



## A Rights-based Approach to Forest Conservation

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# Conservation with Justice

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Thomas Greiber, Melinda Janki, Marcos Orellana,  
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# Foreword

At the Third IUCN World Conservation Congress, which took place in 2004 in Bangkok, Thailand, the IUCN membership adopted IUCN Resolution 3.015 “Conserving Nature and Reducing Poverty by Linking Human Rights and the Environment”. This resolution affirmed that “... social equity cannot be achieved without the promotion, protection and guarantee of all human rights...” It therefore requested the IUCN Commission on Environmental Law “... to provide additional legal research, analysis and resources, and build the capacity of members in the enforcement of environmental laws, in close collaboration with IUCN members” and “... to provide a progress report to future World Conservation Congresses ... with an emphasis on human–rights tools that may be used by IUCN and its members in pursuit of the Mission”.

As a response, the IUCN Environmental Law Centre with the support of distinct members of the IUCN Commission on Environmental Law prepared this publication to inform all actors – governments, the private sector, local communities, nongovernmental organizations – about the rights-based approach (RBA) and its potential contribution to guiding activities that, if unrestrained, may have a detrimental impact on the environment and on people’s livelihoods.

The term “rights-based approach” has been used in various contexts and has been defined in different ways. This publication uses the approach specifically to explore the linkages between conservation and respect for people’s rights, in particular internationally and nationally guaranteed human rights. Such an RBA to conservation parallels the international consensus on taking an RBA to development, which was forged in the context of the 1996 World Summit for Social Development and elaborated in the Millennium Summit and the World Summit on Sustainable Development.

The overall aim of an RBA to conservation is to promote the realization of conservation with justice. It recognizes that activities and projects related to conservation can have a positive or negative impact on human rights, while the exercise of certain human rights can reinforce and act in synergy with conservation goals.

*Conservation with Justice: A Rights-based Approach* discusses how an RBA might be implemented in the context of conservation-related activities that potentially have a negative impact on people’s rights. It introduces the concept of a step-wise approach to the implementation of an RBA to conservation. This step-wise approach was presented and discussed at the Fourth IUCN World Conservation Congress, which was held 5–14 October 2008 in Barcelona, Spain. Key elements are reflected in the IUCN Resolution 4.056 “Rights-based Approach to Conservation”, which was adopted by the IUCN Members’ Assembly and which lists the following principles in its Annex:

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*“Principles concerning human rights in conservation prepared by the IUCN Environmental Law Centre (ELC):*

- 1. Promote the obligation of all state and non-state actors planning or engaged in policies, projects, programmes or activities with implications for nature conservation, to secure for all potentially affected persons and peoples, the substantive and procedural rights that are guaranteed by national and international law.*
- 2. Ensure prior evaluation of the scope of conservation policies, projects, programmes or activities, so that all links between human rights and the environment are identified, and all potentially affected persons are informed and consulted.*
- 3. Ensure that planning and implementation of conservation policies and actions reflect such prior evaluation, are based on reasoned decisions and therefore do not harm the vulnerable, but support as much as possible the fulfilment of their rights in the context of nature and natural resource use.*
- 4. Incorporate guidelines and tools in project and programme planning to ensure monitoring and evaluation of all interventions and their implications for human rights of the people involved or potentially affected which will support better accountability and start a feedback loop.*
- 5. Support improvement of governance frameworks on matters regarding the legal and policy frameworks, institutions and procedures that can secure the rights of local people in the context of conservation and sustainable resource use.”*

I hope that this publication will provide all stakeholders – within but also outside of the conservation community – with a useful tool to ensure an efficient and effective implementation of the concept of an RBA to conservation, and thus to promote the IUCN’s vision of a just world that values and conserves nature.

***Dr. Alejandro Iza***

*Head, IUCN Environmental Law Programme*

*Director, IUCN Environmental Law Centre*

*July 2009*

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# List of Acronyms

CBD	Convention on Biological Diversity
CDM	Clean Development Mechanism
CER	certified emissions reduction
CIFOR	Center for International Forestry Research
DOE	Designated Operational Entity
EB	Executive Board (of CDM)
EIA	environmental impact assessment
FAO	Food and Agriculture Organization
FSC	Forestry Stewardship Council
IGO	intergovernmental organization
IIED	International Institute for Environment and Development
ITTO	International Tropical Timber Organization
IUCN	International Union for Conservation of Nature
JFM	joint forest management
MA	Millennium Ecosystem Assessment
MDG	Millennium Development Goal
NGO	nongovernmental organization
PDD	Project Design Document
PIC	prior informed consent
RBA	rights-based approach
REDD	reducing emissions from deforestation and forest degradation
SATIIM	Sarstoon Temash Institute for Indigenous Management
UNDP	United Nations Development Programme
UNFCCC	United Nations Framework Convention on Climate Change
UNFF	United Nations Forum on Forests
WHO	World Health Organization





# 1 Introduction

In the United Nations Millennium Development Goals (MDGs), clear targets have been set to achieve a number of goals, such as eradication of extreme poverty and hunger (MDG 1), gender equality (MDG 3), and environmental sustainability (MDG 7). While these MDGs and their targets indicate strong linkages between human well-being and environmental objectives, they do not provide an instrument for addressing this interrelationship, dealing with its complexity, and ensuring that achieving one goal does not negatively affect achievement of another.

The concept of developing and applying a rights-based approach (RBA) to nature conservation could be perceived as such an instrument. The objective of an RBA to conservation is to harmonize nature conservation activities with respect for people's rights (in particular, human rights).

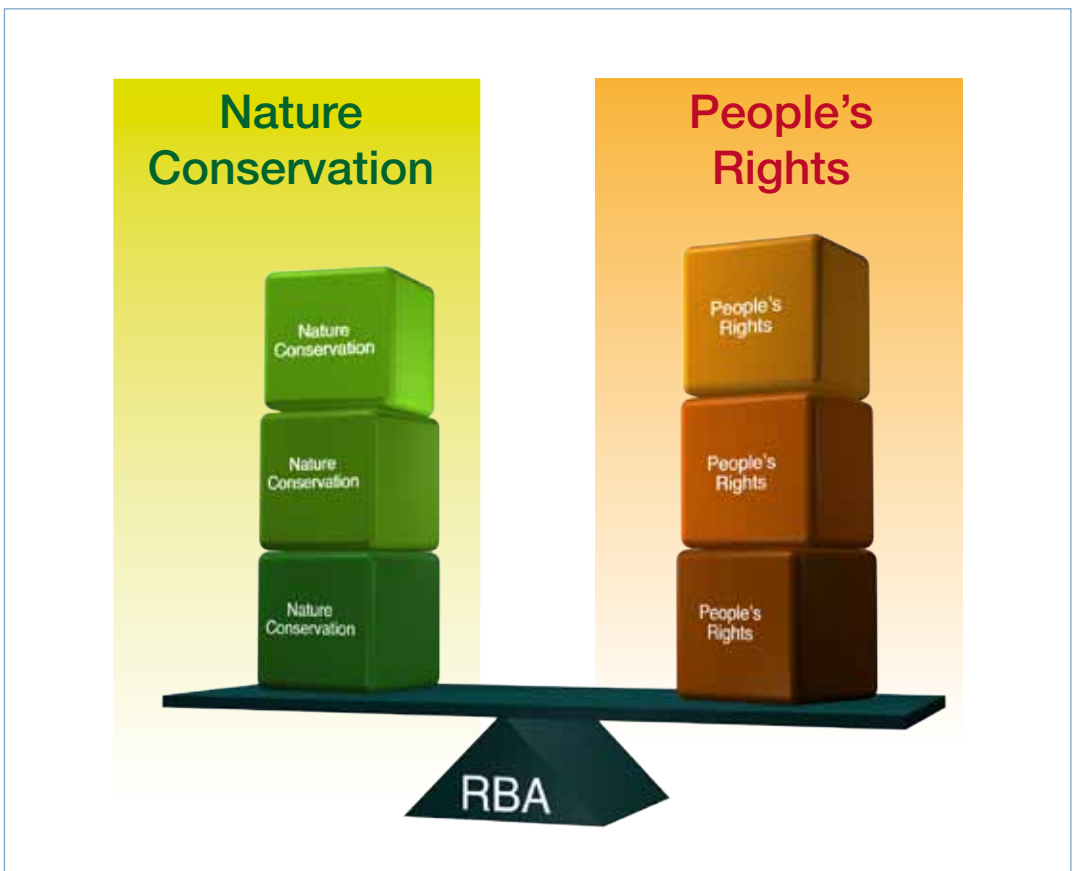


Figure 1: Visual Representation of an RBA to Conservation Objective

While linking environment and human rights issues is not a revolutionary suggestion, the RBA is a relatively new and evolving way of thinking about how to adjust legal and policy instruments in order to acknowledge and strengthen this interrelationship so that sustainable development can be achieved. The harmonization of the two dimensions – nature conservation and people’s rights – and their integration through an RBA in all relevant policies, legislation, and project activities could even be perceived as concretizing or “simplifying” the concept of sustainable development, which covers a range of ideas that bring together environmental, social, and economic development.<sup>1</sup>

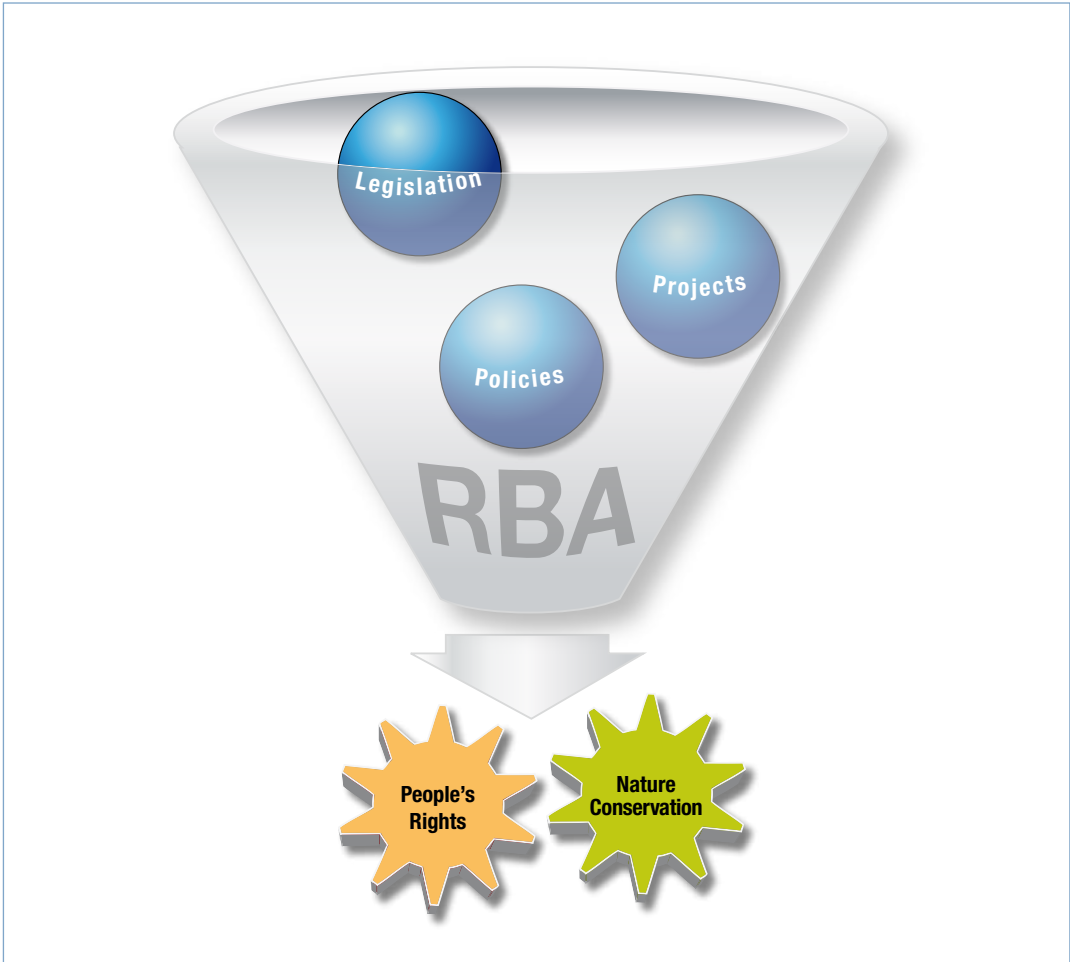


Figure 2: Visual Representation of RBA to Conservation Outcomes

1 See IUCN, *The Future of Sustainability – Re-thinking Environment and Development in the Twenty-first Century*, Report of the IUCN Renowned Thinkers Meeting, 29–31 January 2006 (Gland, Switzerland: 2006). Available at [cmsdata.iucn.org/downloads/iucn\\_future\\_of\\_sustainability.pdf](http://cmsdata.iucn.org/downloads/iucn_future_of_sustainability.pdf).

However, implementation of such an RBA to conservation remains slow to date. As the Millennium Ecosystem Assessment indicates, continuous environmental degradation still adversely affects individual and community rights, such as the rights to life, health, water, food, and nondiscrimination.<sup>2</sup> Countermeasures that aim at halting such degradation are often criticized for their negative impacts on people's livelihoods. Furthermore, the vulnerable communities of the world are both the ones that are suffering the greatest burden of environmental degradation and those least able to mobilize against rights abuses.

One reason for only limited implementation of an RBA in the conservation field is the current lack of an operational framework that would guide participants through such an approach. This gap is closely related to different interpretations of the concept among different actors and the absence of a common language that could be used to achieve consensus on what needs to be done and how. Thus further conceptual development and rigorous testing is required to determine how an RBA to conservation would look and how it could most effectively be applied. For this, it is important to start by creating a common understanding of affected people's rights and visualizing their vulnerabilities in different contexts.

With regard to the latter, climate change, forest conservation, and protected areas are addressed in this publication as they are currently considered as priority issues under the Convention on Biodiversity (CBD), with clearly rights-related challenges. For example, in its expanded Programme of Work on Forest Biological Diversity, the CBD Parties invite all stakeholders to take into account the adequate participation of indigenous and local communities and the respect for their rights and interests.<sup>3</sup> The CBD Programme of Work on Protected Areas also recalls that the establishment, management, and monitoring of protected areas should take place with the full and effective participation of, and full respect for the rights of, indigenous and local communities consistent with national law and applicable international obligations.<sup>4</sup> Conservation and sustainable use of biodiversity and ecosystems generally have to be taken into account when developing and implementing measures to mitigate and adapt to climate change, which according to a Report of the Office of the United Nations High Commissioner for Human Rights is projected to have implications for the enjoyment of human rights.<sup>5</sup>

Against this background, this publication has the following objectives:

- Explaining the critical linkages between nature conservation, respect for people's rights, and human livelihoods;
- Improving the general understanding of "rights" by explaining the different sources of rights, the interdependence of rights and duties, and the importance of both substantive and procedural rights, as well as practical aspects of their implementation in the environmental context;

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2 Millennium Ecosystem Assessment, *Ecosystems and Human Well-being: Synthesis* (Washington, DC: Island Press, 2005).

3 CBD Decision VI/22, Annex.

4 CBD Decision VII/28, 22.

5 "Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights" (A/HRC/10/61), available at [daccessdds.un.org/doc/UNDOC/GEN/G09/103/44/PDF/G0910344.pdf?OpenElement](http://daccessdds.un.org/doc/UNDOC/GEN/G09/103/44/PDF/G0910344.pdf?OpenElement).

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- Describing the implications and the advantages and challenges of applying a rights-based approach to conservation;
  - Suggesting a step-wise approach for applying an RBA to conservation and providing a checklist of key actions that can be adapted to different situations and environmental problems;
  - Discussing this step-wise approach within the context of three key topics of biodiversity conservation: climate change, forest conservation, and protected areas; and
  - Illustrating examples of legal and policy measures that have been taken to achieve particular components of the step-wise approach.

In order to achieve these objectives, Chapter 2 introduces the concept of conservation with justice through an RBA and suggests a step-wise approach for its implementation. Chapters 3, 4, and 5 examine how this suggested concept may be applied to develop law and policy in the context of climate change, forest conservation, and protected areas, where activities conducted by numerous actors have the potential of particularly negative impacts on conservation and livelihoods and where introducing an RBA might be significantly positive for both. It is expected that implementing an RBA to conservation in relation to the three topics will facilitate cooperation among the many relevant actors to shape policies, legislation, and projects towards conservation while ensuring justice among the various stakeholders. Finally, Chapter 6 draws a brief conclusion from the previous chapters and provides the outlook for future research needs and opportunities for promoting the implementation of an RBA to conservation.

Throughout the different chapters, the concern of the authors is to identify how an RBA for proposed and on-going activities can be used to ensure positive conservation impacts, effectiveness, and equity and justice. In this regard, an RBA to conservation – like an RBA to development – follows the principle that the realization of conservation goals (like development goals) should be accomplished in a relationship between rights-holders and the corresponding duty-bearers.

## 2 A Rights-based Approach to Conservation

For more than half a century the international community has acknowledged that human rights represent the inherent attributes of the human person and are the cornerstone of a life with dignity. They represent the maximum claims on society and must be respected in all activities in order to ensure justice. At the same time, it has been recognized for more than three decades that human rights and environmental protection, including biodiversity and natural resource conservation, are interrelated fundamental goals of the global community.<sup>1</sup> The linkages between the two subjects are multidimensional and reciprocal. Several basic principles are generally accepted:<sup>2</sup>

- Failure to conserve natural resources and biodiversity can undermine human rights – e.g., by destroying resources and ecosystem services on which many people, especially indigenous and local communities, depend.
- However, nature conservation can also support the respect for and fulfilment of human rights – e.g., by securing the sustainable availability of critical natural resources and ecosystem services.<sup>3</sup>
- Unfortunately, certain approaches to conservation have the potential to clash with human rights – e.g., the designation of protected areas might exclude people who depend on the natural resources found in this area, and climate change mitigation projects might lead to the displacement of people.
- In addition, failure to respect, ensure, and fulfil internationally and domestically guaranteed human rights can be a trigger for environmental destruction – e.g., by ignoring the needs of individuals and groups who can contribute to conservation with justice if they are consulted and are able to participate in decision making about activities, programmes, and policies that may affect them or their surroundings.

Based on this understanding, activities, programmes, and policies can either undermine or support conservation and/or justice. Applying a rights-based approach (RBA) to conservation is expected to be a means to ensure *conservation with justice*. It is motivated by two main rationales: first, awareness that environmental quality is a prerequisite to ensuring the enjoyment of a host of internationally and domestically guaranteed legal rights and, second, a similar awareness that respect for such rights can lead to better conservation.

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1 See, e.g., the Stockholm Declaration on the Human Environment, Principle 1, and the background papers and final results of the UN High Commission on Human Rights 2002 (Meeting of the Experts on Human Rights and the Environment), available at [www.unhchr.ch/environment](http://www.unhchr.ch/environment).

2 A similar framework of conservation – human rights relationships is described in Campese, J., Sunderland, T., Greiber, T. and Oviedo, G. (eds.) *Rights-based approaches: Exploring issues and opportunities for conservation* (Bogor, Indonesia: CIFOR and IUCN, 2009).

3 Ecosystem services and the natural resources secured through conservation are critical to the enjoyment of many human rights, among them the rights to life, health, personal security, and an adequate standard of living.

### **Box 1: Definitions**

*Conservation with justice* means that all State and non-State actors planning or engaged in policies, projects, programmes, and activities with potential impact on nature conservation shall secure to all potentially affected persons the substantive and procedural rights that are guaranteed by national and international law.

*Conservation*, according to IUCN, means management of human use of the biosphere so that it may yield the greatest sustainable benefit to current generations while maintaining its potential to meet the needs and aspirations of future generations. Thus conservation is positive, embracing preservation, maintenance, sustainable utilization, restoration, and enhancement of the natural environment.<sup>4</sup>

An RBA to conservation with justice, properly implemented, should facilitate the achievement of an ecologically sustainable environment, inter- and intragenerational equity, and respect for the intrinsic value of nature. In sum, the RBA to conservation with justice puts an emphasis on conservation but highlights the livelihoods and rights aspects of projects, programmes, and activities.

## **I Advantages and Challenges of a Rights-based Approach**

Implementing an RBA to conservation requires all those involved in conservation activities, programmes, and policies to respect the rights of affected persons if and as they proceed. Those aiming to develop and apply an RBA to conservation are likely to have advantages and also to face several challenges.

One advantage is that an RBA can illuminate the underlying causes of positive or negative impacts of an activity on people's rights, in particular human rights, and conservation, as well as the impact of the enjoyment or lack of enjoyment of people's rights on conservation efforts, thus allowing better choices in designing and carrying out the proposed project or activity.

A second advantage is that the RBA may improve conservation outcomes by facilitating positive synergies and generally improving the governance of natural resources. It can demonstrate the positive contribution that conserving a safe and healthy environment makes to people's rights and, conversely, it can increase awareness of the negative impact on people's rights of failing to protect critical natural resources and biodiversity. In turn, from the perspective of affected persons, the RBA is likely to increase the legitimacy of proposed activities, programmes, and policies by integrating social concerns with conservation goals, drawing on a widely agreed upon set of norms specifying the rights and responsibilities of all actors. Should the activities prove detrimental to the environment or

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4 World Resources Institute (WRI), World Conservation Union (IUCN), United Nations Environment Programme, *Global Biodiversity Strategy: Guidelines for Action to Save, Study, and Use Earth's Biotic Wealth Sustainably and Equitably* (Washington, DC: WRI, 1992), p. 227.

people's rights, the RBA can be an effective instrument to ensure the accountability of governments, the private sector, and conservation or human rights organizations.

There are also challenges, however, to developing and implementing an RBA related to conservation. While all States have human rights obligations as members of the United Nations and are bound to comply with both human rights and conservation duties pursuant to treaties they have ratified and their own national laws, not all governments are fully engaged in long-term conservation efforts or the realization of human rights. The commitment of non-State actors to conservation and human rights duties may be even more questionable: the degree to which the private sector is bound by international obligations remains a subject of much discussion – business entities, e.g., may challenge efforts to insist on their compliance with international law. Whatever the outcome of this debate, there is no doubt that all actors are duty-bound to conform to the national laws, including guaranteed rights and conservation laws, of the State where their activities take place. And the State is required to ensure that such actors respect the rights of those within the State.

A second challenge arises from the limitations inherent in the RBA itself. It is predominately about human beings. Global human rights texts contain few references to the environment, and efforts to use human rights–complaint procedures to protect nature or other species have had only limited success.<sup>5</sup> Yet with close to 115 national constitutions containing rights to a safe, healthy, or ecologically balanced environment, broader guarantees of conservation as itself a right are emerging.

A further challenge may arise from competition between rights, either across groups or within a single group. The right to property, e.g., may be asserted to limit the designation of a protected area, or the exercise of certain cultural rights may appear to infringe on gender equality. This problem is not new or unique, however. Courts throughout the world have had to balance and reconcile constitutional rights pressed by different claimants. The approach most often taken is to arrive at a decision that can maximize the enjoyment of all claimants' various rights rather than one that disproportionately favours one right or group over another.

Finally, the RBA requires substantial resources of time, expertise, information, and funding to build capacity. These deficits may be mitigated or overcome by seeking out partnerships among all the relevant stakeholders.

## II Understanding Rights

### 1 Sources of Rights

The RBA is facilitated because all legal systems establish a hierarchy among types of laws, claims, and rights. Constitutional (and sometimes treaty-based) human rights guarantees normally have higher value than other laws or regulations and take precedence over them. Other written laws and regulations derived from the democratic, legislative process in turn generally are given higher value than the customs or unwritten laws of any part of society, and these have greater weight than moral claims.

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<sup>5</sup> The Inter-American Commission on Human Rights, e.g., declared a petition inadmissible in which the petitioner asserted that the government had violated the right to property of all Panamanians by authorizing construction of a public roadway through a protected nature reserve. See Case, 11.533 (Panama), Report No. 88/03, Annual Report 2004.



This, of course, does not mean that laws and the rights they delineate necessarily conflict with moral claims, because human rights guarantees, conservation laws, and many other norms have emerged and derive their power in part from moral or ethical values. The moral and legal weight attached to them is an important factor in promoting their respect not only by governmental actors but by all members of society. However, moral or ethical claims that have not been transformed into legal rights usually are not the source of legal obligation and thus lack a basis for judicial or other formal means of enforcement.

Rights are recognized or formulated by many different types of legal texts. International human rights treaties contain internationally guaranteed minimum standards that are understood to be universal, interdependent, and indivisible<sup>6</sup> and are guaranteed to all persons without discrimination.

The same and additional rights may also be guaranteed by national or State constitutions. As noted, close to 115 constitutions throughout the world guarantee a right to a clean and healthy environment, impose a duty on the State to prevent environmental harm, or mention the protection of the environment or natural resources.<sup>7</sup> Over half of the constitutions, including nearly all adopted since 1992, explicitly recognize the right to a clean and healthy environment. The constitutional rights granted in these cases are increasingly being enforced by courts.<sup>8</sup> In India, e.g., a series of judgments between 1996 and 2000 responded to health concerns caused by industrial pollution in Delhi.<sup>9</sup> In some instances, the courts issued orders to cease operations.<sup>10</sup> The Indian Supreme Court has based the closure orders on the principle that health is of primary importance and that residents are suffering health problems due to pollution. South African courts also have deemed the right to a healthy environment to be justiciable. In Argentina, this is deemed a subjective right entitling any person to initiate an action for environmental protection.<sup>11</sup> Colombia also recognizes the enforceability of the right to a healthy environment.<sup>12</sup> In Costa Rica, a court stated

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6 Vienna Declaration on Human Rights, 1993.

7 Examples include: Angola (“All citizens shall have the right to live in a healthy and unpolluted environment.” Article 24-1); Argentina (“All residents enjoy the right to a healthy, balanced environment which is fit for human development.” Article 41); Azerbaijan (“Everyone has the right to live in a healthy environment.”); Brazil (“Everyone has the right to an ecologically balanced environment, which is a public good for the people’s use and is essential for a healthy life.” Article 225).

8 For a discussion of African cases, see Carl Bruch et al., “Constitutional Environmental Law: Giving Force to Fundamental Principles in Africa,” 26 *Columbia Journal of Environmental Law*, vol. 26, no. 1 (2001), p. 131.

9 As early as 1991, the Supreme Court interpreted the right to life guaranteed by Article 21 of the Constitution to include the right to a wholesome environment. See *Charan Lal Sahu v. Union of India*, AIR 1990 SC 1480 (1991). In a subsequent case, the Court observed that the “right to life guaranteed by Art. 21 includes the right of enjoyment of pollution-free water and air for full enjoyment of life”. *Subhash Kumar v. State of Bihar*, AIR 1991 SC 420, 1991 (1) SCC 598.

10 See, e.g., *M.C. Mehta v. Union of India & Others*, JT 1996, reprinted in 1 *The Environmental Activists’ Handbook*, p. 631.

11 *Kattan, Alberto and Others v. National Government*, Juzgado Nacional de la Instancia en lo Contencioso Administrativo Federal. No. 2, ruling of 10 May 1983, La Ley, 1983-D, 576; *Irazu Margarita v. Copetro S.A.*, Camara Civil y Comercial de la Plata, ruling of 10 May 1993, available at [www.eldial.com](http://www.eldial.com) (“The right to live in a healthy and balanced environment is a fundamental attribute of people. Any aggression to the environment ends up becoming a threat to life itself and to the psychological and physical integrity of the person.”).

12 *Funde publico v. Mayor of Bugalagrande and Others*, Juzgado Primero superior, Interlocutorio # 032, Tulua, 19 December 1991 (“It should be recognized that a healthy environment is a *sina qua non* condition for life itself and that no right could be exercised in a deeply altered environment.”).

that the right to health and to a clean environment is necessary to ensure that the right to life is fully enjoyed.<sup>13</sup>

Statutory rights add further protections, often detailing the modalities of the exercise of certain rights, such as the right to participate in environmental impact assessment (EIA) procedures. Customary rights become legal rights only if they are recognized by statutory laws.

## 2 Rights and Obligations

Whatever their legal formulation, it is important to understand that rights are reciprocal in the sense that the rights of one person end where the rights of another person begin. In other words, all rights are coupled by duties towards other persons and society as a whole. In the language of Article 29 (1) of the Universal Declaration of Human Rights (New York, 10 December 1948): “Everyone has duties to the community in which alone the free and full development of his personality is possible.” Thus the exercise of rights and freedoms may be limited to secure the rights and freedoms of others and the general welfare of others, provided the limitations are determined by law and are necessary, proportionate, and non-discriminatory.

A corollary to the RBA to conservation is that duty-bearers (States, multilateral agencies, business entities, organizations, and individuals) have obligations to respect, protect, guarantee, and promote people’s rights and to respect international and national norms concerning conservation. The two goals should be mutually reinforcing and lead States to adopt and implement a minimum set of public policies, laws, and regulations.

Each State has positive and negative obligations with respect to securing the rights of those within its territory and subject to its jurisdiction.<sup>14</sup> A few international human rights agreements, such as the *Covenant on Economic, Social and Cultural Rights*, also contain references to transnational obligations. According to Article 2 of the Covenant, each State party undertakes to take steps not only individually but “through international assistance and cooperation, especially economic and technical,” to achieve the full realization of the rights contained therein.<sup>15</sup>

13 *Presidente de la Sociedad Marlene S.A. v. Municipalidad de Tibas*, Sala Constitucional de la Corte Suprema de Justicia. Decision No. 6918/94 of 25 November 1994.

14 See General Comments of the Committee on Economic, Social and Cultural Rights; Inter-American Court of Human Rights, *Velázquez Rodríguez Case*, judgment of 29 July 1988, Series C, No. 4; and *Social and Economic Rights Action Center and Center for Economic and Social Rights v Nigeria*, African Commission on Human and Peoples’ Rights, Communication No. 155/96, October 2001.

15 While Article 2 grants States necessary discretion and flexibility corresponding to their capabilities, it also imposes some immediate obligations. State actions must be non-discriminatory, States must commit the maximum possible resources to fulfilment of the guaranteed rights, and priority should be given “to ensur[ing] the satisfaction of, at the very least, minimum essential levels of each of the rights”. ICESCR GC No 3, *The Nature of States Parties’ Obligations (art. 2, para. 1, of the Covenant)*, para. 10.

### **Box 2: Positive and Negative Obligations to Secure Rights**

*Respect for rights* means abstention from violating or directly or indirectly interfering with an individual's pursuit or enjoyment of guaranteed rights.

*Protection of rights* means ensuring the observance of rights through control, monitoring, investigation, and enforcement.

Constitutional or statutory guarantees may repeat, reinforce, or add to international minimum standards. In addition, national law may guarantee rights not only against State agents, organs, and actions but against private actors. This in turn means that private actors have their own obligations to respect and protect the rights of others in all their activities, including by sustainable use and conservation of resources. Those involved in activities or projects thus should ensure through prior evaluation of the scope of the activity or project that all potentially affected persons are identified, informed, and consulted. Such planning can ensure that each actor respects and protects guaranteed rights during the life of the project or activity. However, it is important to keep in mind that even in the absence of State regulation, non-State actors should apply an RBA to conservation by conforming their conduct to international norms of human rights and conservation. This is indispensable if they not only admit a social responsibility – which is generally the case – but also take this responsibility seriously and live up to it.

### **3 Substantive and Procedural Rights**

Rights recognized in international and national law today cover numerous dimensions of human well-being and dignity but may be divided generally into substantive and procedural rights.

#### **Substantive Rights**

At the concluding session of the 1972 Stockholm Conference, the participants adopted the Declaration of the United Nations Conference on the Human Environment (Stockholm, 16 June 1972), which established a foundation for linking human rights and environmental protection in law. Principle 1 declared that “Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being”.

The necessity of environmental protection to the enjoyment of human rights has also been recognized by international human rights bodies, such as the Inter-American Commission on Human Rights:

The American Convention on Human Rights (San Jose, 22 November, 1969) is premised on the principle that rights inhere in the individual simply by virtue of being human. Respect for the inherent dignity of the person is the principle which underlies the fundamental protections of the right to life and to preservation of physical well-being. Conditions of severe environmental

pollution, which may cause serious physical illness, impairment and suffering on the part of the local populace, are inconsistent with the right to be respected as a human being.<sup>16</sup>

Furthermore, while many human rights treaties were written before environmental matters or nature conservation were fully considered on the international agenda, there are several relevant textual references.

For example, the International Covenant on Economic, Social and Cultural Rights (New York, 16 December 1966) speaks primarily to the working environment, guaranteeing the right to safe and healthy working conditions (Article 7 b) and the right of children and young persons to be free from work harmful to their health (Article 10 para. 3). The right to health (Article 12) expressly calls on States parties to take steps for “the improvement of all aspects of environmental and industrial hygiene” and “the prevention, treatment and control of epidemic, endemic, occupational, and other diseases”.

The Convention on the Rights of the Child (New York, 20 November 1989) similarly refers to some dimensions of environmental protection in respect to the child’s right to health. Article 24 provides that States parties shall take appropriate measures to combat disease and malnutrition “through the provision of adequate nutritious foods and clean drinking water, taking into consideration the dangers and risks of environmental pollution” (Article 24 (2) (c)). States parties also are to provide information and education on hygiene and environmental sanitation to all segments of society (Article 24 (2) (e)).

ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries (Geneva, 27 June 1989) contains numerous references to the lands, resources, and environment of indigenous peoples (e.g., Articles 2, 6, 7, and 15). The convention requires States parties to take special measures to safeguard the environment of indigenous peoples (Article 4). In particular, governments must provide for environmental impact studies of planned development activities and take measures, in cooperation with the peoples concerned, to protect and preserve the environment of the territories they inhabit.

The most recent UN human rights text, the United Nations Declaration on the Rights of Indigenous Peoples (New York, 13 September 2007) adopted by the General Assembly with only four dissenting votes, contains several provisions relating human rights and environmental conditions. In addition to protection of indigenous lands (Articles 10, 25 – 27) and resources (Articles 23, 26), the declaration contains procedural rights of participation (Article 18) and prior informed consent (PIC) (Article 19) as well as a specific article on conservation. Article 29 states that:

1. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.

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16 Inter-American Commission on Human Rights, *Report on the Situation of Human Rights in Ecuador*, OAS doc. OEA/Ser.L/V/II.96, doc. 10 rev. 1, 24 April 1997, p. 92.

2. States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.
3. States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.

On the regional level, the African Charter on Human and Peoples' Rights (Banjul, 26 June 1981) in Article 24 sets forth that "All peoples shall have the right to a general satisfactory environment favorable to their development".

The Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights (San Salvador, 17 November 1988) similarly contains a right to environmental quality, although the guarantee is not subject to the Inter-American system's individual complaint procedure.<sup>17</sup> Article 11, entitled "Right to a Healthy Environment", proclaims:

1. Everyone shall have the right to live in a healthy environment and to have access to basic public services.
2. The States parties shall promote the protection, preservation and improvement of the environment.

The 2004 Revised Arab Charter on Human Rights (Tunis, 22 May 2004) also contains the right to a safe and healthy environment. Its Article 38 specifies:

Every person has the right to an adequate standard of living for himself and his family that ensures their well-being and a decent life, including food, clothing, housing, services and the right to a healthy environment. The States parties shall take the necessary measures commensurate with their resources to guarantee these rights.

This shows that environmental protection is undoubtedly recognized as a precondition to the enjoyment of some internationally guaranteed human rights, especially the rights to life, health, private and home life, and culture. It directly or indirectly has an impact on other rights as well, such as the right to work and to education. Environmental protection is thus an essential instrument in the effort to secure the effective enjoyment of human rights. Such preconditions to the enjoyment of fundamental rights may be elevated to the status of rights themselves, as happened with the right to equality and nondiscrimination and is increasingly the case with environmental quality itself.

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<sup>17</sup> Despite this limitation in the protocol, applicants have successfully submitted numerous complaints of environmental harm to the Inter-American Commission on Human Rights, invoking, *inter alia*, the rights to life, health, culture, and judicial protection. Several important cases have proceeded to the Inter-American Court of Human Rights, which has issued judgments finding violations and ordering reparations.

**Box 3: List of Relevant Substantive Rights**

- Nondiscrimination and equal protection of the law
- Right to life
- Prohibition of force and child labour
- Freedom of movement and residence
- Right to privacy and home life
- Right to property
- Freedom of religion
- Right to an adequate standard of living (food, medicine, clothing, housing, water)
- Cultural rights
- Minority rights
- Right to safe and healthy working conditions
- Freedom of assembly and expression/opinion
- Right to health
- Right to privacy
- Right to self-determination of peoples (controversial)
- Right to a certain quality of environment (controversial; certain aspects of this right have a global consensus, such as safe drinking water, and nutritious food)

**Procedural Rights**

Procedural rights play an equally important role in the development of an RBA to conservation, since they are essential for supporting as well as ensuring the actual implementation of and compliance with substantive rights.

This approach is illustrated by Principle 10 of the 1992 Rio Declaration on Environment and Development (Rio de Janeiro, 14 June 1992), which declares that access to information, public participation in decision making, and access to effective judicial and administrative proceedings, including redress and remedy, shall be guaranteed because “environmental issues are best handled with the participation of all concerned citizens, at the relevant level”. The same procedural rights are commonly guaranteed in environmental treaties.<sup>18</sup> A few examples of this approach are indicative.

18 See, also Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters (Aarhus, 25 June 1998); Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution Concerning the Control of Emissions of Volatile Organic Compounds or Their Transboundary Fluxes (Geneva, 18 November 1991), Article 2 (3) (a) (4); Convention on the Protection and Utilization of Transboundary Rivers and Lakes (Helsinki, 17 March 1992), Article 16; Convention on Civil Responsibility for Damage Resulting from Activities Dangerous to the Environment (Lugano, 21 June 1993), Articles 13–16; United Nations Framework Convention on Climate Change (Rio de Janeiro, 9 May 1992), Article 6; Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes (London, 17 June 1999); Convention on the Transboundary Effects of Industrial Accidents (Helsinki, 17 March 1992); and Convention on Environmental Impact Assessment in a Transboundary Context (Espoo, 25 February 1991), Article 1 (viii).

The United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (Paris, 17 June 1994), for instance, places human beings at the centre of concern to combat desertification (Preamble) and requires States parties to ensure that all decisions to combat desertification or to mitigate the effects of drought are taken with the participation of populations and local communities (Article 3). The convention emphasizes throughout information and the participation of local communities.

The Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (Rotterdam, 10 September 1998) in Article 15 (2) requires each State party to ensure, to the extent practicable, that the public has appropriate access to information on chemical handling and accident management and on alternatives that are safer for human health or the environment than the chemicals listed in Annex III to the convention.

The Cartagena Protocol on Biosafety (Montreal, 29 January 2000) to the Convention on Biological Diversity (CBD) requires the parties to facilitate awareness, education, and participation concerning the safe transfer, handling, and use of living modified organisms in relation to the conservation and sustainable use of biological diversity, taking into account risks to human health. Access to information on imported living modified organisms should be ensured and the public consulted in the decision-making process regarding such organisms, with the results of such decisions made available to the public. Further, each party shall endeavour to inform its public about the means of public access to the Biosafety Clearing-House created by the convention.

These examples illustrate that procedural rights have special relevance for the development and implementation of an RBA to conservation. An emphasis on rights of information, participation, and access to justice encourages an integration of democratic values and promotion of the rule of law in broad-based structures of governance. Thus, ensuring these rights is not only a way to produce decisions favourable to environmental protection, it can reinforce respect for human rights, the rule of law, and good governance more generally. Experience suggests that “governments that show a disregard for their citizens’ basic rights often protect the environment poorly as well”<sup>19</sup> and that citizen efforts to counter environmental harm tend to promote human rights as well as enhance compliance with environmental norms.

More generally, fairness in procedure is important to ensure the legitimacy and thus acceptance within society of all proposed projects and activities. In law-making or governance, the process by which rules or activities emerge and proposals are adopted is highly important to legitimacy, and legitimacy in turn affects compliance. To a large extent, legitimacy is a matter of participation: the governed must have and perceive that they have a voice in governance through representation, deliberation, or some other form of action.

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19 Hari M. Osofsky, “Learning from Environmental Justice: A New Model for International Environmental Rights,” *Stanford Environmental Law Journal*, vol. 24 (2005), pp. 71, 88.

**Box 4: List of Procedural Rights**

- Access to information
- Participation in decision making
- Access to justice/judicial review
- Due process/fair hearing
- Substantive redress
- Noninterference with international petition (where applicable)

**4 Rights in Practice**

Some of the rights that can be linked to nature conservation and are most often invoked are discussed in this section.

**The Right to Life**

The right to life, enshrined in Article 3 of the Universal Declaration of Human Rights and Article 6 of the International Covenant on Civil and Political Rights, is regarded as the most important right, because without respect for it all other rights would be devoid of meaning. It is a right for which no derogation is permitted, even in times of emergency that threaten the life of the nation. The right to life involves not only a prohibition on the intentional but also the negligent taking of life, thus requiring compensation in cases in which death results – e.g., from the release of toxic products into the environment. It also encompasses an obligation to take positive measures – ensuring the safety of local populations when hazardous products or activities are present, for example, or reducing infant mortality and protecting against malnutrition and epidemics.<sup>20</sup>

The UN Human Rights Committee has received several complaints concerning environmental damage as a violation of one or more guaranteed civil and political rights. In one case, a group of Canadian citizens alleged that the storage of radioactive waste near their homes threatened the right to life of present and future generations. The committee found that the case raised “serious issues with regard to the obligation of States parties to protect human life”, but declared the case inadmissible due to failure to exhaust local remedies.<sup>21</sup>

Similarly, the Inter-American Commission on Human Rights has determined that enjoyment of the right to life depends on environmental conditions:

The realization of the right to life, and to physical security and integrity is necessarily related to and in some ways dependent upon one’s physical environment. Accordingly, where environmental contamination and degradation pose a persistent threat to human life and health, the foregoing rights are implicated.<sup>22</sup>

20 See the General Comment on Article 6 of the Civil and Political Covenant, issued by the United Nations Human Rights Committee, in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc. HRI/GEN/1/Rev.3 (1997), pp. 6-7.

21 Communication No. 67/1980, *EHP v. Canada*, 2 Selected Decisions of the Human Rights Committee (1990), p. 20.

22 Inter-American Commission on Human Rights, op. cit. note 16, p. 88.



Positive obligations emerge from an individual's right to have his or her life respected and protected by law.<sup>23</sup> As stated by the Inter-American Commission:

States parties are required to take certain positive measures to safeguard life and physical integrity. Severe environmental pollution may pose a threat to human life and health, and in the appropriate case give rise to an obligation on the part of a State to take reasonable measures to prevent such risk, or the necessary measures to respond when persons have suffered injury.<sup>24</sup>

In particular, the necessary measures must be taken to remedy existing pollution and to prevent future contamination that would threaten peoples' lives and health, including through addressing risks associated with hazardous development activities, such as mining.<sup>25</sup>

### **The Right to Health**

Every human being is entitled to the enjoyment of the highest attainable standard of health. The Committee on Economic, Social and Cultural Rights has specified that the right to health "embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life and extends to the underlying determinants of health, such as food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy working conditions and a healthy environment".<sup>26</sup>

In the case of *Yanomami v. Brazil*,<sup>27</sup> the petition alleged that the government violated the American Declaration of the Rights and Duties of Man (Bogota, April 1948) by its own actions in constructing a highway through Yanomami territory and by authorizing private exploitation of the territory's resources.<sup>28</sup> These actions had generated the influx of non-indigenous persons who brought contagious diseases that remained untreated due to lack of medical care.<sup>29</sup> The Inter-American Commission on Human Rights found that the government had violated the Yanomamis' rights to life, liberty, and personal security guaranteed by Article I of the Declaration, as well as the right of residence and movement (Article VIII) and the right to the preservation of health and well-being (Article XI).<sup>30</sup> The violations were due specifically to the government's failure to implement measures of "prior and adequate protection for the safety and health of the Yanomami Indians".<sup>31</sup>

But the realization of the right to health is not limited to measures that prevent human exposure to toxic and hazardous substances or to diseases. Specific nature conservation measures can be required to avoid infringements of the right to health. For example, the United Nations Convention to Combat Desertification clarifies that "desertification and drought affect sustainable development through their interrelationships with important social problems such as poverty, poor health and

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23 Article 4 (1) of the American Declaration of Human Rights and Duties (1948) reads: "Every person has the right to have his life respected. This right shall be protected by law... No one shall be arbitrarily deprived of his life."

24 Inter-American Commission on Human Rights, op. cit. note 16, p. 88.

25 Ibid., p. 94. See also *Oneryildiz v. Turkey*, Eur.Ct.H.R. (GC, 30 November 2004).

26 Committee on Economic, Social and Cultural Rights, General Comment No. 14 (2000), para. 4.

27 *Yanomami Case*, Res. No. 12/85, Case 7615 (Brazil), in *Annual Report of the IACHR 1984-1985*, OEA/Ser.L/V/II.66, doc. 10, rev. 1 (1985), p. 24.

28 Ibid., pp. 29-30.

29 Ibid.

30 Ibid., p. 33.

31 Ibid., p. 32.

nutrition, lack of food security, and those arising from migration, displacement of persons and demographic dynamics” (Preamble). The convention sees the phenomenon of desertification as resulting not only from drought but from land degradation linked to loss of natural vegetation (Article 1 (f)). Furthermore, ambient air quality, which has a direct impact on human health, depends in part on the maintenance of forests or other green spaces. Also, the loss of biodiversity can result in famine, since the productivity of ecosystems and presumably their resilience to emerging diseases or pests is connected with the maintenance of biodiversity.

### **The Right to an Adequate Standard of Living**

The right to an adequate standard of living encompasses food, housing, and clothing. Food should be adequate in quantity and quality, free from adverse substances, and acceptable within a given culture.<sup>32</sup> Water should be free from contamination and fit for human consumption. Soil, water, and crops should be assessed to ensure quality is preserved.

The Committee on Economic, Social and Cultural Rights has pursued such questions in monitoring State reports. In 1986 Tunisia reported to the committee, in the context of Article 11 of the International Covenant on Economic, Social and Cultural Rights on the right to an adequate standard of living, on measures taken to prevent degradation of natural resources, particularly erosion, and about measures to prevent contamination of food.<sup>33</sup> The committee has referred to environmental issues in its General Comment on the Right to Adequate Food and its General Comment on the Right to Adequate Housing. In the first, it interpreted the phrase “free from adverse substances” in Article 11 of the Covenant to mean that the State must adopt food safety and other protective measures to prevent contamination through “bad environmental hygiene”.<sup>34</sup> The comment on housing states that “housing should not be built on polluted sites or in proximity to pollution sources that threaten the right to health of the inhabitants”.<sup>35</sup>

### **The Right to Work**

The right to work is enshrined in Article 23 of the Universal Declaration of Human Rights and many human rights treaties. Guarantees for safe and healthy working conditions are contained and detailed in dozens of ILO conventions and recommendations. The right to work can be affected when toxic and hazardous substances are released into the environment (e.g., pesticide pollution affecting agricultural workers) or when noise levels are dangerously high. But infringements on the right to work may also stem from other activities or events that have a direct impact on ecosystems and their services, such as oil spills that contaminate water ecosystems and decimate the fish stocks or the degradation of natural sites that leads to the loss of tourism jobs.

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32 Committee on Economic, Social and Cultural Rights, General Comment No. 12 (1999), E/C.12/1999/5, para. 8.

33 Committee on Economic, Social and Cultural Rights. First Periodic Report of Tunisia, E/1986/3/Add.9.

34 Committee on Economic, Social and Cultural Rights, *op. cit.* note 32, para. 10.

35 General Comment 4 of Dec. 13, 1991, United Nations, *Compilation*, HRI/GEN/1/Rev.3, 63, para. 5.

## The Rights to Religion and Culture

There are over 200 million indigenous and tribal people in the world and many of them live in some of the world's most vulnerable ecosystems: the Arctic and tundra, the tropical rainforests, the boreal forests, riverine and coastal zones, mountains, and semiarid rangelands. These territories used and occupied by indigenous peoples are often seen as important repositories of unexploited riches. According to the views of many indigenous peoples, land should not be torn open and exploited, which they consider a violation of Earth, nor can it be bought, sold, or bartered. There are sacred sites and other religious beliefs implicated. Furthermore, indigenous peoples have, over a long period of time, developed successful systems of land use and resource management. These systems – including nomadic pastoralism, shifting cultivation, various forms of agro-forestry, terrace agriculture, hunting, herding, and fishing – were for a long time considered inefficient, unproductive, and primitive. The notion of sustainability is the essence of both indigenous economies and their cultures.

Thus the cultural and religious rights of indigenous peoples are particularly affected by exploitation of their lands and resources and consequent environmental harm. As found by the Special Rapporteur on Human Rights and the Environment:

Indigenous peoples have a special relationship with the land and the environment in which they live. In nearly all indigenous cultures, the land is revered; "Mother Earth" is the core of their culture. The land is the home of the ancestors, the provider of everyday material needs, and the future held in trust for coming generations.<sup>36</sup>

In the *Toledo Maya* case, the Inter-American Commission acknowledged the importance of economic development for the prosperity of the populations of the western hemisphere but insisted that "development activities must be accompanied by appropriate and effective measures to ensure that they do not proceed at the expense of the fundamental rights of persons who may be particularly and negatively affected, including indigenous communities and the environment upon which they depend for their physical, cultural and spiritual well-being".<sup>37</sup>

The balance between minority or indigenous rights and the protection of marine living resources was also at stake in *Apirana Mahuika et al. v. New Zealand*.<sup>38</sup> In this case, the government of New Zealand acknowledged on the one hand its duty to ensure recognition of the right to culture, including the right to engage in fishing activities. On the other hand, it referred to its "duty to all New Zealanders to conserve and manage the resource for future generations...based on the reasonable and objective needs of overall sustainable management". The Human Rights Committee emphasized "that the acceptability of measures that affect or interfere with the culturally significant economic activities of a minority depends on whether the members of the minority in question have had the opportunity to participate in the decision-making process in relation to these measures and whether they will continue to benefit from their traditional economy".

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36 Commission on Human Rights, Human Rights and the Environment, Preliminary Report Prepared by Mrs. Fatma Zhora Ksentini, Special Rapporteur, E/CN.4/Sub.2/1991/8, 2 August 1991, para. 25.

37 *Maya Indigenous Communities of the Toledo District v. Belize*, Report N° 40/04, Case 12.053 (Merits), 12 October 2004, para. 150.

38 Communication No. 547/1992, *Apirana Mahuika et al. v. New Zealand*, U.N. doc CCPR/C/70/D/547/1993, views issued 16 November 2000.

## The Right to Property

The right to use and enjoy property may be impeded when the State itself, or third parties acting with the acquiescence or tolerance of the State, affect the existence, value, use, or enjoyment of that property without due consideration of and informed consultations with those having rights in the property.

The Inter-American Human Rights Court has given a broad interpretation to the notion of “property”, extending it to communally owned lands and even to lands occupied and used by indigenous peoples that are not considered by them to be “owned”. A landmark case in this context is *Awat Tingni Mayagna (Sumo) Indigenous Community v. Nicaragua*,<sup>39</sup> which originated as an action against government-sponsored logging of timber on indigenous lands of the Awat Tingni community. The Awat Tingnis’ complaint to the Inter-American Commission alleged that the government violated their rights to property, cultural integrity, religion, equal protection, and participation in government. The Inter-American Human Rights Court held that there were violations and unanimously declared that the State must adopt domestic laws, administrative regulations, and other necessary means to create effective surveying, demarcating, and title mechanisms for the properties of the indigenous communities, in accordance with customary law and indigenous values, uses, and customs. Pending the demarcation of the indigenous lands, the State must abstain from realizing acts or allowing the realization of acts by its agents or third parties that could affect the existence, value, use, or enjoyment of the properties located in the Awat Tingni lands. By a vote of seven to one, the Court also declared that the State must invest US\$50,000 in public works and services of collective benefit to the Awat Tingni as a form of reparations for nonmaterial injury and US\$30,000 for legal fees and expenses. In this regard, the issuance by States of natural resource concessions to third parties in respect of the ancestral territory of indigenous people may contravene the rights of those indigenous communities.<sup>40</sup>

However, in its 2007 judgment in the case of the *Saramaka People v. Suriname*,<sup>41</sup> the Inter-American Court distinguished subsistence resources and other resources. The Court easily concluded that resources related to agricultural, hunting, and fishing activities are protected as subsistence activities and that no activities respecting them can occur without the prior informed consent of the people. As for activities involving other resources, the Court struck a balance. It noted that clean water is essential to the subsistence activity of fishing and that water quality is likely to be affected by the extraction of resources not traditionally used or essential for the survival of the Saramaka. In fact, all extractive activities are likely to affect the use and enjoyment of other resources necessary to the people. However, the Court noted that the protection of the right to property is not absolute and cannot be read to preclude all concessions for exploration and extraction in the Saramaka territory.<sup>42</sup> The American Convention on Human Rights, Article 21, itself provides for the limitation of property rights under certain circumstances. In deciding whether such limitations are permissible, the Court set forth three safeguards it deemed essential:

39 *Awat Tingni Mayagna (Sumo) Indigenous Community v. Nicaragua*, Inter-American Court of Human Rights, judgment of 31 August 2001.

40 *Ibid.*, para. 153.

41 *Case of the Saramaka People v. Suriname*, judgment of 28 November 2007.

42 *Ibid.*, paras. 125-126.

- 1 the State must ensure the effective participation of the members of the Saramaka people, in conformity with their customs and traditions, regarding any development, investment, exploration or extraction plan within Saramaka territory;
- 2 the State must guarantee that the Saramakas will receive a reasonable benefit from any such plan within their territory; and
- 3 the State must ensure that no concession will be issued within Saramaka territory unless and until independent and technically capable entities, with the State's supervision, perform a prior environmental and social impact assessment.<sup>43</sup>

In support of this decision, the Court cited the views of the UN Human Rights Committee,<sup>44</sup> ILO Convention No. 169, World Bank policies,<sup>45</sup> and the 2007 UN Declaration on the Rights of Indigenous Peoples. The Court viewed benefit-sharing as inherent to the right of compensation recognized under Article 21 (2) of the American Convention on Human Rights,<sup>46</sup> and this extends to compensation for any deprivation of the regular use and enjoyment of property. Finally, the Court held that large-scale development or investment projects that would have a major impact within Saramaka territory can only proceed with the free, prior, and informed consent of the people, according to their customs and traditions.

### **The Right to Privacy and Home Life**

The right to privacy and home life can be found, for example, in the European Convention on Human Rights (Rome, 4 November 1950). Article 8 (1) provides that “everyone has the right to respect for his privacy, his home and his correspondence”.

Most of the environmental decisions in the European Court of Human Rights have concerned this right to privacy and family life. The Court has consistently held that environmental harm attributable to State action or inaction that has significant injurious effect on a person's home or private and family life constitutes a breach of Article 8 (1).<sup>47</sup> Violations may, for example, occur when national authorities do not respect constitutional or statutory environmental rights.<sup>48</sup>

The harm may, however, be excused under Article 8 (2)<sup>49</sup> if it results from an authorized activity of economic benefit to the community in general, as long as there is no disproportionate burden on any particular individual; that is, the measures must have a legitimate aim, be lawfully enacted,

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43 Ibid., para. 129.

44 See ICCPR, General Comment No. 23, The Rights of Minorities (Article 27), U.N. Doc. CCPR/C/21 Rev 1/Add.5, Aug. 4, 1994; and *Apirana Mahuika et al. v. New Zealand*, U.N. doc CCPR/C/70/D/47/1993, 15 November 2000.

45 See World Bank, *Revised Operational Policy and Bank Procedure on Indigenous Peoples*, OP/BP 4.10 (Washington, DC).

46 Article 21 (2) provides that “[n]o one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law”.

47 See *Lopez-Ostra v. Spain*, 303C Eur.Ct. Hum.Rts. (ser. A) (1994).

48 See ECHR, *Okay and Others v. Turkey* (App. no. 36220/97, judgment of 12 July 2005).

49 Paragraph 2 provides: “There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health and morals, or for the protection of the rights and freedoms of others.”

and be proportional.<sup>50</sup> In this regard, States enjoy a certain discretion or “margin of appreciation” in determining the legitimacy of the aim pursued.

It is important to note that, as with the right to property, the right to privacy and home life is not violated when reasonable environmental protection measures are taken that limit the use of property. As a consequence, the European Court of Human Rights upheld planning restrictions imposed to preserve natural areas. However, compensation may be required.<sup>51</sup>

### **The Rights to Information and Participation**

Lack of information may exacerbate adverse effects on the rights already discussed by preventing affected people from taking the necessary measures to mitigate adverse effects on their rights.

In the case of *Claude Reyes et al. v. Chile*,<sup>52</sup> the applicant nongovernmental organizations (NGOs) and individuals, including Chilean legislative representatives, alleged that the State of Chile violated the right to freedom of expression and free access to State-held information (Article 13 of the American Convention on Human Rights) when the Chilean Committee on Foreign Investment omitted releasing information about a deforestation project the petitioners wanted to evaluate. Also, the domestic courts’ refusal to admit the subsequent case against the State allegedly constituted a violation of the right to judicial protection (Article 25). While the State argued that the requested information had to be considered confidential and that the release of the information would constitute arbitrary discrimination against the investors, the Inter-American Human Rights Court disagreed. In its judgment finding violations of the right to information and the right to judicial remedies, the Court cited a wide range of documents, including not only declarations of the Organization of American States on democratic governance and its own jurisprudence but also Principle 10 of the Rio Declaration on Environment and Development, resolutions of the Committee of Ministers and Parliamentary Assembly of the Council of Europe, and the Aarhus Convention on Information, Public Participation and Access to Justice. The Court directed the government to devise the means to ensure access to information and provide the information sought by the applicants.

## **5 Accountability and Good Governance**

The implementation of rights and obligations, and thus the application of an RBA to conservation, will only be effective if good governance is ensured and the different actors are held accountable.

Accountability is coupled with the existence of monitoring and compliance mechanisms. As shown in the previous section, international supervisory bodies have elaborated indicators for many of the guaranteed rights that can be used to assess whether or not the rights are being enjoyed in practice. These indicators can be found in the General Comments issued by bodies like the UN’s Human Rights Committee (for civil and political rights); the Committee on Economic, Social and Cultural Rights; and the Committee on the Elimination of All Forms of Racial Discrimination. One

50 See *Hatton and Others v. The United Kingdom* (App. no. 36022/97, judgment of 8 July 2003).

51 See *Chapman v. The United Kingdom* (App. no. 27238, judgment delivered 18 January 2001).

52 See *Claude Reyes et al. v. Chile*, judgment of 19 September 2005, Inter-Am. Ct. Hum. Rts. Ser. C, No. 151.

of the most important of the General Comments concerns the right to water and contains detailed criteria on implementation and monitoring.<sup>53</sup>

In addition to the work of the treaty bodies, the UN Human Rights Council appoints Special Rapporteurs or Working Groups to evaluate the enjoyment of and compliance with specific human rights related to environmental conditions, such as the right to food, the right to housing, freedom of religion, and the right to health. Their annual reports to the council provide another source of indicators that can be adopted or adapted to ensure that projects or activities do not affect conservation in ways that violate human rights, thus conforming with an RBA to conservation.<sup>54</sup> On matters of forced and child labour, and on working conditions generally, the International Labour Organization establishes standards and guidelines.<sup>55</sup>

Another source of detail about rights and obligations linked to conservation is the jurisprudence of international tribunals and review bodies. Most human rights treaties and some environmental agreements allow individuals or groups whose rights have been violated to bring complaints or communications to such bodies, which make factual findings and issue recommendations. If a violation occurs, individuals and groups can submit communications or file complaints with global or regional tribunals or review bodies<sup>56</sup> against the State allegedly responsible, provided the State is a party to the relevant legal instrument.<sup>57</sup> There is no international procedure where claims can be brought against non-State actors, but they may be held accountable at the national level if they fail to respect guaranteed rights and conservation laws.

Through the decisions of global and regional bodies, it is possible to see how environmental and conservation impacts interrelate with human rights violations and understand the duties that are imposed on different actors and, in some instances, to get compensation or be awarded other relief. In any case, exhaustion of local remedies is a prerequisite to gaining access to international procedures, allowing and encouraging the State to redress harm.

With greater attention now being given to compliance with human rights guarantees, the accountability of non-State actors has also increasingly been raised as an issue in financial institutions, intergovernmental organizations (IGOs), and litigation. In response, IGOs and NGOs – like major business enterprises – have developed codes of conduct that include measures to respect and protect human rights and to conserve natural resources and the environment. Such codes can be useful tools in developing and guiding the implementation of an RBA to conservation, either by

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53 At its twenty-ninth session, the Committee on Economic, Social and Cultural Rights adopted General Comment No. 15 on „The Right to Water“ (Articles 11 and 12 of the Covenant) (E/C.12/2002/11).

54 United Nations human rights sources mentioned can be obtained through the U.N.’s Office of the High Commissioner for Human Rights at [www.ohchr.org](http://www.ohchr.org).

55 See [www.ilo.org](http://www.ilo.org).

56 In addition to complaints procedures established by human rights treaties, the Aarhus Convention on Information, Public Participation and Access to Justice in Environmental Matters has created a non-compliance mechanism that allows complaints to be brought for violations of the procedural rights it guarantees.

57 Human rights complaints procedures exist in relation to the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the International Convention on the Elimination of Discrimination Against Women, and ILO Conventions, as well as in UNESCO. The three regional human rights systems – for Europe, the Americas, and Africa – also have complaints procedures.

each actor independently or through partnerships among stakeholders and related organizations. Many codes of conduct have been made public and are available online.<sup>58</sup>

Governance, the exercise of authority, is also an important aspect of the RBA. Natural resource governance can be described as: Who has the power to make decisions that affect ecosystems, their resources and the resource users and how those decisions are made; who has the power and responsibility to implement those decisions and how those decisions are implemented; and who is held accountable, and how, if decisions are not implemented.

Good governance can support and be supported by an RBA to conservation.<sup>59</sup> Indeed, the Johannesburg Plan of Implementation adopted at the conclusion of the World Summit on Sustainable Development recognized that “good governance is essential for sustainable development”.<sup>60</sup> Furthermore, according to the UN Office of the High Commissioner for Human Rights, “[A] country cannot achieve sustained progress without recognizing human rights principles (especially universality) as core principles of governance....The concepts of good governance and human rights are mutually reinforcing.”<sup>61</sup>

Good governance thus drives conservation and social outcomes, and it can integrate and reconcile diverse interests across natural, cultural, political, and socioeconomic landscapes. Participation in conservation governance can empower communities, including those that are vulnerable and marginalized, and can mobilize their capacities to protect and fulfil their rights while ensuring conservation.

### III Implementing the Rights-based Approach

As an important first step towards developing and implementing an RBA, each State should develop and adopt policies, laws, and regulations governing activities that could have negative impacts on conservation. Such measures, including planning or land use laws and EIA or risk assessment procedures, should identify and commit to integrating human rights considerations in the design, prior approval, and implementation of all projects, programmes, and activities, whether undertaken by State agents or non-State actors. In addition to complying with international and local laws,

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58 For example: The objective of The World Bank’s environmental and social safeguard policies is to prevent and mitigate undue harm to people and their environment in the development process. These policies provide guidelines for Bank and borrower staff in the identification, preparation, and implementation of programmes and projects. For further information on these, see [www.worldbank.org/safeguards](http://www.worldbank.org/safeguards). The Criteria and Guidelines of the World Commission on Dams (WCD) builds a comprehensive and integrated framework for decision making on water and energy development that incorporates the full range of social, environmental, technical, economic, and financial criteria and standards. This framework is the result of intense study, dialogue and reflection undertaken by WCD, the WCD Secretariat, individual experts, and the WCD Stakeholders’ Forum, which brought together members from 68 institutions in 36 countries, including government agencies, affected people’s groups, multilateral agencies, NGOs, private-sector firms, and research institutes. For more information, see [www.dams.org](http://www.dams.org).

59 Campese, J., Sunderland, T., Greiber, T. and Oviedo, G. (eds.), op. cit. note 2, p. 12.

60 Johannesburg Plan of Implementation, para. 138, at [www.un.org/esa/sustdev/documents/WSSD\\_POI\\_PD/English/POIchapter11.htm](http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/POIchapter11.htm).

61 United Nations Office of the High Commissioner for Human Rights, *FAQ on a human rights-based approach to development cooperation* (New York and Geneva: 2006) pp. 10, 16.



private-sector actors could design their own codes of conduct, as mentioned earlier, or construct a similar publicly available policy commitment to conservation with justice. Components of such codes or policy commitments could include some of the following:<sup>62</sup>

- Recognition that development and other projects and activities have impacts on conservation and human beings, coupled with a commitment to take steps in all cases to minimize environmental harm and ensure respect for human rights.
- Recognition that all stakeholders who are involved in an activity can influence their partners and that all those involved should therefore seek to assist each other to meet their conservation and human rights responsibilities. Supportive actions may include, where appropriate, creating incentives and building capacities for governmental and nongovernmental partners to meet the goal of conservation with justice.
- Recognition that the harmful impact of projects and activities on conservation and human rights often falls disproportionately on the most vulnerable or marginalized individuals and peoples and that efforts need to be made to reach out in particular to these individuals and groups.
- Recognition that there are synergies between conservation and human rights and that these synergies should be identified and promoted through outreach and training, including by bringing together local communities and individuals and organizations with knowledge and experience in conservation and human rights.
- Recognition that ecology, history, culture, governance, economy, law, and other elements contribute to shaping the design and impact of activities on conservation and human rights and that these elements should be investigated and, where appropriate, incorporated into projects and the strategies for implementing them.
- Recognition that increased efforts are necessary to develop and disseminate information about the importance of conservation and respect for human rights in the implementation of all activities and projects.

Once a general RBA framework of laws and policies is in place, it must be implemented with respect to any activity, project, or programme that might have a negative impact on conservation. All programmes designed in accordance with this approach incorporate human rights indicators to monitor and assess the impact of projects and programmes related to conservation. Human rights norms and principles are thus used to identify the initial situation and goals and to assess the impact of the project, programme, or activity. The RBA attaches importance both to the outcome and to the process itself, which should take into account basic principles of nondiscrimination, concern for the most vulnerable and marginalized groups, participation and empowerment, and accountability.

This section describes a step-wise approach that includes some of the significant elements and requirements involved in implementing an RBA.

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62 Adapted from Campese, J., Sunderland, T., Greiber, T. and Oviedo, G. (eds.), op. cit. note 2, pp. 25-26.

## 1 Undertake a Situation Analysis

Before the impact of any policy, project, or programme can be assessed, it is imperative to understand the circumstances and the context in which it is or will be operating. Pre-project analysis is necessary to get a clear picture of any complex operating landscape.

Overall, the legal, policy, economic, and political framework where the proposed project or activity will take place will strongly influence its conservation and human rights impacts. The State's laws and international environmental and human rights obligations may already be identified and known, but it is essential also to inquire about what rights are being enjoyed or exercised, what obligations are being fulfilled, the environmental conditions, and the circumstances that affect the situation in the potentially affected area. This difficult process may involve several parallel efforts that are interrelated with each other and with the objective of ensuring an RBA to conservation:

- Begin a broad, transparent, and equitable collaboration with interested and affected parties.
- Prepare a comprehensive and transparent plan for development, policy decisions, project definition, monitoring, and evaluation.
- Identify the critical potential conservation and human rights impacts, including for the most vulnerable people(s).
- Begin development of indicators of human rights and conservation consequences to be used throughout the process.

### Action 1.1: Identify Actions, Stakeholders, and Roles

Communication with all stakeholders, including the potentially affected right-holders and duty-bearers, is necessary to implement an RBA to conservation. This, however, demands first identifying what actions might have a negative impact on conservation or rights, who the relevant stakeholders are, and what their roles are.

#### Required Action Points:

- Identify the core objectives of the proposed activities and the interests of the proponents (which may create space for later consideration of alternatives that meet these objectives and interests in different ways).
- Identify the potential right-holders, duty-bearers, and other stakeholders.
- Identify project components, partners, and targets, including key benchmarks, focusing on those that appear likely to have negative impacts on conservation or human rights.
- Clarify the powers, limitations, and obligations of the various stakeholders.
- Identify any relevant “lessons learned” from similar prior activities.

### Action 1.2: Identify Applicable Legal Rights, Claims, and Duties

As noted, many internationally recognized human rights are potentially affected by activities that may have a negative impact on conservation, including self-determination and permanent sovereignty over natural resources, life, health, food, housing, information, popular participation, freedom of association, and culture. For any given initiative, only a few rights may be at risk of infringement or

lack of enjoyment. Thus, part of an RBA involves on-going analysis of which specific rights issues are the most pressing in the given context.

