiction of the other Party, and these rights are acknowledged by the traditional inhabitants living in or in proximity to those areas to be in accordance with local tradition, the other Party shall permit the continued exercise of those rights on conditions not less favourable than those applying to like rights of its own traditional inhabitants.

³⁰⁵ The Treaty between Australia and the Independent State of Papua New Guinea concerning the Maritime Boundaries of the Area between the Two countries, including the Area known as the Torres Strait, and Related Matters, Sydney, 18 December 1978.

Non-Binding Declarations and Other Instruments

Rio Declaration on Environment and Development

The 1992 Rio de Janeiro Declaration on Environment and Development includes several principles relevant to major groups (including women and youth.³⁰⁶) The declaration includes:

Principle 22

Indigenous people and their communities, and other local communities, have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.

Agenda 21

The Agenda 21 programme of action which was negotiated within the framework of the United Nations Conference on Environment and Development progress, is a programme for achieving sustainable development. It also attempts to recognise and strengthen the role of indigenous people and their communities. Amongst other measures in its 40 chapters and over 500 pages of general prescriptions,³⁰⁷ governments are to aim to protect indigenous communities from activities considered to be socially and culturally inappropriate and to develop or strengthen national consultative arrangements to better reflect indigenous peoples' needs, values and knowledge. Selected references to indigenous peoples in various chapters of Agenda 21 are presented below.³⁰⁸

Chapter 26 is reproduced in full because of its importance to the subject matter of this report. It is as follows:

Chapter 26: Recognising and Strengthening the Role of Indigenous People and Their Communities

Basis for action

26.1. Indigenous people and their communities have an historical relationship with their lands and are generally descendants of the original inhabitants of such lands. In the context of this chapter the term "lands" is understood to include the environment of the areas which the people concerned traditionally occupy. Indigenous people and their communities represent a significant percentage of the global population. They have developed over many generations a holistic traditional scientific knowledge of their lands, natural resources and environment. Indigenous people and their communities shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination. Their ability to participate fully in sustainable development practices on their lands has tended to be limited as a result of factors of an economic, social and historical nature. In view of the interrelationship between the natural environment and its sustainable development and the cultural, social, economic and physical well-being of indigenous people, national and international efforts to implement environmentally sound and sustainable development should recognize, accommodate, promote and strengthen the role of indigenous people and their communities.

26.2. Some of the goals inherent in the objectives and activities of this programme area are already contained in such international legal instruments as the ILO Indigenous and Tribal Peoples Convention (No. 169) and are being incorporated into the draft universal declaration on Indigenous rights, being prepared by the United Nations working group on indigenous populations. The International Year for the World's Indigenous People (1993) presents a timely opportunity to mobilize further international technical and financial cooperation.

Objectives

26.3. In full partnership with indigenous people and their communities, Governments and, where appropriate, inter governmental organizations should aim at fulfilling the following objectives:

³⁰⁶ Principles 20 and 21 relate to women and youth.

³⁰⁷ See generally: M. Koch and M. Grubb, 'Agenda 21' in M. Grubb, M. Koch, A. Munson, F. Sullivan, K. Thomson, *The Earth Summit Agreements: A Guide and Assessment*, Earthscan Publications Ltd, 1993, pp. 97-157, at pp.97-99.

³⁰⁸ These extracts are in conformity with the provisions in: N.A. Robinson (ed.), *Agenda 21: Earth's Action Plan Annotated*, Under the auspices of the Commission of Environmental Law of IUCN-the World Conservation Union, Oceania Publications, Inc., New York, 1993.

- (a) Establishment of a process to empower indigenous people and their communities through measures that include:
 - (i) Adoption or strengthening of appropriate policies and/or legal instruments at the national level;
 - (ii) Recognition that the lands of indigenous people and their communities should be protected from activities that are environmentally unsound or that the indigenous people concerned consider to be socially and culturally inappropriate;
 - (iii) Recognition of their values, traditional knowledge and resource management practices with a view to promoting environmentally sound and sustainable development;
 - (iv) Recognition that traditional and direct dependence on renewable resources and ecosystems, including sustainable harvesting, continues to be essential to the cultural, economic and physical well-being of indigenous people and their communities;
 - (v) Development and strengthening of national dispute-resolution arrangements in relation to settlement of land and resource-management concerns;
 - (vi) Support for alternative environmentally sound means of production to ensure a range of choices on how to improve their quality of life so that they effectively participate in sustainable development;
 - (vii) Enhancement of capacity-building for indigenous communities, based on the adaptation and exchange of traditional experience, knowledge and resource-management practices, to ensure their sustainable development;
- (b) Establishment, where appropriate, of arrangements to strengthen the active participation of indigenous peoples and their communities in the national formulation of policies, laws and programmes relating to resource management and other development processes that may affect them, and their initiation of proposals for such policies and programmes;
- (c) Involvement of indigenous people and their communities at the national and local levels in resource management and conservation strategies and other relevant programmes established to support and review sustainable development strategies, such as those suggested in other programme areas of Agenda 21.

