

## ENVIRONMENTAL DEMOCRACY AND FOREST CARBON (REDD+)

BY

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*Public funders and private investors are pouring billions of dollars into Reducing Emissions from Deforestation and forest Degradation (REDD+) in the developing world. In REDD+, investors pay people to preserve carbon in trees, and then sell credits based on the stored carbon to those who wish to offset their own greenhouse gas emissions. REDD+ promises a dynamic synergism that mitigates climate change, conserves biodiversity, and alleviates poverty. When done poorly, however, REDD+ may dispossess already impoverished people from their sources of sustenance and may do little to mitigate climate change or conserve biodiversity.*

*Including indigenous, forest-dependent, and other local people in all aspects of planning and implementing REDD+ is not only prudent practice—it is increasingly required by international law, and, I explain, is an essential ingredient in sustainable (effective, synergistic, and equitable) REDD+. Yet fulfilling these Environmental Democracy norms is nigh impossible in REDD+. What then?*

*In this project, I review the current international legal status of Environmental Democracy, i.e., the right to participate in environmental decision making; the right to acquire information on environmental decisions; the right to redress and remedy when environmental rights are violated; and the right to Free Prior and Informed Consent when decisions are made that will affect vital resources and lands. I explain and expand current thinking of how the aspirational language of the principles ought to be implemented, and connect the principles' relevance to REDD+, currently the most important laboratory for expanding Environmental Democracy in international conservation and development work. To illustrate how Environmental Democracy is or is not working in REDD+, I explore*

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*examples from Vietnam and Cambodia, where I conducted fieldwork in December 2012.*

*I conclude that while stakeholders in REDD+ are making progress towards genuine Environmental Democracy, they have a ways to go to fulfill their legal and ethical obligations towards communities in which REDD+ is launching. After explaining why genuine Environmental Democracy in REDD+ is currently impracticable—and perhaps impossible—I conclude that REDD+'s promised benefits nonetheless justify carefully continuing it. I suggest how REDD+ project developers can fulfill the legal exigencies of Environmental Democracy, both as a matter of equity, and as a pragmatic approach to maximizing benefits for human and nonhuman communities.*

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## I. INTRODUCTION

When making decisions about how vital environmental resources will (or will not) be developed, local citizens—who have close knowledge of surrounding land and resources, and have the most to gain or lose from these decisions—should be full and active partners. That is the central claim underlying the legal norms that comprise Environmental Democracy (“ED”), i.e., the right to participate in environmental decision-making; the right to access to information on environmental decisions; the right to redress and remedy when environmental rights are violated; and the right to Free Prior and Informed Consent (FPIC) when decisions are made that will affect vital resources and lands.<sup>1</sup> When governments or developers of environmental conservation and development programs fail to respect ED norms, they may not only violate international law; they may doom an environment-development project to failure, and worse, violate the human rights and even destroy the lives of local citizens.

Investors are pouring billions of dollars into environment development programs known as REDD+ (Reducing Emissions from Deforestation and forest Degradation).<sup>2</sup> In REDD+, parties are paid to preserve forests that

<sup>1</sup> United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3–14, 1992, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), Annex I (Aug. 12, 1992) [hereinafter Rio Declaration], available at <http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm>; UN-REDD PROGRAMME, LEGAL COMPANION TO THE UN-REDD PROGRAMME GUIDELINES ON FREE, PRIOR AND INFORMED CONSENT (FPIC): INTERNATIONAL LAW AND JURISPRUDENCE AFFIRMING THE REQUIREMENT OF FPIC 4 (2013) [hereinafter LEGAL COMPANION TO THE UN-REDD PROGRAMME], available at [http://www.unredd.net/index.php?option=com\\_docman&task=doc\\_download&gid=8792&Itemid=5](http://www.unredd.net/index.php?option=com_docman&task=doc_download&gid=8792&Itemid=5).

<sup>2</sup> Andrew Long, *Global Climate Governance to Enhance Biodiversity and Well-Being: Integrating Non-State Networks and Public International Law in Tropical Forests*, 42 ENVTL. L. 95, 118 (2011).

would otherwise be felled, or to plant forests where none presently exist.<sup>3</sup> The carbon stored in plants is then sold to international investors looking to offset their greenhouse gas emissions or to staunch deforestation for other reasons. REDD+ funding comes with significant strings attached for how forests can be used.<sup>4</sup> Because REDD+ is attracting so many billions of dollars from investors and because of its stunning potential to impact local communities—for better or for worse—it is a crucial strategic site for implementing and advancing ED rights.

As a lawyer and a scholar, I see full, effective, informed participation as essential to fulfilling REDD+'s synergistic promise not only to preserve climate equilibrium and imperiled tropical forests, but also to equitably (re)distribute benefits from nations that have polluted the global atmospheric commons to those who will suffer most from that pollution. Local, meaningful, informed participation is the best means of warding off the negative impacts—both social and environmental—lurking in REDD+ schemes that do not fulfill ED norms.

The twin threats of climate change and deforestation present a calamity of opportunity; herein I analyze how REDD+ responds to that opportunity. By examining how REDD+ schemes are (or are not) promoting environmental participatory democracy, I wish to show REDD+'s realized and unrealized potential as a model for natural resource law and policy. I see the principles of ED not merely as legally required out of fairness to those most affected by projects, but as pragmatically necessary for long-term sustainable resource management. ED provides equitable means to sustainable environmental and human rights enhancing ends. REDD+ is, and could increasingly be, contributing to local resilience not only through supporting the ecological matrix in which communities live, but through abetting the socioeconomic and institutional resilience required to weather the threats of climate change. I believe that all parties benefit most when local stakeholders are full and equal partners.

This article asks: How are (or aren't) principles of ED being manifested in REDD+ in developing countries? After outlining the emerging legal norms of ED and explaining the fundamentals of REDD+, I explain the importance of these ED norms for REDD+. I then compare how these norms should operate in REDD+ with how they are operating. I use case studies from Vietnam and Cambodia, where I conducted field work in December 2012, to suggest that even the best intentioned REDD+ schemes fall short of fulfilling ED requirements, likely to the detriment of all actors, including local people and the ecosystems that sustain them.

If full-throated ED in REDD+ is difficult at best and impossible at worst, does that mean we should call for a halt to REDD+ and its potential synergistic benefits? I conclude it does not. Like other economic, social, and cultural human rights norms—and like democracy in any context—ED

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<sup>3</sup> See, e.g., DAVID TAKACS, FOREST CARBON: LAW + PROPERTY RIGHTS 10 (2009), available at <http://www.ibcperu.org/doc/isis/12699.pdf>.

<sup>4</sup> Jacob Phelps et al., *Does REDD+ Threaten to Recentralize Forest Governance?*, 328 SCL 312, 312 (2010), available at [http://www.rightsandresources.org/documents/files/doc\\_1461.pdf](http://www.rightsandresources.org/documents/files/doc_1461.pdf).

ideals are realized progressively and incrementally. As the ED principles move towards customary legal status—or as they are mandated by law or the standards used to certify a project—REDD+ is the most important laboratory to develop law in situ. It is “most important” because so much money and effort is currently being invested, because the harms are so grave when ED norms are not respected, and because the prospective, synergistic benefits are so great precisely when ED norms are fully fulfilled. REDD+ actors may promote environmental programs to improve democracy and promote democratic reforms to improve the environment, while fomenting ecological, social, and institutional adaptation to the coming depredations of climate change.

I argue that the REDD+’s portended benefits justify (carefully) continuing. I conclude with pragmatic approaches towards fulfilling the legal exigencies of ED in REDD+ in a deeply equitable way.

## II. REDD+

In REDD+, a local community, private developer, government entity, or individual landowner reforests degraded land or preserves a forest that would otherwise be cut down.<sup>5</sup> They may then sell the stored carbon for a contracted period of time to entities that want to offset their greenhouse gas (GHG) emissions (either because they are legally mandated to do so or they are voluntarily reducing their climate change footprint), or simply wants to foment forest preservation.<sup>6</sup> REDD+ may happen on a project-by-project basis, where a developer contracts with landowners to preserve or reforest a discrete area of land, and sells the carbon thus sequestered. Or, increasingly, REDD+ operates on a broader scale, i.e., a nation, state, or province uses REDD+ funding to reduce deforestation or promote reforestation in a wide geographic area, resulting in greater stored carbon than would have occurred without the funding.<sup>7</sup>

Deforestation accounts for somewhere between 11 and 28% of GHG emissions.<sup>8</sup> Terrestrial plants absorb about a quarter of the CO<sub>2</sub> that humans

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<sup>5</sup> Lisa Hayden, *So What is REDD, Anyway?*, PLANET CHANGES, Dec. 8, 2010, <http://change.nature.org/2010/12/08/so-what-is-redd-anyway/> (last visited Feb. 22, 2014). Also falling under REDD+’s aegis: programs to improve forest management, improve agriculture to retain soil carbon, and preserve peatlands. UN-REDD Programme, *About REDD+*, <http://www.un-redd.org/AboutREDD/tabid/102614/Default.aspx> (last visited Feb. 22, 2014).

<sup>6</sup> See David J. Kelly, *The Case for Social Safeguards in a Post-2012 Agreement on REDD*, 6 L. ENV’T & DEV. J. 61, 67 (2010) (explaining funding mechanism); Takacs, *supra* note 3, at 15.

<sup>7</sup> ELECTRIC POWER RESEARCH INSTITUTE, OVERVIEW OF SUBNATIONAL PROGRAMS TO REDUCE EMISSIONS FROM DEFORESTATION AND FOREST DEGRADATION (REDD) AS PART OF THE GOVERNORS’ CLIMATE AND FOREST TASK FORCE 1-1 to 1-5 (2012), *available at* <http://www.epri.com/abstracts/Pages/ProductAbstract.aspx?ProductId=00000000001023811> (click on “download”); SAUNDERS ET AL., PROFOREST, REDUCED EMISSIONS FROM DEFORESTATION AND FOREST DEGRADATION: LESSONS FROM A FOREST GOVERNANCE 4 (2008).

<sup>8</sup> Valerie Volcovici, *A Slow Start for the Carbon Credit Market*, N.Y. TIMES, July 24, 2011, <http://www.nytimes.com/2011/07/25/business/energy-environment/a-slow-start-for-the-for-carb-on-credit-market.html?pagewanted=all> (last visited Feb. 22, 2014) (noting that deforestation “emits as much carbon as all the world’s cars, ships, trucks, and planes”); U.N. DEV.

emit.<sup>9</sup> REDD+ mitigates climate change if trees retain carbon that deforestation or forest degradation would otherwise release. Healthy forests help communities adapt to climate change through providing resilience by sustaining ecosystem services—including preventing erosion, increasing rainfall, buffering floods, cleansing drinking water, and harboring crop pollinators—and biodiversity crucial for human survival.<sup>10</sup> REDD+ investments may also promote socioeconomic climate change adaptation through new sources of income by providing, for example, direct payments for preserving forests, by teaching new forestry-related skills,<sup>11</sup> or by providing for more secure, formal land title.<sup>12</sup> REDD+ may further

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PROGRAMME, HUMAN DEVELOPMENT REPORT 2007/2008: FIGHTING CLIMATE CHANGE: HUMAN SOLIDARITY IN A DIVIDED WORLD 2007 1, 40–41 (2007), available at [http://hdr.undp.org/sites/default/files/reports/268/hdr\\_20072008\\_en\\_complete.pdf](http://hdr.undp.org/sites/default/files/reports/268/hdr_20072008_en_complete.pdf) (noting that deforestation accounts for between 11 and 28% of total carbon dioxide emissions); American Clean Energy and Security Act, H.R. 2454, 111th Cong. § 752(2) (2009) (noting that deforestation accounts for 20% of greenhouse gas emissions globally); Gleb Raygorodetsky, *Can REDD Ever Become Green*, OUR WORLD, Aug. 1, 2012, <http://ourworld.unu.edu/en/can-redd-ever-become-green/> (last visited Feb. 22, 2014) (noting that deforestation accounts for 18% of global greenhouse gas emissions).

<sup>9</sup> Robert J. Carpenter, *Implementation of Biological Sequestration Offsets in a Carbon Reduction Policy: Answers to Key Questions for a Successful Domestic Offset Program*, 31 ENERGY L.J. 157, 158 (2010) (noting that of the 500 gigatons of carbon that have been released globally since 1850, 120–30 gigatons have been absorbed by terrestrial ecosystems).

<sup>10</sup> UNITED NATIONS ENV'T PROGRAMME WORLD CONSERVATION MONITORING CTR., REDUCING EMISSIONS FROM DEFORESTATION: A KEY OPPORTUNITY FOR ATTAINING MULTIPLE BENEFITS 9–10 (2007), available at [http://www.unep-wcmc.org/medialibrary/2010/09/27/fa100d32/REDD\\_Multiple\\_benefits.pdf](http://www.unep-wcmc.org/medialibrary/2010/09/27/fa100d32/REDD_Multiple_benefits.pdf). See Johannes Ebeling, *Risks and Criticisms of Forestry-Based Climate Change Mitigation and Carbon Trading*, in CLIMATE CHANGE AND FORESTS: EMERGING POLICY AND MARKET OPPORTUNITIES 43, 53 (Charlotte Streck et al. eds., 2008); David Freestone, *Foreword*, in CLIMATE CHANGE AND FORESTS: EMERGING POLICY AND MARKET OPPORTUNITIES ix, xi–xii (Charlotte Streck et al. eds., 2008); see generally CERSPA INITIATIVE, CERSPA GUIDANCE DOCUMENT 3, 10 (2009), available at [http://www.cerspa.com/documents/CERSPA\\_Guidance\\_Document\\_v2.0September09.doc](http://www.cerspa.com/documents/CERSPA_Guidance_Document_v2.0September09.doc) (assisting project developers in developing countries in negotiating and drafting a Clean Development Mechanism project agreement).

<sup>11</sup> See Richard Tipper, *Helping Indigenous Farmers to Participate in the International Market for Carbon Services: The Case of Scolec Té*, in SELLING FOREST ENVIRONMENTAL SERVICES: MARKET-BASED MECHANISMS FOR CONSERVATION AND DEVELOPMENT 223, 232 (Stefano Pagiola et al. eds., 2002); Margaret Skutsch et al., *Alternative Models for Carbon Payments to Communities under REDD+: A Comparison Using the Polis Model of Actor Inducements*, 14 ENVTL. SCI. & POL'Y 140, 143 (2011); Promode Kant, *REDD Should Create Jobs, Not Merely Bring Compensation* 3 (Inst. of Green Econ., Working Paper No. 13, 2010), available at [http://www.igrec.in/REDD\\_should\\_create\\_Jobs\\_Not\\_merely\\_bring\\_compensation.pdf](http://www.igrec.in/REDD_should_create_Jobs_Not_merely_bring_compensation.pdf); Forest Carbon P'ship Facility, *International Workshop in Mexico Explores the Role of Local Communities in REDD+ MRV*, <http://www.forestcarbonpartnership.org/international-workshop-mexico-explores-role-local-communities-redd-mrv> (last visited Feb. 22, 2014).

<sup>12</sup> Ashwini Chhatre et al., *Social Safeguards and Co-Benefits in REDD+: A Review of the Adjacent Possible*, 4 CURRENT OPINION IN ENVTL. SUSTAINABILITY 654, 655 (2012) (suggesting that increased land security for local communities, combined with effective participation in land management, can prevent adverse social impacts of REDD+ and better achieve environmental and climate objectives); see KATOOMBA GROUP ET AL., PAYMENTS FOR ECOSYSTEM SERVICES: GETTING STARTED 10 (2008), available at <http://www.katoombagroup.org/documents/publications/GettingStarted.pdf> (advocating for payments for ecosystem services as a means to promote environmental stewardship, clarify property rights, and “strengthen rural peoples’

institutional adaptation as community leaders, landowners, and government officials develop and manage REDD+ projects and hone skills and institutions to negotiate effectively with project developers and government functionaries.<sup>13</sup>

Because of its potentially enormous synergistic benefits, REDD+ has many disparate supporters.<sup>14</sup> National and subnational government officials in both the developed and developing world, environmental and social welfare NGOs, companies looking for GHG offsets, international financial institutions, the United Nations, and private citizens have pledged or spent over \$5 billion dollars for REDD+.<sup>15</sup> But despite its promised potential, critics claim that REDD+ does not mitigate global climate change, and instead violates human rights, circumvents democracy, is methodologically suspect and unworkable in practice, and allows the already rich (mostly in

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position in other resource-based negotiations”); WILLIAM D. SUNDERLIN ET AL., RIGHTS & RES. INITIATIVE, FROM EXCLUSION TO OWNERSHIP? CHALLENGES AND OPPORTUNITIES IN ADVANCING FOREST TENURE REFORM 29–30 (2008) (noting that community based land ownership can prevent land appropriation by outside developers); Carina Bracer et al., *Organization and Governance for Fostering Pro-Poor Compensation for Environmental Services* 35–36 (World Agroforestry Ctr., Working Paper No. 39, 2007), available at <http://www.worldagroforestry.org/downloads/publications/PDFs/wp14961.pdf> (noting that the “growing recognition of indigenous and community forest tenure rights and transfer of administrative responsibilities to local communities and governments” can “create a strong incentive in many situations for conservation and local development”); Julian Quan & Nat Dyer, *Climate Change and Land Tenure: The Implications of Climate Change for Land Tenure and Land Policy* 52 (Int’l Inst. for Env’t & Dev. and Natural Res. Inst., Univ. of Greenwich, Land Tenure Working Paper No. 2, 2008), available at <ftp://ftp.fao.org/docrep/fao/011/aj332e/aj332e00.pdf> (noting the relationship between climate change and the need for land use policies that promote local land rights and autonomy for indigenous groups).

<sup>13</sup> Chhatre et al., *supra* note 12, at 657 (explaining how Nepal has sustained local land and forest rights through the use of community forests); Patricia Nelson, *An African Dimension to the Clean Development Mechanism: Finding a Path to Sustainable Development in the Energy Sector*, 32 DENV. J. INT’L. L. & POL’Y 615, 623 (2004) (discussing how sustainable development is considered by Africans to necessitate institutionalization of balanced growth practices); Alfred Ofosu-Ahenkorah, *CDM Participation and Credit Pricing in Africa*, in EQUAL EXCHANGE: DETERMINING A FAIR PRICE FOR CARBON 127, 133 (Glenn Hodes & Sami Kamel eds., 2007), available at <http://cd4cdm.org/Publications/Perspectives/FairPriceCarbon.pdf>.

<sup>14</sup> Peter J. Kanowski et al., *Implementing REDD+: Lessons from Analysis of Forest Governance*, 14 ENVTL. SCI. & POL’Y 111, 112 (2011) (discussing how REDD+ strategies are being developed in more than 40 countries and that approximately 180 demonstrations and readiness activities for REDD or REDD+ have occurred worldwide); David Takacs, *Carbon into Gold: Forest Carbon Offsets, Climate Change Adaptation, and International Law*, 15 HASTINGS W.-NW J. ENVTL. L. & POL’Y 39, 60–61 (2009) (discussing the involvement of governments such as Spain, Italy, and China); James Kanter, *In London’s Financial World, Carbon Trading is the New Big Thing*, N.Y. TIMES, July 6, 2007, <http://www.nytimes.com/2007/07/06/business/worldbusiness/06carbon.html> (last visited Feb. 22, 2014) (discussing the involvement of banks such as Merrill Lynch, Goldman Sachs, and Morgan Stanley); Volcovici, *supra* note 8 (discussing the participation of the investors in REDD projects).

<sup>15</sup> See INTERNATIONAL SUSTAINABILITY UNIT, EMERGENCY FINANCE FOR TROPICAL FORESTS: TWO YEARS ON: IS INTERIM REDD+ FINANCE BEING DELIVERED AS NEEDED? 7–10 (2011), available at [http://www.pcfisu.org/wp-content/uploads/2011/11/Two-years-on\\_Is-interim-REDD+-Finance-being-delivered-as-needed.pdf](http://www.pcfisu.org/wp-content/uploads/2011/11/Two-years-on_Is-interim-REDD+-Finance-being-delivered-as-needed.pdf). See also FOREST TRENDS INITIATIVE, COVERING NEW GROUND: STATE OF THE FOREST CARBON MARKETS 2013 vii (2013), available at <http://www.forest-trends.org/documents/files/SOFCM-full-report.pdf>.

the global North) to profit at the expense of the poor (in the global South) they are allegedly aiding.<sup>16</sup> At the same time, REDD+ exacts high opportunity costs, because nations and local people may be barred from using forests to generate profits (e.g. through logging) or to sustain local communities (e.g. through conversion to agricultural land or harvesting trees for building material.)<sup>17</sup>

I have been among REDD+'s critics, analyzing how early projects were poorly handled, laying out a set of equitable principles for REDD+ that are difficult to achieve and describing the formidable set of legal issues for delineating forest carbon as property.<sup>18</sup> Yet I believe that REDD+ may be our best chance to institute legal reforms that preserve the planet's resplendent biodiversity, mitigate the planet's unbearable human poverty, and innovate the way developed and developing nations incentivize sound methods of sustainable living for a sustainable planet. While using the South's forests as carbon dumps for Northern profligate habits remains ethically questionable, these forests do remain an essential source of carbon absorption for gluttonous human consumption that we have not found the discipline to tame. As a lawyer and a scholar, I see effective, informed, partnered participation as essential to fulfilling REDD+'s synergistic promise, particularly the equitable (re)distribution of benefits from nations that have polluted the global atmospheric commons to those who will suffer from that pollution.

REDD+ has the potential to benefit indigenous and other forest dependent people (although: aren't we all) through more secure land tenure, a long-term means to finance conservation of their resource base, and institutional skills building. However, if done poorly—as forest carbon becomes more valuable<sup>19</sup> and provides an excuse for governments or private entities to disrupt traditional resource and property patterns—then REDD+ may be a losing proposition for indigenous and forest-dependent communities. Social safeguards thus become key to guarantee REDD+'s synergistic promise. These safeguards first and foremost require full, effective participation from populations who will be most affected, for better or worse, when REDD+ is implemented.

REDD+ has the potential to encourage a new dialectic where subaltern groups demand parallel authority over local forms of ownership, contract,

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<sup>16</sup> Press Release, Durban Group for Climate Justice, No REDD! No REDD Plus!: Global Sign-On Campaign Against Schemes for Reducing Emissions from Deforestation and Forest Degradation (Apr. 13, 2010), *available at* [http://www.durbanclimatejustice.org/wp-content/uploads/2010/04/durbanREDDstatement\\_en.pdf](http://www.durbanclimatejustice.org/wp-content/uploads/2010/04/durbanREDDstatement_en.pdf); Jesse Ribot & Anne M. Larson, *Reducing REDD Risks*, 6 INT'L J. OF THE COMMONS 233, 233–35 (2012).

<sup>17</sup> Chhatre et. al., *supra* note 12, at 4; *see* REDD-NET, MARKET AND NON-MARKET COSTS OF REDD+ PERCEIVED BY LOCAL COMMUNITIES: A CASE STUDY IN EAST CAMBODIA 3 (2011), *available at* [http://theredddesk.org/sites/default/files/resources/pdf/2011/case\\_study\\_5\\_-\\_cambodia\\_alice\\_final.pdf](http://theredddesk.org/sites/default/files/resources/pdf/2011/case_study_5_-_cambodia_alice_final.pdf).

<sup>18</sup> *See* Takacs, *supra* note 14, at 84–87; David Takacs, *Forest Carbon Offsets and International Law: A Deep Equity Legal Analysis*, 22 GEO. INT'L ENVTL. L. REV. 521, 523 (2010); TAKACS, *supra* note 3, at 5, 7.

<sup>19</sup> Kelly, *supra* note 6, at 68.



land management, and property. These groups are aided by top-down international human rights, environmental law, and NGOs that transcend national boundaries, who are not only reifying the legality of the ED norms, but also experimenting with new ways to implement ED norms for the benefit of the subaltern (which includes the nonhuman).<sup>20</sup> Skilled implementation of ED rights in REDD+ provides a laboratory for reforming other forms of North-South environment development projects to benefit all participants.

