Reconciling indigenous peoples and protected areas: rights, governance and equitable cost and benefit sharing

Discussion Paper

By Peter Bille Larsen, with contributions from Gonzalo Oviedo

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Introduction ................................................................................................................................2
New paradigm and new practice ..................................................................................................5
Reconciliation: working with difference ....................................................................................9
Rights – will it be the end of protected areas within indigenous lands and waters?............12
What rights are we talking about? ..........................................................................................13
National legislation and practice ..............................................................................................14
International law and jurisprudence ..........................................................................................17
Some key aspects of indigenous rights ....................................................................................20
Collective rights ..........................................................................................................................20
Self-determination, land rights and protected areas ...............................................................23
Options for recognizing land and resource rights .................................................................24
Free Prior Informed Consent: a final death-blow to protected areas or the right to establish protected areas? ..........................................................26
Revisiting ownership and restrictions .........................................................................................27
The right to development and protected area restrictions in indigenous territories ..........29
So is it a Pandora’s box? .........................................................................................................31
Rights in protected areas: working with common ground and difference .........................36
Will alternative governance – community and co-management do the trick? .......................42
Scientific and indigenous knowledge .....................................................................................44
Will “Small is beautiful” fill the gaps? ....................................................................................47
Cultural diversity: adding a layer or rethinking the box? .......................................................49
Indigenous governance .............................................................................................................52
From types to scales; cross-scale management in ecosystem context ..................................53
Repositioning governance in an ecosystem perspective .........................................................55
Sharing costs and benefits: from deficit towards equity? ....................................................58
Understanding costs and benefits: framing valuation ............................................................59
An equity perspective on unsustainable use ..........................................................................61
Concluding remarks: from paradigms and panacea to practicality .......................................65
References ................................................................................................................................69

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Introduction

Addressing indigenous people’s issues in protected areas has now become a priority. Three of the major milestones of the protected area paradigm change (Philips 2003) involve the recognition of the rights of indigenous peoples, equitable cost and benefit-sharing, and the emphasis on new forms of governance to protected area management. This paper particularly seeks to assess the implications of these three milestones and chart out some of the more contentious issues as well as practical steps to address them.

The involvement of indigenous peoples in protected areas has gone from being an (additional) management burden to considering them an integral management partner and steward with the potential to tip the balance from failure to successful and more equitable conservation. Working with indigenous peoples in protected areas is no longer a question of “doing good”, but doing things right. Yet, (how) will the “right thing” lead to better results? What is at stake when moral imperatives and pragmatic conservation choices meet? Such questions and answers relate to a series of assumptions, which need to be revisited and discussed in a more head-on manner.

This paper argues that current policy objectives may fail to achieve what they set out for, unless more substantial attention is paid to a number of fields of difference being expressed by both indigenous peoples and conservation actors. The importance of clarifying these issues has gained all the more relevance by recent discussions on the practice and potential of conservation organizations engaging with indigenous peoples.

For some whose main aim is reverse biodiversity loss, the recognition of rights may be perceived as involving the politicization of the conservation agenda, with potentially damaging consequences for conservation. There is a fear that protected area concerns may be hi-jacked by indigenous rights issues of self-determination, and that existing protected areas may be reclaimed by indigenous peoples and opened up for further degradation. In a similar vein, alternative governance to government-run protected areas has been questioned considerably in terms of their relevance and effectiveness. For some, the emphasis on co-management and community institutions is seen as a political fad, unlikely to work and most likely to waste scarce resources. Conversely, critical voices from indigenous peoples and support organizations are welcoming paradigm changes, yet also express concerns about the risk of protected areas appropriating indigenous concerns without substantially changing ongoing practice. Both responses are valid, and relate to assumptions and theories of action that for each side tend to be taken for granted. These can be summarized as follows.

On the one hand, actual recognition and protection of indigenous rights are, among other things, considered:

- a critical means to reconciling indigenous peoples and protected areas thus rebuilding conservation around social justice (as in IUCN resolutions, guidelines on indigenous peoples and protected areas, human rights practice);
• as an essential means for conservation agreements and arrangements to truly reflect local conditions by building on existing tenure and rights arrangements rather than pre-supposing terra nullius⁷;
• necessary for harnessing indigenous stewardship of biodiversity and natural resources (whether protected area or not) by clarifying tenure and rights issues and thus facilitating strengthened ownership of protection efforts;
• critical to restore and/or maintain connected landscapes otherwise at risk of being chopped into private land-holdings, thus facilitating the implementation of landscape approaches;
• vital to harnessing conservation opportunities where government protection efforts are either ineffective (paper parks) or absent, through reinforcing indigenous-driven management approaches;
• as a basic step towards positioning protected area practice in wider socio-economic productive landscapes, thus harnessing the relevance, role and sustainability of protected areas in the long-term.

On the other hand, there is a fear that further recognition of indigenous rights and further empowerment will:

• increase conflict rather than reconciliation around conservation efforts, as issues of participation and rights “politicize” the technical/scientific challenges of ecosystem management and conservation;
• overwhelm protected area agencies with growing demands from indigenous communities for restitution and compensation, without effective means to respond adequately;
• revert and fragment existing and new protected areas, thus slowing down (and even back-tracking) protected area efforts to move beyond “islands of protection” and gain sufficient size and coverage to achieve conservation objectives;
• threaten the sustainability, and increase the vulnerability, of protected areas in the long-term if communities decide to abandon previous conservation commitments;
• put even more pressure on the limited financial base for protected areas management by adding the necessity to ensure equitable cost and benefit sharing without obtaining wider societal financial commitments in this respect.

Put somewhat differently, Chapin states that:

“The fact is that indigenous peoples and conservationists have very different agendas. Indigenous agendas almost invariably begin with the need to protect and legalize their lands for their own use. They emphasize the importance of finding ways to make a living on the land without destroying those resources. And they give high priority to documenting their people’s history, traditions, and cultural identity. Conservationist agendas, by contrast, often begin with the need to establish protected areas that are off-limits to people, and to develop management plans. If they include indigenous peoples in their plans, they tend to see those people more as a possible means to an end rather than as ends in themselves. They are seldom willing to support legal battles over land tenure and the strengthening of indigenous organizations; they consider these actions “too political” and outside their conservationist mandate (2004:21).”

⁷“Terra nullius” could be translated as “no-man’s land”, and has been applied to indigenous territories where no legal recognition of tenure rights was in place, which facilitated the creation of government-owned protected areas with little or no recognition of customary land and resource rights.
This paper is written in the spirit of reconciliation emphasized by the many delegates, including indigenous peoples’ representatives, attending the Vth World Parks Congress (Durban, September 2003), and to contribute to paving the way for effective and comprehensive implementation of the CBD Programme of Work on Protected Areas on matters relevant to indigenous peoples and local communities. If the Vth World Parks Congress was a first major step towards effective reconciliation, the CBD Programme of Work represents the greatest opportunity to achieve it – an aim that, however, may remain elusive unless open and frank discussions guide effective progress on the ground. This paper is a contribution from IUCN in this direction; it doesn’t intend to provide all the answers, but rather to pose questions that may help all parties address the challenges in a constructive manner.

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2 The CBD Programme of Work on Protected Areas was adopted by the Seventh Meeting of the Conference of the Parties in February 2004.
New paradigm and new practice

Over the last decades, a paradigm shift has been taking place regarding protected areas (Philips 2003). The classic view of protected areas, which has informed a majority of the world’s approximately 100,000 protected areas, is being expanded, challenged and complemented by new approaches. The traditional view involving mostly government-designated and government-run areas with broad protection objectives is being challenged by increasingly sophisticated approaches addressing the specific contexts and objectives of protected areas in their broader landscapes. Scientists have challenged the biodiversity value of political compromise-based protected area design (Mulongoy and Chape 2004) calling for the establishment of specific, representative and viable biodiversity and ecosystem service goals. Philips has summarized the changes as follows:

Contrasting paradigms (Philips 2003)

<table>
<thead>
<tr>
<th>As it was: protected areas were …</th>
<th>As it is becoming: protected areas are …</th>
</tr>
</thead>
<tbody>
<tr>
<td>Planned and managed against people</td>
<td>Run with, for, and in some cases by local people</td>
</tr>
<tr>
<td>Run by central government</td>
<td>Run by many partners</td>
</tr>
<tr>
<td>Set aside for conservation</td>
<td>Run also with social and economic objectives</td>
</tr>
<tr>
<td>Paid for by taxpayer</td>
<td>Paid for from many sources</td>
</tr>
<tr>
<td>Managed by scientists and natural resource experts</td>
<td>Managed by multi-skilled individuals</td>
</tr>
<tr>
<td>Managed without regard to local community</td>
<td>Managed to help meet needs of local people</td>
</tr>
<tr>
<td>Developed separately</td>
<td>Planned as part of national, regional and international systems</td>
</tr>
<tr>
<td>Managed as ‘islands’</td>
<td>Developed as ‘networks’ (strictly protected areas, buffered and linked by green corridors)</td>
</tr>
<tr>
<td>Established mainly for scenic protection</td>
<td>Often set up for scientific, economic and cultural reasons</td>
</tr>
<tr>
<td>Managed mainly for visitors and tourists</td>
<td>Managed with local people more in mind</td>
</tr>
<tr>
<td>Managed reactively within short timescale</td>
<td>Managed adaptively in long term perspective</td>
</tr>
<tr>
<td>About protection</td>
<td>Also about restoration and rehabilitation</td>
</tr>
<tr>
<td>Viewed primarily as a national asset</td>
<td>Viewed also as a community asset</td>
</tr>
<tr>
<td>Viewed only as a national concern</td>
<td>Viewed also as an international concern</td>
</tr>
<tr>
<td>Managed in a technocratic way</td>
<td>Managed with political considerations</td>
</tr>
</tbody>
</table>

The changes are substantial. Not only are new social, livelihood and cultural objectives being added to the protected area vision; changes are also taking place in ecological and biodiversity terms. As part of a broader drive to substantiate the values and services to be provided by protected areas, their role in broader ecosystem and natural resource management is being emphasized in policy development. General protection objectives based on aesthetic, enjoyment and/or public use values are increasingly accentuated, expanded and complemented by specific biodiversity, cultural or livelihood security values. It is, for example, realized that many (potentially) productive landscapes are substantially underrepresented compared to other types of areas – or e.g. that habitat of key species are
found outside protected area systems (Mulongoy and Chape 2004). The importance of these changes for indigenous peoples should not be underestimated. Protected areas are increasingly being questioned and reinforced around their:

1) **Relevance** of protected areas: Are protected areas the most relevant conservation tool? What is, indeed, the potential of other forms of conservation³?

2) **Utility** of existing protected area modalities: are they seeking to protect what needs to be protected? Are (potential) results relevant for biodiversity conservation goals?

3) **Effectiveness**: to what extent do (or could) they deliver on their biodiversity goals? Do protected areas achieve the protection objectives being set for them?

The point is that the credo that conservation equals ‘no human presence’ is no longer justified or promoted *per se* by the natural sciences. It all depends on the specific biodiversity goals based on a clear assessment of threats and potential solutions. The pragmatic choice of pristine areas with little political resistance against protected area designation is no longer judged as a sufficient basis for ‘exclusive’ protection.

This *inclusive* trend seeking to ground protected areas in their ecological as well as socio-economic landscapes involves working both with new actors (agricultural sector, private sector and NGOs) and as well as reconciling ‘old’ relationships with (e.g. indigenous and local communities).

On the one hand, the protected area community in Durban recognized the legitimate interests of indigenous peoples in conservation matters, and the need to overcome the heavy legacy of insensitive protected area policy and practice towards indigenous peoples. The new paradigm seeks to reconfigure a number of protected area fundamentals namely that:

- indigenous rights have a place in protected areas
- protected areas should not only benefit society as a whole, but be equitably beneficial for indigenous and local communities

Global protected area practice of recent years was largely reviewed and discussed in Durban, and prompted initiatives that now include qualitative benchmarks for protected area performance in the areas of indigenous rights, more diverse governance options and equitable cost and benefit-sharing as part of a broader reconciliation effort further consolidated by the CBD programme of work on protected areas adopted by COP7 in February 2004.

On the other hand, indigenous representatives conveyed their commitment and interest in protected areas, confirming their share of responsibilities in reaching biodiversity conservation objectives.

<table>
<thead>
<tr>
<th>PROGRAMME ELEMENT 2: GOVERNANCE, PARTICIPATION, EQUITY AND BENEFIT SHARING</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Goal 2.1 - To promote equity and benefit-sharing</strong></td>
</tr>
<tr>
<td>Target: Establish by 2008 mechanisms for the equitable sharing of both costs and benefits arising from the establishment and management of protected areas.</td>
</tr>
<tr>
<td><strong>Goal 2.2 - To enhance and secure involvement of indigenous and local communities and relevant stakeholders</strong></td>
</tr>
<tr>
<td>Target: Full and effective participation by 2008, of indigenous and local communities, in full respect of their rights and recognition of their responsibilities,</td>
</tr>
</tbody>
</table>

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³ Interestingly, the CBD PoW speaks of other forms of conservation, not necessarily other forms of protected areas.
Suggested activities of the Parties

2.1.1. Assess the economic and socio-cultural costs, benefits and impacts arising from the establishment and maintenance of protected areas, particularly for indigenous and local communities, and adjust policies to avoid and mitigate negative impacts, and where appropriate compensate costs and equitably share benefits in accordance with the national legislation.

2.1.2. Recognize and promote a broad set of protected area governance types related to their potential for achieving biodiversity conservation goals in accordance with the Convention, which may include areas conserved by indigenous and local communities and private nature reserves. The promotion of these areas should be by legal and/or policy, financial and community mechanisms.

2.1.3. Establish policies and institutional mechanisms with full participation of indigenous and local communities, to facilitate the legal recognition and effective management of indigenous and local community conserved areas in a manner consistent with the goals of conserving both biodiversity and the knowledge, innovations and practices of indigenous and local communities.

2.1.4. Use social and economic benefits generated by protected areas for poverty reduction, consistent with protected-area management objectives.

2.1.5. Engage indigenous and local communities and relevant stakeholders in participatory planning and governance, recalling the principles of the ecosystem approach.

2.1.6. Establish or strengthen national policies to deal with access to genetic resources within protected areas and fair and equitable sharing of benefits arising from their utilization, drawing upon the Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization as appropriate.

Suggested supporting activities of the Executive Secretary

2.2.6 Make available to Parties case-studies, advice on best practices and other sources of information on stakeholder participation in protected areas

2.2.7 Promote, through the CHM, technical publications and other means, the international sharing of experience on effective mechanisms for stakeholder involvement and governance types in conservation in particular with regard to co-managed protected areas, indigenous and local community conserved areas and private protected areas.
While the new protected area paradigm can be considered reconciliatory in spirit and wording, it is also clear that the CBD programme of work on protected areas does not equate an actual consensus on how to effectively reconcile indigenous peoples and protected area relationships.

The majority of protected areas have not been established with the rights of indigenous peoples in mind and the use of alternative governance measures, albeit growing hastily, remains limited. Finally, protected areas have only recently started to qualify and quantify costs and benefits in a more systematic manner, with few mechanisms in place to ensure equitable sharing of actual costs and benefits of protected area establishment. Analyzing a number of cases in Central Africa, for example, Cernea and Schmidt estimated the following income losses in cases of resettlement:

<table>
<thead>
<tr>
<th>Name</th>
<th>Total Area in km²</th>
<th>Population</th>
<th>Estimated annual income loss from h + g in Euro Per capita in cash</th>
<th>In cash</th>
<th>Total (4)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dja Biodiversity Reserve</td>
<td>5,260</td>
<td>~ 7,800</td>
<td>544,596</td>
<td>956,103</td>
<td></td>
</tr>
<tr>
<td>Korup National Park</td>
<td>1,259</td>
<td>1,465</td>
<td>76.02 (1)</td>
<td>111,369</td>
<td>195,522</td>
</tr>
<tr>
<td>Lake Lobke National Park</td>
<td>2,180</td>
<td>~ 4,000</td>
<td>279,280</td>
<td>490,309</td>
<td></td>
</tr>
<tr>
<td>Boumba Beck National Park</td>
<td>2,380</td>
<td>~ 4,000</td>
<td>279,280</td>
<td>490,309</td>
<td></td>
</tr>
<tr>
<td>Dzanga-Ndoki National Park</td>
<td>1,220</td>
<td>~ 350</td>
<td>24,437</td>
<td>42,902</td>
<td></td>
</tr>
<tr>
<td>Nsoc National Park</td>
<td>5,150</td>
<td>~ 10,000</td>
<td>698,200</td>
<td>1,225,772</td>
<td></td>
</tr>
<tr>
<td>Loango National Park</td>
<td>1,550</td>
<td>~ 2,800</td>
<td>195,496</td>
<td>343,216</td>
<td></td>
</tr>
<tr>
<td>Moukalaba-Doudou National P.</td>
<td>4,500</td>
<td>~ 8,000</td>
<td>558,560</td>
<td>980,618</td>
<td></td>
</tr>
<tr>
<td>Ipassa-Mingouli</td>
<td>100</td>
<td>~ 100</td>
<td>6,982</td>
<td>12,258</td>
<td></td>
</tr>
<tr>
<td>Cross-River NP Okwangwo</td>
<td>920</td>
<td>2,876</td>
<td>158.96 (2)</td>
<td>457,169</td>
<td>802,614</td>
</tr>
<tr>
<td>Nouabálé Ndoki National Park</td>
<td>3,865</td>
<td>~ 3,000</td>
<td>209,460</td>
<td>367,732</td>
<td></td>
</tr>
<tr>
<td>Odzala National Park</td>
<td>13,000</td>
<td>~ 9,800</td>
<td>684,236</td>
<td>1,201,257</td>
<td></td>
</tr>
<tr>
<td>Total /Average</td>
<td>41,384</td>
<td>~ 54,000</td>
<td>Extrapolation figure: 69.82 (3)</td>
<td>4,049,065</td>
<td>7,108,612</td>
</tr>
</tbody>
</table>

(Cernea & Schmidt-Soltau 2003)

Such realities on the ground are far too complex, difficult and diverse to be resolved swiftly by changing global policy agendas. A comprehensive reconciliation process is needed to address the legacy of existing protected areas as well as crafting practical solutions to new areas in the spirit of these new objectives. A major challenge evolves around reconciling ethical principles and effective conservation approaches. As Chapin notes:

“There are still some among us who strongly believe that conservation can-not be effective unless the residents of the area to be conserved are thoroughly involved. This is not solely a matter of social justice, which must in any case be a strong component of all conservation work. It is also a matter of pragmatism. Indigenous peoples live in most of the ecosystems that conservationists are so anxious to preserve. Often they are responsible for the relatively intact state of those ecosystems, and they are without doubt preferable to the most common alternatives - logging, oil drilling, cattle ranching, and large-scale industrial agriculture— that are destroying ever larger tracts of forest throughout the tropical latitudes. Forming partnerships and collaborative alliances between indigenous and traditional peoples and conservationists is no easy task, but it would seem to be one of the most effective ways to save the increasingly threadbare ecosystems that still exist. (Chapin 2004:29)”
There is political ambition, but do we have the corresponding technical muscle? Do current policy objectives and the technical solutions raised make sense in real terms?

**Reconciliation: working with difference**

Whereas previous discussions between indigenous peoples and protected area agencies have often remained separate or polarized, there has been a marked development towards speaking a common language. Protected area agencies have taken on board language on sustainable development, customary use, rights and tenure. Indigenous representatives increasingly speak the language of biodiversity and concrete collaborative experiences in all regions have mushroomed within the last decade. Mutual support from conservation and indigenous organizations to the CBD programme of work is also indicative of this trend. Having such a common language and set of objectives is an important achievement allowing for a renewed focus on solutions that actually work on the ground. The critical challenge is now to identify the most effective, efficient and equitable approaches to reconciliation.