Activities

26.4. Some indigenous people and their communities may require, in accordance with national legislation, greater control over their lands, self-management of their resources, participation in development decisions affecting them, including, where appropriate, participation in the establishment or management of protected areas. The following are some of the specific measures which Governments could take:

- (a) Consider the ratification and application of existing international conventions relevant to indigenous people and their communities (where not yet done) and provide support for the adoption by the General Assembly of a declaration on indigenous rights;
- (b) Adopt or strengthen appropriate policies and/or legal instruments that will protect indigenous intellectual and cultural property and the right to preserve customary and administrative systems and practices.

26.5. United Nations organizations and other international development and finance organizations and Governments should, drawing on the active participation of indigenous people and their communities, as appropriate, take the following measures, inter alia, to incorporate their values, views and knowledge, including the unique contribution of indigenous women, in resource management and other policies and programmes that may affect them:

- (a) Appoint a special focal point within each international organization, and organize annual interagency coordination meetings in consultation with Governments and indigenous organizations, as appropriate, and develop a procedure within and between operational agencies for assisting Governments in ensuring the coherent and coordinated incorporation of the views of indigenous people in the design and implementation of policies and programmes. Under this procedure, indigenous people and their communities should be informed and consulted and allowed to participate in national decision-making, in particular regarding regional and international cooperative efforts. In

addition, these policies and programmes should take fully into account strategies based on local indigenous initiatives;

- (b) Provide technical and financial assistance for capacity-building programmes to support the sustainable self-development of indigenous people and their communities;
- (c) Strengthen research and education programmes aimed at:
 - (i) Achieving a better understanding of indigenous people's knowledge and management experience related to the environment, and applying this to contemporary development challenges;
 - (ii) Increasing the efficiency of indigenous people's resource management systems, for example, by promoting the adaptation and dissemination of suitable technological innovations;
- (d) Contribute to the endeavours of indigenous people and their communities in resource management and conservation strategies (such as those that may be developed under appropriate projects funded through the Global Environmental Facility and Tropical Forestry Action Plan) and other programme areas of Agenda 21, including programmes to collect, analyse and use data and other information in support of sustainable development projects.

26.6. Governments, in full partnership with indigenous people and their communities should, where appropriate:

- (a) Develop or strengthen national arrangements to consult with indigenous people and their communities with a view to reflecting their needs and incorporating their values and traditional and other knowledge and practices in national policies and programmes in the field of natural resource management and conservation and other development programmes affecting them;
- (b) Cooperate at the regional level, where appropriate, to address common indigenous issues with a view to recognizing and strengthening their participation in sustainable development.

Means of implementation

(a) Financing and cost evaluation

26.7. The UNCED Secretariat has estimated the average total annual cost (1993-2000) of implementing the activities of this chapter to be about \$3 million from the international community on grant or concessional terms. These are indicative order of magnitude estimates only and have not been reviewed by governments. Actual costs and financial terms, including any that are non-concessional, will depend upon, inter alia, the specific strategies and programmes governments decide upon for implementation.

(b) Legal and administrative frameworks

26.8. Governments should incorporate, in collaboration with the indigenous people affected, the rights and responsibilities of indigenous people and their communities in the legislation of each country, suitable to the country's specific situation. Developing countries may require technical assistance to implement these activities.

(c) Human resource development

26.9. International development agencies and Governments should commit financial and other resources to education and training for indigenous people and their communities to develop their capacities to achieve their sustainable self-development, and to contribute to and participate in sustainable and equitable development at the national level. Particular attention should be given to strengthening the role of indigenous women.

Other relevant chapters of Agenda 21 with references to indigenous peoples and environmental management include the following:

Ch. 8: Interaction of environment and development in decision-making

8.1. The present chapter consists of the following programme areas:

- (a) Integrating environment and development at the policy, planning and management levels;

- (b) Providing an effective legal and regulatory framework;
- (c) Making effective use of economic instruments and market and other incentives;
- (d) Establishing systems for integrated environmental and economic accounting.

8.5. . . . Countries will develop their own priorities in accordance with their national plans, policies and programmes for the following activities:

- (d) Adopting integrated management systems, particularly for the management of natural resources; traditional or indigenous methods should be studied and considered wherever they have proved effective; women's traditional roles should not be marginalized as a result of the introduction of new management systems.

Ch. 15: Conservation of Biological Diversity

15.4. Governments at the appropriate level, with the cooperation of the relevant United Nations bodies and regional, intergovernmental and non-governmental organizations, the private sector and financial institutions, and taking into consideration indigenous people and their communities, as well as social and economic factors, should:

- (g) Recognize and foster the traditional methods and the knowledge of indigenous people and their communities, emphasizing the particular role of women, relevant to the conservation of biological diversity and the sustainable use of biological resources, and ensure the opportunity for the participation of those groups in the economic and commercial benefits derived from the use of such traditional methods and knowledge.

