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# WATER INVESTMENTS AND THE PARTICIPATION OF LOCAL COMMUNITIES

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## INTRODUCTION

Water investments in developing countries have until recently been undertaken primarily by governments themselves. Thus, most projects relating to hydropower, irrigation and drainage, water supply and sanitation, fisheries and water services have been either financed by governments or by outside funding agencies through governments. In recent times, there has been a rapid shift towards the involvement of national and international private sector actors to make up for declining public sectors resources. This ongoing shift is of tremendous importance in that individuals and communities often bear the negative consequences of major water investments. This chapter focuses on the procedural rights in international law of local communities that are adversely affected by water investments.<sup>1</sup> It examines in particular issues concerning the extent to which local communities have rights to be informed and consulted in the context of proposed legislative changes, programmes and specific projects before they are adopted and implemented. It also looks at the extent to which local communities have been given rights to participate and ultimately accept or refuse specific water investments affecting them. In practice, there has been relatively little by way of international and regional decisions focusing expressly on water investments. As a result, wherever water related practice is not available, this chapter looks at decisions and standards that concern the broader field of natural resources as a proxy.<sup>2</sup>

This chapter is divided into four sections. The first section looks at the legal framework for procedural rights in the field of sustainable development. It examines in particular the evolving rights to environmental information, participation in decision-making processes and access to justice for local communities. It then moves on to the specific notion of prior informed consent (PIC) which goes one step further in giving local communities an input into decisions concerning water investments. Given the paucity of practice concerning participatory rights in the environmental field, the second section moves on to examine how similar issues have been treated in the case-law of international and regional human rights bodies. The third section then analyses the practice of two international organizations, the World Bank and the International Labour Organization (ILO) whose internal policies and complaint mechanisms have significantly contributed to the development of participatory standards for local communities. The last section brings together the different fields examined in previous sections and seeks to provide guidelines for the development of a stronger model for participatory principles for local communities in the context of the shift towards private water investments and the increased need to ensure that the rights of affected local communities are respected by all parties involved .

## I. THE SUSTAINABLE DEVELOPMENT FRAMEWORK FOR THE PARTICIPATION OF LOCAL COMMUNITIES

It is with respect to the relationship between environment and development that there has been the most significant development of norms for greater participation of local communities in decision-making processes affecting them. The concept of participation in international environmental law is generally recognized as subsuming three components, namely access to environmental information, participation in decision-making and recourse before administrative and judicial bodies. The notion of PIC has also emerged in specific areas. Participatory rights in environmental matters have been given substantial support in sustainable development documents adopted in the wake of the 1992 United Nations Conference on Environment and Development (UNCED). This section gives an overview of the way in which the concepts of information disclosure, participation, access to justice and PIC are treated in some major international instruments, both generally and specifically with respect to water-related issues.

### A. Information Disclosure, Participation and Access to Justice

The rights of individuals and groups to have access to environmental information, participate in decision-making processes and have access to administrative and judicial proceedings in the realization of sustainable development

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- 1 The term 'local communities' is used here as a shortcut for reference to local communities, indigenous peoples, tribal peoples and other groups of people affected by water investments or more generally natural resource investments. Specific reference to indigenous or tribal peoples is made wherever instruments or decisions directly refer to one or the other.
  - 2 This chapter does not purport to provide an exhaustive survey of existing norms and practice concerning participation of local communities. It examines some of the most salient norms and decisions in chosen contexts with a view to provide a basis for further developments in the specific field of water investments.

on the national and international levels have been broadly endorsed.<sup>3</sup> This includes the effective participation of indigenous people and other local communities.<sup>4</sup> Participatory standards in the field of sustainable development have in particular been given expression in Agenda 21, which sets standards not only for states but also for international organizations including the multilateral development banks (MDBs).<sup>5</sup> Agenda 21 confirms that civil society should have access to timely and relevant information on environmental and related matters, and adds that access to information encompasses a more 'proactive' dimension, reflected in the necessity for promoting public awareness and education in environmental matters.<sup>6</sup> It underscores generally that broad public participation in decision-making is one of the fundamental prerequisites for the achievement of sustainable development and calls for the establishment of judicial and administrative procedures for legal redress accessible inter alia to groups and organizations with a recognized legal interest.<sup>7</sup> Chapter 26 explicitly designates indigenous peoples and their communities as the beneficiaries of participatory processes.<sup>8</sup> Agenda 21 also acknowledges public participation as forming an integral part of the undertaking of environmental impact assessment (EIA),<sup>9</sup> thereby allowing local communities likely to be affected by a decision to be fully informed of its implications and given an opportunity to respond. This is of particular relevance when water projects are concerned.<sup>10</sup> The importance of involving local communities in a number of Agenda 21's programme areas is further highlighted.<sup>11</sup> Most significantly for the present chapter, Chapter 18 sets forth standards regarding the participation of local communities in water resources management. For instance, it mandates states to design, implement and evaluate projects and programmes based on the full participation of local communities and indigenous peoples in water management policy-making and decision-making.<sup>12</sup>

Support for participatory rights for local communities can also be found in instruments that address problems specifically related to water and sustainable development. For instance, a general participatory approach to water development and management is promoted in the 1992 Dublin Statement on Water and Sustainable Development, which provides that decisions should be taken at the lowest appropriate level with full public consultation and involvement of users, including women, in the planning and implementation of water projects.<sup>13</sup> The Bonn Recommendations for Action issued at the 2001 International Conference on Freshwater further underline the importance of the participation of local communities when water resources are concerned, for instance in the construction of large infrastructure projects.<sup>14</sup> Participation in water resources management and project implementation is also mentioned in the Plan of Implementation adopted during the 2002 World Summit on Sustainable Development.<sup>15</sup> Specific guidance can be found in the World Commission on Dams (WCD) Report, which sets forth strategic priorities and guidelines to define a participatory decision-making process for both water and energy policy-making and project design. The Report includes a process for identifying stakeholders in each decision, policy, or project with particular reference to indigenous and tribal peoples, women and other

3 See Principle 10 of the Rio Declaration on Environment and Development, Rio de Janeiro, 13 June 1992, 31 *ILM* 874 (1992).

4 *Id.* Principle 22.

5 Agenda 21, Rio de Janeiro, 13 June 1992, UN Doc. A/CONF.151/26 (Vols. I, II, & III) (1992).

6 *Id.* at Paras. 8.4(f), 23.2 and Chapter 40.

7 *Id.* at Paras. 1.3 and 23.2 and 8.18, respectively.

8 Other beneficiaries include women (Chapter 24) and children and youth (Chapter 25).

9 Detailed provisions on public participation in the context of EIA are found at Articles 2(2) and (6), 3(8) and 4(2) of the Convention on Environmental Impact Assessment in a Transboundary Context, Espoo, 25 Feb. 1991, 30 *ILM* 800 (1991) and in several provisions of its Protocol on Strategic Environmental Assessment, Kiev, 21 May 2003, available at <http://www.unece.org/env/eia/documents/protocolenglish.pdf>.

10 For instance, Agenda 21 recommends mandatory EIA of all major water resource development projects potentially impairing water quality and aquatic ecosystems, as well as of new irrigation schemes in case significant negative environmental impacts are expected.

11 Agenda 21, n. 5 above at Para. 28.1.

12 See further, UN General Assembly, Resolution S-19/2, Programme for the Further Implementation of Agenda 21, 28 June 1997, UN Doc. A/RES/S-19/2 (1997), at Paras. 34(c), 108, 112 and 150. See also the Report of the Secretary-General, Commission on Sustainable Development, Organizational Session, Water: a key resource for sustainable development, E/CN.17/2001/PC/17 (2001), at Para. 11 and Report of the Secretary-General, Commission on Sustainable Development, Implementing Agenda 21, UN Doc. E/CN.17/2002/PC.2/7 (2001), at Para. 132, entrenching the need for stakeholder participation in freshwater resources management (with particular emphasis on indigenous peoples and women).

13 See Principles 2 and 3 of the Dublin Statement on Water and Sustainable Development, International Conference on Water and the Environment (ICWE), Dublin, 26-31 Jan. 1992, UN Doc. A/CONF.151/PC/112.