**Required Action Points:**

- Determine what rights are recognized (in international, regional, and national law) and enjoyed in the country of operation.
- Identify gaps in the existing legal structure (e.g., core human rights conventions that are not ratified and/or applied in practice; unclear and/or ignored tenure rights).
- Determine what rights are most likely to be affected by the proposed activities.
- Identify rights concerns that have arisen in the past and are relevant to proceeding with the proposed activity.

The identification of relevant rights should include not only local and national law but also regional and international law. Databases of regional and international human rights instruments will indicate which treaties have been accepted by the State.<sup>63</sup> Reports prepared by the government and NGOs and submitted to national, regional, and international bodies as part of the State's obligations under human rights instruments will give additional information about the guaranteed rights, their implementation, and the difficulties encountered in this regard. After analysis, it is important and should be possible to distinguish legal rights, claims, and duties from moral or ethical claims and from claims for legal recognition by a community or group. As mentioned earlier, legal claims are enforceable while moral or ethical claims impose a moral or ethical duty but not a legal one.

**Action 1.3: Identify Potential Impacts of the Proposed Activity or Project**

This process should aim at identifying the current status of the enjoyment of human rights and conservation, as well as determining the key concerns of people within the area likely to be affected by the proposed project or activity. This understanding will help to set goals and enable prediction and measurement of impacts.

**Required Action Points:**

- Engage all stakeholders in a participatory process that reflects relevant human rights and principles (e.g., equity, nondiscrimination, transparency, and accountability).
- Develop an understanding of the cultural, ecological, historical, and socioeconomic circumstances of those potentially affected by the project or activity, including de jure and de facto land use and occupation in the area likely to be affected by the activity.
- Identify the concerns of all potentially affected persons, but especially the most vulnerable people(s).
- Attempt to identify structural and other underlying root causes for deficiencies in conservation and rights protection.

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63 See UN Office of the High Commissioner for Human Rights websites at [www.ohchr.org](http://www.ohchr.org) for information on international instruments and their ratification status.

- Assess the baseline context to determine which rights are being respected, protected, and fulfilled for which individuals or groups and the status of natural resources and conservation efforts (assessments should lead to changes in proposed or on-going projects).
- Develop preliminary indicators to measure the impact of the proposed activity on conservation and human rights, given the baseline context (indicators should be developed and used from the beginning of the process and further refined at each step, rather than just at the monitoring or implementation stage). A full set of indicators<sup>64</sup> should include:
  - Structural indicators, which measure whether appropriate legal, regulatory, and institutional structures are in place that are considered necessary or useful for the realization of conservation with justice.
  - Process indicators, which provide information on the processes by which the aims of conservation with justice have been respected in the design, implementation, and conclusion of the project or activity.
  - Outcome indicators, which provide information on the extent of realization of conservation consistent with human rights.

International agreements and national laws now often require environmental impact assessments that are broad in scope and detailed in their requirements and provisions. Such laws commonly provide that no actor should undertake or authorize a project or activity without prior consideration, at an early stage, of the environmental effects,<sup>65</sup> and they involve a multistep process of gathering and disseminating information.<sup>66</sup> However, while the implementation of an EIA will help assess the environmental impact of an activity, the interrelationship between conservation and human rights is not necessarily taken into consideration. As a consequence, EIA does not substitute for an RBA but is only a part of it.

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64 To the degree possible, indicators should be reliable, valid, consistently measurable over time, and possible to disaggregate. Assessing the indicators should lead to changes in policy or action where the results suggest harm is or might be occurring. Ideally, the process should allow for disinterested, independent verification of the assessment.

65 Espoo Convention (25 February 1991); Article 14(1)(a), Biological Diversity Convention (5 June 1982); Article 4(1)(f), Climate Change Convention (9 May 1992); Article 206, UN Convention of the Law of the Sea (10 December 1982); Article I, Kuwait Regional Convention (24 April 1978); Article 13, West and Central African Marine Environment Convention (23 March 1981); Article 10, South-East Pacific Marine Environment Convention (20 November 1981); Article 14, ASEAN Agreement (9 July 1985); Preamble, Amendments to the Protocol for the Protection of the Mediterranean Sea against Pollution from Land-Based Sources, (Syracuse, 7 March 1996); Article III(3), Agreement on the Conservation of Albatrosses and Petrels (2 February 2001). See also Principle 17 of the Rio Declaration (1992) and Principle 11 of the World Charter for Nature (28 October 1982).

66 In general, the EIA documentation submitted by the originator must contain at a minimum the following: description of the proposed activity and its purpose; statement of the reasonable alternatives, including a no-action alternative; information on the environment likely to be significantly affected and alternative sites; potential conservation or environmental impact of the proposed activity and its alternatives and an estimation of its significance; description of mitigation measures to keep adverse impacts to a minimum; explanation of predictive methods and underlying assumptions as well as the relevant data used; identification of gaps in knowledge and uncertainties encountered in compiling the required information; where appropriate, an outline for monitoring and management programmes and plans for post-project analysis; and non-technical summary, including a visual presentation.

#### **Action 1.4: Identify Potential Conflict Resolution Mechanisms**

A dispute resolution process should also be designed and implemented, when appropriate, to help resolve conflicts over whether a proposed project or activity should proceed.

##### **Required Characteristics of Conflict Resolution Mechanisms:**

- Bearing in mind that project proponents can partner with and draw on the capacities of others (including human rights NGOs and government bodies), dispute resolution processes should be:
- Made known to all the relevant individuals and communities;
- Well-governed (e.g., equitable, transparent, accountable), legitimate, and independent;
- Complementary to other mechanisms providing access to justice;
- Free for claimants;
- Specific and transparent regarding responsibilities and processes (e.g., consultation and investigation process) to take up and address allegations of harm or rights violations;
- Confidential, where desired, including “whistleblower” protections;
- Fair in providing compensation or restitution, where necessary; and
- Linked to more general policies, programmes, or projects that can be adjusted to avoid repetition of harmful actions.

## **2 Provide Information**

Access to information about environmental conditions and proposed activities that might affect conservation as well as human rights is a prerequisite to public participation in decision making and to monitoring governmental and private-sector activities. It also can assist in planning and using the best available techniques for an activity or project. For new or ongoing projects or programmes, the proponent should provide information in order to obtain feedback about any areas of (potential) concern with respect to conservation and human rights impacts that have not already been identified.

#### **Action 2.1: Compile, Publish, and Otherwise Disseminate Information in an Understandable and Easily Accessible Way**

While it is critical for the proponent of an activity or project to gather and assess relevant information about its potential impacts on conservation and human rights, it is equally important that the information is disseminated to the relevant stakeholders in local languages, where appropriate. Information should be disseminated in an adequate manner through appropriate media in order to ensure that it reaches potentially affected persons. In areas where a significant proportion of the population is illiterate, it is particularly important to use non-print media, such as the radio.

**Action 2.2: Disseminate General Information Regarding the Action**

National laws on EIA may regulate the type and amount of information that must be gathered and disseminated.<sup>67</sup> But even in the absence of such requirements, the proponent of a project or activity should ensure that potentially affected persons are provided with all the information necessary for them to give prior informed consent or otherwise participate in the decision-making process. In particular, the potential conservation impacts and the exact scope of the proposed activity must be described with sufficient detail to permit informed participation.

**Action 2.3: Disseminate Specific Information Regarding Legal Rights, Claims, and Duties of Potentially Affected Persons**

Capacity-building efforts should be included throughout the project process and more generally integrated into an RBA to conservation. In particular, part of creating and operationalizing an RBA involves building the capacity of people to understand and claim their rights and the capacity of duty-bearers to understand and meet their obligations. For this, project or activity proponents should take the initiative in disseminating information to potentially affected persons about their legal rights and how to exercise them.

**3 Ensure Participation**

Public participation is critical to an RBA to conservation. As emphasized in *Agenda 21*, Chapter 23:

One of the fundamental prerequisites for the achievement of sustainable development is broad public participation in decision-making. Furthermore, in the more specific context of environment and development, the need for new forms of participation has emerged. This includes the need of individuals, groups, and organizations to participate in environmental impact assessment procedures and to know about and participate in decisions, particularly those that potentially affect the communities in which they live and work.

**Action 3.1: Undertake Consultations**

First of all, consultations have to be undertaken in good faith, with multistakeholder dialogues exploring the advantages and constraints of different options, with the aim of developing a collective vision of desired outcomes.

Proper consultations call for drawing on knowledge gained in prior steps. Having identified the different stakeholders, including rights-holders and duty-bearers, it should be possible to identify the concerns and interests of those potentially affected and then to develop options in order to negotiate, in mutually satisfactory ways, the activities and policies that can avoid or mitigate risks to conservation and the community. This step in the RBA is one of collectively developing a vision of desired circumstances or optimal results. It should also help to identify compromise positions – what all parties can “live with” as outcomes that will meet the goals of conservation consistent with human rights. At this point, the objectives, goals, and desired impacts and outcomes of actions should be clear and accepted among parties engaged in the process.

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67 See footnote 66.

Several problems could arise in the context of consultations. In particular, it may be difficult to determine who speaks for a community and whose voice should be heeded in cases of disagreement within the community. Occasionally the decision-making process of a community may not be compatible with certain international human rights standards (e.g., because it involves discrimination against a part of the community). Project proponents may also face a decision-making process so lengthy that it risks jeopardizing the project. These difficult questions should be addressed transparently and in good faith, where appropriate in cooperation or partnership with others who have relevant expertise or experience with the community. Some guidance is provided by the legal norms themselves. There are, e.g., rights that cannot be suspended or derogated from under any circumstances and that consequently must be given priority in case of a conflict. These include the right to life, freedom from torture and slavery, equality and nondiscrimination, and the judicial guarantees necessary to vindicate rights. Property rights are subject to limitation in the general interest, provided the process is fair and compensation is paid.

Possible options can draw on the resources of a range of actors, including other rights-holders and duty-bearers. Relevant options will vary widely, based on the context. They may include anything from capacity building, advocacy or education, and network building to more technical efforts to clarify tenure regimes, adjust resource access levels, or even adopt more inclusive governance processes (e.g., co-management).

**Required Action Points:**

- Develop options aimed at meeting each priority goal. Guiding questions here might include:
  - What actions/alternative strategies can the proponent use to avoid or at least mitigate negative impacts on conservation and human rights?
  - What actions/alternative strategies can ensure and maximize the benefits that accrue to those potentially affected by the conservation impacts of the project or activity?
  - How might the proponent exercise its influence over partners to avoid or at least mitigate negative impacts and support greater benefits for conservation and the community?
- Make efforts to anticipate unintended consequences, including for long-term conservation objectives, other groups, and other rights.
- Develop criteria for choosing among the possible options for action.
- Further refine indicators and monitoring methods for each option to enable assessment of its impacts.
- Agree to, in as inclusive a process as possible, option(s) based on consistency with criteria.

**Action 3.2: Seek and Promote Free and Prior Informed Consent**

Like EIA, prior informed consent is a procedural mechanism used in advance of activities in order to avoid potential conflict and reduce the risks of environmental or social harm. The procedure is often used, for example, to control movements of hazardous substances or to mediate access to biological resources, in order to obtain disclosure of potential benefits arising from the access.

The Convention on Biological Diversity, e.g., calls for access to genetic resources on agreed terms and requires that such access be subject to the prior informed consent of the provider country of

such resources (Article 15 (5)). The modalities of the CBD PIC process were elaborated through the Bonn Guidelines adopted by Decision VI/24 of the sixth Conference of the Parties in April 2002. The principles set forth that the system should provide:

1. Legal certainty and clarity;
2. Accessibility, in that access to genetic resources should be facilitated at minimum cost;
3. Transparency: restrictions on access to genetic resources should be transparent, based on legal grounds, and not run counter to the objectives of the convention; and
4. Consent of the relevant competent national authority(ies) in the provider country and the consent of relevant stakeholders, such as indigenous and local communities, obtained as appropriate and according to domestic law.

More generally, in the case of the lands and resources of indigenous and tribal peoples, international norms require that the outcome of good faith consultations must be determined by the peoples themselves. The United Nations Declaration on the Rights of Indigenous Peoples stipulates that States “shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them” (Article 19). To comply with international standards, all actors proposing programmes, projects, or activities having an impact on indigenous lands or resources should therefore ensure that free and prior informed consent is obtained.

#### **Required Characteristics of PIC:**

- There is no coercion, intimidation, fraud, or manipulation.
- Information is provided that reveals:
  - Nature, size, pace, reversibility, and scope of any proposed project or activity;
  - Reasons for it being proposed;
  - Duration and range of the affected area; and
  - A preliminary assessment of the likely economic, social, cultural, and environmental impact, including potential risks and fair and equitable benefit-sharing in a context that respects the precautionary principle.
- Information is provided in a form that is accessible and understandable, including in a language that people will fully understand.
- Consent is sought sufficiently in advance to allow for traditional indigenous consultation and consensus processes to take place.
- Indigenous peoples specify which representative institutions or individuals are entitled to express consent on behalf of the affected peoples or communities, consistent with the right of nondiscrimination.
- Consultations are undertaken in good faith, establishing a dialogue of mutual respect and full and equitable participation.



### **Action 3.3: Provide and Use Conflict Resolution Mechanisms to Secure Rights**

Where consultations and PIC procedures fail to resolve differences between the proponents of a project or activity and those potentially affected, it may be necessary for the parties to use third-party mechanisms such as mediation or appeals to administrative or judicial bodies. Rights are intended to be legally enforceable and no project proponent should proceed unless rights have been secured. The conflict resolution mechanisms identified in advance (see action 1.4) should be used first, without prejudice to administrative or judicial procedures.

## **4 Take Reasoned Decisions**

The first three steps are designed to produce the maximum information and input from all stakeholders about the consequences of a project or activity. Once this has been accomplished, a decision must be taken about the proposed project or activity.

### **Required Action Points:**

- Check for compatibility with rights and obligations at the international, national, and local levels.
- Check that the decision making has taken place with proper information and participation.
- Include reasons for the decision.
- Disseminate the decision to all relevant stakeholders.

### **Required Options for Decision-making Result:**

- The project/activity proceeds as envisaged; or
- The project/activity proceeds as modified; or
- A “no action” decision is taken because the detrimental consequences of the project/activity are too severe and cannot be mitigated.

In making the decision, the proponent should keep in mind standards developed by international and national tribunals to review decisions taken for compatibility with human rights. Even assuming all procedural requirements have been followed, an action may still be unwarranted if alternative solutions are available that are less burdensome to guaranteed rights or if the decision fails to strike a fair balance between the benefits of proceeding and the negative impact on particular individuals or groups. The European Court of Human Rights has indicated that it will judge the outcome of a fair process on the merits that an activity authorized as one of benefit to the community in general does not impose a disproportionate burden on any particular individual or group.<sup>68</sup>

### **Required Characteristics of Reasoned Decision:**

- The project/activity should have a legitimate aim.
- The project/activity should be lawfully undertaken.
- The means used should be proportional to the aim, with the test of proportionality being met if there is no unreasonable burden imposed on the affected persons.

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<sup>68</sup> See *Hatton and Others v. The United Kingdom* (GC, 2003, 37 EHRR 28).

The burden of proof may shift to the proponent to justify (by using detailed and rigorous data) a situation in which certain individuals face severe impacts on behalf of the rest of the community.

## 5 Monitor and Evaluate Application of the RBA

After completion of a project or activity, it is important to undertake an overall evaluation of all the actions and their impacts, to start a policy-practice loop/feedback loop. While prior steps may have been largely predictive, “[m]onitoring events and evaluating their performance will hold a mirror to the assumptions that were made at the outset, to see how these assumptions compare with the actual experience”.<sup>69</sup>

Monitoring and evaluation will first of all help determine whether the predictions made during the planning phase were accurate or deficient. It also helps to understand whether and how implemented actions are contributing to identified goals (e.g., conservation, mitigation of negative impacts, or rights enhancement). Furthermore, monitoring and evaluation allows consideration of new developments and unintended consequences. The results should help identify what changes need to be made for more effective implementation of an RBA, and ultimately feed back into a cycle of iterative actions and “learning-by-doing” that over time contributes to a more robust and systematic RBA.<sup>70</sup> A full evaluation consistent with the RBA will include communities and persons affected by the project in the evaluation.

Local laws, regulations, or contractual obligations may impose a legal duty to report the result of monitoring and post-project analysis. In other cases someone prepares the report only for his/her own benefit or to maintain consultations with the affected persons or communities. Obtaining and disseminating information about the evaluations undertaken will further implement the RBA.

### Required Action Points:

- Evaluate the application of the RBA through monitoring procedures.
- Use indicators to assess the impacts of steps taken.
- Compare impacts against pre-determined benchmarks.
- Analyse whether actions are contributing to (positive or negative) unintended consequences.
- Evaluate whether and how outcomes contribute to pre-defined objectives.
- Where objectives are not being met, make efforts to understand why (e.g., by going back to a “root causes” analysis).
- Take account of new conditions that may affect conservation or rights.
- Document the process and identify “lessons learned”.
- Ensure that monitoring is transparent, consistent, and participatory.

69 International Business Leaders Forum and International Finance Corporation, “Guide to Human Rights Impact Assessment and Management Road-Testing Draft” (June 2007) p. 58. available at <http://www.ibf.org/resources/general.jsp?id=123946> . The experience gained from the road-testing will be used to further refine the guide. A revised version of the guide will be published by early-2010.

70 Joint UNEP-OHCHR Expert Seminar on Human Rights and the Environment 4-16 January 2002, Geneva: Background Paper No. 1: *Human Rights and Environment Issues in Multilateral Treaties Adopted between 1991 and 2001*, paras 15 and 16, available at <http://www.unhcr.ch/environment/bp1.html> .

- Draw on the whole evaluation and lessons learned to develop, collaboratively negotiate, and implement any further change to the policy, project, or activity.
- Transparently report the experiences and draw on lessons learned to seek ways of expanding and strengthening the overall foundation of an RBA.

## 6 Enforce Rights

When rights have not been respected or harm occurs, Principle 10 of the Rio Declaration provides that “effective access to judicial and administrative proceedings, including redress and remedy, shall be provided”. *Agenda 21* calls on governments and legislators to establish judicial and administrative procedures for legal redress in order to remedy actions affecting the environment that may be unlawful or infringe on rights under the law. They should provide such access to justice to individuals, groups, and organizations with a recognized legal interest. As noted earlier, denial of access to justice or failure to afford appropriate redress may allow a case to proceed to a regional or international human rights body, which may determine that the State has failed to comply with its international obligations.

Some instruments, such as the OECD Recommendation on Equal Right of Access in Relation to Transfrontier Pollution (Paris, 11 May 1976), make it explicit that the right to a remedy is not limited to nationals of a State. Both the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo, 25 February 1991) and the Convention on the Transboundary Effects of Industrial Accidents (Helsinki, 17 March 1992) call for equality of access. Article 32 of the UN Convention on the Non-Navigational Uses of International Watercourses (New York, 21 May 1997) formulates the same principle under the title “nondiscrimination”.

### Possible Options for Remedies:

- Restoration
 

Remediation of environmental harm or restoration of rights that have been infringed is required, where possible, by the preference for restitution as a remedy. It attempts to return those who have been injured to the position they would have been in had the wrong not occurred. Restoration of degraded natural resources is extremely costly and in some instances impossible. It is this reality that has led to the emphasis on prevention of harm.
- Compensation
 

Civil actions for damages may be brought by those whose rights have been infringed due to activities or projects that negatively affect their livelihoods or the environmental conditions in which they live. Compensation for any economically assessable loss as well as for moral damages is common and can lead to considerable awards to those who have been harmed.
- Prosecution where Violation Amounts to a Crime
 

The function of criminal or penal law is to protect the most important values of society by creating and enforcing penalties, including those involving deprivation of liberty. Increasingly, national law is imposing criminal liability on those who have negative impacts on the environment or seriously infringe the rights of others. In most States, not only the company but also its directors and other senior managers may be held responsible for wrongs committed. Normally, a company will be guilty of an offence if the offence-relevant conduct involves instructions or other acts of a “directing mind” of the company. Criminal sanctions can range from fines for petty offences to

imprisonment for more serious ones. Criminal liability may be primary, accomplice, or conspiracy. In many countries, accomplice liability is imposed on those who give help, support, or assistance to a person committing an offence or who incite, encourage, or counsel such a person. The lesser offence of conspiracy involves a decision by two or more parties to perpetrate an unlawful act.



# 3 A Rights-based Approach to Climate Change Mitigation

The Intergovernmental Panel on Climate Change, in its Fourth Assessment Report on the physical science basis of climate change, reported that “warming of the climate system is unequivocal” and that “most of the observed increase in global average temperatures since the mid-20th century is very likely due to the observed increase in anthropogenic greenhouse gas concentrations”.<sup>1</sup> Thus human-made climate change is a global, multifaceted phenomenon that needs to be taken serious. The magnitude and complexity of the challenges posed by climate change demand immediate action, but so far governments have been unable to respond adequately.

Failure to adopt effective policies and actions to address climate change has increasing impacts on human livelihoods and directly affects people’s rights. These impacts range from increased disease and mortality to food insecurity, water scarcity, and threats to the very survival of communities and future generations. Climate change affects certain communities at a fundamental level by changing the basic environmental conditions upon which their livelihoods and cultural traditions depend. For example, inhabitants of small island states are threatened with total loss of territory and with statelessness due to the possibility that their homelands will disappear under the rising ocean. The Inuit, the indigenous peoples of the Arctic, are facing rapid changes to the Arctic ecosystems that threaten their unique culture. Many communities around the world are also affected by the changing habitat of vectors, which carry diseases and increase human mortality or by more frequent and more serious natural disasters such as hurricanes and droughts that result in tremendous human suffering.

International institutions have taken note of the magnitude of this problem. The United Nations Development Programme (UNDP), for instance, has noted that climate change is the defining human development challenge of the twenty-first century and that failure to respond to this challenge will stall and then reverse international efforts to reduce poverty.<sup>2</sup> Furthermore, UNDP found that the poorest countries and the most vulnerable citizens will suffer the earliest and most damaging setbacks, even though they have contributed least to the problem. Likewise, the World Health Organization (WHO) has carried out ample research on the health implications of climate change.<sup>3</sup> In a 2005 study, WHO showed that many serious diseases are endemic to warm areas of the globe and are therefore likely to spread with increased temperatures. As a consequence, WHO found that the spread of malaria, malnutrition, and diarrhea were directly related to climate change.<sup>4</sup>

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1 “Summary for Policymakers,” in Intergovernmental Panel on Climate Change (IPCC), *Climate Change 2007: The Physical Science Basis. Contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge, UK: Cambridge University Press, 2007), pp. 5, 10.

2 See UN Development Programme, *Fighting Climate Change: Human Solidarity in a Divided World* (New York: 2007), p. 1.

3 See generally A. J. McMichael et al., eds., *Climate Change and Human Health – Risks and Responses* (Geneva: World Health Organization, November 2003).

4 Frank Ackerman and Elizabeth Stanton, *Climate Change: The Costs of Inaction* (Medford, MA: Tufts University, 2006), p. vii.

### **Box 1: Malé Declaration on the Human Dimension of Global Climate Change and UN Human Rights Council Resolution on Human Rights and Climate Change**

In November 2007, the representatives of Small Island Developing States met in Malé, the capital of the Maldives, and adopted the Malé Declaration on the Human Dimension of Global Climate Change. The declaration notes that the environment provides the infrastructure for human civilization and that the impacts of climate change pose the most immediate, fundamental, and far-reaching threat to the environment, individuals, and communities around the planet. The Malé Declaration also notes that the fundamental right to an environment capable of supporting human society and the full enjoyment of human rights has been recognized by the international community. It calls for the cooperation of the UN Human Rights Council in assessing the human rights implications of climate change.

In response, in March 2008 the UN Human Rights Council adopted a resolution on human rights and climate change. The resolution observes that climate change poses an immediate and far-reaching threat to people and communities around the world and has implications for the full enjoyment of human rights. The resolution also requested the Office of the United Nations High Commissioner for Human Rights to conduct a detailed analytical study of the relationship between climate change and human rights.

Source: Malé Declaration on the Human Dimension of Global Climate Change, adopted 14 November 2007, available at [http://www.ciel.org/Publications/Male\\_Declaration\\_Nov07.pdf](http://www.ciel.org/Publications/Male_Declaration_Nov07.pdf); Human Rights Commission, H.R.C. Res. 7/23, U.N. H.R.C., at introduction, para 1, 7th Sess., U.N. Doc. A/HRC/RES/7/23 (28 March 2008).

## **I Advantages and Challenges of a Rights-based Approach**

In light of the impacts of climate change on human communities, the human rights dimension of climate change has received increased attention.<sup>5</sup> Addressing climate change through a rights-based approach (RBA) provides a means of exacting action from all decision makers who are involved in climate change policies and projects. The RBA (as described in Chapter 2) will ensure that special attention is given to the needs and rights of the weak and disempowered members of the human community – those who stand to lose the most as a result of the changing climate. Moreover, it will help to respect and enforce (human) rights and therefore markedly level the power imbalances between those who will gain (at least in the short term) and those who will lose from climate change.<sup>6</sup>

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5 See generally International Council on Human Rights Policy, *Climate Change and Human Rights: A Rough Guide* (Geneva: 2008).

6 Amy Sinden, "Climate Change and Human Rights," *Journal of Land, Resources & Environmental Law*, Temple University Legal Studies Research Paper No. 2008-49, forthcoming, pp. 6, 9.

Finally, implementing an RBA may contribute to overcoming the political paralysis at the global and national levels that is delaying effective action to address climate change. It is important to note that an RBA not only requires action to address the risks to fundamental human rights resulting from climate change, it also demands that the rights of individuals and groups are properly considered and safeguarded in the design of such actions.

In the particular case of mitigation policies and projects – i.e., those policies and projects that aim at reducing emissions of greenhouse gases and other substances leading to climate change – an RBA can become a critical tool to ensure that efforts to mitigate climate change do not come at the expense of people’s (human) rights.

As the discussion of applying an RBA to all issues related to climate change would exceed the limits of this chapter, the following sections focus only on its application to climate change mitigation, using the Clean Development Mechanism (CDM) of the Kyoto Protocol as a case study. In this regard, it is important to note that the chapter’s focus on the CDM does not purport to evaluate CDM projects, nor does it imply that CDM projects systematically or structurally violate the rights of communities. Rather, focusing on the CDM allows the RBA to be tested in a concrete market setting involving billions of dollars in carbon credits associated with sustainable development projects. Also, as discussions continue on both expanding and reforming the CDM to encompass broader sectors and ensure environmental and procedural integrity,<sup>7</sup> an RBA would ensure that the CDM’s emphasis on emissions reductions does not compromise people’s rights.

The following section looks briefly at the RBA in the climate change mitigation context, introducing the CDM and other related issues. Part III then examines how to implement the RBA suggested in Chapter 2 in the particular dimension of climate change mitigation. These two parts thus portray how an RBA can be used to address a global crisis such as that posed by climate change, which imposes a great risk on the rights of individuals and groups around the world. In responding to climate change by using an RBA, humanity also has the opportunity to emerge from this crisis with more effective development policies as well as a renewed and stronger respect for human rights.

## II RBA in the Climate Change Mitigation Context: CDM Projects

The Kyoto Protocol to the United Nations Framework Convention on Climate Change (UNFCCC) is the first of its kind to set up a market-based mechanism allowing State parties to reach their treaty obligations by investing in developing countries.<sup>8</sup> This is done through the use of the CDM, which has also provided an effective tool for the engagement of developing countries in the global effort to

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7 See Christiana Figueres, “Sectoral CDM: Opening the CDM to the Yet Unrealized Goal of Sustainable Development,” *McGill International Journal of Sustainable Development Law & Policy*, vol. 2, no. 1 (2006); see also Charlotte Streck and Jolene Lin, “Making Markets Work: A Review of CDM Performance and the Need for Reform,” *European Journal of International Law*, vol. 9, no. 2 (2008), pp. 409-42.

8 See generally David Hunter, Chris Wold, and Melissa Powers, *Climate Change and the Law* (Lexis/Nexis Publishing, forthcoming).



deal with human-induced climate change.<sup>9</sup> The basic CDM project cycle can be summarized in very broad strokes as follows.<sup>10</sup>

A project sponsor prepares a Project Design Document (PDD) and requests a Designated Operational Entity (DOE) to validate the project. Once the project has been validated, the DOE submits it to the CDM Executive Board (EB) for registration. Once registered, the CDM project will calculate and monitor its emissions reductions. At periodic intervals, the project sponsor will request a DOE (different from the one that validated the project) to verify and certify the emissions reductions. On the basis of the DOE's certification report, the EB will issue certified emissions reductions (CERs). These are then traded in global carbon markets.

CDM projects may include a broad range of activities that produce a net decrease in greenhouse gas levels compared with the existing baseline, including fuel-switching projects, the installation of solar panels in villages that have no access to electric grids, and planting and growing trees in deforested areas. For the most, however, end-of-pipe approaches rather than projects leading to increased energy efficiency or the use of renewable energy have generated the lion's share of credits available in the market.<sup>11</sup> Ultimately, the CDM relies on international, national, and private-sector institutions to facilitate foreign investment.

Although such mitigation projects are indispensable for combating human-made climate change and at the same time provide important triggers that promote sustainable development, they also have the potential to affect many stakeholders by posing threats to their substantive and procedural rights. So far, concerns regarding the CDM have focused mainly on its environmental<sup>12</sup> and procedural<sup>13</sup> integrity. In this regard, it is only fair to say that the CDM project cycle has already set a relatively high benchmark. The PDD requires the project sponsor, for example, to share important information in relation to the project. The EB accredits private entities as DOEs according to specific accreditation standards that ensure expertise and independence. At the same time, the EB also exercises general oversight over DOE operations.

However, it must not be forgotten that experience with development projects in general shows that such projects are sometimes undertaken without adequate environmental impact assessments or the prior informed consent of local communities and in the worst case lead to displacement and

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9 Meinhard Doelle, "The Cat Came Back, or the Nine Lives of the Kyoto Protocol," *Journal of Environmental Law & Practice*, July 2006, pp. 261, 273.

10 For a general description of the Clean Development Mechanism (CDM), see Farhana Yamin and Joanna Depledge, *The International Climate Change Regime* (Cambridge, UK: Cambridge University Press, 2005), pp. 159ff. See also, Sebastian Oberthür and Hermann Ott, *The Kyoto Protocol* (New York: Springer Publishing, 1999), pp. 165ff.

11 David M. Driesen, "Sustainable Development and Market Liberalism's Shotgun Wedding: Emissions Trading Under the Kyoto Protocol," *Indiana Law Journal*, vol. 83, no. 1 (2008), pp. 21, 40. See also Kevin A. Baumert, "Note: Participation of Developing Countries in the International Climate Change Regime: Lessons For the Future," *George Washington International Law Review*, vol. 38 (2006), p. 365.

12 See generally Lambert Schneider, *Is the CDM Fulfilling its Environmental and Sustainable Development Objectives? An Evaluation of the CDM and Options for Improvement* (Berlin: Öko-Institut, November 2007).

13 See generally Ernestine E. Meijer, "The International Institutions of the Clean Development Mechanism Brought Before National Courts: Limiting Jurisdictional Immunity to Achieve Access to Justice," *New York University Journal of International Law and Politics*, summer 2007, p. 873.

significant environmental damage. As a consequence, there is no doubt that development projects in general can result in a serious infringement of rights. With regard to CDM projects, the likelihood of future rights violations exists, since CDM projects are only a specific type of development projects. Also, the CDM market is expected to grow considerably in the near future, leading to the implementation of more projects, which consequently bears the danger of more infringements of rights.

Therefore the implementation of an RBA provides an important tool to prevent such violations of the rights of stakeholders that may result from climate change mitigation initiatives, and thus to achieve conservation with justice.

### **III Implementing an RBA in Climate Change Mitigation**

Implementing the RBA in the climate change mitigation context involves a series of steps oriented towards adequate consideration of the rights of individuals and communities that may be adversely affected by mitigation projects. In this respect, undertaking a situation analysis, providing adequate information on the project, and ensuring participation of rights-holders and other stakeholders are initial steps that enable early identification of the rights and interests that may be affected by the project. In addition, a process for taking reasoned decisions would ensure that adequate consideration is given to the rights at issue, which is central to avoid interference with protected rights as well as to balance competing rights where necessary. Further, mechanisms for monitoring, evaluation, and adequate enforcement are important for operationalizing the RBA throughout the life of a project and for learning from the experience during implementation.

As a general matter, competitiveness concerns may arise in relation to implementing an RBA in climate change mitigation, given potentially increased project costs resulting from the different steps of the RBA. Efforts to minimize transaction costs and regulatory risks are not incompatible with the RBA. On the contrary, the RBA can be easily integrated into the CDM project cycle, such as linking a situation analysis with CDM project design, thereby avoiding duplication and additional costs. Further, the RBA can reduce transaction costs and regulatory delays by addressing the social and environmental risks of the project beforehand. Indeed, the RBA prevents risks from materializing into economic harm to the project by engaging local stakeholders and preventing infringements of rights into project design. When contrasted with the social costs resulting from rights violations and the economic and reputational costs resulting from community opposition, the costs of applying an RBA are minimal. The polluter pays principle offers guidance on the proper allocation of such costs.

This section explores the different steps suggested in Chapter 2 in the context of mitigation projects, with a particular focus on the CDM. A certain level of generality is inevitable in this exercise, as factual data are indispensable to operationalizing the RBA in an actual mitigation project. Nevertheless, analysing the various steps of the RBA can draw on the experience with development projects generally and with specific cases of climate change mitigation projects.

#### **1 Undertake a Situation Analysis**

Before a CDM project can be implemented, it is imperative that the potential impacts on people's livelihoods are analysed. This is particularly important because it is estimated that development

projects displace over 10 million people a year, and these tend to be the most vulnerable people – people who often become even more impoverished after being forced to leave their homes and economic activities.<sup>14</sup> Projects involving dislocation or other impacts on communities and the environment can have serious consequences for human rights. As a consequence, the implementation of CDM projects requires a good understanding of the local circumstances and the context in which they are or will be operating, in order to avoid the negative impacts often associated with development projects.

### **Action 1.1: Identify Actions, Stakeholders, and Roles**

Pre-project analysis is necessary to get a clear picture of the often complex operating landscape, and this usually begins by determining the planned concrete actions, their objectives, and their expected social and environmental impacts. The information collected will be critical to evaluate project options, particularly their location, as different locations may affect local communities in different ways.

For instance, it may be that the characteristics of a mitigation project do not allow great flexibility in its location. The example of a hydroelectric dam as a CDM project illustrates a situation in which options as to the location may be restricted by geological, engineering, or geographical circumstances. Still, in this context, a situation analysis is key to exploring the no-dam option, among others, which may be warranted by the social and environmental impacts associated with the construction and operation of the dam. In this regard, identifying all stakeholders affected by the dam is critical at an early stage to implement the RBA.