### III. PRINCIPLES OF ENVIRONMENTAL DEMOCRACY

#### *A. Introduction*

Principle 10 of the 1992 Rio Conference on Environment and Development names three internationally recognized Environmental Democracy rights: 1) the right to participate in environmental decision making, 2) the right for citizens affected by environmental decisions to receive pertinent information, and 3) the right to access judicial and administrative proceedings, including redress and remedy, to effectuate these rights.<sup>21</sup> In addition, indigenous peoples, other forest dependent peoples, and possibly all local citizens should give free, prior, and informed consent (FPIC) when decisions about environmental resources vital to their lives are made.

REDD+ is a strategic laboratory for implementing these ED rights, as decisions about forest resources will affect, for better or worse, the lives of people who directly depend upon forest products and ecosystem services. These ED rights are crucial to REDD+ success. Decisions about forests—where and how much to log and preserve—have long been made far away from the forests in question. Local people worry—and rightly so—that REDD+ will follow the same pattern.<sup>22</sup> REDD+ has the potential to benefit indigenous and other rural people through more secure land tenure, a perpetual means to finance conservation of their resource base, and institutional skills building. However, if done poorly—such as if REDD+ invites monoculture plantation forestry, cuts off people from their traditional resource bases,<sup>23</sup> or forest carbon provides an excuse for governments or private entities to disrupt traditional resource and property patterns as it becomes more valuable<sup>24</sup>—then REDD+ may be a losing

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<sup>20</sup> See David Takacs, *Forest Carbon (REDD+), Repairing International Trust, and Reciprocal Contractual Sovereignty*, 37 VT. L. REV. 653, 716 (2013).

<sup>21</sup> Rio Declaration, *supra* note 1.

<sup>22</sup> David Hunter, *Human Rights Implications for Climate Change Negotiations*, 11 OR. REV. INT'L L. 331, 358 (2009).

<sup>23</sup> PATRICK ANDERSON, CENTER FOR PEOPLE AND FORESTS, FREE, PRIOR, AND INFORMED CONSENT IN REDD+: PRINCIPLES AND APPROACHES FOR POLICY AND PROJECT DEVELOPMENT 9–10 (2011), available at [http://www.recoftc.org/site/uploads/content/pdf/FPICinREDDManual\\_127.pdf](http://www.recoftc.org/site/uploads/content/pdf/FPICinREDDManual_127.pdf).

<sup>24</sup> Kelly, *supra* note 6, at 68.

proposition for indigenous, forest-dwelling, and other peoples who depend directly on forests. Thus social safeguards become paramount to guarantee REDD+'s synergistic promise. These safeguards, first and foremost, require full, effective participation from populations who will be most affected when REDD+ is implemented.

I agree with scholars and activists who argue that global climate change is a human rights issue and attending to human rights is crucial when designing solutions to mitigate greenhouse gas buildup or helping to plan adaptation.<sup>25</sup> ED are procedural rights necessary to fulfill substantive environmental human rights and other human rights. The right to a clean and healthy environment—which is itself necessary to realize the fundamental rights of life, health and physical well-being, culture, property, religion, food, nondiscrimination, self-determination, and freedom from forced relocation—all depend upon respecting ED rights when REDD+ and other development projects are being planned.<sup>26</sup>

These REDD+ procedural norms are instrumental means to fulfill basic human rights, and simultaneously are central to REDD+'s successful implementation. For example, David Hunter argues that a "rights-based perspective can inform a reprioritization of policy responses to climate change away from one focused on carbon accounting and toward one that considers more fully principles of equity, fairness, and impact on the most vulnerable."<sup>27</sup> However, law and policy responses to climate change, such as cap and trade, demonstrate that carbon accounting will continue; I am looking at how to ensure equity and fairness within carbon accounting, to intertwine the two strands. Focusing on procedural rights within REDD+—a complicated system of carbon accounting—is key to making that system work.

### *B. Where Do the Principles Come From?*

International law considers four main participation rights that governments (and, I argue, nongovernmental actors) should guarantee when engaging in REDD+. Various multilateral environmental agreements

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<sup>25</sup> Hunter, *supra* note 22, at 332–33; Donald Goldberg & Tracy Badua, *Do People Have Standing?: Indigenous Peoples, Global Warming, and Human Rights*, 11 BARRY L.R. 59, 71 (2008); Takacs, *supra* note 18, at 563; Svitlana Kravchenko, *Right to Carbon or Right to Life: Human Rights Approaches to Climate Change*, 9 VT. J. ENVTL. L. 513, 514 (2008).

<sup>26</sup> Benjamin J. Richardson & Jona Razzaque, *Public Participation in Environmental Decision Making*, in ENVIRONMENTAL LAW FOR SUSTAINABILITY: A READER 165, 167 (Benjamin J. Richardson & Stepan Wood eds., 2006); UN-REDD PROGRAMME, GUIDELINES ON FREE, PRIOR AND INFORMED CONSENT 9–10 (2013), available at [http://www.unredd.net/index.php?option=com\\_docman&task=doc\\_download&gid=8717&Itemid=53](http://www.unredd.net/index.php?option=com_docman&task=doc_download&gid=8717&Itemid=53); U.N. Human Rights Council, *Report of the Special Rapporteur on the Rights of Indigenous Peoples*, ¶¶ 47–53, U.N. Doc. A/HRC/21/47 (July, 6 2012). See *Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter.-Am. Ct. H.R. (ser. C) No. 172, ¶¶ 120, 128–29, 135 (Nov. 12, 2007) (underscoring the importance of procedural ED rights to secure fundamental human rights, as well as the survival of indigenous groups).

<sup>27</sup> Hunter, *supra* note 22, at 334–35.

articulate these ED rights.<sup>28</sup> These principles are also incorporated into voluntary standards project developers use as they seek certification to conduct REDD+ and sell the resulting carbon credits.<sup>29</sup>

Environmental Democracy formally entered the International Environmental Law canon as Principle 10 of the Rio Declaration on Environment and Development:

Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.<sup>30</sup>

The United Nations Economic Commission for Europe's (UNECE) Aarhus Convention is at the forefront of attempts to codify and implement these ED principles and includes a complaint mechanism that NGOs can use to advocate on behalf of communities.<sup>31</sup> It is seen as the leading expression of the content and implementation of three ED rights it codifies and the Aarhus Compliance Committee has heard numerous complaints and worked extensively with civil society and governments to implement the Convention and to realize the goals of the ED rights the Convention memorializes.<sup>32</sup> UN

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<sup>28</sup> For the range of environmental democracy rights that can be effective in combating climate change, including their sources in international law, see Svitlana Kravchenko, *Procedural Rights as a Crucial Tool to Combat Climate Change*, 38 GA. J. INT'L & COMP. L. 613, 614, 616 (2010) ("When we put climate change in human rights language as violations of the rights to life, health, culture, water, and subsistence surveying the range of environmental democracy rights that can be effective in combating climate change, including their sources in international law."). The four main participation rights referred to are freedom of expression, the right to seek and receive information, the right to participate in decision making and the right of access to justice. *Id.* at 617.

<sup>29</sup> Eduard Merger et al., *Options for REDD+ Voluntary Certification to Ensure Net GHG Benefits, Poverty Alleviation, Sustainable Management of Forests and Biodiversity Conservation*, FORESTS, Apr. 27, 2011, at 551, 554 tbl.1, available at <http://www.mdpi.com/1999-4907/2/2/550/pdf>.

<sup>30</sup> Rio Declaration, *supra* note 1.

<sup>31</sup> Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, Aarhus, Denmark, arts. 2, 9, & 10, 161 U.N.T.S. 447, (Oct. 30, 2001) [hereinafter Aarhus Convention]. See also Svitlana Kravchenko, *The Aarhus Convention and Innovations in Compliance with Multilateral Environmental Agreements*, 18 COLO. J. INT'L ENVTL. L. & POL'Y 1, 7-8 (2007) (noting how the Regional Environmental Center for Central and Eastern Europe (REC) provided funding for grassroots environmental activism, and played a seminal role in the collective democratization of Europe following the collapse of the Soviet Union).

<sup>32</sup> See generally Marianne Dellinger, *Ten Years of the Aarhus Convention: How Procedural Democracy is Paving the Way for Substantive Change in National and International Environmental Law*, 23 COLO. J. INT'L ENVTL. L. & POL'Y 309, 338-49 (2012) (surveying the

Secretary General Kofi Annan described the Aarhus Convention as “the most ambitious venture in the area of environmental democracy so far undertaken under the auspices of the United Nations.”<sup>33</sup> Signed on June 25, 1998, the Convention entered into force on October 30, 2001, and currently has forty-six parties, all UNECE member states.<sup>34</sup> The Convention is open to non-UNECE members, although none have acceded.<sup>35</sup> While the Aarhus Convention only binds governments of the nations who have signed and ratified it, variations on its legal provisions are found in other international legal documents, in domestic law, and in standards project developers may be using.<sup>36</sup> Furthermore, while the principles encoded in the Aarhus Declaration are likely not yet customary international law, their codification in and use under the Aarhus Convention, and their subsequent spread<sup>37</sup> suggests they may one day become custom.

ED rights are, in fact, finding their way into other multilateral environmental agreements and domestic constitutions or statutes. Other scholars have reviewed the US National Environmental Policy Act and other laws, and EU laws that promote ED.<sup>38</sup> Over 100 countries have passed laws mandating access to environmental information and over 120 have promulgated public participation requirements.<sup>39</sup> In the best of all possible worlds, national governments that have ratified international human rights treaties would make those commitments justiciable in national legislation; citizens participating in REDD+ would then be able to realize and vindicate those rights.<sup>40</sup>

Beyond Aarhus, the United Nations Environment Programme (UNEP) has also developed guidelines for nations to incorporate the Aarhus principles and Rio Principle 10 in domestic law.<sup>41</sup> The U.N. Non-legally Binding Instrument on All Types of Forests states that “local communities,

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strengths and weaknesses of various procedural mechanisms by which future substantive ED rights would develop).

<sup>33</sup> DAVID BANISAR ET AL., MOVING FROM PRINCIPLES TO RIGHTS: RIO 2012 AND ENSURING ACCESS TO INFORMATION, PUBLIC PARTICIPATION, AND ACCESS TO JUSTICE FOR EVERYONE 5 (The Access Initiative et al. eds., 2011), available at <http://www.accessinitiative.org> (search “Moving from Principles to Rights”; then follow “Moving from Principles to Rights” hyperlink).

<sup>34</sup> Aarhus Convention, *supra* note 31, at 1.

<sup>35</sup> BANISAR ET AL., *supra* note 33, at 11.

<sup>36</sup> *Id.* at 11–12 (detailing efforts in Chile to proactively include poor and marginalized groups in the decision-making process when revising environmental impact regulations).

<sup>37</sup> *Id.* at 6 (describing the rise of policies that increase access to information on environmental matters in nations throughout the world); see *infra* note 56 (describing various programs that promote the basic policies of the Aarhus Convention).

<sup>38</sup> Dellinger, *supra* note 32, at 326.

<sup>39</sup> The Access Initiative, *Approved Text at Rio +20 Raises Hopes for Principle 10*, <http://www.accessinitiative.org/blog/2012/06/approved-text-rio20-raises-hopes-principle-10> (last visited Nov. 8, 2013).

<sup>40</sup> Stephanie Baez, *The “Right” REDD Framework: National Laws That Best Protect Indigenous Rights in a Global REDD Regime*, 80 FORDHAM L. REV. 821, 872 (2011).

<sup>41</sup> UNEP, GUIDELINES FOR THE DEVELOPMENT OF NATIONAL LEGISLATION ON ACCESS TO INFORMATION, PUBLIC PARTICIPATION AND ACCESS TO JUSTICE IN ENVIRONMENTAL MATTERS 1 (2010), available at <http://www.unep.org/environmentalgovernance/Portals/8/GuidelinesAccessToJustice2010.pdf>.

forest owners and other relevant stakeholders contribute to achieving sustainable forest management and should be involved in a transparent and participatory way in forest decision-making processes that affect them, as well as in implementing sustainable forest management, in accordance with national legislation.”<sup>42</sup> While providing excellent practical content for nations that wish to expand ED rights for their citizens, the Guidelines are little known and have been little used.<sup>43</sup>

The 2003 African Convention on the Conservation of Nature and Natural Resources also guarantees access to justice in environmental affairs.<sup>44</sup> The European Court of Human Rights has asserted that the right to access information about environmental hazards is fundamentally linked to respect for privacy and family life.<sup>45</sup> When Ecuador subjected the Huaorani Indians’ lands to oil development without their approval, the Inter-American Commission on Human Rights declared:

Public participation in decision making allows those whose interests are at stake to have a say in the processes which affect them. Public participation is linked to Article 23 of the American Convention, which provides that every citizen shall enjoy the right “to take part in the conduct of public affairs, directly through freely chosen representatives,” as well as to the right to receive and impart information . . . . Affected individuals should be able to be informed about and have input into the decisions which affect them . . . . [I]ndividuals must have access to judicial recourse to vindicate the rights of life, physical integrity, and to live in a safe environment.<sup>46</sup>

Reforestation projects—but not avoided deforestation projects—are eligible for certification as offsets under the Clean Development Mechanism (CDM) provision of the UN Framework Convention on Climate Change (UNFCCC) and Kyoto Protocol.<sup>47</sup> The CDM allows private parties to implement sustainable development projects in the South that sequester carbon that would otherwise not be sequestered; those parties can then sell resulting carbon credits to entities that have required emissions reductions imposed by their nation’s adherence to the Kyoto Protocol.<sup>48</sup> The 2010 UNFCCC Cancun Agreements committed the international community to furthering REDD+ mitigation activities. The Agreements specify that “safeguards” must be developed, “ensuring the full and effective

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<sup>42</sup> U.N. Econ. & Soc. Council, *Non-Legally Binding Instrument on All Types of Forests*, at 4, U.N. Doc. A/C.2/62/L.5 (Oct. 22, 2007), available at [http://www.fordaq.com/www/news/2007/UN\\_Instrument%20on%20all%20types%20of%20forests.pdf](http://www.fordaq.com/www/news/2007/UN_Instrument%20on%20all%20types%20of%20forests.pdf).

<sup>43</sup> BANISAR ET AL., *supra* note 33, at 4–5.

<sup>44</sup> Jonas Ebbesson, *Public Participation*, in THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 681, 699 (Daniel Bodansky et al. eds., 2007).

<sup>45</sup> *Id.*

<sup>46</sup> Inter-Am. Comm’n H.R., *Report on The Situation of Human Rights in Ecuador*, at ch. VIII, OEA/SER.L/V/II.96 (Apr. 24, 1997), available at <http://www.cidh.oas.org/countryrep/ecuador-eng/index%20-%20ecuador.htm>.

<sup>47</sup> See Takacs, *supra* note 14, at 57–58 (discussing the methodological concerns driving that decision).

<sup>48</sup> *Id.* at 59–60.

participation of relevant stakeholders, inter alia indigenous peoples and local communities.”<sup>49</sup> But as recently as the 2012 Doha UNFCCC meetings, they have developed no performance indicators for ED or other safeguards.<sup>50</sup> As (and *if*) the UNFCCC’s safeguards framework evolves, it will specify the scope of the participation rights and legal responsibilities for project developers and local communities cooperating on REDD+ projects; these will likely mirror those seen both in the Aarhus Convention, and in the voluntary standards discussed below, and would further develop the legal content of ED rights.

International environmental norms are often developed by non-State actors.<sup>51</sup> “Voluntary” standards, or “soft law,” may harden into requirements in the future. Guidelines and principles in “voluntary” codes of conduct may serve as a template for future requirements, *e.g.*, those likely to be implemented in future UNFCCC REDD+ projects or eligible for future funding for REDD+ readiness funds.

In the absence of an overarching REDD+ legal framework for environmental participation rights (or any social and environmental safeguards), voluntary market certification schemes have set the norms for REDD+, including requirements for local citizen participation. The Climate, Community, & Biodiversity Alliance (CCBA) Standards are the most widely used. The CCBA has developed complex guidelines for projects and they have developed a set of comprehensive REDD+ Social and Environmental Standards for national or subnational REDD+, which Ecuador, Nepal, Acre in Brazil, and Kalimantan in Indonesia have adopted.<sup>52</sup>

These standards would govern all REDD+ activities at a national or regional level. Certification for projects that will bear the CCBA imprimatur requires achieving some degree of the three ED goals; the CCBA requires effective consultation, access to information, and a grievance process.<sup>53</sup> For example, CCBA-certified projects must “engage broadly with all community groups and other stakeholders using socially and culturally appropriate methods.” Pertinent stakeholders must be able to express concern and provide input on project design and the project proposers must document how they incorporate this feedback. Consultation must continue throughout

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<sup>49</sup> Conference of the Parties, Cancun, Mex., Nov. 29–Dec. 10, 2010, *Framework Convention on Climate Change, The Cancun Agreements: Outcome of the Work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention*, at 26, U.N. Doc. FCCC/CP/2010/7/Add.1 (Mar. 15, 2011), available at <http://unfccc.int/resource/docs/2010/cop16/eng/07a01.pdf>.

<sup>50</sup> Chhatre et al., *supra* note 12, at 664.

<sup>51</sup> Takacs, *supra* note 20, at 715–16; Naomi Johnstone, *Indonesia in the “REDD”: Climate Change, Indigenous Peoples and Global Legal Pluralism*, 12 ASIAN-PAC. L. & POL’Y J. 93, 100 (2010).

<sup>52</sup> CCBA, REDD+ SOCIAL & ENVIRONMENTAL STANDARDS: VERSION 2 (2010) [hereinafter REDD+ SOCIAL & ENVIRONMENTAL STANDARDS], available at [http://www.redd-standards.org/files/REDDSES\\_Version\\_2/REDDSES\\_Version\\_2\\_-\\_10\\_September\\_2012.pdf](http://www.redd-standards.org/files/REDDSES_Version_2/REDDSES_Version_2_-_10_September_2012.pdf).

<sup>53</sup> CCBA, CLIMATE, COMMUNITY AND BIODIVERSITY PROJECT DESIGN STANDARDS 16–17 (2d ed. 2008), available at [https://s3.amazonaws.com/CCBA/Upload/ccb\\_standards\\_second\\_edition\\_december\\_2008+\(1\).pdf](https://s3.amazonaws.com/CCBA/Upload/ccb_standards_second_edition_december_2008+(1).pdf).

the life of the project.<sup>54</sup> Yet even in this model voluntary code, affected citizens could not necessarily cancel a project, and certainly the standards do not require that local citizens propose, manage, and/or own the projects. And, as I will discuss below, “consultation” is not the same as “consent.”

Among the stakeholder participation requirements described in the REDD+ Social & Environmental Standards (for national or subnational REDD+) we find:

- Free, Prior and Informed Consent for indigenous peoples and local communities for any activities affecting their rights to land, territories, and resources;
- Benefits, costs, and risks are assessed for all relevant stakeholders;
- Adequate information about REDD+ is publicly available;
- All relevant rights holders participate fully and effectively, including procedures to
  - identify these rights holders;
  - ensure full and effective participation;
  - engage in socially and culturally appropriate approaches, include all relevant levels of government;
  - ensure self-directed representation;
  - respect and build on relevant local knowledge;
  - resolve grievances;
  - ensure that all pertinent information is provided to allow full and effective participation in program design and implementation;
  - build capacity for effective participation<sup>55</sup>

As governments adopt these standards to govern all REDD+ activities in their jurisdiction, they will have a powerful effect on how ED rights spread and are implemented. As they are increasingly incorporated into international and domestic law and voluntary standards, ED rights move closer to becoming required as custom. That does not mean, however, that it is always clear what is required and of whom; nor is it clear that fulfilling these legal requirements is practical or possible in REDD+.

### *C. The Principles*

The Aarhus Declaration codifies these principles:

- All citizens have the *right to participate* in environmental decision making for issues that affect their lives and livelihoods.
- All citizens have the *right to access information* about environmental decisions that may affect their lives and livelihoods.
- All citizens have *access to justice, including redress and remedy*, should their environmental participation rights be violated.

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<sup>54</sup> *Id.* at 17.

<sup>55</sup> REDD+ SOCIAL & ENVIRONMENTAL STANDARDS, *supra* note 52, at 9, 11, 14, 18–20.

Elaborating on the right to participate, the Aarhus Convention declares that the “public concerned shall be informed, either by public notice or individually as appropriate, early in an environmental decision-making procedure, and in an adequate, timely and effective manner” of the activity, the responsible authorities, the procedures for participation, and whether a formal Environmental Impact Assessment is envisaged.<sup>56</sup> The Convention requires (early) timing for effective participation and procedures for notification of all activities and decisions; that is to say, participation should occur at a stage in environmental decision making when such participation can actually influence the decision being contemplated.<sup>57</sup> The Convention stipulates that the public has the right to participate in decisions on specific activities affecting them, on more general plans and policies relating to the environment, and “during the preparation by public authorities of executive regulations and other generally applicable legally binding normative rules.”<sup>58</sup> As we will see below, some nations such as Vietnam have made some moves to include various stakeholders while formulating national REDD+ plans, yet this aspect of ED remains uncommon in REDD+.

The right to access information, as framed by Article 4 of the Aarhus Convention, stipulates that upon request, authorities must in reasonable time

in response to a request for environmental information, make such information available to the public, within the framework of national legislation, including false copies of the actual documentation containing or comprising such information: (a) Without an interest having to be stated; (b) In the form requested unless: (i) It is reasonable for the public authority to make it available in another form, in which case reasons shall be given for making it available in that form; or (ii) The information is already publicly available in another form.<sup>59</sup>

The Convention allows for exceptions where, for example, the request is too general or provision of information would undermine national security.<sup>60</sup> Article 5 is more proactive, requiring Parties to collect and disseminate information even absent specific requests.<sup>61</sup>

The UN-REDD Programme calls this right “freedom of information,” and uses it interchangeably with the right to access information.<sup>62</sup> UN reports proclaim that this is not only a fundamental human right, but is

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<sup>56</sup> Aarhus Convention, *supra* note 31, art. 6.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* art. 6–8.

<sup>59</sup> *Id.* art. 4, § 1.

<sup>60</sup> *Id.* art. 4, § 4(b).

<sup>61</sup> *Id.* art. 5, § 4.

<sup>62</sup> PETER NOORLANDER, UN-REDD PROGRAMME ENSURING INCLUSIVE, TRANSPARENT, AND ACCOUNTABLE NATIONAL REDD+ SYSTEMS: THE ROLE OF FREEDOM OF INFORMATION 3 (2013), available at [http://www.unredd.net/index.php?option=com\\_docman&task=doc\\_download&gid=9154&Itemid=53](http://www.unredd.net/index.php?option=com_docman&task=doc_download&gid=9154&Itemid=53).



crucial for transparent, accountable, and ultimately successful REDD+.<sup>63</sup> While the UN-REDD Programme emphasizes the need to proactively provide information,<sup>64</sup> I have seen that REDD+ may be so foreign to some community members that they simply would not know what information to request. Ideally the call for the right to information means that all affected stakeholders have the right to understand how REDD+ works; who is funding programs and where the money goes; who the project proponents and responsible government officials are; who makes decisions, when, and how; what the potential social and environmental impacts are; what the scheme is for benefit sharing; who has what legal rights to carbon, its associated properties,<sup>65</sup> and benefits flowing from those properties;<sup>66</sup> what grievance procedures and legal protections are in place; who receives benefits, and what must be done to guarantee those benefits.

Should environmental procedural rights be violated, affected citizens have the right to access to justice. Article 9.1 of the Aarhus Convention requires “an expeditious procedure established by law that is free of charge or inexpensive” if requests for pertinent information are refused, and Article 9.2 requires that qualified citizens have a right to “challenge the substantive and procedural legality of any decision, act or omission” subject to the right to participate in environmental decision making.<sup>67</sup> As I will discuss further below, grievance procedures are often an afterthought in REDD+.