14 Bonn Recommendations for Action, International Conference on Freshwater, Bonn, 3-7 Dec. 2001.

15 World Summit on Sustainable Development – Plan of Implementation, 4 Sept. 2002, UN Doc. A/CONF.199/20.

vulnerable groups.<sup>16</sup> It provides that stakeholders must share in the benefits of the project, requiring the government or others sponsoring a dam to identify those whose rights are affected by the proposed project and to ensure that they are able to participate in the planning, design, construction and operation of the dam. Of further interest are the guidelines adopted by the Conference of the Parties to a multilateral environmental treaty, the Ramsar Convention on Wetlands, regarding greater transparency and full participation of local communities and indigenous peoples in wetlands management, restoration and rehabilitation.<sup>17</sup> The guidelines call for, amongst other things, the establishment by states parties of a legal and policy context to facilitate the direct involvement of local communities and indigenous peoples in national and local decision-making for the sustainable use of wetlands, and target the bilateral and multilateral donor agencies supporting wetland conservation and integrated water resource management projects in general to take into consideration the priorities for action identified by the Conference of the Parties.<sup>18</sup> Such decisions adopted by the governing bodies of multilateral environmental treaties can significantly contribute to the development of a framework of international participatory norms in specific water-related areas.<sup>19</sup>

While the above instruments are generally considered soft law, states have gone much further through the adoption of the Aarhus Convention.<sup>20</sup> The Convention comprehensively addresses procedural rights in environmental matters including water issues. Its detailed treatment of the way in which information disclosure, public participation and access to justice must be carried out by states will no doubt contribute to fleshing out existing international participatory standards for local communities. Importantly, the Convention binds states parties to promote the application of principles thereunder not only in a domestic context but also 'in international environmental decision-making processes and within the framework of international organizations in matters relating to the environment'.<sup>21</sup> This implies that contracting parties must for instance apply the Convention's participatory standards when they act in the context of MDBs. This is particularly relevant when states undertake water investments in the framework of international organizations.

With respect to information disclosure, firstly, the Aarhus Convention provides that states parties are bound to make environmental information available to the public upon request, without the requester having to show an interest in the information.<sup>22</sup> The scope of information covered is quite broad, encompassing a non-exhaustive list of environmental elements, including water, and factors likely to affect the environment. Access to environmental information is based on a presumption in favour of disclosure subject to explicit – and restricted – exceptions such as confidentiality. The Convention also makes clear that the information disclosed or disseminated must be relevant, adequate and understandable, and must be made available in a transparent way and effectively accessible. Time constraints are likewise significant, as information must be provided in a timely manner if it is to be the basis for effective public participation. Secondly, the implementation of measures allowing for public participation in decisions on specific development activities when they have a significant effect on the environment or are listed in Annex I is required under the Convention.<sup>23</sup> The Convention provides that effective participation involves the actual incorporation of the results of consultations in the final decision-making process, so that changes can be made in development operations that are more reflective of the variety of potentially affected interests.<sup>24</sup> As in the case of information disclosure, time constraints are important in that participation must occur before the adoption of final decisions so that alternatives can be envisaged and adopted if necessary. Thirdly, the principle of access to justice is well entrenched in the Convention. It concerns on the one hand the right to legal remedies to enforce the

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16 World Commission on Dams, *Dams and Development – A New Framework for Decision-Making* (London: Earthscan, 2000), at 215. See also text at nn. 33-34 below.

17 Convention on Wetlands of International Importance, Ramsar, 2 Feb. 1971, 11 *ILM* 963 (1972).

18 As provided in Res. VII.8, Local communities and indigenous peoples, Guidelines for establishing and strengthening local communities' and indigenous peoples' participation in the management of wetlands, *Seventh Meeting of the Conference of the Contracting Parties to the Ramsar Convention*, San José, Costa Rica, 10-18 May 1999. See also, The Ramsar Strategic Plan 2003-2008, *Eighth Meeting of the Conference of the Contracting Parties*, Valencia, Spain, 18-26 November 2002.

19 As seen in the next section, guidelines adopted under the Convention on Biodiversity and its Protocol on Biosafety have in fact been instrumental in the emergence of the notion of PIC.

20 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, Aarhus, 25 June 1998, 38 *ILM* 517 (1999). The Convention, whilst a regional treaty, has potential for universal application since it is open for signature not only by states members of the United Nations Economic Commission for Europe (UNECE) but also by UN members, subject to the approval of the Convention's Meeting of the Parties.

21 *Id.* at Art. 3(7).

22 *Id.* at Arts. 4 and 5.

23 *Id.* at Arts. 6, 7 and 8. Dams, large water projects, and pipelines are listed in Annex I.

24 Note that under Article 2(5) to the Convention, environmental NGOs are deemed to have an automatic interest in any environmental decision-making.

participatory rights granted to the public under it. On the other hand, it reflects the availability of suits by citizens in environmental matters (*actio popularis*) by requiring states to ensure that members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities in order to enforce national environmental laws.<sup>25</sup>

## B. Prior Informed Consent

The question of local communities' right to environmental information and their participation in decision-making concerning natural resource management has been the object of increasing attention in international law and policy as highlighted above. It is generally understood that the possibility to have access to information or to participate in the planning, preparation and implementation of a development project can result in the possibility to have an impact on the way in which the project is carried out.

The notion of PIC seeks to go beyond existing concepts and provides a framework for allowing states or other actors the right to determine whether they want a specific activity to take place or not. In international environmental law, PIC is in particular reflected in the Convention on Biological Diversity.<sup>26</sup> The Convention specifically provides at Article 15(5) that access to genetic resources is subject to the PIC of the state providing access. This implies that the state providing access can determine the conditions under which access is to be provided. Further elaboration of the content of the PIC requirement is found in the Bonn Guidelines adopted in 2002.<sup>27</sup> The Guidelines first recognize that in addition to the consent of the relevant competent national authorities, the consent of indigenous and local communities must also be obtained in situation where this is appropriate. The Guidelines go beyond most existing international instruments in this field by giving an outline of the specific ways in which a PIC system may be established. They also give a number of interesting pointers concerning the substantive requirements that should be followed. This includes the need to seek PIC adequately in advance to make it meaningful for both the party seeking access and the party granting access, the need for PIC to be specific and indicate the specific uses for which consent is being given and the need for PIC to be based on mutually agreed terms, implying that no party can impose its terms on the other.<sup>28</sup>

The concept of PIC has been further developed in the context of inter-state relations in recent years. Thus, the central mechanism put in place in the context of the Biosafety Protocol is a so-called Advance Informed Agreement (AIA) procedure.<sup>29</sup> The AIA procedure gives states importing living modified organisms (LMOs) a legal framework within which they can base their decision to accept or refuse a specific shipment of LMOs covered under the Protocol. The Biosafety Protocol is significant because it is one among few international treaties that gives importing states not only the right to assess the risk posed by a specific shipment but also to reject it on the basis of a precautionary approach that does not require clear scientific evidence. It thus gives importing states some leeway in determining the appropriateness of specific shipments. Similarly, the 1998 Rotterdam Convention seeks to limit the harm caused by certain hazardous pesticides and chemicals by encouraging better sharing of information between countries and promoting reliance on prior informed consent as the principle on which states can rely to deny consent or attach conditions to the shipment of certain pesticides and chemicals.<sup>30</sup>

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25 See also the establishment under the Aarhus Convention of a non-compliance procedure in the form of a Compliance Committee competent to receive communications from one or two members of the public concerning a party's compliance with the Convention, unless that party has notified that it is unable to accept the consideration of such communications, in Draft Dec. 1/7, Review of Compliance, *First Meeting of the Parties to the Aarhus Convention*, Lucca, Italy, 21-23 Oct. 2002, Doc. MP.PP/2002/9.

26 Convention on Biological Diversity, Rio de Janeiro, 5 June 1992, 31 *ILM* 818 (1992).

27 Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization, UN Doc. UNEP/CBD/COP/6/20 (2002).

28 Note that while the Bonn Guidelines do not focus specifically on the rights of local communities, the Recommendations for the Conduct of Cultural, Environmental and Social Impact Assessments 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 are not more specific since they only provide that PIC must be obtained if the national legal regime provides it (*in* Annex II, Decision VI/10, Article 8(j) and related provisions, UN Doc. UNEP/CBD/COP/6/20, 2002).

29 Cartagena Protocol on Biosafety to the Convention on Biological Diversity, Montreal, 20 Jan. 2000, 39 *ILM* 1027 (2000), at Arts. 7 ff.

30 Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, Rotterdam, 11 Sept. 1998, 38 *ILM* 1 (1999).

