

Who owns the carbon in the trees?¹

Clarifying carbon rights in the Philippines and guidance in benefit sharing arrangements

Climate-relevant Modernization of Forest Policy and Piloting of REDD in the Philippines



Context

The Philippine National REDD-Plus Strategy (PNRPS) has identified carbon ownership as an area of concern. At present, there are no Philippine laws that explicitly define carbon rights, identify its claimants and regulate transactions relating to such claims. However, parties have entered and continue to enter into carbon rights agreements without the benefit of a specific law that would govern and safeguard the rights of the parties and the State. This could be dangerous because, first, there is no assurance that the beneficiaries of these contracts are in fact the rightful parties to assert such claims or whether the proponents are entitled to enter into such contracts. The danger is that these contracts may infringe on existing resource rights holders or impugn the rights of its true and lawful claimants. Second, there is no guarantee that these contracts are not onerous. Third, it is not certain whether these contracts would actually contribute to the broader goals of the PNRPS.

Relevant to this, the Department of Environment and Natural Resources (DENR)

Secretary has issued a Memorandum on the “Interim Policy on Forest Carbon Trading and Registry of REDD-Plus Activities”, enjoining all DENR officials and employees not to entertain any initiative on forest carbon trading pending the issuance of guidelines on forest carbon.

Prior to any significant national-level REDD-Plus developments, it is necessary to clarify carbon ownership and tenure. Considering that millions of people are dependent on the forest and its resources, the questions “who owns the carbon?” and “who can sell carbon?” become crucial. Potential REDD-Plus areas are located inside forest areas where communities hold varying and, sometimes, overlapping tenurial instruments. REDD-Plus areas are located in ancestral domains, Community-Based Forest Management Agreements (CBFMAs) areas and Protected Areas Community-Based Resource Management Agreements (PACBRMAs) areas, among others.

¹ This summarizes the findings and recommendations of a study on Clarifying Carbon Rights as part of a series of policy studies undertaken in the Philippines under the project “Climate-relevant Modernization of Forest Policy and Piloting of REDD in the Philippines” funded under the International Climate Initiative of the German Federal Ministry for the Environment, Nature Conservation and Nuclear Safety (BMU) and Non-Timber Forest Products-Exchange Programme (NTFP-EP) through the ASEAN Social Forestry Network supported by the Swiss Agency for Development and Cooperation (SDC).

Carbon rights under the Philippine legal regime

One of the major prerequisites for REDD-Plus is to ensure that tenure rights of indigenous peoples and local communities to forestland and resources are recognized in the national legal regime. REDD-Plus activities allow for the entry of new and powerful actors that seek to take advantage of the new economic opportunity available and may put communities in a vulnerable position. If community tenure rights to the forests are unclear, REDD-Plus projects may result in their marginalization and disenfranchisement. Thus, indigenous peoples and local communities based in the forests must have tenurial security before REDD-Plus programs commence.

Carbon rights as an integral aspect of the bundle of rights

There are numerous existing laws and regulations that already govern the preservation, utilization and development of the country's natural resources. Analyzing carbon rights within the Philippine legal regime must be based on a rights-based approach, treating carbon rights as part of a bundle of rights that should not be segregated from the forest tenure holder. Most importantly, carbon rights should be part of the broader policy direction of forest tenure reform, and any prospective law pertaining to carbon rights must be read in conjunction with the existing laws to prevent conflict and curtailment of existing rights.

Constitutional framework for carbon rights in the Philippines

It is a policy of the State to protect and advance the right of the people to a balanced and healthful ecology in accord

with the rhythm and harmony of nature,² promote social justice in all phases of national development,³ and recognize and promote the rights of indigenous cultural communities (ICC) within the framework of national unity and development.⁴

The Philippine Constitution provides that all natural resources are owned by the State; an exception will be indigenous peoples and their ancestral domains. The exploration, development and utilization of these natural resources are done either by direct undertaking of the State or “co-production, joint venture or production sharing agreements” under the State's full control and supervision, with Filipino citizens and “Filipino” corporations⁵ for a period not exceeding 25 years, which is renewable for another 25 years. **This means that foreign entities cannot enter into agreements for carbon sequestration because these involve the exploration, development and utilization of natural resources. The only exceptions for this nationality rule are financial or technical assistance agreements for exploration of minerals.**