#### **Box 2: Hydropower Projects in China**

Energy generation, given its importance for human activities as well as its pollution impacts, is receiving increasing attention from policy makers. Great emphasis has been put on replacing dirty energy sources with “cleaner” energy, such as hydroelectric power. However, while hydropower has advantages over fossil fuels from a climate change perspective, the World Commission on Dams has clearly shown that all reservoirs – including hydropower reservoirs – emit greenhouse gases. As a consequence, reservoir and catchment characteristics must be investigated to find out the likely level of such emissions. Also, other impacts associated with hydropower exemplify the difficulties associated in the promotion of “alternative” energy sources. Estimates indicate that 60 million people had been displaced by the construction of dams worldwide up to 1996. Hundreds of thousands more were likely displaced by other aspects of hydropower projects, such as the building of canals or powerhouses.



14 International Network on Displacement and Resettlement, “A Global Human Rights and Development Challenge,” available at [www.displacement.net](http://www.displacement.net).

In China, for example, the Xiaoaxi Hydropower Project is currently requesting registration under the CDM. For this project, 7,593 people have been or will be resettled as a result of the inundation of their land. The Guangxi Xiafu Hydropower Project, for which the CDM Executive Board has requested corrections, also entails resettlement of people living in the project's inundation zone. Both of these projects raise issues of relocation, compensation to affected people, livelihoods, quality of life, and sustainable development. The first round of surveys to collect public comments on the Xiaoaxi Project indicated that 61 per cent of respondents were satisfied with the compensation standards; the second round indicated that 97 per cent were satisfied with the standards and that 90 per cent of the respondents had received compensation.

As of April 2008, some 828 hydroelectric projects had been registered or were seeking registration by the CDM, and 542 of these projects were in China. A total of 384 of the hydro projects were large projects according to the CDM definition (greater than 15 megawatts capacity); 280 of these large projects were in China.

Sources: World Commission on Dams (WCD), *Dams and Development: A New Framework for Decision-Making* (London: Earthscan, 2000), p. 75; Leopoldo Jose Bartolome et al., "Displacement, Resettlement, Rehabilitation, Reparation and Development," prepared for the WCD, 2000; Xiaoaxi PDD available at [cdm.unfccc.int/Projects/DB/TUEV-SUED1205920632.77/view](http://cdm.unfccc.int/Projects/DB/TUEV-SUED1205920632.77/view); Guangxi Xiafu PDD available at [cdm.unfccc.int/Projects/DB/JC11201850687.86/view](http://cdm.unfccc.int/Projects/DB/JC11201850687.86/view); International Rivers, Spreadsheet of Hydro Projects in the CDM Project Pipeline, 19 July 2008, available at [www.internationalrivers.org/en/climate-change/carbon-trading-cdm/spreadsheet-hydro-projects-cdm-project-pipeline](http://www.internationalrivers.org/en/climate-change/carbon-trading-cdm/spreadsheet-hydro-projects-cdm-project-pipeline).

Also, in the case of a proposed plantation for the cultivation of crops for biofuels, the social and environmental impacts of the project should be generally described to include changes in land use, which may affect, *inter alia*, traditional agricultural practices, biodiversity, and underground water levels and may even require involuntary resettlement. In light of these expected impacts, alternative projects or various options for the location of the biofuels plantation could then be considered, with a view to avoiding or minimizing the social and environmental impacts.

It has to be noted that biofuels projects are currently not in the CDM pipeline for lack of methodologies. However, this might change in the future, as biofuels have been strongly promoted as a renewable energy source that has the ability to reduce greenhouse gas emissions as compared with traditional fuels. Because biofuels consume carbon dioxide (CO<sub>2</sub>) as they are grown, they offset the CO<sub>2</sub> emissions produced when they are burned as fuel. However, biofuels may also involve significant harmful environmental and even social impacts.<sup>15</sup> Recent studies indicate that they are not as climate-neutral as earlier analyses suggested because they release large amounts of nitrous oxide,

15 See generally Lucas J. Patzek and Tad W. Patzek, "The Disastrous Local and Global Impacts of Tropical Biofuel Production," *Energy Tribune*, March 2007, p. 19; Jack Santa Barbara, *The False Promise of Biofuels* (San Francisco and Washington, DC: International Forum on Globalization and Institute for Policy Studies, September 2007); Eric Holt-Giménez and Isabella Kenfield, *When Renewable Isn't Sustainable: Agrofuels and the Inconvenient Truths Behind the 2007 U.S. Energy Independence and Security Act*, Food First Policy Brief No. 13: Agrofuels (Oakland, CA: Institute for Food and Development Policy, March 2008).

initiate large land clearing, and can release 10 to 100 times as much carbon dioxide as is saved.<sup>16</sup> In addition, grains and seed oils in particular compete with food production. Therefore, biofuels can bring energy and agricultural markets into direct competition and thereby exacerbate water shortage problems and contribute to a sharp rise in global food prices. As a consequence, many people are already calling for a halt in the push for biofuels and for a comprehensive review of biofuels policies.<sup>17</sup>

In the CDM context, afforestation and reforestation projects in degraded lands present similar, albeit different issues. For example, the procedures for demonstrating the eligibility of lands for afforestation and reforestation projects require evidence that the land at the moment the project starts does not contain forest.<sup>18</sup> Thus the location of the project will be determined mainly by the eligibility of the lands. In this connection, a situation analysis under the RBA would further require information on potential impacts on communities, including with respect to agricultural practices and the water table. In this vein, the information that distinguishes between forest and non-forest lands<sup>19</sup> may need to be complemented with information showing, *inter alia*, potential impacts on the water table resulting from the afforestation and reforestation project.

The evaluation of project options and location will in turn benefit greatly from information regarding the various stakeholders who may be affected by the social and environmental impacts. This information will generally include mapping the territory and its uses by various actors, with a view to identifying the appropriate project and the location with the least impact.

### **Action 1.2: Identify Applicable Legal Rights, Claims, and Duties**

Since there is significant emphasis on economic development and emissions reductions, private investors, governments, and international organizations may overlook a project's potential negative side effects in other areas. If such side effects materialize, they can be devastating to the communities directly affected by the project. In this case, a great danger exists that people's rights will be sacrificed for global gains in emissions reductions.

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16 IPCC, *IPCC Scoping Meeting on Renewable Energy Sources: Proceedings*, Lübeck, Germany, 20–25 January 2008 (Geneva: IPCC, 2008), p. 8.

17 *The Hindu News*, "UN Expert Seeks 5 Year Moratorium on Bio-fuels," 27 October 2007; Julian Borger, "UN Chief Calls for Review of Biofuels Policy," (London) *Guardian*, 5 April 2008.

18 UN Framework Convention on Climate Change (UNFCCC), CDM Executive Board, "Procedures to Demonstrate the Eligibility of Lands for Afforestation and Reforestation CDM Project Activities," EB 35 Report, Annex 18, para 1 (a).

19 *Ibid.*, para 2 (a)-(c): "(a) Aerial photographs or satellite imagery complemented by ground reference data; or (b) Land use or land cover information from maps or digital spatial datasets; or (c) Ground based surveys (land use or land cover information from permits, plans, or information from local registers such as cadastre, owners registers, or other land registers.)"

### **Box 3: Examples of Some Potential Rights Impacts Associated with Climate Change Mitigation Projects**

- The flooding of lands by reservoirs of hydropower plants may compromise several rights. The right to property and housing are likely implicated in cases where the reservoir will flood the homes of the community. The right to life, culture, and religion may be at risk where the reservoir will flood cemeteries and ceremonial sites. The right to land, territory, and natural resources will be compromised where the hydroelectric project affects indigenous peoples and other tribal lands.
- Biofuels projects place certain rights at greater risk than others. The right to food may be undermined by changes in land use and by increasing prices of food where biofuels are derived from food products. The right to water may be affected by a lowering of the water table that affects community wells. The right to health may be infringed where aerial pesticide spraying of biofuels plantations affects neighbouring communities or surrounding crops. The application of pesticides without adequate safety measures may also compromise workers' rights.
- Afforestation and reforestation projects may also lead to a lowering of the water table and therefore adversely affect access to drinking water and water for agriculture.
- Wind power turbines may have an impact on migratory birds, which may affect food, cultural, and other values; they may also involve land use transformation, water and soil erosion in the construction phase, and some levels of noise in the operational phase.
- Methane recovery from agricultural and agro-industrial activities may involve transport of waste and consequent impacts, as well as risks of explosions.
- Landfill-to-energy projects may involve land use, nuisance from odor pollution, waste transport, and other negative impacts resulting from a landfill.

There are many examples of how certain rights may be at great risk in climate change mitigation projects. Thus the rights, claims, and duties at issue will also need to be identified in a situation analysis.

It is a truism that different actors enjoy different rights and face different duties. For example, the human rights obligations of a country will vary according to the treaties it has ratified. Also, some human rights have entered the realm of customary law and will bind States regardless of ratification of treaty instruments. Further, the project may affect particular groups that enjoy particular rights. If a project affects, for example, children, then the Convention on the Rights of the Child will be the starting point of the analysis. If the project affects indigenous peoples or other tribal communities' lands and territories, human rights jurisprudence recognizes rights to consultation and/or free and prior informed consent, in addition to adequate sharing of the benefits and prior environmental and

social assessment.<sup>20</sup> As described later, certain kinds of projects are likely to affect certain rights more than others and thus warrant a focused approach. However, the interdependence and indivisibility of human rights needs to be kept in mind in any focused analysis.

### **Action 1.3: Identify Potential Impacts of the Proposed Project**

Once a project option has been chosen, stakeholders and their rights have been identified, and a project location has been proposed in light of expected environmental and social impacts, it is then necessary to undertake a concrete and detailed environmental and social impact assessment of the proposed project. This will take account of the particular circumstances of a specific location, with a view to introducing measures to avoid negative social and environmental impacts or to mitigate these negative impacts when they cannot be avoided. Generally speaking, the availability of compensation or resettlement plans and of programmes for local development will determine whether and to what extent rights are actually infringed.

In this context, it must not be forgotten that despite possible direct and indirect negative impacts, the great majority of CDM projects also constitute an improvement to the actual environmental and social conditions on the ground. For example, a landfill-to-energy project may transform a municipal landfill site lacking safety measures into a landfill that reduces the nuisance of odours and associated health impact from emissions, as well as the risk of explosions from flammable gases, and that in addition produces energy. Likewise, a methane recovery project may contribute to controlling odours and the spread of flies and disease resulting from inadequately managed agricultural waste. Similarly, wind power turbines may be located far from the routes of migratory birds and local communities, thereby reducing reliance on fossil fuels and avoiding negative environmental impacts. As a consequence, establishing the project's environmental and social baseline is essential to adequately compare and evaluate the positive and negative environmental and social impacts.

#### **Box 4: eThekweni (Durban) Landfill-Gas-to-Energy Project in South Africa**

The eThekweni Landfill Gas project involved installing gas extraction infrastructure and landfill gas generators at the Mariannahill and La Mercy landfill sites in southeastern South Africa. The World Bank Carbon Finance Unit, the buyer of the certified emissions reductions resulting from the landfill gas project, considers this as an example of a successful CDM initiative.

The project was realized by the eThekweni Municipality Department of Solid Waste, L' Agence Française de Développement, and the World Bank's energy, environment, and carbon finance teams, all of whom collaborated closely. The landfill project enhanced the collection of landfill methane gas, some of which will be used to generate electricity that will be fed into the national



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20 Inter-American Court of Human Rights, *Case of the Saramaka People v. Suriname*, Judgment (28 November 2007), para 129.

grid, reducing local pollution from fossil fuel plants. In addition, the generators will improve local air quality by lowering the amount of landfill gas released into the atmosphere, in turn reducing the dangerous concentration of methane gas and attendant odours. Last but not least, the project will also lead to a small increase of skilled jobs in the area, and the municipality will benefit from the methane plant's revenue.

Sources: CDM, "Durban Landfill-Gas-to-Electricity Project – Mariannhill and La Mercy Landfills," Project Design Document, pp. 2–3, 4–5; World Bank Carbon Finance Unit, "South Africa: Durban Municipal Solid Waste," UNFCCC Reference No.: 0545.

If conducted under the CDM, the environmental impacts of projects would be assessed if the host State requires this in its domestic law. During the design phase, if the project poses significant environmental problems, an environmental impact assessment must be completed in accordance with whatever procedures are specified by the host country. The impact assessment may be conducted by either the project developer or the host country. However, the CDM modalities do not provide any procedures for impact assessments in the event that the host country has no specified requirements on them.<sup>21</sup>

Operationalizing the RBA is therefore still essential in the context of CDM projects, since the RBA might go beyond the host State's laws and require the assessment of environmental and social impacts with a view to ensuring that the rights of individuals and groups potentially affected are not compromised.

#### **Action 1.4: Identify Potential Conflict Resolution Mechanisms**

In addition to identifying the actors and their rights as well as potential impacts, a situation analysis will call for an examination of possible mechanisms for settling disputes. Adequate mechanisms for conflict resolution are necessary to balance tensions that arise between rights and the public interest, which is particularly acute with respect to mitigation projects that benefit society but at the same time impose burdens on some of its members.

These mechanisms may already exist in the country's legal framework and may include international forums where citizens may seek governmental accountability. Further, usually it should be in the interest of the project sponsor to set up a grievance mechanism to receive and address any claims that affected persons may have. Unfortunately, this is not always the case.

The CDM contains no requirements that provide stakeholders any recourse when required procedures have not been properly followed. Such a grievance mechanism could allow the project to address and remedy situations before disputes aggravate or entrench opposing positions or result in violence. A grievance mechanism available to the various actors participating in the CDM could also

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21 See Ernestine Meijer and Jacob Werksman, "Keeping It Clean: Safeguarding the Environmental Integrity of the Clean Development Mechanism," in David Freestone and Charlotte Streck, eds., *Legal Aspects of Implementing the Kyoto Protocol* (New York: Oxford University Press, 2005), pp. 191, 201.



lift the process to the level of an administrative procedure that meets due process standards, thereby enhancing good governance and the rule of law.<sup>22</sup>

In that light, the International Finance Corporation of the World Bank Group has recently introduced into its Performance Standards on Social and Environmental Sustainability a requirement to establish a grievance mechanism as an element of community engagement by the project sponsor.<sup>23</sup> According to this standard, “if the client anticipates ongoing risks to or adverse impacts on affected communities, the client will establish a grievance mechanism to receive and facilitate resolution of the affected communities’ concerns and grievances about the client’s environmental and social performance”.<sup>24</sup>

It may be that not every issue that arises as a result of a CDM project is amenable to resolution by a grievance mechanism and that other forms of conflict resolution and accountability are also necessary. However, as reported by the UN Special Representative of the Secretary-General on the issue of human rights and transnational corporations, “an effective grievance mechanism is part of the corporate responsibility to respect” human rights.<sup>25</sup>

## 2 Provide Information

Human rights tribunals have emphasized that the right to have access to information is key to enabling public participation and democratic control of government by society through public opinion.<sup>26</sup> In the climate change mitigation context, access to information is also important for addressing the tensions that arise with respect to projects that provide a benefit to society and to humanity generally, including future generations, but that impose a special burden on certain individuals or groups.

In this regard, analysis of legitimate restrictions of rights in light of critical social needs, including measures such as mitigation projects to prevent dangerous anthropogenic interference with climate systems, will require information to determine whether such measures are proportional under the circumstances. If information is unavailable – such as on social and environmental impacts, on comparison options regarding the location of a project, or on the expected benefits of the project – it is impossible to test the restriction of rights against proportionality criteria.

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22 Charlotte Streck and Thiago Chagas, “The Future of the CDM in a Post-Kyoto World,” *Carbon & Climate Law Review*, Issue 1, 2007, pp. 61-62.

23 International Finance Corporation, “Performance Standards on Social and Environmental Sustainability,” 30 April 2006, Performance Standard 1, Social and Environmental Assessment and Management Systems, para 23.

24 *Ibid.*: “The grievance mechanism should be scaled to the risks and adverse impacts of the project. It should address concerns promptly, using an understandable and transparent process that is culturally appropriate and readily accessible to all segments of the affected communities, and at no cost and without retribution. The mechanism should not impede access to judicial or administrative remedies. The client will inform the affected communities about the mechanism in the course of its community engagement process.”

25 “Protect, Respect and Remedy: A Framework for Business and Human Rights, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie,” U.N. Doc A/HRC/8/5, 7 April 2008, para 93.

26 See Inter-American Court of Human Rights, *Claude Reyes et al. v Chile*, Judgment (19 September 2006).

## Action 2.1: Compile and Publish Information in an Understandable and Easily Accessible Way

Under the Marrakesh Accords, those sponsoring CDM projects are required to provide stakeholders with access to information about the projects. In this vein, the information should be accessible, and access to it should be timely to enable participation by affected individuals and groups and by other stakeholders in terms of whether the project should go forward, as well as in the project design and operation. In the CDM context, “stakeholders” means the public, including individuals, groups, or communities affected or likely to be affected by the proposed project.<sup>27</sup>

The Project Design Document is central to the operationalization of information requirements in the CDM. Submission of the PDD is necessary to commence the process of validation, which is the independent evaluation of a project activity by a Designated Operational Entity to assess whether it conforms to CDM modalities.<sup>28</sup> Registration is the formal acceptance by the Executive Board of a validated project, and it is the prerequisite for the verification, certification, and issuance of certified emissions reductions related to that project activity. Thus, the preparation and disclosure of the PDD are the two central windows for public debate over the environmental and social impacts of a CDM project.

The PDD form is structured according to uniform categories, and it applies to all CDM projects; thus it facilitates review of the project by the CDM institutional mechanisms and the public. The contents of the PDD include, *inter alia*:

- General description of project activity,
- Environmental impacts, and
- Stakeholder comments.

The DOE shall make the PDD publicly available in accordance with Paragraph 40(b) of the CDM modalities and procedures, either by establishing a website or by using the existing CDM website.<sup>29</sup> The DOE shall also receive comments on the validation requirements from stakeholders and make them publicly available.<sup>30</sup>

If the DOE determines the proposed project activity to be “valid”, it will request registration of the activity by the CDM Executive Board. The request for registration should include the Project Design Document, the written approval of the host party, and an explanation of how it has taken due account

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27 See UNFCCC, Report of the Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol on its First Session, Montreal, 28 November to 9 December 2005, U.N. Doc. FCCC/KP/CMP/2005/8/Add.1, Annex para. 1(e) [hereinafter CDM Modalities & Procedures]; Yamin and Depledge, *op. cit.* note 10, pp. 162–63.

28 CDM Modalities & Procedures, *op. cit.* note 27.

29 CDM, “Procedures on Public Availability of the CDM Project Design Document and for Receiving Comments Referred to in Paragraphs 40 (B) and (C) of the CDM Modalities and Procedures (Version 04, 8 June 2005),” available at [cdm.unfccc.int/Reference/Procedures/valid\\_proc01\\_v04.pdf](http://cdm.unfccc.int/Reference/Procedures/valid_proc01_v04.pdf).

30 CDM Modalities & Procedures, *op. cit.* note 27, at Annex para. 40(c) (2005).

of comments received. This request for registration shall again be made publicly available through the CDM website for eight weeks. It shall also be announced in the CDM news facility.<sup>31</sup>

The CDM has also elaborated general guidance on how project sponsors should engage potential rights-holders and stakeholders, in order to, *inter alia*, prevent any infringements of their rights. The CDM modalities require that a DOE review the PDD to determine whether “comments by local stakeholders have been invited, a summary of the comments has been provided, and a report has been written on how due account was taken of any comments that have been received”.<sup>32</sup> The CDM Executive Board has clarified that “an invitation for comments by local stakeholders shall be made in an open and transparent manner, in a way that facilitates comments to be received from local stakeholders and allows for a reasonable time for comments to be submitted. In this regard, project participants shall describe a project activity in a manner which allows the local stakeholders to understand the project activity, taking into account confidentiality provisions of the CDM modalities and procedures.”<sup>33</sup>

## **Action 2.2: Disseminate Specific Information Regarding Legal Rights, Claims, and Duties of Potentially Affected Persons**

Although the CDM’s general guidance provides flexibility to address access to information in varying contexts, in order to enable meaningful comments it stops short of providing specific guidance on what particular information the “invitation to comment” should include. In this connection, the guidance offered by the Executive Board relates to the ability of stakeholders to understand the project activity. While important, this focus is different from the ability of stakeholders to understand how the project activity will affect them and their rights. The RBA would address this gap by requiring that active engagement from project sponsors with local communities in the dissemination of information and informed consultations focus on preventing infringements of rights.

Another important issue regarding information in the CDM context relates to the level of detail and the kind of information that should be provided in relation to the social and environmental impacts of the project. Again, the PDD provides an important window to explore these issues, as the CDM modalities and procedures require that the PDD give a description of the environmental impacts and document “the analysis of the environmental impacts, including transboundary impacts”. That is to say, some level of unspecified detail regarding environmental impacts should be disclosed in the PDD in all cases. The lack of specificity in regards to the level of detail and the kind of information that should be provided, however, may undermine the ability of stakeholders to enjoy meaningful access to this information.

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31 CDM, “Procedures for Registration of a Proposed CDM Project Activity, (Version 02, Nov. 2003),” available at [cdm.unfccc.int/Reference/Procedures/reg\\_proc01\\_v02.pdf](http://cdm.unfccc.int/Reference/Procedures/reg_proc01_v02.pdf).

32 CDM Modalities & Procedures, op. cit. note 27, at Annex para. 37(b) (2005).

33 CDM, “Guidelines for Completing the Project Design Document (CDM-PDD), and the Proposed New Baseline and Monitoring Methodologies (CDM-NM) (version 06.2, 2006),” available at [cdm.unfccc.int/Reference/Guidclarif/pdd/PDD\\_guid04\\_v06\\_2.pdf](http://cdm.unfccc.int/Reference/Guidclarif/pdd/PDD_guid04_v06_2.pdf). (“The local stakeholder process shall be completed before submitting the proposed project activity to a DOE for validation.”)

Further, the information provided in the PDD may not be sufficient to determine CDM eligibility. Certain reports from nongovernmental organizations (NGOs) on CDM hydro projects, for instance, have observed that in many cases assessing a PDD's additionality claims depends solely on whether to trust the statements provided by project developers regarding the importance they or their financiers have placed on various factors.<sup>34</sup>

While the CDM modalities and procedures require that the PDD include the "conclusions and all references to support documentation of an environmental impact assessment" if an environmental impact assessment (EIA) is necessary, an EIA will be only necessary "if the impacts are considered significant by the project participants or the host party". In this context, the host State legislation on EIA will have to clarify the meaning of "significant impacts" that would trigger an EIA requirement. As a consequence, host State laws will control the content and process of the EIA, including community engagement and disclosure of information. This construct is inadequate in situations where the host State legislation is silent on the meaning of "significant impact" or where the host State EIA legislation is inadequate to secure access to information and community engagement. It is also inadequate in situations where it is up to the unfettered discretion of the host State's administration to determine the meaning of "significant impact", as the pressure to expedite the establishment of the investment may undermine the necessary protections for local communities that may be affected by the CDM project.

As a general matter, the RBA requires that information be distributed in such time, format, quantity, and quality as to enable rights-holders and stakeholders to understand potential impacts on their rights, participate in decision-making processes, and seek remedies in situations where their rights have been violated. This requirement is not contingent on whether the impacts are "significant" in the terminology of the CDM, but in every situation.

Given this, implementing the RBA in the CDM context would mean that the CDM Executive Board has to clarify the meaning of "significant impact" that will trigger an EIA requirement, as well as the level of detail that the PDD should include. While it is clear that the meaning of "significant impact" has to be established at a certain level of generality, in light of the multiplying circumstances in which it is to be given effect, it could nevertheless provide guidance to the various actors involved in CDM projects. In addition, such clarifications would help to close potential legal gaps between States hosting CDM projects with regard to EIAs, to a certain extent, and further would enable communities to gain access to the information necessary to evaluate potential infringements on their rights resulting from the CDM project. It appears, however, that the CDM Executive Board views clarifying "significant impact" for the purposes of the EIA as an impermissible intrusion into matters that lie within the domestic sphere of participating countries. Yet this view contrasts with the CDM modalities, which allow project participants to determine that a project has a significant impact regardless of the views of the host State.

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34 Barbara Haya, "Failed Mechanism: How the CDM is Subsidizing Hydro Developers and Harming the Kyoto Protocol," *International Rivers*, November 2007.

### 3 Ensure Participation

It is widely recognized that public participation enhances democracy, the legitimacy of projects, and the quality of decisions.<sup>35</sup> For example, the knowledge of local communities can contribute to identifying options for project locations and for adequate consideration of the environmental and social impacts. The participation of individuals and groups whose rights may be affected by mitigation projects is also central to avoiding undue interference with those rights.

It is important to note, however, that depending on the location, certain climate change mitigation projects might require less consultation because they are removed from inhabited places. Wind farm projects, for instance, may be far from towns and local communities, in which case their impact may be *de minimis*, if any. By contrast, other projects may require extensive consultations, such as a thermal power plant gas-steam combined cycle project using natural gas in an urban setting.

#### **Box 5: The Jepirachi Wind Power Project in Colombia**

The Jepirachi Wind Power Project in Colombia is an example of a successful climate change mitigation project that is being implemented in indigenous peoples' territories with active participation from local communities. The project was established in the Guajira region on Colombia's northeast Atlantic coast, one of the poorest regions in South America. It was established by the World Bank through its Prototype Carbon Fund with a Colombian utility company and with support from the Ministry of Mines and Energy; the project became operational on February 2004. This wind project is expected to reduce carbon emissions by 1,168,000 tons over a 21-year operational period, contribute to the national energy grid, and bring additional investment into the country.

Furthermore, the Wayuu indigenous peoples in the area, who have legal rights to their traditional lands, have designed a series of community-driven projects, in consultation with the project sponsor, that are financed by the project and will contribute to community development. These include trainings to facilitate direct and indirect job creation, the provision of a water desalinization plant fed by wind power, the provision of water storage depots, and the provision of health and educational facilities. The project also employed approximately 150 indigenous individuals during construction.

Source: Victoria Tauli-Corpuz and Aqqaluk Lynge, *Impact of Climate Change Mitigation Measures on Indigenous Peoples and on Their Territories and Lands* (New York: United Nations Economic and Social Council, March 2008).

Although participation in governance of CDM projects is critical, neither the UN Framework Convention on Climate Change nor the Kyoto Protocol provide much indication of what these public

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35 Jonas Ebesson, "Public Participation," in Daniel Bodanksy, Jutta Bruneel, and Ellen Hey, eds., *The Oxford Handbook of International Environmental Law* (New York: Oxford University Press, 2007), pp. 681, 688.

participation rights and mechanisms should be. Instead, the CDM public participation rights were established in the Marrakesh Accords in 2001, albeit indirectly, as described next.<sup>36</sup>

### **Action 3.1: Undertake Consultations**

According to the Marrakesh Accords, local stakeholders must be consulted during CDM project design.<sup>37</sup> The CDM provides two mandatory opportunities for stakeholders to comment on projects: during the preparation of the PDD and when the DOE releases the PDD.<sup>38</sup>

During PDD preparation, project participants must invite local stakeholders to comment on the proposed CDM project, and the project developer must explain how local comments were taken into consideration. However, the CDM modalities do not explain in detail how stakeholders are to find out about the existence of a CDM proposal, let alone its possible environmental implications. If potentially affected people are not sufficiently informed about their right to comment on the project, then the CDM consultation process is inherently limited in its ability to incorporate the knowledge and concerns of local communities. This limitation accentuates the already challenging situation facing local communities, especially in developing countries, given that assessing environmental impacts can be an expensive process and that local communities will seldom have the funding or capacity to conduct such research.

The CDM Executive Board has tried to clarify the role of the project sponsor in soliciting public input to the project by requiring the sponsor to engage communities in a way that facilitates comments being received and allows a reasonable time for them to be submitted. Also, the PDD should include a summary of the comments and report on how due account was taken of them. Nevertheless, the actual impact in practice of this clarification remains unclear.

Another open question regarding the effectiveness of these requirements and clarifications relates to the role of the DOE with respect to the evaluation of consultations. It is clear that the PDD must meet the approval of the DOE. Also, DOEs must be certified by the CDM's Executive Board, and they must demonstrate sufficient expertise in not only general environmental and technical issues relating to the project type but also region-specific concerns.<sup>39</sup> The DOEs review whether a project has met all requirements, such as the ones to "invite comments" and to complete whatever EIAs the host country requires.<sup>40</sup> However, the level of scrutiny about whether local stakeholders had a meaningful opportunity to provide their views on the project remains unclear.

Once approved, the DOEs make the PDD also available for public review. A 30-day period allows all parties to the Kyoto Protocol, UNFCCC-accredited NGOs, and general stakeholders to submit comments on the PDD to the DOE.<sup>41</sup> After this 30-day period, the DOE can request the registration

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36 CDM Modalities & Procedures, op. cit. note 27, at 3/CMP.1 (2005).

37 Ibid., at Annex para 1(e) (2005).

38 Nathalie Eddy & Glenn Wisner, "Public Participation in the Clean Development Mechanism of the Kyoto Protocol," in Carl Bruch, ed., *New Public: The Globalization of Public Participation* (Washington, DC: Environmental Law Institute, 2001) at 210 – 11.

39 CDM Modalities & Procedures, op. cit. note 27, at Annex para 20(a) (2005).

40 Ibid., at Annex para 37 (2005).

41 Ibid., at Annex para 40(b)-(d) (2005).

of the project with the CDM Executive Board. Such request should include again the PDD and an explanation of how comments received have been taken into due account. As noted earlier, this request for registration shall be announced and made publicly available through the CDM website for eight weeks. Presumably, the Executive Board will take these comments into account in its evaluation of the registration request. However, none of the 63 projects rejected to date has been rejected for failure to abide by the transparency and participation requirements and guidelines.<sup>42</sup>

A host State's EIA legislation may already require an EIA, in light of the project's impacts, and provide for effective consultation mechanisms. In such cases, the concern regarding lack of effective consultations may be alleviated to the extent that the PDD incorporates the documentation supporting the EIA. However, it may also be that the host State lacks EIA legislation or that, if such legislation does exist, it is inadequate or breached. In such cases, a CDM project will only be likely to pass the RBA test if the Executive Board's clarification and requirements are effectively applied in order to ensure adequate consultations of possibly affected communities.

### **Action 3.2: Seek and Promote Free and Prior Informed Consent**

In addition, in specific projects with profound impacts on indigenous and tribal peoples' lands and territories, such as certain large hydroelectric dams, the State has a duty to obtain the free and prior informed consent (PIC) of those affected, according to their customs and traditions.<sup>43</sup> The right to PIC by indigenous and other local communities with respect to the use of natural resources that they reside in or upon which they otherwise depend is an emerging norm in the protection of the human rights of local communities. PIC is generally defined as a consultative process whereby a potentially affected community engages in an open and informed dialogue with individuals or other persons interested in pursuing activities in the area or areas occupied or traditionally used by the affected community.<sup>44</sup> Discussions should occur prior to and continue throughout the time the activity is conducted.<sup>45</sup> Furthermore, communities should have the right to withhold consent at decision-making points during the project cycle.<sup>46</sup> Throughout the process, these communities should be able to gain a clear understanding of how they specifically will benefit or be harmed by proposed projects, and these projects should take into account cultural valuations of impacts or benefits and traditional modes of decision making.<sup>47</sup>

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42 Research current to August 2008.

43 Inter-American Court of Human Rights, *op. cit.* note 20, at para 134–37. PIC is also referred to as “free, prior informed consent”, in order to be absolutely clear that consent must be free and not be given under duress. This chapter refers to “PIC” and “FPIC” interchangeably.

44 Anne Perrault, Kirk Herbertson, and Owen J. Lynch, “Partnerships for Success in Protected Areas: The Public Interest and Local Community Rights to Prior Informed Consent (PIC),” *Georgetown International Environmental Law Review*, spring 2007, pp. 475-542; see also Robert Goodland, “Free, Prior and Informed Consent and the World Bank Group,” *Sustainable Development Law & Policy*, July 2004, p. 66.

45 See United Nations Economic and Social Council (ECOSOC), Inter-Agency Support Group on Indigenous Issues, *Report on Free, Prior and Informed Consent* (New York: May 2004).

46 See Fergus MacKay, “Indigenous Peoples’ Right to Free, Prior and Informed Consent and the World Bank’s Extractive Industries Review,” *Sustainable Development Law & Policy*, Special Issue: Prior Informed Consent, summer 2004, pp. 43-65.

47 Lyla Mehta and Maria Stankovitch, “Operationalisation of Free, Prior Informed Consent,” prepared for the World Commission on Dams (WCD), 2000.

PIC is gaining increasing recognition in international hard and soft law instruments, both by international finance institutions and private sectors across the globe and through national legislation. Applying the RBA to the climate change mitigation context makes it critically important that efforts continue to put PIC into operation. These efforts involve carrying out PIC in culturally sensitive ways at all stages of the project cycle, especially at the design stage.<sup>48</sup>

### **Box 6: The Changuinola I Project in Panama**

The Changuinola hydropower dam project is currently seeking registration under the CDM. If and when completed, the dam will be 99.2 metres high, flood a reservoir surface area of 1,394.39 hectares, and generate 222.46 megawatts.

The dam is to be constructed in the Changuinola District of Bocas del Toro Province in Panama, where the indigenous Ngöbe (formerly known as Guaymí) people live. Despite the major impacts of the project on the Ngöbe's ancestral lands, the developers have not adequately consulted those affected nor obtained their free and prior informed consent, as required under the American Convention on Human Rights.

AES-Changuinola, the company conducting the project, has negotiated only with heads of household (who speak little Spanish), using Spanish-language documents. And these heads of household have no experience or governmental support in negotiating over land use and rights with people outside their community. The project has already resulted in the relocation of some Ngöbe from their lands to an urban area.

In addition, the Changuinola I dam will be constructed 2.7 kilometres from La Amistad National Park in Panama, a World Heritage Site. Flooding from the dam project will reach 1.8 kilometres from the park's boundary, and the dam and its infrastructure will pose a threat to the park's biodiversity due to the hindrance of the Changuinola River's flow.