While PIC has been progressively accepted as a regulatory tool in the context of inter-state relations, its application to local communities has proved much more difficult to achieve. Some documents seek to promote the use of PIC in the context of natural resources use. The Draft Declaration on the Rights of Indigenous Peoples provides, for instance, that where indigenous peoples' lands have been occupied, confiscated or damaged without their 'free and informed consent', indigenous peoples have the right to the restitution of these lands.<sup>31</sup> The Draft Declaration further affirms that indigenous peoples have the right to require from states that they obtain their free and informed consent before approving projects that affect their land or resources.<sup>32</sup>

Another non-binding document, the report of the World Commission on Dams, adopts similar principles in its recommendations to influence future decision-making concerning dams. It first recommends that decisions on project affecting indigenous and tribal peoples should be 'guided by their free, prior and informed consent achieved through formal and informal representative bodies'.<sup>33</sup> The Commission then goes on to specifically acknowledge that PIC gives in practice indigenous and tribal peoples the right to consent to proposed projects and the power to negotiate the conditions under which they can proceed.<sup>34</sup>

The preceding review indicates that while PIC has become acceptable in certain circumstances at the level of inter-state relations, its application at the non-governmental level remains confined to the realm of policy documents and non-binding instruments in the context of natural resources. There is, however, one related area where interesting developments have taken place concerning PIC. In the context of the increasing interest for biodiversity related traditional knowledge, there have been calls for the development of new requirements in patent law that would force the patent applicant to disclose the source of the knowledge and biological resources used in the invention. This would directly contribute to the better implementation of the PIC requirement included in the Biodiversity Convention.<sup>35</sup> While the inclusion of a disclosure requirement at the international level remains controversial, some developing countries have already incorporated requirements of PIC and disclosure. The Costa Rican Biodiversity Law provides, for instance, that intellectual property rights on inventions using biological resources can only be granted if the certificate of origin and a statement on prior informed consent are provided to the organs instituted under this Law.<sup>36</sup> The Philippines have adopted an even stricter framework in their Indigenous Peoples Rights Act.<sup>37</sup> This Act provides that access to biological resources or associated knowledge is only allowed with prior and free consent from the communities. The Act specifically indicates that free and prior consent involves a consensus of the indigenous peoples concerned which must be 'free from any external manipulation, interference coercion, and obtained after fully disclosing the intent and scope of the activity, in a language and process understandable to the community'.<sup>38</sup> Further, the Act also recognizes the rights of indigenous peoples to the restitution of their intellectual property in case it has been acquired without PIC or in violation of local laws or customs.<sup>39</sup>

## II. PARTICIPATORY RIGHTS IN HUMAN RIGHTS CASE LAW

While there have been significant efforts towards the development of participatory principles in sustainable development instruments, relevant practice related to these instruments remains limited. In the human rights field, there has been extensive emphasis on the development of substantive individual rights, while group rights, including

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31 See Article 27 of the Draft United Nations Declaration on the Rights of Indigenous Peoples, 26 August 1994, in Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its Forty-Sixth Session, Geneva, 1-26 August 1994, UN Doc. E/CN.4/1995/2 – E/CN.4/Sub.2/1994/56.

32 Article 30 of the Draft United Nations Declaration, n. 31 above singling out water as one of the specific areas where this is required. *Note also* that the Permanent Forum on Indigenous Issues has attempted to raise the profile of PIC by recommending at both its first and second session the creation of a three-year working group on free, prior informed consent. See Permanent Forum on Indigenous Issues, Report on the Second Session, UN Doc. E/2003/43 – E/C.19/2003/22 (2003).

33 World Commission on Dams, n. 16 above at 218.

34 *Id.* at 219. *Note* that following this description of PIC, the Commission immediately qualifies its own statement by stating that where PIC cannot be achieved, decisions should be made following a process of good faith negotiations.

35 As acknowledged in Dec. VI/24, Access and Benefit-Sharing as Related to Genetic Resources, *Report of the Sixth Meeting of the Conference of the Parties to the Convention on Biological Diversity*, The Hague, 7-19 April 2002, UN Doc. UNEP/CBD/COP/6/20.

36 Biodiversity Law, 1998.

37 The Indigenous Peoples Rights Act of 1997.

38 *Id.* at Section 3(g).

39 *Id.* at Section 32.

the rights of local communities, and procedural rights are still developing.<sup>40</sup> There are, however, a number of decisions by various human rights adjudicative bodies that are of relevance in this context, either directly or indirectly. This section examines the practice under some of the main human rights treaties, the International Covenants on Human Rights, the African Charter on Human and Peoples' Rights, the American Convention on Human Rights and the European Convention on Human Rights.

## A. International Covenants on Human Rights

The two International Covenants are relevant in the context of water and participatory rights for independent reasons. The International Covenant on Economic, Social and Cultural Rights (CESCR) indirectly recognizes a human right to water while the International Covenant on Civil and Political Rights (CCPR) includes limited protection for minorities.<sup>41</sup> While the former is more relevant from a substantive point of view, the lack of a formal mechanism for bringing individual or collective communications to the Committee on Economic Social and Cultural Rights (ESCR Committee) implies that most of the relevant practice is found in the context of the CCPR.

The ESCR Committee which oversees the implementation of the CESCR has recently given interesting guidance concerning participatory rights in the context of the human right to water. In the context of its General Comment on the right to water, the ESCR Committee has acknowledged that individuals and groups have the right to participate in decision-making processes that may affect their exercise of the right to water. Further, the ESCR Committee also states that individuals and groups should be provided full access to information concerning water and water services held both by public authorities and third parties. Of special relevance in the context of this chapter, the ESCR Committee highlights that to ensure the realization of the right to water, states must make sure that the private sector and civil society consider the importance of the right to water in the pursuit of their activities.<sup>42</sup> These pronouncements are significant from a general perspective and indicate the direction in which participatory rights should be seen in the context of human rights treaties. As long as no procedure exists for bringing specific cases to the attention of the ESCR Committee, more specific elaboration on participatory rights cannot be expected in this context.

Unlike the first Covenant, the CCPR includes an Optional Protocol which provides that the Human Rights Committee is competent to hear individual communications alleging violations of the CCPR.<sup>43</sup> Of particular interest are a series of communications that have focused on Article 27 which provides a limited framework for the protection of the rights of ethnic, religious or linguistic minorities. In *Lubicon Lake* it was recognized that the rights protected by Article 27 include the right of persons, in community with others, to engage in economic and social activities which are part of the culture of the community to which they belong, thereby confirming that Article 27 can be applied in the context of the exploitation of natural resources.<sup>44</sup>

With regard to participatory rights, the Human Rights Committee has specifically indicated in its General Comment on Article 27 that the enjoyment of the rights protected under Article 27 may require measures to ensure the effective participation of members of minority communities in decisions which affect them.<sup>45</sup> Several communications have dealt with the issue of lack of consultation before the carrying out of measures for the exploitation of natural resources. In *Länsman* the Finnish state authorized quarrying activities in a small portion of the region where reindeer herding was carried out by certain herdsmen of Sami origin. The Committee found firstly that only economic activity which amounts to a denial of the right to enjoy one's own culture can constitute a violation of Article 27. Further, the Committee, while agreeing that effective participation was required under

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40 See the Draft Principles on Human Rights and the Environment in Report of the Special Rapporteur on Human Rights and the Environment, UN Commission on Human Rights, 6 July 1994, UN Doc. E/CN.4/Sub.2/1994/9.

41 See respectively, Article 11 of the International Covenant on Economic, Social and Cultural Rights, New York, 16 Dec. 1966, 6 *ILM* 360 (1967) and Article 27 of the International Covenant on Civil and Political Rights, 16 Dec. 1966, 6 *ILM* 368 (1967).

42 Committee on Economic, Social and Cultural Rights, General Comment No. 15 (The Right to Water), UN Doc. E/C.12/2002/11 (2002), at Para. 48-49.

43 Optional Protocol to the International Covenant on Civil and Political Rights, 999 *UNTS* 302 (1976).

44 Communication No. 167/1984, Bernard Ominayak, Chief of the Lubicon Lake Band v. Canada, 26 March 1990, UN Doc. CCPR/C/38/D/167/1984. See also Communication No. 197/1985, Ivan Kitok v. Sweden, 27 July 1988, UN Doc. CCPR/C/33/D/197/1985.

