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Non-State Actor Access and Influence in International Legal and Policy Negotiations

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ESSAYS

NON-STATE ACTOR ACCESS AND INFLUENCE IN INTERNATIONAL LEGAL AND POLICY NEGOTIATIONS

Elizabeth Burleson and Diana Pei Wu***

I. INTRODUCTION

This essay analyzes the importance of increasing civil society actor access to and influence in international legal and policy negotiations, drawing from academic scholarship on governance, conservation and environmental sustainability, natural resource management, observations of civil society actors, and the authors' experiences as participants in international environmental negotiations. We argue that public participation is needed to increase justice in international consensus building.

II. BACKGROUND

Most creative solutions that integrate local needs with local and global environmental concerns come from frontline and fenceline communities in collaboration and dialogue with other actors. These solutions have to be at least partially aligned with values. For instance, Luke Cole's work on community layering in the US

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Environmental Justice context was instrumental in providing technical assistance in response to demands pushed by communities.¹ Academic researchers, legal practitioners, and NGOs have greatly increased their capacity at information sharing and dissemination.² This galvanized participation in gatherings including Seattle and Hong Kong.³ The array of information sharing speaks effectively to different audiences – be it personal testimonies, academic studies of historical or environmental contexts, or legal/policy frameworks. Procedural barriers to participation include: language generally and literacy in particular. Internal politics and hierarchies within communities also create obstacles to involvement, particularly for indigenous people. The environmental justice movement has grown substantially in the last two decades,⁴ raising awareness about the need for genuine involvement rather than perfunctory notification of projects that detrimentally impact public health and ecological viability. Cultural and social capital barriers to participation and equity include access to education and the means by which to gain the requisite “professionalism” to partake in the political process. Historical injustice compounds the ability of extremely understaffed small NGOs directly representing people in frontline communities.

What works and why is it important? NGOs have increased their capacity to gracefully engage with nation states in high stakes international negotiations.⁵ It is crucial that NGOs remain genuine and able to interact with individual stakeholders who benefit from such advocacy efforts. Once theory and technical terminology has been mastered, relating information and policy recommendations in

1. See Luke W. Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 *ECOLOGY L.Q.* 619 (1992); Luke W. Cole, *Macho Law Brains, Public Citizens and Grassroots Activists* 14 *Va. Env'tl. L.J.* 687, 687-710 (1995); Luke W. Cole, *Remedies for Environmental Racism: A View from the Field*, 90 *MICH. L. REV.* 1991-97 (1993).

2. SOCIAL DEVELOPMENT NOTES No. 82, *ENABLING ENVIRONMENTS FOR CIVIC ENGAGEMENT IN PRSP COUNTRIES*, (2003) (informational documents published by the World Bank).

3. Peter Van den Bosshe, *NGO Involvement in the WTO: A Comparative Perspective*, 11 *J. INT'L ECON. L.*, 717, 719, 727 (2008).

4. *Environmental Justice Timelines-Milestones*, SECOND NATIONAL PEOPLE OF COLOR ENVIRONMENTAL LEADERSHIP SUMMIT (2002).

5. Michele M. Betsil & Elisabeth Corell, *NGO Influence in International Environmental Negotiations: A Framework for Analysis*, 1 *GLOBAL ENVTL. POLITICS* 65, 65 (2001).

an accessible manner to the general public appears to be a challenge. It is as if learning shorthand erases pre-existing skills at writing prose. Issues as complex as climate change cannot easily be reduced to bumper sticker slogans. Listening to people takes time but can result in gathering locally specific knowledge, often traditional but also new knowledge based on observations of changing patterns. No one desires to re-invent the wheel but decision-makers do not always have the insight or resources with which to be inclusive in a way that embraces cultural knowledge. Policies are all too often made at centralized levels that preclude the possibility of particular community solutions.

