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GLOBALIZATION, COMMUNITIES AND HUMAN RIGHTS: COMMUNITY-BASED PROPERTY RIGHTS AND PRIOR INFORMED CONSENT

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I. INTRODUCTION

Globalization is placing increasing stress on individuals and communities, particularly in rural areas in developing countries. Increased trade and other economic activities, for example, result in higher demand for wood and other forest products, oil and other minerals, fish products, arable land, etc. – resources that indigenous and other local communities often depend upon for their livelihoods and cultures. Large-scale development projects such as dams, mines and highways often displace local populations, exploit their natural resource base, and interfere with or destroy their livelihoods and cultures.² Even new protected areas such as national parks – terrestrial and maritime – often displace local populations or restrict their access to land and resources on which they traditionally rely.³

Local communities often are unable to protect themselves in the face of these pressures. There are various reasons for their vulnerability, ranging from limitations in resource mobilization or technical expertise to more structural issues of political opportunity and power dynamics. Many communities lack knowledge or experience in mobilizing resources to defend their rights, such as technical, scientific or legal expertise, or other helpful skills such as how to use the media. At the most basic level, communities may not have access to a base of resources,

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2. See, e.g., JOAN MARTINEZ-ALIER, *THE ENVIRONMENTALISM OF THE POOR* (Edward Elgar Publishing, 2002).

3. See, e.g., Mac Chapin, *A Challenge to Conservationists*, 17(6) *World Watch*, 17, 17-31 (2004); COLIN M. TURNBULL, *THE MOUNTAIN PEOPLE* 20-32, 129-39 (1972) (recounting how the society of the Iuk people was destroyed as a result of their having been denied access to their traditional lands after the creation of Uganda's Kidepo Valley National Park).

like a place to meet, money for basic supplies such as copying and telephones, or technology such as computers and the internet.⁴

A more pervasive and structural problem is that rural people, while comprising a large majority in many developing countries, are frequently neglected, or even repressed, by national governments or local elites. A set of political variables, such as the openness of the political system, the State's capacity or propensity for repression, the stability of elite alignments, and the presence of elite allies all may influence the ability or limitations of a community to protect itself in the face of pressures.⁵ Fundamental political and economic problems and the exploitation of the politically powerless often result in environmental injustices, including disparities in the benefits that flow from natural resources development.⁶

A related concern is that many nations continue to mirror the policies and biases of their former colonial governments, including land laws. In many countries, including in much of Asia and Africa, the State claims ownership of vast areas, including areas traditionally occupied by indigenous groups. Since political independence was attained in the 1960s by many African nations, State assertions of ownership have actually been broadened and legally strengthened in many nations.⁷ In Indonesia, the State's authority over its resources since its independence has also been maintained and expanded, and in 1980s the State classified over 75% of the total land area as State Forest, including over 90% of the Outer Islands.⁸ Given this pattern of State control of land and resources, local communities are often vulnerable to losing access to their traditionally occupied lands or resources, and thus to their means of sustenance, way of life, and culture.

This article addresses two related human rights norms that are emerging to counteract pressures being placed on vulnerable communities. The first of these is Community-Based Property Rights, which relate to the rights of long-established communities, especially indigenous ones, to manage and control natural resources they have traditionally utilized, and to maintain and adapt their often complex community rules and norms. The second is Prior Informed Consent by indigenous and other local communities with respect to the use of natural resources that they reside in or upon which they are otherwise dependent.

4. See, e.g., Joe Foweraker, *Theories of Social Movements*, in THEORIZING SOCIAL MOVEMENTS 16 (Pluto Press 1995). (Resource mobilization theory).

5. See, e.g., *id.* at 18 (Political opportunity theory).

6. See, e.g., Gary Bryner, *Assessing Claims of Environmental Justice: Conceptual Frameworks*, in JUSTICE AND NATURAL RESOURCES: CONCEPTS, STRATEGIES AND APPLICATIONS 31-56 (Kathryn Mutz et al. eds., 2002).

7. OWEN LYNCH, CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW, AMPLIFYING LOCAL VOICES, STRIVING FOR ENVIRONMENTAL JUSTICE: PROCEEDINGS OF THE AFRICAN PUBLIC INTEREST LAW AND COMMUNITY-BASED PROPERTY RIGHTS WORKSHOP, USA RIVER, TANZANIA, AUGUST 1 - 4, 2000 (Ctr. for Int'l Envtl. L 2002).

8. OWEN LYNCH & EMILY HARWELL, CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW, WHOSE NATURAL RESOURCES? WHOSE COMMON GOOD? TOWARDS A NEW PARADIGM OF ENVIRONMENTAL JUSTICE AND THE NATIONAL INTEREST IN INDONESIA (Ctr. for Int'l Envtl. L., 2002).

Before describing these concepts, it is helpful first to recall the legal context in which these norms are emerging. The international legal system underwent a radical change at the end of World War II when the international community recognized the existence of human rights. This development was radical because for the first time subjects other than States had rights. Human beings had these rights solely by virtue of their being human. Moreover, they had these rights vis-à-vis their own State, for no longer could a State treat its nationals any way it liked with legal impunity.