45 Human Rights Committee, General Comment No. 23, Article 27 (Fiftieth session, 1994), UN Doc. E/C.12/2000/4 (2000).



Article 27, found that Finland had fulfilled its obligations through the consultations held with the minority community before the delivery of the quarrying permits.<sup>46</sup> In another similar communication brought by Sami reindeer breeders concerning logging and road construction, the Committee further elaborated its views on the question of consultation. It found that while the authors of the communication may have found the process unsatisfactory, the fact was that the Finnish state had consulted the Muotkatunturi Herdsmen's Committee to which they authors belonged and that body had not objected to the logging plans.<sup>47</sup> In another communication against New Zealand, the Committee had to examine the consultation process within the context of legislative measures. It found that the state had carried out significant consultations, had specifically consulted Maori communities and national Maori organizations and that their proposals had made an impact on the final result. Further, the Committee noted that in situations where the rights of certain individuals within a minority affect the exercise of parallel rights by other members of the same group, it is necessary to consider whether the limitation is in the interests of all members of the minority and whether there is reasonable and objective justification for its application to the individuals who claim to be adversely affected. In this case, the Committee regretted that the measures had given rise to divisions among the Maori but concluded that the broad process of consultation and the attention paid by the state to the sustainability of Maori fishing activities constituted sufficient steps within the context of Article 27.<sup>48</sup>

## B. African Charter on Human and Peoples' Rights

The African Charter on Human and Peoples' Rights includes among the basic rights it recognizes Article 24 which acknowledges all peoples' right to a generally satisfactory environment.<sup>49</sup> It is in the context of the right to environment that the most relevant communication for this chapter is found. In the *Ogoni* case, it was contended that the Nigerian government had withheld information from Ogoni communities on the dangers created by oil activities and had failed to involve them in decisions affecting the development of Ogoniland.<sup>50</sup> The African Commission on Human Rights while dealing with the specific claims of the Ogoni people also gave broader directions on the scope of Article 24. Interestingly, it indicated that compliance with the spirit of Article 24 must include a requirement to undertake and publicize environmental and social impact studies prior to any major industrial development as well as the appropriate monitoring of environmental conditions, the provision of information to communities exposed to hazardous materials and activities and the provision of meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities.<sup>51</sup> In the specific case of the Ogoni, the Commission concluded that the Government was obliged to take measures to ensure the protection of the environment, health and livelihood of the Ogoni people, including appropriate environmental and social impact assessment for any future oil developments. Interestingly, the Commission has thus recognized that the substantive right to environment found at Article 24 includes specific procedural guarantees concerning the carrying out of environmental and social impact assessment. Further it has clearly indicated that member states have specific duties to make environmental information available and that they should promote people's participation in the development of activities affecting them.

## C. American Convention on Human Rights

Like the African Charter, the American Convention on Human Rights<sup>52</sup> recognizes a number of basic rights, including, under Article 11 to its Additional Protocol, the right to a healthy environment.<sup>53</sup> The question of local communities' participatory rights has arisen primarily with respect to the rights of indigenous peoples to receive information on and participate in the development of activities affecting them and their traditional lands and

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46 Communication No 511/1992, Ilmari Länsman et al. v. Finland, 26 Oct. 1994, UN Doc. CCPR/C/52/D/511/1992.

47 Communication No. 671/1995, Jouni E. Länsman et al. v. Finland, 30 Oct. 1996, UN Doc. CCPR/C/58/D/671/1995.

48 Communication No. 547/1993, Apirana Mahuika et al. v. New Zealand, 27 Oct. 2000, UN Doc. CCPR/C/70/D/547/1993.

49 African Charter on Human and Peoples' Rights, Banjul, 19 Jan. 1982, 21 *ILM* 58 (1982).

50 Communication No. 155/96, The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria, African Commission on Human & Peoples' Rights, 30<sup>th</sup> Ordinary Session, 13-27 Oct. 2001.

51 *Id.* at Paragraph 53.

52 American Convention on Human Rights, San José, 22 Nov. 1969, 9 *ILM* 673 (1970).

53 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, San José, 17 Nov. 1988, 28 *ILM* 156 (1989), 28 *ILM* 573 and 1341 (1989).

resources.<sup>54</sup> Of particular interest is a series of reports elaborated by the Inter-American Commission on Human Rights regarding the human rights conditions of particular Organization of American States (OAS) member countries, which deal with the issue of consultation of indigenous communities before the undertaking of measures for the exploitation of natural resources. In the case of Peru, the Commission has recognized that large-scale exploitation of natural resources and raw materials in indigenous territories undertaken without consulting or obtaining the consent of the communities affected led in many cases to environmental degradation and endangered the survival of these peoples, and recommended the enactment of a domestic indigenous law guaranteeing participatory mechanisms for indigenous peoples in the adoption of political, economic and social decisions that affect their interests.<sup>55</sup> A report on Ecuador has further recommended that the protection of the rights of indigenous communities affected by oil and other development activities requires that states take the measures necessary to ensure the meaningful and effective participation of these communities in the decision-making processes about development and other issues that affect them.<sup>56</sup> On several occasions, the Commission has also specified that appropriate consultation in the context of projects to build infrastructure or exploit natural resources on indigenous lands should include prior consent from the affected indigenous communities.<sup>57</sup>

The Inter-American Commission is authorized to examine complaints or petitions regarding specific cases of human rights violations. In the Yanomami case, the Commission, in considering the adverse environmental and social effects for the Yanomami of the construction of a highway in their territory, gave passing recognition to the importance of consulting affected indigenous groups in the context of decisions affecting natural resources on their territories.<sup>58</sup> In the *Awás Tingni Mayagna (Sumo) Indigenous Community* case brought by the Inter-American Commission before the Inter-American Court of Human Rights, the Court had the opportunity to examine the scope of the right to property protected under Article 21 of the American Convention on Human Rights including corollary participatory rights for indigenous peoples in activities relating to the exploitation of natural resources.<sup>59</sup> It was contended that Nicaragua had approved destructive logging concessions on lands traditionally owned by the Awás Tingni without consultation with or agreement of the affected communities and that it had failed to carry out its legal obligation to demarcate and legally secure indigenous lands. In examining the contention that Nicaragua had violated Article 21 of the Convention, the Court determined that under this provision the state is required to adopt all necessary means to create effective surveying, demarcating and title mechanisms for the properties of indigenous communities, in accordance with customary laws and indigenous values, uses and customs.<sup>60</sup> The Court concluded that Nicaragua had violated the rights of the Mayagna Awás Tingni Community to the use and enjoyment of their property, in particular by granting concessions to third parties to utilize the property and resources located in an area which could correspond to the lands which must be delimited, demarcated and titled.<sup>61</sup> Significantly, the Court found that the state's obligation under Article 21 to delimitate, demarcate and title the property of indigenous communities implies a corollary duty to ensure 'full participation' of the indigenous community in the process, thereby recognizing that the substantive right of indigenous peoples to their traditional lands protected under Article 21 includes specific procedural guarantees for the populations concerned.<sup>62</sup> This judgement will likely establish an important precedent on indigenous land rights under international and regional

54 Note also that Article XIII(2) and (4) of the Proposed American Declaration on the Rights of Indigenous Peoples (Approved by the Inter-American Commission on Human Rights on February 26, 1997, at its 1333<sup>rd</sup> session, 95<sup>th</sup> Regular Session), OEA/Ser.L/V/II.95 doc.6 (1997) expressly acknowledges the participatory rights of indigenous peoples.

55 See Chapter X to the Second Report on the Situation of Human Rights in Peru, Inter-Am. C. H.R., OEA/Ser.L/V/II.106, doc.59 rev., 2 June 2000, at Paras. 26 and 39(1) respectively.

56 See Chapter IX to the Report on the Situation of Human Rights in Ecuador, Inter-Am. C. H.R., OEA/Ser.L/V/II.96, doc.10 rev.1, 24 Apr. 1997 (Recommendations). The Commission added that 'meaningful' in this sense necessarily implies that indigenous representatives have full access to the information that will facilitate their participation. In Chapter VIII to this report, the Commission addressed the rights of all persons under the American Convention to have access to environmental information (Article 13), to participate in decisions affecting them, including in the conduct of EIA (Article 23), and to effective judicial recourse (Article 25). See also **Chapter VI to the Report on the Situation of Human Rights in Brazil**, Inter-Am. C. H.R., OEA/Ser.L/V/II.97, doc.29 rev.1, 29 Sep. 1997, at Para. 82.

57 See Chapter X to the Third Report on the Human Rights Situation in Colombia, Inter-Am. C. H.R., OEA/Ser.L/V/II.102, doc.9 rev.1, 26 Feb. 1999, at Para. J(4) and Chapter X to the Second Report on the Situation of Human Rights in Peru, n. 55 above at Para. 39(5).

58 Case 7615 (Brazil), Inter-Am. C. H.R., 1984-1985 Annual Report 24, OEA/Ser.L/V/II.66, doc.10, rev.1 (1985).

59 *Awás Tingni Mayagna (Sumo) Indigenous Community v. Nicaragua*, Judgment of 31 Aug. 2001, Inter-Am. Ct. H.R. (Ser. C) No. 79 (2001).