Excerpt from the Constitutional Commission Records where Commissioner Monsod explains Section 6 on the principle of agrarian and stewardship:

“In the case of other natural resources... the intent of this provision is merely to say that in applying the principle of agrarian reform, the chief beneficiaries should be the people in the areas. So, instead of having absentee logging concessions owned by people outside the area, the people in the area and the communities themselves should be considered, too, as the principal beneficiaries. The people may be entrusted with the land but [these lands] need not be given to them by title. It can be the same kind of concession or rights that are now given under the law. If they are the ones given that right, we expect that they will take better care of the area because their children and grandchildren will still be there and, therefore, they would undertake activities like reforestation.”

² Art. II, Sec. 16, 1987 Constitution.

³ Art. II, Sec. 10, 1987 Constitution.

⁴ Art. II, Sec. 22, 1987 Constitution.

⁵ Corporations or associations at least sixty per centum of whose capital is owned by Filipino citizens.

The Regalian Doctrine or state ownership of natural resources should be interpreted together with other provisions of the Constitution; one is the application of agrarian principles of stewardship in the “disposition or utilization of other natural resources”. The intention of the Constitution in this provision is to favor communities and people in the area in granting rights to use and develop natural resources. **Foreigners or foreign-owned corporations cannot “utilize” rights to the carbon.**

All projects relating to the exploration, development and utilization of natural resources are projects of the State and can never be purely private endeavors.⁶

Carbon rights in existing resource rights granted by the State

Land is the “single biggest major resource”⁷ in the Philippines. The Constitution prescribes its ownership, distribution and utilization. Land is neither classified according to its use nor its actual state.⁸ This explains why although 15 million hectares are classified as forestland,⁹ only an estimated 700,000 hectares actually have primary forests.¹⁰

The 1987 Constitution classified lands into four – agricultural, forest timber, mineral and national park – and actual identification of land classification is exclusively given to the Executive Department. It is worth noting, however, that only agricultural lands may be alienated.¹¹

The reality is that classifications are not always clear-cut. The State upholds the

policy of multiple land use, toward the end that the country’s natural resources may be rationally explored, developed, utilized and conserved.¹² This means that based on actual use, mining rights may overlap with forest rights and private rights over the land; forest rights may overlap with ancestral domain claims; and ancestral domain claims may overlap with national parks.

Community-Based Forestry Management Agreements (CBFMA)

The constitutional concept of stewardship of natural resources is exemplified in the Community-Based Forestry Management, a national strategy to achieve sustainable forestry and social justice. The CBFMA holder is granted exclusive occupation and use of the forestland covered by the CBFMA and the forest products therein. The CBFM holder privilege extends to the right **to receive all income and proceeds from the sustainable utilization of forest resources** within the CBFMA area and **to enter into agreements or contracts with private or government entities for the development of the whole or portions of the CBFMA area**, provided, that public bidding and transparent contracting procedures are followed; *provided further* that development is consistent with the Community Resource Management Framework of the CBFMA area.

Given the following, carbon is deemed included in the broad definition of “forest resources” covered under the CBFM agreement. Forest resources is defined as “all natural resources, whether biomass such as plants and animals or non-biomass such as soil and water, as well as the intangible services and values present in forestlands or in other lands devoted for forest purposes”. **Hence, the CBFMA holder**

⁶ PICOP Resources, Inc. v. Base Metals Mineral Resources Corp., G.R. No. 163509, December 6, 2006.

⁷ Bernas, J. 1996. The Constitution of the Republic of the Philippines: A Commentary, p. 1018.

⁸ In the case of Heirs of Amunategui v. Director of Forestry, the Supreme Court pronounced: “The classification is descriptive of its legal nature or status and does not have to be descriptive of what the land actually looks like”.

⁹ “Forestland” has acquired a technical meaning different from “forest” and generally refers to land of the public domain.

¹⁰ Forest Management Bureau, Forestry Statistics at a Glance, 2009.

¹¹ Land may either be public or private. Private lands are those which have been acquired by virtue of some title or grant, and include those lands that have been held since time immemorial (Carino v. Insular Government, No. 72, February 23, 1909, 212 U.S. 449, 53 L. Ed. 594). Everything else falls within the realm of public domain. Lands of the public domain are further classified into two types: alienable and non-alienable.