Sources: UNFCCC, "Changuinola I Hydroelectric Project in Panama: Project Design Document," 11 June 2008, pp. 4, 5, 8; Patricia Kluck, "Chapter 2: The Society and Its Environment," in *Panama: A Country Study* (Washington, DC: Library of Congress, 1989); Petition, "Human Rights Violations by the Government of Panama against the Ngöbe Indigenous Communities and Individuals in the Changuinola River Valley, Bocas del Toro, Panama," 28 March 2008, pp. 12–13, 32–33, on file with Center for International Environmental Law, Washington, DC.

Given the large number of hydroelectric projects seeking CDM registration, NGOs have recommended that the CDM should adopt the World Commission on Dams standards for stakeholder consultations, including free and prior informed consent based on clear understandings of the impacts of the project. The World Commission on Dams highlighted that public acceptance of key decisions is essential for equitable and sustainable water and energy resources development. Acceptance emerges from recognizing rights, addressing risks, and safeguarding the entitlements of all groups of affected

48 See International Alliance of Indigenous and Tribal Peoples of Tropical Forests, "Tiohtiáke Declaration: Statement to the State Parties of the COP 11/MOP 1 of the UNFCCC," International Indigenous Peoples Forum on Climate Change, 9 December 2005, available at [www.international-alliance.org/unfccc.htm](http://www.international-alliance.org/unfccc.htm).



people. Only decision-making processes based on the pursuit of negotiated outcomes, conducted in an open and transparent manner and inclusive of all legitimate actors, can address the complex issues surrounding water, dams, and development.<sup>49</sup> The RBA supports these recommendations and applies them beyond hydroelectric projects to any CDM project having a significant impact on local communities. So far, however, obtaining PIC is not a mandatory requirement for CDM projects.

### **Action 3.3: Provide and Use Conflict Resolution Mechanisms to Secure Rights**

As noted earlier, of the 63 projects rejected to date, none has been rejected for failure to abide by the CDM transparency and participation requirements and guidelines.<sup>50</sup> While this information does not allow inference as to whether the CDM Executive Board is overlooking any violations of these requirements, it does raise questions as to the availability of legal recourse for stakeholders when required procedures have not been properly followed. Likewise, there are no procedures for stakeholder-triggered review of CDM projects.

In this regard, the application of the RBA to climate change mitigation could inspire the CDM Executive Board to play an important role in providing avenues for challenging projects that do not adequately fulfil the CDM objectives with respect to information and participation. This role could be performed in several ways:

- First, the CDM Executive Board could include information and participation issues in its review of DOE operations. As noted, DOEs perform an important function in evaluating compliance by the project sponsor with information and participation requirements during the project’s design and the elaboration of the PDD.
- Second, the CDM Executive Board could allow formal stakeholders to request review of a CDM project after the receipt of the request for registration and prior to registration. Currently, only governments or three CDM Executive Board members can request such review. A close variant could involve setting up a standing panel by the Executive Board that could hear appeals by interested members of the public who may be adversely affected.<sup>51</sup>
- A third approach could crystallize with uniform and constant practice by CDM Executive Board members the exercise of their discretionary authority to request a review of a CDM proposed project in cases where comments received indicate significant environmental and social impacts or the infringement of rights.

## **4 Take Reasoned Decisions**

The discussion so far already highlights some of the main actors involved in the CDM – namely the project sponsor, the stakeholders, the DOE, the host State, and the CDM Executive Board. At several stages of the process, these actors need to take decisions with respect to a CDM project that may have an impact on the rights of affected communities. For instance, the project sponsor needs to

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49 WCD, *Dams and Development: A New Framework for Decision-Making* (London: Earthscan, 2000), p. 215: “Where projects affect indigenous and tribal peoples, such processes are guided by their free, prior and informed consent.”

50 Research current to August 2008.

51 Climate Action Network, “Public Participation in the CDM and JI,” Washington, DC, 21 July 2000, para 18.

decide how and to what extent it will engage local stakeholders; the stakeholders need to decide whether to comment on a CDM project; the DOE needs to decide to what level of scrutiny it will subject the project sponsor; the host State needs to decide whether the project involves significant impacts for the purposes of an EIA; and the CDM Executive Board needs to decide whether the project has fulfilled the information and participation requirements, as well as whether the DOE meets the accreditation standards to prepare the validation, verification, and certification reports. These examples illustrate the critical impact that certain decisions have in the course of a CDM project.

The ability of each of these actors to take reasoned decisions depends on a number of factors. From a general perspective, a central factor influencing all the actors involved in the CDM process is their perception of the function of the CDM. In this regard, if the CDM is viewed solely as a scheme designed to certify emissions reductions that can be traded, then the various actors may not regard negative social and environmental impacts of CDM projects as falling within their responsibility or sphere of influence. It is immediately apparent that this view is limited and often not in line with the RBA, given that it fails to recognize the potential for negative spillover from CDM projects, as well as the responsibility of CDM actors for any negative externalities. This view is also at odds with the purposes of the CDM as defined in the Kyoto Protocol, which first points to sustainable development and then to climate change mitigation objectives.<sup>52</sup>

Given this, the challenge of taking reasoned decisions by the various actors involved in the CDM incorporates at least two elements: reasons relating to the elements of the CDM that involve emissions reductions – i.e., climate change mitigation – and reasons relating to the elements of the CDM that involve avoiding negative externalities of the project and infringements of rights. In this sense, and of great significance, the CDM provides opportunities for using the RBA to achieve sustainable development.

Sustainable development is an open-ended concept that attempts to integrate economic, social, and environmental policies. Therefore, local communities should have the right to participate in any decisions that will affect them, in addition to substantive rights to natural resources, in accordance with human rights norms.<sup>53</sup> In the CDM context, it is the prerogative of the host State to determine whether a project contributes to its sustainable development, and such approval is a requirement for project registration.

However, at times this eligibility requirement raises questions by project proponents, particularly when the host State does not have a clear sustainable development policy.<sup>54</sup> It also raises concerns

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52 Kyoto Protocol, Article 12, para 2: “The purpose of the clean development mechanism shall be to assist Parties not included in Annex I in achieving sustainable development and in contributing to the ultimate objective of the Convention, and to assist Parties included in Annex I in achieving compliance with their quantified emission limitation and reduction commitments under Article 3.” See generally Christina Voigt, “Is the Clean Development Mechanism Sustainable? Some Critical Aspects,” *Sustainable Development Law & Policy*, vol. 7, no. 2 (2008), p. 15. See also Steve Thorne and Emilio La Rovere, “Criteria and Indicators for Appraising Clean Development Mechanism (CDM) Projects,” *Helio International*, October 1999, p. 10.

53 Daniel Magraw and Lisa Hawke, “Sustainable Development,” in Bodanksy, Brunee, and Hey, op. cit. note 35, pp. 613, 628–29.

54 Sebastian Foot, “An Evaluation of the Present Clean Development Mechanism,” *ELM*, vol. 16, no. 3 (2004), p. 127.

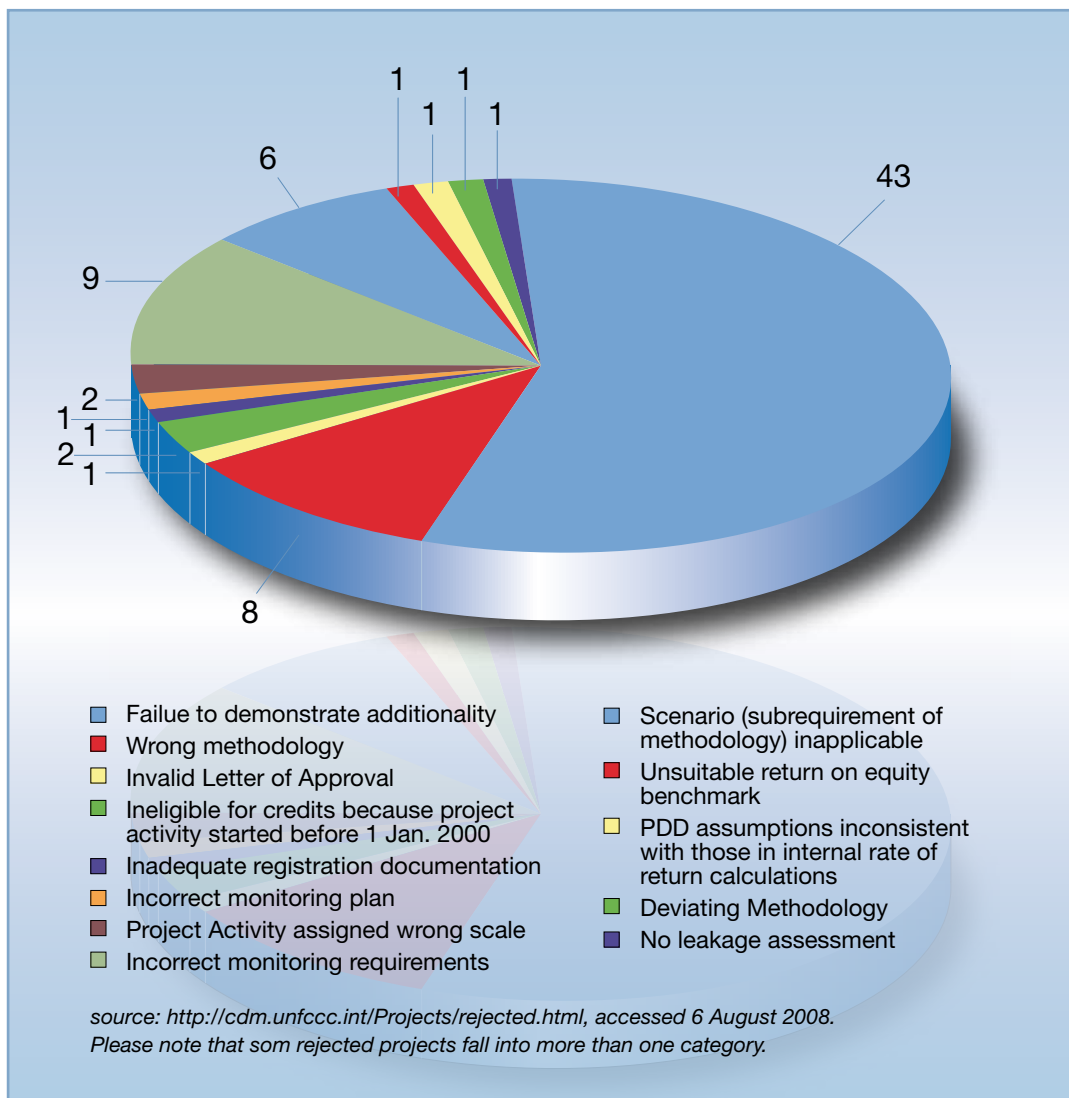


Figure 1: Reasons for CDM Project Activity Rejection

if the host State approves a project as conducive to sustainable development although it involves infringements of rights. This situation presents an inescapable tension between the sovereignty of the State to determine its own sustainable development policy under the CDM scheme, on the one hand, and the recognition that respect for human rights are essential to the pursuit of sustainable development and a matter of international concern, on the other hand.

In this regard, it must not be forgotten that the Johannesburg Plan of Implementation of the World Summit on Sustainable Development recognizes that respect for human rights and fundamental freedoms is essential for achieving sustainable development and ensuring that sustainable

development benefits all.<sup>55</sup> Operationalizing the human rights dimension of sustainable development in the CDM process, however, is clearly a difficult task. For example, it could require the Executive Board to make eligibility determinations on the basis of the human rights record of a project. So far, the Executive Board has not used sustainable development as a criterion to reject a project seeking CDM registration, thus deferring to the host State's determination.

Instead, methodologies that incorporate sustainable development indicators into a CDM project, such as the Gold Standard to the CDM, have been developed and are applied on a voluntary basis.<sup>56</sup> The Gold Standard achieves a high quality standard by using three screens for assessing the projects:

- The *Project Eligibility Screen* assesses whether the project uses renewable energy or energy efficient technologies.
- The *Additionality Screen* ensures that a project goes above and beyond a “business as usual” scenario.
- The unique *Sustainable Development Screen* judges the project on parameters of sustainable development.<sup>57</sup>

For assessing a project on the scale of sustainable development, the Gold Standard uses a list of indicators and assesses the project against each of them, using a scoring range of -2 to +2. Projects receiving a -2 for any of the indicators are classified as ineligible. Moreover, an EIA also needs to be carried out if a project scores a -1 in any indicator. In the assessment of projects on sustainable development issues, the Gold Standard also secures civil society participation in the screening process. Although stakeholder consultations are already provided for in the CDM process, the Gold Standard goes a step further and requires at least two rounds of consultations in the design phase of the project, with at least one public hearing.

## 5 Monitor and Evaluate Application of the RBA

Monitoring and evaluation of CDM projects is foreseen by the CDM modalities and procedures. However, although the purposes of the CDM as defined in the Kyoto Protocol are climate change mitigation *and* sustainable development, by design the CDM's main concern seems to be ensuring the integrity of a process that allows it to certify reductions of emissions. Therefore, in the CDM process strong emphasis is placed on screening validity of projects, determining baselines of anthropogenic emissions, defining methodologies for monitoring data necessary for estimating or measuring anthropogenic emissions, etc. The concern over negative social and environmental spillover of a CDM project appears to be secondary to ensuring that the scheme is able to issue certified emissions reductions.

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55 World Summit on Sustainable Development, *Report of the World Summit on Sustainable Development, Johannesburg, South Africa, 26 August – 4 September 2002, Annex: Plan of Implementation of the World Summit on Sustainable Development*, para 62 at p. 43.

56 See generally W. Sterk and M. Bunse, *Voluntary Compensation of Greenhouse Gas Emissions*, Policy Paper Number 3/2004 (Wuppertal, Germany: Wuppertal Institute for Climate Environment and Energy, October 2004).

57 The Gold Standard Foundation, “The Gold Standard Criteria,” at [www.cdmgoldstandard.org/how\\_does\\_it\\_work.php?id=42](http://www.cdmgoldstandard.org/how_does_it_work.php?id=42).

While the CDM monitoring provisions generally focus on anthropogenic emissions, the CDM modalities and procedures do include a provision that incorporates documentation of the analysis of the environmental impacts of a project into the monitoring plan of the PDD.<sup>58</sup> Significantly, the implementation of the registered monitoring plan shall be a condition for verification, certification, and the issuance of CERs. In other words, the monitoring process needs to look at the environmental and social impacts of the project. However, the CDM modalities do not establish a threshold of negative environmental and social externalities that could invalidate CERs. Consequently, the information produced in the environmental and social monitoring appears to play a strictly formal role, since the verification and certification phase will focus on the application of the monitoring plan with a view to determining the reductions in anthropogenic emissions.

Still, it remains possible that the CDM Executive Board will exercise its authority to supervise the CDM to exact compliance with all terms of the CDM modalities and procedures, including the rules that can contribute to avoiding any negative social and environmental spillover from projects. In the exercise of this authority, the CDM Executive Board could conclude that no CERs shall be issued in connection with projects involving negative social and environmental spillovers, especially if such impacts involve infringements of rights. In this connection, guidance from the Conference of the Parties serving as the Meeting of the Parties to the Kyoto Protocol could clarify this authority and the use of the RBA to prevent infringements of rights.

## **IV Conclusions**

Today proponents of activities or projects that have a potentially negative impact on conservation have greater demands upon them, and greater opportunities before them, to take account of and use human rights law to ensure that their projects minimize impacts deleterious to conservation or the rights of people. A rights-based approach presents a new and highly challenging proposition for actors interested in understanding and addressing their works' linkages to conservation and livelihoods. Despite the difficulties and efforts required to implement an RBA, there are many good reasons for adopting this approach to conservation, not the least of which is the possibility for drawing on mutually reinforcing relationships between conservation and human rights.

As shown in this chapter, such reasons also exist in the context of climate change. Apart from the direct and indirect impacts on human communities caused by the phenomenon of climate change, the measures adopted to mitigate such change may also have impacts on human livelihoods. Biofuels, for example, involve possible impacts on land tenure and food security. Projects under the Kyoto Protocol's Clean Development Mechanism may involve displacement of communities and other local environmental impacts. Denial of free and prior informed consent could further aggravate these impacts, particularly in terms of indigenous rights, lands, and territories. The human rights dimensions of such mitigation measures thus need to be carefully considered in the design of policies and projects.

This chapter has indicated how the implementation of an RBA through the step-wise approach described in Chapter 2 could provide a tool to prevent infringements of rights in the climate

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58 CDM Modalities & Procedures, *op. cit.* note 27, para 53 (g).

change mitigation context, using the CDM as a case study. As shown, current CDM modalities and procedures already contain certain tools necessary to apply certain steps of the RBA; indeed, most of the concerns raised with respect to CDM projects to date relate to its environmental and procedural integrity, not to violation of rights. Then again, as the CDM experiences expansion and reform, the RBA can be used to ensure that its future operations maintain and even improve its track record as a positive contribution to sustainable development, including respect for human rig

To conclude, the normative content of several guaranteed human rights provides the basis for an RBA to climate change. The RBA can inform governmental policies designed to mitigate – but also to adapt to – climate change. The RBA also can provide much needed inspiration and impetus to increasing international cooperation for sustainable development and climate change mitigation.



# 4 A Rights-based Approach to Forest Conservation

The demands of the timber, paper, and pulp industries have heavily simplified and degraded forests worldwide. Global deforestation continues at an alarming rate, as forests are cleared for agriculture or harvested unsustainably.<sup>1</sup> Pressures on forests will not disappear anytime soon, and the Food and Agriculture Organization (FAO) expects croplands in the developing world to expand over the next three decades.<sup>2</sup> The destruction of forests has a heavy impact on the welfare of poor and vulnerable populations and contributes to climate change and to the loss of biodiversity.<sup>3</sup> According to the World Bank, in 2004 more than 1.6 billion people depended to varying degrees on forests for their livelihoods,<sup>4</sup> and a significant number of people living in poverty relied on forests for much of their fuel, food, and income.<sup>5</sup>

Communities living in forests often suffer the consequences of conflicts over forest resources without enjoying the financial benefits.<sup>6</sup> Forest policies in several countries have long assigned priority to financial revenues and sustained timber yields, giving only marginal consideration to customary tenure systems and to traditional subsistence and social support networks. In this context, severe human rights abuses were committed, particularly in connection with the involuntary resettlement of forest-dwelling populations.

The impact of forest activities on human rights has on several occasions been noted by national and international judicial bodies. By way of example, the Inter-American Commission on Human Rights has found that deforestation and logging activities may impair the human rights of forest-dwelling communities, including their right to life.<sup>7</sup> Along similar lines, the UN Human Rights Committee has established that the expropriation of lands for timber development may threaten the way of life and culture of indigenous peoples and violate the prohibition of discrimination.<sup>8</sup>

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1 For updated data on deforestation rates, see Food and Agriculture Organization (FAO), *State of the World's Forests 2007* (Rome: 2007).

2 See J. Bruinsma, ed., *World Agriculture: Towards 2015/2030 – An FAO Perspective* (London: Earthscan, 2003).

3 According to the Intergovernmental Panel on Climate Change (IPCC), between 1970 and 1990 direct greenhouse gases emissions from land use, land use change, and forestry saw an increase of approximately 40 per cent. IPCC, *Climate Change 2007: Mitigation. Working Group III Contribution to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change. Summary for Policy-Makers* (Geneva: 2007), p. 3.

4 World Bank, *Sustaining Forests: A Development Strategy* (Washington, DC: 2004), p. 16.

5 *Ibid.*, p. 2.

6 K. M. Chomitz, *At Loggerheads? Agricultural Expansion, Poverty Reduction and Environment in the Tropical Forests*, Policy Research Report (Washington, DC: World Bank, 2007), p. 95. By way of example, data based on remote sensing suggest that poor people are responsible for less than one-fifth of deforestation in Brazilian Amazonia; see S. Wertz-Kanounnikoff, *Deforestation in Amazonia: An Inquiry into the Effect of Land Tenure and Population from 2000 to 2003* (Washington, DC: World Bank, 2005).

7 *Yanomami Indians v. Brazil*, Decision 7615, Inter-American Commission on Human Rights (IACHR) (1985), p. 264; *Maya Indigenous Community of the Toledo District v. Belize*, Case 12.053, Report No. 40/04, IACHR.

8 *Chief Bernard Ominayak and the Lubicon Lake Band v. Canada*, Communication No. 167/1984, U.N. Doc. CCPR/C/38/D/167/1984 (1990).



Until recently, forestry legislation in developing countries secured forests as State assets and established systems for regulating access to forests. Historically, the implementation of this model has led to the assertion of governmental control over forests at the expense of local actors. In several countries, however, governments do not effectively regulate the use of forests, and much of the global forest estate is characterized by confusion and insecurity over forest ownership and tenure rights. In this regard, many forest-dwelling communities do not have formal rights to the lands and resources on which they depend. This situation of uncertainty has long fanned popular discontent and caused forest conflicts. At stake is a vast amount of real estate, considerable timber wealth, and other assets, including biodiversity and carbon stocks.

### **Box 1: Forest Conflicts**

According to FAO, over the past 20 years at least 26 tropical countries have experienced armed conflicts in forested areas. Conflicts can erupt in frontier areas over access to land and timber.

A 2000 study on the allocation of property rights at the frontier in Brazilian Amazonia reported frequent clashes as landless groups and large landholders disputed property ownership. Clashes were attributed to legal ambiguity: while some legislative measures guaranteed landownership to the property holders, others allowed redistribution of “underutilized” land (including forest) to landless people. The study also highlighted that conflicts were more likely where land was valuable and there were overlaps between land titles.

Source: FAO, *Global Forest Resources Assessment: Progress towards Sustainable Forest Management*, Forestry Paper 147 (Rome: 2005); L. J. Alston, G. D. Lipecab, and B. Mueller, “Land Reform Policies, the Sources of Violent Conflict, and Implication in Deforestation in Brazilian Amazon,” *Journal of Environmental Economics and Management*, vol. 39, no. 2 (2000), pp. 162-88.

Insecure property rights are also a primary cause of forest degradation. By its very nature, forestry needs medium- to long-term investments if returns are to be sustainable. Insecurity undermines sound forest management, as without secure rights, forest holders have few incentives – and often lack legal status – to invest in managing and protecting forest resources.<sup>9</sup>

Stronger forest tenure rights for local communities<sup>10</sup> have recently been promoted as a way of improving local livelihoods and acknowledging legitimate claims over forestlands and resources. The involvement of locally based actors is increasingly regarded as an indispensable aid against deforestation.<sup>11</sup> Efforts to ensure that forest policies pursue conservation and sustainability while

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9 FAO, *Better Forestry, Less Poverty – A Practitioner’s Guide* (Rome: 2006), p. 9.

10 The term community is used here to refer to “complex entities containing individuals differentiated by status, political and economic power, religion and social prestige and intentions”. See A. Agrawal and C. Gibson, “The Role of Community in Natural Resource Conservation,” in A. Agrawal and C. Gibson, eds., *Communities and the Environment: Ethnicity, Gender and the State in Community-Based Conservation* (Piscataway, NJ: Rutgers University Press, 2001), p. 1.

11 FAO, *Best Practices for Improving Law Compliance in the Forest Sector*, Forestry Paper No. 145 (Rome: 2005), p. 38.

benefiting local communities have led to schemes of community forest ownership and management.<sup>12</sup> These efforts have produced mixed results. Whereas reportedly about a quarter of the world's forests are under community management,<sup>13</sup> community control over forest resources is often contested. In several countries forest regulations continue to provide little scope for communities to play a meaningful role in the planning, management, and allocation of forest resources.<sup>14</sup> Many forest reforms have been criticized for not adequately addressing the rights, customs, and institutions of forest communities.<sup>15</sup> Despite this mixed track record, the rationale underlying schemes for community forest management and ownership remains persuasive and urgent, as described in this chapter.

## I Advantages and Challenges of a Rights-based Approach

Disregarding existing rights over forests and their resources may undermine the successful outcome of strategies to ensure forests conservation and sustainable management. It is, however, hard for policy makers to decide which rights to give priority to. To date, no comprehensive rights-based approach (RBA) to forestry has been undertaken. The recently adopted Non-legally Binding Instrument on All Types of Forests of the United Nations Forum on Forests (UNFF) merely encourages States to promote the involvement of local communities, forest owners, and other relevant stakeholders in decision-making processes.<sup>16</sup> Some acknowledgement of the need to protect selected human rights may be found in the Forest Stewardship Council's Principles and Criteria for Forest Management,<sup>17</sup> in the World Bank Operational Policy on Forests,<sup>18</sup> and in the Guidelines for the Sustainable Management of Natural Tropical Forests of the International Tropical Timber Organization (ITTO).<sup>19</sup> These instruments chiefly make reference to forest ownership and access rights and to the rights of indigenous peoples.

12 For a review, see F. Romano and D. Reeb, *Understanding Forest Tenure: What Rights and for Whom?* (Rome: FAO, 2006).

13 A. White and A. Martin, *Who Owns the World's Forests? Forest Tenure and Public Forests in Transition* (Washington, DC: Forest Trends, 2002).

14 For this view, see, e.g., Romano and Reeb, op. cit. note 12, p. 1.

15 M. Colchester, *Beyond Tenure. Rights-based Approaches to Peoples and Forests. Some Lessons from the Forest Peoples Programme*, presented to the International Conference on Poverty Reduction in Forests: Tenure, Markets and Policy Reforms, Bangkok, Thailand, 3–7 September 2007.

16 United Nations Forum on Forests (UNFF), *Non-legally Binding Instrument on All Types of Forests*. Adopted by the UN General Assembly, 17 December 2007, A/RES/62/98, Principles II (c) and V.6 (w), see infra.

17 Forest Stewardship Council (FSC), *Principles and Criteria for Forest Stewardship* (Washington, DC: 2002), Principles 2 and 3 – see infra.

18 See World Bank, op. cit. note 4, p. 4: "In collaboration with its client countries and partners, the Bank's primary roles will be to work with client countries to strengthen policy, institutional, and legal frameworks to ensure the rights of people and communities living in and near forest areas; to ensure that women, the poor, and other marginalized groups in society are able to take a more active role in formulating and implementing rural forest policies and programs."

19 International Tropical Timber Organization (ITTO), *Revised ITTO Criteria and Indicators for the Sustainable Management of Tropical Forests Including Reporting Format*, Policy Development Series No. 15 (Yokohama, Japan: 2005), p. 13; ITTO, *Guidelines for the Restoration, Management and Rehabilitation of Degraded and Secondary Tropical Forests*, Policy Development Series No. 13 (Yokohama, Japan: 2002), p. 34.

A comprehensive RBA can be a powerful instrument to combine conservation interests with the needs of forest-dependent communities. On the one hand, conservation practices can benefit local users by protecting their lands and resources. On the other hand, the protection of the rights of forest communities is required on human rights grounds, and may also help preserve biodiversity, providing a front line defence against deforestation. For example, indigenous peoples' claims may help maintain the integrity of territories and avoid ecological fragmentation – a key requirement for biodiversity conservation.<sup>20</sup>

The priorities of forest communities, however, may not necessarily align with the ones of conservation. A synergy of intents can only be achieved through a careful balancing of conflicting interests. The RBA may prove a useful tool for guidance in this delicate process. This chapter will test the step-wise RBA introduced in Chapter 2 with reference to schemes of community forest ownership and management.

## II RBA in the Community Forest Management Context

As mentioned earlier in this chapter, a growing portion of the world's tropical forest estate is owned or managed by communities.<sup>21</sup> Governments are increasingly aware that formal forest ownership systems may discriminate against the rights and claims of local communities, and measures to recognize communities' claims over forests have been adopted in several countries. This proves particularly relevant to indigenous peoples.

### Box 2: The Rights of Indigenous Peoples

Indigenous peoples enjoy a range of rights aimed to ensure that their distinct characters are reflected in the institutions of government under which they live. One of their distinguishing features is their special relationship to territory. In a series of decisions concerning Suriname, for example, the United Nations' Committee on the Elimination of Racial Discrimination has recommended "legal acknowledgement by the State party of the rights of indigenous and tribal peoples to possess, develop, control and use their communal lands and to participate in the exploitation, management and conservation of the associated natural resources". With specific reference to logging and mining activities, the Committee stated that the ownership of national natural resources "must be exercised consistently with the rights of indigenous and tribal peoples".



20 G. Borrini-Feyerabend, A. Kothari, and G. Oviedo, *Indigenous and Local Communities and Protected Areas. Towards Equity and Enhanced Conservation Guidance on Policy and Practice for Co-managed Protected Areas and Community Conserved Areas* (Gland, Switzerland: International Union for Conservation of Nature (IUCN), 2004), p. 12.

21 For updated data on forest ownership statistics, see FAO, op. cit. note 1, p. 7.

In *Chief Bernard Ominayak and the Lubicon Lake Band v Canada*, the UN Human Rights Committee found that expropriation of the territory of the band and its subsequent use for oil and gas exploration and timber development amounted to a violation of the prohibition of discrimination. Along similar lines, in *Maya Indigenous Communities of the Toledo District v Belize*, the Inter-American Commission found that by failing to take measures to recognize the community's property right to the lands they traditionally occupied, Belize had violated the prohibition of discrimination and the right to equality before the law. In *Mary and Carrie Dann*, the Commission required the State authorities to put in place "special measures to ensure recognition of the particular and collective interest that indigenous people have in the occupation and use of their traditional lands and resources and their right not to be deprived of this interest except with fully informed consent, under conditions of equality, and with fair compensation."

Source: United Nations' Committee on the Elimination of Racial Discrimination (CERD) re Suriname Decisions 1(69) (2006) and 1(67) (2005) CERD/C/DEC/SUR/2 and CERD/C/DEC/SUR/5; *Chief Bernard Ominayak and the Lubicon Lake Band v. Canada*, Communication No. 167/1984, U.N. Doc. CCPR/C/38/D/167/1984 (1990); *Maya Indigenous Communities of the Toledo District v Belize*, Case 12.053, IA C.H.R. Report 40/04 (2004); CERD/C/64/CO/9/Rev.2, 12 March 2004; *Mary and Carrie Dann* (United States), Case 11.140 IA C.H.R., Report 75/02 (2002).

Recognition of the rights of local communities and indigenous peoples over forests is not only an issue of justice. There is also an increasing convergence between conservation and development agendas. As noted earlier, without secure rights local communities lack long-term incentives to invest in forest stewardship and to protect forests. Traditional management practices may have a positive impact on biodiversity conservation and ecosystem maintenance.<sup>22</sup> Building natural assets in the hands of low-income individuals and communities is therefore increasingly regarded as a key strategy to simultaneously advance the goals of poverty reduction and environmental protection.<sup>23</sup>

Another reason for promoting community forestry is that many countries have not developed the governance structures and management capacities necessary to ensure forest protection. In this context, involving forest communities in the management of forest resources may be an effective tool to contrast deforestation and benefit the poor. The following section will outline the notions of forest ownership and tenure, to then illustrate how an RBA approach may be used to promote sustainable forest use, combat illegal logging, and solve forest conflicts.

## 1 Ownership Rights

Forest ownership rights are normally associated with land property. The key attribution of property rights is that they are unlimited in time. Because of its unique and immovable nature, however, land is frequently subject to numerous simultaneous uses, and land property may be characterized as a

22 See, e.g., L. A. Thrupp, S. B. Hecht, and J. O. Browder, *Diversity and Dynamics of Shifting Cultivation: Myths, Realities and Policy Implications* (Washington, DC: World Resources Institute, 1997).

23 See J. K. Boyce, "From Natural Resources to Natural Assets," *New Solutions*, vol. 11, no. 3 (2001), pp. 266-78.

bundle of rights and obligations. Restrictions on land uses may be found in planning, public health, and environmental legislation. Land leases may also be subject to conditions, largely depending on the landowner's objectives.

Forests may be under public or private ownership. In most developing countries forest land is under formal State ownership.<sup>24</sup> In practice, however, large parts of land continue to be run according to "customary rules", especially in remote areas inhabited by indigenous peoples. "Customary rules" were developed to allocate the use of resources, such as land and water, among community members. Rights recognized under customary rules are often quite different from the ones recognized by formal law. The relationship between formal and customary rights is complicated by the fact that the latter often do not have equivalents in formal law. A further complication is that customary rights are likely to vary quite substantially from one context to another.

The key question regarding customary land rights is whether or not they should be incorporated in formal law. Attempts to ignore customary rules have often proved unsuccessful. Notwithstanding the enactment of formal legislation, customary rules frequently remain the only type of "law" applied at the local level.<sup>25</sup> By way of example, a 2003 World Bank survey revealed that the vast majority of land in Africa still remained under customary tenure.<sup>26</sup> Formal law, however, may be the best instrument to support the rights and interests of vulnerable stakeholders.<sup>27</sup> Accordingly, there is an increasing awareness of the need to conciliate customary rights with formal rights regimes.

In this context, several countries have introduced legal frameworks supporting community forest ownership. These experiments have faced several challenges and produced mixed results.

### **Box 3: Failure and Success in the Promotion of Community Property Rights**

In Papua New Guinea the rights of customary owners are embedded in the constitution and indigenous communities own 97 per cent of the nation's land. However, domestic legislation restricts customary landowners' ability to directly negotiate with commercial loggers. The allocation of logging concessions takes place under governmental control. This measure was drafted with the intent to protect landowning groups from manipulation and abuse. Thus, the National Forest Authority acts as an intermediary between customary owners and commercial timber companies. The system, however, has failed to achieve the expected outcome. Reportedly, the National Forest Authority has not properly addressed sustainability concerns and has not developed sufficient capacity to regulate vast tracts of forests. Most crucially, the

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24 For this analysis, see S. Hodgson, *Land and Water – The Rights Interface* (Rome: FAO, 2004), p. 60.

25 Ibid., p. 63.

26 K. Deininger, *Land Policies for Growth and Poverty Reduction*, Policy Research Report (Washington, DC: World Bank, 2003), p. 2.

27 A. White, "A Framework for Assessing Tenure Security," in L. Ellsworth and A. White, eds., *Deeper Roots: Strengthening Community Tenure Security and Community Livelihoods* (Washington, DC: Ford Foundation, 2004), p. 14.

evaluation of proposals for timber extraction permits does not include consultations with customary owners. As a result, customary owners do not have legal control over permits and have no legal relationship or privity of contract with the purchasers of extraction rights. Consequently, they cannot take legal action against breaches of concessions agreements, even though such breaches affect their forests.

In contrast, community forest ownership has produced encouraging results in Mexico. Communities own most of Mexico's forests. The legal status of these forests derives from land reforms in recognition of the claims of indigenous groups and other traditional users. Until 1986, however, the Mexican Government unilaterally granted forest access to private concessionaires, giving communities little voice over forest management decisions. The 1986 Forest Law suspended the existing concessions system and increased opportunities for communities to directly own forest enterprises. As a result, approximately 500 communities have developed successful integrated forest enterprises, generating local employment and providing an alternative to deforestation. Some communities have also invested their profits in social services and conservation, as, for example, in the area near the Calakmul Biosphere Reserve.