60 The applicants also alleged the violation of Articles 1 and 25 of the American Convention, n. 52 above.

61 *Awás Tingni* Judgement, n. 59 above at Para. 153.

62 *Id.* at Para. 164.

human rights law by recognizing that the human rights norms that protect indigenous peoples' interests in land and natural resources obligate states to consult with the groups concerned when decisions on the exploitation of natural resources on their lands are taken, and to adequately integrate those interests in the decision-making process.

## D. European Convention on Human Rights

While the case-law under the European Convention on Human Rights<sup>63</sup> has not as such addressed the participatory rights of local communities, it is relevant from a general perspective by showing the way in which information disclosure and participation in an environmental context are addressed in the human rights system. The most interesting claims for present purposes have invoked two types of rights. On the one hand, the question of a right of access to environmental information has arisen under both Articles 8 and 10 of the European Convention. In the *Guerra* case, the applicants asserted that the government's failure to inform the public of the risks and the measures to be taken in case of a major accident violated their right to freedom of information as guaranteed by Article 10 of the Convention. The European Court of Human Rights found that this provision prohibits a government from restricting a person from receiving information that others wish or may be willing to impart to him but does not confer a *positive* duty on the part of the state to collect and disseminate specific environmental information to the public.<sup>64</sup> The European Court however concluded that Article 8 of the European Convention, which safeguards the right to private and family life, confers a positive duty on the state to impart information, the argument being that the right protected is infringed unless the subject can obtain information about the health risks to which she or he is exposed.<sup>65</sup>

On the other hand, the question of the right of recourse to administrative or other bodies for the purposes of participating in decision-making processes relating to activities impacting on the environment is also of relevance in the context of this chapter. This question has been addressed by the European Court under Article 6 of the European Convention, which stipulates the right to a fair and public hearing. In particular, the Court has examined the reach of the right of access to a court in regard to water pollution in the *Zander* case.<sup>66</sup> The applicants alleged that their rights under Article 6 had been violated because they had been unable to challenge in legal proceedings the decision of a licensing authority to allow a company to dump waste on a tip without requiring the company concerned to take precautionary measures to avoid pollution of the applicants' drinking water. The Court concluded that the unreviewability of the rejected appeal by a court was a breach of Article 6.<sup>67</sup>

## III. PARTICIPATION IN THE PRACTICE OF INTERNATIONAL ORGANIZATIONS

The development and application of participatory standards for local communities and indigenous peoples has also taken place within the internal practice of international organizations. Two prominent institutions in this regard are the World Bank<sup>68</sup> and the ILO, which have both adopted standards and developed internal mechanisms

63 European Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 Nov. 1950, 213 UNTS 221.

64 *Guerra and Others v. Italy* (1998) 26 *Eur. H.R. Rep.* 357, at Para. 53. This interpretation reversed the prior broader interpretation given by the European Commission on Human Rights.

65 *Id.* at Para. 60. The right to privacy has been used also as the basis for several substantive environmental claims. In *Lopez Ostra v. Spain* (1994) 20 *Eur. H.R. Rep.* 277, where the applicant alleged that the fumes of a tannery waste treatment plant operating close to her home had caused important health problems, the European Court found a breach of Article 8, noting that 'severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health' (Para. 51). The European Commission on Human Rights has held that the traditional way of life of an indigenous group can amount to 'private and family life' and 'the home' under Article 8 in a case brought by two members of the Sami People contending that a proposed hydroelectric project would flood part of their traditional reindeer grazing grounds. See *G & E v. Norway*, Joined Applications Nos. 9278/81 and 9415/81, 35 *D&R* 30 (1983).

66 *Zander v. Sweden* (1993) 18 *Eur. H.R. Rep.* 175.

67 *Id.* at Para. 29.

68 The term 'World Bank' or 'Bank' is used here to encompass the International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA). 'World Bank Group' usually covers, in addition, the International Finance Corporation (IFC), Multilateral Investment Guarantee Agency (MIGA), and International Centre for Settlement of Investment Disputes (ICSID).

for reviewing their implementation. This section examines in turn the contribution of these two organizations to the development of participatory rights in the context of natural resources and water investments.

## A. World Bank

Significantly for this chapter, the World Bank has since the mid-1980s progressively adopted a series of operational policies and procedures that contain both mandatory and non-mandatory standards on information disclosure and participation of local communities and indigenous peoples during the preparation and implementation of all Bank-funded projects, including those involving water resources.<sup>69</sup> Participatory standards found in World Bank policies and procedures can be binding not only upon the Bank, but also on the borrowing country when they are incorporated in the terms of loan or credit agreements entered into between these two parties. The private branches of the World Bank Group, the IFC and MIGA,<sup>70</sup> which provide financial support to private sector projects in all developing countries or countries in transition, have also adopted policies and procedures addressing information disclosure and public participation in the context of private sector financing.<sup>71</sup>

In addition to project-based lending, the Bank provides adjustment lending, primarily in the form of structural adjustment loans and credits and sectoral adjustment loans and credits.<sup>72</sup> The conditions attached to adjustment lending can require policy reforms such as privatization in various sectors, including the water sector. In spite of the adverse environmental and social impacts that can result from the privatization of water service systems,<sup>73</sup> Bank policy-based loans are in general subject at the most to very limited information participatory requirements.

The Bank has created an Inspection Panel competent to receive, and if necessary investigate, requests by local communities adversely affected by development funding operations and claiming the violation by the Bank of its own operational policies.<sup>74</sup> The Panel has been increasingly active in dealing with claims concerning Bank funding of water-related projects such as large-scale dams, urban drainage/sanitation, river infrastructure and lake management projects. Significantly, most claims brought to the Panel have alleged Bank non-compliance with information disclosure and public participation requirements. The Panel's jurisdiction is considered to apply both to project-based lending and to adjustment lending by the Bank,<sup>75</sup> although the Panel has to date not dealt with a case involving the privatization of water services. While the Panel's jurisdiction covers only IBRD and IDA projects, the Compliance Advisor/Ombudsman (CAO) can respond to requests by private parties alleging non-compliance of the IFC and MIGA with their environmental and social policies, including those on information disclosure and participation.<sup>76</sup>

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69 Since the early 1990s, Bank policies are embodied in 'Operational Policies' (OPs), 'Bank Procedures' (BPs), and 'Good Practices' (GPs). OPs and BPs contain strict, mandatory rules for Bank staff, while GPs set out advisory guidance.

70 See IFC, Policy on Disclosure of Information (1998) and OP 4.01 on Environmental Assessment (1998), and MIGA, Disclosure Policy (1999) and Environmental Assessment Policy (1999).

71 The IFC has also been instrumental in the adoption of the recently adopted voluntary 'Equator Principles' by private project financiers who have committed to adopting IFC social and environmental guidelines for their financing. See *The Equator Principles – An Industry Approach for Financial Institutions in Determining, Assessing and Managing Environmental & Social Risk in Project Financing*, 2003.

72 See OD 8.60 on Adjustment Lending Policy (1992).

73 Note for instance the case currently before ICSID concerning the privatization of the water system in Cochabamba, Bolivia.

74 World Bank Board of Executive Directors, Resolutions No. 93-10 and 93-6, 22 Sept. 1993, 34 *ILM* 520 (1995). The Resolution has been interpreted and amended by two sets of Clarifications adopted by the Executive Directors in 1996 and 1999. Note also the independent investigation mechanisms set up at the Inter-American Development Bank (IADB) in 1994 and Asian Development Bank (ADB) in 1996, as well as the independent recourse mechanism at the European Bank for Reconstruction and Development (EBRD) established in 2003.

75 See Request for Inspection – Report and Recommendation on the Bangladesh: Jute Sector Adjustment Credit (INSP/R97-3), 20 Mar. 1997; Report and Recommendation on Request for Inspection – Argentina: Special Structural Adjustment Loan (Loan 4405-AR), 16 Dec. 1999; Report and Recommendation on Request for Inspection Papua New Guinea: Governance Promotion Adjustment Loan (Loan No. 7021-PNG), 30 Apr. 2002.

76 See Terms of Reference of the Compliance Advisor/Ombudsman (2000). The functions of the CAO are not limited to investigating complaints from affected parties ('Ombudsman role'), like the Inspection Panel, but include also the undertaking of compliance audits of the IFC and MIGA's social and environmental performance ('Compliance role'), as well the provision of advice and assistance to both institutions on controversial projects or on specific policies and procedures ('Advisory role').