¹² PICOP Resources, Inc. v. Base Metals Mineral Resources Corp., G.R. No. 163509, December 6, 2006, citing PD 705, Sec. 2 and RA 7942, Secs. 72, 76.

may claim incomes and proceeds from the utilization thereof. The holder may likewise enter into agreements for the development of the CBFMA area.

Other forestry agreements

Other forestry agreements like Integrated Forest Management Agreement (IFMA), Forest Land Grazing Management Agreement (FLGMA) and other arrangements only grant specific rights particularized in the agreement. It does not grant broad rights over forest resources and cannot imply that carbon rights are included in contractual rights granted by the State.

The Revised Forestry Code of the Philippines, or Presidential Decree 705, states that no person may utilize, exploit, occupy, possess or conduct any activity within any forestland unless that person has been authorized to do so under a license agreement, lease, license or permit.¹³ These instruments are mere privileges. **The Supreme Court has time and again declared that a license or permit, particularly a timber license, is not a contract, property or a property right protected by the due process clause of the Constitution. Hence, it may be revoked anytime.**¹⁴

In addition, because of the importance of forests to the nation, the State's police power has been wielded to regulate the use and occupancy of forest and forest reserves.¹⁵

Mineral agreements

A mineral agreement grants the exclusive right to conduct mining operations and to extract all mineral resources found in the contract area for a period of 25 years, renewable for another term not exceeding 25 years.¹⁶ Contractors are granted auxiliary mining rights relating to timber, water, easement,

possession of explosives and entry into private lands and concession areas.¹⁷ **As a general rule, mining companies do not have rights over forest resources except in relation to auxiliary right to cut trees or timber within the mining area as may be necessary for operation. Thus, mining companies do not have any right to the forest independent of their mining operations.**

Although the law provides for obligations of the mining company to reforest its mining area, it does not provide for any right to use forest resources and benefit from the conservation of the forest area. **Moreover, there is no provision in the present laws, regulations and also in existing mining contracts to show that mining companies have rights to benefit from the conservation of the forest, including the rights to the carbon.** However, note that the right of mining companies to enter land may be deemed as a limitation to all carbon sequestration contracts that were entered into after the enactment of Republic Act 7942 on areas with overlapping mineral agreements.

Carbon rights in protected areas

Protected areas are placed under the control and administration of the DENR.¹⁸ The DENR, upon the recommendation of the Protected Area Management Board (PAMB), may enter into Protected Area Community-Based Resource Management Agreement (PACBRMA) with tenured migrant communities¹⁹ of protected areas.²⁰ Interested ICC/IPs may likewise

¹³ P.D. 705, Chapter III, Sec. 20.

¹⁴ Alvarez vs. PICOP Resources, Inc., G.R. Nos. 162243, 164516, 171875, December 3, 2009, citing Oposa v. Factoran, Jr., G.R. No. 101083, 30 July 1993, 224 SCRA 792, 812; Tan v. Director of Forestry, 210 Phil. 244 (1983).

¹⁵ Director of Forestry vs. Munoz, G.R. Nos. L-24796 and L-25459, June 28, 1968.

¹⁶ Section 26, Rep. Act No. 7942.

¹⁷ Chapter XII, Secs. 72-76, Rep. Act No. 7942.

¹⁸ Rep. Act No. 7586, Sec. 10.

¹⁹ Tenured migrants are those who actually and continuously occupied a portion of a protected area for five years before its designation as protected area and solely dependent therein for subsistence.

²⁰ DENR AO 26-08, Rule 15, December 24, 2008.

participate in community-based programs in protected areas.²¹ The tenure instrument, or PACBRMA, shall be issued only within multiple use, sustainable use and buffer zones.