Sources: Forest Trends, *Logging, Legality and Livelihoods in PNG: Synthesis of Official Assessments of the Large-Scale Logging Industry* (Washington, DC: 2006); C. Filer and N. Sekhran, *Loggers, Donors and Resource Owners. Policy that Works for Forests and People, Series No. 2: Papua New Guinea* (Port Moresby, PNG, and London: National Research Institute and International Institute for Environment and Development (IIED), 1998); A. A. Vegter, "Forsaking the Forests for the Trees: Forestry Law in Papua New Guinea Inhibits Indigenous Customary Ownership," *Pacific Rim Law & Policy Journal*, vol. 14 (2005), pp. 545–74; C. Antinori and D. B. Bray, "Community Forest Enterprises as Entrepreneurial Firms: Economic and Institutional Perspectives from Mexico," *World Development*, vol. 33, no. 9 (2005), pp. 1529–43; F. Chapela and Y. Lara, *El Ordenamiento Comunitario del Territorio. Un Esquema para Hacer Compatibles los Objetivos de Conservación y los Derechos Sociales e Indígenas* (Mexico: Rural Studies and Consulting, date unknown); I. Thompson and T. Christophersen, eds., *Cross-Sectoral Toolkit for the Conservation and Sustainable Management of Forest Biodiversity*, Technical Series No. 39 (Montreal: Secretariat of the Convention on Biological Diversity, 2008); ITTO, *Achieving the ITTO Objective 2000 and Sustainable Forest Management in Mexico* (Yokohama, Japan: September 2005).

As the case of Mexico shows, public policies play a crucial role in facilitating sustainable forestry through community ownership. In this context, the role of the state is to establish adequate policies and legislation that define and secure forest property rights. Policies over forest property should also ensure participation in decision making over forest resources. As the experience of Papua New Guinea demonstrates, the risk is to provide hollow property rights, deprived of any substantial content.

This question is particularly relevant to the current debate on incentives to reduce emissions from deforestation and forest degradation in developing countries (REDD).<sup>28</sup> Influential stakeholders may

28 See proceedings associated with the UNFCCC Workshop on Reducing Emissions from Deforestation in Developing Countries, Rome, 30 August – 1 September 2006, and the UNFCCC Second Workshop on Reducing Emissions from Deforestation in Developing Countries, Cairns, Australia, 7–9 March 2007.

be better positioned to reap the economic incentives associated with REDD.<sup>29</sup> This could lead to inequitable situations whereby local communities that have acted as forest stewards fail to receive the financial benefits. In this connection, the Stern Review on the Economics of Climate Change mentions that defining property rights to forestland and determining the rights and responsibilities of landowners, communities, and loggers is key to effective forest management for carbon sequestration. The review also stresses the need to involve local communities in forest management and to respect informal rights and social structures.<sup>30</sup>

**Box 4: Combination of Conservation, Carbon Sequestration, and Pro-Community Policies**

Bolivia hosts one of the earliest examples of REDD projects, the Climate Action Project in Noel Kempff Mercado National Park. The project has been described as “a carbon emissions and leakage avoidance project with a community-development component” and stemmed from a pilot voluntary initiative by the Government of Bolivia and a consortium of companies and non-governmental organizations. In particular, the project aims to lower carbon dioxide emissions from deforestation, providing forest conservation and leakage avoidance through two complementary activities: monitoring logging companies and assisting community development.

At the outset, the project bought back concessions from logging companies that had obtained the right to harvest timber in the area adjacent to the national park. The regained land was donated to the park, where a deforestation ban was enforced. The risk of leakage was addressed through agreements with former timber concessionaires, which obligated them to report on the use of compensatory funds received to cease operations and to cooperate in sustainable forestry practices outside the protected area. The project encompasses a programme to measure the carbon stored in the forest and avoided carbon emissions.

Although not eligible for registration under the Clean Development Mechanism (CDM), the project was the first conservation-based REDD initiative to be certified following CDM standards. The Government of Bolivia owns 49 per cent of the emissions reductions achieved through the project and is required to spend the proceeds from the sale of offset credits on park management and biodiversity conservation.

The project included initiatives to create economic alternatives to deforestation and to improve the livelihood of local communities. In this regard, the project provided a programme promoting land tenure and community property rights. Before the project started, none of the communities bordering the park had property rights to the land they historically had lived on. After

29 For this analysis, see L. Peskett, D. Huberman, E. Bowen-Jones, G. Edwards and J. Brown, *Making REDD Work for the Poor* (Gland, Switzerland: IUCN, 2008).

30 “Executive Summary,” in N. Stern, *The Economics of Climate Change: The Stern Review* (Cambridge, UK: Cambridge University Press, 2006), p. 16.

the implementation of the project, the entitlement of native communal lands has advanced by nearly 80 per cent. The programme has also promoted income-generating activities, including community forestry. The project supported the elaboration of a community forest management plan and the establishment of community forest concessions. These initiatives were accompanied by the creation of a timber-selling point and a sawmill run by local indigenous peoples.

Sources: P. H. May et al., *Local Sustainable Development Effects of Forest Carbon Projects in Brazil and Bolivia: A View from the Field* (London: IIED, 2004); UN Framework Convention on Climate Change Secretariat, *Background Paper for the Workshop on Reducing Emissions from Deforestation in Developing Countries* (Bonn: 2006).

## 2 Tenure Rights

The term forest tenure refers to rights over the use and management of forest resources. In particular, forest tenure determines who can use what forest resources, for how long, and under what conditions.<sup>31</sup> These rights are often separated from landownership.

Rights of access, including spatial and temporal use rights, are defined by terms imposed by the owner or negotiated between the owner and the person desiring use of the land. In several developing countries forestland is held in State ownership, and access rights are sold to large private forest industry through logging concessions. Under these agreements, logging companies obtain long-term rights to access and manage forests, harvest timber, and exclude other users. In return, the companies pay royalties and other fees to the government. As seen in the previous section, institutions charged with enforcing logging agreements are often ineffective. The causes of illegal activities include flawed policy and legal frameworks, lack of enforcement capacity, insufficient data and information about illegal operations, and corruption.<sup>32</sup>

Regulations governing forest management are often engineered for large concessionaires and make it difficult for local communities to access and use forest resources legally.<sup>33</sup> As with unclear and insecure property rights, poorly defined tenure rights generally also have a negative impact on both local communities and forests. Unless local actors have a significant stake in the management of forest resources, the efforts of forest conservation officials often prove futile.<sup>34</sup> Lack of community involvement reduces the incentives to comply with the law and promotes indifference to such compliance. By contrast, landholders with secure tenure are more likely to plant and maintain forests and may improve their revenue. At the local level, secure tenure is therefore a prerequisite for ensuring sustainability, as well as accountability and control over forestry operations. In addition, according to the ITTO Guidelines for the Restoration, Management and Rehabilitation of Degraded and Secondary Tropical Forests, secure land tenure and land-user access are fundamental to the restoration, management, and rehabilitation of such forests.<sup>35</sup>

31 Romano and Reeb, op. cit. note 12, p. 3.

32 FAO, op. cit. note 11, p. 7.

33 Ibid., p. 23.

34 FAO, op. cit. note 9, p. 41.

35 ITTO, *Guidelines*, op. cit. note 19, p. 34.



In principle, communities should be better than distant governments at managing and policing their forests. Some countries have therefore devolved to local communities management rights to public forests. Forest tenure reforms are often implemented when overall State management has failed.<sup>36</sup> Such reforms aim to reverse the results of unsuccessful management by increasing the participation of local populations or the private sector, recognizing local customary rights, and allocating management responsibilities to local actors. These arrangements, also known as “joint management” and “co-management,” do not alter landownership patterns but convey limited management rights and responsibilities. Joint forest management (JFM) and co-management arrangements are increasingly common in areas where governments recognize their limited capacity to manage public forestlands effectively. They are also spreading in degraded forest areas, where they have produced positive results.

### **Box 5: Successful Joint Forest Management in India**

Joint forest management was introduced in India with the 1988 Forest Policy. This reform attempted to share forest benefits and management responsibility between the State and communities, with the aim to combine conservation and development objectives. By 2005 JFM covered 27 per cent of the national forest area. Although rules differ State by State, they generally give communities access to forests for fuelwood, fodder, and other extractive products and grant them a proportion of revenue from commercial timber sales. More degraded, less commercially valuable forests are most likely to be put under the programme.

Reportedly, JFM has improved forest regeneration and has had a positive impact on livelihoods, while legitimizing people’s use of forests. In the State of Orissa, for example, participatory JFM arrangements have helped overcome some of the difficulties posed by protected forests where, in the absence of recognized rights over land, people had been displaced without compensation or continued cultivating and living on lands over which they had no valid title. The Orissa Government provided guidelines for local community involvement in the protection of forests through the formation of village-level forest protection committees. A State-level steering committee was also constituted to monitor and guide implementation. The forestry department supervised the selection/demarcation of the forest area for JFM, the preparation of JFM micro-plans and budgets, the transfer of sound silviculture and soil conservation skills to village committees’ members, and the implementation of JFM micro-plans. Although much needs to be done to strike an improved balance between conservation and community needs, JFM may be regarded as a useful step in the right direction.

Sources: K. D. Singh, J. P. Singh, and B. Sinha, “Trends in Forest Ownership, Forest Resources Tenure and Institutional Arrangements: Are they Contributing to Better Forest Management and Poverty Reduction? Case Studies from Orissa, India,” in FAO, *Understanding Forest Tenure in South and Southeast Asia* (Rome: 2006), pp. 81–114; K. S. Murali, I. K. Murthy, and N. H. Ravindranath, “Joint Forest Management in India and Its Ecological Impacts,” *Environmental Management and Health*, vol. 13, no. 5 (2002), pp. 512–28; A. Khare et al., *Joint Forest Management: Policy, Practice and Prospects* (London: IIED, 2000).

36 For this analysis, see Romano and Reeb, op. cit. note 12, p. 7.

As the case of India exemplifies, when rights are granted on a long-term basis and are clearly defined, community forest management and joint forest management schemes are conducive to sustainable forest management and regeneration. To be effective, community tenure rights need to be supported by adequate capacity and by legal frameworks that take into consideration pre-existing entitlements. However, often tenure reforms do not make provision for clear, long-term rights and responsibilities.

### 3 Common Obstacles

This section has illustrated how merely placing forests under local stewardship may not be sufficient to promote sustainable community forest management. Although situations and contexts differ from country to country, flaws that undermine forest ownership and tenure reforms share some common features:<sup>37</sup>

- *Fragility of rights*: Often the introduction of community forest ownership and tenure schemes is not matched by clear, formal, long-term, enforceable rights and responsibilities. Many forest policies and legal frameworks fail to address issues concerning rights security. Sustainable forest uses are more likely when communities have clear rights backed by sufficient institutional strength and when there are mechanisms in place to monitor and regulate use.<sup>38</sup>
- *State control in disguise*: Despite the official transfer of rights, States often retain predominant or overall control on forest management activities.
- *Limited management capabilities*: Without appropriate training, the mere transfer of forestland to communities may not solve questions relating to deforestation and forest degradation. While some forest communities have centuries-old traditions to draw on, others are assemblages of recent migrants with little internal organization and expertise over forest management.<sup>39</sup>
- *Lack of transparency and accountability*: It is inevitable that wealthier, better educated and more politically connected community members exercise greater control over resources. While this control can be more or less benign, in the worst cases corrupt leaders may sell or seize community resources for private gain.
- *Poor quality of resources allocated to local holders*: often forests handed over to communities are severely degraded and have little or no commercial value.
- *Need to combine sustainable livelihoods and income generation with forest conservation*: communities' interests may not be aligned with conservation objectives. In this regard, it is necessary to achieve a workable balance between users' rights and responsibilities and to ensure that poor and vulnerable individuals have access to forest benefits. An RBA may serve to streamline and rationalize property rights and tenure regimes to this effect.

37 For the following analysis, see *ibid.*, pp. 6-10.

38 C. Pye-Smith and G. Borrini Feyerabend, *The Wealth of Communities* (London: Earthscan, 1994).

39 E. Wollenberg, D. Edmunds, and L. Buck, *Anticipating Change: Scenarios as a Tool for Adaptive Forest Management: A Guide* (Bogor, Indonesia: Center for International Forestry Research (CIFOR), 2000).

### III Implementing an RBA in Community Forest Management

This section will test the step-wise approach described in Chapter 2 with regard to community forest management. Examples and lessons learnt will be drawn primarily from a case study on community forests in Nepal. Nepal's community forest management schemes have produced positive conservation results and contributed to solving the vexed question of forest conservation in the country. Nepal has reportedly experienced serious conflicts associated with forest conservation, and army officers and forest rangers have been accused of severe human rights abuses at the expense of local populations.<sup>40</sup> Community forest schemes represent a viable alternative to the deployment of the army to secure forest conservation. In this context, the adoption of an RBA may help solving tensions between conflicting objectives in the administration of forest resources.

#### **Box 6: Community Forests in Nepal**

Community forestry has significantly contributed to slowing deforestation and increasing forest cover in Nepal. The 1993 Forest Act and the 1995 Forest Regulation enabled the handover of public forests to traditional user households adjoining forests for development, conservation, and utilization. The main objective was fulfilling local communities' need for basic forest products, such as fuelwood, fodder, bedding materials for livestock, and timber.

Community forest users groups are authorized to protect and manage the forest in accordance with the provisions made in forest operational plans. Plans are prepared with technical assistance from forest rangers, and they are subject to the approval by local District Forest Offices. Forest plans describe how to protect, manage, and utilize forests, how to sell or dispose of forest products, and punish violators. Operational plans are valid for five years and may be renewed after termination.

As a general rule, community forests should be managed and used without any negative impact on the environment. Forest users groups are responsible for protecting the community forests from encroachment. For management purposes, the most important activities delegated to communities are clearing unwanted weeds; removing dead, dying, and diseased trees; thinning thick stems and pruning branches to maintain horizontal space between stems; and planting in gaps. In community forests it is illegal to construct residential buildings, cause erosion and landslides, quarry, collect stone or soil, and catch or kill wildlife.

Users groups can collect forest products and distribute them among their members, according to the rules stipulated in the operational plan. Forest products are available to beneficiaries only at specified times of the year. The groups can also sell forest products to outsiders after the group members' requirements have been met. Prices are fixed by the groups but cannot be



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40 See S. Jana, "Voices from the Margins: Human Rights Crises Around Protected Areas in Nepal," *Policy Matters* (IUCN), vol. 15 (2007), pp. 87–100; N. Sharma Paudel, S. Ghimire, and H. Raj Ojha, "Human Rights – A Guiding Principle or an Obstacle for Conservation?" *Policy Matters* (IUCN), vol. 15 (2007), pp. 299-310.

lower than those fixed by the government. When selling *sal* (*Shorea robusta*), timber, and *khair* (*Acacia catechu*) outside the user group, communities are required to pass on 15 per cent of the proceeds to the government. In addition, groups must spend at least 25 per cent of their total forest income on forest management; the remaining 75 per cent can be spent on community development activities.

Most community forest groups are protection-oriented and do not manage their forests intensively. Overall, communities have successfully reversed deforestation and improved forest conditions. A report on Nepalese forestry over 1976–2000 found that the highest net improvement and gain in forest cover occurred in public forests under the de facto control of local communities or municipalities, followed by formalized community forests.

Source: B. K. Singh and D. P. Chapagain, “Trends in Forest Ownership, Forest Resources Tenure and Institutional Arrangements: Are they Contributing to Better Forest Management and Poverty Reduction? Community and Leasehold Forestry for the Poor: Nepal Case Study,” in FAO, *Understanding Forest Tenure in South and Southeast Asia* (Rome: 2006), pp. 115 – 52; A. P. Gautam, G. P. Shivakoti, and E. L. Webb, “Forest Cover Change, Physiography, Local Economy, and Institutions in a Mountain Watershed in Nepal,” *Environmental Management*, vol. 33, no. 1 (2004), pp. 48 – 61.

## 1 Undertake a Situation Analysis

When developing new or revising existing forest policies and legislation in order to solve forest conflicts, the needs, potential, and requirements for the establishment of community forestry regimes should be analysed. This has to start with a thorough situation analysis.

### Action 1.1: Identify Actions, Stakeholders, and Roles

A situation analysis should preliminarily identify ongoing actions, stakeholders, and their roles. Forests are extensively used by several subjects for a wide range of purposes. Due to seasonal factors, different groups may have rights over the same products at different times. Not all claimants may be local residents: migratory pastoralists, hunters, rubber tappers, and prospectors may have reasonable claims to use or access a forest and the resources that lie within it. Downstream water users may also claim rights in an effort to prevent deforestation of watershed forests. In addition, national government or international actors may lay claims to forests’ environmental services, recreational values, or subsoil minerals. In particular, new markets for forests’ environmental services (such as landscape beauty, soil conservation, biodiversity protection, or the carbon sequestration function of trees) increase considerably the range of potential stakeholders.

With reference to forest ownership and tenure, relevant stakeholders are all those who have a title to land and/or forest resources, based on formal or customary law. They may include:

- State and local authorities;
- Large and small private holders;
- Forest-dwelling communities;

- Third parties who do not have a title to land but still have a legitimate interest to the forest resources upon it, such as conservation actors and logging companies; and
- Local advocacy groups and NGOs may be important vehicles to voice the concerns of local communities.

In the case of community forests in Nepal, the key rights-holders are user groups, the government, (which retains formal land ownership), and local District Forest Offices. Federations accepting membership from user groups may also be regarded as stakeholders, together with national and international NGOs that provide funding and support to community forests. Other stakeholders include traditional forest users who are not part of community user groups.

### **Action 1.2: Identify Applicable Legal Rights, Claims, and Duties**

At the root of many forest conflicts there is a fundamental question over who owns forests and who has the right to decide what happens to them. These relationships are chiefly ruled by land tenure and property regimes. In order to establish the potential for community forestry regimes, it is also crucial to carry out an assessment of the implementation of existing regulations and to understand the social, economic, cultural, and political causes of non-compliance.<sup>41</sup> In this context, the following set of preliminary questions can identify the extent to which local communities are involved in forest ownership and management:<sup>42</sup>

- Do communities have ownership or tenure rights over the forest area?
- If so, are these clear, legally recognized, and protected?
- How long is the period of tenure?
- What are the reasons behind investing or not investing in forest and tree management?
- Do communities have clear rights to gain access to products from the forest?
- Is access hindered by costly and complex requirements for inventories, management plans, or permits and licenses?
- Are there any conflicting rights or unresolved claims?
- Are there restrictions for selling forest products, including price restrictions?

When drawing conclusions from the answers to these questions, it is important to recognize that some human rights are particularly relevant in connection with the establishment of forest community ownership and management schemes. These are:

- The right to an adequate standard of living;
- The right to adequate housing;
- The prohibition of discrimination; and
- The right to freedom of movement.

When dealing with indigenous peoples, it is important to emphasize that these groups enjoy special protection under international law, due to their historical relation to the lands and territories they

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41 FAO. op. cit. note 11, p. xiii.

42 FAO, op. cit. note 9, pp. 9-10.

use or occupy. The Forest Stewardship Council Principles and Criteria for Forest Stewardship contain specific guidelines in this regard. According to Principle 3, “the legal and customary rights of indigenous peoples to own, use and manage their lands, territories, and resources shall be recognized and respected”.<sup>43</sup> Forest management must not threaten or diminish, either directly or indirectly, the resources or tenure rights of indigenous peoples. Sites of special cultural, ecological, economic, or religious significance to indigenous peoples must be clearly identified in cooperation with such peoples and must be recognized and protected.

At this stage of the RBA process, it is necessary to identify the specific duties or obligations of all actors. For example, loggers and commercial actors should not establish dangerous operations in areas where local or indigenous communities have access rights. The same actors should also remain alert and mitigate any negative effects that their operations might have on the health of local inhabitants, as well as on their access to clean water and land that is suitable for the production of food. This includes respecting the needs of the people with whom they share public services, such as electricity. Other disruptions that might significantly affect the well-being and subsistence of local communities include activities affecting wildlife and natural land use patterns.

Where community forest schemes are already in place, forest users need to comply with the requirements set out by the law. In Nepal, the relevant rights and duties are chiefly described by community forest plans and domestic legislation. Domestic authorities must monitor compliance with such prescriptions. The establishment of community forests in Nepal has raised some key participation and discrimination questions. Community forestry schemes are accessible only to communities adjoining forests and they exclude other traditional users who live some distance away. In addition, reportedly elite groups tend to perform leading roles in community self-governing bodies, marginalising more vulnerable group members and women. As a consequence, in its present form this policy arrangement has curtailed access to basic means of sustenance for some vulnerable groups.

### **Action 1.3: Identify Potential Impacts of the Proposed Project**

The impact of reforms of forest tenure and ownership regimes on the livelihoods of local communities needs to be carefully assessed. As explained earlier, the transfer of rights and responsibilities needs to be coupled with adequate security of tenure and management capacities.<sup>44</sup> The establishment of community forests needs to strike a fair balance between rights and responsibilities. Use and access restrictions need to be realistic and comply with the fundamental rights of users and all affected individuals.

### **Action 1.4: Identify Potential Conflict Resolution Mechanisms**

Under a rights-based approach, claims and conflicts over forest resources must be clarified and solved in accordance with domestic law and international human rights. Reforms must be based on rigorous data on property claims and ownership collected at the local and regional level. Official

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<sup>43</sup> FSC, op. cit. note 17, Principle 3.

<sup>44</sup> Romano and Reeb, op. cit. note 12, p. 6.

manifestations of rights, such as property surveys and titles, can enhance tenure security. However, formal adjudication and title registry can be a great challenge to the affirmation of customary rights. When there is a lack of fair and legitimate procedures, surveys and titles may not only fail to deliver tenure security, they may also increase the levels of conflict.<sup>45</sup> It is therefore necessary that these processes keep local circumstances, customs, and uses in due consideration. At the community forest level, conflicts between users should be addressed through fair adjudicating procedures that guarantee impartiality. The use of these mechanisms should not preclude access to courts of law.

## **2 Provide Information**

Reforms of forest property and tenure systems should take place transparently and should guarantee public access to information. Even when such reforms are grounded in law and policy, information still needs to be disseminated to facilitate the participation of all stakeholders.

In this context, different groups may benefit from different types of information. For example, forest rangers and staff in charge of monitoring forest access must be fully informed about existing users rights. Forest users, on the other hand, need to be informed about their rights and duties, as well as of mechanisms to protect and enforce them.

### **Action 2.1: Compile and Publish Information in an Understandable and Easily Accessible Way**

Community forestry needs to be supported through the spread of adequate information. Appropriate support must be provided to help potentially affected groups appreciate the implications of adhesion (and lack of adhesion) to community forest schemes. To this effect, leaflets, manuals, training course curricula, and handbooks need to be made available. Furthermore, it is necessary to inform all potentially affected individuals through appropriate media (e.g., radio programmes, newspapers, etc).

For instance, in Nepal's community forests, forest officers provide advice, technical assistance, and support to user groups. Officers receive training on participatory forest management, training methodology, facilitation methodology, and tools for rapid and participatory rural appraisal. Furthermore, user groups are trained to enhance their capacity to manage their forests in a sustainable manner.

### **Action 2.2: Disseminate Specific Information Regarding Legal Rights, Claims, and Duties of Potentially Affected Persons**

Information about the rights and responsibilities associated with forest ownership and tenure must be publicly available and easily accessible. All stakeholders, in particular communities, need to be informed of their rights and empowered to actively participate in legal reforms. Giving appropriate information and professional advice, for example, to customary landowners is essential to balance negotiation inequities. Affected subjects also need to be informed of their rights to seek redress and compensation for abuses. Measures to educate government officials on community rights and on mechanisms for enhancing livelihoods should be considered.

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<sup>45</sup> Ellsworth and White, op. cit. note 27, p. 19.

### 3 Ensure Participation

Like other natural resources, forest resources are subject to capture and exploitation by political, economic and military elites. Lack of transparency in decision-making enables political and corporate elites to act with minimal public accountability, which tend to lead to unsustainable practices. By contrast, following an RBA in forest activities means ensuring an open, highly inclusive, multistakeholder process and the effective participation of all interested parties.

In this regard, the UNFF Non-legally Binding Instrument on All Types of Forests states that “local communities, forest owners and other relevant stakeholders contribute to achieving sustainable forest management” and requests that they “should be involved in a transparent and participatory way in forest decision-making processes that affect them, as well as in implementing sustainable forest management, in accordance with national legislation”. The instrument calls on States to “promote active and effective participation by major groups, local communities, forest owners and other relevant stakeholders in the development, implementation and assessment of forest-related national policies, measures and programmes”.<sup>46</sup>

Generally, allocating forest resources in a more participatory and accountable way contributes to improving forest management and to reducing conflicts.<sup>47</sup> For community forestry, participation entails in particular:

- A participatory approach to forest law design;
- Promoting transparency;
- Reducing the potential for corruption;
- Enabling people to scrutinize the effectiveness of subsequent implementation;
- Ensuring greater equity; and
- Minimizing the undue influence of privileged groups.<sup>48</sup>

#### Action 3.1: Undertake Consultations

Consultations are a time-consuming activity that should start early and ideally should include direct contacts with affected subjects. Consultations should take place in good faith and adhere to domestic legislation.<sup>49</sup> It is good practice to record what percentage of stakeholders is present at each moment of consultation, subdividing by category (gender, age, etc). An evaluation of the quality of participation is also necessary to prevent situations where, for example, a local community is merely informed about the proposed project(s) and about decisions already taken by others. The main goal is to guarantee that stakeholders have a real chance to exercise negotiating power and influence decisions in their capacity as rights-holders, persons affected, and beneficiaries. An

46 UNFF, op. cit. note 16.

47 L. Tacconi, K. Obidzinski, and F. Agung, *Learning Lessons to Promote Forest Certification and Control Illegal Logging in Indonesia* (Bogor, Indonesia: CIFOR, 2000), p. 10.

48 J. Lindsay, A. Mekouar, and L. Christy, *Why Law Matters: Design Principles for Strengthening the Role of Forestry Legislation in Reducing Illegal Activities and Corrupt Practices* (Rome: FAO, 2002), p. 9.

49 For the following guidelines, see C. Tanner et al., *Making Rights a Reality: Participation in Practice and Lessons Learned in Mozambique* (Rome: FAO, 2006), p. 54.



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important feature may be the inclusion of procedures open to the public aimed at reducing incentives and opportunities for corruption and manipulation of forestry administration.

The involvement of all categories of stakeholders entails a true commitment to listening and understanding their needs, objectives, insights, and capacities and to finding ways to accommodate the multiple interests at stake. Limited consultation so that only acceptable voices are heard is not sufficient. Identifying those with rights to speak for communities may be, however, a challenge. In this regard, it is vital to comply with the requirements and prescriptions of domestic law and to ensure respect for the human rights of those affected.

At the community level, community representatives should ideally be a part of the community in question, democratically elected. Elections should be held regularly and should also be recorded. Internal decision-making should take place through the direct involvement of all affected stakeholders. NGOs and community activists may play a fundamental role of intermediation. It is nevertheless important to carefully establish the legitimization of these subjects, their links to the communities and other potential stakeholders, and their accountability to those they represent.

In Nepal's community forests, elite groups tend to exclude more vulnerable subjects from decision-making and benefit sharing. In this context, positive discrimination measures to ensure broader participation may be considered, together with special policies to address the needs of more-vulnerable users, including those who live some distance away.

### **Action 3.2: Seek and Promote Free and Prior Informed Consent**

Free, prior and informed consent procedures enable affected subjects to decide whether to give consent to projects, such as the establishment of community forests. Consent must be obtained without coercion, after the full disclosure of the intent and scope of any given activity, in language and processes understandable to the affected communities and prior to commencement of activities.

In this connection, the Forest Stewardship Council Principles and Criteria for Forest Stewardship require that local communities with legal or customary tenure or use rights maintain control over forest operations, unless they delegate control with free and informed consent to other agencies.<sup>50</sup>

### **Action 3.3: Promote and Use Conflict Resolution Mechanisms to Secure Rights**

Subjects affected by forest policies must have access to a grievance mechanism without discrimination or fear of repercussions. Appropriate administrative and judicial mechanisms should be in place to provide effective protection against imposed projects and policies infringing upon rights.

When dealing with local communities, actors must establish and maintain effective grievance processes whereby members of the community can lodge complaints. Any individual filing a grievance should receive notification of the findings regarding his or her complaint and of any corrective action. If the individual or organization disagrees with the decision, he or she should have recourse to some reasonable form of arbitration or dispute resolution to settle the claim.

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50 FSC, op. cit. note 17, Principle 2.

The Forest Stewardship Council Principles and Criteria for Forest Stewardship explicitly provide that appropriate mechanisms must be used to resolve disputes over tenure rights and use claims. Such disputes are explicitly considered during forest evaluation and may disqualify an operation from being certified.<sup>51</sup>

#### **Box 7: Key Elements to Achieve Tenure Security**

- Security requires clarity of the content of rights over forests. Confusion over rights can significantly undermine the effectiveness and enthusiasm with which those rights are exercised.
- Security requires certainty that rights may not be revoked or changed unilaterally and unfairly. Conditions need to be fair, clearly established, and transparent.
- Security is enhanced if the duration of rights is either in perpetuity or for a period that is clearly spelled out and is long enough for the benefits to be fully realized. If rights are to be in force only for a particular period of time – as in some co-management arrangements or forestry leases, for example – care should be taken to ensure that agreements are made for at least as long as realistically required to reap the benefits of participation.
- Security means that rights need to be enforceable against the State (including local government institutions).
- Security requires that the holders of rights be able to exclude or control the access of outsiders. The definition of rights-holder needs to be handled carefully to ensure that subjects with legitimate claims are not unfairly excluded. Attention is required to identify and protect different types of rights of access and use.
- A corollary to exclusivity is that there must be certainty as to the boundaries of the resources to which the rights apply and as to the subjects entitled to claim group membership.
- Security requires that right-holders be enabled to acquire legal personality and to take a range of steps, such as applying for credits or subsidies, entering into contracts with outsiders, collecting fees, etc.
- Security requires accessible, affordable, and fair avenues for seeking rights protection, solving disputes, and appealing decisions of government officials.

Source: J. M. Lindsay, *Creating Legal Space for Community-Based Management: Principles and Dilemmas* (Rome: Development Law Service, FAO, 1998).

The development of participatory land planning tools may facilitate popular support for policy choices and reduce the potential of conflicts regarding forest uses. These may prove particularly relevant

51 Ibid.: “Long-term tenure and use rights to the land and forest resources shall be clearly defined, documented and legally established.”

to the restriction of forest uses. Popular participation in shaping plans and negotiating land rights means adjusting land planning to recognize reality on the ground – not vice versa.

Participatory forest mapping is another mechanism to build community consensus that has been used successfully in several countries.<sup>52</sup> Under this approach, local people supply place names, land use zones, and the corresponding use and access information for the area they are seeking to map. The resulting map is then used as a first step to negotiate tenure rights with government agencies and private firms. The popularity of this method is explained by the fact that the mapping process elicits concrete information on claims, along with a common, objective basis for discussing whether a specific claim can be considered.

Finally, the adoption of pilot working models that illustrate successful forest management may be a practical tool to involve stakeholders and demonstrate that it is possible to implement change. Models also give government agencies the opportunity to experiment with different solutions. Exchange visits and apprenticeships can be very effective for sharing lessons learnt and good practices.

In the case of Nepal's community forest projects, officials carry out such visits in order to facilitate the exchange of lessons learnt. Reportedly, the transfer of forest staff from one district to another has had positive effects on the performances of community forests.<sup>53</sup>

#### **4 Take Reasoned Decisions**

The information gathered through Steps 1–3 must be taken into consideration when making decisions over the allocation of forest resources and user rights. When developing or revising community forestry regimes the respective policies and legislation must be endowed with clarity, transparency, and consistency. Regulations also need to be realistic and meet enforcement capacities. Particular care must be exercised in ensuring that small-scale forest entrepreneurs are in a position to comply with requirements for forest management plans. At the same time, forest owners must respect use and entry rights provided by the law and must train staff and security guards to do the same when managing their forestlands.

When dealing with forest ownership, the issue of forcible relocations is particularly sensitive.<sup>54</sup> Internal displacement and arbitrary denial of access to defined parts of a territory may contravene the right of liberty of movement and freedom to choose a place of residence.<sup>55</sup> Applying an RBA therefore means that no coercive measures should be taken to obtain transfer of property interests. Forced relocation should only be conducted by the government and only in accordance with domestic law

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52 For a sample study on the use of this tool, see C. Eghenter, *Mapping People's Forests: The Role of Mapping in Planning Community-Based Management of Conservation Areas in Indonesia* (Washington, DC: Biodiversity Support Program, 2000).

53 B. K. Singh and D. P. Chapagain, "Community and Leasehold Forestry for the Poor: Nepal Case Study," in FAO, *Understanding Forest Tenure in South and Southeast Asia*, Forestry Policy and Institutions Working Paper 14 (Rome: 2006), p. 75.

54 On the issue of relocation, see M. Barutciski, "International Law and Development-Induced Displacement and Resettlement," in C. de Wet, ed., *Development-Induced Displacement and Resettlement* (Oxford: Berghahn, 2006), pp. 71-104.

55 International Covenant on Civil and Political Rights, Article 12. Cf. Human Rights Committee, *General Comment No. 27: Freedom of Movement (Art. 12)*, 02/11/99CCPR/C/21/Rev.1/Add.9.

and international human rights. It should be emphasized that forced relocation of non-consenting inhabitants is only allowed in limited circumstances for a public purpose, when necessary to promote national security or economic development or to protect the health of the population.<sup>56</sup> Thus forced relocation must not be used for private-sector developments that do not have some public purpose. Once removed, those who were displaced must be provided with adequate compensation and not be rendered homeless.

## 5 Monitor and Evaluate Application of the RBA

The implementation of an RBA demands the development of effective monitoring and evaluation systems. The evaluation of forest projects must take into account whether stakeholders participated in the consultation process and in the development of policies that affected them, if their rights and desires were taken into account, and if eventual approval of the proposal depended on the participation of the stakeholders. Members of local communities should be enabled to participate actively in the monitoring and evaluation of projects that they helped design and implement.

Compliance with existing rights and land uses should be monitored by seeking first-hand information from affected groups, their representatives, and local NGOs working in the area, where applicable. In this regard, the ITTO Criteria and Indicators for the Sustainable Management of Tropical Forests provides a checklist to monitor respect for communities and indigenous rights.