The following discussion examines some instances of the treatment in Inspection Panel reports on water resources projects of the standards for information disclosure and participation of local communities and indigenous peoples couched in World Bank operational policies and procedures.

### ***1. Information Disclosure***

The information disclosure standards found in World Bank policies and procedures provide for the public availability of certain project and environment-related documents subject to explicit exceptions. Disclosure requirements are found in an overarching Bank policy on the disclosure of information<sup>77</sup> as well as in the policies and procedures regulating the EIA of Bank-funded projects.<sup>78</sup>

The disclosure of information to the public by the Bank is in principle based on a presumption in favour of disclosure. Exceptions to disclosure can reflect concerns related, for instance, to the functioning of the Bank and the integrity of its decision-making processes, and to the protection of confidential or proprietary information received by third parties. The Bank's policies on information disclosure adopt a 'passive' approach, in that usually the available information is accessible to those who request it; they neither set forth real measures for more active and local dissemination of information to local communities, nor for facilitating practical access to released information.<sup>79</sup> They contain moreover only very limited requirements for the release of information about the Bank's structural adjustment operations.

The implementation of the World Bank's information disclosure requirements has been examined in several Inspection Panel reports, and most significantly in the investigation report on the China Western Poverty Reduction Project.<sup>80</sup> The Panel report reiterated the importance for the improvement of projects of the timely disclosure of information and the opportunity for public comment.<sup>81</sup> It also provided specifications on the types of documents that are to be disclosed under Bank policy. In particular, project information documents, which represent the main source of information available to the public while a project is still under preparation, are to be made publicly available at the project concept stage, with the initial document updated and expanded periodically as project preparation proceeds. Documents relating to the EIA should be publicly available in the borrowing country before the start of project appraisal.<sup>82</sup> Although the Panel in this case found the Bank to be in violation of these disclosure standards, it considered that overall the Bank has tried to move beyond the minimum requirements.<sup>83</sup> Other Panel reports have however pointed to inadequate information disclosure to local communities in the course of Bank-funded projects involving water resources.<sup>84</sup> Moreover, a CAO report has notably highlighted the deficiencies in the implementation of IFC disclosure and participatory policies in the context of a water-related project financed by the IFC in Chile.<sup>85</sup>

### ***2. Participation of Local Communities and Indigenous Peoples***

On the basis of preliminary, adequate disclosure of relevant information, a number of World Bank policies and procedures provide for the participation of local communities in the preparation and implementation of all Bank-funded projects. These documents acknowledge that the sustainability of Bank-funded projects can only be ensured with adequate public involvement. In particular, the Bank's policy on environmental assessment requires the

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77 See BP 17.50 on Disclosure of Information (2003) and the 2002 Policy on Disclosure of Information.

78 See OP 4.01 on Environmental Assessment (1999).

79 For instance, by allowing for better on-site dissemination of information or making available translations of documents in local languages.

80 The Qinghai component of the project involved the renovation of an existing dam and the construction of a new one, as well as the construction of two canals to supply water for irrigation.

81 Investigation Report – The Qinghai Project: A Component of the China: Western Poverty Reduction Project (Credit No. 3255-CHA and Loan No. 4501-CHA), 28 Apr. 2000, at Para. 421.

82 *Id.* at Paras. 411-13 and 416-18, respectively.

83 *Id.* at Para. 420.

84 See Report and Recommendation – Bangladesh: Jamuna Bridge Project (Credit 2569-BD), 26 Nov. 1996, at Paras. 47-48 and Investigation Report – Uganda: Third Power Project (Credit No. 2268-UG), Fourth Power Project (Credit No. 3545-UG), and Bujagali Hydropower Project (PRG No.B003-UG), 30 May 2002, at Para. 332.

85 See Assessment by the Office of the Compliance Advisor/Ombudsman in relation to a complaint filed against IFC's investment in ENDESA Pangue S.A., May 2003. Also of interest is the Final Report on the Independent Assessment of Water Quantity and Quality near the Yanacocha Mining District, Cajamarca, Peru, prepared for the IFC/MIGA CAO, November 2003, commissioned by a group of stakeholders, including urban and rural communities, with an interest in the environmental, social and economic consequences of the operation of the Yanacocha mine.

undertaking during EIA of 'meaningful consultation' of potentially interested and/or affected parties in order for them to express their concerns regarding the environmental impacts of projects and for their interests to be taken into account.<sup>86</sup> It specifies that consultation must be undertaken as early as possible and throughout project implementation. Indigenous peoples and involuntary resettled persons are two particular groups that benefit from specific participatory standards in Bank policy during project design and implementation.<sup>87</sup> In addition, the commitments of the Bank in regard to participatory requirements for local communities in the course of water-related operations are highlighted in its 1993 Policy on Water Resources Management.<sup>88</sup>

In contrast to water infrastructure projects Bank investments in water services are generally not subject to participatory requirements.<sup>89</sup> In particular, Bank policy does not give affected communities consultation or participation rights with respect to particular sectoral or structural adjustment loans requiring the privatization of water services.<sup>90</sup> On the other hand, the Bank involves civil society organizations in the review of its structural adjustment strategies.

Of special relevance in the context of this chapter, the scope and level of implementation of existing Bank participatory requirements have been the object of close scrutiny in several Inspection Panel reports involving water projects.<sup>91</sup> Early on in the Panel's existence, two controversial dam projects, the Arun III Hydroelectric Project (Nepal)<sup>92</sup> and Yacyretá Hydroelectric (Argentina/Paraguay) Project,<sup>93</sup> were the object of requests to the Panel concerned with the adverse impacts of the dams on indigenous peoples and other displaced local communities. The Panel has also examined problems stemming from the inadequate participation and consultation of resettled minorities (here the char people) in the development of mitigation measures relating to a project financing the construction of a multipurpose bridge over the Jamuna River in Bangladesh.<sup>94</sup>

More recently, the Panel's investigation report into the China Western Poverty Reduction Project contained a number of interesting findings on the interpretation and implementation of public participation standards in Bank policies on indigenous peoples and involuntary resettled persons. These firstly concerned the methodology of consultation and survey methods used for the affected populations in the preparation of the project and the importance of correctly determining the scope of those being consulted in order to ensure adequate representation in the survey sample of affected minority groups.<sup>95</sup> In this context, the Panel noted that when a particular domestic context is conducive to reluctance on the part of local communities to freely impart their opinion, the Bank has the responsibility to guarantee the confidentiality of those being consulted.<sup>96</sup> Panel findings secondly related to the application of the Bank policy on indigenous peoples. They indicated that separate, free-standing indigenous peoples development plans have to be developed for the different minority groups affected by the project in order to preserve their cultural uniqueness, and that the elaboration of these plans has to be accompanied by adequate participation of the relevant local groups.<sup>97</sup> Overall, the Panel's findings concluded that the level of consultation

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86 Note that Bank-funded Projects are categorized according to their environmental impacts. Under OP 4.01, a full EIA is only required for Category 'A' projects which are likely to have 'significant adverse environmental impacts that are sensitive, diverse, or unprecedented', while a less exhaustive form of assessment is required for Category 'B' projects whose potential adverse environmental impacts are 'less adverse' than Category A projects. Category 'C' relates to projects that are likely to have 'minimal or no adverse environmental impacts' where no EIA is required.

87 See OP/BP 4.10 on Indigenous Peoples (2001) and OP/BP 4.12 on Involuntary Resettlement (2001).

88 See also the specific policies applying to water-related projects, namely OP 4.07 on Water Resources Management (2000), OP/BP 4.37 on Safety of Dams (2001) and OP/BP 7.50 on International Waterways (2001).

89 Paragraph 13 of OD 8.60 merely recommends that Bank staff should review the environmental policies and practices in the country concerned, and that the design of adjustment programs should take into account the findings and recommendations of such reviews.

90 Notwithstanding the problem of identifying affected parties when measures deriving from privatization often affect population at large rather than a circumscribed circle of parties.

91 The importance of the participation of local communities in development water-related projects has been underscored in a regional context also, in particular by the ADB investigation mechanism in Final Report of Inspection Panel on Samut Prakarn Wastewater Management Project, 14 Dec. 2001, at Paras. 117, 152-153 and 165-166.

92 Request for Inspection: Panel Investigation Report – Nepal Arun III Proposed Hydroelectric Project (INSP/SecM95-3), 22 June 1995.

93 Request for Inspection – Argentina/Paraguay: Yacyretá Hydroelectric Project, Panel Recommendation (INSP/R96-2), 26 Dec. 1996. See also Report and Recommendation – Paraguay: Reform Project for the Water and Telecommunications Sectors (Loan No. 3842 –PA), Argentina: Segba v. Power Distribution Project (Loan No. 2854 – AR), Aug. 2002.