III. INCLUSIVE PUBLIC PARTICIPATION IN ACHIEVING SUSTAINABLE DEVELOPMENT

A. *Poor People's Movements are Rarely Considered Environmental Movements*

Joan Martinez-Alier's famous work, *The Environmentalism of the Poor*, articulated some of the reasons for the disconnects between the people on the ground, defending local resources, and international economic and environmental negotiations – in particular, the negotiations and protests over the World Trade Organization talks in Seattle in 1999 and the ongoing climate change conferences pursuant to the United Nations Framework Convention on Climate Change (UNFCCC).⁶ Poor people have defended the environment in such struggles as the Chipko movement in the Himalaya, Narmada Bachao Andolan, Chico Mendes and Rubber Tappers' movement in Amazonia and Ogoni in Niger River Delta.⁷ Issues have ranged from forest livelihoods, water availability as well as oceans/estuaries/fisheries stewardship, mangrove conservation and the protection of genetic diversity.⁸ The environmentalism of the poor is an environmentalism of livelihood concerned not only with economic security in the market place but also concerned with non-market access to environmental resources and services. Youth and

6. J. Martinez-Alier, *THE ENVIRONMENTALISM OF THE POOR* 6, 31 (2002) (a report for U.N. Research Institute for Social Development for the World Summit on Sustainable Development).

7. *Id.* at 1.

8. *Id.* at 2.

women have increasingly been recognized as stakeholders with community knowledge and sustainable policy recommendations.

Poor people's movements, when they want to participate, face barriers to effective participation. Environmental activists and academics have drawn from three broad categories of justice: distributional justice, procedural justice and entitlements.⁹ Distributional justice refers to the distribution of harms and benefits over a population.¹⁰ For this standard to be met, the distribution of harms should not be more prevalent for any identifiable subgroup than another.¹¹ If egalitarian (equality-based) standards are used to assess distributional justice, then each group should have the same level of harms and benefits.¹² If equity-based standards are applied, then groups may not have identical levels of harms and benefits.¹³ Distributional justice principles can be applied across groups within society and across time (intergenerational equity).¹⁴

Procedural justice focuses on the process through which environmental decisions are made.¹⁵ If decisions are made through a fair and open process, they may be considered just regardless of their distributional impact. "Concern with procedural justice therefore centers on two issues: procedural fairness and the effective ability of groups to participate in ostensibly fair processes."¹⁶ Issues of community empowerment and "access to resources necessary for an

9. Robin L. Turner & Diana P. Wu, *Environmental Justice and Environmental Racism: An Annotated Bibliography and General Overview, Focusing on U.S. Literature*, in BERKELEY WORKSHOP ON ENVIRONMENTAL POLITICS 10 (2002).

10. *Id.*

11. *See id.*

12. *See id.*

13. *See* David S.G. Thomas & Chasca Twyman, *Equity and Justice in Climate Change Adaptation Amongst Natural Resource-Dependent Societies*, 15 GLOBAL ENVTL. CHANGE 115, 117-120 (2005), available at <http://www.astepback.com/GCC/Equity%20and%20Justice%20in%20CC%20Adaptation.pdf>.

14. *See Intergenerational Equity*, SOC. CAPITAL BLOG, Feb. 26, 2010, available at <http://socialcapital.wordpress.com/2010/02/26/intergenerational-equity/> (describing how intergenerational equity requires older generations to take care of their young).

15. Turner & Wu, *supra* note 9.

16. *Id.* at 10.

active role in decisions affecting one's life" are crucial.¹⁷ This includes attention to the role of knowledge and expertise in a class-stratified society and the right of communities to be involved in all stages of planning processes, especially when political representatives do not reflect the concerns, needs, knowledge and/or experience of their constituents.¹⁸ Some procedural justice struggles are as basic as providing translators so that public hearings can be held in multiple languages or publishing environmental impact assessments in languages other than English. Sheila Foster contends that devolving decision-making and adopting collaborative approaches will not produce procedural justice without explicit attention to distributional equity issues, including the ability to participate.¹⁹

Rights approaches seek to ensure that individuals (and communities) have effective access to and control over environmental goods and services necessary to their well-being.²⁰ This conception of justice leads to minimum standards for just outcomes.²¹ For instance, one may say that there is a universal right to a clean and healthy environment.²²

The rights approach is compatible with the precautionary principle, that is, the idea that policymakers should prioritize preventing

17. See Michael K. Heiman, *Race, Waste, and Class: New Perspectives on Environmental Justice*, 28 *ANTIPODE* 111, 111-21 (1996), available at <http://www.ejnet.org/ej/rwc.html>.