### **Box 8: ITTO Criteria and Indicators for the Sustainable Management of Tropical Forests – Communities and Indigenous Peoples' Rights and Participation**

Community participation is vital at all levels of forestry operations to ensure transparency and accountability in forest management, conservation and development and that all interests and concerns are taken into account. This requires openness from forest agencies, forest owners and concessionaires.

7.12 Extent to which tenure and user rights of communities and indigenous peoples over publicly owned forests are recognized and practiced

- Are such tenure and user rights recognized and practiced?
- If so, how?
- Describe any constraints and proposals for improvements.



<sup>56</sup> For these principles, see International Covenant on Economic, Social and Cultural Rights, Article 11; compare also Committee on Economic, Social and Cultural Rights, *General Comment 7: The Right to Adequate Housing: (Art. 11) Forced Evictions: 20/05/97*.

7.13 Extent to which indigenous knowledge is used in forest management planning and implementation

- Is indigenous knowledge used?
- If so, how?
- Describe any constraints and proposals for improvements.

7.14 Extent of involvement of indigenous peoples, local communities and other forest dwellers in forest management capacity-building, consultation processes, decision-making and implementation

- *Describe the extent of involvement in forest management of:*
  - *Capacity-building;*
  - *Consultation processes;*
  - *Decision-making; and*
  - *Implementation (e.g. financial and economic aspects of forest utilization).*
- *Indicate the legal basis of this involvement.*
- *Describe shortcomings and proposals for improvement.*

From ITTO, *Revised ITTO Criteria and Indicators for the Sustainable Management of Tropical Forests Including Reporting Format* (Yokohama, Japan: 2005), p. 33.

Forest certification may also be a useful tool for post-action evaluation. The Forest Stewardship Council's Principles and Criteria for Forest Stewardship, for example, include among the criteria for certification:

- Monitoring compliance with national laws,
- Respect for indigenous rights,
- Conservation of biodiversity, and
- Establishment of and compliance with a management plan.<sup>57</sup>

In the case of Nepal, community forest user groups are required to submit an annual progress report to the District Forest Officer describing the activities planned and achieved. When an operational plan is being prepared or renewed, a forest officer prepares an inventory of the forest stock. This inventory provides the basis for planning activities in the community forest. The Community Forestry Division of the Department of Forest keeps a management information system section, which maintains records of community forests in the whole country, providing an overall picture of community forestry and information on individual districts. This evaluation system has been criticised for lacking effectiveness. Measures to improve compliance with monitoring and evaluation requirements may include entrusting surveys to third parties that could also monitor users' opinions and suggestions.

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<sup>57</sup> FSC, op. cit. note 17, Principle 2.

## IV Conclusions

The rights-based approach can be a powerful tool to integrate forest conservation interests with the rights and needs of forest stakeholders, especially indigenous and local communities. The RBA supports the implementation of fundamental human rights. Although these entitlements are often recognized by domestic constitutions and international human rights treaties, they are rarely taken into account in sectoral decision making on forests. The RBA provides a promising instrument to clarify the human rights at stake and to facilitate their implementation in forest activities.

The elaboration of measures concerning the use and allocation of forest resources requires mediation between stakeholders with conflicting rights, claims, and duties. Sorting out and defending forest property and tenure rights is one key policy challenge. In this context, implementing the RBA will clarify and simplify forest property rights and tenure, and lead to increased rights security. Such security promises to improve legal compliance and reduce opportunities for discretionary decisions and subjective interpretations of the law by government officials and forest operators.

The process to solve conflicts over forest ownership and tenure requires sufficient financial, human, and technical capacities. State authorities are better placed to promote the application of an RBA in this connection. Although practitioners cannot change legal frameworks, they can provide crucial inputs for applying the RBA in the forest sector, by developing community forest management systems and adapting forest management plans to the particular conditions and capabilities of local communities.

The step-wise RBA may be a valuable tool for dealing with the maze of conflicting interests regarding forest resources. Properly implemented, the RBA brings together all stakeholders and, integrates their interests in the decision-making process. However, implementing the RBA may not provide similar outcomes in all areas. The heterogeneity of local circumstances and of forest ownership and tenure regimes may pose different challenges and require different solutions. It is therefore important that the step-wise approach is adjusted in accordance with local realities.



# 5 A Rights-based Approach in Protected Areas

Scientific evidence of ongoing and even accelerating biodiversity loss sends alarming signals about the conservation of the world's natural heritage. The *IUCN Red List*, for example, currently assesses 16,928 species as threatened with extinction.<sup>1</sup> It is estimated that species have been disappearing at 50–100 times the natural rate, and this is predicted to rise dramatically.<sup>2</sup> While the loss of individual animal and plant species catches our attention, the issue of biodiversity loss is about more than that. “Biological diversity” means the variability among living organisms from all sources including, *inter alia*, terrestrial, marine, and other aquatic ecosystems and the ecological complexes of which they are part; this includes the diversity within species, between species, and of ecosystems.<sup>3</sup> Against this background, the fragmentation, degradation, and outright loss of forests, wetlands, coral reefs, and other ecosystems has to be taken seriously as the gravest threat to biological diversity.<sup>4</sup> The Millennium Ecosystem Assessment (MA) reported that 60 per cent of the world's ecosystem services are being degraded or used unsustainably, which indicates the current state of emergency.<sup>5</sup>

A number of legal and policy instruments are aimed at conserving biodiversity and ecosystem services, including the designation of protected areas. Today, noted the MA, protected areas are “the cornerstones of virtually all national and international conservation strategies, set aside to maintain functioning natural ecosystems, to act as refuges for species and to maintain ecological processes that cannot survive in most intensely managed landscapes and seascapes”.<sup>6</sup> However, protected areas do not only support the conservation of the environment in general and biodiversity in particular. As the MA explains, biodiversity is “not only” the foundation of ecosystems and their services, but as such also an essential factor of human well-being.<sup>7</sup> More concretely, the findings of the Millennium Ecosystem Assessment support, with high certainty, that biodiversity loss and deteriorating ecosystem services contribute – directly or indirectly – to worsening health, higher food insecurity, increasing vulnerability, lower material wealth, worsening social relations, and less freedom for choice and action.<sup>8</sup> Thus the establishment of protected areas can have direct human benefits, since they support the future provision of different ecosystem goods and services (e.g., different goods such as food, water, genetic resources, and timber or non-timber products; and

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1 See Numbers of threatened species by major groups of organisms (1996 – 2008), at [www.iucnredlist.org/documents/2008RL\\_stats\\_table\\_1\\_v1223294385.pdf](http://www.iucnredlist.org/documents/2008RL_stats_table_1_v1223294385.pdf).

2 Secretariat of the Convention on Biological Diversity, *Sustaining Life on Earth. How the Convention on Biological Diversity Promotes Nature and Human Well-being* (Montreal: 2000), p. 5.

3 Convention on Biological Diversity, Article 2.

4 Secretariat of the Convention on Biological Diversity, *op. cit.* note 2, p. 5.

5 Millennium Ecosystem Assessment (MA), *Ecosystems and Human Well-being: Synthesis* (Washington, DC: Island Press, 2005), p. 1.

6 Nigel Dudley, ed., *Guidelines for Applying Protected Areas Management Categories* (Gland, Switzerland: International Union for Conservation of Nature (IUCN), 2008), p. 2.

7 MA, *Ecosystems and Human Well-being: Biodiversity Synthesis* (Washington, DC: World Resources Institute, 2005), pp. 18, 30.

8 *Ibid.*, p. 30.



different services such as the regulation of air quality, maintenance of climate systems, reducing soil erosion, opportunities for recreation and education in national parks and wilderness areas, etc.) that are crucial in order to secure people's rights.

At the same time, the designation of protected areas can also have disadvantages for certain groups of people and their rights with respect to the protected site in general and its natural resources in particular. The concrete impact (negative or positive) depends on the individual case and the different management approaches that can be taken. Although few if any people will be allowed to enter highly protected sites such as wilderness reserves, in parks – where the emphasis is on conservation – visitors are more welcome; in other less restrictive areas, conservation will even be integrated into human lifestyles or will take place alongside limited sustainable resource extraction. As a consequence, some protected areas might ban activities like food collecting, hunting, or extraction of natural resources, while in other protected areas such activities may be an accepted and even a necessary part of management.<sup>9</sup>

Thus, there can be strong linkages between halting the ongoing loss of biodiversity through protected areas, improving human livelihoods, and ensuring people's rights (e.g., the right to land and traditional use of natural resource as well as the right to a healthy environment).

## I Advantages and Challenges of a Rights-based Approach

Two schools of thought underpin the importance of nature conservation. The first is that areas should be protected because they may harbour species that are useful for humans. This is the instrumental view, in which the value of non-human life and the value of habitats and natural features are rated according to their usefulness to humans as, for instance, food, medicine, recreation, or spiritual practices. This view is based on the idea of human dominion or ownership of the planet and is closely associated with Judeo-Christian beliefs in which God created man and gave him “dominion over the fish of the sea, and over the fowl of the air, and over every living thing that moveth on the earth”.<sup>10</sup> This school of thought can be represented as a pyramid with humans at the top.

The second school is that humans are part of an interconnected web of nature not separate from or outside of nature. This view is shared by various peoples and religions and is succinctly stated in the speech attributed to Chief Seattle in the nineteenth century: “This we know: the earth does not belong to man: man belongs to the earth... All things are connected like the blood which unites one family... Whatever befalls the earth, befalls the sons of the earth. Man did not weave the web of life; he is merely a strand in it. Whatever he does to the web, he does to himself.”<sup>11</sup> In this view, Earth is shared with non-human life that also has a right to be here.

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9 Dudley, op. cit. note 6, p. 3.

10 *The Holy Bible*, Genesis Chapter 1, Verse 28, Cambridge University Press.

11 Quoted in Edith Brown-Weiss, *In Fairness to Future Generations* (Tokyo: United Nations University: reprint 2006). There is much dispute over the authenticity of the words attributed to Chief Seattle. See J. L. Clark, “Thus Spoke Chief Seattle: The Story of an Undocumented Speech,” *Prologue: Journal of the National Archives*, vol. 18, no. 1 (spring 1985).

**Box 1: Schools of Thought under the Convention on Biological Diversity**

The Convention on Biological Diversity shows both schools of thought. In its preamble, the States parties pronounce themselves to be “Conscious of the intrinsic value of biological diversity and of the ecological, genetic, social, economic, scientific, educational, cultural, recreational and aesthetic values of biological diversity and its components; [and] Conscious also of the importance of biological diversity for evolution and for maintaining life sustaining systems of the biosphere”.

Both schools of thought have influenced not only different approaches to nature conservation in general but also the development of various types or models of protected areas. In this context, it is interesting to have a closer look at three very different cases that indicate the existing broad spectrum of protected areas models and their management goals. In the case of the Yellowstone National Park as created in the United States during the nineteenth century, an area is identified as wilderness and set aside for humans to visit and enjoy but not to inhabit. The area is managed by the State for protection and for certain identified uses, irrespective of the rights and interests of citizens. Traditional owners, occupiers, and users of the area are regarded as destructive or as spoiling the scenic and recreational value of the protected area. In Yellowstone itself, the native Indians were ejected from the park and their cultural and spiritual values ignored so that the “wilderness” could be preserved. The Yellowstone model, which was originally followed in Australia, South America, and many African States, clearly demonstrates the potential conflicts between people’s rights and a protected areas management goal that requires no or little human influence on a precious natural site.

In contrast, other protected areas models allow local people to be included more. Depending on the particular situation, such inclusion can be achieved in different ways and to different degrees: by simply having a public hearing, by directly involving stakeholders in determining protected areas management arrangements, by putting in place co-management agreements, or even by recognizing the authority of traditional leaders to control and manage resources to conserve biological diversity. In the case of traditional management, the Sarstoon Temash National Park in Belize is an interesting example. This national park was created in 1994 on lands traditionally used by the Garifuna and Maya communities who lived in the area.<sup>12</sup> In order to respect their interests, the Sarstoon Temash Institute for Indigenous Management (SATIIM), a community-based indigenous environmental organization, was created. It now co-manages the national park with the Belizean Forestry Department. SATIIM’s objectives are, among others, to protect the ecological integrity and cultural values of the Sarstoon Temash region, to develop and implement a park management strategy that recognizes the historical and ongoing relationship between the Garifuna and Maya indigenous communities and the land and resources of the national park, and to develop and implement a regional land management strategy for the indigenous communities that facilitates community participation in regional conservation and natural resource management.

<sup>12</sup> Information taken from [www.satiim.org.bz/index.php?section=2](http://www.satiim.org.bz/index.php?section=2).

A third model more in keeping with respect for human rights is the WaiWai Community Owned Conservation Area in Guyana. In this case, the WaiWai tribe were granted title to 2,300 square miles of territory. The WaiWai have taken the decision to manage this territory as a protected area. The land is divided into different use areas based on the IUCN management categories for protected areas and approximately one-third of the territory has been set aside by the WaiWai for strict protection. All decisions regarding management and use are made by the WaiWai through their traditional decision making processes. This is a good example of a protected area which is owned, managed and controlled by indigenous peoples.

The Yellowstone model, the SATIIM co-management system and the WaiWai example are all based on different protected areas philosophies which have more or less negative impacts on people's rights. The Yellowstone model by excluding traditional users and managers has negative impacts on people's rights. The SATIM model of co-management may have a negative impact on some rights. On the other hand in the WaiWai example, national law fully recognises and protects the rights and traditional governance structure of the indigenous peoples and enables the WaiWai to use their legal powers to conserve their land as a protected area in keeping with their traditional lifestyle and culture. However all three models also follow very diverse management goals that have particular advantages for the conservation of biological diversity as well as challenges in respecting people's rights.

An internationally recognized instrument already exists for grouping protected areas according to their management goals. The International Union for the Conservation of Nature (IUCN) now distinguishes between six types of protected areas, which are managed for:<sup>13</sup>

- Strict protection – Category I (including strict nature reserves and wilderness areas);
- Ecosystem conservation and protection – Category II (i.e., national parks);
- Conservation of natural features – Category III (i.e., natural monuments);
- Conservation through active management – Category IV (i.e., habitat/species management areas);
- Landscape/seascape conservation and recreation – Category V (i.e., protected landscape/seascape); and
- Sustainable use of natural resources – Category VI (i.e., managed resource protected areas).<sup>14</sup>

The IUCN management categories are an international standard that has been used by many States or that has influenced States in their determination of what categories to include in national systems for protected areas.<sup>15</sup> The categories are mainly focused on avoiding negative impacts on natural resources, not on human interests and people's rights. However, a process or instrument equally recognized as the protected areas category system is required in order to give equitable answers to hard questions about who or what should be given priority in situations of tension between the objectives of a protected area site and people's rights. A rights-based approach (RBA), as described in Chapter 2, might provide the needed process or instrument to assess and to mitigate, if not to

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13 Dudley, op. cit. note 6, p. 4.

14 Note that the protected area management categories were revised in 2008.

15 Kevin Bishop et al., eds., *Speaking a Common Language: Uses and Performance of the IUCN Management Categories for Protected Areas* (Gland, Switzerland: IUCN, 2004).

avoid, negative impacts on human well-being and people's rights in the context of developing and managing protected areas.

## II Understanding Protected Areas

### 1 Terminology

There is no single definition of a protected area. International treaties, national legislation, and conservation organizations use a variety of terms.

#### **Box 2: Terms for Protected Areas in International Law**

- 1940 Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere: national parks, national reserves, nature monuments, strict wilderness reserves
- 1971 Convention on Wetlands of International Importance especially as Waterfowl Habitat: nature reserves
- 1972 Convention concerning the Protection of World Cultural and Natural Heritage: natural features, natural sites, precisely delineated areas
- 1979 Convention on Conservation of Nature in the South Pacific: protected area means national park or national reserve
- 1985 Convention for the Protection, Management and Development of the Marine and Coastal Environment of the Eastern African Region: parks and reserves
- 1992 Convention on Biological Diversity: a geographically defined area that is designated or regulated and managed to achieve specific conservation objectives

The Global Biodiversity Strategy of 1992 defines a protected area as “a legally established land or water area under either public or private ownership that is regulated and managed to achieve specific conservation goals”.<sup>16</sup> According to the definition used by IUCN, a protected area is a “clearly defined geographical space, recognised, dedicated and managed, through legal or other effective means, to achieve the long-term conservation of nature with associated ecosystem services and cultural values”.<sup>17</sup>

Since each term used in national and international law may have been developed for the particular circumstances in which it is to be used, this chapter will not adopt any of the current definitions but will apply the common principle behind protected areas, namely the conservation of biological diversity. The term protected area will thus be restricted to an area dedicated to the conservation of biological diversity. It may include the maintenance of ecosystem services or the protection of ecological processes.

16 World Resources Institute, *Global Biodiversity Strategy: Guidelines for Action to Save, Study, and Use Earth's Biotic Wealth Sustainably and Equitably* (Washington, DC: 1992), p. 230.

17 Dudley, op. cit. note 6, p. 8.

## 2 Characteristics

A State may establish a protected area in any part of its territory. The territory set aside must be large enough to protect the relevant species, habitat, or ecosystem. It must also be dedicated for long enough to ensure that it achieves its conservation goals.

A State's territory includes the land within its boundaries, including the subsoil and internal waters such as lakes, rivers, and canals. It also includes the airspace above the State's territory up to the point at which the legal regime for outer space begins.<sup>18</sup> A protected area may be terrestrial or marine or may encompass both. Internal saltwater lakes and freshwater systems such as rivers and lakes are counted as part of a terrestrial protected area. A marine protected area may be created in the territorial sea and may extend into the exclusive economic zone.<sup>19</sup> It is important to note that the issues raised by marine protected areas differ from those of terrestrial protected areas and that the former face the following key challenges:

- Size – typically a marine protected area needs to be large;
- Scale of marine processes;
- High mobility of marine species;
- Need for connectivity with terrestrial protected areas in order to cover certain species (sea birds, marine turtles);
- Need to influence and control developments on land that could have an adverse impact on the marine protected area;
- Difficulty of setting and marking boundaries at sea;
- Need to protect marine life to the limits of the exclusive economic zone; and
- Greater difficulty in enforcement because marine protected areas are larger and less accessible.

## III Implementing an RBA in Protected Areas

In the following section, the step-wise approach described in Chapter 2 will be tested with regard to protected areas. Although the creation of a protected area will vary from country to country, most cases will be marked by similar milestones. These are:

- Activities prior to the decision to create the protected area:
  - Identification of the site; and
  - Justification for having a protected area at this site.
- Decision to create the protected area:

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18 Malcolm N. Shaw, *International Law*, 5th ed. (Cambridge, U.K.: Cambridge University Press, 2003), p. 480.

19 Under Article 2 of U.N. Convention on the Law of the Sea (UNCLOS), the sovereignty of a coastal State extends beyond its land territory and internal waters to the territorial sea, which is limited to 12 nautical miles. Sovereignty extends to the seabed, subsoil, and air space above the territorial sea. Under Articles 55 and 56 of UNCLOS, a State may also exercise sovereignty over the exclusive economic zone, an area beyond and adjacent to the territorial sea. In this zone the State has sovereign rights to explore, exploit, conserve, and manage the natural resources (whether living or non-living) of the water superjacent to the seabed and of the seabed and its subsoil. The State also has the sovereign right to protect and preserve the marine environment.

- Taken by the protected area authority, a minister, or some other body that has the relevant legal mandate.
- Declaration of the protected area:
  - Definition of the management category; and
  - Demarcation of the boundaries.
- Development of the management plan, including the ongoing arrangements for:
  - Protecting or using the land (or marine area) and resources in general;
  - Specifically permitted or prohibited activities; and
  - Zoning, etc.
- Implementation and evaluation of the management plan.

If properly applied, the RBA needs to be followed continuously throughout the life of the protected area, and the step-wise approach will have to be applied at each stage of creating and managing the protected area in order to ensure that all relevant rights are being taken into account.

## 1 Undertake a Situation Analysis

The creation of a protected area requires a good understanding of the overall context in which it is being developed in order to avoid possible negative impacts on people's rights. The first stage of the RBA is therefore to identify the relevant factors through a situation analysis. This should provide the baseline information that enables the State to implement its obligation to protect the environment in a way that ensures respect for people's rights. Furthermore, it could also enable the State to go beyond this basic requirement and develop best practices within that State's particular legal, social, economic, and cultural context.

A situation analysis should consider the existing

- *Scientific and economic circumstances*: the current state of the country's biodiversity; factors (including socioeconomic ones) that are reducing, maintaining, or increasing biodiversity at the country and site-specific level; and whether a particular area meets the necessary criteria for conservation (assessment of its biological diversity, its size, the proposed management objectives and categories to be applied)
- *Policies*: international programmes of work;<sup>20</sup> national conservation strategies; biodiversity strategy action plans; general policies regarding the use of natural resources (forestry, agriculture, mining, wildlife trading, tourism, etc.); specific policies on protected areas
- *Institutional framework*: relevant agencies responsible for protected areas in particular and for forests, mining, agriculture, fisheries, wildlife, tourism, etc. in general

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20 The Convention on Biological Diversity (CBD) Programme of Work on Protected Areas contains four elements for the creation and management of protected areas: Direct Actions for Planning, Selecting, Establishing, Strengthening, and Managing Protected Area Systems and Sites; Governance, Participation, Equity, and Benefit Sharing; Enabling Activities; and Standards, Assessment, and Monitoring. It sets standards and goals for protected areas and can be used by States and by non-State actors as a guide to their actions in ensuring that they follow at least this aspect of international best practice. See [www.cbd.int/protected](http://www.cbd.int/protected).

- *Legal framework*: international and national legal obligations to protect biodiversity, establish protected areas, and respect people's rights

In relation to the legal framework, virtually every State has accepted international treaty obligations to create protected areas.<sup>21</sup> For example, Article 8 (a) of the Convention on Biological Diversity imposes an obligation on its 191 parties to ensure in situ conservation by requiring States as far as possible and as appropriate to “establish a system of protected areas or areas where special measures need to be taken to conserve biological diversity”.

Furthermore, at the national level constitutional obligations to protect the State’s environment for present and future generations, general environmental laws, and laws directly or indirectly related to nature conservation have to be taken into consideration. Many States have also enacted specific protected areas legislation, which may provide a general legal framework for the creation and management of protected areas, and individual legal acts regulating more detailed issues with regard to a particular protected area site.<sup>22</sup>

It is important to note that where a private landowner (individual or juridical person) is creating a protected area, the situation analysis could be more limited because it relates to private, not public, land. The assessment of the legal framework should then focus on the scope of the landowner’s authority to create the protected area, a scientific assessment of the area, etc. The situation analysis should also cover restrictions on the landowner’s authority, such as the obligation to permit lawful passage along public roads or footpaths and the right to hunt, fish, or gather on the land. The institutional and management arrangements would be within the scope of authority of the landowner subject to respect for the other rights identified in the situation analysis. If the private landowner wishes to have the private protected area recognized as a part of the national system of protected areas, then he or she would have to include in the situation analysis the legal requirements for such recognition.

### **Action 1.1: Identify Actions, Stakeholders, and Roles**

As mentioned before, in the best-case scenario an RBA will take place at each step of creating and managing a protected area. This means that a situation analysis has to take place at the following stages: identification of a potential site and justification for having a protected area at this site; actual decision to create the protected area; declaration of the protected area; development of the management plan, including the ongoing arrangements for management; and implementation and evaluation of the management plan. The situation analysis may need to be refined for the later stages of creating and managing the protected area, as more detailed information will be needed for setting the boundaries and the management categories, for developing the management plan, and for evaluating it.

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21 See 1940 Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere, 1971 Convention on Wetlands of International Importance especially as Waterfowl Habitat, 1972 Convention concerning the Protection of World Cultural and Natural Heritage, 1976 Convention on the Conservation of Nature in the South Pacific, 1992 Convention on Biological Diversity, or 2003 Revised African Convention on the Conservation of Nature and Natural Resources.

22 See, for example, the Saguenay – St. Lawrence Marine Park Act 1997, c. 37, in Canada, which established the Saguenay – St. Lawrence Marine Park with boundaries, zones, and provisions for enforcement.

Furthermore, applying an RBA also requires that a stakeholder analysis identifies the different actors – the people or organizations that are vital to the success or failure of the protected area.<sup>23</sup>

### **Box 3: Protected Areas Stakeholder Groups**

Primary stakeholders are those needed for permission, approval, and financial support of a protected area and those who are directly affected by a protected area.

Secondary stakeholders are those who are indirectly affected by the creation of a protected area.

Tertiary stakeholders are those who are not affected or involved but who can influence opinions either for or against the creation of a protected area.

Source: Adapted from F. J. Hesselink et al., *Communication, Education and Public Awareness, a Toolkit for the Convention on Biological Convention* (Montreal: Secretariat of the Convention on Biological Diversity, 2007), p. 161.

While substantive issues in an RBA will involve only the legal rights-holders and legal duty-bearers, it is important to include other actors in order to ensure procedural fairness. Primary stakeholders will thus include those who have legal rights or legitimate interests in the proposed protected area site – the landowner, a holder of a mining or timber permit, a conservation organization or private company that is proposing to pay for the protected area, conservation organizations and scientists working in the proposed site, Government agencies with a mandate over the resources in the proposed site (e.g., water authorities, agencies responsible for cultural heritage who require access to the site, mining and forestry regulators whose authority may be excluded), people occupying or using the area, and so on.

In most cases the actors will be individuals or legal persons such as companies or organizations. But rights may also be held by communities. Such rights are collective, not individual. The term “community” has a number of different meanings, but here it will be restricted to a legally recognized body. A community is not simply a group of individuals who have come together for some purpose or who happen to have a shared culture and traditions. Such an entity is merely the sum of the individual rights. In contrast, a community is a body distinct from its members. The members who make up the community will change as individuals die and others are born. But the community continues as a separate entity, irrespective of who its members are at any given time and of the fact that its numbers fluctuate.<sup>24</sup> Individuals may exercise collective rights because they are members of the community

<sup>23</sup> F. J. Hesselink et al., *Communication, Education and Public Awareness, a Toolkit for the Convention on Biological Convention* (Montreal: Secretariat of the Convention on Biological Diversity, 2007), p. 161.

<sup>24</sup> See British Columbia, Canada, *Oregon Jack Creek Indian Band v. Canadian National Railway* 34 B.C.L.R. (2d) 344. In relation to aboriginal rights, the Court stated that “It is a mistake... to ignore the historical fact that the rights are communal, and that they are possessed today by the descendants of the persons who originally held them. They are not personal rights in the sense that they exist independently of the community, but are personal in the sense that a violation of the communal rights affects the individual member’s enjoyment of those rights.”



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which has those rights. However, one individual alone cannot dispose of land that is owned by the community – the interest is an interest in every part of the land rather than an interest in a particular bit of the land. The same principles apply to collective rights to hunt, fish, farm, cut timber, mine, etc. The exercise of these rights is subject to the rules of the community.

It is possible to treat a group as if it is a community because of shared culture or shared interests or because the group wishes to act collectively. But this should be done with caution. In strict legal terms, the rights in such a group are held by individuals, and the individual exercise of a right has to be respected even when it goes against the views of the other members of the group. In the case of a community, however, the individual exercise of the collective right is subject to the rules of the community.

It must be noted that such community rules have formal legal status only in some States where the statutory legislation officially recognizes customary law. In other States, they might have no formal legal status but continue to be exercised in practice, which indicates that they still have some legal significance. In any case, the RBA requires respect for such internal community rules and thus considers communities as potential primary stakeholders.

Secondary stakeholders could include conservation organizations that are not necessarily working at the site but have an interest in conservation in general in the country, those who use the proposed site but do not have a recognized legal right to do so, or those with a claim to own or use the land. Tertiary stakeholders could include, for example, journalists, economists, or advocacy groups.

The results of a stakeholder analysis will vary from one State to another and from one stage to another. The stakeholder analysis needs to be updated at each stage, since the stakeholders will differ depending on the action to be carried out. A primary stakeholder at one stage may be a secondary stakeholder at another stage or may disappear altogether.

Before the decision is taken to create a protected areas system, for example, the stakeholders will be a very wide and disparate group. Members of the general public should be considered as having some stake in the decision-making process, as all citizens have an interest in national patrimony. Other stakeholders could include State agencies with a mandate over the land, sea, or natural resources within the boundaries of the proposed protected area; individuals and non-State entities that have an interest in the area or its resources; those who may be assigned enforcement duties (police, coast guard); and those with rights over the proposed area. Once the decision has been made to create a protected area, some of these stakeholders may drop out of the picture. The mandate of the regulatory agencies such as mining and forestry may be removed because no mining or commercial logging is permitted in the protected area. Similarly, a mining company with rights within the proposed site will be a primary stakeholder during the discussion to establish the protected area. Once those mining rights over the area have been ended (for example, terminated in accordance with the terms of the permit or upon payment of negotiated compensation), the mining company will probably cease to be a stakeholder.

**Box 4: Useful Questions for Identifying Stakeholders before Taking a Decision to Create a Protected Area**

- Who owns the area?
- Who has a lease over the area?
- Who has the legal mandate to regulate use of the area?
- Who occupies the area?
- Who takes resources from the area, e.g. mining, hunting, fishing, cutting timber, gathering/foraging, farming, scientific research (taking of specimens)?
- Who uses the area in non-material/non-consumptive ways, e.g. traversing, conducting spiritual activities, recreation, education, scientific research (monitoring and collecting of baseline data using non-lethal methods), film-making, photography, etc.?
- Are there any disputes or claims over the area?
- Who has an interest in the area, e.g. conservationists, potential users such as miners or loggers?
- Whose land will share a boundary with the proposed protected area?

This example clearly shows that stakeholders should not only be identified with regard to the general decision about the creation of a protected area. They should also be identified for involvement in making and implementing future decisions. For example, where the protected area is contiguous with lands that local people own, occupy, or use, these people should be involved in the setting of boundaries. Also, since the choice of a particular management category will affect what can be done in a protected area, stakeholders should be involved in setting management objectives, assigning a management category, and developing a management plan.

The stakeholders for the actual management of a protected area on the ground will be a smaller group than in previous stages. The key actor at this stage will be the authority with the responsibility for managing the protected area, but other stakeholders may be directly involved in management or simply exercise influence over the decisions.<sup>25</sup>

Key stakeholders with regard to enforcement actions could include the Coast Guard (for marine protected areas), the police, and enforcement officers from other regulatory agencies, such as the agency responsible for forestry or an environmental protection agency.

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<sup>25</sup> There are three management possibilities: management by the State; management by a non-State entity (individual, community, corporation, trust, friendly society, association etc.); or a combination of the two (co-management).

## Action 1.2: Identify Applicable Legal Rights, Claims, and Duties

The RBA requires that once the stakeholders have been identified the next step is to examine whether they have a legal right, claim, or duty. The concept of stakeholder is broader than that of the legal rights-holder and legal duty-bearer and includes those with an interest that may be affected. Some individuals may be stakeholders because they carry out activities in the area but they might not be rights-holders or duty-bearers. In other words, *de facto* activity is not the same as *de jure* activity.

This identification of rights, claims, and duties leads to a number of challenges. First, a distinction needs to be drawn between the activities that are prohibited by law and those that are not. Such a distinction is not always easy to draw. If an activity requires a permit or some kind of authorization, it will generally be unlawful without the permit or authorization. In some cases, however, there may be a dispute as to whether a particular activity requires a permit or is allowed because it is some form of traditional or customary right. Where the issue cannot be settled between the conflicting parties, it may need to be resolved by a court, which is the only body that can give a final decision on whether the activity is legal or illegal and the extent to which the right is exercisable if it is legal.

It is important to note that while international law may create legal rights, the decisions of international bodies are generally not enforceable by the affected individuals and communities but depend on the political will of the State. Enforceable rights will generally be found under national law. In the context of protected areas, the affected rights will include property rights (ownership, lease), permits issued by the government (e.g., mining permits, forest concessions, hunting licences), rights held by aboriginal or tribal peoples under custom or treaty, and rights recognized in statute, such as rights of way. Not all rights are of equal value. Rights which are constitutionally protected generally take priority over other rights.

Creating a protected area may also have an impact on cultural rights. According to the UN Human Rights Committee, “culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting.”<sup>26</sup> Access to those resources may be an essential element in continuing a tradition but may clash with other values. In a multicultural society there may be a conflict or tension between the cultural attachments that different peoples, communities, or groups have to a resource and a protected area in particular. It can be difficult to identify which groups have cultural rights that should be protected. There may also be conflicts or tensions within discrete peoples or communities, particularly where there are limited resources.

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26 U.N. Human Rights Committee, General Comment No. 23, The Rights of Minorities, Para. 7, U.N. Doc. CCPR/C/21/Rev.1/Add.5.

**Box 5: Recognition of Cultural Rights**

In England, the Countryside Alliance objected to the British Government's ban on fox hunting. They claimed, *inter alia*, that fox hunters were a distinctive cultural group like the Sami and gypsies and therefore entitled to protection for their traditional culture and lifestyle. Lord Bingham noted that there was “a strong psychological and social commitment to hunting as a traditional rural activity involving the individual, the family and the community more deeply than any other ordinary recreation” and that there were “those for whom hunting is a core part of their lives”. Nevertheless, in rejecting the claim he stated: “The Lapps... and the gypsies... belonged to distinctive groups each with a traditional culture and lifestyle so fundamental as to form part of its identity. The hunting fraternity...cannot possibly be portrayed in such a way. The social and occupational diversity of this fraternity, often relied on as one of its strengths, leaves no room for such an analogy.”

Under Swedish law, reindeer herding was limited to those Sami who were members of a Sami village (*sameby*). They numbered approximately 2,500 out of a total population of 15,000 to 20,000. Admittance to the *sameby* was determined by the existing members. Ivan Kitok claimed that his cultural rights as guaranteed by Article 27 of the International Covenant on Civil and Political Rights were violated because he was denied the right to membership of the Sami community and the right to carry out reindeer husbandry. An important factor was that the amount of available pasture areas remained constant but new members would mean more reindeer on those pastures. The Human Rights Committee was of the opinion that limiting the right to engage in reindeer husbandry to members of the *sameby* was reasonable and consistent with Article 27 and stated that “a restriction upon the right of an individual member of a minority must be shown to have reasonable and objective justification and to be necessary for the continued viability and welfare of the minority of a whole”. Consequently there was no violation of Article 27.

Source: For Countryside Alliance, see *R (on the application of Countryside Alliance and others (Appellants) v Her Majesty's Attorney General and another (Respondents)* [2007] UKHL 52; Sweden from *Ivan Kitok v. Sweden*, Communication no. 197/1985, CCPR/C/33/D/197/1985 (1989).