Carbon rights in private lands

Ancestral domain

The right of indigenous peoples or indigenous cultural communities (ICC/IPs) to their ancestral domains and ancestral lands emanates from their time immemorial claim. These rights to ancestral domains of ICCs/IPs by virtue of native title exist regardless of paper Certificate of Ancestral Lands/Domains Title (CALT/CADT). This right includes the right to develop lands and natural resources.²² It also includes, among others, “the right to benefit and share the profits from allocation and utilization of the natural resources found therein” and “the right to negotiate the terms and conditions for the exploitation of natural resources in the areas”.²³

Other private lands

The New Civil Code likewise recognizes private ownership of woodlands²⁴ and bestows upon them the bundle or rights concurrent with ownership including the right (i) to enjoy and dispose of a thing, without other limitations than those established by law²⁵; and (ii) to exclude any person from the enjoyment and disposal thereof.²⁶ Although these statutes recognize private rights of ownership, they also explicitly provide the State’s right to wield its police power to regulate the use and occupancy of forest reserves.²⁷

Rights of local government units (LGUs)

The LGUs share with the national government the responsibility in the management and maintenance of ecological balance within their territorial jurisdiction, subject to the provisions of the Local Government Code and national policies. They have the right to share in the national wealth, and the latter refers to all natural resources situated within the Philippine territorial jurisdiction, including forest products.

Lamsis v. Dong-E, G.R. No. 173021, October 20, 2010.

“The titling of ancestral lands is for the purpose of ‘officially establishing’ one’s land as an ancestral land. Just like a registration proceeding, the titling of ancestral lands does not vest ownership upon the applicant but only recognizes ownership that has already vested in the applicant by virtue of his and his predecessor-in-interest’s possession of the property since time immemorial.”

This share is equivalent to 40% share of the gross collection derived by the national government from taxes, fees or charges from any agreement in the utilization and development of national resources within their territorial jurisdiction. The 40% share is distributed as follows: 20% for the province, 45% for the component city/municipality and 35% for the barangay. Proceeds from the share in national wealth must be applied to development and livelihood projects.

²¹ DENR AO 32-04, Section 3, August 31, 2004.

²² Rep. Act No. 8371, Sec. 7(b).

²³ Id.

²⁴ Article 577 of the New Civil Code provides for the rights of a usufructuary of woodland. ²⁵ New Civil Code, Art. 428.

²⁶ New Civil Code, Art. 429.

²⁷ Id.

In July 2010, NCIP issued Admin. Order 20, series of 2010, a “Resolution declaring in accordance to IPRA and Rights Based Approach that in any Forest Carbon Engagement the Indigenous People have Carbon Ownership in recognition of their concept of Ancestral Territories as referring to not only the physical environment but the total environment including spiritual and cultural bonds to the areas which they possess, occupy and use and to which they have claims of Ownership”.

In a nutshell, with the exception of carbon rights in the ancestral domain, which is a private property of the indigenous people, carbon rights are state owned, but such rights should be given to communities, who act as stewards of the forest. This right should be treated as part of the bundle of rights of the tenure holder. The local government right shares in carbon revenues are akin to its share in the distribution of income from national wealth.

Other safeguards under Philippine law

Transparency and accountability right to information

The Constitution expressly provides that the State shall recognize “the right of the people to information on matters of public concern and this includes access to official records and documents pertaining to official acts, transactions or decisions, subject to limitations prescribed by law.” This means that government agencies cannot exercise discretion in refusing disclosure of, or access to, information of public concern. It must be noted that the right to information primarily pertains to information in the possession of government. In the context of carbon rights contracts, some information may be in the possession of the private contractors; this may no longer be

within the ambit of the constitutional right to information. However, such information is essential for the exercise of indigenous peoples and local communities of their right to Free and Prior Informed Consent. There is a pending Freedom of Information Act in Congress.

Full and effective participation of stakeholders

Right to participation is enshrined in the 1987 Constitution. Art. XIII, Section 16 of the Constitution provides for the right of the people and their organizations to effective and reasonable participation at all levels of social, political and economic decision-making. Similar to the right to information, the Supreme Court has also held that this right is self-executing and does not need any implementing legislation.²⁸