As is well known, these rights were first recognized in 1948 in a non-binding declaration of the United Nations General Assembly – the Universal Declaration of Human Rights.⁹ They later were established in two binding agreements – with the solemn name “covenants” – one on civil and political rights,¹⁰ and the other on economic, social and cultural rights.¹¹ These and other rights have also been enshrined in a multitude of regional and specialized international agreements, including the European Convention for the Protection of Human Rights and Fundamental Freedoms,¹² the American Convention on Human Rights,¹³ the African Charter on Human and Peoples’ Rights,¹⁴ the Convention concerning Indigenous and Tribal Peoples in Independent Countries (ILO No. 169),¹⁵ the International Covenant on the Elimination of All Forms of Racial Discrimination,¹⁶ the Convention on the Elimination of All Forms of Discrimination Against Women,¹⁷ the Convention on the Rights of the Child,¹⁸ and most recently, the Convention on the Rights of Persons with Disabilities.¹⁹ Eventually, these human rights became recognized as customary international law,²⁰ some even reaching the status of *jus cogens*.²¹

9. Universal Declaration of Human Rights, art. 3, G.A. res. 217A (III), at 71, U.N. Doc. A/810 at 71 (Dec. 12, 1948).

10. International Covenant on Civil and Political Rights, art. 27, Dec. 16, 1966, 999 U.N.T.S. 3171 (1976).

11. International Covenant on Economic, Social and Cultural Rights, art. 12, Jan. 2, 1976, 993 U.N.T.S. 3.

12. European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 8, Sept. 3, 1953, 213 U.N.T.S. 222 *as amended by* Protocols Nos. 3, 5, 8, and 11, which *entered into force* on Sept. 21, 1970, Dec. 20, 1971, Jan. 1, 1990, and November 1, 1998 *respectively*.

13. American Convention on Human Rights, art. 21, June 18, 1978, 1144 U.N.T.S. 123.

14. African Charter on Human and Peoples’ Rights, art. 14, June 27, 1981, 21 I.L.M. 58.

15. Convention Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, International Labour Organization No. 169, *entered into force* Sept. 5, 1991, 72 I.L.O. Official Bulletin 59.

16. International Covenant on the Elimination of All Forms of Racial Discrimination, Jan. 4, 1969, 660 U.N.T.S. 195.

17. Convention on the Elimination of All Forms of Discrimination Against Women, Sept. 3, 1981, 1249 U.N.T.S. 13.

18. Convention on the Rights of the Child, Sept. 2, 1990, 1577 U.N.T.S. 3.

19. Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, U.N. Doc. A/61/611.

20. For a description of how this occurred with respect to the Universal Declaration of Human Rights, see Jo M. Pasqualucci, *Louis Sohn: Grandfather of International Human Rights Law in the United States*, 20 Human Rts. Q. 924, 939-940 (1998).

21. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 702,

This area of human rights has continued to evolve over the half century since the Universal Declaration of Human Rights. For example, in the 1990s the international community finally recognized that these rights applied to women, not just men,²² and human rights efforts have focused increasingly on rights of indigenous people.²³ More recently, the evolution of human rights has included environmental considerations,²⁴ recognizing, for example, that pollution can violate the rights to life and property.²⁵

In 1992, the international community took a bold step towards acknowledging the link between human rights and environment by recognizing sustainable development as the overarching paradigm for improving the quality of life of people around the world through the adoption of the Rio Declaration on Environment and Development²⁶ and Agenda 21.²⁷ The importance of sustainable development has been recognized many times since adoption of the Rio Declaration.²⁸ Sustainable development has four defining characteristics: the interests of future generations must be taken into account; the needs of the world's poor must be given priority; the environment must be protected; and social, environmental and economic policies must be integrated.²⁹

At about the same time, the environmental justice movement came to the fore in the United States when research by the Christian Science Monitor and others revealed that environmental hazards and pollution were disproportionately located in poor and minority areas, with race being the most significant predictor of the

cmnt. n (AMERICAN LAW INSTITUTE, 1990).

22. Beijing Declaration and Platform for Action, Fourth World Conference on Women, Sept. 15, 1995, U.N. Doc. A/CONF. 177/20 (1995) and A/CONF. 177/20/Add.1 (1995). For a description of the role of civil society in reaching that realization, as well as a compilation of the 49 most significant international instruments leading up to the Beijing Declaration's recognition that women's rights are human rights, see generally C. LOCKWOOD ET AL., INSTRUMENTS OF CHANGE: THE INTERNATIONAL HUMAN RIGHTS OF WOMEN (ABA Press 1998).

23. See, e.g., Vice President and Rapporteur, Report to the General Assembly on the First Session of the Human Rights Council, at 56-73, U.N. Doc. A/HRC/1/L.10 (June 30, 2006).

24. For early articles regarding that relationship, see Dinah. Shelton, *Human Rights, Environmental Rights, and the Right to Environment*, 28 STAN. J. INT'L L. 103, 103 (1991); Philip Alston, *Conjuring up New Human Rights: A Proposal for Quality Control*, 78 AM. J. INT'L L. 607, 612 (1984).