In addition to the three environmental participation rights discussed above, a process of Free, Prior, and Informed Consent is required, particularly when planning projects that could impact the lives, livelihoods, and territories of indigenous or forest-dependent people.

Climate change disproportionately affects forest-dependent, indigenous people.<sup>68</sup> Indigenous people are more likely to be directly dependent on functional forest ecosystems—precisely the kinds of ecosystems climate change is most likely to affect.<sup>69</sup> They are also among the smallest planetary contributors to climate change and have been traditional guardians of intact forests.<sup>70</sup> Indigenous and other forest-dependent people are on the front line of noticing changes in ecological conditions and of being affected by those changes, while traditionally having little power to effect government or international development policy over the fate of forest resources.<sup>71</sup>

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<sup>63</sup> *Id.* at 17.

<sup>64</sup> *Id.* at 3.

<sup>65</sup> TAKACS, *supra* note 3, at 17–18.

<sup>66</sup> NOORLANDER, *supra* note 62, at 4.

<sup>67</sup> Aarhus Convention, *supra* note 31, art. 9.

<sup>68</sup> See Bracer et al., *supra* note 12, at 38; CARMENZA ROBLEDO ET AL., CLIMATE CHANGE AND GOVERNANCE IN THE FOREST SECTOR 10–12 (2008), available at [http://www.rightsandresources.org/documents/files/doc\\_857.pdf](http://www.rightsandresources.org/documents/files/doc_857.pdf); ANNELIE FINCKE, INT’L UNION FOR CONSERVATION OF NATURE INDIGENOUS PEOPLES AND REDD-PLUS: CHALLENGES AND OPPORTUNITIES FOR THE ENGAGEMENT OF INDIGENOUS PEOPLES AND LOCAL COMMUNITIES IN REDD-PLUS 2 (2010), available at [http://cmsdata.iucn.org/downloads/a4\\_iucn\\_indigenous\\_peoples\\_and\\_redd\\_.pdf](http://cmsdata.iucn.org/downloads/a4_iucn_indigenous_peoples_and_redd_.pdf).

<sup>69</sup> FINCKE, *supra* note 68, at 2.

<sup>70</sup> *Id.*; See UN-REDD PROGRAMME, *supra* note 26, at 8; Baez, *supra* note 40, at 840.

<sup>71</sup> See FINCKE, *supra* note 68, at 5.

Both treaty law and customary international law support the right of indigenous peoples to manage their own environmental resources.<sup>72</sup> The Convention on the Elimination of All Forms of Racial Discrimination (CERD), the American Convention on Human Rights, and the International Labour Organisation Convention 169 (Indigenous and Tribal Peoples Convention) all require FPIC to ensure that the underlying substantive rights are fulfilled.<sup>73</sup> The Convention on Biological Diversity requires that “[a]ccess to traditional knowledge, innovations and practices of indigenous and local communities should be subject to prior informed consent or prior informed approval from the holders of such knowledge, innovations and practices.”<sup>74</sup>

The 2007 UN Declaration on the Rights of Indigenous Peoples (UNDRIP), in addition to general admonitions on the right of indigenous peoples to participate in decision making, and requiring FPIC conducted “in good faith . . . through their own representative institutions,” specifies environmental participation rights when natural resource decisions are made.<sup>75</sup> Certainly, indigenous peoples can never be relocated without FPIC “and after agreement on just and fair compensation and, where possible, with the option of return.”<sup>76</sup> Indigenous peoples have the right to determine

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<sup>72</sup> For an overview of indigenous people and environmental law, see Benjamin J. Richardson & Donna Craig, *Indigenous Peoples, Law and the Environment*, in ENVIRONMENTAL LAW FOR SUSTAINABILITY: A READER 195, 196 (Benjamin J. Richardson & Stepan Wood eds., 2006); see also International Labour Organization Convention 169: Indigenous and Tribal Peoples Convention, June 27, 1989, 28 I.L.M. 1382, art. 15 [hereinafter ILOC Convention], available at [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C169](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169); Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295, art. 25–26, 29, 32 (Sept. 13, 2007), available at [http://www.un.org/esa/socdev/unpfi/documents/DRIPS\\_en.pdf](http://www.un.org/esa/socdev/unpfi/documents/DRIPS_en.pdf); Russell Lawrence Barsh, *Indigenous Peoples*, in THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 845 (Daniel Bodansky et al. eds., 2007) (acknowledging indigenous right to ownership of their “total environment”); DAVID HUMPHREYS, LOGJAM: DEFORESTATION AND THE CRISIS OF GLOBAL GOVERNANCE 208 (2006) (providing an example of CDM being criticized for failing to include provisions protecting the rights of indigenous peoples in its forest policies); International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171, art. 1.1–1.2, available at <http://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf>; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3, art. 1.1–1.2, available at <http://www.refworld.org/docid/3ae6b36c0.html>.

<sup>73</sup> See Committee on the Elimination of Racial Discrimination, General Recommendation XXIII: Indigenous Peoples, ¶ 5, U.N. Doc. A/52/18/Annex V (Aug. 18, 1997), available at <http://www.unhcr.ch/tbs/doc.nsf/MasterFrameView/73984290dfea022b802565160056f1c>; Mary & Carrie Dann v. United States, Case 11.140, Inter-Am. Comm’n H.R., Report No. 75/02, doc. 5 rev. 1, ¶ 131 (2002), available at <http://www.law.arizona.edu/depts/iplp/international/shoshone/documents/DannIACHRPubRpt7502.pdf> (“[T]his approach includes the taking of special measures to ensure recognition of the particular and collective interest that indigenous people have in the occupation and use of their traditional lands and resources and their right not to be deprived of this interest except with fully informed consent, under conditions of equality, and with fair compensation.”); ILOC Convention, *supra* note 72, art. 16.

<sup>74</sup> UNEP, REPORT OF THE FIFTH MEETING OF THE CONFERENCE OF THE PARTIES TO THE CONVENTION ON BIOLOGICAL DIVERSITY, 143, ¶ 5 (2000), available at <https://www.cbd.int/doc/meetings/cop/cop-05/official/cop-05-23-en.pdf>.

<sup>75</sup> See Declaration on the Rights of Indigenous Peoples, *supra* note 72, art. 10, 18–19, 28(1), 32.

<sup>76</sup> Declaration on the Rights of Indigenous Peoples, *supra* note 72, art. 10.

priorities for their own land, territories, and resources; states must “consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources,” and must offer access to justice when adverse environmental impacts occur.<sup>77</sup>

#### *D. FPIC: What Does it Mean?*

According to the Center for People and Forests, FPIC is “the establishment of conditions under which people exercise their fundamental right to negotiate the terms of externally imposed policies, programs, and activities that directly affect their livelihoods or wellbeing, and to give or withhold their consent to them.”<sup>78</sup>

The UN-REDD Programme Operational Guidance explains the terms of FPIC in the REDD+ context. UN-REDD has thus far invested over \$170 million dollars to help nations get ready for REDD+, and the Programme’s publications provide some of the best-developed and most rigorous guidelines for ED in REDD+.<sup>79</sup> According to UN-REDD, “Free” means “no coercion, intimidation, or manipulation.”<sup>80</sup> “Prior” suggests that consent has been sought well in advance of REDD+ implementation, and respects “time requirements of indigenous consultation/consensus processes.”<sup>81</sup> “Informed” means that sufficient information has been given with a) “[t]he nature, size, pace, reversibility, and scope” of any project; b) purposes of the project; c) duration of the project; d) location of the project; e) “preliminary assessment of the likely economic, social, cultural and environmental impact, including potential risks and fair and equitable benefit sharing in a context that respects the precautionary principle; f) personnel likely to be involved; and g) procedures of the project.”<sup>82</sup> The information should be provided in a culturally and linguistically appropriate manner.<sup>83</sup> Finally, “consent” must be secured in sufficient time, with sufficient representation of minority groups and women, should include the groups’ own chosen representatives, and should include the option of withholding consent.<sup>84</sup> As I will explain, each of the elements of FPIC is difficult to achieve in REDD+.

In the REDD+ context, I view the first two Aarhus principles—the right to participate in environmental decision making, and the right to access

<sup>77</sup> *Id.* art. 19.

<sup>78</sup> ANDERSON, *supra* note 23, at 15.

<sup>79</sup> See UN-REDD Programme, *About the UN-REDD Programme*, <http://www.un-redd.org/AboutUN-REDDProgramme/tabid/102613/Default.aspx> (last visited Feb. 22, 2014).

<sup>80</sup> UN-REDD PROGRAMME, UN-REDD PROGRAMME OPERATIONAL GUIDANCE: ENGAGEMENT OF INDIGENOUS PEOPLES & OTHER FOREST DEPENDANT COMMUNITIES 8 (2009) [hereinafter UN-REDD PROGRAMME OPERATIONAL GUIDANCE], *available at* <http://www.un-redd.org/Portals/15/documents/events/20090309Panama/Documents/UN%20REDD%20IP%20Guidelines%2023Mar09.pdf>.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> Goldberg & Badua, *supra* note 25, at 70.

<sup>84</sup> UN-REDD PROGRAMME OPERATIONAL GUIDANCE, *supra* note 80, at 8.

pertinent environmental information—as means to the end of Free, Prior, Informed Consent to REDD+. The first two ED norms are themselves en route to becoming customary norms, plus they describe a system for defining and realizing FPIC rights. Implementing the right to information or the right to participate is insufficient unless they are in service of helping local people give genuinely free, prior, informed consent. FPIC advocates are not merely looking for access to information for education’s sake, and they don’t merely want to participate or be heard: They want a genuine, fully participatory, equal, democratic process where fundamental decisions about their land don’t happen unless they are copartners, unless they consent to these decisions and they are coconspirators every step of the way. Because the first two Aarhus principles are difficult to fulfill in REDD+, FPIC is difficult to achieve. In the REDD+ context, “access to justice” is required if the first two ED rights or FPIC doesn’t occur. In reality, in REDD+, FPIC is not always free, prior, or fully informed, as I will discuss below.

#### *E. FPIC’s Imprecise Legal Status: To Whom?*

The specific legal requirements of FPIC are still emerging in international law. Who requires FPIC and other ED rights in REDD+? Is it just indigenous people? It is not always clear to whom FPIC applies—both who must give free prior and informed consent and who must seek it. Who counts as “indigenous?” Where do we draw the geographic, ethnic, and “impacted” bounds on required consultation and consent?

FPIC appears most often in legal documents as applied to indigenous, forest-dependent, or tribal peoples. But one scholar notes that “[t]he term ‘indigenous peoples’ has never been authoritatively defined.”<sup>85</sup> The UN Declaration on the Rights of Indigenous People, which requires FPIC, never defines who comprises ‘indigenous people.’<sup>86</sup> UN-REDD notes that “[t]he international community has not adopted a common definition of indigenous peoples, but the prevailing view today is that no formal universal definition is necessary for the recognition and protection of their rights.”<sup>87</sup> That’s a tricky legal position to maintain: If there’s no agreed upon definition of who counts as “indigenous,” then there can be no agreed upon definition of to whom FPIC or other ED rights are owed.

The International Labour Organization Convention 169, the Indigenous and Tribal Peoples Convention, attempts a more precise definition. The Convention applies to:

- (a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;

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<sup>85</sup> Barsh, *supra* note 72, at 835.

<sup>86</sup> United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007).

<sup>87</sup> UN-REDD PROGRAMME, *supra* note 26, at 36.

(b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.<sup>88</sup>

UN-REDD offers the following chart to clarify to whom FPIC might apply<sup>89</sup>:

They identify themselves as indigenous peoples and are, at the individual level, accepted as members by their community;

They have historical continuity or association with a given region or part of a given region prior to colonization or annexation;

They have strong links to territories and surrounding natural resources;

They maintain, at least in part, distinct social, economic and political systems;

They maintain, at least in part, distinct languages, cultures, beliefs and knowledge systems;

They are resolved to maintain and further develop their identity and distinct social, economic, cultural and political institutions as distinct peoples and communities; and

They typically form non-dominant sectors of society.<sup>90</sup>

It is clear that some degree of FPIC is required in REDD+. But to whom, by whom and what the content of that requirement comprises is still amorphous. In only a few cases—as in siting hazardous waste on indigenous land or when contemplating forced relocation—is FPIC legally mandated.<sup>91</sup> And in some cases, activists fear, REDD+ could result in forced relocation.<sup>92</sup> The UN Special Rapporteur on the rights of indigenous peoples declares that “[a] significant, direct impact on indigenous peoples’ lives or territories establishes a strong presumption that the proposed measure should not go

<sup>88</sup> ILO Convention, *supra* note 72, art. 1.

<sup>89</sup> UN-REDD PROGRAMME, *supra* note 26, at 38.

<sup>90</sup> *Id.*

<sup>91</sup> See LEGAL COMPANION TO THE UN-REDD PROGRAMME, *supra* note 1, at 20, 42 (requesting that states consult with indigenous peoples regarding relocation and storage of waste).

<sup>92</sup> See, e.g., Adam Russell, *Indigenous Leaders Rejecting California REDD Hold Governor Responsible for Their Safety*, FRIENDS OF THE EARTH, Oct. 24, 2012, <http://www.foe.org/news/archives/2012-10-indigenous-leaders-rejecting-california-redd-hold-go> (last visited Feb. 22, 2014); Chris Lang, *Statement from Chiapas, Mexico: REDD Project is a Climate Mask “to Cover up the Dispossession of the Biodiversity of the Peoples,”* REDD-MONITOR.ORG, Sept. 7, 2011, <http://www.redd-monitor.org/2011/09/07/statement-from-chiapas-mexico-redd-project-is-a-climate-mask-to-cover-up-the-dispossession-of-the-biodiversity-of-the-peoples/> (last visited Feb. 22, 2014) (“But what Governor Sabines describes as voluntary resettlement takes on a darker shade from the viewpoint of those with no land rights. At the village assembly in Amador Hernández, villagers stood up one by one to denounce what they perceived as a land grab.”).

forward without indigenous peoples' consent."<sup>93</sup> Many REDD+ schemes would meet this description.

The universe of subjects of FPIC—"indigenous," "forest dependent" and "local" people—is difficult to pin down. How far from the forest does one have to be to exercise ED rights? What customary rights or knowledge entitles one to participate? In the project we investigated in Vietnam, some "indigenous" people left the region for decades during the Vietnam War and have recently moved back to the area; others had been "indigenous" to some other location and are new to the project site.<sup>94</sup> Our field interviews suggest that local residents displayed little cultural attachment to, or knowledge of, the surrounding forest, much of which has been deforested or degraded for decades. Does this somehow earn them fewer ED rights?

Indigenous peoples claim special rights in international law because of historic and ongoing connection to a piece of land that may predate the sovereignty of the modern nation state.<sup>95</sup> Patrick Macklem argues that

Indigenous rights in international law mitigate some of the adverse consequences of how the international legal order continues to validate what were morally suspect colonization projects by imperial powers. Indigenous peoples in international law are communities that manifest historical continuity with societies that occupied and governed territories prior to European contact and colonization.<sup>96</sup>

In a world where true equity obtained, we would recognize the historical and present day inequities facing indigenous, forest-dependent peoples, and realize that REDD+ can foment intergenerational equity both by preserving sustainable forest use options for future generations, and promote intragenerational equity by generating income to compensate those who will be protecting forests and foregoing opportunities they could otherwise pursue.

Does that mean that only formally recognized indigenous people have international ED rights, including FPIC? Suspect colonization projects leave their legacies on all colonized peoples. The colonization continues because of lopsided power relations in most modern endeavors, including development projects, despite the idealized fiction of "sovereign equality," and REDD+ is no different. Furthermore, while UNDRIP is imprecise in who falls under its aegis, it is forceful in its protections of indigenous people and

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<sup>93</sup> U.N. Human Rights Council, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, ¶ 47 U.N. Doc. A/HRC/12/34 (July 15, 2009).

<sup>94</sup> Author's personal observations from field work in Kom Tum Province, Vietnam, December 2012.

<sup>95</sup> See generally U.N. DEP'T OF ECON. & SOC. AFFAIRS, STATE OF THE WORLD'S INDIGENOUS PEOPLES 52–55 (2009) (discussing the unique international legal rights of indigenous peoples that arise out of their "profound spiritual relationship with their land and natural resources").

<sup>96</sup> Patrick Macklem, *Indigenous Recognition in International Law: Theoretical Observations*, 30 MICH. J. INT'L L. 177, 179 (2008).

thus creates perverse incentives for local people to allege indigeneity even if they are not technically indigenous.<sup>97</sup>

Exact definitions of indigeneity will be important in domestic legal systems where formally recognized indigenous groups' accrue land tenure and political self determination rights (and thus access to REDD+), especially since indigenous people often lack formal legal property rights to the land their people have long inhabited.<sup>98</sup> But even if we can find some precision in who counts as "indigenous," a flow chart offered by the Center for People and Forests (RECOFTC) asks, "Do indigenous peoples or local communities have customary and/or legal rights to the area?" If "none," then "No FPIC needed."<sup>99</sup> But that cannot be right. ED rights, including FPIC, exist because the underlying substantive rights to food, housing, etc. are essential to human sustenance and dignity.

While I recognize that indigenous people have special dispensation for specialized legal treatment, this does not mean such ED rights devolve only to them. Women, ethnic minority groups, and extremely poor people should all have ED rights, and the barriers to them participating may be particularly high due to intravillage discrimination, traditional gender roles, or the need to work or take care of families.<sup>100</sup> I agree with Kelly, who states that "an inclusive definition which encompasses all groups that may be affected by the introduction to REDD would be preferable."<sup>101</sup>

I believe that ED rights extended to indigenous peoples should be extended to all local people whose livelihoods are directly intertwined with functioning forests—through current use of forest lands or products—or through direct dependence on ecosystem services forests are providing. The legal principles undergirding intragenerational equity and sustainable development say that people who are now dependent on forests should have a say in how those forests are managed or developed. If REDD+ constrains traditional use of land, or even dispossesses people of their customary land, its implementers will violate basic human rights.<sup>102</sup> Furthermore, as I will discuss below, extending ED rights will more likely result in a sustainable REDD+ over the long run. Some REDD+ ED "law" follows the REDD+ Social & Environmental Standards, which require FPIC "of Indigenous Peoples and local communities for any activities affecting their rights to lands, territories and resources."<sup>103</sup>

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<sup>97</sup> *Id.* at 202–03.

<sup>98</sup> Maria Banda & John Oppermann, *Building a Latin American Coalition on Forests: Negotiation Barriers and Opportunities*, 44 VAND. J. TRANSNAT'L L. 527, 544 (2011).

<sup>99</sup> ANDERSON, *supra* note 23, at 24–25.

<sup>100</sup> See generally JOSEPH FOTI & LALANATH DE SILVA, WORLD RESOURCES, INST., A SEAT AT THE TABLE: INCLUDING THE POOR IN DECISIONS FOR DEVELOPMENT AND ENVIRONMENT 5 (2010), available at [http://pdf.wri.org/a\\_seat\\_at\\_the\\_table.pdf](http://pdf.wri.org/a_seat_at_the_table.pdf) (explaining the access barriers the poor face); UN-REDD PROGRAMME, *supra* note 26, at 44.

<sup>101</sup> Kelly, *supra* note 6, at 65.

<sup>102</sup> See, e.g., ILOC Convention, *supra* note 72, art. 14 (requiring recognition of the rights and ownership of lands traditionally occupied by indigenous and tribal people).

<sup>103</sup> REDD+ SOCIAL & ENVIRONMENTAL STANDARDS, *supra* note 52, at 9.

Thus, this project avoids the legal semantics of who “counts” as indigenous or forest-dependent and instead urges that ED rights extend to all communities whose lives and livelihoods depend directly on the forest. I say “directly” because all of our lives depend upon distant forests whose living biomass act as the lungs of the world; this is a central truth of REDD+, without which we would never be talking about carbon offsetting in the first place. Rather than get caught up in debates about which category of people merit ED rights, those rights should devolve to anyone with an ecological, spiritual, or cultural attachment to neighboring forests that are candidates for REDD+; to anyone who is directly dependent upon forests for their sustenance; and to anyone with particular knowledge of the biodiversity, legal tenure, history or ecological changes of REDD+ forests.

All forest-dependent people should have the basic rights to participate in, and give consent to activities such as REDD+ if those activities will fundamentally affect their ability to use forest products and will fundamentally decide how healthy local forests will remain. For pragmatic reasons—both because it is or eventually will become custom, and because by observing these guidelines, synergistic benefits will accrue—I treat FPIC as a legal norm and suggest all REDD+ participants do so, too. Rather than engage with the semantics of who, what, when, and where FPIC and the other ED rights apply, my best advice is to take the broadest possible view of FPIC requirements, both because such interpretations are more likely to lead to sustainable REDD+ projects, and because FPIC and other ED rights are crucial for realizing underlying human rights obligations. Furthermore, if FPIC is not a clearly defined customary principle right now, it is on its way to becoming so: REDD+ projects and programs last a long time, and all stakeholders should take the prudent, longterm view.

*F. FPIC's Imprecise Legal Status: When, to What, by Whom, Where?*

UN-REDD notes “that there is, as of yet, no single internationally agreed definition of FPIC nor a one-size fits all mechanism for its implementation.”<sup>104</sup> As noted above, it seems clear that some degree of FPIC is required for some projects for some groups of indigenous (and other) people, it is difficult to know exactly when and where. For example, the UN-REDD Programme acknowledges that FPIC may be a “right,” a “principle,” or something else; but “[n]o description changes the fact that all the authorities agree that it is a normative obligation [and] . . . a requirement that imposes affirmative duties and obligations on States.”<sup>105</sup> While I would assert it is more of a “right” than a principle—both because of the growing body of law backing the right,<sup>106</sup> and because equitable treatment of those around us

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<sup>104</sup> UN-REDD PROGRAMME, *supra* note 26, at 10.

<sup>105</sup> *Id.* at 9–10.

<sup>106</sup> See LEGAL COMPANION TO THE UN-REDD PROGRAMME, *supra* note 1, at 4 (stating 200 states have adopted numerous treaties and covenants recognizing duties to obtain FPIC); see also Richardson & Craig, *supra* note 72, at 203–06 (describing development of indigenous rights,



demands it as a right—this is not the paper to parse these semantics. Suffice it to say that FPIC’s precise legal status remains murky.

Whether or not FPIC is legally required in a given case, in REDD+ it is not clear precisely what communities are consenting to. The Center for People and the Forests provides an eight-step pathway for what local participants in REDD+ might need to consent to.<sup>107</sup> In theory, a nation’s REDD+ legal framework would obtain local “consent to REDD+ as a possible solution to the forestry-related drivers of climate change that will impact the forests of indigenous peoples and local communities.”<sup>108</sup> Several nations have surveyed local communities for input (i.e., they have “consulted” representative groups), I know of no mechanism for nations or subnational entities to gain *consent* from affected communities or groups.

Each of the Center’s other possible consent points illustrate both best practices for ED, and how difficult it will be for project proponents to achieve those best practices. Among the items to which consent should be given we find:

- Method of calculating baseline (of forest cover)
- Analysis of drivers of deforestation (especially to drivers to which consent gives currently contribute)
- Forest management plans
- Benefit sharing arrangements
- Forestry practices that would change with REDD
- Renewing consent when issues arise
- Ceasing the project or program<sup>109</sup>

No REDD+ projects or standards currently require consent at all of these junctures.<sup>110</sup>

Often in REDD+, the chain of command is opaque and thus it is not clear who must seek out and obtain FPIC. Although scholars and activists may argue that it should be otherwise, governments have primary, formal responsibilities under international law to respect, protect, and fulfill the human rights of citizens. This includes the ED rights, including FPIC.<sup>111</sup> But private developers often hold the strings for REDD+. Government officials sometimes don’t even know about projects going on in their country.<sup>112</sup> Or, as in so many other kinds of international development, the promise of foreign aid filling government coffers—or, in some cases, filling corrupt officials’

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including participatory rights, in international law); ILO Convention, arts. 6, 16; Declaration on the Rights of Indigenous Peoples, *supra* note 72, arts. 10, 19, 28, 29, 32.