15.5. Governments at the appropriate levels, consistent with national policies and practices, with the cooperation of the relevant United Nations bodies and, as appropriate, intergovernmental organizations and with the support of indigenous people and their communities, non-governmental organizations and other groups, including the business and scientific communities, and consistent with the requirements of international law, should, as appropriate:

- (e) Subject to national legislation, take action to respect, record, protect and promote the wider application of the knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles for the conservation of biological diversity and the sustainable use of biological resources, with a view to the fair and equitable sharing of the benefits arising, and promote mechanisms to involve those communities, including women, in the conservation and management of ecosystems;
- (f) Undertake long-term research into the importance of biodiversity for the functioning of ecosystems and the role of ecosystems in producing goods, environmental services and other values supporting sustainable development, with particular reference to the biology and reproductive capacities of key terrestrial and aquatic species, including native, cultivated and cultured species; new observation and inventory techniques; ecological conditions necessary for biodiversity conservation and continued evolution; and social behaviour and nutrition habits dependent on natural ecosystems, where women play key roles. The work should be undertaken with the widest possible participation, especially of indigenous people and their communities, including women;
- (i) Develop policies to encourage the conservation of biodiversity and the sustainable use of biological and genetic resources on private lands.

15.6. Governments at the appropriate level, consistent with national policies and practices, with the cooperation of the relevant United Nations bodies and, as appropriate, intergovernmental organizations and with the support of indigenous people and their communities, non-governmental organizations and other groups, including the business and scientific communities, and consistent with the requirements of international law, should, as appropriate:

- (c) Initiate or further develop methodologies and begin or continue work on surveys at the appropriate level on the status of ecosystems and establish baseline information on biological and genetic resources, including those in terrestrial, aquatic, coastal and marine ecosystems, as well as inventories undertaken with the participation of local and indigenous people and their communities.

15.11. There is a need, where appropriate, to:

- (d) Enhance the capacity of governmental and private institutions, at the appropriate level, responsible for protected area planning and management to undertake intersectoral

coordination and planning with other governmental institutions, non-governmental organizations and, where appropriate, indigenous people and their communities.

Ch. 17: Protection of the Oceans, All Kinds of Seas, Including enclosed and Semi-enclosed Seas, and Coastal Areas and the Protection, Rational Use and Development of their living resources

17.3. The coastal area contains diverse and productive habitats important for human settlements, development and local subsistence. More than half the world's population lives within 60 km of the shoreline, and this could rise to three quarters by the year 2020. Many of the world's poor are crowded in coastal areas. Coastal resources are vital for many local communities and indigenous people. The exclusive economic zone (EEZ) is also an important marine area where the States manage the development and conservation of natural resources for the benefit of their people. For small island States or countries, these are the areas most available for development activities.

17.6. Each coastal State should consider establishing, or where necessary strengthening, appropriate coordinating mechanisms (such as a high-level policy planning body) for integrated management and sustainable development of coastal and marine areas and their resources, at both the local and national levels. Such mechanisms should include consultation, as appropriate, with the academic and private sectors, non-governmental organizations, local communities, resource user groups, and indigenous people.

17.15. Coastal States should promote and facilitate the organization of education and training in integrated coastal and marine management and sustainable development for scientists, technologists, managers including community-based managers and users, leaders, indigenous peoples, fisherfolk, women and youth, among others. Management, development, as well as environmental protection concerns and local planning issues should be incorporated in educational curricula and public awareness campaigns, with due regard to traditional ecological knowledge and socio-cultural values.

17.70. Marine living resources provide an important source of protein in many countries and their use is often of major importance to local communities and indigenous people. Such resources provide food and livelihoods to millions of people and, if sustainably utilized, offer increased potential to meet nutritional and social needs, particularly in developing countries. To realize this potential requires improved knowledge and identification of marine living resource stocks, particularly of underutilized and unutilized stocks and species, use of new technologies, better handling and processing facilities to avoid wastage, and improved quality and training of skilled personnel to manage and conserve effectively the marine living resources of the exclusive economic zone and other areas under national jurisdiction. Emphasis should also be on multi-species management and other approaches that take into account the relationships among species.

17.74. States commit themselves to the conservation and sustainable use of marine living resources under national jurisdiction. To this end, it is necessary to:

- (b) Take into account traditional knowledge and interests of local communities, small-scale artisanal fisheries and indigenous people in development and management programmes.

17.79. Coastal States, individually or through bilateral and/or multilateral cooperation and with the support, as appropriate of international organizations, whether subregional, regional or global, should inter alia:

- (b) Implement strategies for the sustainable use of marine living resources, taking into account the special needs and interests of small-scale artisanal fisheries, local communities and indigenous people to meet human nutritional and other development needs.

17.81. Coastal States should support the sustainability of small-scale artisanal fisheries. To this end, they should, as appropriate:

- (a) Integrate small-scale artisanal fisheries development in marine and coastal planning, taking into account the interests and, where appropriate, encouraging representation of fishermen, small-scale fisherworkers, women, local communities and indigenous people;
- (b) Recognize the rights of small-scale fishworkers and the special situation of indigenous people and local communities, including their rights to utilization and protection of their habitats on a sustainable basis.