18. See, e.g., Jeanne N. Clarke & Andrea K. Gerlak, *Environmental Racism in the Sunbelt? A Cross-Cultural Analysis*, 22 *ENVTL. MGMT.* 857, 857-867 (1998).

19. See, e.g., Sheila Foster, *Environmental Justice in an Era of Devolved Collaboration*, 26 *HARV. ENVTL. L. REV.*, 468-471 (2002).

20. See, e.g., AMARTYA SEN, *POVERTY AND FAMINES: AN ESSAY ON ENTITLEMENT AND DEPRIVATION* (1983); Melissa Leach et al., *Environmental Entitlements: Dynamics and Institutions in Community-Based Natural Resource Management*, Vol. 27, *WORLD DEV.* 225, 243 (1999).

21. See Declaration on the Rights of Indigenous Peoples, Human Rights Council Res., at 58, U.N. GAOR, 1st Sess., U.N. Doc. A/HRC/1/L.10 (June 30, 2006).

22. See, e.g., Jeff Romm, *The Coincidental Order of Environmental Justice*, in *JUSTICE AND NATURAL RESOURCES* 117-37 (K. M. Mutz et al. eds., 2002); Jennifer Wolch et al., *Parks and Park Funding in Los Angeles: An Equity Mapping Analysis*, 26 *URBAN GEOGRAPHY* 4, 4-35, (2002); Robert P. Porter Jr., *Environmental Justice and North Georgia Wilderness Areas: A GIS-based Analysis* (2001) (unpublished Ph.D. dissertation, University of Georgia) (on file with Author).

adverse impacts rather than redressing or remediating them after they have occurred.²³ The precautionary principle states that “[w]here an activity raises threats of harm to the environment or human health, precautionary measures should be taken even if some cause and effect relationships are not fully established scientifically.”²⁴ Generally the application of this principle should lead policymakers to err on the side of caution in interpreting uncertain data. This approach is integral and necessary to producing intergenerational distributive justice.

Critiques of equity as a key component of environmental policy frequently draw upon utilitarian principles.²⁵ Utilitarianism defines the most just policy as that which produces the greatest good for the greatest number.²⁶ Because it is focused on aggregate outcomes rather than individual or group outcomes, a just utilitarian policy could be inequitable. For instance, an infamous leaked World Bank memo argued that a policy of exporting pollution to developing countries was economically beneficial and rational since the cost of human health and environmental problems in poor countries was less than that in industrially developed countries.²⁷ Utility-based calculations frequently rely on economic indicators to measure benefits²⁸, which are highly problematic. For example, a researcher might compare the price different individuals are willing to pay for clean air. As one might expect, willingness to pay is linked to ability to pay; poor people are willing to pay less for the same goods even if

23. Peter Montague, *The Wingspread Statement on the Precautionary Principle*, RACHEL'S ENV'T & HEALTH NEWS (1998), available at <http://www.mindfully.org/Precaution/Precautionary-Principle-Rachels.htm>.

24. The Wingspread Consensus Statement on the Precautionary Principle was signed in 1998 by 32 activists, academics and doctors. WINGSPREAD STATEMENT ON THE PRECAUTIONARY PRINCIPLE (1998), available at <http://www.gdrc.org/u-gov/precaution-3.html>. They argue that “the release and use of toxic substances, resource exploitation, and physical alterations of the environment have had substantial unintended consequences on human health and the environment.” *Id.*

25. Ted W. Simon, *In Defense of Risk Assessment: A Reply to the Environmental Justice Movement's Critique*, 6 HUM. & ECOLOGICAL RISK ASSESSMENT 555, 555-560 (2000).

26. See David Marcus, *The Federal Rules of Civil Procedure and Legal Realism as a Jurisprudence of Law Reform*, 44 GA. L. REV. 433, 464 (2010).