25. See, e.g., San Mateo de Huancho v. Perú, Petition 504/03, Inter-Am. C.H.R., Report No. 69/04, OEA/Ser.L/V/II.122, doc. 5 rev. 1 (2004), discussed *infra* at text accompanying notes [40-42] [hereinafter San Mateo]. See also Mayagna (Sumo) Awas Tingni v. Nicaragua, 2001 Inter-Am. Ct. H.R. (ser. C) No. 79, at 25 (Aug. 31, 2001), discussed *infra* at text accompanying notes [37-39] [hereinafter Awas Tingi].

26. United Nations Conference on Environment and Development, Rio de Janeiro, Brazil, June 3-14, 1992, *Rio Declaration on Environment and Development*, U.N. Doc.A/CONF.151/26 (June 25, 1993), 31 I.L.M.874 (1992).

27. United Nations Conference on Environment and Development, Rio de Janeiro, Brazil, June 3-14, 1992, *Agenda 21*, U.N. Doc.A/CONF.151/26 (June 25, 1993).

28. See, e.g., World Summit for Social Development, March 6-12, 1995, Copenhagen, Den., Copenhagen Declaration on Social Development, para. 6, U.N. Doc. A/CONF.166/9 (Apr. 19, 1995).

29. Daniel Magraw & Lisa Hawke, *Sustainable Development*, in OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 613 (Daniel Bodansky et al. eds. 2007).

location of hazardous facilities.³⁰ There is widespread agreement in the environmental justice movement that disadvantaged communities have a right to participate in decisions affecting them, that they should not bear a disproportionate environmental burden, and that they should share in the benefits of environmental protection, such as clean drinking water, sanitation, and access to parks. Environmental justice should also be viewed as requiring effective and equal access to justice by those injured by environmental degradation, as well as the protection of the environment sufficient to maintain a healthy quality of life.³¹

In 1991, the first national environmental justice event was held, in which environmental justice activists from the United States and other countries forged the "Principles of Environmental Justice", which are still looked to as a defining document of the movement.³² The U.S. Environmental Protection Agency created an Environmental Justice office in 1992. The American Bar Association, which had endorsed sustainable development in 1992, adopted an environmental justice resolution in 1993.³³ Additionally, in 1994, President William J. Clinton signed an Executive Order on Environmental Justice, which declared that every federal agency should make "achieving environmental justice part of its mission by identifying and addressing... disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations."³⁴

As the movements for sustainable development and environmental justice progressed, it became increasingly evident that they were inextricably linked since they both addressed the confluence of social, environmental and economic factors, both required that the environment be preserved at a level sufficient to maintain a healthy quality of life, and both considered justice implications of development projects and processes.³⁵

One set of instances where the search for environmental justice and sustainable development coincide is the treatment of long-established communities that are dependent on particular natural resources for their sustenance, their livelihood, their shelter, or their culture. This is the case, for example, with indigenous communities in the Amazon rainforest that depend on their

30. John Bryne et al., *A Brief on Environmental Justice*, in ENVIRONMENTAL JUSTICE: DISCOURSES IN INTERNATIONAL POLITICAL ECONOMY (John Bryne et al. eds., 2002).

31. Daniel Magraw & Owen Lynch, *One Species, One Planet: Environmental Justice and Sustainable Development*, in 2 WORLD BANK LEGAL REVIEW: LAW, EQUITY AND DEVELOPMENT 441, 442-45 (Ana Palacio ed., 2006).

32. For a discussion of The First National People of Color Environmental Leadership Summit, see David H. Getches & David H. Pellow, *Beyond "Traditional" Environmental Justice*, in JUSTICE AND NATURAL RESOURCES: CONCEPTS, STRATEGIES AND APPLICATIONS, (Kathryn M. Mutz et al. eds., 2002).

33. Policy Positions Adopted by ABA House of Delegates, Environmental Justice, Aug. 11, 1993, <http://www.abanet.org/publicserv/environmental/envirjonjus.shtml>.

34. Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations. Exec. Order No. 12898, 3 C.F.R. § 859 (1994), *reprinted in* 42 U.S.C.A. § 4321 at 7629-32 (1994).

35. See Magraw & Lynch, *supra* note 31.

surroundings for their way of life. In some communities in the Amazon, community members have reported using 30 different plant species for commercial sale alone, and many more forest materials for food and medicines, such as Brazil nuts for sale, palm fibers for clothes, seeds for oils, locust for medicine, heart of palm for food, etc., in addition to fishing and hunting for food.³⁶ Other examples include traditional coastal or river fishing communities that depend on fishing for their livelihoods, and communities that depend on rivers or lakes for their water. Unfortunately, as indicated above, these communities are often vulnerable to outside threats. Essentially, natural-resource dependent communities often are highly vulnerable to losing their land or access to resources.