17.82. Coastal States should ensure that, in the negotiation and implementation of international agreements on the development or conservation of marine living resources, the interests of local communities and indigenous people are taken into account, in particular their right to subsistence.

17.93. States individually, or through bilateral and multilateral cooperation and with the support of relevant international organizations, whether subregional, regional or global, as appropriate, should encourage and provide support for developing countries, inter alia, to:

- (a) Expand multi disciplinary education, training and research on marine living resources, particularly in the social and economic sciences;
- (b) Create training opportunities at national and regional levels to support artisanal including subsistence fisheries, to develop small-scale use of marine living resources and to encourage equitable participation of local communities, small-scale fishworkers, women and indigenous people.

17.95. Coastal States, with the support of relevant subregional, regional and global agencies, where appropriate, should:

- (b) Provide support to local fishing communities, in particular those that rely on fishing for subsistence, indigenous people and women, including, as appropriate, the technical and financial assistance to organize, maintain, exchange and improve traditional knowledge of marine living resources and fishing techniques, and upgrade knowledge on marine ecosystems.

The Commission on Sustainable Development (CSD), which is a sub-Commission of the Economic and Social Council (ECOSOC) of the UN, is the monitoring agency for the implementation of Agenda 21. The Commission on Sustainable Development meets at least annually to discuss the implementation of selected chapters of Agenda 21 and it can recommend additional national or international measures to improve its implementation. These recommendations are sent to the ECOSOC, which tends to pass them unmodified to the UN General Assembly. The General Assembly debates and normally approves these recommendations, which then become resolutions.

Some commentators are sceptical about the effectiveness of the CSD process, suggesting:

The CSD is still in an early stage. Whether it will become an interesting, lively, well-visited and thus politically relevant forum will depend on the spirit of its recommendations. At its previous sessions, which dealt with finance, technology, trade, consumption and the 'grey' issues in Agenda 21 (waste, human settlements, fresh water, etc.), delegations were not tempted to debate recommendations which extend further than Agenda 21. Consequently, little progress was achieved, and delegates and observers left with serious doubts about the usefulness of the process.³⁰⁹

Emerging International Law

The Draft Declaration on the Rights of Indigenous Peoples

The Draft Declaration on the Rights of Indigenous Peoples which has been developed by the Working Group on Indigenous Populations (WGIP) includes many articles relevant to natural and cultural resource management. The draft Declaration was finalised in August 1993, formally adopted by the WGIP in July 1994, approved by the Sub-Commission on Prevention of Discrimination and Protection of Minorities and referred on to the Commission on Human Rights for discussion in 1995.³¹⁰ An inter-sessional working group of the Commission on Human Rights (which comprises government representatives)³¹¹ has now been convened 'with the sole purpose of providing a draft declaration for consideration and adoption by the General Assembly within the International Decade of the World's Indigenous People'.³¹²

The following draft Articles are of special relevance:

³⁰⁹ gn:iucnethcomm, 'Some Basic Info on CSD', in peg:biodiversity, Feb 21, 1995.

³¹⁰ C.J. Iorns, 'Working Group on Indigenous Peoples: Twelfth Session', *Aboriginal Law Bulletin*, Vol. 3, No. 71, December 1994, pp.6-8 at pp.6-7.

³¹¹ B. Barber and S. McIntosh, 'Update: UN Draft Declaration on the Rights of Indigenous People', Vol. 3, No. 73, *Aboriginal Law Bulletin*, April 1995, p. 26.

³¹² *Australia, Canada, Denmark, Finland, New Zealand and Norway: Draft Resolution: Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its Forty-Sixth Session*, Commission on Human Rights, Fifty-first session, Agenda item 19, Economic and Social Council, 28 February 1995, UN Doc. E/CN.4/1995/L.62.

Art. 1: human rights recognition; Art. 2: freedom from discrimination; Art. 3: self-determination; Art 12: the right to practise and revitalize cultural traditions and customs; Arts. 19, 20: participation in decision-making; Art. 21: to maintain and develop indigenous political, economic and social systems; Art. 23: right to development; Art. 24: right to traditional medicines and health practices; Art. 25: to maintain and strengthen spiritual and material relationships with their customary territories; Art. 26: to own, develop, control and use customary environments, tenure systems and resource management practices; Art. 27: to restitution of traditional territories or compensation payments; Art. 29: to cultural and intellectual property rights; Art. 30: to determine development priorities.

Draft Declaration of Principles on Human Rights and the Environment

The Sub-Commission on Prevention of Discrimination and Protection of Minorities in the United Nations' Economic and Social Council appointed a special Rapporteur in 1989 to prepare a study on the linkages between human rights and the environment.³¹³ The final report submitted in 1994 included a draft Declaration on Human Rights and the Environment.³¹⁴ Of particular relevance to conservation activities on Aboriginal and Torres Strait Islander peoples' territories are the following draft articles in that Declaration:

13. Everyone has the right to benefit equitably from the conservation and sustainable use of nature and natural resources for cultural, ecological, education, health, livelihood, recreational, spiritual or other purposes. This includes ecologically sound access to nature.