27. Memorandum from Lawrence Summers (Dec. 12, 1991), available at <http://www.whirledbank.org/ourwords/summers.html>.

28. See Simon, *supra* note 25, at 559.

they place equal value upon them.²⁹ Many utilitarians see free exchange capitalism as the most efficient means of producing utilitarian justice, but most radical scholars see capitalism (and market-based remedies) as a major source of injustice.³⁰ Jeff Romm has argued that a “just environment” requires social and ecological relations in which all groups of people have equal opportunity for benefit and influence.³¹

Colonial occupation has been simultaneously military, commercial, educational and administrative. All have had devastating effects on Native people’s access to land, self-determination, culture, and language. This link between the military, environmental degradation and colonization is described in the work of Margo Okazawa-Rey and Haunani Kay Trask, among others.³² Some tensions in the work include, in the case of Hawaii, the position of Asians and white allies,³³ which is echoed in by Kalan and Peek for South Africa, although they come to different experiences with international white allies and other people of color groups.³⁴ Projects of decolonization

29. Christian Broda et al., *The Role of Prices in Measuring the Poor’s Living Standards*, 23 J. OF ECON. PERSPECTIVES, Spring 2009, at 2, available at [http://faculty.chicagobooth.edu/christian.broda/website/research/unrestricted/z30002092155p%20\(2\).pdf](http://faculty.chicagobooth.edu/christian.broda/website/research/unrestricted/z30002092155p%20(2).pdf).

30. See Joe H Bandy; *Border Crossings: Transnational Movements for Alternative Development and Radical Democracy in the United States-Mexico Border Region* (1998) (unpublished PhD Dissertation, University of California, Santa Barbara); see also WINONA LADUKE, *ALL OUR RELATIONS: NATIVE STRUGGLES FOR LAND AND LIFE* (1999); Joan Martinez-Alier, *Mining Conflicts, Environmental Justice, and Valuation*, 86 JOURNAL OF HAZARDOUS MATERIALS 153, 153-170 (2001); Greg Ruiters, *Environmental Racism and Justice in South Africa’s Transition*, 28 POLITIKON 95, 95-103 (2001); AL GEDICKS, *CORPORATE STRATEGIES FOR OVERCOMING LOCAL RESISTANCE TO NEW MINING PROJECTS* (1997), <http://www.wrpc.net/corporate.html>.

31. Romm, *supra* note 22.

32. See HAUNANI K. TRASK, *FROM A NATIVE DAUGHTER: COLONIALISM & SOVEREIGNTY IN HAWAI’I* (1999); see also, LINDA TUHIWAI SMITH, *DECOLONIZING METHODOLOGIES: RESEARCH AND INDIGENOUS PEOPLES* (1999). “Dr. Margo Okazawa-Rey is a Professor at Fielding Graduate University and one of the founding members of the International Network of Women Against Militarism.” Speaker, Margo Okazawa-Rey, Forta.tv, http://fora.tv/speaker/6669/Margo_Okazawa-Rey (last visited May 24, 2010).

33. See generally TRASK, *supra* note 32.

34. See Press Release, South African Exchange Program on Environmental Justice, “Bucket Brigade” To Train SA Communities Living Next To Polluting

in this context include decolonization of land and environmental management practices, decolonizing culture and ideology, and the amplification of values and solidarity.³⁵

Fischer examines the politics of non-expert, community participation in an increasingly technocratic industrial society, and explores the meanings of participation for alternative visions of democracy.³⁶ He counters the claim that non-experts are simply unable to participate in complex environmental decision-making processes by citing several examples where they do: popular epistemology, participatory resource mapping and the consensus conference.³⁷ Many ordinary people “are quite capable of grappling successfully with both the technical and the normative issues that bear on environmental decision-making.”³⁸ He argues that scientific expertise will continue to be important, but that a democratic society needs to rethink the role of policy expertise, and the professional-client relationship.³⁹ He suggests that policymakers are as often in need of non-experts’ knowledge as they are of “experts,” and that expert’s role can be rethought of as “specialized citizen.”⁴⁰

Refineries on How To Monitor Pollution (May 8, 2000), *available at* <http://saepej.igc.org/bbpressrelease.html>.