Some threats can be addressed by using standard human rights mechanisms in international law. For example, the Awas Tingni case in the Inter-American Court of Human Rights addressed the violations of the right to property of the community by the Nicaraguan State, when Nicaragua granted a concession to a company to carry out road construction work and logging exploitation on Awas Tingni lands, without the consent of the Awas Tingni community.³⁷ The court spoke of the rights to property of the Awas Tingni, and other indigenous communities in Nicaragua and elsewhere, in their finding that “[i]ndigenous groups, by the fact of their very existence, have the right to live freely in their own territory; the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival.”³⁸ The Court ruled that the State had to adopt legislative, administrative, and other necessary measures to provide property title to the indigenous communities in accordance with their customary law, values, and customs.³⁹

Another example of the application of standard human rights mechanisms is the San Mateo de Huanchor case in the Inter-American Commission on Human Rights (IACHR). This case addressed the environmental and health impacts from mining contamination in San Mateo de Huanchor, Peru.⁴⁰ The IACHR requested that Peru take precautionary measures, including taking steps to remove the tailings dump that was contaminating their community and the river on whose bank it was located, and to provide medical assistance to community members who had been harmed by the contamination.⁴¹ As a result of the request of the Commission, the toxic mine tailings were removed and the State has taken some initial efforts to provide medical assistance to community members as of 2007.⁴²

36. Philip Fearnside, *Extractive Reserves in Brazilian Amazonia: An Opportunity to Maintain Tropical Rain Forest under Sustainable Use*, 39 BIOSCIENCE 387 (1989).

37. Awas Tingi, *supra* note 25.

38. *Id.* at para. 149.

39. *Id.* at para. 25. Another point of particular note by the Court was the finding that, given the significance of this relationship, indigenous peoples' customary law is adequate to support recognition of a property right even in the absence of State recognition of that right (para. 151).

40. San Mateo, *supra* note 25.

41. *Id.* at para. 12.

42. Another point of particular note is that the IACHR's decision highlights the linkage between pollution and human rights, the decision of the Commission sets a precedent to consider environmental

Sometimes, however, it is not possible to apply standard human rights doctrine or, in other instances, standard human rights mechanisms are inadequate. Community-Based Property Rights (CBPRs) and Prior Informed Consent (PIC) have emerged to fill this gap.

II. COMMUNITY-BASED PROPERTY RIGHTS

The term “community-based property rights” was first publicly invoked by the Center for International Environmental Law (CIEL) in 2000.⁴³ Among other things, the CBPR concept was designed to be useful in advocating on behalf of local communities and their legal rights to manage and control their natural resources.

CBPRs relate to the rights of long-established communities, including indigenous ones, to natural resources they have traditionally utilized. CBPRs also include the right to maintain and adapt the complex and dynamic rules and norms of their communities that often are formed over long periods of time in response to local environmental conditions.

In contrast to widely used and largely uniform Western concepts, CBPRs within any given local community typically encompass a number of different rights, including rights to ownership, use and transfer (including inheritance) of natural resources, all of which are understood and respected by a self-defined group of local people. CBPRs often include several distinct property rights within a community area, like private property that is owned by an individual or family, common property areas that can be accessed by all members of the community although not open to people outside of the community, and other types of property, such as areas that may be closed to any form of use in order to encourage regeneration of natural resources (e.g., forest or fish sanctuaries) or due to cultural reasons (such as sacred spaces). CBPRs can likewise include rights to land, wildlife, water, forest products, fish, marine products, and intellectual property. Furthermore, CBPRs may vary in time and place to include rights to seasonally available resources such as fruit, game, fish, water or grazing areas. They often specify under what circumstances and to what extent certain resources are available to individuals and communities to inhabit, to harvest, to hunt and gather on, and to inherit.

A key feature of CBPRs is that they derive their authority from the local community in which they originated and operate, not from the State where they are located. These rights emanate from and are enforced by communities. In this way, CBPRs are akin to human rights, which derive their authority from and are

pollution or degradation, not as environmental management decisions, but as actions that violate human and community rights. The recognition of such linkages has been resisted by governments on the ground that pollution is a matter of environmental management, and that every State is sovereign to determine its levels of protection. The IACHR had earlier issued a report making the connection between pollution and human rights. See the Report on the Situation of Human Rights in Ecuador, OEA/Ser.L/V/II.96, Doc. 10 rev. 1, at Chapter VIII (1997).

43. Much of this section is drawn directly from LYNCH & HARWELL, *supra* note 8. Owen Lynch developed the concept of CBPRs while head of the CIEL's Law and Communities Program.

recognized by international law as well as by natural law concepts. International human rights law also forms a basis for CBPRs, because it recognizes basic civil and political rights essential to CBPRs, as well as other relevant rights such as the right to enjoy the benefits of culture.

CBPRs exist in many places throughout much of the Global South and are often distinguishable from Western property rights concepts, most notably private individual property rights. Where CBPRs exist, communities should be able to maintain these rights, including associated property and natural resources, particularly when the area is an ancestral domain or indigenous territory. Formal legal recognition of CBPRs by the State is important in this regard, and can help to ensure that CBPRs are respected and used in the pursuit of the public interest. Formal state recognition of these rights makes it more difficult for property and resources traditionally used by communities to be usurped, and recognizes the human rights of these communities to their livelihoods and culture. Formal State recognition of CBPRs also provides State assurance that local people will be better able to profit from investments of their time and labor, recognize local communities' authority to prevent migration into their territories, and help local communities better protect and maintain natural resources by bolstering the enforcement of local management regulations.