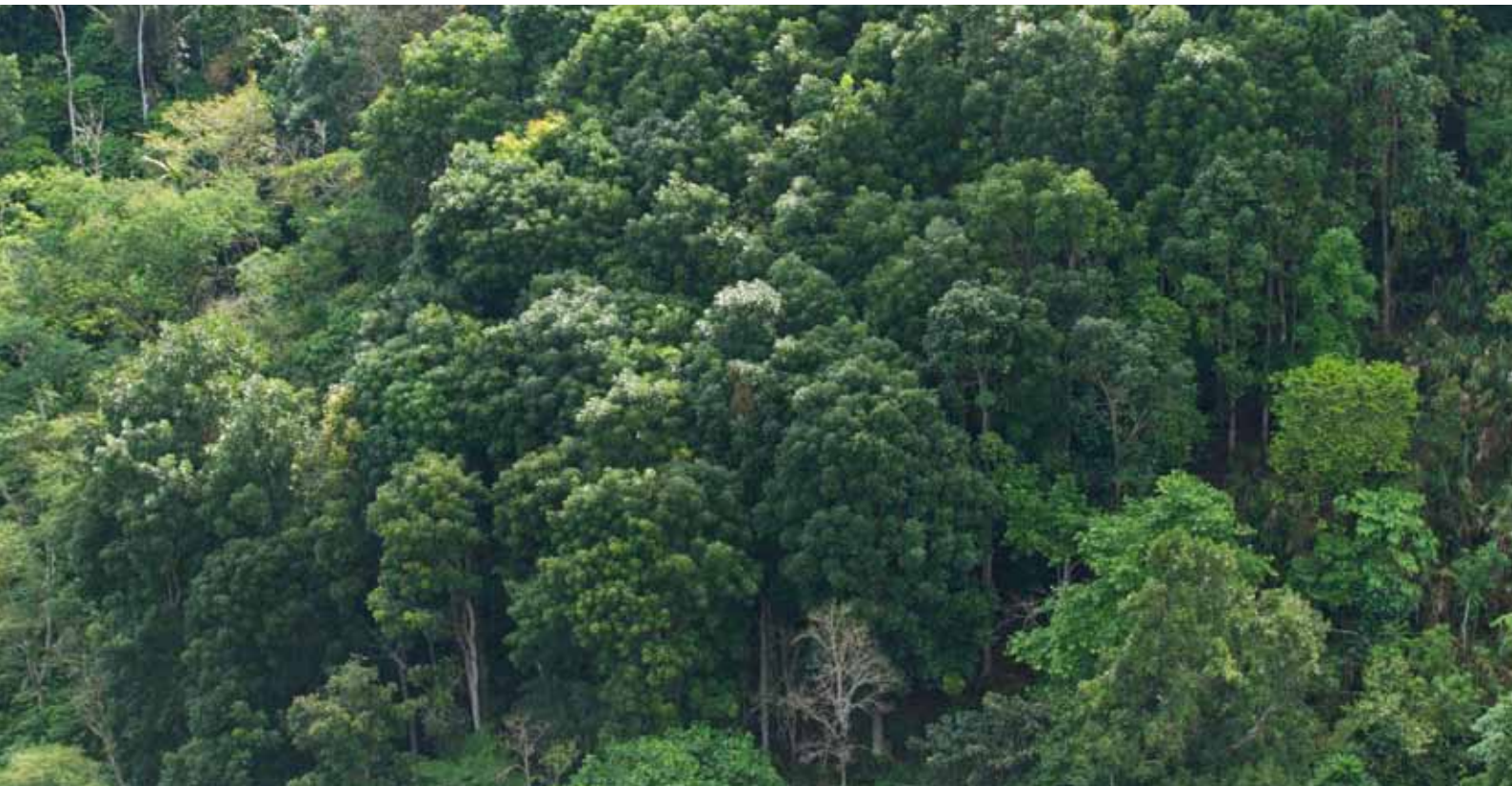
Free and Prior Informed Consent (FPIC)

The Cancun decision requires full and effective participation of indigenous and local communities. Thus, FPIC must be required for carbon rights projects insofar as they affect both indigenous peoples and local communities. IPRA already mandates the conduct of FPIC for IPs; the need is to enact guidelines for FPIC for non-IPs.

Recommendations for policy makers

It is imperative to enact a legal instrument that will clarify carbon rights in relation to forests, adopting the following framework:

- The legal instrument must follow a rights-based approach.
- The legal instrument must uphold the stewardship principle under Article XII, Sec. 6 of the Constitution.
- The rights of indigenous peoples and local communities under international and national law must be recognized.
- Recognition of carbon rights must be part of the broader forest tenure reform policy.
- Carbon rights must be part of a bundle of rights of tenure rights holders and should not be segregated as a separate right from the tenure instruments within the forest.
- Rights holder must be specifically identified in the legal instrument in order to avoid potential conflicting claims.
- Any legal instrument on carbon rights must not result in displacement of local communities and indigenous peoples.
- Mechanisms to address conflicting claims must be established.