<sup>107</sup> ANDERSON, *supra* note 23, at 23.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 4 (explaining that respect for FPIC in REDD+ projects is “evolving”).

<sup>111</sup> Jason Prno & D. Scott Slocombe, *Exploring the Origins of ‘Social License to Operate’ in the Mining Sector: Perspectives from Governance and Sustainability Theories*, 37 RESOURCES POL’Y 346, 349 (2012).

<sup>112</sup> See Michael L. Brown, *Limiting Corrupt Incentives in a Global REDD Regime*, 37 ECOLOGY L.Q. 237, 253 (2010).

pockets<sup>113</sup>—leads government officials to approve projects and to ignore local opposition or not seek out local opinion. Getting over this “principle-agent problem”—motivating one party to act in ways that benefit the broader good—will be challenging. Nonetheless, in countries where the government does not respect and protect ED rights and where government officials are not accountable to the people, REDD+ and all development may fail, or at least lead to unwanted consequences for poor people and the forests that sustain them. As Richard Herz puts it: “Only meaningful political participation can break this vicious cycle, under which repression, environmental degradation and destructive ‘development’ persist *ad infinitum*.”<sup>114</sup>

When so much is at stake for vital resources upon which local people depend—whether those resources are preserved in a way that sustains a local community or it is barred from using life-sustaining resources—the community’s underlying substantive human rights that are established in international law must be respected. International law traditionally imposes affirmative duties only on states; but so many disparate actors beyond the State are involved in REDD+.<sup>115</sup> I believe any actor having fundamental power to control local access to vital resources should obtain FPIC from local communities and proactively provide the information a community needs to give genuinely informed consent. No matter what the State’s formal obligation or actual capacity to supervise REDD+, it is a requirement (and simply prudent) that project developers respect FPIC to the maximum extent practicable to the widest feasible network of local actors. That is, no matter what the specific legal status of FPIC, or the formal legal status of both the project actors or the community members, it makes deeply equitable—but also deeply pragmatic—sense that all project actors extend maximum FPIC to the maximum number of practicable parties.

#### IV. THE PRAGMATIC CASE FOR ED RIGHTS IN REDD+

In REDD+, ED rights are crucial if local people are to make informed decisions about whether or not to participate and consent. Below I will discuss how difficult it is to fulfill these norms. But despite the time, cost, and complexity that genuine community participation adds to REDD+, I will suggest that at least six reasons should compel project officials to engage stakeholders early, often, and with culturally and linguistically appropriate materials: 1) Community participation may be legally required under domestic or international law; 2) community participation may be required under the voluntary standards a project developer uses; 3) incorporating community feedback early and often is likely to result in a better designed

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<sup>113</sup> *Id.* at 241–42, 250; see UN-REDD PROGRAMME, SCOPE OF WORK: TOWARDS A “GOVERNANCE MRV FRAMEWORK” 3 (2009), available at <http://europeandcis.undp.org/ourwork/environment/show/5979879F-F203-1EE9-B50CDC856DB6038E>.

<sup>114</sup> Richard Herz, *Making Development Accountable to Human Rights and Environmental Protection*, 94 AM. SOC. OF INT. L., 216, 217 (2000); Chhatre et al., *supra* note 12, at 656–57.

<sup>115</sup> Takacs, *supra* note 20, at 715–16.

project; 4) involving community members from the onset is likely to improve community buy-in, making it more likely the community will respect the terms of the project and participate fully in its success—in other words, spending money up front means lower implementation costs over the course of the project;<sup>116</sup> 5) maximizing community participation in successful projects provides a pragmatic model for other deeply equitable environmental sustainable development projects;<sup>117</sup> 6) what is merely savvy and “pragmatic” today may be legally required tomorrow, as ED rights are growing in international law. In sum, there are legal, pragmatic, and ethical reasons to pay close attention to stakeholder participation.

ED rights empower local citizens to make informed decisions for their communities. This is not merely a non-consequentialist good. It is essential because local people’s livelihoods and human rights are fundamentally intertwined with the functioning ecosystems that support them. Poor people in the developing world are most directly affected by climate change<sup>118</sup> and by programs that attempt to mitigate climate change or help them adapt, no matter how well meaning.

Realizing ED rights for local people is not just equitable, and perhaps legally required; it’s also the only pragmatic way to achieve synergistic benefits over the thirty (or more) years of a REDD+ project. As one observer put it, “REDD will never succeed . . . without the involvement of the [communities] that are making decisions every day as to whether to cut a tree down or leave it standing.”<sup>119</sup> REDD+ developments that engage full ED rights will more likely reflect the ecological or social safeguards that local people desire and will be more accountable to local people.<sup>120</sup> Engaging fully with local people is likely to make a more sustainable (i.e., effective, synergistic, equitable) REDD+ project.

Drawing from disparate sources of expertise is not just fair (even if expensive)—it is smart.<sup>121</sup> There is an epistemological basis for relying on

<sup>116</sup> Chhatre et al., *supra* note 12, at 657.

<sup>117</sup> Judith E. Innes & David E. Booher, *Reframing Public Participation: Strategies for the 21st Century*, 5 PLAN. THEORY & PRAC. 419, 422 (2004).

<sup>118</sup> Carmen G. Gonzalez, *Environmental Justice and International Law*, in ROUTLEDGE HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 77, 95 (Shawkat Alam et al. eds., 2013); ERIC A. POSNER & DAVID WEISBACH, CLIMATE CHANGE JUSTICE 11 (2010); Maxine Burkett, *Climate Reparations*, 10 MELBOURNE J. INT’L L. 509, 513–14 (2009); Andrew C. Revkin, *Poor Nations to Bear Brunt as World Warms*, N.Y. TIMES, Apr. 1, 2007, <http://www.nytimes.com/2007/04/01/science/earth/01climate.html?pagewanted=all> (last visited Feb. 22, 2014). See KENNETH M. CHOMITZ ET AL., WORLD BANK, AT LOGGERHEADS? AGRICULTURAL EXPANSION, POVERTY REDUCTION, AND ENVIRONMENT IN THE TROPICAL FORESTS xi (2007), available at <http://elibrary.worldbank.org/doi/pdf/10.1596/978-0-8213-6735-3> (log-in access required).

<sup>119</sup> Nicholas Anderson, *REDDy or Not? The Effects on Indigenous Peoples in Brazil of a Global Mechanism for Reducing Emissions from Deforestation and Degradation*, J. SUSTAINABLE DEV., Nov. 2009, at 18, 26 (citing an unidentified interview participant); see also UN-REDD PROGRAMME, *supra* note 26, at 5.

<sup>120</sup> Benjamin J. Richardson & Jona Razzaque, *Public Participation in Environmental Decision-making*, in ENVIRONMENTAL LAW FOR SUSTAINABILITY: A READER 165, 166 (Benjamin J. Richardson & Stepan Wood eds., 2006).

<sup>121</sup> David Takacs, *How Does Your Positionality Bias Your Epistemology?*, THOUGHT & ACTION, Summer 2003, at 28–29.

different kinds of expertise when designing and implementing REDD+ projects. One of the hallmark elements of REDD+ is that so very many stakeholders with so very different interests in REDD+ have so many different kinds of expertise, and REDD+ requires all of these kinds of expertise to work. ED supposes that each of us is constrained by our experiences and each of us only has limited knowledge of the world. Local people have vital, distinctive knowledge of forest ownership, products, biodiversity, history and health; project developers ignore this knowledge at their own peril. Indigenous and other forest dependent, local people are on the front line of noticing changes in ecological conditions and of being affected by those changes,<sup>122</sup> while traditionally having little power to effect government or international development policy over the fate of forest resources.<sup>123</sup> A forest engineer or ecologist may view and calculate potential social and environmental impacts very differently than would a local, forest-dependent citizen.<sup>124</sup> All of this knowledge will matter if REDD+ is to work.

Incorporating local forest users' knowledge and soliciting their free, prior, and informed consent makes good business sense.<sup>125</sup> Respecting ED rights reduces the transaction costs of enforcement and thus money spent upfront is recouped later.<sup>126</sup> One article recommends that project managers secure FPIC early and often—both for the communities' and their own benefits—and that host governments require these FPIC processes before granting permits.<sup>127</sup> Development project sponsors who maximize ED rights will be at “a strong competitive advantage over their industry peers. These companies may be able to reduce project costs below their competitors' costs, or develop projects that would be too risky for a sponsor with a less sophisticated understanding of how to achieve community support.”<sup>128</sup>

Respecting ED rights makes it more likely project sponsors can avoid the cautionary tales of past development projects with inadequate ED mechanisms.<sup>129</sup> Certainly REDD+ developers will prefer working with cooperative local people rather than resentful local people who might

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<sup>122</sup> “Incorporating indigenous knowledge into climate change policies can lead to the development of effective adaptation strategies that are cost-effective, participatory and sustainable.” Secretariat of the U.N. Permanent Forum on Indigenous Issues, U.N. Dept. of Econ. & Soc. Affairs, Div. for Soc. Policy & Dev., *Climate Change: An Overview*, at 11 (Nov. 2007), available at [http://www.un.org/esa/socdev/unpfii/documents/EGM\\_cs08\\_Overview.doc](http://www.un.org/esa/socdev/unpfii/documents/EGM_cs08_Overview.doc).

<sup>123</sup> See *id.* at 4 (outlining the limited participation of indigenous groups in high level policy); see also FINCKE, *supra* note 68, at 5 (outlining REDD-plus goals objectives for involvement of indigenous peoples).

<sup>124</sup> See Ciaran O'Faircheallaigh, *Public Participation and Environmental Impact Assessment: Purposes, Implications, and Lessons for Public Policy Making*, 30 ENVTL. IMPACT ASSESSMENT R. 19, 21 (2010).

<sup>125</sup> UN-REDD PROGRAMME, *supra* note 26, at 16.

<sup>126</sup> Chhatre, *supra* note 12, at 654–55.

<sup>127</sup> STEVEN HERZ ET AL., WORLD RES. INST., *DEVELOPMENT WITHOUT CONFLICT: THE BUSINESS CASE FOR COMMUNITY CONSENT 3* (Jonathan Sohn ed., 2007), available at [http://pdf.wri.org/development\\_without\\_conflict\\_fpic.pdf](http://pdf.wri.org/development_without_conflict_fpic.pdf). One difficulty for REDD+: At least at the project level, REDD+ can proceed without government approval or even knowledge.

<sup>128</sup> *Id.* at 48.

<sup>129</sup> See ANDERSON, *supra* note 23, at 10.

undermine REDD+'s success—full participation leads to higher likelihood of acceptance and compliance with REDD+ project goals.<sup>130</sup> REDD+ has faced resistance from local people, and projects have failed as a result.<sup>131</sup> Indigenous and other rural, forest dependent people often start from a position of mistrust for externally imposed development programs, even ones that hypothetically would help them. A survey of indigenous groups prior to the launching of the World Bank's Forest Carbon Partnership Facility noted that the FCPF does not acknowledge UNDRIP, does not afford ED rights to indigenous people, is "top down," and could lead to expropriating traditional land to expand protected areas (or plantation forestry) without adequate consultation.<sup>132</sup> A formal statement at the 2007 UNFCCC Conference of Parties from the International Forum of Indigenous Peoples warned that REDD+ "will increase the violation of [their] Human Rights, [their] rights to [their] lands, territories, and resources, steal [their] land, cause forced evictions, prevent access and threaten indigenous agricultural practices, destroy biodiversity and cultural diversity and cause social conflicts."<sup>133</sup> In mining projects, for example, failure to observe ED has resulted in aggressive resistance from local communities.<sup>134</sup> Sohn provides an overview of development projects where developers did engage in FPIC

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<sup>130</sup> BANISAR ET AL., *supra* note 33, at 3 (arguing that without adequate stakeholder engagement, successful outcomes are more difficult to achieve); ANDERSON, *supra* note 23, at 10–12 (explaining that when not fully engaged, indigenous populations halted developments in Peru and remain negatively affected by voluntary carbon-offsets in uplands Ecuador).

<sup>131</sup> See REDD-Monitor.org, *REDD in the News*, <http://www.redd-monitor.org/redd-in-the-news/> (last visited Feb. 22, 2014) (containing near daily postings criticizing REDD and arguing that without indigenous participation, projects are failures); Johnstone, *supra* note 51, at 101–02 (discussing solutions beginning with local communities); ANDERSON, *supra* note 23, at 9–11; GREENPEACE, *OUTSOURCING HOT AIR 11* (2012), available at <http://www.greenpeace.org/international/en/publications/Campaign-reports/Forests-Reports/Outsourcing-Hot-Air/> (reporting Greenpeace research that found failed or underperforming REDD projects in Bolivia, Brazil, Uganda, and Mozambique); Larry Lohman, *Carbon Trading: A Critical Conversation on Climate Change, Privatisation, and Power*, DEVELOPMENT DIALOGUE, Sept. 2006, at 230–33 (outlining failed REDD programs where local communities faced barriers such as geography, climate and lack of training that prevented them from completing work outside of traditional unpaid collective labor, known as *minga*).

<sup>132</sup> FOREST PEOPLES PROGRAMME, *SOME VIEWS OF INDIGENOUS PEOPLES AND FOREST-RELATED ORGANISATIONS ON THE WORLD BANK'S 'FOREST CARBON PARTNERSHIP FACILITY' AND PROPOSALS FOR A 'GLOBAL FOREST PARTNERSHIP'* 3–4 (2008), available at <http://www.forestpeoples.org/sites/fpp/files/publication/2010/08/fcpfipsurveyfeb08eng.pdf>.

<sup>133</sup> Goldberg & Badua, *supra* note 25, at 63; International Forum of Indigenous Peoples on Climate Change (IPFIPCC), *Statement by the International Forum of Indigenous Peoples on Climate Change (IPFIPCC) on 'Reduced Emissions from Deforestation and Forest Degradation' (REDD) Agenda Item at the UNFCCC Climate Negotiations*, FOREST PEOPLES PROGRAMME, Nov. 1, 2007, <http://www.forestpeoples.org/topics/un-framework-convention-climate-change-unfccc/news/2011/05/statement-international-forum-indi> (last visited Feb. 22, 2014).

<sup>134</sup> Prno & Slocombe, *supra* note 111, at 346. For an overview of development projects where developers did engage in FPIC with positive results and cautionary tales of the fate of development projects where FPIC was not obtained, see HERZ, *supra* note 127, at 19–46.

(with positive results as a consequence), and cautionary tales of the fate of development projects where FPIC was not obtained.<sup>135</sup>

Project success depends upon successful conservation, which in turn depends upon robust local participation: the more healthy and intact the forest, the greater the amount of carbon one can market, and the greater the accrued financial benefits. Various studies show that indigenous groups tend to be good stewards of tropical forests, and sometimes even better stewards than when formal conservation programs come to traditional indigenous lands.<sup>136</sup> Incorporating local wisdom and securing local consent is likely to translate into greater benefits for all stakeholders.

At the same time, if, in some projects, REDD+ developers have steamrolled over local knowledge, that doesn't mean we throw the baby out with the bathwater and ignore expertise that is not local. REDD+ supporters, including project developers, have distinctive expertise not only on the needs for REDD+, but for the economic and ecological calculations that make it feasible. One article notes that,

during the 1970s, several commentators such as Ophuls and Hardin believed that the intensification of societal conflict over an ever-decreasing pool of natural resources could be dampened only through the enlightened despotism of an authoritarian state. Today, the complex and multi-faceted nature of sustainability, involving various social objectives flanking and supporting environmental protection, suggests that no single institution can be expected to hold all of the expertise and knowledge needed for good decision making.<sup>137</sup>

Part of why REDD+ is such an interesting experiment to support is precisely because it potentially blends the expertise of so many different actors and with potential benefits for all of them. Sustainable REDD+ programs—ones that are effective, synergistic, and equitable—require respecting ED rights for all stakeholders, both endogenous and exogenous.<sup>138</sup>

#### V. GENUINE ENVIRONMENTAL DEMOCRACY: HOW DO WE KNOW IT WHEN WE SEE IT?

Richardson and Razzaque discuss three models of Environmental Democracy. "Rational elitism"—which has been the norm in too many

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<sup>135</sup> The Forward to the book challenges: "simply ask this question: Is your company better off having the people in the communities where you operate with you or against you?" Jonathan Lash, *Forward to DEVELOPMENT WITHOUT CONFLICT: THE BUSINESS CASE FOR COMMUNITY CONSENT*, World Resources Institute (2007).

<sup>136</sup> Goldberg & Badua, *supra* note 25, at 59–60; Anderson, *supra* note 119, at 21; Ashwini Chhatre & Arun Agrawal, *Trade-offs and Synergies between Carbon Storage and Livelihood Benefits from Forest Commons*, PNAS EARLY EDITION Sept. 2009, at 1, 3–4, available at <http://www.pnas.org/content/early/2009/10/05/0905308106>; D. Nepstad et al., *Inhibition of Amazon Deforestation and Fire by Parks and Indigenous Lands*, 20 CONSERVATION BIOLOGY 65, 69–70 (2006).

<sup>137</sup> Richardson & Razzaque, *supra* note 26, at 170.

<sup>138</sup> See generally Innes & Booher, *supra* note 117 (discussing strategies to include public participation regarding ED rights of stakeholders).

environmental projects—prioritizes expertise held by distant experts, and will encourage consultation with citizens when local people hold knowledge that may help experts.<sup>139</sup> The “liberal democratic” paradigm prevails in the Aarhus model; by stressing procedural rights, project planners acquire buy-in from the public and remain more accountable to that public.<sup>140</sup> Finally, and foremost in fulfilling ED rights, in “deliberative democracy,” citizens are empowered as full partners in all decision making.<sup>141</sup> REDD+ has all too often ended with “rational elitism,” where esoteric technical knowledge about GHG science, species population sizes, and international financial markets trump local knowledge and preferences about forest ecosystems and use. So, for example, in REDD+, a foreign project developer, an NGO, or a government entity may initiate consultation with a local group, but this is done “top down.” Seldom are ED rights exercised “bottom up”—i.e., a community does not instigate the REDD+ project on its own and set the terms of its own participation.<sup>142</sup>

Arnstein provides a “participation ladder” that measures “degrees of citizen power.”<sup>143</sup> At the lowest rungs of the ladder we find nonparticipation, which she labels “manipulation” and “therapy.” Here, elite knowledge holders aim not for genuine participation, but to “educate” stakeholders about the projects that will be done to them for the purpose of “engineering their support.”<sup>144</sup> Early REDD+ projects too often fall into this category where outside elites maneuvered participants into participating in projects they didn’t understand and whose risks they didn’t appreciate.<sup>145</sup> Arnstein labels the middle rungs of the ladder as “tokenism.” Under “tokenism” we find terms that are seen in some REDD+ schemes: “informing” and “consultation,” where top down experts might discuss plans with local people, but those people have no guarantees their views will be heeded or respected. At the top of the ladder, and mapping onto “deliberative democracy,” we find more genuine “citizen power”: “Partnership” enables citizens to negotiate with more powerful stakeholders; “delegated power” and “citizen control” give local people the majority of decision-making power.<sup>146</sup> In REDD+, this would mean they could scuttle any project they did not wish to participate in. Hypothetically this would also mean they would

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<sup>139</sup> Richardson & Razzaque, *supra* note 26, at 170–71.

<sup>140</sup> *Id.* at 171–72.

<sup>141</sup> *Id.* at 172.

<sup>142</sup> See *infra* Part VI.A and accompanying notes 189–240. The Cambodian example I discuss below may be a rare example of a bottom-up forest preservation project; but there the local monks sought help to preserve their imperiled forests, and REDD+ was a top-down solution crafted in response.

<sup>143</sup> Sherry R. Arnstein, *A Ladder of Citizen Participation*, 35 J. AMER. INST. PLANNING 216, 217 (1969).

<sup>144</sup> *Id.* at 217–18.

<sup>145</sup> See, e.g., GREENPEACE, CARBON SCAM: NOEL KEMPF CLIMATE ACTION PROJECT AND THE PUSH FOR SUB-NATIONAL FOREST OFFSETS 12–13 (2009), available at <http://www.greenpeace.org/usa/Global/usa/report/2010/1/carbon-scam-noel-kempff-clima.pdf>; Lohmann, *supra* note 131, at 230–33 (recounting the current and potential negative effects of subnational REDD offset projects).

<sup>146</sup> Arnstein, *supra* note 143, at 217.

propose REDD+ projects as well. I know of no REDD+ projects that climb these higher rungs of citizen power; even the well-regarded Cambodian project I discuss below doesn't rise to the level of fully actualized citizen power. I conclude below that genuine FPIC is impracticable or impossible: genuine "delegated power" or "citizen control" would also be predicated on necessarily incomplete information.

The UN-REDD program distinguishes different levels of genuine ED in REDD+.<sup>147</sup> "Information sharing" hypothetically flows both ways, but in reality tends to be a top down approach where, in Arnstein's typology, those with special expertise educate those without, and seek their cooperation in a plan formulated at sites distant from the project forest and surrounding communities.<sup>148</sup> "Consultation" may have two-way information flow, and may be done in a culturally and linguistically appropriate manner, but that does not mean consultation yields informed consent; it may merely mean that affected local populations have been informed in a way they can understand.<sup>149</sup> "Collaboration" means genuinely working together on equal footing to plan and conduct a REDD+ project; it does not necessarily mean, however, that local people have an informed, final say.<sup>150</sup> "Joint decision making" is collaboration that includes consensus from all stakeholders and still remains the exception rather the rule in REDD+.<sup>151</sup> Finally,

[c]onsent refers to a freely given decision from the rights-holders based on full, prior and objective information; a decision made by the people or community in question, through their designated representatives and in accordance with their traditions, customs and norms. It is a collective decision that will determine how and if an activity or action will be carried out.<sup>152</sup>

As we shall see, genuine bottom-up informed consent where joint decision making is the norm and citizens control the process may be difficult or impossible in REDD+.

## VI. CASE STUDIES FROM VIETNAM AND CAMBODIA: HOW ARE ED RIGHTS IMPLEMENTED IN REDD+ IN SITU?

In December 2012, I participated in a pro bono legal consulting trip to Vietnam and Cambodia for an international NGO that was planning REDD+ projects in Southeast Asia. While there, we met with numerous national, regional, and local government officials. A Vietnamese forest anthropologist, Dr. Binh Tran, and I spent time in prospective REDD+ villages interviewing local people about their knowledge of and participation in REDD+.

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<sup>147</sup> UN-REDD PROGRAMME, *supra* note 26, at 41–42.

<sup>148</sup> Arnstein, *supra* note 143, at 219; UN-REDD PROGRAMME, *supra* note 26, at 41.

<sup>149</sup> Arnstein, *supra* note 143, at 219; UN-REDD PROGRAMME, *supra* note 26, at 41. I argue most local people can never fully understand REDD+, so consultation is always incomplete and consent is never fully informed.

<sup>150</sup> Arnstein, *supra* note 143, at 217; UN-REDD PROGRAMME, *supra* note 26, at 42.

<sup>151</sup> Arnstein, *supra* note 143, at 221; UN-REDD PROGRAMME, *supra* note 26, at 42.

<sup>152</sup> UN-REDD PROGRAMME, *supra* note 26, at 42.