Everyone has the right to preservation of unique sites, consistent with the fundamental rights of persons or groups living in the area.

14. Indigenous peoples have the right to control their lands, territories and natural resources and to maintain their traditional way of life. This includes the right to security in the enjoyment of their means of subsistence.

Indigenous peoples have the right to protection against any action or course of conduct that may result in the destruction or degradation of their territories, including land, air, water, sea-ice, wildlife or other resources.³¹⁵

Other United Nations Activities

The World Commission on Environment and Development in 1987 made various recommendations concerning the need to empower so-called 'vulnerable groups' of indigenous and tribal peoples. It advocated the recognition of indigenous peoples' 'traditional rights to land and the other resources which sustain their way of life – rights which may not fit into standard legal systems'. The Commission recommended that positive measures could include earnings from traditional activities and marketing arrangements that ensure a fair price for produce, and the conservation and enhancement of resources and resource productivity.³¹⁶

There have also been various other reports, conferences and resolutions concerning the inclusion of indigenous peoples' perspectives in United Nations environment and development processes. The recognition of indigenous peoples' intellectual and cultural property rights, and the equitable distribution of returns from the application of traditional ecological knowledge are currently topical, with special reports being prepared for various UN bodies. The chair of the Working Group on Indigenous Populations, Mme Daes, for example, has prepared a special study on the protection of the cultural and intellectual property of indigenous peoples, following requests from participants in the Working Group on Indigenous Populations and other United Nations

³¹³ F. Z. Ksentini, *Review of Further Developments in Fields with which the Sub-Commission has been Concerned: Human Rights and the Environment: Progress Report*, Distr. General, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Commission on Human Rights, Economic and Social Council, United Nations, Forty-fourth session, Item 4 of the provisional agenda, 2 July 1992, UN Doc. E/CN.4/Sub.2/1992/7.

³¹⁴ F.Z. Ksentini, *Review of Further Developments in the Fields with which the Sub-Commission has been Concerned: Human Rights and the Environment: Final Report*, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Commission on Human Rights, Economic and Social Council, Forty-sixth session, Item 4 of the provisional agenda, 6 July 1994, UN Doc. E/CN.4/Sub.2/ 1994/9.

³¹⁵ 'The 1994 Draft Declaration of Principles on Human Rights and the Environment', Sierra Club Legal Defense Fund Pamphlet.

³¹⁶ World Commission on Environment and Development, *Our Common Future*, pp.12, 114-6.

bodies.³¹⁷ That report includes an annexure of principles and guidelines for the protection of the heritage of indigenous peoples. The report is to be circulated widely for comment from governments, indigenous communities and intergovernmental and non-governmental organizations concerned and a follow-up report is to be prepared.³¹⁸

International Decade of the World's Indigenous People

In December 1993 the United Nations General Assembly proclaimed the International Decade of the World's Indigenous People — to commence from December 1994. The goal of the decade is:

the strengthening of international cooperation for the solution of problems faced by indigenous people in such areas as human rights, the environment, development, education and health.³¹⁹

The General Assembly has also suggested that the lessons of 1993, the International Year of the World's Indigenous People, be built upon.

Intellectual property rights and ensuring equitable returns on the provision or maintenance of genetic resources are important concerns within the United Nations' Programme of Action for the International Decade of the World's Indigenous People. The Food and Agriculture Organisation, for example, reported to the Working Group on Indigenous Populations:

5. *Genetic resources.* FAO will continue to be actively involved in the implementation of Agenda 21's provisions on conservation and use of genetic resources and the Convention on Biodiversity. Many of these activities will involve indigenous people.

7. *Animal genetic resources.* FAO will continue to develop its global information system for domestic animal diversity and its animal genetic conservation programme which will give particular attention, *inter alia*, to the animals of indigenous peoples. While FAO recognizes the importance of indigenous knowledge it does not at present have the resources to undertake studies in this field. However, it would be willing to cooperate with other United Nations organizations and national or international institutions in such an endeavour.

8. *Fishery genetic resources.* FAO is planning to develop means of tapping indigenous knowledge in this area in follow-up to the Convention on Biodiversity and the November 1992 FAO Expert Consultation on Aquatic Genetic Resources.

9. *Fisheries.* FAO is planning to undertake a series of case studies dealing with the comparative analysis of traditional fishery management systems in Asia, Africa, Latin America and the Caribbean and the South Pacific. Due to funding constraints these will take place over a number of years.³²⁰

An International Coral Reef Initiative (ICRI) Workshop was held at Silliman University in Dumaguete City, Philippines in May, in mid-1995 and a Framework For Action was developed. Amongst other things, it calls for the integration of traditional knowledge into environmental management.