Legal recognition of CBPRs by States should be understood to be an aspirational and optimal goal, and while full legal recognition of CBPRs as private rights may not be the final outcome of a particular negotiation with States, it is important that long-marginalized local communities and persons who advocate on behalf of such communities know of and pursue an optimal ideal outcome. The first step to recognize and support CBPRs is for governments to acknowledge officially their responsibility to help resource-dependent communities defend and benefit from their natural resources and from their rights relating to the environment. In many countries, constitutions can be interpreted as already protecting the CBPRs of indigenous peoples (i.e., original long-term occupants). There are also procedural and substantive rights associated with the recognition of CBPRs.

Procedural rights include the right of communities to participate in decision making processes that affect them. These rights of participation are related to Prior Informed Consent (PIC), and will be discussed in the next section.

Substantive rights, the strongest form of State recognition of CBPRs, are achieved primarily through the creation of a legal presumption of local community ownership where CBPRs exist. An example of this is Certificates of Ancestral Domain Title, as provided in the Philippines, which will be described in more detail below as an example of how CBPRs and PIC have been legally recognized.

The ideal State-local community arrangement would be private property rights for the community. This would entail legal recognition of private group or community property rather than of individual or public property. Of course, individual rights already exist within most CBPR systems and are already well known to community members. These rights probably would and should endure,

although the community, and not necessarily the State, would remain the primary guarantor.

Despite being a departure from typical Western conceptions of property rights, such an arrangement would best capture the unique and dynamic nature of CBPRs. The main benefit that local communities would gain from being legally recognized as private group property rights holders would most likely be the increase in bargaining leverage with outside interests, including their own government. Moreover, in light of the property rights being group-held, decisions to sell any rights must involve the group, thereby limiting the vulnerability and “commodification” of the property rights.

In summary, the concept of CBPRs and the State’s recognition of CBPRs are emerging innovations in the protection of human rights. Legally recognizing and supporting these rights will allow communities to continue to maintain their traditional ways in addition to better managing their interactions with and their adaptations into mainstream societies and economies. It helps protect their rights to livelihood and culture, and in doing so, safeguards their human rights.

III. PRIOR INFORMED CONSENT

PIC is another important innovation in the protection of the human rights of local communities in developing countries. 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.⁴⁴ Discussions should occur prior to, and continue throughout, the time the activity is conducted.⁴⁵ Furthermore, communities should have the right to withhold consent at decision-making points during the project cycle.⁴⁶ 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 will take into account cultural valuations of impacts or benefits and traditional modes of decision-making.⁴⁷

44. Much of this section is drawn from ANNE PERRAULT ET AL., PARTNERSHIPS FOR SUCCESS IN PROTECTED AREAS: THE PUBLIC INTEREST AND LOCAL COMMUNITY RIGHTS TO PRIOR INFORMED CONSENT (PIC) 19 *Geo. Int'l Envtl. L. Rev.* 475-542; see also Robert Goodland, *Free, Prior and Informed Consent and the World Bank Group*, 4 *SUSTAINABLE DEV. L. & POL'Y* 66, 66 (2004). 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. We consider that essential idea to be inherent in the word “consent” Thus for purposes of this article, we only refer to the term “Prior Informed Consent” (or “PIC”) and encompass “free, prior informed consent” within that terminology.

45. See United Nations Economic and Social Council (ECOSOC), Inter-Agency Support Group on Indigenous Issues, REPORT ON FREE, PRIOR AND INFORMED CONSENT (May 2004).

46. See Fergus MacKay, *Indigenous Peoples' Right to Free, Prior and Informed Consent and the World Bank's Extractive Industries Review*, IV(2) *Sust. Dev. Law and Policy*, Spec. Issue: Prior Informed Consent: 43-65.

47. L. MEHTA & M. STANKOVITCH, OPERATIONALISATION OF FREE, PRIOR INFORMED CONSENT (2000).

Although PIC is framed and understood in a theoretical and broad manner, explicit discussions and applications of PIC typically arise in more concrete situations. Indeed, like CBPRs, PIC includes essentially local aspects that must be taken into consideration if PIC is to be successful.

The importance of PIC has been highlighted for the process of creating new protected areas, particularly since indigenous peoples and other communities have often lost access to traditionally controlled land and resources as a result of conservation activities.⁴⁸ In this context, PIC can serve as a tool for: facilitating more transparent and effective negotiations between communities, conservation groups, and government officials; reconciling local and national interests relating to environmental conservation on indigenous territories; and securing better protection of biological diversity and other resources in protected areas.⁴⁹

The right to PIC has also been acknowledged in the context of access to and benefit sharing of genetic resources under the Convention on Biological Diversity (CBD).⁵⁰ PIC is seen as essential to ensure the equitable treatment of "providers" of genetic resources and traditional knowledge as pharmaceutical companies develop products and obtain patents to use them. This was recently highlighted at the CBD 7th Conference of the Parties (COP 7) in Kuala Lumpur, Malaysia in February 2004, during which the Parties to the Convention collectively recognized the need to strengthen the CBD's approach towards the access of indigenous people to genetic resources and benefit sharing.⁵¹