What are the options being proposed? Durban recommendation 5.24 recommended “governments, inter-governmental organizations, local communities and civil societies to”, among other things:

a. respect the rights of indigenous peoples
b. cease involuntary resettlement
c. ensure protected areas are established based on the free, prior and informed consent of indigenous peoples
d. elaborate and apply the IUCN-WWF Principles and Guidelines
e. recognize the value of indigenous protected areas
f. enforce laws to protect intellectual property of indigenous peoples
g. enact laws that recognize land rights
h. implement mechanisms to address historical injustices (caused by protected areas)
i. establish participatory mechanisms for the restitution of indigenous lands taken over by protected areas without their consent and providing fair compensation
j. Establish a “Truth and Reconciliation Commission on Indigenous Peoples and Protected Areas”.
k. Ensure respect for indigenous peoples’ decision-making authority
l. Require protected area managers to support revitalization of indigenous knowledge and practices
m. Undertake review of all biodiversity conservation laws and policies that impact on indigenous peoples
n. Develop incentives to support self-declared protected and self-managed protected areas
o. Ensure open and transparent processes for genuine negotiation with indigenous peoples
p. Integrate indigenous knowledge and education systems
q. Ensure that protected areas are geared towards poverty alleviation

While shared language and resonance have been on the increase, it is also clear that these suggestions were not all directly integrated by the CBD PoW, although it has strong implications in this direction. It establishes the global policy imperative to rework the costs and benefits of protected area establishment and securing indigenous participation in the management of existing areas based on their rights. At the national level, the latter has, in several countries, involved restitution as part of broader reconciliatory processes to address

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4 This is not simply a question of indigenous representatives having a strong grasp of international terminology, but also reflects the real importance of biodiversity and ecosystem services for indigenous communities.

5 This was very clear from the substantial emphasis indigenous organizations put on Durban outputs and programme element 2 of the CBD Programme of Work on Protected Areas (see e.g. WCC 3, resolution 81).

IUCN Social Policy Discussion Paper
“historical injustices”, as the Durban recommendation emphasizes. This follows the general principle that rights-based approaches necessarily imply remedies where rights have been omitted or violated (MacKay 2002).

What matters, at the end of the day, are the tangible outcomes rather than further “common language”. Although it could be argued that the CBD PoW alone does not explicitly address restitution issues, it does suggest Parties to compensate costs where appropriate.

What is needed are reconciliatory efforts to address a number of “fields of difference” inherent in this common language. Critical differences in opinion, issues and value persist, and need to be tackled in a more head-on fashion. This would, for example, involve identifying constructive ways of going about addressing indigenous peoples concerns in existing protected areas established without the consent of indigenous communities. It would involve a closer look at how countries best secure effective conservation approaches in conjunction with restitution. This not only concerns previous neglect of indigenous rights in protected areas, but worries within the protected area community about the long-term commitment of indigenous communities towards conservation needs and responsibilities where restitution is undertaken.

Reconciliation is probably best understood as an on-going process rather than a one-time “correct” policy response to a wider range of issues. Given the global policy commitment, finding practical and tangible solutions to relatively well-established fields of difference would seem to be a critical step to move beyond panacea atmosphere created by global policy discussions.

The typology below is an attempt to describe four general types of relationships between protected area agencies and indigenous peoples. The two parameters proposed are; 1) the extent to which there is agreement on objectives and 2) the extent to which there is agreement on the management means. Most relationships fit into one of these categories. Reconciliation necessarily entails working out differences at both objective and management levels.

**Objectives and management means: a general typology**

<table>
<thead>
<tr>
<th>1. Agreement on objectives, disagreement on management means</th>
<th>2. Agreement on both objectives and management means</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ex: Consensus on protection needs, but different ideas about management responses</td>
<td>Ex: Consensus on conservation objectives and protected management system</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>3. Disagreement on objectives, disagreement on management means</th>
<th>4. Disagreement on objectives, but agreement on means</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ex: Different indigenous land use priorities and disagreement on protected category designation</td>
<td>Ex: Difficulties in recognizing indigenous rights, yet agreement on interim protection modalities (implying agreement on conservation objectives)</td>
</tr>
</tbody>
</table>

The utility of the typology from a reconciliation perspective, lies in identifying actual opportunities for action. In a situation, where there is no agreement on objectives, it will be most unlikely to proceed with discussions on appropriate management modalities. In the most
Reconciling indigenous peoples and protected areas: rights, governance and equitable cost and benefit sharing.

extreme case, this would e.g. involve indigenous communities rejecting a conservation initiative per se. However, in most cases a more likely scenario involves redefining protected area approaches along with the introduction of alternative conservation tools and incentive measures. This requires a new set of questions when setting the objectives and choosing the strategic approach for protected areas such as:

i. If a conservation approach has a high negative social impact, can objectives be modified to “do no harm”? For example, can productive or modified landscapes (IUCN Categories V and VI) replace a strictly protected area (Category I or II) in reaching the most critical conservation objectives?

ii. If not, what strategic direction can be taken to strengthen synergies between social development and conservation? For example, if it recognized that a strict protected area is necessary and will have substantial socio-economic impact on a given indigenous community, what are the relevant strategic management approaches to be taken?

In cases where there is agreement on broader visions, management planning is likely to proceed. The following compares the ecological principles of Parks Canada with the Inuit vision (from Anilniliak and Seale 2003).

<table>
<thead>
<tr>
<th>Inuit Qaujimajatuqangit</th>
<th>Parks Canada</th>
</tr>
</thead>
<tbody>
<tr>
<td>Avatimik Kamattiamiq</td>
<td>Ecological Integrity</td>
</tr>
<tr>
<td>- Inuit are part of the environment</td>
<td></td>
</tr>
<tr>
<td>- What we put into environment comes back to us</td>
<td></td>
</tr>
<tr>
<td>Pijitsirmiq</td>
<td>Leadership &amp; Stewardship</td>
</tr>
<tr>
<td>- To serve is the foundation of being a leader</td>
<td></td>
</tr>
<tr>
<td>- Use wisdom and knowledge to better serve your community</td>
<td></td>
</tr>
<tr>
<td>Aajiqatigiigniq</td>
<td>Collaboration and Cooperation in Decision Making</td>
</tr>
<tr>
<td>- Consensus decision making</td>
<td></td>
</tr>
<tr>
<td>- Meaningful dialogue is essential to arriving at creative solutions</td>
<td></td>
</tr>
<tr>
<td>Piliriqatigiingniq</td>
<td>Relationship &amp; Responsibility</td>
</tr>
<tr>
<td>All members can contribute to the community</td>
<td></td>
</tr>
<tr>
<td>Pilimmaksarniq</td>
<td>Knowledge</td>
</tr>
<tr>
<td>Knowledge is gained through observation and experience</td>
<td></td>
</tr>
<tr>
<td>Management decisions are based on the best possible knowledge</td>
<td></td>
</tr>
</tbody>
</table>

Much has been written about the diverging histories of the park movement with very different roots and concerns compared to indigenous cosmologies (see e.g. Colchester 2003). The Canadian exercise above revealed the presence of commonalities in terms of both goals and process, which facilitated Parks Canada and Inuit collaboration. Still, there is a common tendency to strongly emphasize the role of management reform, easily implying, for example, that a change in governance regime (e.g. from government to community control) would somehow solve basic disagreements on objectives or somehow address of conservation problems of a different scale and nature.

However, even in cases where they may be disagreement on, or lack of, possibility to resolve certain objectives (e.g. recognition of land rights or restitution), identifying common objectives does allow for the possibility to pursue action at the management level. Indigenous peoples, in many cases, share many conservation objectives with protected area agencies. For example, in the Gwaii Haanas National Park Reserve, covering 1,495 km2, Haida and Parks
Canada have in their accord agreed to disagree on land-ownership matters, yet continue to collaborate on common conservation objectives (Gladu et al 2003).

As relationships are not static, most cases will involve evolving scenarios e.g. involving growing consensus on management means or perhaps emerging disagreement on land use objectives (e.g. when land becomes valuable for resource exploitation or tourism reasons). This is, indeed, not different from other protected areas often cast into question by new development agendas, extractive industries etc. Such pressures are likely to increase in many developing countries, against which reconciliatory agendas between indigenous communities and conservation actors become even more important for securing progress on their respective agendas.

Rights – will it be the end of protected areas within indigenous lands and waters?

“We want to stress our insistence for the recognition and respect of the rights of indigenous peoples in existing and proposed protected areas and to prioritize the recognition of indigenous-owned and community-owned territories and areas as a sound basis for conservation. We also reiterate indigenous peoples’ vital role in the achievement of sustainable development and to recognise that indigenous peoples have their own concepts of protected areas and conservation that are based upon their customary laws, traditional knowledge and profound connection with their lands, territories and resources.” (Closing plenary indigenous statement in Durban)

While one may get the impression from recent policy stances as well as conservation organization responses to criticisms regarding the involvement of indigenous peoples that indigenous rights are now a matter of evidence, this has not always been the case. In practice, problems persist.

Addressing the broader rights of indigenous and local communities in protected area management is a relatively new phenomenon.

First of all, it is only recently that such rights have started to get recognized at a global policy scale. Many protected areas have been established on the basis of the *terra nullius* doctrine. Few people today argue against the role of communities in protected area management, and even less would defend protected areas as a realm where human rights are less important than elsewhere. Secondly, conservation bodies and community organizations are involved in a learning process to respond to the evolving body of international and national law, jurisprudence and regulations on indigenous and local community rights to implement them in practice. Has the protected area community given in to pressures and opened up a Pandora’s box leading to the decline of effective protection on indigenous lands and waters? Or is there a wider realization that recognizing rights, whether through *de jure* or *de facto* means, offer real opportunities to consolidate conservation gains?

Addressing indigenous rights in protected areas remains a contested issue. What from the perspective of many indigenous organizations is viewed as an essential asset for engaging equitably in conservation, is by some conservation actors viewed as bearing substantial risks of weakening the potential to ensure effective protected areas. IUCN’s resolutions and other policies, as well as the Durban outputs, have emphasized the importance of indigenous rights.

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6 The Durban Action Plan lists recognition and guarantee of indigenous rights in relation to natural resource management and biodiversity as one out of 10 major outcomes, accompanied by three specific targets.
in protected areas. The CBD PoW also puts forward an ambitious participation agenda based on the recognition of rights.

Rights of indigenous and local communities in the CBD PoW

The CBD PoW sets as a target the:

*Full and effective participation* by 2008, of indigenous and local communities, in *full respect of their rights and recognition of their responsibilities, consistent with national law and applicable international obligations,* and the participation of relevant stakeholders, in the management of existing, and the establishment and management of new, protected areas.

It is furthermore suggested to:

2.2.2 Implement specific plans and initiatives to effectively involve indigenous and local communities, *with respect for their rights consistent with national legislation and applicable international obligations,* and stakeholders at all levels of protected areas planning, establishment, governance and management, with particular emphasis on identifying and removing barriers preventing adequate participation.

**What rights are we talking about?**

In practice, what is meant by “full and effective participation” in “full respect of their rights and recognition of their responsibilities...”? The CBD PoW mentions that such efforts should be in line with both “national legislation” and “applicable international obligations.” It is clear that the relevant body of jurisprudence would relate particularly to procedural rights given the emphasis on participation, but would also, in the spirit of national and international law and jurisprudence, along with the CBD emphasis on equitable cost and benefit-sharing, link closely to substantive rights including e.g. the right to food, right to development along with customary rights to land and water.

Taking a human rights approach involves addressing the current, cumulative and future impacts of protected areas on a broad set of rights. Essentially, rights do not establish ethical values, but obligations on states for minimal standards for dealing with vulnerable persons and groups. What does this mean in practice? We know that protected area establishment can help communities to protect their watersheds, just as it may exclude certain segments from their livelihood or even result in their resettlement.

In both cases, there will also be impact on widely-recognized social indicators such as school performance and health. Indigenous and local communities have particularly highlighted land and resource rights as integral to their customary rights. In the protected area context, this, in particular, concerns rights to collective lands and resources. Lack of tenure security or lack of collective titling of indigenous and community lands and waters, is seen as a fundamental obstacle to participate effectively in protected area management. Many claims of indigenous and local communities remain unresolved often making it difficult for conservation bodies to move forward in establishing long-term agreements at the community level. Given the inherent politics of such questions, it has also led to considerable hesitance by conservation actors to engage proactively on the issue.

Furthermore, the importance of taking into account indigenous rights, interests and aspirations and their full involvement and participation runs through other major outcomes and suggested activities of the Action Plan.
The CBD PoW holds the potential of substantiating the use of indigenous “participation” from a rights-based perspective thus responding to criticisms that governments and conservation organizations have tended to incorporate participation in a business-as-usual approach rather than substantially changing practice.

**National legislation and practice**

National legislation relates to indigenous peoples’ rights in very different ways, ranging from established treaties in some countries, to *de facto* lack of recognition in others. Whereas e.g. New Zealand’s Treaty of Waitangi, federal approaches to Indian nations in the United States or treaties in Canada provide a framework for relating to indigenous peoples as distinct political communities, many other national or regional governments lack such founding or constitutional documents and relate to indigenous peoples differently e.g. through more or less comprehensive indigenous policies and specialized administrative agencies.

Such policies in many cases deal less with wider political and decision-making concerns and focus more on wider social (e.g. health) and economic concerns, particularly if no “founding” documents establish clear cut procedural or substantive rights to address indigenous customary rights as a whole.

In yet other cases, governments may employ other categories comparable, but distinct, to that of “indigenous” with considerable overlap in terms of the decision-making and natural resource management issues at stake. Finally, countries may also harbour different rights regimes, as in Canada, where Aboriginal rights are considered context specific and not necessarily be the same for all indigenous peoples (Gov. of Canada 2003:13).

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**Land claim processes in Canada: learning from experience**

There are three types of indigenous land claims processes in Canada.

*Comprehensive land claims* address indigenous rights and title, which have not previously been dealt with by treaty or other legal means

*Specific claims* arising from the non-fulfilment of existing treaties

*Other claims*

Globally, the vast majority would fit into the first type as their rights have rarely been dealt with extensively by other legal means. The objective of this claim type is to conclude agreements with indigenous peoples, which clarifies and establishes certainty around rights to ownership and use of lands and resources. They typically encompass a wide range of rights, responsibilities and benefits. More than 16 such agreements have been signed covering 40% of the national territory. Over 70 mandates have been provided for claim negotiations (INAC 2003).

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7 According to Martinez, “that hundreds of treaties entered into effect between nation-states and indigenous nations is a matter of record (2004:9), although he also notes that such treaties along with other agreements have often been ignored (ibid).

*IUCN Social Policy Discussion Paper*
In any case, it is clear that indigenous communities with recognized self-governance arrangements, from a domestic policy point of view, will have a stronger starting point for their effective position in protected area establishment.

What is clear is that national legislation is often lacking in terms of either specificity or comprehensiveness when it comes to identifying and defining indigenous rights. In particular, it is difficult to assume the relevance of national protected area legislation from the constitutional recognition of indigenous peoples or established treaties without a careful examination of the extent to which indigenous and local community rights and responsibilities have actually been formalized and institutionalised in particular regions or cases. This is indirectly recognized in the CBD PoW, which includes both national law and “applicable international obligations”. Reconciliation processes with indigenous peoples in several countries have exactly entailed further exploring, defining and securing indigenous rights through the comparative use of customary law, national law and taking into account international jurisprudence. It thus makes good legal sense to take a similar approach and specifically add to this the body of policy-making and good practice established in several countries and by several conservation organizations, particularly within the last decade.

It is therefore useful to briefly explore certain aspects of the approaches taken by countries that have recognized or addressed indigenous rights (e.g. countries that have ratified ILO Convention 169, and countries such as Canada and Australia with extensive reconciliation and collaborative management experiences from a rights-based perspective). What are some of the emerging lessons?

For one, efforts to reconcile indigenous rights and protected areas have, in many cases, led to constructive agreement building around policy reform, protected area design and management securing benefits for both indigenous communities and conservation agendas. This has typically included a combination of formal apologies, representation in management (including consent procedures to veto management changes, compensation measures). The origins (and thus the nature) of such agreements differ considerably including situations where:

- National reconciliatory processes have clarified (some) indigenous rights in protected areas (e.g. South Africa, Australia, New Zealand, Canada)
- Implementation of existing treaty arrangements have reconfigured protected area practice on indigenous territories (Canada, United States, New Zealand)
- Constitutional and policy reform have followed ratification of international instruments and regional jurisprudence (notably ILO Convention 169 in many Latin American Countries and judgements by the Inter-American Court of Human Rights).
- International focus and technical support have facilitated the reform of protected area policy and practice to better reflect customary rights
- Settlements resulting from court-decisions and prolonged negotiations between indigenous peoples and protected area agencies have triggered the need for accommodation and consensus-building (e.g. South Africa, Canada)

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9 The inscription of the Uluru-Kata Tjuta park in Australia as a cultural landscape on the World Heritage List was considered instrumental in creating a new management plan “looking after the country in accordance with Tjukurpa” as a prime responsibility shared by Parks Australia and the Ananagu (Rossler 2003:203).
Secondly, with regards to settlements, protected area agencies and conservation actors have typically played a critical role in securing constructive outcomes. The conclusion from many national experiences is, indeed, that effective agreements require the employment of appropriate consent procedures and realistic implementation plans (see e.g. Government of Canada 2003).

Third, countries with substantial reconciliation experiences and concrete progress on working within an indigenous-rights framework typically harbour a variety of indigenous-protected area relationships, where particular claims, conflicts and disagreement persist (for Canada see e.g. Gladu et al 2003). The reasons for this are many. As mentioned above, the recognition of indigenous rights often differs from one region to another. This partly relates to the existence or absence of historical recognition of indigenous peoples and treaty arrangements, legal traditions (e.g. differences between countries with statutory and common law, see Oviedo 2003) as well as the political make-up of particular countries. In both Canada and Australia, many land, resource and conservation related issues are under state or provincial jurisdiction. Thus, while progress may be made at the federal level with immediate impact on policy and practice for lands and waters under federal jurisdiction, recognition at subsidiary levels may differ significantly. A considerable number of protected areas in both countries are subject to land claims by indigenous peoples (MacKay 2002:33).

Fourth, existing experiences with rights, restitution and protected area reconfiguration on indigenous territories, although heralded as progressive, continue to remain questioned by indigenous communities and rights organizations. This generally relates to the employment of conditionality when protected areas are restituted and indigenous ownership is recognized. Examples include:

• “Lease-back” arrangements, requiring indigenous communities to lease-back territories to federal and provincial governments for “joint” management (e.g. Australia) as a condition for the transfer of indigenous ownership
• Development restrictions on indigenous land and resource use (e.g. prohibiting the expansion of settlements, only allowing subsistence use, limiting ecological high-impact exploitation tools or more broadly limiting use to ecologically sustainable levels).

Developing appropriate legal frameworks to address indigenous rights and protected area establishment remains a considerable hurdle in many countries (Roldan 2004). Even in countries with constitutional recognition of indigenous rights, developing operational policies remain a challenge. According to Roldan these include:

• passing laws defining how land rights are granted
• poorly conceived procedures for gaining legal recognition of indigenous lands
• weak conflict resolution mechanisms where conflicting land claims exist
• time consuming and complex procedures
• imprecise legislation
• inadequate consultation practices
• lack of legal definition of ownership rights and administration of natural resources in indigenous territories

In particular, it is difficult to assume the relevance of national protected area legislation from the constitutional recognition of indigenous peoples or established treaties without a careful
examination of the extent to which indigenous and local community rights and responsibilities have actually been formalized and institutionalised in particular regions or cases. This has recently been highlighted in the World Bank review of policies in Latin America, cited above, noting that:

“Lack of adequate legal definition of the management of indigenous territories that overlap with national parks or other protected areas. In many countries, the areas that harbour the most important biodiversity are the ancestral lands of indigenous peoples. Since the region’s legal system cannot recognize two titles to the same land, there is often a conflict between areas that have been declared some type of protected area by the national government, but which are claimed as ancestral territory by indigenous people. While a clear solution would be to recognize indigenous land with restrictions that would preserve its biodiversity values, states have been reluctant to do so, perhaps because, as mentioned above, they fear losing control of the invaluable natural resources of those areas. Nevertheless, recently Colombia and Bolivia have made some progress towards resolving these contradictions, which gives hope that they are not insoluble (Roldan 2004).”

Existing national experiences reveal the lengthiness and complexity of reconciling indigenous rights and protected areas management. With all their limitations, they underline the importance of constructive dialogues. Important elements in such dialogues have involved the bringing together both indigenous representatives and protected area practitioners, but also making wider use of comparable experiences including both emerging good practice (community or co-managed protected areas) and international standards and principles.