³¹⁷ E.-I. Daes, *Discrimination against indigenous peoples: Protection of the heritage of indigenous people: Preliminary report of the Special rapporteur, Mrs Erica-Irene Daes, submitted in conformity with Sub-Commission resolution 1994/44 and decision 1994/105 of the Commission on Human Rights*, E/CN.4/Sub.2/1994/31, Distr. General, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Commission on Human Rights, Economic and Social Council, United Nations, Forty-sixth session, Item 15 of the provisional agenda, 8 July 1994.

³¹⁸ J. Bengoa, *Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its Forty-Seventh Session, Geneva, 31 July-25 August 1995*, E/CN.4.1996/2, E/CN.4. Sub.2.1995/51, Distr. General, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Commission on Human Rights, Economic and Social Council, United Nations, 23 October 1995, pp.93-94.

³¹⁹ See generally: United Nations Economic and Social Council, 'International Decade of the World's Indigenous People: International Day of Indigenous People', E/CN.4/Sub.2/AC.4/1994/9, June 1994.

³²⁰ Food and Agriculture Organisation of the United Nations, in *Programme of Action for the International Decade: Information received from the United Nations System*, Item 8 of the provisional agenda, Technical Meeting on the international Year and the International Decade of the World's Indigenous People, Geneva, 20-22 July 1994, E/CN.4/1994/AC.4/TM.4/6, 22 June 1994.

Recommendations From Major International Organisations

International environmental organisations such as the International Union for the Conservation of Nature (IUCN) and the World Wide Fund for Nature (WWF) are regarded as particularly important by governments in the international environmental policy era. A couple of their major policy initiatives are noted here.

The Caracas Declaration

The Caracas Declaration — Parks, Protected Areas and the Human Future — was developed by 1500 delegates to the Fourth World Congress on National Parks and Protected organised by IUCN — the World Conservation Union — in February 1992. It urged that a range of measures be taken by all governments and appropriate national and international bodies, including:

- to support the development of national protected area policies which are sensitive to customs and traditions, safeguard the interests of indigenous people, take full account of the roles and interests of both men and women, and respect the interests of children of this and future generations;
- to allocate adequate financial and other resources so that, once designated, protected areas are managed effectively, to achieve their intended objectives.

The Congress made about twenty detailed recommendations including the following:³²¹

Recommendation 6: People And Protected Areas

Human communities, especially those living in and around protected areas, often have important and long-standing relationships with these areas. Local and indigenous communities may depend on the resources of these areas for their livelihood and cultural survival. Increasingly, the resources which justify establishment of protected areas include cultural landscapes and adapted natural systems created by long-established human activity. These relationships embrace cultural identity, spirituality and subsistence practices, which frequently contribute to the maintenance of biological diversity.

These relationships have too often been ignored and even destroyed by resource conservation and management initiatives. Sometimes, protected areas have been established on lands possessed and used by local people. Communities have in many cases been the victims of inadequate land and resource use patterns, as well as the inadequacy of rural development programmes, thus being compelled to exploit and degrade their environment. This can impoverish rural populations and constrain the effective management of protected areas.

Protected areas cannot co-exist with communities which are hostile to them. But they can achieve significant social and economic objectives, when placed in a proper context. The establishment and management of protected areas and the use of resources in and around them must be socially responsive and just. In many cases, the continuation and development of human activities in protected areas should be accepted, insofar as it is compatible with conservation objectives.

Community participation and equality need to be achieved urgently in decision-making processes, with mutual respect among cultures. These processes must require direct community involvement, as well as the participation of concerned international, governmental and non-governmental organizations. Customary tenure systems, traditional knowledge and practices, and the role of men and women in communities, must be respected and built upon in designing and implementing conservation plans.

The IV World Congress on National Parks and Protected Areas recommends that:

- a. governments recognize the needs and aspirations of people living in and around protected areas, and institute measures to ensure the continuity and development of social and cultural values. Policies and practices should be adopted to guarantee that local communities, particularly women, are not disadvantaged by protected areas, and that they receive benefits from enhanced economic and employment opportunities;
- b. governments ensure that the planning process for protected areas is properly integrated with programmes for the sustainable development of local cultures and local economies, and that it uses and enhances local knowledge and decision-making mechanisms. Also, protected area networks should be supportive of ecologically sustainable and economically viable development;
- c. IUCN, governments and protected area managers incorporate customary and indigenous tenure and resource use and control systems as a means of enhancing biodiversity conservation;

³²¹ 'Subject: Caracas Recommendations', Written 7:08 PM Apr 22, 1992 by igc:iucnus in peg:iucn.news.

- d. IUCN undertake an evaluation of the relationship between property rights and the sustainability of protected areas; IUCN should address particularly customary 'communal' property systems, tenure-related issues, territorial and legal conflict and gender issues;
- e. governments and international bodies recognise non-governmental and community-based organizations as partners in the management of protected areas;
- f. IUCN promote the participation of local communities in planning and evaluating the relationship between people and protected landscapes;
- g. IUCN promote the sharing of information on how local community groups and non-governmental organizations can participate in protected areas management, through publications, training and education programmes.