Both Vietnam and Cambodia have actively engaged with REDD+ and have launched projects seeking to sell credits on the voluntary market.<sup>153</sup> Both have prepared Readiness Preparation Proposals (R-PPs) to obtain funding from the World Bank's Forest Carbon Partnership Facility (FCPF).<sup>154</sup> These proposals seek funds to ensure effective consultation with affected citizens; each nation has suggested hundreds of thousands of dollars for ED procedures as part of multimillion-dollar REDD+ Readiness requests.<sup>155</sup> For example, preliminary stakeholder consultations in Cambodia have been guided by "two key objectives" of empowerment to engage in REDD+ and access to information on REDD+, stressing that the process should be "transparent," "inclusive," "iterative," "timely," and "adequately resourced."<sup>156</sup> The Cambodia R-PP addresses the third principle of environmental democracy by stressing that responsible parties should be "held to account" with a clear complaint mechanism and conflict resolution mechanisms.<sup>157</sup> They seek funds to translate aspirational ED norms into concrete programs.<sup>158</sup>

It is beyond the scope of this paper to discuss the complex political milieus in which REDD+ operates in both nations. But each faces challenges in implementing REDD+ in a truly democratic way that respects local people's rights. As one example, both Vietnam<sup>159</sup> and Cambodia<sup>160</sup> have been

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<sup>153</sup> See SOCIALIST REPUBLIC OF VIET., READINESS PREPARATION PROPOSAL (2011) [hereinafter R-PP VIETNAM], available at [http://www.forestcarbonpartnership.org/sites/forestcarbonpartnership.org/files/Documents/PDF/Nov2011/Viet%20Nam%20R-PP\\_Revised%2018%20November2011.pdf](http://www.forestcarbonpartnership.org/sites/forestcarbonpartnership.org/files/Documents/PDF/Nov2011/Viet%20Nam%20R-PP_Revised%2018%20November2011.pdf); CAMBODIA, READINESS PREPARATION PROPOSAL (2011) [hereinafter R-PP CAMBODIA], available at [http://theredddesk.org/sites/default/files/cambodia\\_r-pp.pdf](http://theredddesk.org/sites/default/files/cambodia_r-pp.pdf).

<sup>154</sup> R-PP VIETNAM, *supra* note 153; R-PP CAMBODIA, *supra* note 153

<sup>155</sup> R-PP VIETNAM, *supra* note 153, at 30; R-PP CAMBODIA, *supra* note 153, at 33–34

<sup>156</sup> R-PP CAMBODIA, *supra* note 153, at 29–30.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 5.

<sup>159</sup> Among the concerns stated were "the displacement of minorities and the confiscation of ancestral lands without prior consent and appropriate compensation for confiscated lands." Comm. on the Elimination of Racial Discrimination, Consideration of Reports Submitted by States Parties Under Art. 9 of the Convention: Concluding Observations of the Comm. on the Elimination of Racial Discrimination, 80th Sess., Feb. 13–Mar. 9, 2012, CERD/C/VNM/CO/10-14, 80th Sess., ¶ 15, (Mar. 9, 2012), available at <http://www2.ohchr.org/english/bodies/cerd/docs/CERD.C.VNM.CO.10-14.pdf>. The Committee further called for Vietnam to "adopt measures to safeguard indigenous rights over ancestral lands and pursue efforts, together with communities affected, towards adequate resolution of land disputes including the provision of appropriate compensation." *Id.*

<sup>160</sup> As for Cambodia, the Committee stated concerns "that the quest for economic growth and prosperity is pursued, in some cases, to the detriment of particularly vulnerable communities such as indigenous peoples. The Committee is particularly concerned about reports of the rapid granting of concessions on land traditionally occupied by indigenous peoples without full consideration, or exhaustion of procedures provided for, under the land law and relevant sub-decrees." Comm. on the Elimination of Racial Discrimination, Consideration of Reports Submitted by States Parties Under Article 9 of the Convention, Feb. 15–Mar. 12, 2010, CERD/C/KHM/CO/8-13, 76th Sess., ¶ 16 (Mar. 16, 2010), available at [http://www2.ohchr.org/english/bodies/cerd/docs/co/AdvanceUnedited\\_Cambodia.doc](http://www2.ohchr.org/english/bodies/cerd/docs/co/AdvanceUnedited_Cambodia.doc). "The Committee further encourages corporate business entities when engaging in economic land

criticized in reviews on resource development under the Convention on the Elimination of Racial Discrimination (CERD), to which they are both signatories.

### A. Vietnam

The UN—namely UNDP, UNEP, and FAO—the World Bank (via the Forest Carbon Partnership Facility), and other entities are working with NGOs and businesses to prepare nations to participate in the international REDD+ market.<sup>161</sup> Vietnam has submitted and had its R-PP approved to qualify for World Bank FCPF funding; combined, the UN and World Bank have spent about \$8 million on REDD+ in Vietnam thus far.<sup>162</sup> Based on its pilot projects, Norway granted Vietnam \$30 million to finance REDD+.<sup>163</sup> One study estimates that REDD+ could generate \$80–100 million per year in the nation.<sup>164</sup>

Local Management Boards or People's Committees could be granted land tenure and thus permission to enter into REDD+ deals, but only with explicit permission of the national government, following national guidelines.<sup>165</sup> In certain selected provinces, Vietnam is developing Provincial REDD+ Management Units to carry out the details of REDD+, including “participatory planning.”<sup>166</sup> Devolution of land rights has included attention

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concessions to take into consideration their corporate social responsibility as it relates to the rights and well-being of local populations.” *Id.*

<sup>161</sup> See, e.g., UN-REDD PROGRAMME OPERATIONAL GUIDANCE, *supra* note 80, at 1; UN-REDD Viet Nam Programme, *Project Factsheet*, <http://mptf.undp.org/factsheet/project/00072449> (last visited Feb. 22, 2014); UN-REDD Viet Nam Programme, *Trust Fund Factsheet*, <http://mptf.undp.org/factsheet/fund/VNM00> (last visited Feb. 22, 2014); FOREST CARBON PARTNERSHIP FACILITY, *REDD Readiness Progress Fact Sheet: Vietnam* (2013), available at [http://www.forestcarbonpartnership.org/sites/fcp/files/2013/june2013/Vietnam%20FCPF%20RED D%20Readiness%20Progress%20Sheet\\_June2013.pdf](http://www.forestcarbonpartnership.org/sites/fcp/files/2013/june2013/Vietnam%20FCPF%20RED D%20Readiness%20Progress%20Sheet_June2013.pdf). This excludes the \$20 million, five-year grant that USAID has provided to several southeast Asian nations, including Vietnam. See USAID, LOWERING EMISSIONS IN ASIA'S FORESTS 1 (2012), available at [http://www.leafasia.org/sites/default/files/resources/LEAF%20Annual%20Report%20FY%202012\\_FINAL.pdf](http://www.leafasia.org/sites/default/files/resources/LEAF%20Annual%20Report%20FY%202012_FINAL.pdf).

<sup>162</sup> See Final Report: Viet Nam National Program, UN-REDD Viet Nam Programme 2 (2012), available at <http://mptf.undp.org/document/download/10134> (detailing the \$4,384,756 transferred from UN Agencies); Letter from Victoria Kwakwa, Country Dir. for Vietnam, East Asia and Pacific Region, World Bank, to B.E. Nguyen Van Binh, Governor, State Bank of Vietnam (Nov. 9, 2012), available at [http://www.wds.worldbank.org/external/default/WDSContentServer/WDSP/EAP/2013/02/05/090224b0818f732d/1\\_0/Rendered/PDF/Official0Docum0t0for0Grant0TF013477.pdf](http://www.wds.worldbank.org/external/default/WDSContentServer/WDSP/EAP/2013/02/05/090224b0818f732d/1_0/Rendered/PDF/Official0Docum0t0for0Grant0TF013477.pdf) (granting the Socialist Republic of Vietnam \$3,800,000 for its REDD project); see also R-PP VIETNAM, *supra* note 153.

<sup>163</sup> UN-REDD Programme, *Viet Nam, Norway and UN Announce US\$30 Million for REDD+ in Viet Nam at UN-REDD COP18 Event*, Dec. 5, 2012, <http://www.un-redd.org/COP18PR/tabid/105687/Default.aspx> (last visited Feb. 22, 2014).

<sup>164</sup> UN-REDD PROGRAMME, DESIGN OF A REDD-COMPLIANT BENEFIT DISTRIBUTION SYSTEM FOR VIET NAM 8 (2010), available at [http://www.unredd.net/index.php?option=com\\_docman&task=doc\\_download&gid=1409%25Itemid=53](http://www.unredd.net/index.php?option=com_docman&task=doc_download&gid=1409%25Itemid=53).

<sup>165</sup> UN-REDD PROGRAMME, *supra* note 26, at 3; Interviews with Government Officials in Hanoi, Vietnam (Dec. 2–12, 2012) (on file with author); Interviews with Government Officials in Kon Tum Province, Vietnam (Dec. 2–12, 2012) (on file with author).

<sup>166</sup> UN-REDD PROGRAMME, *supra* note 26, at 23–24.

to the specific rights of ethnic minorities and indigenous populations.<sup>167</sup> It is not clear, however, how much say the local people would have in negotiating REDD+ schemes, given the strong hand of the central government and lack of capacity at the local level.<sup>168</sup> That is to say, the State manages all forestland on behalf of the people and has developed a complicated hierarchy of managerial responsibilities for forests.<sup>169</sup> In my interviews, it was clear that local and provincial forestry officials had little latitude to carry out programs or policies that were not devised or approved by central government officials.

Vietnam was the first nation under the UN-REDD Programme to launch REDD+ in the field and the first to conduct and evaluate an FPIC process.<sup>170</sup> Despite the fact that “Viet Nam has progressed further with its national UN-REDD Programme than any other partner country,” they had still not approved a national REDD+ program, even as the government and NGOs were piloting projects and claiming to secure FPIC for REDD+.<sup>171</sup>

The government has carried out an extensive stakeholder consultation project while developing national REDD+ policies.<sup>172</sup> Vietnam has established a network of sub-technical working groups for all aspects of REDD+, and an impartial evaluation suggests this network is working well to bring disparate expertise and concerns to the REDD+ planning process.<sup>173</sup> Furthermore, well-respected NGOs are playing an active role in representing multiple interests in the REDD+ planning process.<sup>174</sup> Among other projects, UN-REDD helped the government pilot an equitable benefit distribution system for REDD+ funding that included government officials at all levels, university departments, and local NGOs.<sup>175</sup> This consultation “is a living process” and has “shown that it is very essential and useful to get local communities to be involved in discussion of detailed activities (e.g.,

<sup>167</sup> LEGAL COMPANION TO THE UN-REDD PROGRAMME, *supra* note 1, at 4.

<sup>168</sup> Interviews with government officials in Hanoi, Vietnam (Dec. 2–12, 2012) (on file with author); Interviews with government officials in Kon Tum Province, Vietnam (Dec. 2–12, 2012) (on file with author); *see also* UN-REDD PROGRAMME, *supra* note 26, at 23–24.

<sup>169</sup> UN-REDD PROGRAMME, *supra* note 164, at 6–7; Law on Land, No. 13-2003-QH11, art. 1, (Mar. 21, 2004) (Viet.), *available at* [http://www.vietnamlaws.com/freelaws/Lw13na26Nov03Land\[X2865\].pdf](http://www.vietnamlaws.com/freelaws/Lw13na26Nov03Land[X2865].pdf) (“This Law governs the powers and responsibilities of the State as representative of the ownership of land by the entire people for uniform administration of land and the regime for administration and use of land; and the rights and obligations of land users.”); Law on Forest Protection and Development, No. 29/2004/QH11, arts. 4, 8, 13–21, 29, (Dec. 14, 2004) (Viet.), *available at* <http://vietnam-redd.org/Upload/CMS/Content/Library-GovernmentDocuments/29-2004-QH11.pdf>.

<sup>170</sup> UN-REDD PROGRAMME, LESSONS LEARNED: VIET NAM UN-REDD PROGRAMME PHASE 1, at 10 (2012) [hereinafter LESSONS LEARNED: VIETNAM], *available at* [http://www.unredd.net/index.php?option=com\\_docman&task=doc\\_download&gid=8100&Itemid=53](http://www.unredd.net/index.php?option=com_docman&task=doc_download&gid=8100&Itemid=53).

<sup>171</sup> *Id.* at 2, 40.

<sup>172</sup> R-PP VIETNAM, *supra* note 153, at 20–21, 27–31. The request was for \$495,000 to carry this out. *Id.* at 31.

<sup>173</sup> LESSONS LEARNED: VIET NAM, *supra* note 170, at 20–22.

<sup>174</sup> *Id.* at 28.

<sup>175</sup> DESIGN OF A REDD-COMPLIANT BENEFIT DISTRIBUTION SYSTEM FOR VIET NAM, *supra* note 163, at 6; R-PP VIETNAM, *supra* note 153, at 22–26.

arrangement of labour forces to patrol forest and designing locally accepted benefit sharing regulations).<sup>176</sup>

UN-REDD has provided a multistep overview of their pilot FPIC project.<sup>177</sup> Vietnam has fifty-three ethnic minorities comprising sixteen million of their eighty million people.<sup>178</sup> The Vietnam FPIC pilot project took place in Lam Dong province, home to thirty ethnic minorities.<sup>179</sup> In the Lam Dong pilot, “interlocutors” were recruited who spoke local languages, and facilitated discussions without local government officials, thus encouraging local community members to speak more freely.<sup>180</sup> Project planners invented (and evaluated) an innovative role-playing game to help community members understand and design a benefit distribution system, given the potential variables and stumbling blocks along the way.<sup>181</sup> The processes they employed and the lessons they learned could be a model for robust—and likely legally secure—REDD+ FPIC. Their reports include recommendations on training methods, sociocultural appropriateness, recording results, including marginalized stakeholders, and flexible design of options from which local people might choose.<sup>182</sup>

UN-REDD’s evaluation of the Vietnam project revealed that crucial elements of even a well-designed, highly scrutinized FPIC fell short. These included: 1) Rushed information sessions, which precluded meaningful discussion and deliberation;<sup>183</sup> 2) Complicated information was not given until the time of the meeting and people did not have time to digest the material; and 3) Given that the contours of REDD+ in Vietnam have yet to be decided, it is not clear what local people were consenting to;<sup>184</sup> 4) Interlocutors focused on the prospective benefits of REDD+, and not the considerable risks—e.g., failure of benefits to accrue; opportunity costs for not using the forest; potential liability should carbon stocks not grow as robustly as contracted—that participation could entail, thereby failing to fully inform prospective participants;<sup>185</sup> 5) Because the process was rushed,

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<sup>176</sup> R-PP VIETNAM, *supra* note 153, at 21.

<sup>177</sup> UN-REDD PROGRAMME OPERATIONAL GUIDANCE, *supra* note 80, at 2–5.

<sup>178</sup> UN-REDD PROGRAMME, *supra* note 26, at 6.

<sup>179</sup> UN-REDD PROGRAMME OPERATIONAL GUIDANCE, *supra* note 80, at 2.

<sup>180</sup> LESSONS LEARNED: VIET NAM, *supra* note 170, at 10.

<sup>181</sup> THOMAS SIKOR ET AL., UN-REDD PROGRAMME, PILOTING LOCAL DECISION MAKING IN THE DEVELOPMENT OF A REDD+ COMPLIANT BENEFIT DISTRIBUTION SYSTEM FOR VIET NAM 6 (2012), available at [http://www.unredd.net/index.php?option=com\\_docman&task=doc\\_download&gid=8726&Itemid=53](http://www.unredd.net/index.php?option=com_docman&task=doc_download&gid=8726&Itemid=53).

<sup>182</sup> *Id.* at 6–7.

<sup>183</sup> LESSONS LEARNED: VIET NAM, *supra* note 170, at 11.

<sup>184</sup> *Id.* at 14–15. REDD+ in Vietnam (and everywhere else) is in process of being designed, so early efforts at FPIC cannot fully convey the complicated, necessary information for local people to give informed consent.

<sup>185</sup> *Id.* at 13.

“consent” may have been coerced and premature;<sup>186</sup> 6) The process lacked a grievance mechanism—a violation of the third Aarhus principle of ED.<sup>187</sup>

Certainly the REDD+ project we visited demonstrated some of the ED difficulties described here.<sup>188</sup> For its FPIC process, an NGO hired and trained local interlocutors who spoke the local language, but who nonetheless knew little about REDD+ or forest management. During the three days of training, villagers reported that these translators did not actually translate the presentation into the local language, but only translated during the question and answer session. Most people with whom we spoke evinced no real understanding of REDD+.<sup>189</sup>

While Vietnam has a Democracy Ordinance with the motto of “People know, People discuss, People execute and People examine,” Vietnam does remain a one-party state and genuine local democracy is not well developed.<sup>190</sup> The REDD+ planning process involving multiple technical groups representing disparate interests does not seem well coordinated with the official government decision makers, who are concentrated in Hanoi; they have the ultimate say on REDD+ matters, and this lack of coordination is a definite ED weakness.<sup>191</sup>

With a pilot project to guide them, other REDD+ developers are nonetheless attempting to improve ED in Vietnam. UN-REDD is funding a National REDD+ Information System that will be a public repository for all REDD+ information,<sup>192</sup> though it will be difficult for local villagers to find this information without access to computers. More promising, the funding is going to “interlocutors” to help translate and build capacity for REDD+, particularly in selected pilot provinces.<sup>193</sup> Furthermore, not only has Vietnam not concluded its own REDD+ planning, but the contours of REDD+ are still evolving internationally.<sup>194</sup> Genuine ED will remain elusive, and informed consent will remain illusory when information remains necessarily incomplete.

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<sup>186</sup> *Id.* (“[T]he culture of Viet Nam is generally geared towards consent, and to follow the guidance of authorities . . . . Most of the information provided to communities during the FPIC process encouraged consent, rather than explaining options.”).

<sup>187</sup> NGUYEN QUANG TAN ET AL., CTR. FOR PEOPLE & FORESTS, EVALUATION AND VERIFICATION OF THE FREE, PRIOR AND INFORMED CONSENT PROCESS UNDER THE UN-REDD PROGRAMME IN LAM DONG PROVINCE, VIETNAM 11 (2010).

<sup>188</sup> I’d like to thank Dr. Binh Tran, with whom I worked, for her insights here. Dr. Tran conducted several weeks of ethnographic research in local villages at the project sites in both Vietnam and Cambodia.

<sup>189</sup> Field interviews (on file with author).

<sup>190</sup> Jörg Wischermann, *Civic Organizations in Vietnam’s One-Party State: Supporters of Authoritarian Rule?* 6–7 (German Inst. of Global & Area Studies, Working Paper No. 228, 2013); field interviews (on file with author).

<sup>191</sup> LESSONS LEARNED: VIET NAM, *supra* note 170 at 20–24.

<sup>192</sup> UN-REDD PROGRAMME, LEGAL ANALYSIS OF CROSS-CUTTING ISSUES FOR REDD+ IMPLEMENTATION: LESSONS LEARNED FROM MEXICO, VIET NAM AND ZAMBIA 21 (2013), available at [http://www.unredd.net/index.php?option=com\\_docman&task=doc\\_download&gid=10081&Itemid=53](http://www.unredd.net/index.php?option=com_docman&task=doc_download&gid=10081&Itemid=53).

<sup>193</sup> *Id.*

<sup>194</sup> See DESIGN OF A REDD-COMPLIANT BENEFIT DISTRIBUTION SYSTEM FOR VIET NAM, *supra* note 164, at 8, 10.

*B. Cambodia*

Cambodia has also submitted and had approved its Readiness Preparation Proposal (R-PP) to qualify for World Bank FCPF funding and has also been approved as a UN-REDD Programme nation.<sup>195</sup> Note that both of these programs fund REDD+ “Readiness” (i.e., getting the nation prepared to run sustainable REDD+) and “stakeholder engagement.”<sup>196</sup> These agencies have pledged over \$3 million for REDD+ in Cambodia.<sup>197</sup> The Japanese government has further pledged \$10 million for REDD+ in Cambodia.<sup>198</sup>

Cambodia’s first REDD+ demonstration project, the Oddar Meanchey Community Forest REDD+ project, (OM CF REDD+) has been submitted to the Climate, Community and Biodiversity Alliance (CCBA) for certification, and was validated for CCBA certification by global company TUV-SUD in 2012. The NGO Pact, the UNDP, the John D. and Catherine T. MacArthur Foundation, the William J. Clinton Foundation, and the overseas development aid arms of the U.S., U.K., Denmark, and New Zealand governments have contributed funds for this project.<sup>199</sup> The proposed carbon credits are being offered by Terra Global Capital, a San Francisco-based firm, whose “goal is to facilitate the market for land use carbon and other environmental credits . . . by providing technical expertise for the measurement and monetization of land use carbon credits and carbon finance through a dedicated investment fund.”<sup>200</sup> Terra Global Capital seeks to market the offset credits in 2014, although as of this writing, it has not yet happened. This project began development in 2008; it has taken over five years from conception to market, and project developers have learned important lessons along the way.<sup>201</sup> In addition to talking to NGO project officials,<sup>202</sup> Dr. Binh Tran and I visited villages participating in the project, talking to local people about forests and REDD+. The project offers take-home lessons about ED in REDD+.

The project aims to sequester seven million metric tons of carbon during its thirty-year lifespan.<sup>203</sup> Fifty-eight villages participate in the OM CF

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<sup>195</sup> R-PP CAMBODIA, *supra* note 153, at 5.

<sup>196</sup> REDD+ Cambodia, *Forest Carbon Partnership Facility*, <http://www.cambodia-redd.org/category/supporting-redd-framework/fcpf> (last visited Feb. 22, 2014); REDD+ Cambodia, *UN-REDD*, <http://www.cambodia-redd.org/category/supporting-redd-framework/un-redd> (last visited Feb. 22, 2014).

<sup>197</sup> UN-REDD PROGRAMME, ANNUAL REPORT 2012: CAMBODIA PROGRAMME 14 (2013), *available at* [http://www.unredd.net/index.php?option=com\\_docman&task=doc\\_download&gid=10444&Itemid=53](http://www.unredd.net/index.php?option=com_docman&task=doc_download&gid=10444&Itemid=53).

<sup>198</sup> *Id.*

<sup>199</sup> DONAL YEANG & JULIEN BREWSTER, REDD+ DEMONSTRATION ACTIVITIES IN CAMBODIA: THE CASE OF THE ODDAR MEANCHEY COMMUNITY FORESTRY REDD+ PROJECT 24–25 (2012), *available at* <http://www.pactcambodia.org/Programs/FPCC/A%20case%20of%20the%20Oddar%20Meanchey%20REDD+%20demonstration%20project.pdf>.

<sup>200</sup> Terra Global Capital, *About Us*, <http://www.terraglobalcapital.com/About.htm> (last visited Feb. 22, 2014).

<sup>201</sup> *See* ANDERSON, *supra* note 23, at 42–44.

<sup>202</sup> YEANG & BREWSTER, *supra* note 199, at 16 tbl.3 (showing project actors and roles).

<sup>203</sup> ANDERSON, *supra* note 23, at 42.

REDD+ project, covering a mosaic of thirteen blocks of forest totaling 63,831 ha.<sup>204</sup> The Government of Cambodia has granted fifteen-year renewable Community Forest Agreements to the villages to manage these forests.<sup>205</sup> The Cambodian Forestry Administration is the formal contracting partner on the project, and negotiated that a minimum of 50% benefits from offset sales would go to village-level projects.<sup>206</sup> In their Project Design Document (PDD), the project developers have described ten different deforestation drivers and linked those drivers to ten different interventions to curb deforestation. These interventions would result in carbon accruals above what would have been found in the absence of the project; forest cover has been declining 2.1% annually in the province, compared with 1.3% nationally.<sup>207</sup>

The original impetus for the project sprung from a group of Buddhist Monks intent on protecting their forests, led by the charismatic Venerable Bun Saluth, who has won international awards for his efforts.<sup>208</sup> Mr. Saluth explained to me that community involvement, including community patrols, predated the REDD+ project, and thus villagers were informed about threats to, and protections for, their forests before the project began. Community members start with strong incentive to protect the forests; Dr. Tran and I found that use and sale of Non-Timber Forest Products (NTFPs)—especially resin, mushrooms, wild ginger, rattan, and medicinal plants—comprised about a quarter of families' annual incomes.<sup>209</sup> As the forest disappears, so does the availability of these NTFPs.