As the CBD PoW includes both national legislation and applicable international obligations, is it not likely that many policy makers will limit efforts to participation as it is currently prescribed within existing national legislation existing obligations without taking on board the emerging international standards discussed below. As Roldan notes in the review of national experiences in South America:

“While a few states, such as Ecuador, Colombia, and Peru, have tried to define participation in a meaningful way, most states have not engaged in meaningful consultation with indigenous communities over issues that are in their vital interest. Often consultation is in reality simply the act of informing indigenous representatives of programs that are already approved and about to begin, without giving them time to study the proposals, inform their own communities, or properly comment on them (Roldan 2004).”

In order to fulfil the goals and targets of the CBD PoW, there is often a need to look beyond existing national practice to develop adequate solutions. Furthermore, from a legal perspective, it has been argued that that limiting focus to existing national legislation runs counter the principle that “even lawful State authority must be exercised in a manner that protects and respects human rights” (Daes 2004: 16). Given that indigenous rights have evolved considerably, therefore much to learn from international experiences of developing relevant policy and practice with regards to the right to participation.

**International law and jurisprudence**

What constitutes “applicable international obligations” in the CBD PoW in relation to the rights of indigenous and local communities in protected areas? From the point of view of
Reconciling indigenous peoples and protected areas: rights, governance and equitable cost and benefit sharing.

international law and jurisprudence, this relates to both human rights instruments of general application as well as instruments dealing specifically with indigenous peoples. Awaiting further legal clarification and expertise, different entry-points may be taken to explore this:

1. International and regional human rights instruments of general application and jurisprudence by the respective treaty bodies, which increasingly have addressed indigenous peoples rights and environment inter-linkages. At the global level, these include the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Rights of the Child. Regional instruments and jurisprudence, such as rulings by the Inter-American Court of Human Rights are also of critical relevance.

2. International law and jurisprudence specifically regarding indigenous peoples, including regional human rights processes. International law related to indigenous peoples has evolved considerably involving both global and regional processes. From the global perspective, IUCN particularly makes use of ILO Convention 169 on the rights of indigenous and tribal peoples, which in article 15, paragraph 1, specifically notes:

“The rights of the peoples concerned to the natural resources pertaining to their lands shall be specifically safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources”

<table>
<thead>
<tr>
<th>Indigenous and tribal peoples, ILO Convention 169 coverage</th>
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</thead>
<tbody>
<tr>
<td>1. This Convention applies to:</td>
</tr>
<tr>
<td>(a) (a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;</td>
</tr>
<tr>
<td>(b) Peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present State boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.</td>
</tr>
<tr>
<td>2. Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.</td>
</tr>
<tr>
<td>3. The use of the term &quot;peoples&quot; in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law (<a href="http://www.ilo.org">www.ilo.org</a>).</td>
</tr>
</tbody>
</table>

ILO Convention 169 is particularly relevant to the CBD PoW not least given the strong emphasis on participation, one of two major areas of emphasis in the CBD PoW as well as specific wording on environmental concerns.

The body of international law is evolving and other global policy processes including notably the Draft Declaration on the Rights of Indigenous Peoples, regional instruments and processes such as the OAS proposed Declaration on the Rights of the Indigenous Peoples of the Americas and the work undertaken by the African Commission on Human and Peoples' Rights are important references in this respect.

IUCN Social Policy Discussion Paper
(For a more thorough discussion see e.g. Colchester 2003, Mackay 2003, Thornberry 2002, [www.ohchr.org](http://www.ohchr.org)).

4. The convergence of environmental and human rights in national and international law. Particularly since UNCED (1992), and the consolidation of the sustainable development approach, international and national standards inter-linking human rights and environmental protection have increasingly emerged. This includes regional instruments like the 1998 Aarhus Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters (in line with Rio Principle 10). At the national level, the right to a healthy environment has since 1992 been recognized in an increasing number of constitutions. Such standards, and others, relating to procedural rights, are of critical importance in terms of consolidating equitable processes for reconciling indigenous peoples and protected area relationships. There is a growing recognition of indigenous rights in international environmental law, which also builds on historical advances such as the 1968 African Convention of Nature and Natural Resources indicating that all Contracting parties shall take legislative measures to reconcile customary rights with the provisions of the Convention.

5. For IUCN policy and practice, entry-points are provided by the existing body of IUCN policy on indigenous peoples and protected areas making use of international law. IUCN has recognized the importance of human rights instruments and processes in a number of resolutions and other policy initiatives, particularly in relation to indigenous peoples. Without binding legal effect for IUCN members, this provides, however, a body of policy particularly relevant for the CBD discussions, the reform of protected area policies and the wider conservation community. Resolution 19.22, GA 1994 on “indigenous peoples and the sustainable use of natural resources” generally acknowledges the importance of the two covenants on political and civil rights and economic, social and social rights “according to which no people under any circumstances may be deprived of its means of subsistence”. WCC 1996 resolutions on indigenous peoples call on members to adopt the principles of ILO Convention 169 and comply with the spirit of the UN Draft Declaration on the Rights of Indigenous Peoples. The 1999 “Principles and Guidelines on Indigenous and Traditional Peoples and Protected Areas” propose concrete steps for a rights-based approach to crafting protected area agreements with indigenous and traditional peoples. Resolution WCC 3.055 from IUCN’s Third World Conservation Congress “Indigenous peoples, protected areas and the CBD Programme of Work” reiterates the links between IUCN Policy, the Durban Outputs and the CBD as an international instrument on matters concerning the rights of indigenous peoples in protected areas.

Relevant and applicable international law and jurisprudence is considerable, and it is noteworthy that many reconciliatory processes with indigenous peoples have relied extensively on adapting this emerging body of legal practice to determine appropriate national solutions. Furthermore, different indigenous peoples may emphasize such international policies differently. What may be considered a great advance for African or Asian indigenous peoples (e.g. applying the principles of ILO Convention 169), may be deemed insufficient by
indigenous peoples with existing treaties. An inclusive approach in terms of identifying relevant international standards and jurisprudence is therefore critical.

Such complexities being mentioned, it is worthwhile not just to focus on the particular end-products in terms of how policies address rights, but examine the reconciliatory processes countries have engaged to achieve such rights in practice. How has Australia e.g. moved from the stalemate of *terra nullius* towards co-management at federal and state levels? How have indigenous peoples in Canada reconciled unresolved self-government issues, while strengthening collaboration on parks management on the ground? Much progress has relied on finding effective ways of dealing with a number of indigenous priority issues.

**Some key aspects of indigenous rights**

A number of rights issues have been particularly emphasized by indigenous peoples. These include collective rights, in particular the right to self-determination, land and prior informed consent. What are major characterizing issues in this respect and their implications and how have they been addressed constructively in a protected area context?

**Collective rights**

Collective rights are fundamental to indigenous peoples, as recognized by ILO Convention 169 and evolving international jurisprudence such as the judgement made by the Inter-American Court of Human Rights in the Awas Tingni case of 2001. The latter judgement, among other things, specified the communal forms of collective property of land held by indigenous peoples along with associated collective rights. A UN expert seminar also recently judged them critical for effective conflict-resolution procedures (Martinez 2003). The core issue involves collective rights to customary territories, lands and resources increasingly considered as a “developed legal principle” (Daes 2004), also having been framed in terms of the “permanent sovereignty… a collective right by virtue of which States are obligated to respect, protect and promote the governmental and property interests of indigenous peoples (as collectivities) in their natural resources”:

“As a general matter, in the absence of any prior, fair and lawful disposition of the resources, indigenous peoples are the owners of the natural resources on or under their lands and territories. In the case of shared lands and territories, a particularized inquiry is necessary to determine the extent and character of the indigenous ownership interests” (Daes 2004)

In the context of protected areas and the CBD focus on rights-based participation, collective aspects would include:
• The collective cultures and identities of indigenous peoples (protected areas need to recognize these collective identities, practices and values rather than work only with individuals)
• Collective aspects of relationships to lands, waters and territories in terms of ownership, use, control and management (Protected areas e.g. need to recognize customary collective tenure and property practices not only individual tenure and ownership practices)
• Political rights (Protected areas e.g. need to recognize and work with representative indigenous institutions and organizations in the planning and design of protected areas)
• Collective rights on biodiversity-related knowledge and intellectual and cultural heritage linked to the protected area

**Collective rights as a conservation opportunity**

“From the conservation perspective, collective rights can have great impact. First of all, when applied to land, they are the basis for maintaining the integrity of the territory and avoiding ecological fragmentation, which is in turn a key requirement for meaningful biodiversity conservation. Secondly, collective rights provide a strong basis for the building and functioning of community institutions, which are indispensable for sound, long-term land and resource management. Thirdly, they strengthen the role of customary law as related to land management, and of traditional knowledge applied to broader territorial and landscape units (Oviedo 2003).”

With regards to land rights, ILO Convention 169 harbours an important set of standards of particular relevance towards improving protected area practice:

<table>
<thead>
<tr>
<th>ILO Convention 169 on land rights</th>
<th>Implications for protected areas</th>
</tr>
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<tbody>
<tr>
<td><strong>Article 13</strong></td>
<td></td>
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<tr>
<td>1. In applying the provisions of</td>
<td>Respecting special importance for</td>
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<td>this Part of the Convention</td>
<td>indigenous cultures and spiritual</td>
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<tr>
<td>governments shall respect the</td>
<td>values, in particular the</td>
</tr>
<tr>
<td>special importance for the</td>
<td>collective aspects when</td>
</tr>
<tr>
<td>cultures and spiritual values of</td>
<td>designing or reworking existing</td>
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<tr>
<td>the peoples concerned of</td>
<td>protected areas to reflect</td>
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<tr>
<td>their relationship with the</td>
<td>indigenous rights.</td>
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<tr>
<td>lands or territories, or both as</td>
<td></td>
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<td>applicable, which they occupy or</td>
<td></td>
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<tr>
<td>otherwise use, and in particular</td>
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<tr>
<td>the collective aspects of this</td>
<td></td>
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<tr>
<td>relationship.</td>
<td></td>
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<tr>
<td>2. The use of the term <strong>lands</strong></td>
<td>Recognizing indigenous ownership</td>
</tr>
<tr>
<td>in Articles 15 and 16 shall</td>
<td>and possession in protected area</td>
</tr>
<tr>
<td>include the concept of territories,</td>
<td>design as well as customary use</td>
</tr>
<tr>
<td>which covers the total</td>
<td>in areas shared with other</td>
</tr>
<tr>
<td>environment of the areas which</td>
<td>socio-economic actors.</td>
</tr>
<tr>
<td>the peoples concerned occupy or</td>
<td></td>
</tr>
<tr>
<td>otherwise use.</td>
<td></td>
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</table>

| Article 14                        |                                  |
| 1. The rights of ownership and    | Recognizing indigenous ownership  |
| possession of the peoples         | and possession in protected area  |
| concerned over the lands which     | design as well as customary use  |
| they traditionally occupy shall be | in areas shared with other        |
| recognised. In addition, measures  | socio-economic actors.           |
| shall be taken in appropriate cases|                                  |
| to safeguard the right of the     | Integrating the identification of |
| peoples concerned to use lands not | indigenous lands and territories  |
| exclusively occupied by them, but  | in conservation mapping and       |
| to which they have traditionally   | planning along with de jure and   |
| had access for their subsistence  | de facto procedures for            |
| and traditional activities.       | conservation efforts to          |
| Particular attention shall be     | effectively protect customary     |
| paid to the situation of           | rights.                          |
| nomadic peoples and shifting      | Adapt protected area policy and   |
| cultivators in this respect.      | practice to facilitate, or as a   |
| 2. Governments shall take steps   | minimum not impede the resolution |
| as necessary to identify the lands | of indigenous land claims         |
| 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                      |                                  |

*IUCN Social Policy Discussion Paper*
Reconciling indigenous peoples and protected areas: rights, governance and equitable cost and benefit sharing.

2.1.2. Recognize and promote a broad set of protected area governance regimes related to their potential for achieving biodiversity conservation goals in accordance with the Convention, which may include areas conserved by indigenous and local communities and private nature reserves. The promotion of these areas should be by legal and/or policy, financial and community mechanisms.

<table>
<thead>
<tr>
<th>Article 15</th>
<th>CBD PoW Goal 2.2 - To enhance and secure involvement of indigenous and local communities and relevant stakeholders</th>
</tr>
</thead>
<tbody>
<tr>
<td>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.</td>
<td></td>
</tr>
<tr>
<td>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 programmes 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.</td>
<td></td>
</tr>
<tr>
<td><strong>Target:</strong> Full and effective participation by 2008, of indigenous and local communities, in full respect of their rights and recognition of their responsibilities, consistent with national law and applicable international obligations, and the participation of relevant stakeholders, in the management of existing, and the establishment and management of new, protected areas</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Article 16</th>
<th>CBD PoW article 2.2.5 “Ensure that any resettlement of indigenous communities as a consequence of the establishment or management of protected areas will only take place with their prior informed consent that may be given according to national legislation and applicable international obligations.”</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Subject to the following paragraphs of this Article, the peoples concerned shall not be removed from the lands which they occupy.</td>
<td></td>
</tr>
<tr>
<td>2. Where the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent. Where their consent cannot be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned.</td>
<td></td>
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<tr>
<td>3. Whenever possible, these peoples shall have the right to return to their traditional lands, as soon as the grounds for relocation cease to exist.</td>
<td></td>
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<tr>
<td>4. When such return is not possible, as determined by agreement or, in the absence of such agreement, through appropriate procedures, these peoples shall be provided in all possible cases with lands of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. Where the peoples concerned express a preference for compensation in money or in kind, they shall be so compensated under appropriate guarantees.</td>
<td></td>
</tr>
<tr>
<td>5. Persons thus relocated shall be fully compensated for any resulting loss or injury.</td>
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<td><strong>“Goal 2.1 - To promote equity and benefit-sharing</strong></td>
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<td><strong>Target:</strong> Establish by 2008 mechanisms for the equitable sharing of both costs and benefits arising from the establishment and management of protected areas.”</td>
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<th>Article 17</th>
<th>Adapting protected area policy and practice to land rights issues</th>
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<tbody>
<tr>
<td>1. Procedures established by the peoples concerned for the transmission of land rights among members of these peoples shall be respected.</td>
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<td>2. The peoples concerned shall be consulted whenever consideration is being given to their capacity to alienate their lands or otherwise transmit their rights outside their own community.</td>
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<tr>
<td>See also CBD “2.2.2 Implement specific plans and initiatives to effectively involve indigenous and local communities, with respect for their rights consistent with national legislation and applicable</td>
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IUCN Social Policy Discussion Paper
3. Persons not belonging to these peoples shall be prevented from taking advantage of their customs or of lack of understanding of the laws on the part of their members to secure the ownership, possession or use of land belonging to them.

International obligations, and stakeholders at all levels of protected areas planning, establishment, governance and management, with particular emphasis on identifying and removing barriers preventing adequate participation.

**Article 18**

Adequate penalties shall be established by law for unauthorised intrusion upon, or use of, the lands of the peoples concerned, and governments shall take measures to prevent such offences.

CBD PoW activities including e.g.:

2.2.4 Promote an enabling environment (legislation, policies, capacities, and resources) for the involvement of indigenous and local communities and relevant stakeholders [73] in decision making, and the development of their capacities and opportunities to establish and manage protected areas, including community-conserved and private protected areas.

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**Self-determination, land rights and protected areas**

Collective rights to self-determination are central to indigenous concerns. Yet, for many the concept relates to politics rather than conservation. How then does it relate to protected areas management?

“1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development

2. All peoples, may for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon the principles of mutual benefit, and international law. In no case, may a people be deprived of its own means of subsistence. (Common article 1, International covenants)”

Much emphasis by indigenous peoples organizations have been put on the right to self-determination notably in the context of their political status, lands, territories and natural resources. For many conservation actors, this relates to political discussions beyond their mandates (see e.g. critique by Chapin 2004). There is weariness from conservation organizations to get involved in civil unrest, conflicts for political agendas, which may not directly concern their conservation priorities. Yet, the politics of self-determination should not overshadow the practical relevance and application of the self-determination concept in designing and reworking protected area policies. Currently many policies do not allow for

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10 For one, self-determination, as has been pointed out by many indigenous peoples and human rights organizations, does “most often NOT imply secession from the State” (http://www.iwgia.org/sw228.asp, Henriksen 2001).

“While understood to no longer include a right to secession or independence (except for a few situations or under certain exceptional conditions), nowadays the right to self-determination includes a range of alternatives including the right to participate in the governance of the State as well as the right to various forms of autonomy and self-governance” (Daes 2004:7).

“In claiming their 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” (Colchester and Mackay 2004)
dual land titling as both protected area and indigenous territory (see e.g. Roldan 2004), which represents a concrete policy hurdle to address.

From an IUCN stand point, resolution 1.49, WCC 1996 called for compliance with the spirit of the UN draft declaration on the rights of indigenous peoples as well as the adoption and implementation of the ILO Convention 169. In line with the UN draft declaration, the right to self-determination provides for indigenous peoples to “freely determine their political status and freely pursue their economic, social and cultural development.”

Given the CBD emphasis on procedural rights, self-determination (indeed a procedural right) has a clear role when determining the meaning of “full and effective participation in the management of existing, and the establishment and management of new, protected areas.”

Marcus Colchester has noted that a “practical expression of indigenous peoples’ right to self-determination is their right to free, prior and informed consent before the implementation of activities which affect their lands (2003: 13).” John Henriksen has noted that “The right of self-determination should be regarded as a “process right” rather then a right to a pre-defined outcome. In other words, the outcome of any exercise of the right of self-determination must be individually defined, through a process of dialogue in which all peoples and nations concerned are participating on equal terms” (2001:15).

The point is, furthermore, that many governments have long-standing jurisprudence and governance practice putting self-determination into practice. According to Daes, for example, the “term sovereignty is entirely accepted in the United States law today in regard to Indian and Alaskan Native governments” (2004:9).

This has, for example, entailed reworking relationships with existing decision-making processes and administrative bodies including protected area agencies. The right of self-determination does not a priori involve reinventing the whole protected area system before collaboration with indigenous peoples can start, but it does involve changing the process of working with indigenous peoples within this system. This brings us back to the CBD consensus of securing full and effective participation of indigenous peoples. Rather than seeking to solve a political problem belonging elsewhere, it would seem more productive to adopt the relevant principles in the protected area context until the former are solved.

Indeed, while protected area agencies cannot reconcile major political and economic concerns, they can be a vehicle for promoting and showcasing reconciliation of land rights and self-determination issues in practice.

**Options for recognizing land and resource rights**

The options for recognition of the land and resource rights of indigenous peoples vary, according to the legal frameworks and historical backgrounds of each country. Generally, there seem to be five predominant models:

**Common law developed countries**, especially former British colonies, where based on the precedent of the Mabo case on the value of customary law, and on the recognition of treaties signed by indigenous peoples with the Crown, land rights are
increasingly being recognized, within and outside protected areas. In some cases, measures like leasing of lands for ensuring the permanence of protected areas within national systems, and/or co-management agreements, immediately follow\textsuperscript{11}. Examples are Canada, Australia, and New Zealand.

Civil law developing countries, mainly those having colonial experience with Spain and France, where public ownership of all protected areas is the rule, and where, except in countries having ratified the ILO Convention 169, recognition of land rights for indigenous peoples within protected areas (and also outside in most cases) continues to be rejected by governments. This is mostly the case in Africa, and was until recently the case of Latin America.

Civil law countries having ratified the ILO Convention 169 (mainly Latin American countries), where legal and policy changes are taking place in the direction of recognizing land and resource rights within and outside protected areas. As indicated, Bolivia has already done so, and has at the moment two major protected areas (the Isiboro-Secure and the Kaa-Iya National Parks) which are at the same time legally recognized indigenous territories. Another interesting example is Colombia, where 18 out of the 46 areas of the National System are inhabited by 34 different indigenous peoples, and contain legally recognized territories called "resguardos"; 27 percent of the total area of the system has already this status (Colombia, 1998c)\textsuperscript{12}. In Ecuador, traditional indigenous lands of the Huaorani people within the Yasuni National Park were recognized in 1990 as their ancestral territory, and although legal ownership title was not granted because of provisions of the protected areas law, permanent and exclusive use rights were recognized (Ecuador, 1999). The protected areas legislation is currently being revised, and a new Environmental Law proposal under consideration by the Congress specifically guarantees recognition of land and resource rights for indigenous peoples within protected areas (Ecuador, 2000).

Common or civil law (or a mixture of both) developing countries, including some former British colonies, where the recognition of land and resource rights of indigenous peoples within (and even in some cases outside) protected areas is rejected by the state, and authoritarian regimes have adopted tough policies of relocation, access restriction, and vertical management of protected areas. Typical examples of this model are some Asian countries.