Also, the World Bank and the International Finance Corporation require "broad community support" for certain projects as part of their Revised Operational Policy and Bank Procedure on Indigenous Peoples, and Policy on Social & Environmental Sustainability, respectively. These policies indicate that "broad community support" from individuals or representatives of the affected communities should be obtained in order for the project to go forward, although it is not yet known what this looks like in practice, or whether it satisfies PIC requirements.⁵²

48. See Chapin, *supra* note 3; TURNBULL, *supra* note 3; Peter Wilshusen et al., *Contested Nature, Conservation and Development at the Turn of the Twenty-First Century*, in *CONTESTED NATURE: PROMOTING INTERNATIONAL BIODIVERSITY WITH SOCIAL JUSTICE IN THE TWENTY-FIRST CENTURY* (Peter Wilshusen et al. eds., 2003).

49. See PERRAULT, *supra* note 44.

50. Article 8(j) of the CBD requires that "Each Contracting Party shall, as far as possible and as appropriate ... respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities ... and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from [their] utilization. Convention on Biological Diversity, June 5, 1992, 31 I.L.M. 818.

51. CBD Conference of the Parties 7, Decision VII/19 E. Access and benefit-sharing as related to genetic resources (Article 15). Measures, including consideration of their feasibility, practicality and costs, to support compliance with prior informed consent of the Contracting Party providing genetic resources and mutually agreed terms on which access was granted in Contracting Parties with users of such resources under their jurisdiction.

52. See REVISED OPERATIONAL POLICY AND BANK PROCEDURE ON INDIGENOUS PEOPLES (OP/BP

Finally, the UN Declaration on the Rights of Indigenous Peoples, which was adopted by the UN General Assembly in September 2007 (with a resounding majority of 144 in favor, with 4 opposed and 11 abstentions), strongly endorses the rights of indigenous peoples to PIC. The Declaration has several articles on PIC (which it refers to as “free, prior informed consent;” FPIC), including language that provides that: no relocation shall take place without the FPIC of the indigenous peoples concerned and after agreement on just and fair compensation; no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without FPIC; States shall provide redress with respect to cultural, intellectual, religious and spiritual property taken without their FPIC; States shall obtain FPIC before adopting and implementing legislative or administrative measures that may affect them; and States shall obtain FPIC before approving any project affecting their lands or territories, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.⁵³ Each country that voted against the Declaration (i.e., Australia, Canada, New Zealand, and the United States), cited provisions on FPIC as a major reason for their opposition, raising concerns that these provisions could be understood as a right of veto over the decisions of a democratic legislature.⁵⁴

Despite some initial efforts and successes at applying PIC, in practice there have also been difficulties in the application of this right. States and businesses have sometimes had difficulty determining who to ask for consent, how to do it (especially in light of cultural differences), how much information is necessary, and what constitutes consent. For example, communities may not have set processes for PIC, or may have procedures that are not clear, transparent or broadly representative. Also, different people within a community may have different or incompatible interests and expectations for a proposed project. Dialogue between communities and outside interests may also be impeded by language, cultural barriers, or distrust. Finally, those seeking access to community land or resources may believe that PIC procedures are unnecessary, or too costly or time-consuming, and thus may resist or engage only minimally in the process.

These difficulties are tractable, but in order to achieve PIC effectively, they must be addressed in specific situations, including drawing from best practices and building capacities of stakeholders involved in the dialogue.⁵⁵ It is also extremely valuable to support enabling conditions at the local, State, international and project levels, as is touched upon below.⁵⁶

4.10) (World Bank, July 2005); *see also* POLICY ON SOCIAL & ENVIRONMENTAL SUSTAINABILITY at paras. 19-20 (Int'l Fin. Corp., 2006).

53. United Nations Declaration on the Rights of Indigenous Peoples, arts. 10, 11, 19, 28, 29, 32, G.A. Res. 61/295, Annex, U.N. Doc. A/Res/61/295 (Sept. 13, 2007).

54. U.N. GAOR, 61st Sess., 107th plen. mtg. at 11-15, U.N. Doc. A/61/PV.107 (Sept. 13, 2007).

55. *See* SARAH LAIRD, BIODIVERSITY AND TRADITIONAL KNOWLEDGE: EQUITABLE PARTNERSHIPS IN PRACTICE (2001); *World Commission on Dams Guidelines*, in WORLD COMMISSION ON DAMS, DAMS AND DEVELOPMENT, A NEW FRAMEWORK FOR DECISION (2000); L. Mehta and M. Stankovitch, *Operationalisation of Free Prior Informed Consent*, in WORLD COMMISSION ON DAMS, DAMS AND DEVELOPMENT, A NEW FRAMEWORK FOR DECISION (2000).

56. *See* PERRAULT, *supra* note 44.

A first key enabling condition at the community level is to have a clear understanding, and if possible, legal recognition of property rights, including CBPRs. This provides greater certainty and incentives for those proposing projects and for the potentially affected local communities. Strengthening of communities can also include: community mapping of ancestral territories; identifying community needs and priorities regarding management of land and other natural resources; identifying criteria and procedures to guide efforts to obtain PIC; and building technical and legal capacity to engage fully in PIC processes.