In many ways, this project is a model of ED. Pact, the lead NGO, “enables systemic solutions that allow those who are poor and marginalized to earn a dignified living, be healthy, and take part in the benefits that nature provides. Pact accomplishes this by strengthening local capacity, forging effective governance systems, and transforming markets into a force for development.”<sup>210</sup> Pact's main mission seeks to build local capacity, and

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<sup>204</sup> TERRA GLOBAL CAPITAL, PROJECT DESCRIPTION: REDUCED EMISSIONS FROM DEFORESTATION AND DEGRADATION IN COMMUNITY FORESTS ODDAR MEANCHEY, CAMBODIA 5 (2012), available at <http://www.terraglobalcapital.com/press/Oddar%20Meanchey%20REDD%20Project%20VCS%20PDD%20v4-2.pdf>.

<sup>205</sup> *Id.* at 5, 163.

<sup>206</sup> JULIEN BREWSTER, CONFLICT RESOLUTION IN REDD+: AN ASSESSMENT IN THE ODDAR MEANCHEY COMMUNITY FORESTRY REDD+ SITE, CAMBODIA 3, 7 (2012), available at [http://www.pactcambodia.org/Programs/FPCC/Lessons%20Learned%20Report\\_Conflict%20resolution%20in%20OM.pdf](http://www.pactcambodia.org/Programs/FPCC/Lessons%20Learned%20Report_Conflict%20resolution%20in%20OM.pdf).

<sup>207</sup> TERRA GLOBAL CAPITAL, *supra* note 204, at 10–11; YEANG & BREWSTER, *supra* note 199, at 13.

<sup>208</sup> As well as appearances with supermodels! U.N. Dev. Programme, *In Cambodia, A Monk Fights for the Environment*, <http://cq-publish.dev.undp.org/content/undp/en/home/ourwork/environmentandenergy/successstories/Cambodian-monk-environment-crusade/> (last visited Feb. 22, 2014).

<sup>209</sup> Author's interviews with community members, in Oddar Meanchey province, Cambodia (Dec. 2012); YEANG & BREWSTER, *supra* note 199, at 7.

<sup>210</sup> Pact, *Our Mission*, <http://www.pactworld.org/our-mission> (last visited Feb. 22, 2014).

(unusual for REDD+) is not primarily biodiversity-focused: Community governance and participation is central to the mission of their work.<sup>211</sup>

Eighty-eight percent of citizens living in Oddar Meanchey's community forest sites have joined community forest management organizations.<sup>212</sup> Extensive interviews with stakeholders during a Participatory Rural Appraisal revealed and ranked the drivers of deforestation and potential remedies to curb those drivers.<sup>213</sup> Project sponsors claim that this information has been integrated into all aspects of the project.<sup>214</sup> Elected Community Forestry Management Committees (CFMCs) represent the communities and give feedback to the project developers. Leaders of these CFMCs participate in a Community Forestry Network (CFN) supported by project developers,<sup>215</sup> and channel information and concerns back and forth between government officials, project developers, and villagers.<sup>216</sup> The CFN recently put together a petition, with 2,000 thumbprint signatures from community members, to the Ministry of Agriculture, Fishery, and Forestry to address military incursions into the CFs.<sup>217</sup> Project developers envision monthly meetings with NGOs, government, and villagers to assess ongoing progress, and promise regular focus groups and annual surveys.<sup>218</sup>

At the beginning of the project, project developers held "awareness raising" workshops in more than fifty villages, in addition to workshops for government officials, military officials, and police.<sup>219</sup> A one-day provincial workshop, held in the Khmer language, was attended by representatives of all thirteen communities that would be participating in the project.<sup>220</sup> Community members participated in demarcating the boundaries of the community forests.<sup>221</sup> Community members also selected sites for assisted natural regeneration, which will generate both carbon credits—and thus community benefits—and direct employment.<sup>222</sup>

The OM CF REDD+ project is pioneering community based measuring, monitoring, reporting, and verification (MMRV) for ecological and social data.<sup>223</sup> Project managers aim to enhance community engagement with the

<sup>211</sup> Pact, *Governance*, <http://www.pactworld.org/governance> (last visited Feb. 22, 2014).

<sup>212</sup> JULIEN BREWSTER ET AL., COMMUNITY-BASED MONITORING, REPORTING AND VERIFICATION (MRV): AN ASSESSMENT IN THE ODDAR MEANCHEY COMMUNITY FORESTRY REDD+ SITE, CAMBODIA 13 (2012), available at [http://www.pactcambodia.org/Programs/FPCC/Lessons%20Learned%20Report\\_Community%20Based%20MRV.pdf](http://www.pactcambodia.org/Programs/FPCC/Lessons%20Learned%20Report_Community%20Based%20MRV.pdf).

<sup>213</sup> Author's Interview of Julien Brewster, Redd+ Monitoring and Evaluation Advisor, Pact Cambodia (Dec. 2012); TERRA GLOBAL CAPITAL, *supra* note 204, at 163–65.

<sup>214</sup> BREWSTER ET AL., *supra* note 212, at 14–15.

<sup>215</sup> BREWSTER, *supra* note 206, at 10.

<sup>216</sup> Interviews with Julien Brewster, Redd+ Monitoring and Evaluation Advisor, Pact Cambodia, and various Cambodian government officials (Dec. 2012); BREWSTER, *supra* note 206, at 10; TERRA GLOBAL CAPITAL, *supra* note 204, at 165.

<sup>217</sup> YEANG & BREWSTER, *supra* note 199, at 11; BREWSTER, *supra* note 206, at 10–11.

<sup>218</sup> TERRA GLOBAL CAPITAL, *supra* note 204, at 165.

<sup>219</sup> BREWSTER, *supra* note 206, at 8.

<sup>220</sup> ANDERSON, *supra* note 23, at 43.

<sup>221</sup> BREWSTER, *supra* note 206, at 9.

<sup>222</sup> YEANG & BREWSTER, *supra* note 199, at 19, 21.

<sup>223</sup> See Takacs, *supra* note 20, at 664 (for an exhaustive, and exhausting, review).



project with an eye towards improving project design and management through local expertise, enhancing local support, ensuring project success, improving project data accuracy, and enhancing cobenefits through local employment associated with the project.<sup>224</sup> The OM CF REDD+ project is guided by the philosophy that “[e]nsuring that there is strong local involvement in the design, implementation, and use of MRV activities can help build the sense of trust and responsibility that local communities have towards the project.”<sup>225</sup> Staff has formal recommendations for supporting stakeholder MRV throughout Cambodia, including clear standards for data collection, enhanced training, support for women to participate fully, and experience-sharing opportunities across community based REDD+ projects.<sup>226</sup> Community expertise was used—and augmented—during a large biodiversity assessment of the area in 2010.<sup>227</sup> Community representatives have helped develop the terms of reference for the monitoring scheme.<sup>228</sup> The NGO developers conduct regular workshops with reciprocal advice on data collection and use.<sup>229</sup> Community members have used data and maps from these workshops to confront government officials to help them curb deforestation in their CFs.<sup>230</sup>

Despite all these efforts, project developers fall short of fully realized Environmental Democracy. The developers promise—but have not yet produced—a community monitoring plan.<sup>231</sup> Legal documents are available only in English and thus local, non-English speakers are excluded from detailed negotiations. Even documents in Khmer presume readers can understand the abstruse legal and technical language, or read at all—a questionable presumption given the collapse of the education system during the Pol Pot era.<sup>232</sup> Pact officials themselves admit that “local awareness towards the project remains quite limited, illustrating the challenges of explaining REDD+ to local communities and the need for even more extensive awareness raising efforts over time.”<sup>233</sup> Our interviews confirmed

<sup>224</sup> BREWSTER ET AL., *supra* note 212, at 4.

<sup>225</sup> *Id.* at 9; Kravchenko, *supra* note 28, at 634. For a thorough review of MRV, see generally Takacs, *supra* note 20.

<sup>226</sup> BREWSTER ET AL., *supra* note 212, at 5.

<sup>227</sup> VITTORIA ELLIOTT ET AL., BIODIVERSITY ASSESSMENT OF THE REDD COMMUNITY FOREST PROJECT IN ODDAR MEANCHEY, CAMBODIA 8–9 (2010), *available at* <http://www.hcvnetwork.org/resources/assessments/Oddar%20Meanchey%20Biodiversity%20Assessment%202011.pdf>.

<sup>228</sup> BREWSTER ET AL., *supra* note 212, at 16.

<sup>229</sup> *Id.* at 17.

<sup>230</sup> *Id.*

<sup>231</sup> TÜV SÜD, VALIDATION OF THE CCBA-PROJECT: REDUCED EMISSIONS FROM DEGRADATION AND DEFORESTATION IN COMMUNITY FORESTS – ODDAR MEANCHEY, Cambodia 36 (2012), *available at* [https://s3.amazonaws.com/CCBA/Projects/Oddar\\_Meanchey\\_REDD\\_Project/Validation-Report\\_CCBA\\_Cambodia.pdf](https://s3.amazonaws.com/CCBA/Projects/Oddar_Meanchey_REDD_Project/Validation-Report_CCBA_Cambodia.pdf).

<sup>232</sup> Stephen J. Duggan, *Teacher Training and Prospects for Economic Recovery in Cambodia*, 32 COMP. EDUC. 361, 365 (1996) (describing the destruction of the Cambodian education system under the Khmer Rouge, stating, “formal education was abandoned, books and equipment destroyed and teachers and students were sought and interned. Under the Khmer Rouge, literacy education beyond the lowest grades was abolished and formal schooling of the Western kind was eradicated.”).

<sup>233</sup> BREWSTER, *supra* note 206, at 8.

that knowledge of the project spanned an array from sophisticated—understanding that trees sequester CO<sub>2</sub> and somehow by preserving these trees, villagers can sell the carbon to people who wish to prevent climate change—to uncomprehending: one person asked “does harvesting carbon from forests hurt the trees?” But, even some CF elected officials and those participating in forest patrols showed little understanding of how the project is expected to work and what the risks and benefits of the project might be.

No benefit sharing mechanism has been designed: Villagers have “consented” to a project, invested time and money, and foregone other opportunities, all with no guarantees of what their investments will yield.<sup>234</sup> No REDD+ grievance procedure has been formalized.<sup>235</sup> Local communities play no role in marketing carbon credits on the international market. They have no say on to whom the credits are sold, and for what price. They play no role in any investor speculation on these credits. Marginalized groups may remain marginalized, despite the best intentions of project organizers. For example, despite numerous entreaties and requirements from project developers, women remain underrepresented in leadership roles in the CFs.<sup>236</sup>

The Cambodia OM MRV report provides essential lessons for community participation in MRV specifically, but it is scalable to general stakeholder participation in all aspects of REDD+. The ambitions of bottom up, community based MRV run into the realities of a “very formalized, top down and technocratic data regime”<sup>237</sup> driven by the exigencies of distant investors’ profit motives and risk avoidance, western notions of property-in-general and carbon-as-property, very specific data on rates of reforestation and deforestation, and other legal requirements outside the grasp of local villagers. Imprecisions in volunteer, or even formally trained and paid, rural data collection may not meet the exacting technical requirements of REDD+.<sup>238</sup> As Cambodia, like most REDD+-instituting countries, has not clarified the role community based MMRV will play in a national policy, the Pact project has the potential to shape significant stakeholder democracy in REDD+ or have its program overruled by national government edicts beyond its control. For example, only in 2013 did the government establish a National REDD+ Taskforce that will “be the primary coordination and decision-making body on REDD+ within the Government of Cambodia.”<sup>239</sup> Stakeholder-run MRV programs also may be the results of resource-strapped national governments or project developers forcing labor-intensive requirements on local communities.<sup>240</sup>

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<sup>234</sup> *Id.* at 7; ANDERSON, *supra* note 23, at 42.

<sup>235</sup> BREWSTER, *supra* note 206, at 15.

<sup>236</sup> BREWSTER ET AL., *supra* note 212, at 17.

<sup>237</sup> *Id.* at 5.

<sup>238</sup> *Id.* at 19–20.

<sup>239</sup> UN-REDD Programme, *Cambodian National REDD+ Taskforce Established*, 37 UN-REDD PROGRAMME NEWSLETTER, Apr. 2013, [http://www.un-redd.org/Newsletter37/Cambodian\\_REDD\\_Taskforce/tabid/106149/Default.aspx](http://www.un-redd.org/Newsletter37/Cambodian_REDD_Taskforce/tabid/106149/Default.aspx) (last visited Feb. 22, 2014).

<sup>240</sup> BREWSTER ET AL., *supra* note 212, at 10.

From these national examples, we see that despite best intentions, genuine ED rights remain elusive in REDD+ on the ground.

#### VII. ROADBLOCKS ON THE PATH TO GENUINE ENVIRONMENTAL DEMOCRACY IN REDD+

No matter how committed project developers or government officials are to fulfilling the principles of Environmental Democracy as they implement REDD+, they will confront problems.

##### *A. Process Is Expensive*

The Center for People and Forests provides an eight-step “consent” chart for REDD+. <sup>241</sup> They note, “implementing a robust and verifiable process to obtain the consent of a community to a proposed REDD+ project needs a significant investment in people, time, communication materials and strategies, capacity building activities, independent verification, and technical and legal advice.” <sup>242</sup> Each of the eight steps is lengthy and expensive to complete. Time is money—money spent by often-not-well-heeled NGOs starting a project, donated by foreign sources who want to see quick results, or spent by project developers looking for a rapid financial return on investment. Environmental and social impact assessments, often not required in domestic law, add time and thus cost to projects. <sup>243</sup>

As of a decade or so ago, no one owned carbon: it was just the stuff of life. REDD+ has brought a complicated regime of carbon property rights combining uniquely Western property law and the specifics of the domestic legal system in each nation where REDD+ happens. <sup>244</sup> Verification of carbon stocks involves baroque formulas, complex terminology, an alphabet soup of acronyms, validators and verifiers located in far-flung locales, and complicated and distant financial transactions. <sup>245</sup> Ensuring genuinely informed consent of local people takes time, care, patience, a stack of culturally and linguistically appropriate visual aids, and a corps of translators. All of this is expensive.

<sup>241</sup> ANDERSON, *supra* note 23, at 24–25.

<sup>242</sup> *Id.* at 26.

<sup>243</sup> See KATOOMBA GROUP ET AL., *supra* note 12, at 15 (discussing how buyers are not obligated to pay for services until the seller actually delivers them, which can take years); ANDY WHITE & ALEJANDRA MARTIN, WHO OWNS THE WORLD’S FORESTS? FOREST TENURE AND PUBLIC FORESTS IN TRANSITION 21 (2002), available at [http://www.cifor.org/publications/pdf\\_files/reports/tenurereport\\_whoowns.pdf](http://www.cifor.org/publications/pdf_files/reports/tenurereport_whoowns.pdf) (providing overview of the challenges encountered in Bolivia); TOM GRIFFITHS, FOREST PEOPLES PROGRAMME, SEEING ‘RED’? ‘AVOIDED DEFORESTATION’ AND THE RIGHTS OF INDIGENOUS PEOPLES AND LOCAL COMMUNITIES 10–11 (2007), available at [http://www.forestpeoples.org/sites/fpp/files/publication/2010/01/avoideddeforestationredjun07eng\\_0.pdf](http://www.forestpeoples.org/sites/fpp/files/publication/2010/01/avoideddeforestationredjun07eng_0.pdf) (describing the danger to the rights of Indigenous Peoples and local communities where priorities are set by the World Bank, governments and large conservation NGOs).

<sup>244</sup> See generally TAKACS, *supra* note 3 (detailing ongoing attempts to design clear forest carbon property laws and to allocate legal rights and responsibilities for forest projects).

<sup>245</sup> See generally Takacs, *supra* note 14 (describing all of these features).

As described above, I agree that, “before assuming that additional or enhanced participation by poor communities will cost more, may delay projects and programs, or may require too much valuable staff time, decision makers must weigh these short-term costs against the longer-term risks to project legitimacy and execution.”<sup>246</sup> But, it is difficult to overcome the myopia of so many diverse stakeholders invested in demonstrating that REDD+ can work now.

### *B. Process Is Impracticable*

In a decade of the Clean Development Mechanism (CDM) under the Kyoto Protocol, we have some track record of ED rights under the UN’s auspices. Due to methodological concerns, avoided deforestation projects have not been eligible for CDM credits; but reforestation projects have been approved.<sup>247</sup> Elsewhere, I have reviewed the ED problems with reforestation CDM: Is information available in a format or language local people can understand? Do poor, local villagers have access to computers? Would they have the political freedom to oppose a project? Do they have a hope of understanding the technical jargon required for project approval? Would they understand what the overarching causes and effects of global climate change are, and their own role in legal solutions to mitigate climate change problems?<sup>248</sup> Kylie Wilson decries the lack of access to justice in CDM Projects: No in-country appeals processes are required for CDM approval and many nations, such as China, do not provide for any such access to justice; developing nation courts may lack capacity to adjudicate such claims; the overworked Executive Board of the CDM has no process for local stakeholders to request reviews of CDM decisions or implementation; no international forums are equipped or enabled to hear such disputes.<sup>249</sup> Core ED rights have been under-observed in the CDM.

“Public authorities” in REDD+ include not just government actors, but private project developers who may not have formal legal obligations under domestic or international law.<sup>250</sup> National legislation with respect to ED—or with respect to REDD+—may be missing, or underdeveloped, or unenforced. Furthermore, how to provide information that is jargon-laden

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<sup>246</sup> FOTI & DE SILVA, *supra* note 100, at 25 (citations omitted).

<sup>247</sup> Emma Paulsson, *A Review of the CDM Literature: From Fine-tuning to Critical Scrutiny?*, 9 INT’L ENVTL. AGREEMENTS: POL. L. & ECON. 63, 75 (2009).

<sup>248</sup> Takacs, *supra* note 14, at 67–69 (stating, “[t]he public, particularly those who are likely to be affected by a CDM forestry scheme—should be able to review and comment before any trading scheme is implemented, and should be able to prevent unjust trading schemes,” but that “[s]takeholder participation is often minimal in CDM project verification.”).

<sup>249</sup> Kylie Wilson, *Access to Justice for Victims of the International Carbon Offset Industry*, 38 ECOLOGY L.Q. 967, 1005–06, 1012–15 (2011).

<sup>250</sup> See generally U.N. REDD PROGRAMME, ENSURING INCLUSIVE, TRANSPARENT, AND ACCOUNTABLE NATIONAL REDD+ SYSTEMS: THE ROLE OF FREEDOM OF INFORMATION (2013), available at <http://www.un-redd.org/Newsletter35/FreedomofInformationandREDD/tabid/105809/Default.aspx>.

technically complicated, and difficult to translate is deeply problematic.<sup>251</sup> Too often “participation” means local people attend trainings where communication goes one way. Local people find out what is being planned, and either may consent or not: REDD+ is done to them.<sup>252</sup>

The Aarhus Convention frames the right to participate in environmental decision making with respect to decisions not just on individual, proposed activities,<sup>253</sup> but also to plans, programs and policies related to the environment,<sup>254</sup> and to laws, regulations, and legally binding norms.<sup>255</sup> While some nations, as part of REDD+ Readiness activities, may listen to different stakeholders when designing their national programs,<sup>256</sup> I know of no REDD+ program where citizens who are going to be impacted most have a primary role in designing the parameters of a national or regional REDD+ scheme.

Participation must be meaningful: It should occur at a stage in decision making where public input can still make a difference in whether or not a REDD+ scheme continues, and in what manner.<sup>257</sup> But as REDD+ develops top down, it is difficult for local people to stop a project or propose substantial revisions once developers and government officials are committed to REDD+. Timing of ED rights can be difficult to calibrate: If project developers seek consent too far prior to delivering REDD+ benefits, they raise expectations without concrete results, as we saw for Cambodia, and as a formal UN-REDD evaluation revealed was the case in Vietnam.<sup>258</sup> If they wait too long, the process is too far advanced for input from ED to be meaningful in terms of project development or in terms of actually stopping an ill suited, locally opposed REDD+ scheme.<sup>259</sup> For projects described here, and all others with which I’m familiar, local communities are brought into the process once powerful stakeholders have invested considerable resources in making REDD+ feasible. It is difficult to stop that train once it has left the station.

### *C. There May Be Mismatches Between International, Domestic, and Local Law*

The laws and norms of a nation, region, or village may clash with the absolutism of international human rights norms. National legislation may not only fail to require ED; it may discourage it out of fear of empowering local

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<sup>251</sup> See *infra* Part VI.

<sup>252</sup> Author’s interviews with local villagers in Vietnam and Cambodia.

<sup>253</sup> Aarhus Convention, *supra* note 31, art. 6.

<sup>254</sup> *Id.* art. 7.

<sup>255</sup> *Id.* art. 8.

<sup>256</sup> For example, Vietnam claims to have held extensive stakeholder consultations before designing their national REDD+ policies. See DESIGN OF A REDD-COMPLIANT BENEFIT DISTRIBUTION SYSTEM FOR VIET NAM, *supra* note 163, at 29.

<sup>257</sup> FOTI & DE SILVA, *supra* note 100, at 13.

<sup>258</sup> LESSONS LEARNED: VIET NAM, *supra* note 170, at 12, 30.

<sup>259</sup> O’Faircheallaigh, *supra* note 124, at 25.

people in contentious resource decisions.<sup>260</sup> National governments may have fractious relationships with indigenous groups or nonindigenous communities and may seek to avoid FPIC and other ED rights to avoid empowering local populations; in formal UNFCCC negotiations, nations have opposed explicit reference to UNDRIP and the ED rights it supports.<sup>261</sup> Grievance procedures to be implemented in national law are often promised, but nearly never developed before consent has been given, perhaps out of fear of setting a precedent that gives too much legal power to local people who may have gripes with their government.<sup>262</sup> Nations where REDD+ is being implemented may regard ED requirements as infringing national sovereignty.<sup>263</sup> While nations may sign and ratify international human rights or environmental treaties, they often choose not to make those obligations justiciable through domestic implementing legislation and enforcement.

Local law may simply be difficult to meld with formal law.<sup>264</sup> Indigenous notions of property may be hard to fit with Northern notions of property that allow carbon offsetting transactions.<sup>265</sup> Finally, we should not forget that international law is preoccupied with the responsibilities of national governments; so much of REDD+ is done subnationally or by private actors, and any legal obligations that redound to the State may not formally apply to these actors.

#### *D. There May Be Mismatches in Goals of Project Actors*

Priorities of international donors, carbon credit purchasers, project developers, local villagers, biodiversity advocates (and the life forms for whom they speak), and national, provincial, and state governments are not always aligned in REDD+. Obviously, project developers want quick action and local people may see urgent threats to their forests. But REDD+ faces an ineluctable tension between developers, government officials, and NGOs who want to make money or save dwindling forests sooner rather than later, and the needs of local people to understand project details, including restrictions on forest use and benefits that may redound.<sup>266</sup>

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<sup>260</sup> Dellinger, *supra* note 32, at 316.

<sup>261</sup> Baez, *supra* note 40, at 835.

<sup>262</sup> Even as REDD+ moves forward in the UN negotiating procedures, no grievance procedures have been formulated. The UN-REDD Programme, despite dozens of submissions from nations and many millions of dollars dispensed, has not yet devised a grievance procedure. See FLORENCE DAVIET & GAIA LARSEN, WORLD RES. INST., SAFEGUARDING FORESTS AND PEOPLE: A FRAMEWORK FOR DESIGNING A NATIONAL SYSTEM TO IMPLEMENT REDD+ SAFEGUARDS 18 (2012), available at [http://www.wri.org/sites/default/files/pdf/safeguarding\\_forests\\_and\\_people.pdf](http://www.wri.org/sites/default/files/pdf/safeguarding_forests_and_people.pdf).