94 See Jamuna Report, n. 84 above at Paras. 46 and 54.

95 See China Report, n. 81 above, at Paras. 94-95.

96 *Id.* at Para. 116.

97 *Id.* at Paras. 275-76 and 336-37.

of affected populations during the project had been inadequate. The report moreover addressed the question of the implementation of Bank policies generally, underscoring that they cannot be taken to authorize a level of interpretation and flexibility that would enable to override those standards that are clearly binding.<sup>98</sup> These statements, and the problems that they raise regarding the status of the Bank's internal operational policies, will no doubt impact the way in which participatory standards are to be implemented in future Bank water-related projects.

Other water projects that are illustrative of the way in which the Panel has dealt with participatory requirements for local communities include the Lake Victoria Environment Management Project<sup>99</sup> and three IDA-financed hydropower projects in Uganda.<sup>100</sup> In regard to the former, the Panel's investigation report found poor levels of participation of affected communities, due to the fact that stakeholders were not fully consulted during the scoping of the environmental analysis, the issues raised not fully taken account of, and that the EIA was not made available to them for discussion or review before or after finalization.<sup>101</sup> The absence of adequate consultation of local groups in the decision-making process led in this case to a lack of clear understanding as to the purpose and scope of the operation.<sup>102</sup> The Panel investigation report on the Uganda hydropower projects set forth useful guidelines regarding participatory techniques applicable during EIAs. According to the Panel, particularly effective techniques include making available environmental documents in local public libraries, placing notices in national and local newspapers, translating issues statements in local languages, diffusing public hearings, considering public submissions, and organizing forums to consult with civil society.<sup>103</sup>

## B. International Labour Organization

The ILO has adopted a significant number of conventions in the past few decades. Conventions 107 and 169, which focus on the rights of indigenous peoples, are of particular importance in the context of this chapter.<sup>104</sup> Both Convention 107 and its successor Convention 169 seek to protect indigenous and tribal peoples' rights and help their integration in mainstream society. Convention 107 provides, for instance, some minimal rights like the right of indigenous and tribal peoples not to be removed from their habitual territories without their free consent.<sup>105</sup> Convention 169 goes much further and includes the obligation for member states to 'consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly'.<sup>106</sup> The implementation of Convention 169 which is yet to be widely ratified has attracted a fair number of complaints in recent years, a number of which relate to consultation and participation.

In the context of legislative instruments, the Committee of Experts on the Application of Conventions and Recommendations has had the opportunity to reaffirm the importance of consultation procedures in the case of a Columbian Decree that was adopted by the Government without consultations.<sup>107</sup> The Committee emphasized that it was not enough to propose the establishment of a process of consultation in the Decree but that the procedure leading to the adoption of the Decree should also have involved consultations.<sup>108</sup> The Committee also reiterated

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98 *Id.* at Para. 37.

99 Investigation Report – Kenya: Lake Victoria Environmental Management Project (IDA Credit 2907-KE) (GEF TF 23819), 15 Dec. 2000.

100 *See* Uganda Report, n. 84 above.

101 *See* Kenya Report, n. 99 above at Para. 50.

102 *Id.* at Para. 167.

103 *See* Uganda Report, n. 84 above at Paras. 343-46.

104 Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, 26 June 1957 [hereinafter Convention 107] and Convention concerning Indigenous and Tribal Peoples in Independent Countries, 27 June 1989, 28 *ILM* 1382 (1989) [hereinafter Convention 169].

105 Convention 107, n. 104 above at Art. 12. *Note* that removal is authorized under Article 12 as long as it is 'in accordance with national laws and regulations for reasons relating to national security, or in the interest of national economic development or of the health of the said populations'.

106 Convention 169, n. 104 above at Art. 6.

107 Representation alleging non-observance by Colombia of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Central Unitary Workers' Union (CUT), Document GB.276/17/1 – GB.282/14/3.

108 *See* the Report of the Committee set up to examine the representation alleging non-observance by Peru of the Indigenous and Tribal Peoples' Convention, 1989 (No. 169), made under Article 24 of the ILO Constitution by the General Confederation of Workers of Peru (CGTP), Document GB.270/16/4 – GB.273/14/4.

that Article 6 should be seen in light of other provisions of the Convention, in particular Article 7 which provides a right of indigenous peoples to participate in the development of policies and programmes affecting them and Article 15 which reminds member states that even where they retain ownership of minerals, they must consult indigenous peoples before undertaking any exploitation of the same. On the whole, the Committee clearly indicated that while Article 6 does not require consensus, it requires, alongside other relevant articles that people should have an opportunity to participate freely at all levels in the formulation, application and evaluation of measures that directly affect them. It also specifically indicated that while speedy decisions could be welcome under some circumstances, the speed should not be to the detriment of effective consultation.<sup>109</sup>

A number of representations have been made concerning consultation in the context of specific activities or projects. In a case from Ecuador, it was claimed that the Government had failed to consult indigenous peoples before entering into an agreement with the Arco company. This case provided the Committee an opportunity to discuss the temporal requirement of consultation since the Convention came into force after the agreement with Arco. It indicated that the obligation to consult does not apply only to the conclusion of agreements but 'also arises on a general level in connection with the application of the provisions of the Convention'.<sup>110</sup> The Committee emphasized the central importance of participation by stating that the spirit of consultation and participation constitutes the cornerstone of Convention 169. It also took this opportunity to provide a general interpretation of consultation. It indicated that consultation should include a genuine dialogue between concerned parties characterized by communication, understanding, mutual respect, good faith and the sincere wish to reach a common accord. An information meeting is not enough for compliance with the terms of the Convention. Further, consultation should always take place beforehand. In this regard, the Committee specifically indicated that communities should participate early on in the process, including in the preparation of EIA studies. The Committee finally stressed the importance of representative participation which implies at least the duty not to exclude a representative organization.<sup>111</sup> In another case concerning mining and logging activities in the Tarahumara range in Mexico, the Committee found that in the specific case of Article 15 concerning peoples' rights to natural resources, peoples should not only have the right to participate in their use, management and conservation but that the Government was required to establish and maintain procedures for consulting the peoples concerned with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of resources pertaining to their lands.<sup>112</sup>

## IV. TOWARDS THE DEVELOPMENT OF PARTICIPATORY PRINCIPLES IN THE CONTEXT OF WATER INVESTMENTS

Most of the material examined above tends to refer to natural resources management generally rather than water investments, with the exception of the World Bank where significant practice in the field of water already exists. This can be explained in part by the lack of a comprehensive treatment of water issues in international law. Further, existing practice often concerns situations where the rights holders are not necessarily local communities. Accordingly, this section first seeks to provide an understanding of the law at it stands today on the basis of the evidence examined and then moves on to outline some of the principles that should inform the future development of participatory rights in the context of private water investments.

### A. Existing Participatory Norms and Principles

The practice examined above allows a number of general observations on the status of participatory norms and principles at present. Firstly, international sustainable development instruments provide a general legal framework recognizing a number of basic participatory rights for local communities, which are considered crucial to the

<sup>109</sup> Document GB.276/17/1 – GB.282/14/3, n. 107 above at Para. 79.

<sup>110</sup> Representation alleging non-observance by Ecuador of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Confederación Ecuatoriana de Organizaciones Sindicales Libres (CEOSL), Document GB.277/18/4 – GB.282/14/2, at Para. 30.

<sup>111</sup> *Id.* at Para. 44.

<sup>112</sup> Mexico, Individual observation, C169, Labour representatives: FAT (1999).



sustainability of development projects and the representation of different interests in decision-making processes. There is in particular a growing recognition of the need for participatory mechanisms when water issues are at stake, for instance in the case of dams. One of the main characteristics of these standards is that the rights are either framed at a high level of generality or included in non-binding instruments. They typically include the right of access to environmental information, the right to participate and the right to have access to administrative or judicial mechanisms. They are granted to a wide range of beneficiaries that can be quite diffuse, but there is often express reference to local communities and indigenous peoples as well as a growing emphasis on the role of women in the context of water. The instruments examined, especially the binding Aarhus Convention, are important in fleshing out the content and scope of these concepts as they are crystallizing in international law. A particular application of these rights, the right to consent or refuse consent to specific water investments, does not yet seem to be included in any widely accepted legal instrument, even though PIC is developing rapidly at the level of interstate relations and some policy documents like the World Commission on Dams report argue in favour of the recognition of such a right.