35. See *Indigenous Peoples and Climate Change: Briefing Paper, Bangkok 2009*, INDIGENOUS PORTAL, Sept. 25, 2009, <http://www.indigenousportal.com/Climate-Change/Indigenous-Peoples-and-Climate-Change-Briefing-Paper-Bangkok-2009.html> (UNFCCC Intersessional Meeting); see also Marcia Langton, *The “Wild”, the Market, and the Native: Indigenous People Face New Forms of Global Colonization*, in GLOBALIZATION, GLOBALISM, ENVIRONMENTS, AND ENVIRONMENTALISM: CONSCIOUSNESS OF CONNECTIONS 141-167 (2003); “*The REDD Train is Going Pretty Fast and it’s Left us at the Station*”: Interview with Tom B.K. Goldtooth, INDIGENOUS ENVIRONMENTAL NETWORK, Dec., 2008, <http://www.ienearth.org/docs/interviewtomgoldtoothreddmonitor>. Additionally, for more resources see: INDIGENOUS ENVIRONMENTAL NETWORK, REDD: REAPING PROFITS FROM EVICTIONS, LAND GRABS, DEFORESTATION AND DESTRUCTION OF BIODIVERSITY, <http://www.ienearth.org/REDD.index.html> (last visited April 24, 2009).

36. See FRANK FISCHER, *CITIZENS, EXPERTS, AND THE ENVIRONMENT: THE POLITICS OF LOCAL KNOWLEDGE* 245 (2000).

37. *Id.* at 242.

38. *Id.* at 242.

39. *Id.* at 243.

40. *Id.*

Community participation in policy inquiry is important for three reasons. First, it is intrinsic to the meaningful practice of what Benjamin Barber calls a strong democracy.⁴¹ Second, community participation can contribute to the legitimacy of policy development and implementation, for instance, “collaborative deliberation has the possibility of building new political cultures.”⁴² Third, community or non-expert participation can contribute to the science itself, by integrating the general and the specific.⁴³ He argues that the contributions of non-experts in the decision-making process are integral to environmental sustainability.⁴⁴ For instance, in South Africa, post-apartheid activism has helped fragment the legacy of industry–government collusion and secrecy. “Thus spaces for what constitutes new frames of legitimate corporate environmental performance have evolved.”⁴⁵

*B. Collaborative Community-Based Natural Resource Management*⁴⁶

Community-based natural resource management (CBNRM) is an increasingly popular, though not un-criticized, form of natural resource management/conservation, particularly in Asia and Africa,⁴⁷ which involves local communities in the management of local natural resources. CBNRM is based on four assumptions:

41. *Id.*

42. *Id.* at 244.

43. *Id.*

44. *Id.* at 242.

45. James Van Alstine, *Governance from Below: Contesting Corporate Environmentalism in Durban South Africa*, 18 *BUS. STRATEGY AND ENV'T* 108, 119 (2009).

46. Louise Fortmann et. al., *At the Threshold Between Governance and Management: Community-Based Natural Resource Management in Southern Africa*, 21 *PUB. ADMIN. AND DEV.* 171, 171 (2001).

47. See Wayne M. Getz et al., *Sustaining Natural and Human Capital: Villagers and Scientists*, 283 *SCI.* 1855, 1855 (1999); see also IRDC, *Community-Based Natural Resource Management (Asia)*, available at http://www.idrc.ca/en/ev-3161-201-1-DO_TOPIC.html (last visited April 25, 2009).

1. Local people are reasonably knowledgeable about local ecosystems, indeed often more knowledgeable than most outside 'experts' are likely to be.
2. A benefit flow can be created from management activities that significantly outweigh the costs of coexisting with the resource or the benefits foregone from other uses or management strategies.
3. A group capable of implementing management strategies exists.
4. Control over the resource will be devolved to the community.⁴⁸

Even where all assumptions hold, the implementation of CBNRM can be complicated by the necessity of managing mobile or fugitive resources (including but not limited to wildlife and fish) requiring coordination across multiple administrative units, including international borders. Fortmann et al. conclude:

The appropriate scale and levels of natural resource management depend on the landscape in question, the types of ecosystems therein and where the ecosystems are. In practical terms, natural resource management becomes an issue in zones of conflict that are under increasing pressures to ensure the reliable supply of various resources (ecosystem services). This means minimally that CBNRM occurs case-by-case and optimally that it can become over time a form of high-reliability management for various resources such as wildlife, agriculture, and others that are integrated in an overall production system.⁴⁹

Local environmental communities in actors, broadly defined, possess expertise in the form of detailed knowledge about local conditions, modes of interacting, and ways of life that is essential to accurately assessing environmental health and other risks⁵⁰ and critical to successful advocacy.⁵¹

48. Fortmann et. al., *supra* note 46, at 171.

49. *Id.* at 184.