Common law (mainly) developing countries, especially in the Pacific, where traditional lands were never substantially affected by the establishment of protected areas, and where these continue to be owned and managed by local communities. These are the cases for example of the Solomon Islands and Papua New Guinea, where conservation areas build on recognized customary ownership. In specific protected areas examined it was found that land and resource rights are still a conflicting and delicate issue, despite legal and policy changes taking place in some of those countries. In protected areas of Australia, Bolivia, Nicaragua, and Papua New Guinea, land rights have been recognized for the entire protected area or close to it, but existing regulations and agreements are not entirely satisfactory for the concerned

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\textsuperscript{11} The agreements process is explored later, using the example of Canada.

\textsuperscript{12} Appendix 5 shows the overlap for 14 areas of the National Park category in Colombia, where indigenous territories represent half the total area protected. Most of these areas are in the Amazon region.
communities. In the rest of 16 areas analysed, particularly in Asia, there is no recognition of land rights within protected areas, and regulations on resource use are still being negotiated and are generally a subject of conflict and dissatisfaction. In any case, processes show in many cases a direction towards finding agreements that do recognize land and resource rights, but set at the same time clear regulations on use.

**Free Prior Informed Consent : a final death-blow to protected areas or the right to establish protected areas?**

When Durban recommendation 5.24 recommends the protected area establishment to be based on the free, prior informed consent of indigenous peoples and on comprehensive impact assessments, reality remains that the vast majority of protected areas, with a few exceptions, cannot be said to proceed or have proceeded in this manner. This is changing. On the one hand, increasing recognition of indigenous land rights logically entails parallel increase of consent measures. On the other hand, FPIC is increasingly recognized as the emerging international standard for indigenous participation in developments affecting their lands and waters. Operationalizing this right ideally entails a comprehensive set of activities:

- “Free” implies that consent to protected area establishment has not been imposed or manufactured, but obtained through free consultation and voluntary negotiations
- “Prior” implies that indigenous communities have been informed and consulted with sufficiently in advance of decision-making
- “Informed” implies full disclosure of information relevant for protected area establishment in a form accessible and understandable to indigenous communities
- “Consent” needs to build on full indigenous participation in all major phases through their own freely chosen representatives including the right to access relevant technical/legal services (for more details see e.g. Motoc & Tebtebba 2004)

Would a corresponding set of procedures, in practice, veto much protected area establishment? Would joint management arrangements in Australian protected areas have appeared if lease-back arrangements had not been a precondition? A recent study argues that much consent is “frequently engineered and indigenous institutions out-maneuvered by competing interests seeking access to indigenous peoples’ common resources (Colchester and Mackay 2004, see also MacKay 2002).”

It should not be forgotten that the (potential) benefits of protected areas for many indigenous communities are considerable – and many increasingly engage in establishing protected areas particularly in the wake of the new protected area paradigm. Yet, despite many commonalities between indigenous and conservation priorities, it would be unrealistic to assume that full implementation of free, prior and informed consent would only entail an increase in consultation practices and increase indigenous support for protected areas. Increasing cases of lack of indigenous consent is foreseeable in a number of cases, notably if projected conservation measures have negative livelihood impacts without much in return. It is very likely that many protected area pipeline initiatives will be cast in doubt be it for reasons of differing objectives or other management priorities.

What is a productive response to this?
The conservation community has recognized that basic ethical principles functioning elsewhere, should also apply to the protected area establishment on indigenous lands and water. The question is not about back-tracking on policy goals reinforcing consent procedures, although the CBD PoW only recommends (2.2.5) the use of prior informed consent in the context of resettlement. This is more or less in line with article 16 of ILO Convention 169.13

Furthermore, we know today that the likelihood of protected areas failing, in practice, may be much higher where communities work against conservation compared to non-designated areas under community stewardship. As recommendation 5.24 notes:

“Effective and sustainable conservation can be better achieved if the objectives of protected areas do not violate the rights of indigenous peoples living in and around them. It is widely acknowledged that successful implementation of conservation programmes can only be guaranteed on long term basis when there is consent for and approval by indigenous peoples among others, because their cultures, knowledge and territories contribute to the building of comprehensive protected areas. There is often commonality of objectives between protected areas and the need of indigenous peoples to protect their lands, territories and resources from external threats.”

If we are serious about this commitment – and the CBD PoW confirms this to some extent– we need to adopt these changes and their accompanying challenges in practice, and not assume buy-in to current status quo.

This, however, begs the question what to do if indigenous peoples, for various reasons, do not provide their consent to establish a protected area identified as paramount for particular conservation objectives. Would PIC in practice not open up a Pandora’s box substantially damaging any effort to establish comprehensive networks and effective protection? Would there not be a risk, given the large coverage of indigenous lands and waters that protected area networks, already substantially flawed by other “productivist” priorities, would come out even more patchy?

**Revisiting ownership and restrictions**

The protected areas doctrine recognizes three ways in which restrictions on land and resource use can be imposed: public ownership, the exercise of police powers of the state, and self-imposed restrictions (De Klemm, 1993:165).

Public ownership is no doubt the most powerful tool to impose restrictions, especially in conditions of weak legal and political structures for the other options to work, and is also the obvious one in countries where no legal titles exist over large tracts of land. Understandably, this is the option that was preferred a couple of decades ago by protected area promoters in developing countries, where relatively recent decolonization processes had established new states based on nationalization of lands (notably forest lands) and resources.

The exercise of police powers by the state consists of the imposition of regulatory measures on private lands (or lands owned by public agencies others than those in

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13 While certain differences exist in terms of wording and breadth, it should be kept in mind that the CBD only suggests action. It does prescribe national action per se.
charge of protected areas). Generally, this is a common practice in all countries of the world (Ibid., p. 173) for activities such as forest management, mining, and construction. Its use for the establishment and management of protected areas is more complex, since it implies stricter regulations over large areas, which requires agreement with landowners and usually also compensation.

Self-imposed restrictions are voluntary measures that landowners adopt in their own interest, for whatever reason. Landowners may be either public agencies owning lands, or private individuals, corporations, or communities.

In theory, the three of them remain options for the establishment of protected areas, but in practice, countries have adopted the first or the second one, or a combination of both, as the basis for their protected area systems. Voluntary designation of protected areas is still marginal, but steadily growing in many regions of the world including the growing role of private protected areas.

As indicated, developing countries rely, with very few exceptions, on public ownership of lands comprised in protected areas. Typically, the protected areas legislation in those countries does not provide for any private or communal property to exist within protected areas, in almost any category, and determines the obligation to expropriate lands whenever necessary for the purposes of declaring, expanding, or consolidating areas or systems (Perez, 1995). In contrast, as De Klemm points out, "many other countries, including most European nations and Japan, are showing a marked preference for the use of regulatory measures for the conservation of private land", and very often the legislation provides for a combination of public and private ownership. This is also true for most common-law countries.

In the legal context of developing countries and some common-law countries that were former colonies, like Australia, protected areas were established on traditional lands as a result of the fact that these were never legally titled, and therefore were de jure state lands, although de facto they were lands held by traditional communities. In these cases, the concept of terra nullius had been applied, that is to say, the concept that on arrival of the European conquistadores those lands were unoccupied, and that unless the Crown of whichever imperial nation had granted formal titles to native tribes, all remaining lands were still the Crown's or its heir government's.

The terra nullius doctrine deprived indigenous peoples from their traditional land and resource rights in practically all countries that were former colonies, either under civil law or common law systems; exceptions were only those cases where indigenous peoples had signed agreements with the imperial governments, or where they had received legal titles in colonial periods as indicated. In post-colonial governments, the terra nullius concept offered the ideal basis for the establishment of state-owned protected areas on traditional lands, based on a public-ownership model, and thus it became the cornerstone of the protected areas legislation.

The problem then resides not so much on the definition and objectives of protected areas, but on the derivations of a colonialist concept of terra nullius applied to

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14 The Martínez-Cobo Report observes that "Recognition of 'original occupation' as 'aboriginal title' was one of the major considerations in early accords, agreements and treaties concluded with indigenous peoples" (1987: para 214).

IUCN Social Policy Discussion Paper
traditional lands of indigenous peoples, coupled with the simplistic view that protected area interests are best served by a public ownership model. Deprivation of indigenous peoples from their lands and resources was not mainly the direct result of the establishment of protected areas, but rather the consequence of the terra nullius concept, by virtue of which the state attributed itself legal property of aboriginal lands, following which it exerted the right to freely decide on any use or status for such lands.

The right to development and protected area restrictions in indigenous territories

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<td>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 programmes for national and regional development which may affect them directly.</td>
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<td>2. The improvement of the conditions of life and work and levels of health and education of the peoples concerned, with their participation and co-operation, shall be a matter of priority in plans for the overall economic development of areas they inhabit. Special projects for development of the areas in question shall also be so designed as to promote such improvement.</td>
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<td>3. Governments shall ensure that, whenever appropriate, studies are carried out, in cooperation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned development activities. The results of these studies shall be considered as fundamental criteria for the implementation of these activities.</td>
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A key protected area tool involves putting certain limitations on use of a given resource and/or access to a given habitat. In IUCN Resolution 1.44 on public access this is formulated as “the needs of conservation, management, ownership, safety and security may well require some limits on public access to land”. Similar formulations run through several policy documents such as the 1994 Protected Area Category Guidelines. Local needs and use may be required to be restricted in some way or another to reach particular conservation objectives. In other words, while IUCN recognizes a range of rights, there is also a firm body of policy emphasizing the necessity, in some cases, to restrict, limit access and use for the sake of the greater public good. While this may be interpreted as infringements on local rights to development, it remains a fundamental conservation practice and a defining criterion of protected area establishment as such.

Restrictions or other forms of use and access limitation form part of conservation for the “common good”. What the CBD PoW brings to this approach is the need for equitable cost and benefit-sharing if such restrictions are considered necessary, and consented to, by indigenous communities. The question should therefore not only be whether restrictions are relevant or necessary. This is very often required for a given ecosystem or population of species to recover, also within indigenous territories.

The question is rather how restrictions are introduced and who bears the cost.

The key policy issue is how local needs, access and are addressed using a rights framework in the designation, planning and day-to-day management process. In this sense, there has been an overall policy movement from the imposition of conservation solutions towards rights-based participatory frameworks along with equitable cost/benefit sharing of conservation costs. This being said, this has not overruled potential conflict of interest between global/

*IUCN Social Policy Discussion Paper*
national conservation priorities and indigenous communities. Yet, are such conservation restrictions inherently in contradiction with indigenous rights to development?

“Are there any qualifications or limitations on this right [to own and control their resources]?” Daes asks? (2004:15). Article 22 of the CBD states that:

“1. The provisions of this Convention shall not affect the rights and obligations of any Contracting Party deriving from any existing international agreement, except where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity. (emphasis added)”

In this context, what would then qualify as sufficient reason for a national conservation agency to “impose” development restrictions?

“Limitations, if any, on this right of indigenous peoples to their natural resources must flow only from the most urgent and compelling interests of the state. For example, article 4 of the International Covenant on Civil and Political rights provides for limitations on some rights only “in time of public emergency which threatens the life of the nation and which is officially proclaimed”. Few, if any limitations, on indigenous resource rights are appropriate, because the indigenous ownership of the resources is associated with the most important and fundamental of human rights: the rights to life, food, shelter, the right to self-determination, and the right to exist as a people. The principal question is whether under any circumstances a State should exercise the State’s powers of eminent domain to take natural resources from an indigenous people for public use while providing fair and just compensation (Daes 2004:15)”

“States rarely or never have a truly urgent or compelling need to take indigenous lands or resources…it may be premature to reach a conclusion on the question of States’ authority to compulsorily take indigenous resources with fair and just compensation”, Daes continues (ibid).

While the question here is about “taking” resources, it relates to the underlying issue of the State representing the common good versus indigenous rights.

Should the State, from a protected area perspective, have the authority to impose use and access limitations (with fair and just compensation) despite indigenous resistance to say a protected area (category 1) in the name of the common good? The answer would in part, according to the above quotations, depend on the level of public emergency or biodiversity threat, in other words, the severity of the conservation problem at stake from a public perspective. Is the conservation problem serious enough – and have all alternative conservation tools been explored adequately – to deem restrictions sufficiently necessary? There is no easy answer, yet recognizing indigenous rights to development necessarily underlines the importance of recognizing the need for trade-offs. This being said, restrictions, particularly with regard to external resource use and pressures do form an integral part of indigenous territorial management providing a grassroots basis for protected area consolidation. In fact, the emphasis on integrating sustainable development in protected areas may also harbour dangers for indigenous communities15.

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15 The example of the relationship between extractive industries and protected areas is a case in point. Ironically, while indigenous peoples have expressed considerable opposition to discussions with the mining industry, indigenous demands for protected area policy changes may, if not designed in a careful manner, further empower industries in accessing and extracting resources from protected areas – with or without the consent of indigenous communities. The push for less restrictive protection and sustainable use – and “sustainable development” in protected area policy could potentially provide extractive industries with an entry point to indigenous lands currently (or potentially) under protected areas management.
However, not all conservation priorities may be realizable, nor may all indigenous development priorities be accommodated by win-win solutions. This is the tough reality faced in finding workable solutions between protected area agencies and indigenous peoples. The way equitable cost and benefit-sharing is put in practice is therefore a critical element of taking protected areas management forward (discussed later in this paper).

So is it a Pandora’s box?

Given the legacy of marginalizing indigenous peoples when seeking to protect biodiversity, is there not an inherent contradiction between empowerment and effective biodiversity conservation? The question raised, often in private, by conservation practitioners is relatively straightforward. If power is devolved to indigenous peoples (“if we lose control…”) will this not result in the break up of protected areas and the fragilization of conservation? Undoubtedly, in many cases “yes” – but is it also not likely that in the exact cases, national or regional governments themselves have been conceding to economic interests and development strategies? Furthermore, is it not exactly in such cases, that indigenous peoples and conservation actors have been found on the same side of a wider debate no longer about whether to have protected areas or not, but one of deciding upon appropriate development choices?

It is clear that employing rights-based participatory approaches towards the involvement of indigenous peoples has substantial implications for protected areas overlapping with customary territories of indigenous peoples. The CBD Programme specifically relates to rights-based approaches to participation (emphasizing procedural aspects), yet also emphasizes substantive aspects (such as addressing “the management of existing, and the establishment and management of new, protected areas”). Further substantive implications, building on the collective rights of indigenous peoples, could include the recognition of customary indigenous institutions and law and integrating indigenous land rights in protected area management.

Will such rights impede the establishment of protected areas in biodiversity rich areas? Will indigenous peoples turn their back against protected areas and conservation once their rights are firmly recognized? In part, yes. The right to veto conservation, as called for by some human rights groups, could, indeed, lead to the break down of conservation as we know it today. The consolidation of indigenous rights will undoubtedly lead to strengthened rejection of protected area design based on poor science, aesthetic values and top-down political designations. Indigenous representatives have furthermore been vocal opponents to paper parks and will increase such opposition. Naturally, further recognition of property and veto rights will also increase the number of communities prioritizing use/development over strict conservation – or at least making sure that due value of lost opportunity costs are recognized. Can conservation actors take up this challenge? It could furthermore be argued that if human rights issues are not taken seriously by the conservation community, this would pose even more far reaching threats to sustainability of conservation regimes. With increasing political and socio-economic pressures on natural resources, mobilizing wider societal support for protected areas is more critical than ever to maintain – and enhance – political commitment, and indigenous permanent residents are an important starting point and alliance. Both from
ethical and effectiveness stand points, a consolidated human rights framework is fundamental to bring conservation into the 21st century. It is also very likely that protected area establishment and design will receive a boost in many areas, where indigenous communities are currently resisting their establishment or hindering effective management due to limited involvement in their establishment and protection. In fact, it is very likely in many parts of the world that indigenous peoples would be far more eager than national and regional authorities to establish protected areas. This will undoubtedly have substantial implications for the way protected areas are designed, zoned and established. Is this then the beginning of the end of strict protection on indigenous territories (and effective conservation as feared by some)? Such alarmist conclusions would seem flawed for a series of inter-related reasons:

1. First of all, it is well-recognized that wider conservation approaches need to the support and involvement of indigenous (and local, private and corporate) communities in order to be sufficiently comprehensive, inter-linked and effective. The Durban Action Plan specifically notes the potential of “community conservation areas, community managed areas, and private and indigenous reserves”. It particularly involves linking indigenous protection efforts up in overall system design and planning to fully recognize the conservation value of indigenous territories in key biodiversity areas. In the Indian Himalayas, for example, research has revealed how Community Conserved Areas can fill major gaps between officially protected areas (Kothari 2003). In the Russian Arctic, indigenous natural sacred sites as an integral part of customary lands and waters form a cultural basis for linking protected areas to surrounding landscapes (Raipon and Caff 2004). In the Brazilian Amazon, indigenous territories not only fill many existing protected area gaps, but often provide more effective protection measures compared to conventional protected areas (Maretti 2002). Often, however, such conservation contributions are not fully recognized and fully linked up with protected area systems.

2. Another dimension to this is the comparative protection viability of private or government run protected areas. Cases abound where protection objectives have been altered to accommodate different land-use planning, exceptions for extractive industries etc. Strengthened community involvement would prevent this or at least secure a basis for preventing the wholesale of protection objectives.

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**Building protected areas based on community rights**

In Oaxaca, Mexico, official protected areas only cover 330412 ha and community landownership (80% of the territory) hinders further establishment of government-run protected areas. Yet, in contrast, the State is experiencing a growing number of Community Protected Areas (Aquino 2003). Currently 60 are in place. These are generally:

- established through community decision-making mechanisms
- designed to addressed basic community needs
- established within a community territory building upon rather than extinguishing land rights

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16 It is therefore not surprising that the 3rd World Conservation Congress adopted a resolution adopting a human rights framework.
3. Indigenous peoples may very well – and in many cases do - accept strict protection regimes (for considerable parts of their customary territories) given that additional costs and benefits are equitably shared. In addition, many are asking whether protected areas will have a future without securing community support and ownership of protection objectives. Others again recognize that further increasing protected area coverage necessarily implies clarifying indigenous rights and build protected areas through consent.

4. While indigenous rights may be used to veto a proposed strict protection regime for the sake of a more intensive development or land use model, reality remains that indigenous communities are often reclaiming land rights for long-term protection objectives versus short-term exploitation opportunities. The Nicaraguan Awas Tingni case before the Inter-American Court of Human Right was fundamentally about the right to own and protect timber resources on their lands (IACHR 2001), and several co-management regimes in the Canadian Arctic have emerged from conflicts around dam development (e.g. the James Bay and Northern Quebec agreement), timber or resource exploitation. As has been noted, indigenous peoples often end up as the “miner’s canary”, being the first to feel the effect of a given policy or practice going wrong (Havemann and Whale 2002). While communities may prioritize use over strict conservation, the former may, in fact, harbour considerable conservation potential if other tools are applied.

5. Biodiversity will not suffer a deathblow if protected areas are established slower. While much justification logic involves whistle blowing by conservation players, actual conservation impact of protected areas is a long-term issue. Time spent on getting indigenous communities on board initially through appropriate participation measures is more likely to contribute to rather than impede conservation.

6. Numerous studies reveal that indigenous collective ownership is different from western property regimes (see e.g. FAO 2003). Risks of collective resources being sold off, over-exploited for short-term gains or disposed are considerably lower. Indigenous representatives have continuously emphasized the importance of natural resources for their social, economic and cultural well-being and questioned commoditization of these resources. The long-term presence and commitment of indigenous peoples to their ancestral territories is a social fact, which although often questioned as romanticism/ political opportunism, rather than contextualized in the context of external pressures, stands in stark contrast to companies, migrants and others moving through an area. Indigenous notions of “caring”, “living with/of/in” a given area and interdependence as part of an ecocentric vision or cultural landscapes, transformed by customary use, sacred sites, cultural geographies etc. cannot simply be reduced to political opportunism or rhetoric.

7. There is a growing body of experiences with indigenous communities establishing protected areas or involved in protected area design/ management and conservation in accordance with their rights. Indeed, the right to conservation and healthy environment and to establish protected areas is not a given for many indigenous

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17 Ecocentrism is here understood as the values derived “from a concern for ecology of whole communities and their interdependent relationships” (Putney and Harmon 2003:6).
peoples. This ranges from indigenous communities acknowledging the potential force
of protected areas as a management tool for their customary territories towards
indigenous territories contributing directly or indirectly to wider conservation goals.
Indigenous communities, as remaining society, but often even more, rely on
biodiversity for their well-being.