<sup>263</sup> Annalisa Savaresi, *The Role of REDD in the Harmonisation of Overlapping International Obligations*, in CLIMATE CHANGE AND THE LAW 391, 412 (Erkki J. Hollo et al. eds. 2013); Dellinger, *supra* note 32, at 316. For an overview of REDD+ and sovereignty, see generally Takacs, *supra* note 20.

<sup>264</sup> See *infra* Part VIII.B.

<sup>265</sup> TAKACS, *supra* note 3, at 21, 51.

<sup>266</sup> ANDERSON, *supra* note 23, at 7–10.

Government officials may be under conflicting mandates, because ED rights may conflict with antidemocratic government laws and policies—though they may also help open up broader democratic spaces in a community, region, or nation.<sup>267</sup> Neither Vietnam nor Cambodia, for example, has a freedom of information law.<sup>268</sup> A review of freedom of information laws in numerous UN-REDD Programmes reveals that fewer than half of forty-four participating nations have such laws, and even where they exist,

weaknesses in implementation of these laws exist at all levels . . . weaknesses range from a prevailing culture of secrecy to a basic lack of capacity with regard to information processing . . . within affected communities, which are insufficiently aware or informed of their rights; and within the international community, which has insufficiently scrutinized and promoted the speedy implementation of international commitments made on access to information.<sup>269</sup>

#### *E. There Will Be Mismatches in Capacity of Project Actors*

Project developers and local people are often unfairly matched in terms of capacity in REDD+. Project documents are usually in English or another colonial language, which local people may not speak. Local people may be illiterate or innumerate. They may not have the ability to access computers. Certainly it is unlikely that local people will understand complicated technical details of carbon-as-property or financial markets or technical formulas to calculate carbon stored in biomass.<sup>270</sup> So, for example, while Cambodia has an official REDD+ online portal,<sup>271</sup> how would rural villagers access it, and what would they understand if they did?

Local villagers may lack access to government officials, while project developers gain access with promises of great financial benefits. Project developers are certain to be better funded than local groups.<sup>272</sup> ED rights are designed, in part, to account for and mitigate those disadvantages, but the capacity gap has, in practice, been a bit too wide to bridge.

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<sup>267</sup> O'Faircheallaigh, *supra* note 124, at 24.

<sup>268</sup> NOORLANDER, *supra* note 62, at 42–43 (containing table of freedom of information laws in REDD+ participating countries).

<sup>269</sup> *Id.* at 69.

<sup>270</sup> See, e.g., ANDERSON, *supra* note 23, at 8 (noting that the complexity and evolving nature of REDD+ programs make it inherently difficult for both project staff and local people to understand).

<sup>271</sup> REDD+ Cambodia, <http://www.cambodia-redd.org> (last visited Feb. 22, 2014) (providing a “site to access all information about REDD+ in Cambodia”).

<sup>272</sup> Michael I. Jeffery, *Intervenor Funding as the Key to Effective Citizen Participation in Environmental Decision-Making: Putting the People Back into the Picture*, 19 ARIZ. J. INT'L & COMP. L. 643, 671–75 (2002) (discussing proponent-based funding legislation to facilitate effective citizen involvement in environmental decision making).

*F. Environmental Democracy, Especially FPIC, May Be Impossible*

Once given timely, full information, groups must give express consent. But it's almost impossible to provide timely, full information in REDD+ schemes. Increasingly demanding guidelines and safeguards don't change the fact that genuine, sustained FPIC may be impossible.

Even the most detailed and well planned consultation process seeking free, prior, informed consent presents a conundrum: Consent to what? REDD+ is a moving target. National programs and guidelines are still being developed in all REDD+ nations and internationally. Projects go through complicated validation and verification procedures that result in changes up until the time a project's credits go to market. REDD+ implementers are building the bicycle as they're riding it: Even the most rigorous, inclusive, culturally and linguistically appropriate FPIC process cannot fully explain what the project will be, what local citizens will be required to do, and how, when, and what manner of benefits will accrue. Local people may have access to the forest, but they lack access to both the capital and the capitol: Fully informed consent is not possible. And if local people simply do not want a REDD+ project, they may not be able to refuse—although they can subvert the process later on.<sup>273</sup> Thus, local people cannot fully participate in REDD+ decision making, cannot access information they do not understand, that does not yet exist, or is rapidly changing, and cannot truly offer informed consent when the details of what they are consenting to are not yet formulated.

#### VIII. WAYS FORWARD TO REALIZING ENVIRONMENTAL DEMOCRACY IN REDD+

The aspirational language of ED rights meets a hard reality on the ground and in the forest. While REDD+ practitioners are making progress toward genuine ED, they have a ways to go to fulfill their legal and ethical obligations to communities in which REDD+ is launching.

My research is guided by the belief that for REDD+ to be sustainable, it must be: 1) effective—working for all stakeholders with minimal complication; 2) synergistic—maximizing benefits for climate, biodiversity, and local people; and 3) equitable—narrowing gaps between rich and poor. Specifically, to achieve sustainability over the duration of a program, REDD+ should be implemented in a deeply equitable way. By “deep equity,” I refer to laws, policies, and values promoting sustainable pathways that act in synergy to maximize the health and potential of all individuals, communities, and ecosystems. The equity is “deep” because values become rooted within each individual. It is also deep because it requires that we fundamentally re-envision our community structures and responsibilities, and root these values and responsibilities in our legal systems and policy

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<sup>273</sup> Baez, *supra* note 40, at 841.



choices. Our laws and policies would, in turn, support values and actions promoting even deeper equity.<sup>274</sup>

Deeply equitable, environmentally democratic REDD+ costs more up front. True Aarhus and FPIC compliance means process, which takes time, which means money. It has been five years since the Oddar Meanchey project was initiated and—as of this writing—the carbon credits have still not gone to market. The project developers have worked hard to engage local citizens and government officials at all stages of the process, yet our interviews suggest that local people do not really understand REDD+. Furthermore, a common theme we heard in villages was, to paraphrase: *We are told we can sell carbon, but we were told that a long time ago. We are investing time and effort in forest patrols and reforestation, yet we see no financial returns. When will the money come?* Delay is especially problematic for poor people, particularly when they have forgone opportunities—such as securing employment, collecting forest materials, refraining from clearing forestland to plant crops—and invested time in such things as serving on forest patrols, attending meetings in order to earn promised REDD+ rewards.

Fully realized local participation—in essence, genuine informed consent, participation in all aspects of planning and management, and a fair grievance procedure—is not just equitable, but is the only pragmatic way to achieve synergistic benefits over the thirty or more years of a REDD+ project. That is to say, maximizing local citizen participation in REDD+ is not only legally encouraged or required; it is common sense and sound policy if all stakeholders are to realize REDD+'s synergistic benefits over the long run. Herein, I propose ways forward for REDD+ that help fulfill the norms of ED and further the goals of all stakeholders.

#### *A. Weighing ED Against Imminent Threats to Life-Sustaining Forests*

The procedural safeguards encoded in ED rights are necessary for a precautionary approach to REDD+, given the potential for serious incursions on people's ability to sustain their lives if they lose access to forest. However, this precaution must be measured against immediate threats to life-sustaining forests; if REDD+ is the only practicable—i.e., financially feasible and supported by many different stakeholders, including those with money and power—means to preserve these forests, how does one balance the need for precaution and democratic process against the exigencies arising from multiple, immediate causes and effects of rampant forest destruction?

In their review of international environmental law and indigenous peoples, Richardson and Craig note:

whatever approach is taken to empower indigenous peoples, it is vital to recognise that their claims to economic and cultural self-determination should

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<sup>274</sup> See Takacs, *supra* note 18, at 526.

not be interpreted as a freedom to engage in unsustainable uses of the environment. The right to self-determination must be understood in the context of common responsibilities for maintaining the health of our ecological systems, which know no jurisdictional boundaries.<sup>275</sup>

Richardson and Craig cite the Convention on Biological Diversity, section 10(c), which requires parties to “[p]rotect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements.”<sup>276</sup> Subsidiarity—a preference for making natural resource decisions at the local level, where knowledge is greatest and costs of development projects are primarily borne—is a cornerstone principle in International Environmental Law.<sup>277</sup> ED rights reflect that principle. But subsidiarity has exceptions if local decisions would undercut the life support systems of local communities or contribute significantly to problems that don’t respect national borders.<sup>278</sup> A preference for subsidiarity thus does not mean that local people a priori have right to full control of REDD+ and it does not mean that failure to engage in perfect ED processes automatically scuttles a project or renders it illegal. In other words, ED processes are not unbounded if their outcomes lead to environmental destruction.

Forests are vitally important for so many reasons, and in a deeply equitable world, we would do everything in our power to preserve them. Realizing ED in REDD+ is a fundamental step towards this goal. But, as we have seen, ED takes time and time means money. But time also means inexorable declines for forests, which are disappearing, especially in the biodiversity-rich tropics where poor people most depend upon forests and the biodiversity they harbor.<sup>279</sup>

Thus I am not saying that because ED norms are not fully realized, we should let the perfect be the enemy of the good and give up on REDD+. REDD+ promises too much to throw in the towel; the end benefits of REDD+ may justify the currently imperfect means. No democracy is perfect—inequalities in power and resources exist everywhere.

ED norms are part of a new wave of Environmental Human Rights that fall under the classification of “Economic, Social, and Cultural Rights.”<sup>280</sup> The

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<sup>275</sup> Richardson & Craig, *supra* note 72, at 226.

<sup>276</sup> Convention on Biological Diversity, *supra* note 74, art. 10(c).

<sup>277</sup> See DAVID HUNTER ET AL., INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 488–91 (4th ed. 2011) (discussing the Subsidiarity Principle).

<sup>278</sup> *Id.*

<sup>279</sup> See U.N. FOOD & AGRIC. ORG., STATE OF THE WORLD’S FORESTS: 2012, at 16 (2012), available at <http://www.fao.org/docrep/016/i3010e/i3010e.pdf> (explaining that between 2000 and 2010, 130 million hectares of forest were lost, although 78 million hectares were gained through plantations and natural forest expansion, representing a 1.3% net loss of global forest over the decade); FOREST PEOPLES PROGRAMME, FOREST PEOPLES: NUMBERS ACROSS THE WORLD (2012), available at [http://www.forestpeoples.org/sites/fpp/files/publication/2012/05/forest-peoples-numbers-across-world-final\\_0.pdf](http://www.forestpeoples.org/sites/fpp/files/publication/2012/05/forest-peoples-numbers-across-world-final_0.pdf) (detailing the number of forest-dependent indigenous peoples globally and their dependence on forests for their livelihood).

<sup>280</sup> See David Takacs, *The Public Trust Doctrine, Environmental Human Rights, and the Future of Private Property*, 16 N.Y.U. ENVTL. L.J., 711, 720–721, 725–727 (2008). Note that these

International Covenant on Economic, Social, and Cultural Rights proclaims that rights therein enshrined should be realized not absolutely and immediately, but progressively:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.<sup>281</sup>

Therefore, the question is not whether REDD+ should be scrapped because ED rights are not perfectly realized? The question, instead, is: How do we maximize the pace, scope, and depth of progressive realization of ED norms in REDD+? I offer some thoughts below.

### *B. Legal Pluralism and ED*

The idea that carbon can be property and can shape shift from an ecological to financial commodity comes from distinctly Northern legal systems.<sup>282</sup> Domestic or international laws that govern carbon ownership, delineate the right to negotiate for carbon rights, monitor financial transactions based in carbon, and mandate greenhouse gas reductions, cling to certain notions of what constitutes “law,” what comprises “property,” and what constitutes an “impact.”<sup>283</sup> Yet all REDD+ laws will be layered on local law that regulates human nature and human-to-human relations. Some of these systems will fit with what Northern project proponents understand as “law,” and some derive from systems of law rooted in nonprofessional, locally distinct, cultural or religious traditions. The concept of “legal pluralism” recognizes that in any given locale, formal, Western-derived, State legal systems will overlay traditional norms that maintain order, manage resources, and distribute property.<sup>284</sup>

Power relations shape all law. In REDD+, developed country actors or elites within a developing nation usually have the power to dictate what formal law will comprise.<sup>285</sup> Scholars of legal pluralism have “focused on the

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rights may serve to fulfill other more fundamental rights (e.g., the right to life) that are absolute and not subject to the limitation that they be realized progressively.

<sup>281</sup> International Covenant on Economic, Social and Cultural Rights, *supra* note 72, at 5.

<sup>282</sup> TAKACS, *supra* note 3, at 21.

<sup>283</sup> *Id.* at 6.

<sup>284</sup> See generally Johnstone, *supra* note 51 (examining the development of legal pluralism and the contemporary struggle of indigenous peoples in Indonesia for recognition of their customary forest rights within the emerging legal frameworks for REDD).

<sup>285</sup> Lorenzo Cotula, *Legal Empowerment to Secure Land Rights: Defining the Concept*, in LEGAL EMPOWERMENT IN PRACTICE: USING LEGAL TOOLS TO SECURE LAND RIGHTS IN AFRICA 7, 15 (Lorenzo Cotula & Paul Mathieu eds., 2008); Paul Mathieu, *Legal Empowerment in Practice to Secure the Land Rights of the Poor: A Short Concept Note*, in LEGAL EMPOWERMENT IN PRACTICE: USING LEGAL TOOLS TO SECURE LAND RIGHTS IN AFRICA 24 (Lorenzo Cotula & Paul Mathieu eds., 2008).

rejection of the state legal order as the lynch-pin of legal normativity.<sup>286</sup> More immediately, I advise those promoting REDD+ to see that ED rights include the need to democratize what counts as law, both out of fairness to participants and self-interest for successful projects.

A keystone of ED and of sustainable REDD+ requires understanding, respecting, and integrating local legal systems. REDD+ schemes that impose one legal system on another, where local people do not understand the abstract legal notions at play, or that deny local people benefits that local law has sustained, are unlikely to be sustainable. Any given nation may host a wide array of local laws that regulate property; a national legal framework that makes uniform forest carbon law more hospitable to foreign investment may disrupt local legal arrangements that have evolved and stabilized over centuries. Particularly in rural areas in developing nations, few people have formal legal title to their land, but nonetheless communities have their own property norms.<sup>287</sup> When such norms and laws are disrupted or disrespected, local people who are angry or desperate can assert their own power to disrupt a forest carbon scheme that does not attend to the multiple layers of law that control social relations and community-nature interactions.<sup>288</sup>

On the other hand, the legal underpinnings of the Aarhus Convention, other multilateral environmental agreements, and various voluntary standards do not just further “another Northern plot.”<sup>289</sup> True legal pluralism means recognizing and respecting the Northern web of laws that facilitate REDD+ and its potential synergistic outcomes, and that could provide a powerful voice for potentially marginalized people to manage their natural resources and profit. Furthermore, we do need experts who understand the big picture of the causes of climate change and deforestation, and we need laws that devolve from that expertise.

Finally, and in particular, for deeply equitable REDD+, while legal pluralism requires that project developers respect local legal mechanisms to adjudicate grievances, genuine Access to Justice requires protecting community members through more formal legal protections. Local law may be ineffective, for example, at adjudicating disputes drawn up in offices thousands of miles from the project site, using Northern legal notions beyond the ken of local citizens.

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<sup>286</sup> Martha-Marie Kleinhans & Roderick A. McDonald, *What is a Critical Legal Pluralism?*, CAN. J. L. & SOC'Y, Fall 1997, at 25, 30.

<sup>287</sup> Maria Banda & John Oppermann, *Building a Latin American Coalition on Forests: Negotiation Barriers and Opportunities*, 44 VAND. J. TRANSNAT'L L. 527, 544 (2011).

<sup>288</sup> Jon D. Unruh, *Carbon Sequestration in Africa: The Land Tenure Problem*, 18 GLOBAL ENVTL. CHANGE 700, 704 (2008); Daniel Fitzpatrick, *Evolution and Chaos in Property Rights Systems: The Third World Tragedy of Contested Access*, 115 YALE L.J. 996, 1020 (2006).

<sup>289</sup> LALANATH DE SILVA & JEREMY WATES, GLOBALIZING ENVIRONMENTAL DEMOCRACY: A CALL FOR INTERNATIONAL ACTION 32 (2012), available at [http://www.accessinitiative.org/sites/default/files/ENVIRONMENT\\_PAPERS\\_DISCUSSION\\_7.pdf](http://www.accessinitiative.org/sites/default/files/ENVIRONMENT_PAPERS_DISCUSSION_7.pdf).

*C. ED Skills Translate Into Broader Governance Skills, Necessary for  
Adaptation to Climate Change and to Broader Forest and Other Governance  
Issues*

REDD+ is a laboratory for reforming not just forest governance and management, but also governance and management of all environment development projects. The ED provisions of the Aarhus Convention have been important not only for improving environmental decision making in member countries, but in helping nations—particularly in Eastern Europe—enhance democracy in all areas of the law.<sup>290</sup> Nations or subnational governments may have renewed impetus to enhance democracy if REDD+ funds require such democratic transparency—either because ED rights come to be legally required internationally or the donor’s standards require them. So, for example, the UN-REDD Programme is investing many millions in REDD+ in forty-four nations—as of this writing—and is promoting a set of ED reforms, some of which must be achieved for nations to receive funding. Their chief general recommendation is to “apply existing freedom of information laws to REDD+, pass such laws if they do not exist, and/or build freedom of information into REDD+.”<sup>291</sup> They request specific reforms such as “mechanisms to provide information [that are] proactive, rather than by request, and provided in accessible format and language tailored to different stakeholder groups,” and the provision of “training and awareness-raising to the public service on how to implement freedom of information, along with budget support for relevant agencies to carry out this work.”<sup>292</sup> If actualized, these reforms are likely to influence a greater sphere than simply REDD+.<sup>293</sup>

As over two-thirds of the forests in the world’s most forested nations remain under central government control,<sup>294</sup> devolution of some governance to local communities will help residents develop the kinds of institutions needed not only to manage forests, but also to cope with multiple ecological and political stressors that global climate change will exacerbate.<sup>295</sup> In the words of one scholar, public participation in environmental projects is crucial for “promoting broadly-based individual and social learning, so enabling the transition to sustainability.”<sup>296</sup> Maximizing democratic participation in REDD+, if successful synergistic benefits result, provides a model for reforms for managing other prized or contested rural natural resources.<sup>297</sup> More than that, full, effective participation in REDD+ planning and implementation will likely extend to other informed participation that

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<sup>290</sup> Dellinger, *supra* note 32, at 365.

<sup>291</sup> NOORLANDER, *supra* note 62, at 7.

<sup>292</sup> *Id.* at 7–8.

<sup>293</sup> *Id.* at 7.

<sup>294</sup> Arun Agrawal et al., *Changing Governance of the World’s Forests*, 320 SCIENCE 1460, 1460 (2008).

<sup>295</sup> Chhatre et al., *supra* note 12, at 655.

<sup>296</sup> O’Faircheallaigh, *supra* note 124, at 19.

<sup>297</sup> See Innes & Booher, *supra* note 117, at 422 (contending that cooperative policy models can move decision-making beyond stalemate).

enables poor, local people to realize the full benefits of citizenship.<sup>298</sup> In this way, according to one scholar, full participation in environmental planning “can be used by socially marginalized groups as a platform from which to change the social order, and in so doing alter in basic ways the distribution of costs and benefits from development.”<sup>299</sup>

*D. Recognize that Legal Status and Requirements of ED Rights Are Likely to Expand*

Annalisa Savaresi notes that “[w]ith regard to REDD+, it is clear that all Parties must comply with their extant international obligations, including human rights obligations, whenever they undertake REDD+ activities.”<sup>300</sup> Easier said than done: the problem is discerning what those human rights obligations are, particularly with respect to ED rights.

Nonetheless, as a fundamental part of due diligence, any REDD+ project developer must recognize the current and changing legal landscape. As ED laws expand and harden in future multilateral environmental agreements, domestic legislation, and voluntary standards, and as ED norms are increasingly recognized, smart project managers will plan ahead. Legal risks for transnational enterprises failing to respect human rights are likely to grow, and part of due diligence for any REDD+ developer should be to survey what those risks are likely to be in the future.<sup>301</sup> For long-lived REDD+ schemes, project stakeholders should take the most capacious reading of ED norms, thus avoiding the risks that their projects will be invalidated due to non-compliance with current or future legal norms.

*E. “Consultation” Is Not Enough*

Some REDD+ programs require *consultation* to fulfill ED requirements. When they consult, project developers or government officials might inform local stakeholders about REDD+; they may solicit information and feedback on proposals.<sup>302</sup> For example, the World Bank’s Forest Carbon Partnership Fund follows the World Bank’s operational policies, which require “a process of free, prior, and informed consultation.”<sup>303</sup>

But merely offering or exchanging information does not mean you have secured genuine *consent* to proceed with REDD+. As the Center for People and Forests notes, “FPIC is not participatory engagement, it is not

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<sup>298</sup> O’Faircheallaigh, *supra* note 124, at 22.

<sup>299</sup> *Id.* at 23.

<sup>300</sup> Savaresi, *supra* note 263, at 411.

<sup>301</sup> Rae Lindsay et al., *Human Rights Responsibilities in the Oil and Gas Sector: Applying the UN Guiding Principles*, 6 J. WORLD ENERGY L. & BUS. 2, 52–53 (2013).

<sup>302</sup> HERZ ET AL., *supra* note 127, at 7–8 (introducing concept of “free, prior, and informed consent”).

<sup>303</sup> Savaresi, *supra* note 263, at 415.

negotiations, and it is not consultation. Rather, these are means through which FPIC can be achieved.<sup>304</sup>

In a perfect REDD+ world, project developers and government officials would adopt a rigorous consent process that goes beyond mere consultation. Decision making would be collaborative and would include the right to refuse or revoke permission.<sup>305</sup> The Philippines government adopted one such template for community consent in development projects.<sup>306</sup> Project developers require endorsement letters from municipal, local NGOs, and community leaders before they may proceed. Project proponents must document how they have incorporated community input. An official entity representing community stakeholders must agree, in writing, to participate in implementation and/or monitoring of projects.<sup>307</sup>

Furthermore, consent and participation are not one-time events: they should continue throughout the project cycle as important developments occur. They are not merely legal boxes to check off before moving on. Most REDD+ projects or programs evolve rapidly as they go through validation procedures, as donors change or make extra demands, and as national REDD+ programs—and associated laws—develop. Included in “consent” should be some consent to a process for when further consent is necessary; this could include notification, consultation, reciprocal dialogue, and subsequent consent when unexpected developments or significant changes in the scheme occur.<sup>308</sup>

The Cambodian Oddar Meanchey project sponsors, as we have seen, have engaged in continuous participation activities, resulting in some kind of “consent;” but even there, villagers told us they were uncertain what they had consented to and what the current status of the project is, even while they were participating in forest patrols, attending meetings, and making other investments in the project. Meanwhile, the Cambodian government is still formulating their REDD+ laws. So how continuous does the participation process have to be, and how frequently does consent need to be garnered before we can say that local peoples’ ED rights have been honored? At very least, each time a major milestone is reached—a benefit distribution system is proposed or a set of requirements for participation is offered—consent should be reacquired.<sup>309</sup>

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<sup>304</sup> ANDERSON, *supra* note 23, at 15.

<sup>305</sup> See HERZ, ET AL., *supra* note 127, at 7–8.

<sup>306</sup> See *id.* at 21.

<sup>307</sup> See *id.* at 21–22.

<sup>308</sup> *Id.* at 47–49.

<sup>309</sup> See ANDERSON, *supra* note 23, at 23 (identifying major milestones at which consent should be sought).