50. See Clarke & Gerlak, *supra* note 18, at 866; see also Mary Arquette et. al, *Holistic Risk-Based Environmental Decision Making: A Native Perspective*, 110

Ramachandra Guha summarizes Anil Agarwal's thinking on the environmentalism of the poor in the case of India:

The 'first lesson' is that 'the main source of environmental destruction in the world is the demand for natural resources generated by the consumption of the rich (whether they are rich nations or rich individuals and groups within nations) . . .' The 'second lesson' is that 'it is the poor who are affected the most by environmental destruction'; thus, the 'eradication of poverty in a country like India is simply not possible without the rational management of our environment and that, conversely, environmental destruction will only intensify poverty.'⁵²

In contrast, including underrepresented members of civil society in decision-making can help achieve good governance and sustainable development.

Game theory suggests that cooperation results from interactions that do not have a future end point.⁵³

The international community is sufficiently intertwined to necessitate ongoing dialogue on transboundary concerns. Civil society generally, and youth in particular have contributed to this international decision-making process.

C. Youth Participation in International Decision-Making

Underrepresented civil society engagement in international legal negotiations has not only led to such procedural legitimacy as transparency but to strong environmental provisions being included in international conventions. In particular, involving youth in

ENVTL. HEALTH PERSP. 259, 259-261 (2002); see also Jason Coburn, *Combining Community-Based Research and Local Knowledge to Confront Asthma and Subsistence-Fishing Hazards in Greenpoint/Williamsburg, Brooklyn, New York*, 110 ENVTL. HEALTH PERSP. 241, 241 (2002).

51. See George Towers, *Applying the Political Geography of Scale: Grassroots Strategies and Environmental Justice*, 52(1) PROF. PHOTOGRAPHER 23, 24 (2000).

52. Ramachandra Guha, *Environmentalism of the Poor*, 37 ECON & POL. WKLY. 204, 206 (2002).

53. Kevin Gibson et al., *Once Bitten: Defection and Reconciliation in a Cooperative Enterprise*, 9 BUS. ETHICS Q. 69, 75 (1999).

genuine environmental decision-making can facilitate intergenerational equity and sustainable development. Public participation enables youth the opportunity to voice their recommendations.

Diplomacy skills can be learned through observation and practice. Combined with respect and persistence, the ability to affect change depends upon thoughtful policy recommendations delivered in a compelling manner. Bravery is not the absence of fear – it is the ability to contribute to important work in the face of fear. Henry David Thoreau suggested that most people lead lives of quiet desperation.⁵⁴ Yet, committed spirits come together to advance simple truths of equity, integrity, and sustainability in the face of daunting odds. Increasing the diversity of civil society participation must remain a priority.

In the political fray, this is a wise path, requiring inner peace and outer presence. Jeffersonian and Hamilton dilemma's regarding representation versus direct public involvement arise time and again. Civic discourse to arrive at political consensus does not always remain civil in nature. Youth do not have jobs to protect nor institutions to represent – they can and do say what is on their minds.

Savvy UN conference attendees have learned that the best way to get up to speed on developments is to ask the closest youth who will cut to the chase and explain the current impasses between nation states and the array of acronyms that render conversations unintelligible to recent arrivals until they master the lingo. Countries sponsor youth delegates who then struggle to walk a tightrope between protocol and pushing the envelope. These findings about the role of youth and representatives from frontline and fenceline communities in international negotiations are echoed in the scholarship on the role of youth and these communities in social movements in general.⁵⁵ As the international community gathers to

54. Brian Walker, *Thoreau's Alternative Economics: Work, Liberty and Democratic Cultivation*, 92 AM. POL. SCI. REV. 845, 846 (1998).