A second set of enabling conditions relates to State efforts to develop mechanisms and requirements for PIC, including enacting legislation, rules and policies that support this right, as well as establishing or strengthening institutions to facilitate PIC. Mechanisms and policies should incorporate concerns, criteria and procedures identified by local communities, and should facilitate an understanding of and capacity to implement appropriate processes for attempting to obtain PIC. In addition to the strengthening of laws, institutions and policies, the State can also better enable PIC by supporting capacity-building efforts of local communities, assisting with mapping efforts, and recognizing property rights of local communities.

On the international level, the existence of fair and impartial dispute resolution and enforcement mechanisms that fully recognize the PIC rights of local communities is critical. Much remains to be done in this regard, although some mechanisms currently exist. The World Bank Inspection Panel is available, for example, to examine whether the Bank's "broad community support" criteria was met in a particular project.

Project-level enabling factors relate largely to when and how communities should be involved in decision-making processes and how they relate to other actors. Project cycles will, of course, vary, but generally a project cycle includes the following components: project identification, project preparation and appraisal, project implementation, project monitoring, and project expansion or temporal extension (if either is proposed).

The project identification stage usually involves identification of various prospective sites and includes a summary of the proposed project, which is used to identify subsequent project requirements. For purposes of enabling PIC, it is critical that local communities potentially impacted by a project are identified at this stage and processes are established with their input for facilitating their participation. The project preparation and appraisal stage involves, at a minimum, the following tasks: defining project objectives; identifying key issues; assessing baseline conditions; developing options; assessing environmental and social impacts and feasibility; and selecting options.

Enabling successful PIC requires meaningful engagement with potentially affected local communities on each of these tasks. Project implementation should be consistent with and conform to prior agreements with local communities, and should involve communities to the extent the option chosen reflects such involvement. Project monitoring, among other things, should review and if necessary ensure - that the rights and interests of communities (as reflected in law,

custom, and written agreements) are being respected and supported. Finally, any proposals to expand the scope of the project or extend the time of a project should also include PIC throughout.

At each stage of the project cycle, the implementation of PIC should consider the specific cultural contexts of the project. For example, a person seeking access should obtain consent from every affected community in the traditionally recognized manner, i.e., according to the customary laws and practices of the concerned community. Also, information should be provided to local communities in culturally appropriate ways, e.g., by both written and oral presentations and in local languages understood by potentially affected communities. Another key point about PIC implementation is that discussions should be inclusive so that all affected people have opportunities to participate actively. Consent should be part of all ongoing processes conducted throughout the project cycle.

In summary, putting PIC into operation involves strengthening international regimes for recognition of this right, strengthening domestic laws and policies by establishing mechanisms to facilitate PIC, and carrying out PIC in culturally sensitive ways at all stages of the project cycle, from project identification through monitoring and project adjustments. Recognizing CBPRs is also useful in the realization of community rights to PIC since it clarifies territorial boundaries and reinforces the rights of local communities to the property and resources traditionally held by them.

IV. RECOGNITION OF CBPRs AND PIC: TWO EXAMPLES

The rights of communities to PIC are related to CBPRs in several important ways. At the most basic level, both concepts recognize the rights of local communities to procedural guarantees that ensure their participation in decisions that would affect them. Both PIC and CBPRs also incorporate more substantive rights, especially the ability of communities to stop projects that would unjustly or arbitrarily expropriate their property rights or natural resources. Both CBPRs and PIC also possess essential local characteristics.

There are also key differences: the application of PIC is carried out in response to proposals for new projects that would occur in or impact a community area, and is more focused on a process of dialogue, compared to the acknowledgement of CBPRs which involve State recognition of community property or resource management.

These rights are gaining increasing recognition by national legislatures and in international hard and soft law instruments, especially in regard to indigenous peoples. Below are two examples of official recognition of these rights.

The government of the Philippines' acknowledgement of CBPRs and PIC is a good example, specifically in regards to its passage and initial efforts towards the implementation of the Indigenous Peoples Rights Act (IPRA) of 1997.⁵⁷ This law

57. An Act to Recognize, Protect and Promote the Rights of Indigenous Cultural Communities/Indigenous Peoples, Creating a National Commission on Indigenous Peoples, Establishing Implementing Mechanisms, Appropriating Funds Therefore, and for Other Purposes, Rep.

recognizes the right of indigenous peoples in and to their ancestral domains, as well as their rights to cultural integrity. IPRA provides for private, communal ownership of ancestral domains and sustainable traditional resource rights for indigenous groups, including portions of the physical and spiritual environment used by them for their subsistence, such as fishing and hunting grounds.⁵⁸ IPRA details rights to ancestral domain that include: right of ownership, right to develop lands and natural resources, right to regulate entry of migrants, right to safe and clean air and water, and rights in the case of displacement (such as from natural catastrophes).⁵⁹