If the protected area is being established on land owned by the State, private property rights and public rights of access are likely to be the most important rights that could be affected. In some jurisdictions, use rights – such as rights to hunt, mine, fish, etc. – are recognized as private property rights or rights in the nature of property. These rights are generally held against the State and may be protected by the Constitution.

In general, the scope and legal basis of each right should be examined in order to understand:

- Exactly what the right consists of;
- What limits there are to its exercise;
- How (if at all) it may legally be restricted or terminated;
- Whether collective rights are recognized in national law;

- Whether customary rules have any legally binding effect;
- Whether there are areas of concurrent jurisdiction between State authorities; and
- Whether there are conflicts between different laws or ambiguities in the law that mean it is difficult to confirm who is responsible for what.

In addition to existing legal rights, the RBA should take into account claims that other rights such as political, moral, or traditional rights should be legally recognized. To fall within the ambit of the RBA, a claim would have to have some formal status. It should be filed as a court case or be registered under a statutory procedure or given some other kind of formal or official recognition. At the very least there should be some evidence of a genuine attempt to bring the claim formally to the attention of the potential defendant. If a claim is genuine, it is up to the claimant to take steps to prosecute it. Otherwise it would be impossible to separate genuine claims, which should be taken into account, from frivolous assertions that may adversely affect the process of creating protected areas.

The RBA also requires that actions taken in the context of protected areas do not compromise the outcome of any such claims. Since protected areas are intended to conserve resources, their impact on a claim will not usually be detrimental. For example, a claim may be made for hunting rights over land that is designated as a protected area. While the claim is being adjudicated, no hunting takes place. But if the claimant is successful, the animals are still there to be hunted. In such a situation the protected area acts as a temporary moratorium and there is no permanent disadvantage to the claimant. Where there is a conflict between proposed development and a claim of ownership to that land, a protected area may be a temporary solution that preserves the future rights of all parties until the conflict can be resolved.

#### **Box 6: Protecting Land Rights while a Claim is being Adjudicated**

The damage caused by moving ahead with development in the absence of settling a claim for aboriginal rights is well illustrated by the case of *Ominayak, Chief of the Lubicon Lake Band v Canada*. The complaint was brought under Article 27 of the International Covenant on Civil and Political Rights, which protects the right of minorities to enjoy their own culture in community with the other members of their group. The Human Rights Committee held that energy exploration, energy extraction, and logging authorized by Canadian Governmental authorities were destroying the land base of the Lubicon people and their culture. The Committee pointed out: “The recognition of aboriginal rights or even treaty rights by a final determination of the courts will not undo the irreparable damage to the society of the Lubicon Lake Band, will not bring back the animals, will not restore the environment, will not restore the Band’s traditional economy, will not replace the destruction of their traditional way of life and will not repair the damages to the spiritual and cultural ties to the land.” Once the Band had lost its “unique, valuable and deeply cherished way of life”, there was no way to bring it back.

Had the area been temporarily set aside as a protected area with respect for the Band’s traditional rights to use and occupy the lands, the resources on those lands and the Band’s way of life could have been preserved while the legal arguments were settled.

Source: *Ominayak, Chief of the Lubicon Lake Band v Canada*, Communication No. 167/1984 U.N.Doc. CCPR/C/38/D/167/1984 (1990)

Furthermore, apart from identifying applicable rights and claims, the RBA also requires consideration of the corresponding duties (if any) that a rights-holder may have (e.g., the duty in common law systems by which a property holder may not lay waste to the land or may not permit a nuisance). In most cases the relevant legal duties will be held by the State, particularly those duties that relate to rights and freedoms guaranteed by the Constitution.

### **Action 1.3: Identify Potential Impacts of the Proposed Project**

The potential impact of a protected area depends on the stage of the process. All stages involve procedural rights.

It is also important to understand that the intention to create a protected area does not in itself have any impact on substantive rights. For example, a company with a mining licence is not affected merely by the decision to create a protected area. It will only be affected if the decision is made to include the mining area in the protected area, the protected area is established, and mining becomes a prohibited activity as a consequence.

The potential impacts of a protected area largely depend on which IUCN management category is assigned to a protected area. Since a different level of human activity is permitted in each, the category chosen will have different implications for the rights, claims, and duties at stake. Where rights have been granted by the State, it may be possible to terminate those rights in accordance with the provisions of national law if this is necessary to achieve the management objectives for the category selected. Compensation may also be payable.<sup>27</sup>

Where rights are not granted by the State but are recognized by it, the situation is more complex. Traditional rights recognized by the State are usually the right to hunt, fish, farm, etc. Rights held by local or indigenous communities may be a burden on the State's title to the land. Such rights are often linked to culture and are usually sustainable, since a traditional right that is not exercised sustainably must inevitably cease to be exercisable as the resource disappears. The situation will vary from State to State, but termination could be a violation of human rights law or national law. However, a State may be entitled to restrict rights even where these are protected by the Constitution.

#### **Box 7: Canadian Experiences with Rights Restrictions**

In Canada, the State has legal power to restrict the fishing rights of the Musqueam people in the interests of conservation even though those rights were aboriginal rights protected by Section 35 of the Constitution. The Court noted that “the conservation and management of our resources is consistent with aboriginal beliefs and practices, and indeed with the enhancement of aboriginal rights”.



<sup>27</sup> Note that termination should be an option only where the right in question conflicts with the management objectives.

In another case, a reduction in fishing quotas for conservation purposes violated native food fishing rights under Section 35 of the Constitution because it did not give special consideration to Indian food needs but treated all user groups, whether native, sport, or commercial, the same.

Source: *Canada R v Sparrow* [1990] 1 S.C.R. 1075; *Canada R. v. Joseph* [1990] 4 C.N.L.R. 162.

#### **Action 1.4: Identify Potential Conflict Resolution Mechanisms<sup>28</sup>**

A situation analysis also requires identifying potential conflict resolution mechanisms that can help avoid rights conflicts and ensure that respect for rights is integrated into the decision-making process.

Stakeholder participation leads to decisions that are not only legally correct but are also legitimate, thereby reducing the scope for conflict. Nevertheless conflict, or at least tension, may still arise. The RBA approach requires that this is dealt with through a culturally appropriate mechanism as early as possible in the process. This is particularly important when the conflict involves communities or peoples whose approach to resolving issues may be consensus-based rather than adversarial.

Conflict resolution in protected areas should aim to find a solution that the parties to the conflict can accept. In the best-case scenario, it should not be about winning, since that implies that someone else loses. The success of protected areas depends to some extent on the goodwill and cooperation of others, and an adversarial approach in which one party loses or that damages relationships can adversely affect the ultimate goal of conservation. For example, where there are disagreements over the extent of traditional rights and their exercise, it may be possible to address this in the management plan or in a separate document in which the parties agree on the content of the traditional rights and the level of resource exploitation. This could be done through negotiation or by involving a mediator to enable the parties to reach a mutually acceptable solution.

In cases of more serious claims involving legal issues, however, such as a claim for title to an area, the effectiveness of non-adversarial mechanisms might be limited. Instead, it will be more appropriate to seek a determination from a court of competent jurisdiction. The advantages are that the court can give a final legally binding decision that is usually enforceable against the defendant. The conflict is resolved only when there is a final legal decision (i.e., a decision not subject to appeal). The disadvantages are that courts can be slow, court cases can be time-consuming and expensive, and the outcome may be affected by the quality of legal representation. Statutory tribunals that can give a binding decision may be an alternative to a court.

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28 For a more detailed discussion, see Connie Lewis, ed., *Managing Conflicts in Protected Areas* (Gland, Switzerland: IUCN, 1996).

**Box 8: Disadvantages of Adversarial Conflict Resolution Mechanisms**

In 2001 the Inter-American Court ordered Nicaragua to demarcate the Awas Tingni lands and issue a title. On 20 March 2008, nearly seven years later, a communication from the University of Arizona Indigenous Peoples Law and Policy Program (representing the Awas Tingni) to the Human Rights Committee stated: “The most fundamental aspect of the Inter-American Court’s decision – the demarcation and titling of Away Tingni lands – has yet to be completed. What should be a fairly simple procedure (laying physical posts along Awas Tingni’s boundary) at times seems to be as much a distant probability as it was before the 2001 judgment of the Inter-American Court.”

Source: See [www2.ohchr.org/english/bodies/hrc/docs/ngos/AwasTingniObservations.pdf](http://www2.ohchr.org/english/bodies/hrc/docs/ngos/AwasTingniObservations.pdf).

In any case, wherever there is a dispute over legal rights or claims it is important to identify the interests of the parties who are involved and to distinguish them from the positions that such parties may take. This is essential to understand the actual impact of the protected area on a party as well as the perceived impact and to address both sets of concerns. Furthermore, it is important to identify the party to a conflict and to distinguish that party’s interests from positions held by other stakeholders. For example, where a conflict affects local or indigenous communities it is crucial to deal directly with them or their chosen leaders or, where they have legal representation, with the lawyer representing them. The rights of the community as a legal collective must be respected when applying the RBA. It is not appropriate to permit the State or NGOs or other entities to speak on behalf of local or indigenous communities.<sup>29</sup>

**2 Provide Information**

As a second step in applying an RBA, it is important to ensure sufficient public information is available. The basic principle is that information should be provided to stakeholders.

Yet there may be instances when this principle should not be applied. For example, it may be illegal to reveal information that is subject to confidentiality obligations or it may be inappropriate or counterproductive to put into the public domain information on the location of species threatened by hunting or by wildlife trade if that information could then be used to reduce biodiversity before the protected area can be established. Another important exception may apply to traditional knowledge. Article 8(j) of the Convention on Biological Diversity requires that a State must as far as possible and as appropriate, “subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation of and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and

<sup>29</sup> For example, in Guyana the *touchau* (elected leader) and village council are the only legally recognized representatives of a community. The State may consult nongovernmental organizations but cannot use such interactions as a substitute for ascertaining the opinions, interests and legal rights of the community.



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practices and encourage the equitable sharing of the benefits arising from the utilisation of such knowledge, innovation and practices.” Thus, such traditional knowledge should be obtained only from individuals who hold it and have the authority to release it. Also, permission in the form of prior informed consent should be obtained from the holders of traditional knowledge before their knowledge is put into the public domain, and arrangements for payment should be made based on mutually agreed terms with the collective owners of the traditional knowledge.

In general, it is important to keep in mind that providing information is not a one-off exercise but should be done throughout the life of the protected area. The content of the information will need to be updated and adjusted to suit the different stages of creating and managing a protected area. This means that certain actions are required for each stage, as described here.

### **Action 2.1: Compile and Publish Information in an Understandable and Easily Accessible Way**

As a first step, it is necessary to understand that – subject to restrictions on confidentiality or the need to protect sensitive data – information should be collected and disseminated as widely as possible. As the stakeholder list is to be regularly updated, this could be used to ensure that these persons are contacted directly and either given the relevant information or told how they may obtain it. The public can also be informed through television, radio, and newspapers of the proposal to create a protected areas system. Larger amounts of information such as policy documents, reports, analyses, management plans, etc. can be put on a website for members of the public to download and read.

Information must always be made available in an understandable and easily accessible way. This means, for example, taking into consideration the fact that people without access to electricity and telecommunications will not be reached through normal channels and cannot be expected to use the Internet to find out what is proposed. Some information may filter through when newspapers arrive, but this may be some time later. As a consequence, different options for publishing information (according to local circumstances) have to be used. Shortwave radios can be used to notify communities of the proposed action, or materials can be sent in hard copy directly to communities in remote areas.

Furthermore, information should be disseminated in a way that does not discriminate against ethnic or racial groups within a society but is equally available to all. This may mean that information has to be translated into secondary languages or presented orally, not just in written form. This is particularly important when dealing with indigenous or tribal communities who may formerly have been excluded from normal political processes.

### **Action 2.2: Disseminate General Information Regarding the Action**

Regarding the type of information that has to be published, it is important to understand that this should not be limited to specific biodiversity data. More general information should also be made available to stakeholders. This could include background information about the proposed site, the outcomes of the situation analysis, and the proposal to establish a protected area. But it should

also include an explanation of the general procedure to be followed when creating and managing a protected area, as well as all other information needed to fully understand the rationale behind the creation and particular management of a protected area.

### **Action 2.3: Disseminate Specific Information Regarding Legal Rights, Claims, and Duties of Potentially Affected Persons**

The general and more scientific data need to be complemented by specific information about legal rights, claims, and duties during the creation and management of a protected area. In particular, it is important to inform the potentially affected people prior to the creation of the protected area about how they may participate in the ongoing process. In addition, all information that has a direct or indirect impact on their rights, claims, and duties has to be publicized as widely as possible. This means that documents such as the formal declaration of the protected area, the procedure for the development of the management plan, the management plan itself, or the evaluation of the protected area should all be made public.

## **3 Ensure Participation**

Participation needs to be ensured at all stages – from creating to managing a protected area. The form and extent of participation might vary from stage to stage, and different stages may involve different stakeholders. Still, certain common approaches and key actions can be determined which will apply at all stages.

### **Action 3.1: Undertake Consultations**

In general, participation can be ensured by holding public meetings as well as having specific meetings with key stakeholders. While all stakeholders should be given adequate time to consider the issues, special arrangements may need to be made for indigenous and tribal peoples to ensure culturally appropriate participation. For example, it may be necessary to extend the timetable for participation in order to ensure that such peoples have adequate time to discuss the issues internally and reach a collective decision. Along these lines, the Canadian Supreme Court in *Mikisew Cree First Nation v Sheila Copps, Minister of Canadian Heritage and Thebacha Road Society* held that: “The Crown’s duty to consult imposes on it a positive obligation to reasonably ensure that aboriginal peoples are provided with all necessary information in a timely way so that they have an opportunity to express their interests and concerns, and to ensure that their representations are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action.”<sup>30</sup> Also, it may be necessary to hold meetings in the community rather than requiring the community to appoint representatives.

The exact form and level of consultation will mostly depend on the extent of the duty to consult, which in turn depends on who is affected and to what extent. According to C. J. McLaughlin, “the

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30 See *Mikisew Cree First Nation v Sheila Copps, Minister of Canadian Heritage and Thebacha Road Society* [2005] 3 S.C.R. 388, 2005 SCC 69.

existence or extent of a duty to consult or accommodate is a legal question in the sense that it defines a legal duty. However, it is typically premised on an assessment of the facts.”<sup>31</sup>

**Box 9: Legal Duty to Consult in the Cobourg Peninsula Aboriginal Land, Sanctuary, and Marine Park, Northern Territory of Australia**

Under Section 4 the Land Council is required to consult all relevant traditional aboriginal owners and satisfy itself that “(a) the traditional Aboriginal owners understand the nature and purpose of;

(b) the traditional Aboriginal owners have a reasonable opportunity to take advice and express their views on; and (c) a majority of the traditional Aboriginal owners have consented to” the proposed action.

The form and level of consultation required can also depend on more practical issues. For example, when compiling relevant information on protected areas under the previous step, scientific data on biodiversity are usually collected by scientists. Nevertheless, very often the scientists rely on local people to tell them what species are found where and when in a particular site. To ensure the most accurate and comprehensive information possible, the RBA suggests that local people and indigenous communities should be fully involved and participate in collecting and compiling data, including preparing species lists and carrying out long-term monitoring.

**Action 3.2: Seek and Promote Free and Prior Informed Consent**

Free and prior informed consent (FPIC) is another guiding principle in order to ensure public participation in line with the RBA standard. However, it might not be necessary at all stages or from all stakeholders. Instead, the scope and content of a stakeholder’s rights will determine whether free prior informed consent is necessary. If it is, no actions should be taken without obtaining this consent from any person whose legal rights and interests may be affected.

It can be assumed that commercial entities, government agencies, and other relatively powerful entities will be able to obtain full legal advice on their rights and that their consent will not be given unless they have sufficient information. More care should again be exercised when dealing with indigenous or local communities. FPIC requires that a community be given adequate time to discuss and reach a consensus and that the internal decision-making processes of the community are respected, including the authority of the elected or traditional leaders of the community. It also means that the community is clear about what they are giving their consent to.

In some cases free prior informed consent is impossible because the community lacks the legal power to give consent. Lands belonging to indigenous or local communities might be inalienable, and the community may therefore lack the legal capacity to dispose of it or any part of it for a protected area. This is, for example, the case in Guyana, where Amerindian land is regarded as held

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31 See *Haida Nation v British Columbia (Minister of Forests)* [2004] 3 S.C.R. 511.

by Amerindian communities in perpetuity in order to protect Amerindian culture and traditional way of life. Under Section 44 of the Amerindian Act 2006 any attempt to dispose of any right, title, or interest in Amerindian land is void except for limited leases and the Amerindian right to dispose of resources on the land. Similarly, in the case of *Mayagna (Sumo) Awas Tingni Community v Nicaragua*, the Inter-American Court held that the right to property under the Inter-American Convention on Human Rights includes communal property where ownership of the land is not centred on an individual but on the community. Communal lands are therefore inalienable and cannot be donated, sold, encumbered, or mortgaged.<sup>32</sup>

### **Action 3.3: Provide and Use Conflict Resolution Mechanisms to Secure Rights**

Where consultations and procedures for FPIC fail to resolve rights conflicts, a conflict resolution mechanism has to be chosen from the previously identified potential mechanisms and then used. As indicated before, there are a number of possible conflict resolution mechanisms, ranging from “soft” approaches such as apology, undertakings, negotiation, and mediation to “hard” approaches such as arbitration or litigation, in which a decision is imposed by a third party. Arbitration is more suited to commercial disagreements and should not be used to resolve disputes related to human rights.

The type of mechanism selected should be appropriate, especially with regard to the level of the existing conflict. For example, if a person who has been excluded from participation or not given adequate information agrees with the decision to create a protected areas system, making an apology and providing the information may be acceptable, along with an undertaking to ensure that the person is fully involved as appropriate in future decisions and actions. If a person, however, disagrees with the decision to create a protected areas system, the appropriate action might be to apply to the court to have the decision overturned on grounds of procedural irregularity. Whether this will succeed will depend on whether the decision maker has followed the proper legal procedure.

## **4 Take Reasoned Decisions**

Wherever possible, decisions should be made on the basis of what is most effective for conservation, but with the intention of having the least impact on existing rights. This balance cannot always be achieved, but it should be the starting point if competing rights are to be taken into account adequately. Furthermore, it should be noted that stakeholders can have conflicting or opposing views and rights, and it is rarely possible to please all those involved in or affected by the process of creating and managing a protected area. Therefore, conflicting rights have to be balanced as well.

The decision to create a protected area should not compromise the outcome of legal claims. For example, if there is a land claim by an indigenous or tribal community, the proposed boundary of the protected area should not adversely affect the outcome of the land claim. It should be possible to protect the area until the land claim is resolved, but the fact that a protected area has been established should not affect the right of the indigenous or tribal community to have their title legally recognized.

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32 See the decision in *The Mayagna (Sumo) Awas Tingni Community v Nicaragua*, Judgement of 31<sup>st</sup> August 2001, Inter-Am. Ct. H.R., (Ser.C) No.79 (2001).

New activities such as tourism may also create conflicts with conservation interests and the rights of local peoples or communities. Tourism within a protected area should therefore be developed in partnership with local stakeholders, and they should have priority for economic and employment opportunities. Wherever possible, tourism should be controlled by local people, tourism facilities should be owned and run by local people, and tourism goods and services should be provided by them. Income-generating activities should be linked to the local economy. Tourism in a protected area should be conducted in a culturally appropriate way. Where there are sacred sites, the RBA suggests that the peoples to whom those sites are sacred should be the ones to decide whether tourists are permitted to visit, how many people at any one time, etc.<sup>33</sup>

The case of so called uncontacted peoples raises very different issues. The RBA suggests that a protected area should be created and managed in such a way that it does not have any negative impact on uncontacted peoples. Uncontacted peoples are not unaware of the State and other citizens but they may choose not to become engaged. In that case, the RBA suggests that their wishes should be respected and they should be left to continue their traditional way of life and culture without outside interference. Applying the RBA suggests that the choice of whether to make contact should be made by the uncontacted peoples, not by those involved in the protected area. These people can also be especially vulnerable to diseases introduced by outsiders. The interest in scientific research would therefore have to be balanced against the right to life and health of uncontacted peoples, their right to continue their culture, and even their right to privacy. The right to privacy is guaranteed by several international treaties, including Article 17 of the International Convention on Civil and Political Rights, Article 11 of the American Convention on Human Rights, and Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. One option is to ensure that there are no visitors to areas that uncontacted peoples occupy or use unless and until such uncontacted peoples voluntarily make contact and freely confirm that others may have access to these areas.

In general, reasoned decisions enable any stakeholders whose views have not been incorporated or whose rights have been modified or narrowed to understand why this has happened. This is an important element in building consensus.

The decision to create a protected area is likely to be a political one taken by the Government at the time. However, reasoned decisions are important to show why particular boundaries have been established or why a particular management category has been chosen. Where activities are to be restricted, it is important to link this to scientific data, local data, and the carrying capacity of the land. The decision will be more legitimate if the decision maker (such as a minister or the relevant protected area authority) is able to demonstrate that its reason is based on information and recommendations from stakeholders or that it at least takes stakeholder views into account. Also, a decision is more likely to be accepted if the decision maker can show why a stakeholder recommendation could not be followed. Similarly, decisions made as part of the development, implementation, and enforcement

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33 See also Secretariat of the Convention on Biological Diversity, *Akwé: Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessment regarding Developments Proposed to Take Place on, or which are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities*, CBD Guidelines Series (Montreal: 2004).

of a management plan will be more legitimate if it can be shown that they take stakeholder views into account.

## **5 Monitor and Evaluate Application of the RBA**

Since the RBA is an attempt to incorporate rights fully into protected areas, the various procedures for doing so should be assessed at reasonable intervals in order to detect errors and to apply any lessons learnt in order to improve the RBA in protected areas.

An essential part of evaluation would be stakeholder feedback. Depending on the case and the severity of rights conflicts, it may be appropriate to require an independent evaluation in which stakeholders are able to give their views confidentially so that they can speak freely.

A useful approach would be to compile a checklist of protected areas stakeholders and their interests from the situational analysis and use this as a basis for obtaining stakeholder assessments of the RBA. Furthermore, monitoring and evaluation reports should be publicly available, subject to the duty to respect confidentiality. The assessment of the impact of the protected area should be built into the management plan.

## **IV Conclusions**

The creation of a protected area is a political decision that requires balancing competing interests in the area to be set aside for conservation. Such interests include the resource sectors (such as mining, forestry, agriculture, tourism), the rights of local people or indigenous communities to use the area (for example for hunting, fishing, farming, gathering, spiritual activities), public rights such as rights to travel through the area, and so on. The choice of a protected area management category and the development and implementation of the management plan thus require balancing conservation goals with other legitimate rights and interests. A rights-based approach requires that stakeholders are fully involved throughout the process, that real interests are identified and addressed, and that decisions are made on the basis of the best available information – whether that is scientific data or traditional knowledge. Applying the RBA will not necessarily give the same result in each situation, but it should ensure that decisions and actions are not only legal but also legitimate.



# 6 Conclusions and Outlook

The goal of applying a rights-based approach (RBA) to conservation is to ensure equity – or in a “simpler” word, justice – within but also through nature conservation. At the same time, an RBA to conservation shall promote conservation efficiency and conservation effectiveness through greater respect for people’s rights in all public or private activities related to the environment (including the development and implementation of policies, legislation, programmes, projects, and actions), which will lead to their greater support and acceptance by all stakeholders.

Based on this understanding, an RBA to conservation is perfectly in line with the vision of the International Union for Conservation of Nature (IUCN), which aims for “a just world that values and conserves nature by influencing, encouraging and assisting societies throughout the world to conserve the integrity and diversity of nature and to ensure that any use of natural resources is equitable and ecologically sustainable”.<sup>1</sup> This correlation between the goal of an RBA to conservation and the vision and mission of IUCN is underlying IUCN Resolution 4.056 “Rights-based approaches to conservation”,<sup>2</sup> which was adopted by the IUCN membership at the Fourth IUCN World Conservation Congress held 5–14 October 2008 in Barcelona, Spain.

## I The Step-wise Approach as a Benchmark or Standard

In the case of an official adoption of an RBA to conservation by States, State agencies, conservationists, land owners and occupiers, scientists, private industries, and other resource users (as requested by IUCN Resolution 4.056),<sup>3</sup> an RBA will be used by these diverse players in order to integrate rights into their different types of environment-related actions. In this context, it is important to understand that the RBA is a process rather than a goal. As mentioned above, the goal of an RBA to conservation is to harmonize all environment-related activities, including those undertaken in the name of nature conservation, and people’s rights in order to ensure equity and nature conservation. The RBA itself is a possible tool that will help achieve this goal.

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1 See the vision and mission of IUCN at [www.iucn.org/about](http://www.iucn.org/about).

2 See all resolutions from the Fourth World Conservation Congress at [www.iucn.org/congress\\_08/assembly/policy](http://www.iucn.org/congress_08/assembly/policy).

3 IUCN Resolution 4.056 states under point 1: “CALLS ON IUCN’s governmental and non-governmental members as well as non-member states and non-state actors, to:

- (a) develop and/or work towards application of rights-based approaches, to ensure respect for, and where possible further fulfilment of human rights, tenure and resource access rights, and/or customary rights of indigenous peoples and local communities in conservation policies, programmes, projects and related activities;
- (b) encourage relevant government agencies, private actors, businesses and civil-society actors to monitor the impacts of conservation activities on human rights as part of a rights-based approach;
- (c) encourage and establish mechanisms to ensure that private-sector entities fully respect all human rights, including indigenous peoples’ rights, and take due responsibilities for the environmental and social damage they engender in their activities; and
- (d) promote an understanding of responsibilities and synergies between human rights and conservation;”



However, a major challenge for all actors is how to put such a policy statement into practice. Confusion about terminology – for example, whether it is a rights-based approach or rights-based approaches, or whether it is a human rights-based approach or a rights-based approach in general – can turn out to be counterproductive for reaching the RBA to conservation goal. Also, disputes among the different players and stakeholders about the specific requirements and obligations of applying an RBA to conservation can lead to high transaction costs, legal uncertainty, lack of transparency, and in the end barriers to the accomplishment of the goal. The step-wise approach for applying an RBA to conservation, as presented in Chapter 2, is one way to shed light on this issue and promote a standardization of the RBA process that could help overcome the barriers and turn theory into practice.

As shown in the Chapters 3, 4, and 5, the step-wise approach provides a comprehensive and logical framework that has the potential to strengthen the coherence of thinking and programming. If implemented correctly, it ensures proper identification as well as clarification of relevant rights and allows a change from concepts with unclear rights/value systems to a standard process with increased clarity and coherence. At the same time, it provides for certain recourses in order to support the progressive realization of these rights according to applicable principles. The step-wise approach could thus serve as a benchmark for evaluating the “quality” of any RBA to conservation activities undertaken by different actors.

Going a bit further, the step-wise approach could also be promoted as a standardized process. Nevertheless, when talking about standardization of the RBA to conservation process, it must be remembered that the decision makers who are supposed to go through this process are so diverse that it is scarcely possible to propose a full-fledged step-wise approach that foresees every possible detail. Such a rigid framework would also hardly be acceptable to all actors. But as Chapters 3 – 5 indicate, the step-wise approach can be adjusted to all kinds of subject matters – from climate change mitigation to community forest conservation and the creation of protected areas – as well as to issues not analysed in this publication, such as water resources management and reducing emissions from deforestation and forest degradation. This flexibility is an important characteristic that allows the step-wise approach to be incorporated into all environment-related activities, such as the development and implementation of policies, legislation, and project activities at both international and national levels. It thus has a great potential to be accepted by all kinds of players not only as a benchmark but as a standard to follow.

Another challenge that all actors face when trying to harmonize conservation and people’s rights is how to be sure that all rights that need to be respected are actually taken into consideration. Social, political, and legal rights can differ from country to country, and even from one location to another within a country. While the step-wise approach per se does not provide an easy answer in the form of a simple list of rights that need to be respected in each individual case, it nevertheless offers a process for identifying the relevant rights at stake and ensuring that these rights are properly balanced against each other and against conservation interests. After the identification of people’s rights has taken place, the list of recognized human rights (see Chapter 2) can serve as another benchmark in order to test whether an appropriate rights standard has been met.

Regardless of whether the step-wise approach is accepted as a benchmark or as a standard process, another important issue is how the application of an RBA to conservation can be further

encouraged and, if necessary, enforced. In this context, awareness raising and further learning are key, as discussed in the next section. Furthermore, different triggers could be used to encourage a comprehensive application of RBA to conservation, as suggested in the step-wise approach.

A first trigger can be seen in the development of RBA policies. Such policies can be adopted by all relevant actors, the public sector, private business, and also nongovernmental organizations (NGOs) representing civil society. These policies can be developed in different forms – for example, national RBA policies as well as government support programmes, corporate social responsibility standards, and common institutional principles developed jointly by NGOs. These policies could directly introduce the step-wise approach or at least use it as a benchmark during the development phase.

While the development of such policies is a vital first step, it is important to complement these “voluntary” standards with “mandatory” requirements to apply the different steps and actions of the step-wise approach, or at least to test all environment-related activities against this benchmark. Such mandatory requirements can be included in existing laws on strategic environmental assessment or environmental impact assessment, or even in standalone laws requiring a social impact assessment. For this, existing legislation would usually need to be reviewed and, if necessary, revised, in order to meet the “standard” set by the step-wise approach for applying an RBA to conservation. If such laws do not yet exist, the step-wise approach could guide the drafting of new laws.

The value-added of making use of such legal instruments is that they:

- Introduce normative specificity – meaning that they will be more precise than voluntary schemes, which often include only broad goals that can be interpreted differently – and thus protect individual right-holders;
- Empower people – meaning that their rights not only have the status of social or political rights that are based on promises included in different policies but they are “turned into” legal rights that can be claimed in court, if necessary – and at the same time create duty-bearers; and
- Promote monitoring and compliance – meaning that the different actors can be held accountable for their already agreed commitments according to obligatory standards.

## **II An RBA to Conservation Clearing-house as a Platform for Learning**

As mentioned earlier, encouraging a comprehensive application of an RBA to conservation will require further efforts to raise awareness as well as to build capacities for an RBA to conservation. IUCN Resolution 4.056 clearly stresses this need within the conservation community and its partners and requests IUCN “to engage with IUCN’s members, representatives of Indigenous Peoples and local communities, and other relevant partners to:

- (a) facilitate exchange of experiences, methods, and tools on rights-based approaches to conservation;

- (b) develop greater understanding and capacity for rights-based approaches;
- (c) actively promote and support the adoption and implementation of such approaches”.<sup>4</sup>

A logical response to this request is the development of an “RBA to conservation clearing-house”, which should be available free of charge on the internet. The aim of establishing such a clearing-house is first of all to provide a “one-stop shop”, meaning a central point for collecting and sharing relevant information on an RBA to conservation. Developing the clearing-house as an online tool will ensure that a wide range of stakeholders around the world can be reached who need to have easy access to the information and the opportunity to learn and make use of it. In addition, providing a central online platform for all stakeholders to contribute to and share information on will be critical in order to have everyone helping to analyse the very dispersed information about an RBA to conservation. Furthermore, creating a central point of information that can grow interactively will increase the chances of this tool being accepted by all relevant actors.

In order to fully understand the need for and niche of such a clearing-house, it is important to recall that the issue of a rights-based approach has mostly been addressed in the development and business context, but the concept is still rather new to conservation. So far, no web-based information platform concentrates on an RBA to conservation, provides a comprehensive understanding of the topic, and facilitates its promotion in the international environmental policy arenas or its implementation at national and local levels.

Again, when building the clearing-house the step-wise approach for applying an RBA to conservation as described in Chapter 2 can be very helpful. This approach offers a logical, cross-sectoral structure around which the information platform could be built and that could be used to:

- Support the development of a standardized terminology or “controlled vocabulary” that would improve the understanding and application of an RBA to conservation at the international and national level;
- Take stock of the past and present work of all different actors related to various RBA-to-conservation steps and rights;
- Inform stakeholders about existing public and private policies as well as legislation related to an RBA to conservation;
- Start a collection of case studies and tools that can provide further guidance and lessons learned for implementing the step-wise approach;
- Report “violations” of an RBA to conservation – meaning cases where the step-wise approach either should have been applied to avoid negative impacts on people’s rights or should have been used to improve the performance of conservation activities – as such reporting is crucial in order to ensure proper monitoring of the RBA commitments and obligations of different actors;
- Offer guidance on how to respond to failures in an RBA to conservation – meaning litigation options in theory and practice;

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4 Resolution 4.056 is available at [intranet.iucn.org/webfiles/doc/IUCNPolicy/Resolutions/2008\\_WCC\\_4/English/RES/res\\_4\\_056\\_rights\\_based\\_approaches\\_to\\_conservation.pdf](http://intranet.iucn.org/webfiles/doc/IUCNPolicy/Resolutions/2008_WCC_4/English/RES/res_4_056_rights_based_approaches_to_conservation.pdf) .

- Establish a mechanism for exchanging information about planned and ongoing projects and activities in line with the step-wise approach in order to enhance RBA understanding, offer learning opportunities, identify synergies among different activities, and, most important, facilitate the further integration of an RBA to conservation in international and national policy processes; and
- Provide wide coverage of the biodiversity-related sectors and policy topics that require the application of the RBA filter.

It can be concluded that an RBA to conservation can be seen as a systematic process through which rights of all stakeholders are respected or, in the case of conflicting rights, are at least considered and balanced in decision-making processes according to reasonable criteria.

The different steps and action points of the suggested step-wise approach to applying an RBA to conservation can be seen as possible components of future instruments that aim at promoting the linking of people's rights (in particular, human rights), nature conservation, and poverty reduction strategies. Or the different steps and action points could be used as indicators that will allow decision makers to evaluate whether their activities fully or at least partly comply with RBA requirements.

Taking the step-wise approach to applying an RBA to conservation serious will not per se mean achieving all the goals on conservation and rights agendas. But it will help disqualify activities that fail to achieve conservation objectives simply because rights concerns have been ignored, and vice versa.

While the step-wise approach and its action points are surely not a revolutionary suggestion, they have clear advantages, such as standardizing language on an RBA to conservation, being cross-sectoral, and providing flexibility on the different types of actions that need a rights-based approach, which will be crucial for the future promotion of the idea. The step-wise approach thus has the potential to communicate and clarify a rather new way of thinking that has to be integrated in the environmental dimension as well as in human rights and poverty reduction strategies.