55. See CLAYBORNE CARSON, IN STRUGGLE: SNCC AND THE BLACK AWAKENING OF THE 1960S (1995); see also ASIAN AMERICANS: THE MOVEMENT AND THE MOMENT (Steve Louie & Glenn Omatsu eds., 2006); BEYOND RESISTANCE! YOUTH ACTIVISM AND COMMUNITY CHANGE (Shawn Ginwright et al., eds., 2006); ROBIN D. G. KELLEY, FREEDOM DREAMS (2002); CARLOS MUÑOZ, JR., YOUTH, IDENTITY, POWER: THE CHICANO MOVEMENT (1989); NOT ONLY THE MASTER'S TOOLS: AFRICAN AMERICAN STUDIES IN THEORY AND PRACTICE (Lewis

agree upon a shared vision at the Copenhagen Climate Conference, we must pool our intergenerational, multilateral, legal, economic, scientific, community development, and diplomacy skills to achieve genuine sustainable development that advances current progress without jeopardizing development of future generations.

IV. CONCLUSION

Who Decides? This is at the core of achieving sustainable development. Good governance often proves to be elusive. Public participation can help achieve good governance that is responsive to present and future societal needs in an accountable, effective, transparent, equitable, and inclusive manner. “[U]ltimate choice[s] between possible solutions can only be made after considering qualitative issues such as power, politics, public opinion, tradition, and fairness,”⁵⁶ Katrina Smith explains. Political conversation builds skills unattainable by merely instilling political knowledge. Deliberative democracy depends upon a healthy public sphere, which in turn requires public space to facilitate rational discourse. Deliberation legitimizes decisions by exposing the decision-making process to a discussion among equal citizens.⁵⁷ While such factors as age and newspaper readership affect political sophistication, conversation as opposed to sophistication increases deliberative capability. Discourse enables people to form articulate opinions. For deliberation to provide decision-makers with the views of the people, there must be an even playing field.⁵⁸ Devolving environmental regulation to industry moves issues out of the public sphere. This downplays conflict since differences do not come to light through public debate. This is not an adequate solution to the manner in which governments have protected the environment. People have a

Gordon & Anna Gordon eds., 2006); LAURA PULIDO, BLACK, BROWN, YELLOW, LEFT: RADICAL ACTIVISM IN LOS ANGELES (2006); JULIE QUIROZ-MARTINEZ ET AL., REGENERATION: YOUNG PEOPLE SHAPING ENVIRONMENTAL JUSTICE (2005).

56. Katrina Smith, *Fairness in Water Quality: A Descriptive Approach*, 4 DUKE ENVTL. L. & POL’Y F. 85, 85 (1984).

57. See Daniel Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?*, 93 AM. J. INT’L L. 596, 600 (1999).

58. David Dutwin, *The Character of Deliberation: Equality, Argument, and the Formation of Public Opinion*, 15 INT’L J. PUB. OPINION RES. 239, 240 (2003).

right to participate in decisions that affect their social and physical environment.⁵⁹

Legal frameworks can increase or decrease sustainable development. Non-state actors include civil society, which in turn includes individual stakeholders, and an array of organizations that have become effective advocates in negotiations among nation states. High transaction costs can hinder the formation of bilateral, regional, and global treaties. When interdisciplinary expertise is needed to understand and determine optimal use, efforts to find a solution often stall. In 1987, the General Assembly adopted the study *Our Common Future* and instructed all U. N. agencies to report annually on their progress toward sustainable development.⁶⁰ Since the Earth Summit in 1992, we have had global conferences on human rights, indigenous people, population, social development, and women.⁶¹ Yet, we often are unable to cooperate, to innovate, or to transcend rhetoric. Equity and efficiency can be balanced in a manner that facilitates genuine non-state actor participation in international decision-making. Bali helped demonstrate that civil society participation and sustained international interactions can achieve consensus on emissions reduction in line with climate science.

Changing the culture of experts requires the development of an analytic-deliberative method capable of bringing together citizens and experts.⁶² Participation is especially important in the early stages of the process, when problems and questions themselves are being developed. While deliberation cannot end all conflict, it can include normative judgments more easily than reductionist approaches, such as formal risk analysis.⁶³ On the other hand, people within the environmental justice movement have been particularly successful at developing professional–community collaborative projects.

59. Ton Bührs, *From Diffusion to Defusion: the Roots and Effects of Environmental Innovation in New Zealand*, 12 ENVTL. POL. 83, 98 (2003).