IPRA also includes explicit rights of indigenous groups to PIC, which it defines as the "consensus of all members of the [indigenous cultural communities/indigenous peoples] to be determined with their respective customary laws and practices, free from any external manipulation, interference or coercion, and obtained after fully disclosing the intent and scope of the activity, in a language and process understandable to the community."⁶⁰ Having the right to PIC has meant that communities can deny projects or programs that may affect the community financially, economically or culturally, and can stop or suspend any project that has not satisfied the requirements of PIC.⁶¹

In the last 10 years since the passage of IPRA, and despite many challenges, implementation has been slow and steady. A National Commission on Indigenous Peoples has been created to carry out the policies enshrined in the law, which has approved 29 Certificates of Ancestral Domain Title and 48 Certificates of Ancestral Land Title⁶² and has approved 23 Certificates of Compliance to the PIC process that certify that the community has given its consent.⁶³ IPRA is a good example of the legal recognition that a State can carry out to protect the social, economic and cultural rights of a subset of the long-established communities in the country, as well as to prevent the potential human rights violations that can occur

Act 8371, 94:13 O.G. 276-2295, (March 20, 1998) (Phil.), available at <http://www.ncip.gov.ph/downloads/philippines-ipra-1999-en.pdf> [hereinafter *IPRA*].

58. Grizelda Mayo-Anda, Loreto L. Cagatulla, and Antonio G. M. La Vina, *Is the Concept of 'Free and Prior Informed Consent' Effective as a Legal and Governance Tool to Ensure Equity among Indigenous Peoples? A Case Study on the Experience of the Tagbanua on Free Prior Informed Consent, Coron Island, Palawan, Philippines* (2006) (unpublished paper presented at "Survival of the Commons: Mounting Challenges and New Realities," the Eleventh Conference of the International Association for the Study of Common Property, Bali, Indonesia, June 19-23, 2006). Paper also adapted for a book: *SHARING NATURAL WEALTH FOR DEVELOPMENT: CASE STUDIES FROM PALAWAN PROVINCE, PHILIPPINES* (forthcoming).

59. *IPRA*, *supra* note 57, at § 7.

60. *Id.* at § 3(g).

61. *See id.* at § 59. *See also* National Commission on Indigenous Peoples (NCIP) Administrative Order No. 3, Series of 1998 (setting guidelines for the issuance of NCIP certifications that are required for applications to lease, permit, license, contract and other forms of concession in ancestral domains, and which are only issued with the free and prior informed consent of the indigenous peoples concerned).

62. NATIONAL COMMISSION ON INDIGENOUS PEOPLES, ACCOMPLISHMENTS REPORT CY 2004, at 2-3.

63. *Id.* at 24.

when development projects are undertaken in the ancestral domains of communities without the legal guarantee of PIC.

A second example of the legal recognition of CBPRs and PIC is in the Inter-American Court of Human Rights' decision of *Moiwana Village v. Suriname*. In this case, the Court found that communities, including those that are not indigenous to a given area, but have established significant physical, spiritual, and cultural ties to the land, have rights to property and to PIC.⁶⁴ The Court noted that the Moiwana community members, a N'djuka tribal people:

possess an 'all-encompassing relationship' to their traditional lands, and their concept of ownership regarding that territory is not centered on the individual, but rather on the community as a whole. Thus... their traditional occupancy of Moiwana Village and its surrounding lands – which has been recognized and respected by neighboring N'djuka clans and indigenous communities over the years... should suffice to obtain State recognition of their ownership.⁶⁵

The Court also explicitly recognized the rights of the community to PIC by finding that Suriname must take legislative, administrative, and other measures necessary to ensure the human rights and property rights of the community "with the participation and informed consent of the victims as expressed through their representatives, the members of the other Cottica N'djuka villages and the neighboring indigenous communities."⁶⁶ Furthermore, the court ruled that:

[u]ntil the Moiwana community members' right to property with respect to their traditional territories is secured, Suriname shall refrain from actions – either of State agents or third parties acting with State acquiescence or tolerance – that would affect the existence, value, use or enjoyment of the property located in the geographical area where the Moiwana community members traditionally lived....⁶⁷

In the findings of the Court, CBPRs, or at least the rights of a long-established community to ownership of traditionally occupied lands, as well as the right to PIC are explicitly recognized, paving the way for substantive action by the State.

Although just two examples, these situations demonstrate how governments and regional courts can and have already begun to recognize formally CBPRs and PIC.

V. CONCLUSION

While there remains much to do to ensure that CBPRs are recognized and the right to PIC is achieved, there is a growing array of experience in bringing each of these approaches to life. PIC, in particular, is gaining increasing recognition in

64. *Moiwana Village v. Suriname*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 124, at 54-55 (June 15, 2005).

65. *Id.*

66. *Id.* at 81.

67. *Id.* at 81-82.

international hard and soft law instruments, both by international finance institutions and private sectors across the globe and through national legislation. It is critically important that efforts continue and become more effective with respect to both CBPRs and PIC. Continuing these efforts supports and protects the human rights of local communities and betters the conditions of an important but increasingly vulnerable segment of the world's population. Finally, societies that take part in CBPRs and PICs will benefit as a whole, because these human rights concepts will increase the stability and legitimacy of the countries' governing structures in light of the State's willingness to protect the human rights of indigenous and other local communities.