8. Numerous countries, which within the last decades have recognized indigenous rights,
have not experienced a comparatively significant decline in protected area
establishment. While there has been a decline in certain types of protected areas,
others have increased significantly. In Canada, protected areas are a major component
of comprehensive land claim agreements with indigenous peoples. However, even
where rights remain unresolved, mechanisms are often set-up to continue
collaboration on shared conservation objectives. Protected areas being declared by
indigenous communities in Nunavut in Canada or indigenous protected areas in
Australia provide critical lessons in this respect. Innovative protected area models are
appearing in countries, which have ratified ILO Convention 169 or have otherwise
recognized indigenous rights to land and resources (Larsen 2000, Borinni-Feyerabend
2003).

9. Experiences with restitution of protected areas to indigenous communities have not
equated their disappearance, nor a radical break with a conservation agenda, but rather
a review of conservation objectives, negotiation of appropriate management
modalities and a redistribution of costs and benefits. Indeed, as the post–Durban
agenda seeks to consolidate societal benefits of protected areas, restitution to
indigenous residents offers opportunities to strengthen this relevance.

The experience of the Makuleke in South Africa is an interesting one. Relocated in 1969,
22,000 hectares of land were in 1996 returned to their Communal Property Association (CPA)
using the new land restitution laws. After negotiations with SANParks, communities agreed to
keep land within the Kruger National Park as a contractual park. Communities agreed to
maintain conservation objectives, keeping the same standards as the remaining park with
specific agreements reached on commercial use (tourism), sustainable hunting together with
interim agreement on the establishment of a Joint Management Board (50/50 with
SANParks). An important detail (confirming the relevance of the joint objectives) is perhaps
that villages added another 5000 hectares of communal land to the park arrangement. The
management situation has been evolving with differences remaining in terms of transfer of
skills and responsibilities, the wider role of the management board etc. Overlaps in interests
and objectives, in the Makuleke case, however, outweighed differences in objectives
facilitating reconciliation action at the management level.

10. For protected area agencies, the critical question is how to engage in restitution, while
ensuring viable protection efforts. Learning from on-going experiences in countries,
such as Australia, which have combined restitution efforts with protected area
agreement building, provide relevant lessons in this respect.

11. The CBD PoW is a global commitment to end the reproduction of protected areas
imposed on indigenous peoples without consultation, but is it also an end to large
connected protected areas overlapping with protected areas? While protected areas are
critical, wider ecosystem-based solutions to conservation and development, and thus
healthy ecosystems, are just as – if not more – important in the long-term. As McNeely notes “We also now realize the futility of trying to conserve 10% of the planet as protected areas when the other 90% is going down the drain (McNeely 2003:21)”. The importance of conservationists building alliances with indigenous peoples is not merely hypothetical. Developments in the Arctic since the 1970s towards establishing alternative development solutions is a case in point. While such indigenous environmentalism may be questioned, it is also clear for many that indigenous communities form a key alliance to compete against other development priorities. Protected areas have, in many, cases suffered from becoming islands of biodiversity in wider degraded landscapes. Broader conservation planning, including protected area management, with indigenous communities and regional commitments is a critical avenue to move beyond compartmentalized conservation action. The increasing emphasis on conservation networks, landscape planning, eco/bio-regional approaches are critical steps forward in this respect.

In summary, it would seem that the alarmist arguments against recognizing indigenous rights in protected areas tend to minimize both positive gains as well as a considerable body of practical solutions already being worked out in countries, where rights are recognized.

This being said, indigenous, or any other, societal commitment to conservation is not a given and will be continuously be challenged by other emerging priorities.

This has in some cases led to the questioning of indigenous management practices and recommendations from conservation organizations, which may – and often do – meet resistance from indigenous institutions and representatives. This highlights a critical dimension of indigenous rights and conservation in terms of wider obligations to global conservation priorities. These obligations do not disappear, nor should conservation actors stop being vocal watch dogs, when indigenous, or any other, individual or collective rights are recognized as a basis for conservation regimes. Such recognition, however, still remains the exception rather than the rule. It is therefore often argued that criticisms and accompanying recommendations remain misguided. Chapin e.g. notes that:

“Indigenous peoples, on whose land the three conservation groups have launched a plethora of programs, have for their part become increasingly hostile. One of their primary disagreements is over the establishment of protected natural areas, which, according to the human inhabitants of those areas, often infringe on their rights. Sometimes the indigenous people are evicted, and the conservationists frequently seem to be behind the evictions. On other occasions, traditional uses of the land have been declared “illegal,” resulting in prosecution of the inhabitants by government authorities.(2004:18)

When Chapin, and others before him, identify such differences of priority or even hostility, this is not a problem per se, rather a possible outcome of protected area agencies and indigenous communities comparing agendas. The problem, indeed, arises when conservation approaches are imposed without due recognition to rights, forced evictions being the most flagrant case in point.

Put differently, rights do not extinguish the importance of external (global or national) conservation interests in indigenous territories, but they do reconfigure how such conservation responses can and should be taken. This often entails substantial debates regarding population sizes, conservation threats and the most effective management means. Indeed, what else could be expected when dialogues regarding protected area design devolve from often-distant
government offices to indigenous institutions closer to the subsistence and commercial interest of (potential) resource users?

Both Durban conclusions and the CBD PoW has provided important elements for this exact purpose. There is a need to reconsider land rights, costs and benefits, protected area categories, sustainable development – but also go even further and question whether other conservation approaches could provide more effective answers to the kind of conservation challenges faced. There is a need to question the protected area model, not just in terms of governance approaches, but in terms of its relative comparative advantage and effectiveness. Where there is no consent, it may be more effective from a conservation perspective to emphasize alternative conservation avenues. This may e.g. involve putting in practice incentive measures to protect biodiversity in productive landscapes.

**Rights in protected areas: working with common ground and difference**

Durban confirmed that the moment is more ripe than ever to pursue alliance building between conservation actors and indigenous peoples based on their customary rights. This does not require starting from scratch. Many countries and indigenous communities have made substantial progress and found practical solutions to long-standing conflicts.

As Chapin notes the years around UNCED saw many meetings, alliances seeking to translate intentions into practical arrangements (2004). In addition to this, many countries have undertaken reconciliation processes with indigenous communities around their rights. This has not always, indeed rarely, been easy and protected area status, objectives and management remain a cause of concern.

To get out of the Pandora’s box dilemma requires thinking out of the box of previous practice, making trade-offs and employing different strategies. Addressing rights constructively is a critical concern in this respect.

Is there, for example, a need to establish clear-cut legally recognized rights before protected areas can start dealing with indigenous concerns or indigenous peoples can start engaging in protection? On the one hand, conservation organizations have emphasized the clear advantages in consolidated rights to effectively plan and undertake conservation with indigenous peoples in the long-term. Clarifying rights, in theory at least, also facilitates the consolidation of clear-cut conservation obligations. On the other hand, rights organizations have claimed that only protected areas, which build on indigenous rights are just and equitable.

Respecting rights, in practice, depends, among other things, on “the rule (and existence) of law” securing equality before the law, independent judiciary mechanisms and the obligation for government officials to act in accordance with legal requirements. In practice, many indigenous rights claims (whether overlapping with conservation areas or not) have been at a stalemate for years pending further legal action. Would working with rights therefore not considerably slow down improved protected area expansion and strengthened management practice where urgently needed?
The rights-based approach being promoted by indigenous organizations and human rights organizations often entails securing indigenous rights before collaboration can begin. This is understandable, given the risk of “forgetting” indigenous rights by other stakeholders once other elements have been achieved.

Yet, can indigenous peoples and protected area agencies afford to wait? The danger is that effective on-the-ground conservation may come to a standstill and collaborative opportunities are lost in cases where indigenous rights are not recognized.

The basic point is that conservation organizations and protected area agencies or conservation organizations are not in a position to formally recognize rights. They can work with them, but actual recognition rights depend on wider political mechanisms and outcomes of the legal apparatus. Indeed, as securing rights, constitutionally speaking, falls beyond the legal realm of protected area agencies, joint action potential may be limited considerably for legal reasons. Settling rights and seeking redress involve expensive and long claim processes through the legal apparatus of a specific country. As long as this in the process, slow or not yet finalized, other solutions would seem to be needed to secure progress on the ground.

A number of national experiences in dealing with indigenous rights in protected areas provide us with practical steps and experiences for ways forward. In Canada, it has been argued, that there has been a move from an “earlier focus on ‘rights’ and ‘grievances’”, into an integrated approach to quality of life, encompassing economic development, human capital, community infrastructure and governance” (2003:3). The lesson is particularly relevant in securing common ground approaches to indigenous rights and protected areas as well. While the recognition of rights is fundamental, it also needs to be accompanied by a broader programme of work and actual implementation. Process needs to be accompanied by substance through tangible benefits and changes to make sense for often impoverished indigenous communities. While legal recognition of rights may be a major priority for most indigenous communities, it is also increasingly clear that these do not automatically lead to their implementation and the increase of tangible benefits on the ground.

Such benefits typically depend on a wider range of socio-economic processes (see discussion on equitable cost and benefit sharing below) and are very often represent critical bread-and-butter, health and basic well-being concerns for indigenous communities. Limiting collaboration on protected areas management until rights are recognized could, paradoxically, prevent action to improve living conditions and livelihoods for the most impoverished communities.

In contrast, it may be argued that without properly established rights such joint action will remain piecemeal and never be fully adequate. While much protected area legislation is changing substantially, many policies and overall legal frameworks, related to indigenous peoples, currently provide little, if any, opportunity to recognize, and build conservation regimes on, indigenous land rights. This has led to considerable pessimism among certain indigenous representatives and advocacy groups in terms of potential progress and further collaboration on conservation.

“Especially in developing countries…national park legislation alienates protected areas to the state, thereby annulling, limiting or restricting local rights of tenure and use. This act alone makes collaboration between indigenous peoples and conservationists nigh impossible (Colchester 2003:43).”
Others have proven the opposite. Indeed, for many indigenous peoples the conservation stakes are high and of an urgent character making it fundamental to get core progress on the ground even where rights are not fully recognized. Secondly, just as ‘paper parks’ reveal the limitations of officially designated protected areas, similar threats prevail in the context of recognized indigenous land rights. As Colchester himself notes later:

“Legalised indigenous control of their commons will not by itself ensure either the sanctity of these areas from invasions and disruptions or guarantee that indigenous economies do not overwhelm their environmental base. Effective management requires procedures to enforce agreed regulations, whether imposed by outside managers or self-imposed by indigenous communities. The challenge is to find means by which the indigenous peoples’ own institutions can agree to or develop for themselves such controls. Moreover, only in a few situations is it likely that indigenous institutions can effectively secure their areas from outside pressures, without outside assistance. This implies the continuing need to define a role for the state in securing indigenous territories as conservation areas. (2003:70).”

This is a fundamental issue. Whether or not rights are recognized or consent procedures have ensured voluntary commitment to protected areas, there is often a need for effective protection solutions on the ground, which put these rights into practice. Restitution would in most cases, at best, only be an intermediary step towards securing indigenous communities such kinds of protection.

While rights-based perspectives are being promoted in much policy making, they do not per se or alone lead to tangible benefits hoped for or associated with those rights. The effectiveness of the much-acclaimed Indigenous Peoples’ Rights Act of the Philippines in protecting ancestral domains, even where these have been recognized, has for example been cast in doubt (Sidchogan-Batani 2003). When rights are in place, actual implementation often entails a long process of reorganizing governance structures, administrative structures and concretely redistributing roles, responsibilities and resources.

When rights are absent, there is still considerable need and room for manoeuvre to put in place similar institutions and practices enabling more constructive conservation arrangements. In Canada, for example, reaching a final agreement on a land-claim situation can take from 5 to 20 years. In the Yukon protected area strategy, for example, it is stipulated that protected areas will not be designated in regions of the territory where land claims have not been settled18 (http://www.cd.gov.ab.ca/preserving/parks/fppc/yukon_eng.pdf). In most cases, however, even the lack of settlement of aboriginal rights does provide policy opportunities for further action. This was specified by a Canadian policy change in 1986 providing for the establishment of interim measures to protect indigenous rights. In practice, this allows for the continuation of traditional harvesting rights and interim management boards with aboriginal representatives. Parks Canada has also engaged in amending policies to provide greater flexibility for the recognition of Aboriginal concerns in protected areas, among other things, addressing access and use issues. Awaiting final decisions, the use of Interim Measures Agreements essentially allows for the development of incremental measures to address concrete challenges. Benefits highlighted include:

- Strengthened dialogue and grassroots-driven solution building
- Incremental building-blocks, which then feed into broader settlements
- The protection of lands and resources before agreements are concluded
Such interim agreements are often time-limited. While there has been some criticism as to the real effect and impact of such measures, the approach is most relevant to ensure on the ground progress in complex situations (INAC 2003:19).

In New Zealand, interim measures have e.g. involved the establishment interim institutions, which have wounded down once final agreements were put in place. It should also be noted that the CBD programme of work emphasizes the use of interim measures where necessary for protection purposes (1.1.5).

Strong stances against initiating partnerships, until indigenous land rights are recognized risk putting to a standstill important activities to secure effective protection of rights on an interim basis as a vehicle for effective protected areas management, whether or not these rights are legally sanctioned. While it is also clear that recognition of rights has been fundamental in sparking off reconciliation processes e.g. in Australia and South Africa, they are not the only means to achieve reconciliation, nor are they complete. Working towards effective conservation with indigenous peoples, even if rights are not recognized or fully-fledged claims processes not yet finalized, can and should persist.

Indeed, if the protected area community is to ensure effective progress on the targets set out by 2008, strengthened language on interim measures\(^{19}\) and mechanisms would seem to provide an opening for further engagement and involvement for the vast majority of indigenous peoples whose land rights remained unsettled. This may involve the use of non-derogation/non-abrogation\(^{20}\) language and clauses to legally guarantee that no unforeseen effects of the legislation will erode indigenous rights. A non-derogation clause would have the advantage of securing clarity around the interim character of agreements, until such rights are settled elsewhere. This would allow concrete discussions to take place in while to secure effective and concrete agreement building on the ground addressing substantial aspects related to protected area management as well as the equitable cost and benefit sharing.

Reaching such concrete “results”, however, relies on often prolonged discussions, negotiations, exchanges to overcome legacies of conflict. This has been the case in most countries engaged in substantial reconciliation processes – and have relied on a number of factors beyond the political will to do something about it. Two elements deserve particular mentioning.

On the one hand, “discussions” were not merely coincidental, but required the systematic, and lengthy, development of national, regional agreements on how to cooperate, discuss and negotiate. Such agreements were, as the CBD Programme of Work aims for, about fleshing out full and effective participation.

On the other hand, collaborative results such as the extensive agreement building in the Canadian Arctic have involved a considerable contingency of non-indigenous professionals,

\(^{19}\) Suggested activity 1.1.5 of the CBD PoW does mention this to some by encouraging the development of national plans “provide interim measures to protect highly threatened or highly valued areas wherever this is necessary.”.

\(^{20}\) Abrogate refers to removing a right entirely and derogate means to repeal or lessen part of that right. Thus: “Nothing in this Agreement will be construed to affect, derogate from or abrogate the indigenous, customary or other rights being settled in through legal means”
regional government officials and activists (Jull 2002). These were not merely bystanders to indigenous empowerment, but critical actors. As Jull notes about Nunavik:

“The Nunavik success has involved not only Inuit and their staff, but also dedicated officials in federal and Quebec governments who have strong commitment to Inuit and the North, often persons who have themselves lived and worked with Inuit. Although the “negotiation” of hinterland policy and politics may begin in a tense mood, the nature of processes over time is to create a climate of collective problem-solving in which everyone is trying to find the best way through the problems, having gradually educated each other to the various needs. (2002:16)”

The point is that protected area agencies and professionals have a critical constructive role to play in finding solutions. They have helped in fleshing out technically viable solutions, better understand indigenous priorities and ensure that negotiated outcomes made sense two ways.

Indeed, the new paradigm offers ample opportunities for indigenous peoples to increasingly benefit from protected area establishment. This involves more than simply asserting protected areas as a second-best or “better than nothing” solution to indigenous communities with little other opportunities to restrict external pressures. The promotion of equitable cost and benefit-sharing is particularly important in this respect. Socio-economic tools to valuation are today sufficiently sophisticated to allow indigenous communities to benefit as stewards providing services to surrounding society rather than bearing the costs of protection efforts (see discussion below).

Further employing the ecosystem approach to protected areas has particular implications in this respect. First of all, this relates to the emphasis on protected areas as a conservation tool among many others. While protected areas, particularly under the new paradigm, are increasingly embraced by indigenous peoples, strengthened application of consent procedures will most likely be accompanied by a certain increase of indigenous communities vetoing protected area establishment or rejecting existing protected areas on their territories. The employment of alternative conservation measures will increasingly be necessary means to meet wider global and national conservation needs along with indigenous development priorities.

Within a conservation paradigm increasingly emphasizing the value of ecosystem services provided by conservation stewardship, this offers good opportunities for indigenous communities entering contractual arrangements to secure effective delivery of services to the surrounding society. Whether the conservation approach taken involves protected areas or not, indigenous stewards accepting development restrictions and lost opportunity costs would in turn benefit from wider societal recognition – and payment for their services.

In terms of equitable sharing of benefits, it is clear that protected area agencies (and indigenous peoples) in most cases have not benefited from indirect use values generated from their management of protected areas on their territories. The challenge is not simply about shifting money from protected area agencies to indigenous communities, but about re-asserting protected areas as part of relevant development models for indigenous peoples and, importantly, surrounding society recognizing the value of indigenous protection efforts to ensure indirect values. There are examples of this including indigenous upstream communities being paid for added-value protection by downstream societies benefiting from clean water supply.
Such arrangements will not be achieved overnight, but protected areas and indigenous peoples have a joint cause in establishing this argument. While many indigenous peoples are weary about engaging in monetary valuation seen as commodifying ancestral territories and relationships, they are also widely calling for external recognition of indigenous contributions to sustainable development. Whereas the Convention 169 calls for “attention to the distinctive contributions of indigenous and tribal peoples to the cultural diversity and social and ecological harmony of humankind” and to international co-operation and understanding”, environmental economists have elaborated tools and approaches relevant to quantify some of these contributions – and communicate them to wider society.

Does this run the risk of turning ancestral territories into resources for exploitation, increasing pace of commoditization or could it succeed in securing the protection of direct values to indigenous peoples as well as indirect values of surrounding society?

Carbon sequestration and watershed management are real necessities, which however, often remain undervalued by surrounding society. The question is therefore also how much worse off we would be if indigenous peoples no longer protected territories. Is it not possible for surrounding society to value good indigenous management without transforming the particular indigenous relationship to their customary territories?
Reconciling indigenous peoples and protected areas: rights, governance and equitable cost and benefit sharing.

Will alternative governance – community and co-management do the trick?

“Are governments alone able to ensure the accomplishment of all their protected areas conservation objectives and social requirements? (WPC Rec 5.25)”

“Indigenous peoples are also supportive of the fact that the WPC is looking at a variety of options to recognise community initiatives on conservation. We are committed to continuing our efforts to promote understanding of our conservation strategies that incorporate our cultural and spiritual perspectives and the interconnection between land and spiritual life, and the use of customary laws to regulate our lives and our environment (Final indigenous statement in Durban).”

Governance has been defined as

“The interactions among structures, processes and traditions that determine how power and responsibility are exercised, how decisions are taken, and how citizens or other stakeholders have their say.” (Amos 2003)

Several Durban outputs emphasized the need to explore other “governance types” centred around the question of:

“Who holds management authority and responsibility and is expected to be held accountable. This authority may be derived from legal, customary or otherwise legitimate rights. WPC Rec 5.17).

Furthermore, the word governance appears 13 times in the CBD PoW. Some are listed in the box below.

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

1.5.6 Develop policies, improve governance, and ensure enforcement of urgent measures that can halt the illegal exploitation of resources from protected areas, and strengthen international and regional cooperation to eliminate illegal trade in such resources taking into account sustainable customary resource use of indigenous and local communities in accordance with article 10(c) of the Convention.