The Global Biodiversity Strategy

The Global Biodiversity Strategy which was developed by a number of international environmental organisations and published in 1992, outlines 85 guidelines for 'action to save, study and use the Earth's biotic wealth sustainably and equitably'. Guidelines which are particularly relevant include the following:

- (32) increase incentives for local stewardship of public lands and waters;
- (33) recognize the ancestral domains of tribal and indigenous peoples and support their efforts to maintain traditional practices and adapt them to modern pressures and conditions;
- (34) compensate individuals and local communities who own or depend on land or resources taken for public purposes;
- (41) promote recognition of the value of local knowledge and genetic resources and affirm local peoples' rights;
- (42) base the collection of genetic resources on contractual or other agreements ensuring equitable returns;
- (43) develop new methods and mechanisms at the bioregional level for dialogue, planning, and conflict resolution;
- (44) give weak and disenfranchised groups the means to influence how the bioregion's resources should be managed and distributed;
- (55) provide incentives for establishing private protected areas;
- (57) broaden participation in the design of protected area management plans and expand the range of issues addressed by those plans;
- (82) strengthen research on ethical, cultural, and religious concerns related to conserving biodiversity.³²²

Other relevant publications by international organisations include: *IUCN/UNEP/WWF World Conservation Strategy*,³²³ *Keeping Options Alive: The Scientific Basis for Conserving Biodiversity*,³²⁴ *Conserving the World's Biodiversity*,³²⁵ and *Caring for the Earth: A Strategy for Sustainable Living*.³²⁶

There have also been a range of declarations by indigenous peoples and supporters, regarding the need for more effective natural and cultural heritage protection. Just a small selection of relevant declarations, conference proceedings and resolutions include the 'Kari-Oca Declaration' (1992); proceedings of the United Nations

³²² World Resources Institute, The World Conservation Union, United Nations Environment Programme, Food and Agriculture Organisation, United Nations Education, Scientific and Cultural Organisation, *Global Biodiversity Strategy: Guidelines for Action to Save, Study, and Use Earth's Biotic Wealth Sustainably and Equitably*, WRI, IUCN, UNEP, 1992.

³²³ International Union for the Conservation of Nature, United Nations Environment Program, World Wide Fund for Nature, *World Conservation Strategy: Living Resource Conservation for Sustainable Development*, IUCN-UNEP-WWF, Gland, 1980.

³²⁴ W. Reid and K. Miller, *Keeping Options Alive: The Scientific Basis for Conserving Biodiversity*, World Resources Institute, Washington, 1989.

³²⁵ J. McNeely, K. Miller, W. Reid, R. Mittermeier and T. Werner, *Conserving the World's Biodiversity*, IUCN, Gland, Switzerland CI, WWF-US and the World Bank, Washington DC, USA, 1990.

³²⁶ IUCN, UNEP and WWF, *Caring for the Earth: A Strategy for Sustainable Living*, Gland, 1992.

Technical Conference on Practical Experience in the Realization of Sustainable and Environmentally Sound Self-Development of Indigenous Peoples;³²⁷ recommendations from a conference on the Science of Pacific Island Peoples;³²⁸ and the 'Manila Declaration concerning the Ethical Utilization of Biological Resources'.³²⁹ In June 1993 the Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples was issued following the first international conference on the cultural and intellectual property rights of indigenous peoples in Whakatane, Aotearoa, New Zealand and in November 1993 the Julayinbul Statement on Indigenous Intellectual Property Rights, and a Declaration Reaffirming the Self-determination and Intellectual Property Rights of the Indigenous Nations and Peoples of the Wet Tropics Rainforest Area was negotiated at a Rainforest Aboriginal Network conference in North Queensland.

Regional Conventions

At a regional level also, some governments have agreed to instruments which call on governments to recognise and protect customary practices relevant to natural and cultural resource management, and to promote the protection, recording and the integration into biological conservation of traditional knowledge and resource use practices.

The Convention on Conservation of Nature in the South Pacific (the Apia Convention)

The Convention on Conservation of Nature in the South Pacific (the Apia Convention) entered into force in 1990. Australia acceded to it in March 1990, and deposited a Federal statement in November 1990. The Convention allows contracting parties to make provision for customary use of areas and species in national parks and national reserves in accordance with traditional customary practices.

The preamble to the Convention notes that the contracting parties, recognise 'the special importance in the South Pacific of indigenous customs and traditional cultural practices and the need to give due consideration to such matters', amongst other matters. Article VI provides:

Notwithstanding the provisions of Articles III, IV and V, a Contracting Party may make appropriate provision for customary use of areas and species in accordance with traditional cultural practices.³³⁰

³²⁷ Ingmar Egede (Rapporteur), Discrimination Against Indigenous Peoples: Report of the United Nations Technical Conference on Practical Experience in the Realization of Sustainable and Environmentally Sound Self-Development of Indigenous Peoples (Santiago, Chile, 18-22 May 1992), E/CN.4/Sub.2/1992/31, Distr. General, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Commission on Human Rights, Economic and Social Council, United Nations, Forty-fourth session, Item 15 of the provisional agenda, 23 June 1992; Ingmar Egede (Rapporteur), Discrimination Against Indigenous Peoples: Report of the United Nations Technical Conference on Practical Experience in the Realization of Sustainable and Environmentally Sound Self-Development of Indigenous Peoples (Santiago, Chile, 18-22 May 1992), Addendum: Background Papers, E/CN.4/Sub.2/1992/31/Add.1, Distr. General, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Commission on Human Rights, Economic and Social Council, United Nations, Forty-fourth session, Item 15 of the provisional agenda, 25 May 1992.