60. Oluf Langhelle, *Sustainable Development: Exploring the Ethics of "Our Common Future"*, 20 INT'L POL. SCI. REV. 129, 129 (1999).

61. Bührs, *supra* note 59, at 94.

62. See FISCHER, *supra* note 36, at 242-245.

63. *Risk Analysis*, NEWSLETTER (Association for Veterinary Epidemiology and Preventive Medicine), Winter 2002/2003, at 12, available at <http://vetmed.illinois.edu/avepm/newsletters/winter02.pdf> (noting how the U.S. National Academy of Sciences favors formal risk analysis).

None of the changes articulated will come about easily. As Fischer explains, “collective participation is not something that just happens. It has to be organized, facilitated and even nurtured.” Professionals, on the other hand, need to shift their discourse “from that of authoritative advisor to facilitator of [community] discourse.” He argues that these are key to creating a vigorous democratic society.⁶⁴

Successful CBNRM management is often substantially enhanced by indigenous knowledge and good scientific methods.⁶⁵ Getz et al. continue to say, “computer technology and quantitative modeling help provide solutions to natural resource and ecosystem management problems. However, Western-trained scientists often do not appreciate the extent to which solutions depend on the expertise and power of local people.”⁶⁶ In the experience of natural resource management, in particular, wildlife management in southern Africa, indigenous knowledge provides direction for data collection; villagers’ priorities guide the formulation of management questions, and village institutions implement policies.⁶⁷ Science can help integrate analysis and policy formulation across ecological and sociopolitical scales. It has been necessary for scientists to conscientiously integrate and solicit knowledge and opinions of local women and men. Particularly relevant to negotiations at the international level, the role of scientists – and we add, negotiators and representatives in international arenas – could be to provide knowledge and political leverage to enable communities to implement their own decisions and affect decision-making at higher levels. The goal is policies and institutions that enable local people to have sustainable livelihoods where they live and an effective voice at higher sociopolitical levels. Conservation and the sustainable use natural resources are two sides of the same coin.

Increasing the flow of information to and the thoughtful analysis by ordinary citizens avoids policy stagnation in a rapidly changing world. The Århus Convention⁶⁸ recognizes the need to protect the

64. FISCHER, *supra* note 36.

65. Getz et al., *supra* note 47.

66. *Id.*

67. *Id.*

68. See Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, June 25, 1998, 38 I.L.M. 517 (1999) (entered into force Oct. 30, 2001), *available at* <http://www.unece.org/env/pp/documents/cep43e.pdf> (negotiated among the

environment for both present and future generations.⁶⁹ Including citizens in environmental protection increases the effectiveness of that protection since people often have a deep interest and are affected by the state of their surrounding environment.⁷⁰ This rights-based approach prohibits discrimination on the basis of citizenship, nationality, or domicile. Public authorities must generate and provide basic environmental information, access to which will facilitate informed participation in decision-making. By increasing government accountability and transparency, better decisions can be reached. Having a stake in the process should enhance people's willingness to implement decisions. Public authorities have both a passive responsibility to respond to requests for information and an active responsibility to collect, update and distribute information. Both individuals and NGOs may request environmental information without proving that they are interested parties.⁷¹ The Convention brings together human rights and environmental law. This approach to transboundary decision making that affects sustainable development should become widespread throughout international, regional, national, provincial, and local efforts to balance equity and efficiency to achieve good governance. Public participation in international decision-making can sustain trust in governments and strengthen international consensus building.

Member States of the United Nations Economic Commission for Europe (UNECE) [hereinafter Århus Convention]. On June 25, 1998, the convention was adopted at a pan-European meeting of environment ministers in Århus, Denmark. *Questions and Answers on the Århus Convention*, EUROPA.EU, Oct. 28, 2003, <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/03/210&format=HTML&aged=0&language=EN&guiLanguage=en>. All of the member states of the European Union and the EU itself signed. *Id.* The convention entered into force on October 30, 2001. *Id.* For the convention and general information see, UNECE, *Introducing the Århus Convention*, <http://www.unece.org/env/pp/welcome.html> (last visited Aug. 3, 2010).

69. Århus Convention, *supra* note 68.

70. *Id.*

71. *Id.* at art. 2(5) (“The public concerned’ means the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest.”).