2.1.2. Recognize and promote a broad set of protected area governance types related to their potential for achieving biodiversity conservation goals in accordance with the Convention, which may include areas conserved by indigenous and local communities and private nature reserves. The promotion of these areas should be by legal and/or policy, financial and community mechanisms.

2.1.3. Establish policies and institutional mechanisms with full participation of indigenous and local communities, to facilitate the legal recognition and effective management of indigenous and local community conserved areas in a manner consistent with the goals of conserving both biodiversity and the knowledge, innovations and practices of indigenous and local communities.

2.1.5. Engage indigenous and local communities and relevant stakeholders in participatory planning and governance, recalling the principles of the ecosystem approach.

2.2.2 Implement specific plans and initiatives to effectively involve indigenous and local communities, with respect for their rights consistent with national legislation and applicable international obligations, and
stakeholders at all levels of protected areas planning, establishment, governance and management, with particular emphasis on identifying and removing barriers preventing adequate participation.

3.1.4 Consider governance principles, such as the rule of law, decentralization, participatory decision-making mechanisms for accountability and equitable dispute resolution institutions and procedures.

Target: By 2008, standards, criteria, and best practices for planning, selecting, establishing, managing and governance of national and regional systems of protected areas are developed and adopted (4.1).

Who is or should be responsible for protected areas? Who makes the decisions? (How) are indigenous peoples involved in decision-making? Governance has only recently started to be addressed in a more explicit manner by protected area agencies. There is no blueprint for appropriate governance options, yet questions of “good governance” (Abrams et al 2003) and alternative governance options are increasingly called for with the CBD PoW. Whereas previous emphasis was put only on government run protected areas, several Durban outputs called for further support to co-management and community conserved areas as well as private protected areas. This included a call to recognize the vast presence of customary governance measures through traditional authorities and law. This call was replied to by the CBD PoW, particularly suggesting to:

2.1.2. Recognize and promote a broad set of protected area governance types related to their potential for achieving biodiversity conservation goals in accordance with the Convention, which may include areas conserved by indigenous and local communities and private nature reserves. The promotion of these areas should be by legal and/or policy, financial and community mechanisms.

2.1.3. Establish policies and institutional mechanisms with full participation of indigenous and local communities, to facilitate the legal recognition and effective management of indigenous and local community conserved areas in a manner consistent with the goals of conserving both biodiversity and the knowledge, innovations and practices of indigenous and local communities.

Indeed, reforming governance approaches would be a critical element of a rights-based approach to indigenous participation as promoted by the CBD Programme of Work. If

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21 See also the following suggested activities (2.2.7, 4.1.1, 4.1.4, 4.2.1)

22 For quite obvious reasons, there is no global consensus on what good governance implies, yet as evidenced in the CBD PoW approaches being promoted in multilateral contexts include:

- The rule of law
- Accountability
- Democratization of decision-making mechanisms

Equitable dispute resolution

23 “Co-managed protected areas (CMPAs) are defined as protected areas (as per IUCN categories I-VI) where management authority, responsibility and accountability are shared among two or more stakeholders, including government bodies and agencies at various levels, indigenous and local communities, non-governmental organizations and private operators, or even among different state governments as in the case of trans-boundary protected areas (WPC Rec 5.25).”

“CCAs are natural and modified ecosystems, including significant biodiversity, ecological services and cultural values, voluntarily conserved by indigenous and local communities through customary laws or other effective means. The term as used here is meant to connote a broad and open approach to categorizing such community initiatives, and is not intended to constrain the ability of communities to conserve their areas in the way they feel appropriate.(WPC Rec 5.26)”

_IUCN Social Policy Discussion Paper_
implemented, a veritable mushrooming or diversification of protected area governance regimes could be on its way.

Management planning is no longer an administrative given, but an increasingly complex course of action involving the crafting of institutions, outreach “beyond boundaries” (surrounding landscapes, working cross conventional line agencies and involving communities) combined with increasing inwards specialization and professionalization involving complex management models, systems and tools.

Debates on management planning with indigenous peoples have centred around these two axes. Whereas “opening up” management institutions was previously regarded as loosening up on scientific priorities and professionalism, the protected area community has largely embraced and recognized the importance and necessity of engaging with indigenous peoples. Yet, a considerable gap remains between global objectives and perceptions among many conservation actors, who are yet to be convinced about both the relevance and effectiveness of other governance forms. Disagreement as to the real conservation value of community involvement, often expressed in the corridors, remains within the conservation community. The starting point for such discussions partly relate to distinctions made between scientific and indigenous knowledge.

**Scientific and indigenous knowledge**

A critical challenge of the reconciliation agenda involves bridging differences between knowledge traditions. How does indigenous knowledge fit into a CBD PoW calling for strengthened scientific priorities, (external) management effectiveness evaluations and goal 4.4 which seeks “To ensure that scientific knowledge contributes to the establishment and effectiveness of protected areas and protected area systems”? Indigenous knowledge has received considerable attention in the context of the CBD on the basis of the Article 8(j) mandate, yet substantial challenges persist not least in terms of mainstreaming the application of 8(j) in other conservation and sustainable use strategies.

Customary knowledge and law obviously are clearly important, although rarely in the form of unexploited solutions ready to be inserted in protected area management plan. This is admittedly a strong generalization given the legacy of protected areas completely disregarding the potential of customary knowledge Berkes (2000) has noted how aboriginal hunters in the Arctic have extensive knowledge about caribou distributions, migration patterns and ecosystem changes. He emphasizes the difference between scientific monitoring regimes, which tend to underline quantitative population models, and aboriginal models, which, for example, through local observation use fat content to understand the state of the caribou population over time. As a qualitative model, such indicators provide information about the direction the population is moving rather than simply relying on population estimates (Berkes 2000). Such species related information is often questioned by scientific approaches, yet are gaining increasing importance in more dynamic understandings of ecosystems and thus protected areas management.

24 “….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…..”

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A general flaw, in protected areas management has been the lack of recognition of indigenous knowledge or social capital. While there has been considerable valorization of ethno-botanical knowledge, there has been less recognition of less tangible knowledge related to relationships, ancestral attachments, tenure arrangements and customary management approaches.

There is a need to strike a balance between scientific and indigenous knowledge traditions. On the one hand, scientific assessments of ecosystem health or species populations need to recognize their own limitations and the value of indigenous knowledge systems and perspectives. On the other hand, linkages between scientific and indigenous knowledge systems are increasingly practised by indigenous peoples. Scientific data-gathering, in one way or another, continuously inform indigenous organizations engaged in environmental impact assessments, poverty analysis or ancestral domain management planning.

Nurturing this balance is fundamental for effective protected area reconciliation to take place. Protected area planning disregarding indigenous knowledge will continue to meet resistance, just as rejections of scientific knowledge in favour of indigenous knowledge systems will stand little chance of convincing policy makers and the wider conservation community.

### Is science a problem?

An additional problem in this respect relates to the perceived dangers resulting from a scientific focus of protected areas. Marcus Colchester e.g. notes that;

“an unintended result of this approach [ the identification of biodiversity hotspots] is that protected areas tend to be selected according to technical criteria while giving only secondary consideration to social and political issues. This also reinforces conservation’s technocratic tendency, with the effect of marginalizing indigenous peoples” (2003:21, bold inserted).

Mac Chapin has also recently noted that:
“Discussion of “natural” alliances between conservationists and indigenous peoples and the need to work closely with local communities, common just a few years ago, has largely disappeared”. It has been displaced, in the biggest conservationist NGOs, by talk of changed priorities, with a new focus on large-scale conservation strategies and the importance of science, rather than social realities, in determining their agendas. (2004:18, bold inserted)”

That protected areas are selected according to technical criteria or science is a fundamental, and positive, development. Scientific criteria are not *per se* a technocratic strategy (bad science is...), but one of justifying protected area creation in terms of biodiversity priorities and, indeed, identifying conservation needs based on the particular populations of species and habitat and the wider ecosystem context. The CBD PoW calls for gap analyses to be undertaken at national and regional levels:

“based on the requirements for representative systems of protected areas that adequately conserve terrestrial, marine and inland water biodiversity and ecosystems. ...take into account Annex I of the Convention on Biological Diversity and other relevant criteria such as irreplaceability of target biodiversity components, minimum effective size and viability requirements, species migration requirements, integrity, ecological processes and ecosystem services.”

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25 This conclusion is somewhat surprising seen in the context of the Durban conclusions as well as the CBD Programme of Work.

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Emphasis is here clearly on scientific criteria in order to focus on what needs to be protected rather than how to protect it. Too many protected areas have been based on easy political commitments, poor science, conservation “eager” rather than substantial arguments. Strengthening science for determining priorities does therefore not *per se* marginalize indigenous peoples conservation efforts, but actually offer growing opportunities. The role of different knowledge systems and the extent to which they are somehow incommensurable is more of an assumption than based on actual practice. In most cases, the dividing line between indigenous communities and protected areas is quite clear around particular issues, objectives and modalities rather than different knowledge practices (although these exist of course).

Yet, it is also clear that conventional gap analysis along strictly scientific criteria will not necessarily identify indigenous protection priorities. The boundaries identified for areas in need of protection will not necessarily coincide with indigenous territories. Nor will analyses necessarily reveal particular resources, landscapes or species important from an indigenours perspective. While there often is overlap between scientific and indigenous priorities, important differences will also be present. Indigenous communities may e.g. prioritise the protection of ecosystems already considered well-represented in national systems. Furthermore, to what extent will gap analyses be ready to integrate *other* indigenous protection priorities often inter-linked with conservation objectives (cultural and spiritual values, physical protection of communities etc)?

What is further needed is in reality improved scientific practice to understand and integrate indigenous knowledge and protection priorities in protected area selection. A strong technical approach, also integrating indigenous knowledge on species, habitat and ecosystem inter-linkages, is fundamental to get the site-specific objectives straight. Determining appropriate conservation approaches is an exercise that necessarily also involves socio-political negotiation, economic analysis and the integration of *other* priorities in the management equation. Strict protection objectives and central government coordination, based on sound science and clear-cut biodiversity priorities, are a fundamental necessity not least for indigenous peoples seeking e.g. to receive benefits and support, which correspond to their stewardship efforts.

Identifying overlaps and differences thus become fundamental preparatory elements to facilitate the following protected area reviews and identify appropriate protection models. This is further important as protected area design is suggested to closely follow “precise maps” identified through the national and regional gap analyses. Such *precision* is just as important to indigenous peoples, but needs to reflect customary boundaries of territories and indigenous priorities on protection gaps.

Many indigenous communities, for example, promote strict protection against external pressures and require centralized legal and financial support to ensure this. What is being argued against is that top-down driven strict protection schemes have often further marginalized or impoverished communities through resettlement or fences without the equitable sharing of costs and benefits linked to conservation. Secondly, it is argued that strict protection is often applied as a blanket solution without sufficient scientific basis to justify it. Solid scientific approaches are a fundamental ingredient of, and not in opposition, to other governance options.
Will “Small is beautiful” fill the gaps?

“A considerable part of the earth’s biodiversity survives on territories under the ownership, control, or management of indigenous peoples and local (including mobile) communities. However, the fact that such peoples and communities are actively or passively conserving many of these sites through traditional or modern means, has hitherto been neglected in formal conservation circles (Rec 5.26).”

It is clear that in many regions, shrinking natural areas outside protected areas overlap with indigenous territories. Many areas of fundamental biodiversity importance are found within indigenous areas including many coastal and freshwater areas as well as under-represented terrestrial biomes. The fourth replenishment of the GEF includes a target to increase protected area coverage by 17 million hectares. How can this happen without repeating the legacy of marginalizing indigenous communities in their design and creation?

Indigenous territories are not merely small areas of concern. In Canada, beyond the 2.300 indigenous reserves covering more than 28,000 km², over 800,000 km² have come under indigenous control through comprehensive land claim processes and 861,683 km² have been acquired under the Specific land claims program (INAC 2003). In Colombia, it is estimated that some 2,477,500 ha of indigenous resguardos overlap with national parks. Furthermore, resguardos total more than 28’488.300 ha offering important opportunities for protection beyond the existing protected areas (Riascos et al 2003). Even where indigenous areas are relatively small areas, they may often provide networks of protection in fragmented landscapes.

One major question emerging from Durban and the CBD is whether indigenous peoples can fill the “protection gap”. Community-conserved areas and co-management were show-cased in Durban and emphasized as effective solutions to complex problems in many of the final statements. Examples from Asia included several thousands of sacred groves in India and sacred mountains in Yunnan, China. Durban acknowledged that many unprotected areas are, in fact, under some level of protection by indigenous and local communities.

Current definitions proposed for community conserved areas (CCAs) focus first and foremost on the “predominant or exclusive control and management by communities” with some commitment to conservation or its achievement.

The promotion of CCAs as a solution to earlier conservation challenges has considerable merit, particularly in response to “blind” top-down approaches, yet is by no means a panacea to conservation problems.

In fact, among some conservation actors, there is a fear, that basic scientific approaches are giving way to calls for social empowerment and ethical approaches with little concern for actual conservation impact. Would indigenous peoples be better stewards and managers if they were empowered to do so? Would they establish further protected areas if they were empowered to do so? Are, sceptics ask, indigenous peoples really more supportive of conservation than private land-owners or local government agencies?

Others are moving rapidly forward seeing changing governance options as potentially workable solutions to conservation challenges, which remain despite increasing protected area coverage.
Furthermore, how is it ensured that further involvement of indigenous peoples does not lead to the fragmentation of existing, and already limited, conservation gains? Would the transfer of authority of existing or new protected areas to indigenous institutions not risk weakening actual protection further limiting the possibility of putting into practice national biodiversity strategies, securing compatible management on wider scales? There are no easy answers.

What is clear is that many existing protected area strategies are often ineffective or incomplete (Mulongoy and Chape 2004). Indeed, many of the questions above could be asked to protected areas as a conservation strategy as such:

- Are protected areas leading to fragmented/island conservation?
- Does the creation of protected areas effectively improve stewardship?
- Are protected areas more effective and efficient conservation strategies compared to other strategies?

What is also clear is that the “small, local, community is good/better/effective/beautiful” discourse often remains anecdotal rather than based on critical analysis and documentation (Worah 2002). While there are numerous case studies on the importance of community efforts, there is also a fear in the conservation community, that its potential risks becoming overrated or being promoted as the *per se-* correct solution without a clear identification of the conservation challenges at stake.

This could in practice lead to the proliferation of community conservation “paper park” projects promoting good ideas rather than locally relevant solutions in the end back-firing (once again) on the importance of working with indigenous communities.

Indeed, the emphasis put on community-conserved areas to a large extent relies on the assumption that community control leads to better conservation. While numerous cases do show this, the reality is that conservation problems and challenges are often of a scale and nature beyond the immediate reach of community institutions. The introduction of alternative governance options should not be seen in isolation from national biodiversity plans, strict protection regimes for key areas or maintaining a role of central government in the coordination of conservation. Control and participation issues at the management level need to be kept distinct from wider issues of objectives.

There is a danger of simplifying complex challenges to “either-or” choices risking the loss of the current opportunity to actually address conservation challenges in a more locally-responsive manner, while retaining firm linkages with wider national efforts. The danger of CCAs, as it is with co-management or government-run areas, is when one model is promoted as the *solution* for the indigenous peoples and protected areas relationship. There is a danger that community-conserved areas are promoted as the most appropriate solution for indigenous communities and protected areas, while other options remain second-best options.

What is fundamental to retain from the discussion on CCAs is the need to build on rights as well as recognizing the considerable presence and potential of local conservation regimes and cultural values, which are often neglected. There is a need for better tools at integrating such local conservation institutions and mechanisms. Although there is a growing recognition of the (past, current and potential) conservation contribution of indigenous and local communities, there is a need for strengthened approaches, which render explicit the contributions as well as the shortcomings of new governance approaches. The use of general
management effectiveness tools (Hockings et al. 2000) to assess capacity and impact is fundamental, although some adaptation is necessary to accommodate the specific goals, institutional arrangements and knowledge practices of indigenous and local communities. Introducing alternative governance models will not lead to miracle solutions in terms of effectiveness.

Indeed, major shifts in governance based on empowerment agendas with little rooting in local realities harbour considerable risks of failing substantially in both ecological and social terms. While they may allow for alternative ways of dealing with problems, and allow for local constituencies to actively form and influence the conservation agenda, it is critical that changes are initiated in a gradual and well-documented manner. This lesson is just as important for blueprint protected area solutions, which have been introduced without building on existing structures and practices. The importance of rigorously documenting and addressing both conservation gains and shortcomings of community-oriented conservation initiatives in the coming years seems fundamental.

Now that conservation consensus has established the relevance of co-management and community-conserved areas, the next step involves identifying the necessary conditions for making them as effective as possible – and understanding what potentially makes them fail (Acheson 2000). Such an approach requires a comprehensive effort to document the effectiveness of such approaches both in terms of biodiversity impact and socio-economic impacts. Does co-management effectively protect? Does it effectively lead to greater equity? This entails entering a domain much less researched.

**Cultural diversity: adding a layer or rethinking the box?**

26 While the above discussion has centered around the concrete conservation contexts, it is also clear that a stronger ethical concern is re-emerging. Emphasis has been on securing equality in terms of access to and involvement in governance of protected areas and systems. It is less clear how and to what extent this leads to improvement in terms of equity.

Equal access to decision-making processes may not necessarily make protected areas more equitable. The ethical goals consolidated by the CBD PoW will not be achieved by changes in governance structures alone. As with institutional set-ups, CCAs also harbour the potential of being controlled by powerful local actors. Establishing mechanisms for the equitable distribution of costs and benefits remain a core challenge for all governance types. Fully understanding such questions of distribution of rights and benefits should also be a core part of management effectiveness approaches.
Acknowledging and working with cultural diversity is at the heart of crafting sensible protected area approaches with indigenous peoples, yet its cross-cutting nature is rarely fully embraced. A flawed understanding and use of culture is behind much misrepresentation as well as scepticism of fully taking on board culture-sensitive approaches:

Cultural diversity, indeed, relates to almost every standard protected area issue, from setting objectives and institution building to planning and day-to-day management. A useful starting point is therefore the recognition that protected areas themselves are cultural constructs. This does not make such areas or what they set out to do less real. No one will deny the existence – or the need to protect – ecosystems, particular habitat or species. However, what this entails and how to go about it is a different question. It is far less accepted that scientifically neutral descriptions of the natural world along with equally scientifically neutral descriptions of relevant management options have an inherent cultural bias. The clearest examples involve the identification of areas as natural, despite having been shaped by human presence and use. The consequence has often been prohibition of (threatening) use or resettlement of inhabitants. This is not to deny the presence of some indigenous communities undermining the resource base or potentially threatening the survival of a specific species in customary territories. Nor is the intention to deny that cultural practices are sometimes as idealized as they may be stigmatized. The point is much broader. Culture is not limited to exotic values or natural-product based handicrafts, but relates to the very way people interact with their environments.

A “protected area” is one such cultural model. Protected areas, whether they wish or not, operate in a cultural field, where they co-exist more or less harmoniously with other perceptions, institutions and practices. Integrating cultural diversity - rather than treating it in a compartmentalized manner - hence becomes the real challenge. This particularly so when dealing with indigenous peoples whose cultural values, customary management institutions and ways to go about natural resource management differ from that of mainstream society.

Despite a general appreciation of cultural and spiritual values in conservation policies, they tend to either remain in the backstage (not really important) or be put in the forefront as some level of cultural cosmetics (emphasizing e.g. only cultural values of conservation relevance). Either way, they represent a (potential) add-on rather than an essential to the real stuff addressed by conservation. Acknowledging the importance of cultural and spiritual values as not only an asset for conservation, but as part of the very reality has been uneven. In the world of hard data on biodiversity degradation, there may be a feeling that cultural aspects reflect sympathetic, but essentially irrelevant values in the broader context of conservation.

Yet, if the very way both scientists and communities relate to nature is inherently cultural, effective protected area strategies need to build on this cultural reality. The continuous marginal role of biodiversity values when trade-offs are made between conservation or development reflect the nuts and bolts of prioritizing certain cultural values over others.

As protected areas are increasingly perceived, or at least promoted, in terms of their contribution to society and wider development goals as the MDGs and the WSSD plans, culture needs to reframed by conservationists as the very basis from which choices are made. Economic choice, increasingly recognized and addressed through valuation and incentive measures, provides one angle to this, but cannot be isolated from other or broader cultural or societal values. For many indigenous communities this goes without saying. Ancestral relationships with their lands and waters makes the relationship much more than a “rational”
question of maximizing economic benefits from natural resources. How is such an understanding translated into conservation practice?