The field of sustainable development law, while relatively developed at the level of principles and norms, does not yet provide significant practice, partly because participatory rights are still emerging and partly because compliance with international environmental law does not significantly rely on traditional dispute settlement mechanisms. As a result, the human rights foundation for participatory rights is important as it rests on universally accepted international human rights concepts and norms and can also provide for individual complaint mechanisms of a judicial and quasi-judicial character. The human rights case law is noteworthy because it shows that human rights supervisory bodies have often striven to recognize participatory rights in the context of existing substantive human rights which do not specify participation through an evolutionary interpretation of the treaties. Since none of the main human rights treaties specifically provide for consultation or participation in the context of development activities, the rights recognized are not tailored for application in an environmental context, with the consequence that they remain fairly general in their formulation and may not be directly applicable in water investments. There is no doubt, however, that today basic human rights include the right of local communities in groups or as individuals including of indigenous peoples to participate in decisions directly affecting their fundamental rights, such as where displacement is involved or where the realization of their right to a clean environment, right to health, right to life or right to land are at risk. Therefore, more attention should be focused on developing existing rights to make them more specific.

Besides human rights, the contribution of the World Bank and the ILO to the development of international participatory norms and principles has been significant. The practice of these two organizations is more relevant than human rights instruments because the standards applied are much more specific with regard to the need for consultation and participation. The first striking feature in the case of the World Bank is that the Bank has developed a detailed body of operational policies requiring information disclosure and participation from the preparation to the implementation of projects that adversely affect local communities including indigenous peoples. Given the level of specificity encountered in Bank policies, these could provide a model for the development of more comprehensive standards at the international level. There however remains a lack of participatory procedures applicable to the Bank's adjustment lending operations. A further significant feature in the World Bank context is the contribution of the Inspection Panel to the strengthening of participatory rights for local communities. It provides one of the few existing forums at the international level allowing local communities to directly bring grievances in the context of water investments carried out by an international organization. The findings of the Panel have provided guidelines on the way in which Bank policies should be interpreted and implemented when water-related projects funded by the Bank have impacts on local communities. They also highlight that despite the significant body of standards adopted by the Bank, implementation of participatory standards remains inadequate. Given the prominence of the role of the World Bank and other MDBs in development assistance, and particularly in water investments, the systematic application of information disclosure and public participation requirements should be ensured through formalized procedures with respect to all lending operations, including adjustment lending, and compliance with participatory policies reviewed by specific, independent mechanisms.

The various representations in the ILO under Convention 169 have provided relevant bodies an opportunity to shed light on the particular meaning of participation in the context of indigenous peoples' rights. Some of their main contributions include the recognition that participation should take place from the formulation to the implementation of a given activity and the recognition that while it may slow down proceedings speed cannot be an excuse for compromising the level of participation. Further, it has been clearly indicated that information is not the same as consultation which necessitates a sustained engagement between parties genuinely seeking to reach a common accord and that the duty to consult cannot be deemed to be fulfilled by hand-picking representatives of a given community.

On the whole, the practice examined in this chapter establishes a clear consensus in principle in favour of strong participatory principles. There is, however, a significant discrepancy between the principles that have been and are being established and the reality observed on the ground. This is due in part to the fact that the principles developed in institutions like the ILO and the World Bank only apply in specific contexts. Further, the contribution of supervisory organs can, for instance, be limited by their own terms of reference. Thus, the Inspection Panel can only investigate the World Bank's compliance in the context of a particular project but can neither assess the adequacy of Bank policies and procedures themselves nor review the range of applicable international standards. The relevance of some of the norms and principles examined is also limited by the fact that they apply only to specific groups of people such as indigenous and tribal peoples in the case of the Convention 169 of the ILO. From the perspective of water investments, there is no justification for limiting participatory principles to particular groups. In other words, the right to be consulted, the right to participate or the right to consent to a project should be provided to all communities adversely affected by water investments, whether or not they are part of a specific sub-group.

## **B. Principles for Participation in Private Water Investments**

As noted above, while there already exists a significant body of practice on participatory rights in international law and policy, it is often not applicable specifically to water investments or is only relevant in some particular context. Most importantly, most of the standards have evolved until now in contexts where the main proponents of water investments were states or international organizations and they therefore do not purport to bind private parties. The growing importance and impacts of private water investments necessitate the development of participatory principles applicable to all relevant situations.

When water investments in project infrastructure or in services are concerned, it appears important to go beyond existing principles to strengthen local communities' opportunities not only to participate but have a final say in investment decisions that directly and significantly affect their livelihoods and human rights, including the right to affordable and clean water, as well as the sustainability of water resources management. The basis for further development should be the guarantees already recognized in existing international legal frameworks and institutions. In more specific terms, some of the basic minimum principles that should be guaranteed in the case both of public and private water investments include the following:

- Participation can only be meaningful if potentially affected local communities are fully informed by investors in a timely manner of all the risks and impacts involved in specific water investments. This includes, for instance, providing comprehensive information on displacement and rehabilitation such as in the case of dam projects which require the acquisition of inhabited lands.
- The information disclosed or disseminated must be relevant, adequate and understandable by affected communities. Sufficient information must include the prior notification of consultation procedures.
- There should be a presumption in favour of information disclosure. While there is no absolute right to all existing information and a balance must be struck between the interests of different actors, affected communities have a right to receive all information which is directly or indirectly linked to the realization of their human rights.
- Information and participation must not be selective but must be continuous and iterative processes. This includes the provision of information from the stage of planning to the stage of implementation, the active dissemination of information especially in remote areas, and translation in local languages.
- Participation should take into account the existence of different interest groups within a given local community. In other words, participation should not be limited to specific individuals or groups within a community handpicked by investors. It should on the contrary include broad-based representative participation giving all opinions within a community a chance to be heard. This is of great importance in a context where some sub-groups of affected communities such as women, which might be the most directly affected by water investments, are often excluded from decision-making procedures. Participation must thus not only target appropriate communities but also identify each individually affected groups within a given community.

- Participation should constitute a process which takes place from the time of project planning to the adoption of final decisions and the implementation of the project itself. This is the only way to ensure that alternatives are considered and adopted if necessary. Participation can easily become meaningless in situations where people are only consulted at the implementation stage. Thus, in the context of adjustment lending, disclosing adjustment-related information prior to loan approval would enable communities and civil society as a whole to be aware of the commitments entered into by their governments and make proposals regarding alternative water management options.
- Participation often has limited impacts because it is conceived in an ad-hoc manner. Where specific fora for participation do not exist there is a risk that the results of consultations depend to an extent on the goodwill of the actors involved. The creation of specific institutions through which participation is routed would significantly strengthen the whole process. This need not involve the creation of new institutions, for instance, in cases where local self-governance bodies already exist. Thus, in a country like India which has constitutionally recognized democratically elected bodies at the local level (panchayats), strengthening participation could be achieved by using panchayats as the consultative forum rather than the legally amorphous concept of local communities. The latter should be kept for situations where other representative bodies at the local level do not exist.
- The inputs provided through participatory procedures must be used in taking final decisions. This should crucially also involve the need to factor in the possibility not to go ahead with the project. In other words, participation can only be fully meaningful if it includes a 'no-project' option. On a substantive level, this implies giving local communities the right to negotiate under what conditions specific water investments can be carried out. In its strongest form, this form of PIC authorizes affected communities to decide whether they want to accept or reject specific water investments.
- Participation in itself does not provide any guarantees concerning the type of decisions that are taken. The most important element here is the need to take decisions at the lowest possible level or in other words the need to let the communities that are directly affected by water investments decide their own future in order to promote a more efficient and productive use of water resources.
- Participatory principles outlined should apply similarly to all water investment actors. While there is an increasing recognition in the field of human rights, as noted by the ESCR Committee, that private actors should also respect human rights, this should be generally extended to all participatory procedures and rights.
- Following on strict participatory rights, there must be mechanisms for determining the accountability of all actors involved. In other words, local communities must benefit from the establishment of administrative, quasi-judicial and judicial mechanisms, both on the international and domestic levels, to adjudicate their participatory rights.

The adoption of these basic procedural criteria that need to be fulfilled to improve the outcomes of decision-making in private water investments would significantly contribute to enhance the situation for adversely affected local communities. It must, however, be noted that procedural rights can only be meaningful if they are considered within the broader context of substantive rights. In other words, the fulfilment of procedural guarantees is required not as an aim in itself but as a tool to guarantee the realization of substantive rights. This implies, for instance, that all actors involved in water investments must work towards procedures that ensure that the fundamental rights of local communities, and each person within these communities, are not violated because of proposed water investments.

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