³²⁸ MacLeod, Morrison, Ravuvu, O'Sullivan, Crowl, 'Recommendations of the Conference on Science of Pacific Island Peoples', in Morrison, Geraghty and Crowl (eds), *Science of Pacific Island Peoples*, pp 5-9.

³²⁹ See: The Melaka Accord, resolutions ratified by ASOMPS VIII: Eighth Asian Symposium on Medicinal Plants, Spices and other Natural Products, 12-16 June 1994, Melaka, Malaysia': M. Garson, 'Biodiversity, the Manila Declaration and the Melaka Accord: Contemporary Issues for Australian Natural Product Chemists', (1995) *January Chemistry in Australia* 62-64.

³³⁰ Under Art.1: 'Protected area' means national park or national reserve; 'National park' means an area established for the protection and conservation of ecosystems, containing animal and plant species, geomorphological sites and habitats of special scientific, educative and recreational interest or a natural landscape of great beauty, which is under the control of the appropriate public authority and open to visits by the public; 'National reserve' means an area recognised and controlled by the appropriate public authority and established for protection and conservation of nature, and includes strict nature reserve, managed nature reserve, wilderness reserve, fauna or flora reserve, game reserve, bird sanctuary, geological or forest reserve, archaeological reserve and historical reserve, these being reserves affording various degrees of protection to the natural and cultural heritage according to the purposes for which they are established.

The South Pacific Declaration on Natural Resources and the Environment

The South Pacific Declaration on Natural Resources and the Environment which was adopted at the Conference on the Human Environment in the South Pacific in 1982 declared that ‘traditional conservation practices and technology and traditional systems of land and reef tenure adaptable for modern resource management shall be encouraged’ (para. 13), and that traditional environmental knowledge will be sought and considered when assessing the expected effects of development projects: para.13. The involvement and participation of directly affected people in the management of their resources, including the decision making process was also to be encouraged: para. 14. The Declaration also stated that resource use planning should accommodate a ‘system of specially-designated areas such as national parks and reserves [which] is essential for the protection of traditional use of resources’: para. 5.³³¹

Convention for the Protection of the Natural Resources and Environment of the South Pacific Region (SPREP Convention)

The Convention for the Protection of the Natural Resources and Environment of the South Pacific Region (SPREP Convention) was concluded in 1986, ratified by Australia in 1989, and entered into force in 1990. It has two protocols — one for the prevention of pollution of the South Pacific Region by dumping, and the other concerns cooperation in combating pollution emergencies in the South Pacific region. The SPREP Convention only refers to the importance of the region’s natural heritage, and to customary and traditional practices in its preambular paragraphs. Under Art. 14 state parties are to take all appropriate measures to protect and preserve threatened or endangered flora, fauna, habitat and ecosystems, and thus to establish protected areas and implement regulatory provisions.³³²

In 1993 SPREP was established by treaty as an intergovernmental organisation under international law.³³³ The SPREP is administering a Regional Marine Turtle Conservation Program and in 1995 SPREP and the Endangered Species Unit in ANCA produced and circulated educational materials (including posters and information brochures) on marine turtles. 1995 was the Year of the Sea Turtle in the Pacific Region.

South Pacific Forum Fisheries Agency Convention

The South Pacific Forum Fisheries Agency Convention entered into force for Australia in October 1979. In April 1992 the 6th Technical Sub-Committee Meeting of the Forum Fisheries Agency’s Fisheries Committee recommended that customary resource management, traditional knowledge concerning marine resources,

³³¹ South Pacific Regional Environment Programme, *Report of the Conference on the Human Environment in the South Pacific, Rarotonga, Cook Islands, 8-11 March 1982*, South Pacific Commission, Noumea, n.d.

³³² B. Boer, ‘Environmental Law in the Pacific Region’, in B. Boer, R. Fowler and N. Gunningham (eds), *Environmental Outlook: Law and Policy*, Australian Centre for Environmental Law, The Federation Press, Sydney, 1994, pp.65-84 at p.71.

³³³ P. Lawrence, ‘Regional Strategies for the Implementation of Environmental Conventions: Lessons from the South Pacific’, in D.W. Greig and P. Alston (eds), *The Australian Year Book of International Law 1994: Vol.15*, Centre for International and Public Law, Faculty of Law, Australian National University, Canberra, 1994, pp.203-229 at p.213.

customary marine tenure systems and relevant national and international law should be investigated, and policies developed.