Most land planning processes emphasize legal/formal tenure (vs. customary) or documented histories of material use (vs. oral histories). Cultural and spiritual forms of use and associated practices often remain less verifiable, and thus less valid. The reduction of one cultural reality to the culture of science, albeit discrete and seemingly neutral, is not without consequence.

For example, with the “new” focus on socio-economics (including equitable cost and benefit sharing), it is indeed possible that while ground will be gained in terms of social equity, questions related to cultural diversity and practice may be left aside. Cultural and spiritual linkages outside of traditional occupation and use areas may easily pose problems to legal mechanisms or planning processes looking for “hard facts” when calculating costs and benefits (Tarlock 1999). Returning to the body of experience gained in promoting Integrated Conservation and Development Projects, many exactly failed because of simplified calculations and solutions on appropriate benefits to replace lost opportunity costs. Economic calculations and solutions are useful models, but economic sense does not necessarily lead to rational choice. This being said, the CBD PoW in activity 2.1.1 does suggest to:

“Assess the economic and socio-cultural costs, benefits and impacts arising from the establishment and maintenance of protected areas, particularly for indigenous and local communities, and adjust policies to avoid and mitigate negative impacts, and where appropriate compensate costs and equitably share benefits in accordance with the national legislation (bold inserted).”

The Durban Parks Congress also underlined the importance of spiritual and cultural values with a recommendation particularly emphasizing those of indigenous peoples. Cultural values are also emphasized in the recently adopted CBD (voluntary) guidelines on impact assessments. Cultural diversity increasingly matters. In Australia, a review of Aboriginal involvement in the management of the Wet Tropics, released in 1999, recommended the development of a comprehensive set of cultural indicators. The Rainforest Cooperative Research Centre is undertaking research to develop indicators in collaboration with two Aboriginal communities. These include recognition of Aboriginal rights and interests, participation in management, socio-economic benefits, status of language, protection of cultural sites, and transmission of knowledge and spiritual values. The research is focusing on both the development and application of cultural indicators, including how monitoring occurs and by whom, how information is documented and accessed, and how the information derived from cultural indicators can feed back into management of the Wet Tropics World Heritage Area (Smyth and Beeron 2003)

From having been an external value of residual interest, protected areas have increasingly taken these on board, particularly in collaboration with indigenous peoples. In practice, both ethical and effectiveness drivers justify a more culturally sensitive approach. The CBD PoW consolidates the imperative to address socio-cultural costs, benefits and impacts and adjust policies accordingly. From an effectiveness point of view, there is wide recognition that culturally sensitive planning can allow for bottom-up design, the integration of cultural values, crafting of institutions and alternative governance models, which allow for stronger, locally credible and more effective protected area institutions.

Jurisprudence in some countries, such as rulings by the Australian High Court, has recognized the importance of spiritual connections. On a global scale, such policy thinking has led to
win-win solutions, where protected areas, for example, seek to protect both cultural and biological diversity (such as the Alto Fragua Indi Wasi in Colombia) to crafting management regulations, which recognize customary rules of access and use to sacred sites within larger protected areas (Kakadu in Australia). In both cases, it involves some level of coherence between customary rules and more formalized management approaches.

The question of cultural pluralism in management approaches is critical if approaches to cultural values are to move beyond residual acknowledgement. Moving from notions of culture as an obstacle towards culture as an asset, or an inherent part of conservation reality is also leading to a much greater recognition of cultural practices with direct conservation relevance.

As Yogesh Gokhale has argued in the Indian context, there exists a variety of ecosystems valued for their sacredness, yet formal systems are rarely equipped to build on these resources. Only about a tenth of the estimated 100,000 to 150,000 sacred groves in India have been recorded, and many unrecognised sites, providing substantial conservation value, are linked to indigenous and tribal communities. These include endangered ecosystems as the Myristica swamps in the Western Ghats and the sacred woodlands (orans) of deserts of Rajasthan (Gokhale 2003).

The CBD PoW is a critical window of opportunity to rework how culture is dealt with in protected area processes, particularly, but not only, in relation to indigenous peoples.

**Indigenous governance**

Governance issues are central elements of indigenous rights. Particularly the issues of self-governance and the exercise of powers on customary territories have been priority items on the indigenous agendas. This relates closely to issues of self-determination, land claims, jurisdiction and self-governance practice. Henriksen, for example, identifies four ways of arranging indigenous self-governance:

1. indigenous autonomy through contemporary indigenous political institutions, such as the Sami Parliaments in the Nordic countries;
2. indigenous autonomy based on the concept of an indigenous territorial base, such as the Comarca arrangement in Panama;
3. regional autonomy within the State, such as the Nunavut territory in Canada and the indigenous autonomous regions in the Philippines; and
4. indigenous overseas autonomy, such as the Greenland Home Rule arrangement (Henriksen 2001).

How do such issues relate to protected area governance? The current promotion of indigenous protected areas and community-conserved areas would seem to fit well with indigenous political visions of self-governance. Durban recommendation 5.27 e.g. speaks of recognizing “indigenous peoples’ community conserved areas as a protected area governance type, build up on *their traditional and evolving institutions* and customary norms”. This is further accentuated by recommendation 5.24 recommending to:

> “ENSURE that the establishment of protected areas is based on the free, prior informed consent of indigenous peoples, and of prior social, economic, cultural and environmental impact assessment, undertaken with the full participation of indigenous peoples”

*IUCN Social Policy Discussion Paper*
Yet, in practice, securing official integration of CCAs according to indigenous governance visions may, in practice, prove difficult and requires addressing a range of issues (see e.g. WCPA 2004 for some of the questions). Indigenous territories may be subject to on-going negotiations, and even conflict, raising a substantial amount of issues e.g. regarding jurisdiction, roles and rights of institutions. As discussed above in the rights-section, such challenging situations can be handled in a number of ways to nevertheless secure progress on the conservation front.

Clearly, governance issues entail understanding different areas of competence and establishing appropriate governance approaches accordingly. Part of the challenge with new forms of governance evolves around how to address different levels of competence rather than only promoting specific types of governance.

**From types to scales; cross-scale management in ecosystem context**

The different governance models show-cased in Durban such as community conserved areas, co-management and private protected areas reflect different abstract models rather than necessarily the specifics on the ground. Protected area management in practice almost always entails working at different scales (McNeely 2004:19), which typically involve government-management, co-management and community conservation simultaneously. In reality, it is rarely an either-or question. It involves the careful design of institutions with different responsibilities to effectively address the objectives set at different scales. This relates to governments, which:

“cannot delegate their role as guarantors of the conservation of a country’s cultural and natural heritage, so the appropriate authorities need to build the capacity to fulfill their regulatory and management duties and responsibilities” (McNeely 2004:21).

What changes with governance innovation is therefore not the disappearance of national biodiversity action plans and central responsibilities for maintaining cultural and natural heritage, but rather how such responsibilities are implemented and partially devolved through other management approaches. As the recommendation on co-management puts it:

“The sharing of protected area management authority, responsibilities, benefits and costs should be distributed among relevant actors, according to legitimate entitlements. Such entitlements should be defined through a negotiation process that specifically involves disadvantaged groups, and results in stronger engagement of civil society in conservation. (WPC Rec 5.25)”

WPC Rec 5.17 on governance types also mentioned that “systems combining different governance types are likely to be more resilient, responsive and adaptive under various threats to conservation, and thus more sustainable and effective in the long run.” It further recommends governments to:

“Promote relationships of mutual respect, communication, and support between and amongst people managing and supporting protected areas under all different governance types.”

It should, however, beyond devolving management and encouraging communication also involve a strong emphasis on horizontal and vertical integration. This was e.g. very clear in the Durban presentation made by Australian Aborigines from the Nantawarrina indigenous
protected area seeking to integrate the area with surrounding landscapes as well as the broader protected area systems.

In the promotion of community-based protected area models, the eagerness to strengthen the role of communities, from a moral imperative, risks overshadowing the necessity and reality of inter-linked systems requiring management responsibilities at all levels. In reality, most if not all approaches require cross-scale management responsibilities. As Berkes notes:

“Environmental disturbances in one area (e.g. mountain erosion) may generate feedbacks somewhere else within the same ecosystem (e.g. the lower watershed), hence the need for cross-scale management” (Berkes 2000:1).

It is also quite evident that biodiversity conservation in general requires addressing issues such as biodiversity threats at larger scales beyond the boundaries of indigenous territories. Further reasons, related to indigenous concerns, include the importance of central legislation and enforcement to support the viability of indigenous management efforts in often hostile environments (massive in-migration, strong external industrial actors etc).

Another reason often put forward in the favour of community conservation, and thus further adopting CCAs, relates to failure of many government-run protected areas (also known as “paper parks”). Yet, how big are the chances for communities succeeding where governments have failed? The root causes behind park failure are very often, beyond the reach of any governance regime and relate to far broader issues of inequity, poverty and political systems. Communities may be just as vulnerable to poor governance as public services. Furthermore, community institutions are under considerable outside pressures. Another danger of over-emphasizing community management is the danger of codifying or freezing existing practices without addressing necessities of change or broader scales of management (Berkes 2000).

The key issue is that in redesigning governance approaches for protected areas, community-conserved areas or co-management do not offer quick-fix site-based solutions to what essentially constitutes multi-scaled problems. Management responses need to respond to, address and benefit from all governance levels. In other words, the choice is not between central or decentralized management, but one of identifying appropriate roles for each level. For more community-driven approaches, there is, in many countries, a clear need for centralized legitimacy support. Beyond this, there is often a need for enforcement support. Are resources and capacity, for example, sufficient to monitor ‘free-riders’ and enforce regulations?

<table>
<thead>
<tr>
<th>Governance level Domain/ function</th>
<th>National</th>
<th>Regional government management</th>
<th>Co-management</th>
<th>Community-Conserved</th>
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<tbody>
<tr>
<td>Protected area design</td>
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<td>Decision-making structures</td>
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<td>Measuring</td>
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<td>Policy management</td>
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<td>Different roles and responsibilities</td>
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<td>Law enforcement</td>
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<td>Border management</td>
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<td>Cultural &amp; sacred sites</td>
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<td>Conflict resolution</td>
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<td>Integrating</td>
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\[IUCN Social Policy Discussion Paper\]
Reconciling indigenous peoples and protected areas: rights, governance and equitable cost and benefit sharing.

protected area in broader ecosystem planning processes

The questioning above of how community-conserved areas and co-management is promoted not a rejection of their validity.

On the contrary, many examples are showing their relevance, added value and potential in addressing not only conservation challenges, but also in wider community concerns (see e.g. boxes in WCPA 2004). Indeed, co-management as a comprehensive approach encompassing several levels and scales is more critical than ever in order to effectively link up with other conservation approaches.

Without reopening the whole debate, strengthened and more comprehensive economic approaches (see e.g. Emerton 2000) are needed to establish a broader economic understanding at wider scales in order to craft relevant incentive approaches influencing the site-level. This goes beyond merely securing economic gain in return for lost opportunity costs (the conventional ICDP approach) and requires addressing wider economic processes creating dis/incentives for conservation.

Such a wider approach is particularly crucial for indigenous peoples, despite the often considerable hesitation to engage with economic valuation fearing it may reduce or “commodify” cultural relationships to lands, waters and natural resources.

Indeed, quick-fix one-dimensional benefit solutions will often do little to address the wider threats to indigenous livelihoods and territories. Multi-scale economic analysis may in turn however, help identify how economic structures, policies and activities influencing indigenous resource use, customary land tenure and ultimately provide a better idea of the drivers behind unsustainable development.

Indeed, there is a danger that support to local level protection efforts alone become a preferred tool by donors and governments to implement CBD PoW with regards to indigenous concerns rather than less “sexy” subjects such as land reform, payment for ecosystem services or fiscal policy. One of the future challenges in implementing the CBD PoW will, similar to the wider development community, involve moving beyond project-scale interventions to address wider policy concerns.

This requires the rigorous identification of feasible roles and responsibilities in a multi-level and interconnected governance approach.

Repositioning governance in an ecosystem perspective

As discussed above, the wide call in both Durban and the CBD PoW for wider recognition of governance regimes is an important step, yet unlikely to have much impact unless accompanied by other, more structural, changes, which link different scales and challenges rather than opting only for specific types of management changes. This essentially boils down to identifying appropriate management approaches based on actual needs and opportunities as well as the use of other conservation tools where this is deemed more relevant.

IUCN Social Policy Discussion Paper
The key seems to be revisiting co-management. First of all, acknowledging that it encompasses a variety of institutional measures, which may range from community-driven management to government-management with minimal indigenous participation. Secondly, that co-management, say from the national perspective, involves inter-linking and combining different management approaches for territorial or area management as well as specific species regimes. Thirdly, that co-management entails further combination of different conservation measures including e.g. economic incentive measures.

Such combined approaches will be critical to address the vast diversity of protected area-indigenous people relationships and have substantial implications in terms of repositioning the role of government agencies in relation to indigenous peoples and protected area management. How are central regulatory and policy adapted to the specific needs of indigenous peoples? How do protected area agencies move from promoting protected areas towards promoting a wider set of conservation tools? A key challenge here involves protected area agencies taking on a facilitator role.

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<tr>
<th>Conventional roles of pa agencies</th>
<th>Pa agency as facilitator</th>
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<tr>
<td>Enforcing strict legal frameworks</td>
<td>Creating adaptive legal frameworks</td>
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<tr>
<td>Protecting conservation interests</td>
<td>Identifying conservation interests and concerns of indigenous peoples</td>
</tr>
<tr>
<td>Inserting protected areas in landscape</td>
<td>Building linkages protected areas as part of wider landscape/ ecosystem strategies</td>
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<tr>
<td>Closed system of protected areas</td>
<td>Open system: Linking different governance modalities and levels</td>
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<tr>
<td>Centralized governance, directive approach</td>
<td>Harmonizing, coordinating different central – decentral approaches</td>
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<tr>
<td>Enforcement</td>
<td>Conflict resolution, building alliances</td>
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</table>

Developing adequate management mechanisms extends well beyond the immediate institutional design or creation of an area. When national parks were set up in the Nunavut, Canada this did not simply involve having a contract signed between Parks Canada and a Regional Inuit Organization or the establishment of a joint park management committee, it entailed a management planning process including steps such as:

1. Establish Planning Team
2. Develop Scoping Document (Terms of Reference)
3. Draft Management Plan
4. Public Consultation
5. Revision following public Consultation lead to final plan
6. Committee recommends plan to Minister

This remains a fundamental lesson in reconciling indigenous peoples and protected areas. The new paradigm is not about reinventing new blueprint models merely doing the opposite of previous exclusionary protected area models. It does, for example, not suggest to replace all existing protected areas with community conserved areas. However, it does call for a

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27 Cooperative Management in Auyuittuq National Park of Canada, Nancy Anilniliak Park Manager, Auyuittuq National Park & Elizabeth Seale Superintendent, Parks Canada – Nunavut

*IUCN Social Policy Discussion Paper*
systematic and comprehensive approach to management planning processes fully and effectively involving indigenous peoples and thus revisiting appropriate objectives for an area as well as opening up for other governance options.

A critical aspect in this respect was the Durban call for resilience and adaptive management. The need for adaptive and resilient management systems for protected areas derives not only from a social policy perspective (e.g. in the context of mobile peoples, Durban recommendation 5.27), but broader “science-based” findings acknowledging that biodiversity is *per definition* in evolution and, secondly, that climate change and impacts from other developments will require protected area strategies capable of changing.

The bottom-line is that management planning has gone from the introduction of standard institutions towards a much more open-ended process of making strategic management choices between a panoply of conservation tools. This offers significant opportunities to work with indigenous ownership and engage in a process of re-defining roles and responsibilities.
Sharing costs and benefits: from deficit towards equity?

What is equitable cost and benefit-sharing about? The bottom-line reveals that the costing of protected areas has tended to cover mainly out-of-pocket resources for designation, management maintenance and not the lost opportunity costs of indigenous and local communities. Yet, the fact that wider society has not been paying what it costs to undertake conservation, no longer legitimises letting indigenous communities pay instead. What are then the potential “mechanisms” for introducing equitable cost and benefit-sharing?

CBD PoW goal and target
Goal 2.1 – To promote equity and benefit-sharing
Target: Establish by 2008 mechanisms for the equitable sharing of both costs and benefits arising from the establishment and management of protected areas.

Given the history of protected areas creating social and economic deficits for indigenous and local communities, securing equitable and pro-poor management practice is a challenging one particularly given that future protected area expansion will mainly take place in low-income countries (Rodrigues et al 2004). The question concerns both government-driven protected areas as well as indigenous peoples own protected areas. Activity 2.1.1 of the CBD PoW suggests Parties to:

“Assess the economic and socio-cultural costs, benefits and impacts arising from the establishment and maintenance of protected areas, particularly for indigenous and local communities, and adjust policies to avoid and mitigate negative impacts, and where appropriate compensate costs and equitably share benefits in accordance with the national legislation.”

From this point of view, it would seem that such a “mechanism” implies a relatively straightforward exercise involving a valuation process of costs and benefits followed up by mitigation of negative impacts, compensation where necessary and equitable sharing of benefits.

Whereas the focus in above sections was on empowering indigenous peoples in the context of rights, objectives and governance, equitable cost and benefit-sharing essentially builds on the recognition that indigenous and local communities bear most of the costs of protected area establishment and maintenance in terms of lost opportunity costs. Thus while there is a growing recognition that the protected area community has not been effective in identifying and communicating the value of ecosystem services provided by protected areas to wider society, there is also a broad realization that it is ethically incorrect to continue having indigenous and local communities bearing the major cost of sustaining these services. Indigenous casualties caused by protected areas are not ethically defensible, nor desirable from the point of view of management effectiveness.

A mechanism established to render the equation equitable, once an understanding of cost and benefit distribution has been established, thus basically involves choosing between two approaches:

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While it is likely that more equal access to protected area management will strengthen certain forms of equity, it is far from certain that e.g. gender equity or inter-generational equity are given.

IUCN Social Policy Discussion Paper
Reconciling indigenous peoples and protected areas: rights, governance and equitable cost and benefit sharing.

i. Continuing status quo design of protected areas and the institutional set-up, while increasing investments in benefits (very often community-development schemes, compensation measures, but could also be in the form of subsidies) provided to communities. This has typically been the model promoted by conventional Integrated Conservation and Development Projects. While benefits in early approaches were selected randomly, there is a growing trend towards determining these according to lost opportunity costs or payments in return for ecosystem services provided by the added value of the protected area to surrounding national, regional and local community.

ii. Redistributing benefits to communities through a wide range of options including:

   a. Redistribution of revenue where this (potentially) exists (e.g. from eco-tourism, research, ABS regimes related to genetic resources etc.)
   b. Redesigning (and potentially compromising) conservation objectives to allow for greater natural resource use and development options to decrease lost opportunity costs. Determining acceptable trade-offs from a conservation perspective is critical in this respect.
   c. Strengthening devolution of ownership, management and budgetary means to community institutions along with adequate incentive measures.

In practice, many cases will involve a combination of both. Furthermore, given the sheer cost of the first approach, it is likely that CBD Parties with declining resources (or decreasing donor interest) seeking to implement equitable cost and benefit sharing in practice will increasingly explore the second option. A number of issues need to be highlighted in this respect.

The potential of revenue sharing and further income-generation from protected areas differs widely, but is generally overrated in terms of its economic potential. While CBD activity 2.1.4 to “use social and economic benefits generated by protected areas for poverty reduction, consistent with protected-area management objectives” should certainly be pursued, many protected areas do not generate significant extra social and economic benefits.

As for redirecting (public or private) financial means for management to community-level institutions, this remains a necessary success criterion for equitable cost-and-benefit sharing. This would include the legal recognition of indigenous ownership and management institutions, which in turn would facilitate formalized agreements to pay for added-value in terms of ecosystem service provision and landscape maintenance provided to surrounding society.