Guidance in benefit sharing

The advent of REDD-Plus has revived interest in forest conservation and preservation from various stakeholders because of the benefits and incentives that may be derived from entering into forest carbon agreements. In the context of REDD-Plus, benefit sharing is said to include “**intentional transfers of financial payments and goods and services to designated beneficiaries**”.²⁹

At present, indigenous people and local communities continue to enter into forest carbon contracts without state regulation. This leaves them vulnerable to entering lopsided agreements. For example, one indigenous community had entered into

others, that can be used as a reference for formulating benefit sharing agreements; however, they do not adequately address the peculiarities of the REDD-Plus.

There is a need to determine whether or not benefits should be given across stakeholders both vertically and horizontally. In the Philippines, for example, one of the important areas to examine is the role of local governments in REDD-Plus activities and whether or not they will receive some form of benefit from the REDD-Plus projects in the area. In one of the case studies that this research examined, a latent conflict was sparked between the local government and the project proponent because they wanted

In the context of REDD+, benefits can stem from forest rent or incentives. Forest rent includes the distribution of money among stakeholders, from revenue or “rent” derived from the management of a forest resource (for example payments for emission reductions). Incentives are not directly linked to forest rent, but are monetary or nonmonetary benefits transferred to a stakeholder to enable or motivate a particular behavior. They can encompass a broad range of monetary and non-monetary rewards. The benefits can be provided in return for an action, for forfeiting use of a resource, or, in the case of rents, simply as rent-sharing. The benefits may be viewed as incentives, opportunities, additional payments, or compensation. Whether the benefits are from rents or incentives associated with investments will influence who benefits, what the benefits are, and the instrument for transferring these.

an agreement that only gives them 10% share. In another instance, the indigenous community had not been fully informed that the cost of initial technical survey may far outweigh the benefits of the agreement.

There are existing guidelines on benefit sharing under the Local Government Code, NIPAS and Mining Law, among

to claim the benefits for the carbon project instead of the community.

To address the current situation, it is necessary to enact specific guidance on minimum standards or models for a benefit sharing arrangement. This must reflect the following principles:

²⁹ Forest Carbon Partnership Facility, Background Note on Benefit Sharing for REDD+ regional dialogue, June 2012: Note 1, <http://www.forestcarbonpartnership.org/fcp/sites/forestcarbonpartnership.org/files/Documents/PDF/June2012/120409_FAQ%20regarding%20Benefit%20Sharing_note%201-May%2031,%202012.pdf>, accessed on June 18, 2012.



1. The goal of benefit sharing is the sustainable development of the community;
 2. Benefits must go directly to communities who actually protect the forest;
 3. Benefit sharing must also be divided fairly and equitably within the community;
 4. Communities must be aware of the basis of the benefit sharing;
 5. Over and above financial benefits, non-monetary benefits should also be included;
 6. Funds and other benefits should be under the control of the community; and
 7. Vertical and horizontal benefit sharing should be ensured.
- Said guidance on a benefit sharing arrangement shall be based on the specific allocation of carbon rights vis-à-vis tenure holders in forestlands as provided by a carbon rights law.

Aside from the principles on benefit sharing, safeguards should be in place both during the negotiation process and upon implementation of the benefit sharing agreements:

- Support services should be available for communities negotiating agreements to ensure that they get a fair deal from the project, e.g. legal support.
- There should be a period for readiness and capacity-building.
- Establish a review mechanism for benefit sharing agreements to safeguard the rights of the ILCs, e.g. a clearing house mechanism.
- Trust fund mechanisms may be proposed to ensure that the long-term benefits to the community are in place.
- Mechanisms should be established to ensure that government officials do not take advantage of the local communities.
- The introduction of monetary benefits may sometimes change community dynamics and behavior. Strengthening community mechanisms and ensuring social cohesiveness will help in ensuring equitable distribution of benefits at the community level.
- Address the practice of “power brokers” or agents who represent communities and in exchange get huge amounts from the benefits.
- Culturally sensitive transparency and accountability mechanisms.
- Government should monitor the implementation of the agreement including the benefit sharing arrangements.

For more information

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On behalf of



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