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# SUMMARY OF OPENING REMARKS

by Daniel Magraw\*

*The Prior Informed Consent Conference held at American University's Washington College of Law began with opening remarks by Daniel Magraw, President of the Center for International Environmental Law. Mr. Magraw began this conference by briefly addressing the origins of "prior informed consent" ("PIC") and raising some key questions about this concept.*

In the realm of international law and natural resources, the notion of "prior informed consent" is relatively undeveloped with respect to community-based rights to land and natural resources. "Prior informed consent" (often referred to as "PIC"), is developed in some areas, but not this particular area. It is largely reliant on doctrines of self-determination and on nation states' permanent sovereignty over their natural resources. PIC provides opportunities for developing new international law that blends the state level with the individual and/or the community level. A brief overview of the history of PIC is worth noting.

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PIC developed in the medical area in the United States where powerful medical groups such as hospitals, physicians, and experimenters were making decisions for individuals without fully disclosing or alerting them to their actions. The existing power relationships at the time allowed those powerful groups, that is the hospitals, the experimenters, and the physicians, to make the decisions about what they were going to do with individuals. There are some horrifying examples of this in the history of the early 20<sup>th</sup> century in this country. Out of this time of relative little disclosure of information came the idea that individuals should have a right to voice their concerns and a right to elect to be part of an experiment or not, even though the hospitals, physicians, and experimenters thought these experiments were good for society. This idea gave the individual the right to choose not to be part of certain experiments thus preventing the physician, hospital, and even the government from acquiring certain data. Fifty years ago, this concept was radical, the societal dynamics of the time were such that there was a relationship between the powerful and informed, on the one hand, and the less powerful and uninformed, on the other.

Today, although the PIC concept has developed quite extensively with respect to state-to-state, that is government-to-government interaction, individuals and communities should also be involved and not overlooked. This begs the question that will be addressed later on in this conference, should PIC be extended, under what circumstances, and in what ways? So in a way, we are coming back to asking similar questions to those that society confronted when discussion of PIC began.

Now let us turn to the basic facts we are dealing with on the ground. There are clear adverse environmental and human development trends around the world. There is a dearth of local community voices in decision making about natural resources. Despite economic growth in many countries, there is an increasing income and wealth disparity. We are not getting more equal as a world. Finally, many nation states fail to aid and protect materially impoverished constituencies. While this is part of the reason for an increasing gap, it is not the only reason.

Let us now turn to the political parameters and context of PIC. First of all, and these are my assertions of course, my own views. Powerful groups are unlikely to recognize stronger rights in weaker groups. This generalization is one that seems plausi-

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ble because governments, certainly in our country right now, are often beholden to powerful groups, to people or institutions that contribute to their election or to their selection. Civil society groups, on the other hand, often have a preference for poorer groups. So we have political conflicts in addition to legal questions surrounding the PIC concept. For example, the doctrine of eminent domain, which is virtually universal under different names, often clashes with local communities, particularly indigenous people's right to their own property, to be free from forced displacement, and to be treated fairly in their ancestral domains. Therefore, there is a tension between eminent domain, on the one hand, where governments will seize property and take property rights, and with individual and community rights, on the other. As I say, these are partly political and partly legal issues.

I am going to propose a participation principle that is actually Owen Lynch's, a Senior Attorney at the Center for International Environmental Law ("CIEL") who was invited to speak, but could not attend. He says, "every human being by virtue of being human, not because of the legal system but because he or she is human, has a right to participate in official government decisions that directly impact on his or her life or livelihood." This is a basic public participation and democracy point which assumes that there is information. A person cannot participate in a meaningful way if he or she does not have adequate information. The challenge today, and more broadly of course, is to define what these words and concepts mean.

CIEL just participated in a case in the Inter-American Commission on Human Rights where a group of 700 indigenous people were being displaced from their ancestral lands by a dam in Chile. We eventually settled the case on very fair and favorable grounds but a hurdle that had to be overcome was that the indigenous people did not want to move. However, the Chilean Government claimed that the country's national sustainable development depended on construction of the dam.

The dam's catchment area would inundate the lands where the indigenous people lived forcing the indigenous people to move. Now, should the community have the right to say no and stop that kind of national project? Arguably, governments are going to be extremely reluctant to provide this type of veto, and while that should not be determinative in terms of a discussion on PIC, we must recognize that it is part of the political reality.


Therefore, we have come to our first question that arises out of the PIC concept: What does "participate" mean and does it mean veto? If it does not mean veto, what does it mean in order to be meaningful? Does the government merely have to hold a hearing, listen, and then make a decision? That cannot be all that there is to "participation." There must be something else. The

second question, which I find very interesting from a professional point of view and important from an advocacy point of view, is how does one attain meaningful disposition if there is, for example, an indigenous tribe? How does someone inform indigenous people? Informing is essential to the entire PIC process. If people do not have the right information or they do not have complete information, they will not be able to participate meaningfully. This is a supposition on my part, a proposition. So, how can someone carry out the educational process of providing information? Thirdly, how does one get consent, in terms of "prior informed consent"? The "prior" piece of PIC can be done beforehand in conjunction with education. But suppose only 51% of a community agrees, or suppose there are rival decision making methodologies in a particular community. The difficulties that can emerge are clear. From all perspectives, including those of the government and the private sector, there are no easy answers to these questions.

The following are some other questions given to me from Owen Lynch. Nation states have the right to information in order to provide and to protect information and to promote the public interest. It is important to protect information, a notion that I added, because this is a problem found in PIC situations where governments are often simultaneously providing information to the public, while protecting confidential business information or

even national security information. How can there be prior informed consent if that information cannot or was not provided by the government? In this situation there may be some prior information and there may be consent, but how truly informed is it? This is particularly going to be a problem with the Cartagena Protocol on Biosafety because I think countries will be extremely reluctant to provide the appropriate information to allow the importing country to really make an informed decision. Another consideration is how to fit the indigenous and other local peoples rights to due process and fair compensation into the PIC notion.

One way to find answers to these questions is to ask more questions. For example, what does "prior" mean? When must it occur or how early does it have to be to constitute "prior"? Who is responsible for providing information and in what format? Are there minimum standards of information that need to be given? What does "informed" mean? What level of knowledge do people need to have and what kind of information? How should information be phrased, packaged, and disseminated so people effectively understand it? Finally, what does "consent" mean?

Owen wanted me to leave you with this charge: any productive exploration of the PIC concept requires you to abandon all preconceived notions you might have about prior informed consent. So remember to be open-minded, to listen, and to learn. 

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## *What does "participate" mean and does it mean veto?*

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