**Understanding costs and benefits: framing valuation**

It is often raised that protected areas, besides ensuring in situ biodiversity conservation, provide core economic and ecological services to indigenous and local communities, a benefit, which serves as a core incentive for their involvement (Eken et al 2004, McNeely 2004). Better valuation of ecological services and benefits help understanding the benefits to

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29 The challenge here is to conduct a valuation process, which integrates both long and short-term benefits and costs of increased resource use/development.
indigenous peoples accrued from biodiversity conservation as well benefits to wider society. It is also reasoned that such benefits may not suffice as the only incentive for conservation in a given location, particularly given that many of these services are public goods equally shared by the nation at large or even broader regions such as those further downstream of mountain protected areas or even globally (the West profiting from the mega-diverse rest). This typically results in unequal distribution of costs and benefits. Obtaining a more accurate assessment of the extra value protection provides in terms of ecosystem service provision is a fundamental part of the cost and benefit assessment.

“Information on values to different user groups, and of the driving forces behind these values, is also important for enabling better management, ameliorating threats, and resolving conflicts. However, to date, efforts to communicate these economic and other values to decision makers and others has been ad hoc and has relied on poorly tailored communication strategies and tools.” (UNEP/CBD/SBSTTA/9/INF/3:20)

Ecosystem flows harnessed and maintained by protected areas, whose upstream or wider development contributions are typically undervalued, have also tended to overvalue their contributions to community development strategies. The convergence between community-level costs and benefits and wider cost-benefit analysis of protected areas for national and regional economies is thus necessary. There is a need to move beyond the overall argument that protected areas are beneficial, and fully address how the sharing costs and benefits are distributed in a highly differentiated manner.

This requires a solid understanding of indigenous development priorities, and a sound assessment of the development benefits and potential lost opportunity costs at the community level. Again, such practice currently remains marginal when convincing national and regional authorities about the relevance of protected area establishment.

Approaches such as the Total Economic Value (TEV)\textsuperscript{30} concept (IUCN 1998) are being used to assess such values and provide an opportunity to assess the conservation costs often being borne by indigenous peoples. They, in theory at least, also address social and cultural “non-use” values. It is fundamental that indigenous peoples, protected area agencies and government agencies acknowledge the complementarities of such value assessments. Broader economic assessments are fundamental to ensure that protected area management affecting indigenous development strategies includes equitable cost and benefit-sharing. The assessment and recognition of economic lost opportunity costs is powerful information to redress cost-benefit imbalances. Yet, monetary evaluation will not do the trick alone. Many important “low (economic) value” benefits from natural resource use play an extremely important role, yet may not be captured by through economic valuation alone. The role of non-timber forest products for medicinal, ritual or nutritional purposes or the importance of locally accessible timber for construction, firewood cannot be reduced to monetary values. Valuing a hunting ground, which is also a sacred site in monetary terms may simply miss the point. In more general terms, indigenous peoples’ relationships to their lands and territories are not easily captured by conventional valuation methods, yet constitute the fundamental value through which equity in the context of indigenous peoples should be framed.

\textsuperscript{30} TEV assessments identify values for both present and future uses along different categories (use values (direct/indirect), option values, non-use values and bequest values. 

\textit{IUCN Social Policy Discussion Paper}
There may be considerable social impacts from engineering solutions based on strictly economic information. Women may have to walk longer to gather firewood or rely on traders in turn reducing time and resources spent on taking care of children or securing adequate food. Food quality and access may decrease considerably by replacing access to certain commons with alternative livelihoods without being identified as significant economic issue. Finally, the importance of customary lands and territories and the associated rights (see above) risk being undermined if reduced to a monetary value.

Understanding the costs and benefits at stake require a comprehensive valuation process addressing both the socio-cultural context and the associated rights. One of the major obstacles hindering indigenous peoples from sharing costs and benefits equitably remain the very fact that many indigenous rights (see section above) are either nullified or are not clarified when setting up protected area regimes. This in turn may hinder communities from claiming rights to benefits. Conversely, clarified land and resource rights have substantial implications for measuring the costs and benefits at stake. The lost opportunity costs differ considerably whether speaking of indigenous territorial rights or usufruct rights on government-owned land. Furthermore, indigenous rights emphasize the importance of indigenous visions and values related to land and water. This is particularly an issue in protected areas where resettlement continues to be applied as a conservation strategy. In such cases, compensation schemes derived from an economic assessment cannot and should not, as emphasized in the CBD programme of work on protected areas, replace broader indigenous-driven value assessments and the use of Prior Informed Consent procedures.

In short, the emphasis put on indigenous rights in the CBD PoW provides an opportunity to broaden the scope of valuation processes to move beyond strictly economic criteria. These relate both to process aspects (using e.g. Prior Informed Consent) and substantive aspects, notably through the importance of customary rights to lands, territories and natural resources as an integral dimension to equity for indigenous peoples.

**An equity perspective on unsustainable use**

What then to do with customary natural resource use, which is identified as in contradiction with conservation objectives? Does an effort to secure equitable cost and benefit –sharing not consolidate the need to further recognize the rights of indigenous peoples to continue customary use as a rightful benefit *per se*? The CBD PoW suggest to:

1.5.6 Develop policies, improve governance, and ensure enforcement of urgent measures that can halt the illegal exploitation of resources from protected areas, and strengthen international and regional cooperation to eliminate illegal trade in such resources *taking into account sustainable customary resource use of indigenous and local communities in accordance with article 10(c) of the Convention*. CBD PoW

The formulation of activity 1.5.6 more or less eloquently tries to bridge the CBD objectives on sustainable use and conservation. Indigenous use whether defined as traditional, customary, modern or market-oriented remains one of the most contested aspects in protected areas. How such use is banned, controlled, managed or regulated – and by whom (see above discussions on rights and governance) to a large extent reflect existing distribution of costs and benefits. The end result has typically been inequitable. Indigenous peoples have been required to reduce resource use for the sake of conservation without adequate compensation. What to do? Oviedo captures the indigenous perspective:
“In most cases, the key approach taken by managers is sticking to a narrow concept of “traditional use”, implying that only subsistence use and traditional technologies would be acceptable. Certainly both conditions are difficult to agree for most indigenous communities, because they represent an imposition that condemns them to freezing their cultures, abandoning aspirations to improving their quality of life, and giving up their self-development right. Further, an ethical question emerges: indigenous peoples were imposed protected areas and subsequent restrictions on their lands, and then they are also forced to drop their development right, while the rest of the society enjoys it and moreover benefits from those protected areas. This looks indeed as a very unfair situation.” (Oviedo 2002).

Such unfairness is further accentuated in the context of economic interests such as extractive industries often securing permits for large-scale extraction, while indigenous peoples in neighbouring protected areas or “core zones” experiences dramatic limitations on resource use they depend on for food security and general well-being.

The role of biodiversity and ecosystem services for securing sustainable development remains ill understood. Yet, a growing body of research reveals how the poorest often depend significantly on the sustainable harvest of resources poorly captured by conventional growth analysis. IUCN research has thus shown how some communities in Southeast Asia depend significantly on non-timber forest products for food security and household economies. Support addressing such ecology-development inter-linkages has in the Laotian context had significant impact on poverty reduction, food security and school enrolment (Morris 2002).

In the marine context, despite the limited coverage of MPAs, no-take areas have been instrumental in securing fish stock recovery. It has been estimated that overall fish catches increase if up to 30% of total fishing areas are protected (Mulongoy and Chape 2004). Such win-win arguments are seductive, yet also have their limits, particularly in cases where conservation offer no immediate tangible benefits. Indigenous peoples have often been the first to suffer from the establishment of no-go or no-take protected areas or zones, in part because the significance of their particular, and often highly diverse, customary livelihoods remains undervalued.

While a no-take zone may benefit the fishing fleet at large, it may have the contrary effect on a particular fishing community without the fishing equipment necessary to go to approved fishing areas. Addressing win-win solutions, thus requires a strong equity dimension identifying actual winners and losers. This in turn may, for example, help adapting zonation approaches to set boundaries in both space (strengthening the integration of indigenous criteria in setting spatial limits) and time (core zoning may be time based as is often the case with regulations during breeding seasons) e.g. permitting regeneration of resilient populations. It may also help in devising use and access regimes, which reflect the rights of different user communities.

The CBD goal and target to instate equitable cost and benefit-sharing is a significant step to change this, yet is certainly easier said than done. How to e.g. determine and secure sustainable delivery of benefits to replace resource use has been the preoccupation by conventional Integrated Conservation and Development Initiatives. On the other side of the spectre, use is being promoted as a conservation strategy per se. Typical examples include work on non-timber forest products, sustainable harvesting and other productive use forms of and from biodiversity. Proponents of the “use or loose” argument emphasize that use:

- May play an essential function in maintaining healthy ecosystems and biodiversity
• Maintains bio-cultural landscapes and habitat (e.g. burning, shifting cultivation, livestock grazing maintaining landscapes and improving grass quality for wildlife)
• In mixed use/non-use systems may increase biodiversity (cultivation, selected harvesting, agro-forestry etc.)
• In the context of indigenous territories is often, at least partially, governed by indigenous stewardship
• provides an incentive for ensuring sustainable harvest rates, and thus increases local ownership

The argument that certain use forms actually produce or maintain biodiversity is often put forward, yet certainly also has its limitations. While bio-cultural landscapes of mobile peoples may maintain certain species habitat and corridors (see e.g. WPC Rec. on mobile peoples), the relationship is far from unequivocal. Drivers behind unsustainable use are often externally driven (growing market demands, population increase and outside pressures), and efforts to strengthen customary use as a conservation strategy often encounter practical limitations. The considerable self-reinforcing economic potential of unsustainable wildlife trade is a case in point. Indigenous communities may have as a goal to sustain the resource base without sufficient social cohesion or external support to maintain it. The answer, most often, is not either or. Many areas and species populations are under such enormous pressures from wider society, and, in some cases indigenous communities themselves, that alternatives are needed if conservation objectives are to be maintained. We need to improve our understanding of tipping points and thresholds beyond which potential synergies become antagonistic to conservation (Reid 2003).

In many protected areas in the South, exclusionary protected area objectives banning most forms of use leave few options to explore the potential and limitations of sustainable use. Indeed, the Durban and CBD move from overall protection to specific conservation objectives is fundamental in this respect. Conservation institutions are used to making compromises with powerful actors, and need to get better at doing it with indigenous and local communities. It could, for example, be imagined that a number of non-sustainable extractive activities could be tolerated if they have limited impact on the conservation objectives. This is, indeed, anyway very often the de facto scenario in many protected areas.

The renewed focus on scientific assessments offers an opportunity to address the stigmatization of much indigenous resource use as unsustainable per se without in-depth analysis of root causes, real impact and inherent conservation opportunities. Certain national policies against shifting cultivation tend to neglect the inherent conservation opportunities through improved land tenure regimes and agroforestry approaches. There is, in other words, a need for both indigenous peoples and protected area agencies to collaborate more closely when assessing sustainable harvest or production levels of plants and animals. The recent adoption by the CBD COP 7 of sustainable use principles testify to the importance of strengthening the implementation of this CBD objective.

Furthermore, the protected area community needs to get even better at understanding and working certain forms of higher-impact use forms, which may need to be tolerated in exchange for other protection objectives. Trade-offs, particularly in connection with the establishment of new protected areas in what is likely to be increasingly productive landscapes are necessary. Learning more from experiences with IUCN protected area categories V and VI are essential in this respect (see e.g. Philips 2002).
The equation is not simply one of establishing trade-offs between conservation and use priorities. Indeed, many ICDPs have experience how such “simple equations” rarely fit reality. In this line of thinking, recognizing customary use right may not necessarily strengthen commitment to other conservation objectives.

Recognizing customary use as part of a strategy to secure equitable cost and benefit sharing should in this respect not water down conservation objectives. On the contrary, capacity to enforce indigenous conservation responsibilities should be tackled head-on. Although much work on putting restrictions on customary use have been criticized for freezing cultures, such restrictive approaches may very well be inevitable to reach particular conservation objectives. It is true that accepting and formulating the issue in terms of tolerating “subsistence or traditional use”, while banning modern technologies has been somewhat misleading of the real issue at stake. Indeed, the question is not one of traditional hunting-gear vs. modern hunting techniques or subsistence vs. commercial enterprise, but one of identifying means and the quantitative or qualitative limits of use in order to restore and sustain the resource base.

Traditional harvesting techniques may prove to be the most effective means to reach the objective, but there is a critical need to reformulate this as a conscious trade-off rather than an act of benevolent tolerance through the imposition of development restrictions. This may e.g. involve policy measures to consider indigenous peoples as “stewards” (Worah 2002) financially supported (compensation, direct payment, subsidies etc) to provide protection services or landscape values benefiting surrounding communities. If we recognize that trade-offs often need to be made between local development priorities, national and global conservation priorities, it needs to be clarified how such trade-offs are made and make this explicit in agreement building between conservation agencies and indigenous peoples.
Concluding remarks: from paradigms and panacea to practicality

“Discussion of “natural” alliances between conservationists and indigenous peoples and the need to work closely with local communities, common just a few years ago, has largely disappeared (Chapin 2004).”

Perhaps they have, but rather than being replaced by “changed priorities”, the conservation community is gradually coming to terms with the actual implications of working with indigenous peoples. Alliances need to be built around substantial concerns rather than vague assumptions of shared interests. There has been a considerable and growing collaboration between indigenous peoples and conservation actors, be they national or international. These are not easy relationships further complicated by the often unequal distribution of power and resources. Some cases may, indeed, end in court requiring constructive efforts to secure agreements to move beyond a situation of stalemate. Yet, although currently not the norm, is it not reasonable right, to say the least, for people who have many times suffered under the creation of protected areas to the benefit of wider society?

Current recognition of indigenous rights by the conservation community is a quantum step forward from previous protected area policy, yet the current CBD PoW is not a “magic bullet”, which will do the trick solving long-lasting legacies, on-going controversy, power differences not to mention the emerging conservation challenges of climate change and increasing global demand for natural resources. Neither is there a universal mechanism, which has now appeared to swiftly and equitably solve conflicts and standouts between indigenous peoples and protected areas nor wider nation states for that matter.

While the protected area policy agenda is now about reconciliation, it should also be remembered that many other socio-economic forces often go in opposite directions. Governments face competing claims for indigenous territories, and protected area promoters, and indigenous peoples are rarely among the most influential actors to determine the final decision. Although, both movements have made significant headway within the last decades, the general picture is one of increasing, rather than decreasing, external pressures on indigenous territories and overlapping priority areas for conservation. The reconciliation process is necessarily embedded in such struggles between competing interests.

Both indigenous peoples and protected area agencies have generally more to gain from collaborating than pursuing individual agendas.

For many indigenous peoples pressures from extractive industries or in-migration present immediate and long-term challenges to their management of ancestral lands and waters. The point is that for many indigenous peoples the choice is not simply one of choosing between sustainable development within or outside protected areas. It is rather one of choosing

31 As Chapin mentions: “Establishing a relationship of trust across cultures, when people come to the table carrying different agendas and worldviews, requires patience and respect - qualities that are hard to muster even in normal circumstances. The challenge grows exponentially more difficult when money intervenes and the relationship becomes glaringly asymmetrical, with virtually all of the money and power held by one side (2004:22).”

IUCN Social Policy Discussion Paper
between uncontrollable developments exerted by outside actors and further protection value provided by protected areas. Many indigenous communities are unlikely to ensure effective protection of their territories and benefit from their stewardship role in conservation merely through claiming legal recognition. Alliances with other actors, notably the conservation community, offers important opportunities in this respect.

Protected area agencies, in turn, are unlikely to secure effective, efficient or equitable conservation regimes on indigenous territories without indigenous support. Protected areas, and conservation at large, is increasingly perceived as a particular development choice rather than a value in itself. From this perspective, mutual disagreements should not overshadow the importance building mutual support – and political pressure - for alternative development models.

If the overall purpose of the CBD PoW is taken seriously, protected areas designed to reduce biodiversity loss should also be measured in terms of impact and performance on other aspects of sustainable development and thus also in terms of their contribution to the MDGs. While presenting an immediate extra burden for protected area agencies, it is, indeed, also a challenging opportunity to further make the case of protected areas for sustainable development policies, securing extra financial means based on such relevance as well as building credibility and relevance at the local level.

In this respect, an aspect which may easily be neglected in protected area gap analyses concerns the conservation potential in indigenous areas currently degraded, but with substantial opportunities for livelihood rehabilitation and ecological restoration efforts in terms of e.g. building incentives for people relying on biodiversity and ecological services for their livelihoods. Gap analysis tends to focus on what’s there already (remaining) rather than including what could be there. The immediate response may be that the conservation community has more than enough in dealing with immediate biodiversity loss. Be it as it may, but does this hinder building long-term partnerships and strategies with indigenous peoples moving beyond ad hoc negotiations regarding particular areas of immediate priority?

Two reasons could be highlighted. First, if protected areas are to build on existing support rather than starting from scratch, community efforts to reestablish control of territories and harness management of ecosystems provide an important opportunity to consolidate alternative, conservation-oriented, development models.

Secondly, the ambitious protected area agenda is likely to meet considerable resistance from stakeholders in many productive landscapes. Energy and resources may be better spent on recreating protected areas in areas with future conservation potential and interest rather than only investing into isolated areas under immediate threat.

As protected area thinking increasingly seeks to link up to surrounding landscapes and wider ecosystem management not least in the context of climate change, building on customary territorial relationships and rights offers a golden opportunity to rework the topography of conservation. Trade offs are critical in this respect.

Immediate conservation impact lost in terms of resistance to large inter-connected strict protected areas with fixed boundaries based on biological criteria as we know them today, could be regained through multi-pronged conservation strategies for indigenous territories including the use of networks of different protected area categories, incentive measures and
alternative development practice. The resilience and adaptability of such approaches would seem to stand a better chance in challenging wider threats of climate change and socio-economic pressures.

This does not make full indigenous participation in protected area management a sacrosanct institution beyond criticism or improvement. Discussions about the management effectiveness of indigenous peoples’ initiatives are as critical as the self-inspection the protected area community embarked on in Durban. Yet, criticisms of new governance approaches and practices should not lead to shooting down indigenous involvement, questioning indigenous institutions or their rights – while Durban critically reviewed protected areas management, it did not lead to its abandonment, but redefining priorities and “good practice”.

As discussed in this paper, “good practice” - or perhaps rather “good policy”- around indigenous rights, alternative governance and equitable cost and benefit sharing are key milestones in reconciling the relationship between indigenous peoples and protected areas. Yet, it is also clear that these paradigm changes do not offer panacea solutions for indigenous communities and protected area promoters rather a window of opportunity.

Recognizing customary rights in protected areas offer opportunities to revert the legacy of marginalizing indigenous communities and in turn rebuild substantive conservation alliances. This in turn requires constructive engagement and hard work around how not only to benefit from shared conservation priorities, but also how to proceed in cases, where disagreement persists.

Such decisions may increasingly be taken through alternative governance options recognizing the say of indigenous communities regarding conservation options. However, the scope of such governance changes also presents limitations. This paper has particularly emphasized the importance of addressing governance as a multi-scale issue rather than an either-or choice between government-managed protected areas and more devolutionary approaches. The problems and threats facing indigenous territories and protected areas are of such a multi-levelled character, that attempts to respond effectively in most cases necessarily involves combining government-management, co-management and community conserved areas.

The aim for equitable cost and benefit sharing is a powerful ethical attempt to ensure that indigenous and local communities do not bear the costs of protected areas management without reaping adequate benefits. There are economic consequences – as well as opportunities - for indigenous communities and there is a need to value them without reducing the indigenous ancestral territorial relationships to monetary values alone. The potential of strengthening stewardship arrangements based on the added value of indigenous protection efforts of valuable ecosystem services for surrounding national and global society is a case in point. Defining equity in terms of the specific concerns and rights of indigenous peoples are critical in this respect.

Refocusing indigenous peoples and protected area discussions around practical issues need not shy away from political agendas. Indeed, the latter more than ever require practical approaches to transform global standards into tangible improvements for the everyday lives of communities within existing as well as new protected areas. If such reconciliatory steps are not taken, the worst-case scenario would involve collaborative efforts coming to a standstill rather than benefiting from the considerable opportunities, and growing body of good practice, for mutual support.
A Second UN Decade on Indigenous Peoples is now under way and securing progress in terms of protected area reconciliation is a critical benchmark to make real progress not just in the environmental field, but for indigenous peoples as such. Although the programme of work for the second decade does not include specific wording on the protected areas, the convergence with the CBD PoW is evident and there is a clear overlap in terms of timing. Critical decisions relating to protected area system and policy design will be made in the next few years with a clear need to reflect the advances made in terms of recognizing indigenous concerns.
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