*F. Use the UN's "Guiding Principles on Business and Human Rights"<sup>310</sup> as a Template When Implementing REDD+*

UN Special Representative John Ruggie named a series of standards that the UN Human Rights Council has endorsed as "Guiding Principles" for how businesses should "protect, respect and remedy" human rights when operating transnationally.<sup>311</sup> Those who implement REDD+ should study these Principles, as they were unanimously endorsed by the nations elected to the Human Rights Council. As such, they have been the subject of much commentary, and are increasingly likely to be seen as required for businesses operating transnationally; REDD+ business developers are no exception.<sup>312</sup> In addition, as I argue throughout, REDD+ proposers that adhere to these guidelines are also likely to sustain their investments through the long life of the projects.

The Principles start with a series of obligations for states to regulate transnational business operations within their sovereign territories.<sup>313</sup> The three overarching principles are:

- 1) States have a duty to protect citizens against human rights infringements from business enterprises;
- 2) Businesses operating transnationally should exert due diligence to avoid violating human rights in the nations in which they operate; and
- 3) Victims of human rights violations by businesses should have access to effective remedies.<sup>314</sup>

While these principles are eloquent and ideal, the first and third remain aspirational for many resource-strapped nations in which REDD+ operates. The underlying principles provide excellent, concrete guidance for host nations, although they don't address ED per se. However, REDD+ international actors should heed the principles that name specific obligations for businesses operating transnationally—both because they are becoming increasingly required custom under international law, and, as I argue throughout, because they are likely to help the REDD+ project succeed in the long term.

Guiding Principle 18(b) advises that:

business enterprises should identify and assess any actual or potential adverse human rights impacts with which they may be involved . . . This process should . . . involve meaningful consultation with potentially affected groups and other

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<sup>310</sup> See U.N. Office of the High Comm'r. for Human Rights, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, U.N. Doc. HR/PUB/11/04 (2011) [hereinafter *Guiding Principles*].

<sup>311</sup> *Id.*

<sup>312</sup> For a template on how scholars are using the Guiding Principles in other industries, see, for example, Rae Lindsay et al., *Human Rights Responsibilities in the Oil and Gas Sector: Applying the UN Guiding Principles*, 6 J. WORLD ENERGY L. & BUS. 2 (2013).

<sup>313</sup> *Guiding Principles*, *supra* note 310, at 3.

<sup>314</sup> *Id.* at 1.



relevant stakeholders, as appropriate to the size of the business enterprise and the nature and context of the operation.<sup>315</sup>

The framers stop short of requiring consent (settling for “consultation”), but do urge that businesses

should seek to understand the concerns of potentially affected stakeholders by consulting them directly in a manner that takes into account language and other potential barriers to effective engagement. In situations where such consultation is not possible, business enterprises should consider reasonable alternatives such as consulting credible, independent expert resources, including human rights defenders and others from civil society.<sup>316</sup>

Furthermore, the Guiding Principles exhort businesses to “track the effectiveness of their response . . . draw[ing] on feedback from both internal and external sources, including affected stakeholders.”<sup>317</sup>

In most REDD+ schemes, it is not clear how affected local people would obtain justice should they feel their rights have been violated. The Guiding Principles contain excellent guidelines on grievance mechanisms, including a list of criteria to ensure effective justice in nonjudicial settings. In addition to being “legitimate,” “accessible,” “predictable,” “equitable,” “transparent,” “rights-compatible,” and “a source of continuous learning,” the standard asks that the grievance procedure is “based on engagement and dialogue: Consulting the stakeholder groups for whose use they are intended on their design and performance, and focusing on dialogue as the means to address and resolve grievances.”<sup>318</sup>

### *G. Earning and Maintaining a Social License to Operate*

Environment-development projects that fail to observe ED rights may fail as a result.<sup>319</sup> And, as we have seen, fully realized ED rights, including genuinely informed consent, are impracticable or impossible in REDD+. Is there a way for project developers, government officials, and local stakeholders to engage in a process that fulfills the norms underlying ED rights, even if fully informed consent remains elusive?

In one potential solution that honors ED rights, project officials win and maintain the trust of the communities in which they seek to implement REDD+. That is to say, even if every community member does not receive—or cannot understand—all of the detailed information needed to make truly informed decisions about REDD+, they may come to trust those who are implementing the scheme. Project developers would have to earn a “Social License to Operate,” and that license may be revoked if they violate the trust

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<sup>315</sup> *Id.* at 19.

<sup>316</sup> *Id.* at 20.

<sup>317</sup> *Id.* at 22.

<sup>318</sup> *Id.* at 33–34.

<sup>319</sup> See, e.g., FOTI & DE SILVA, *supra* note 100, at 2; HERZ ET AL., *supra* note 127, at 3.

they have earned.<sup>320</sup> In other words, according to a business advisor, now “companies have to do even more to maintain a Social License to Operate. It is not a task that has a beginning and an end; rather, it is an ongoing relationship that needs constant attention.”<sup>321</sup> REDD+ would thus become a strategic site to test the validity and practicality of the Social License to Operate, which could in turn be a model for other environment-development schemes where complicated technical data merge with shifting timetables and evolving stakeholder demands to make it difficult for community members to exercise ED rights.

The Social License to Operate may not be a formal agreement, although certain aspects of the agreement may be put in formal contracts or covered by a set of social safeguards required by a government or the independent standards a project developer uses.<sup>322</sup> I return to this in the next section. To obtain a Social License to Operate, project officials would climb a process ladder from “legitimacy” to “credibility” to “trust.” Officials gain “legitimacy” through understanding and respecting the legal and cultural norms in the communities in which they seek to implement REDD+.<sup>323</sup> This means adopting the legal pluralism paradigm I discuss above. It also means identifying the institutions that the community uses to maintain order, to adjudicate grievances, and to demarcate property.<sup>324</sup> Project developers achieve legitimacy by identifying these community institutions and maximizing transparency in communicating seminal information, and listening to and incorporating community concerns and desires.<sup>325</sup>

By memorializing understandings in a linguistically and culturally apposite format and by delivering on the promises so recorded, project developers gain and maintain “credibility.” Genuine “trust” obtains when project developers offer full collaboration—as opposed to achieving mere cooperation with their own goals—and maintain equal collaborative status throughout the life of the project.<sup>326</sup> The process required to climb the ED ladder to achieving trust is analogous to Richardson and Razzaque’s “deliberative democracy,” or Arnstein’s “citizen power,” where local people

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<sup>320</sup> See, e.g., SocialLicense.com, *What is the Social License?*, <http://sociallicense.com/definition.html> (last visited Feb. 22, 2014) (defining the social license); Ernst & Young Global Ltd., *Business Risks in Mining and Metals 2013-2014: The Top 10 Risks*, <http://www.ey.com/GL/en/Industries/Mining--Metals/Business-risks-in-mining-and-metals-2013-2014--The-top-10-risks> (last visited Feb. 22, 2014).

<sup>321</sup> Ernst & Young Global Ltd., *supra* note 320 (quoting Mathew Nelson, Asia-Pacific Climate Change and Sustainability Services Leader for Ernst & Young).

<sup>322</sup> See, e.g., JACQUELINE L. NELSON & MALCOLM SCOBLE, *SOCIAL LICENSE TO OPERATE: ISSUES OF SITUATIONAL ANALYSIS AND PROCESS* 1–3 (2006) available at <http://www.yumpu.com/en/document/view/11369769/social-license-to-operate-mines-ubc-mining-engineering>.

<sup>323</sup> SocialLicense.com, *supra* note 320.

<sup>324</sup> Prno & Slocombe, *supra* note 111, at 347–49 (using the mining industry as a micro study of Social Licenses to Operate, it is crucial for project developers to identify a communities’ governance mechanisms to establish legitimacy).

<sup>325</sup> See *id.* at 347–49.

<sup>326</sup> SocialLicense.com, *supra* note 320.

and project developers have a genuine, reciprocal partnership and locals are genuinely empowered to make decisions.<sup>327</sup>

The social license to operate finds increasing use in the mining sector, where local communities excluded from active participation aggressively resisted when adverse social and environmental outcomes occurred.<sup>328</sup> Business consultants Ernst & Young list obtaining and maintaining a Social License to Operate as the number four business risk for mining and metals in 2013–2014.<sup>329</sup> Pierre Lassonde warns mining executives, “[w]ithout local community support, your project is going nowhere.”<sup>330</sup> Under the aegis of “corporate social responsibility,” mining firms have recognized that using the Social License to Operate not only reduces their risks, but improves their reputations in the international market and keeps the industry viable in the face of increasingly sophisticated local community networks.<sup>331</sup> Furthermore, according to advocates, “[i]t also represents a genuine opportunity to transform mining into an activity that is recognized to promote economic and social development of associated communities.”<sup>332</sup>

Formulators of the Social License to Operate propose that one can measure the strength of the license through various indirect measurements: Are community members boycotting the project? Are they carefully watching over the product and process, either with trepidation or with pride, or taking satisfaction in collaborative achievements?<sup>333</sup> They also propose a more formal, direct method for measuring whether or not the Social License to Operate has been achieved and maintained.<sup>334</sup> Once each level is achieved, it must be maintained; like consent, legitimacy can be undermined, credibility can be lost, and trust can be revoked.<sup>335</sup> And, as in other approaches to realizing ED rights, achieving and maintaining the Social License to Operate takes time. Truly divining the local legal landscape is as time-consuming a process as measuring the local ecological landscape, but both are essential for REDD+ to succeed.

No international law or domestic law currently requires the Social License to Operate. It is, instead, a method to fulfill the requirements of ED

<sup>327</sup> Interview with Ian Thomson, Dir., European Documentation Centre, Cardiff University (July 17, 2013); Arnstein, *supra* note 143, at 216.

<sup>328</sup> HERZ ET AL., *supra* note 127, at 41–42, 44 (describing the “strong public resistance” from the local community to the expansion of mining operations in the Quilish reserves at the Yanacocha mine because the community’s traditional agricultural and farming practices conflict with industrial mining operations); Prno & Slocombe, *supra* note 111, at 351–52 (describing the Environmental Assessment process as the “primary stage where mining-community onlicts are played out” between mining companies and aboriginal peoples).

<sup>329</sup> Ernst & Young Global Ltd., *supra* note 321.

<sup>330</sup> NELSEN & SCOBLE, *supra* note 322, at 2.

<sup>331</sup> Prno & Slocombe, *supra* note 111, at 352; NELSEN & SCOBLE, *supra* note 323, at 2–3.

<sup>332</sup> NELSEN & SCOBLE, *supra* note 322, at 3.

<sup>333</sup> SocialLicense.com, *Measuring the Social License*, <http://sociallicense.com/measure.html> (last visited Feb. 22, 2014).

<sup>334</sup> ROBERT G. BOUTILIER & IAN THOMSON, MODELING AND MEASURING THE SOCIAL LICENSE TO OPERATE 2–3 (2011), *available at* <http://sociallicense.com/publications/Modelling%20and%20Measuring%20the%20SLO.pdf>.

<sup>335</sup> SocialLicense.com, *supra* note 319; Ernst & Young Global Ltd., *supra* note 319.

in a context where the international and domestic legal landscapes are evolving and informed consent is difficult. Requiring a Social License to Operate avoids distinctions in international law that impose ED obligations on states but not on private actors; furthermore, it avoids distinguishing between indigenous and non-indigenous communities, as the Social License to Operate should be in effect for all communities that would be impacted by a REDD+ project.<sup>336</sup> But no matter the current formal status of ED legal “rights,” the Social License to Operate also fulfills the crass pragmatics that promote ED in REDD+: All investors in REDD+ will maximize their investments if they earn the cooperation and participation of local citizens.

#### *H. Formulating a Community Protocol*

Stakeholders can formulate, with assistance and money from REDD+ funding sources or project developers, a working agreement that sets out the terms of REDD+, including how community concerns will be addressed and how ED rights will be respected. These agreements can include customary law<sup>337</sup> that preexists REDD+ to help all stakeholders understand the cultural-legal milieu of the forest-community dynamic.<sup>338</sup> These are living documents; plans can be continually amended as new details about a REDD+ scheme emerge and as communities become more sophisticated about REDD+.

One NGO calls these “community protocols” and suggests all local communities should start with one as they engage with REDD+.<sup>339</sup> By preparing this way, and “[b]y approaching REDD as more equal partners, communities are better able to engage with other stakeholders such as investors, researchers and governments on their own terms and to negotiate according to the bio-cultural values that help conserve forests.”<sup>340</sup>

A community protocol might start with community members making maps that record their understanding of patterns of land use, land tenure, and land ownership, both formal and traditional.<sup>341</sup> In a community protocol process, the community also memorializes the legal institutions it uses to make decisions and adjudicate grievances.<sup>342</sup> The protocol then develops the ED process, including how consent would be given, by whom, and how often. Community members, government officials, and project developers specify how frequently meetings will take place, what happens at those meetings, who attends, and who is empowered to represent community viewpoints. They identify the existing property rights holders, and what

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<sup>336</sup> Prno & Slocombe, *supra* note 111, at 349.

<sup>337</sup> See *supra* text accompanying notes 284–91.

<sup>338</sup> ANDERSON, *supra* note 23, at 4.

<sup>339</sup> See NATURAL JUSTICE, COMMUNITY PROTOCOLS IN REDD, *available at* [http://naturaljustice.org/wp-content/uploads/pdf/Community\\_Protocols\\_in\\_REDD.pdf](http://naturaljustice.org/wp-content/uploads/pdf/Community_Protocols_in_REDD.pdf).

<sup>340</sup> *Id.*

<sup>341</sup> ANDERSON, *supra* note 23, at 32–33.

<sup>342</sup> UNDRIP requires that FPIC be conducted “in good faith . . . through [indigenous peoples’] own representative institutions.” Declaration on the Rights of Indigenous Peoples, *supra* note 72, art. 19; ANDERSON, *supra* note 23, at 35; UN-REDD PROGRAMME, *supra* note 26, at 5.

rights they possess. Some questions remain: Would consent need to be unanimous? If not, how would stakeholders know that some significant proportion of affected citizens consent to REDD+? Furthermore, what provisions would there be to empower women, ethnic or political minorities, and especially poor community members to participate?<sup>343</sup>

The community protocol might include a formal Impact and Benefits Agreement between a developer and a community.<sup>344</sup> The community protocol would also lay out the role community members would play in measuring, monitoring, reporting, and verifying (MMRVing) the project, as in the Pact Cambodia project.<sup>345</sup> In short, the community protocol would memorialize local citizens' legal and cultural norms, their current patterns of forest use and ownership, and how they understand and what they expect from REDD+.

### *I. Ombudsperson Support for Informed Participation*

As outlined above, it is difficult to have genuinely informed consent in REDD+. Northern legal conceptions of property drive REDD+ and enable the alchemy that converts carbon sequestered in trees to carbon inscribed in financial instruments. No matter what they know about the ecology and history of their neighboring forests, local people will ineluctably lack the capacity to understand the legal, scientific, and economic details of this prestidigitation. Information will always be incomplete.

Given the complicated technologies and processes beyond the ken of nearly all local community members, to make a community protocol, local people will need to identify, contact, and build relationships with REDD+-literate allies that they trust.<sup>346</sup> As part of the process of earning the social license to operate, project sponsors should endorse the support mechanism that communities choose, by helping identify potential NGO or government allies and paying for the service, if necessary. Like any project stakeholder, local citizens need to view the NGO as legitimate—i.e., the NGO itself needs a kind of social license to operate. NGO representatives who have transnational goals, whether they be biodiversity preservation or climate change mitigation, may be less concerned with the direct needs of local people and may not be the best choice for this role.<sup>347</sup>

<sup>343</sup> NATURAL JUSTICE, *supra* note 339. See generally ANDERSON, *supra* note 23, at 41 (identifying outline of consent agreement).

<sup>344</sup> Prno & Slocombe, *supra* note 111, at 348.

<sup>345</sup> See generally Takacs, *supra* note 20 (giving an overview of how MMRV and REDD+ may address issues surrounding climate change, deforestation, and poverty). See also BREWSTER, *supra* note 206, at 4, 6, 8–9.

<sup>346</sup> FOTI & DE SILVA, *supra* note 100, at 27; ANDERSON, *supra* note 23, at 45.

<sup>347</sup> Matthias Koenig-Archibugi & Kate Macdonald, *Accountability-by-Proxy in Transnational Non-State Governance*, 26(3) GOVERNANCE 499, 500 (2013); Robert G. Boutilier & Leeora Black, *Legitimizing Industry and Multi-Sectoral Regulation of Cumulative Impacts: A Comparison of Mining and Energy Development in Athabasca, Canada and the Hunter Valley, Australia*, 38 RESOURCES POLICY 2 (2013).

To help local people access information and truly participate in an informed way, project developers and participating governments should pay for trained ombudspersons who speak the local languages as well as the complicated carbon languages. Vietnam, for example, is training and hiring interlocutors in REDD+ provinces to assist local villages in REDD+ readiness.<sup>348</sup> These ombudspersons could be trained to understand forest carbon property law and to help translate complicated notions of forest carbon-as-property into legal terms local communities would understand. For example, in Africa, such ombudspersons assist community members in understanding their legal rights and demanding justice against more powerful forces.<sup>349</sup> In Mali, paralegals help herders understand their legal rights to access certain common property resources and also advise village chiefs on legal rights and how to adjudicate property disputes.<sup>350</sup>

### *J. Access to Justice: The Oft-Overlooked ED Right*

Grievances will normally be adjudicated under domestic legal systems, which in the developing world are often weak. Access to justice is particularly important for REDD+ because project managers are often foreign, nongovernment officials; the chain of grievance, should a project go awry, is seldom clear. Citizens are thus vulnerable when REDD+ comes to their forests.

Access to Justice is the ED right most often overlooked when designing REDD+. I have found no REDD+ scheme where the grievance procedure is well developed before consent is given. National legislation may not provide for such redress and remedy in environmental matters, and grievance procedures within REDD+ are often to be determined.<sup>351</sup> Unlike the Compliance Committee under the Aarhus Convention or the (not particularly effective) Executive Board of the Clean Development

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<sup>348</sup> UN-REDD PROGRAMME, *supra* note 26, at 5.

<sup>349</sup> See, e.g., Simeon Koroma, *Paralegals and Community Oversight Boards in Sierra Leone*, in LEGAL EMPOWERMENT IN PRACTICE: USING LEGAL TOOLS TO SECURE LAND RIGHTS IN AFRICA 77 (Lorenzo Cotula & Paul Mathieu eds., 2008), available at <http://pubs.iied.org/pdfs/12552IIED.pdf>.

<sup>350</sup> Boubacar Ba, *Paralegals as Agents of Legal Empowerment in the Bankass Area of Mali*, in LEGAL EMPOWERMENT IN PRACTICE: USING LEGAL TOOLS TO SECURE LAND RIGHTS IN AFRICA 46, 52–58 (Lorenzo Cotula & Paul Mathieu eds., 2008), available at <https://pubs.iied.org/pdfs/12552IIED.pdf>; Koroma, *supra* note 349, at 77, 80; Rita H. Aciro-Lakor, *Land Rights Information Centres in Uganda*, in LEGAL EMPOWERMENT IN PRACTICE: USING LEGAL TOOLS TO SECURE LAND RIGHTS IN AFRICA at 71, 72; DAVID TAKACS, CONSERVATION INT'L, FOREST CARBON: LAW + PROPERTY RIGHTS 65 (2009), available at [http://www.conservation.org/Documents/CI\\_Climate\\_Forest-Carbon\\_Law-Property-Rights\\_Takacs\\_Nov09.pdf](http://www.conservation.org/Documents/CI_Climate_Forest-Carbon_Law-Property-Rights_Takacs_Nov09.pdf); PATRICK ANDERSON, FREE, PRIOR, AND INFORMED CONSENT IN REDD+, 36, 49 (2011), available at <http://www.forestpeoples.org/sites/fpp/files/publication/2012/08/fpicinreddmanual127patrick-anderson.pdf>; JOSEPH FOTI & LALANATH DE SILVA, WORLD RESOURCES INSTITUTE, A SEAT AT THE TABLE: INCLUDING THE POOR IN DECISIONS FOR DEVELOPMENT AND ENVIRONMENT (2010), available at [http://pdf.wri.org/a\\_seat\\_at\\_the\\_table.pdf](http://pdf.wri.org/a_seat_at_the_table.pdf).

<sup>351</sup> KRISTEN HITE ET AL., A COMPLAINT MECHANISM FOR REDD+ 1 (2011), available at [http://www.ciel.org/Publications/REDD+\\_ComplaintMech\\_May11.pdf](http://www.ciel.org/Publications/REDD+_ComplaintMech_May11.pdf).

Mechanism under the Kyoto Protocol, no centralized entity purports to control REDD+ or can administer justice.

Even as REDD+ moves forward in the UN negotiating procedures, no overarching grievance procedures have been formulated. The UN-REDD Programme, despite dozens of submissions from nations and many millions of dollars dispensed, has not yet devised a grievance procedure.<sup>352</sup> Even the excellent guide to FPIC from the Center for People and Forests has a grievance procedure almost as an afterthought at Step 11, after their guidelines for how to monitor once REDD+ has begun.<sup>353</sup> Similarly, the model Pact project in Cambodia has no grievance procedure in place.<sup>354</sup>

To honor the right to Access to Justice, the community protocol should set out what legal forums will be used to settle disputes. It should be clear what responsibilities each stakeholder holds and what happens if the stakeholder fails to fulfill those responsibilities. While traditional, local legal forums should be respected and used, community members should understand that those mechanisms may not be appropriate or adequately protective should contract, or other complicated western legal disputes arise. The UN Office of the High Commissioner for Human Rights's Guiding Principles on Business and Human Rights, discussed above, provides sound guidance on designing culturally appropriate grievance mechanisms.<sup>355</sup>

#### *K. Project Developers and Government Officials*

First and foremost, project officials should earn the Social License to Operate and honor the community protocol that has been developed. They should be copartners in a process of deliberative democracy. They should seek out the most ED-detailed set of standards—which, in my opinion, is currently the REDD+ Social & Environmental standards discussed above<sup>356</sup>—and honor at least those parameters. They should observe the UN-REDD's guidelines on FPIC,<sup>357</sup> and provide this information both proactively and in response to requests from community groups, updating that information as often as necessary.

They should recognize that ED rights are likely to expand, as these rights evolve into customary international law, as domestic legal regimes require them, as international agreements specify them, and as they become de rigeur in voluntary standards that a jurisdiction or project developer adopts. They should respect and maximize ED norms because the law, equity, and self-interest compel it.

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<sup>352</sup> DAVIET & LARSEN, *supra* note 262, at 43.

<sup>353</sup> ANDERSON, *supra* note 23, at 51–54.

<sup>354</sup> BREWSTER, *supra* note 206, at 13–14.

<sup>355</sup> Guiding Principles, *supra* note 310, at 27–35.

<sup>356</sup> See REDD+ SOCIAL & ENVIRONMENTAL STANDARDS, *supra* note 52.

<sup>357</sup> UN-REDD PROGRAMME OPERATIONAL GUIDANCE, *supra* note 80, at 2.

## IX. CONCLUSION

For legal, practical, and equitable reasons, all stakeholders in REDD+ should take the most expansive reading of ED norms. Project developers, government officials, and NGOs supporting REDD+ for various reasons should all realize that sustainable—effective, synergistic, and equitable—REDD+ requires that local people participate as full and equal partners in planning and implementing it.

The REDD+ mechanism, imperfect though it is, still may be our best chance to mitigate greenhouse gas accumulation, preserve biodiversity, and staunch poverty in the developing world. The perfect should not be the enemy of the good. Though ED rights are not perfect, democracy rights are never perfect anywhere, and at some level technocratic expertise plays an important role in harnessing international capital for local benefit in a novel way that is beyond the grasp of local people. That they cannot achieve perfect participation rights does not necessarily mean we scuttle REDD+. But that ED rights are difficult to fulfill does not mean REDD+ should scuttle ED.

REDD+ is perhaps the most important laboratory right now for advancing ED rights. That is to say, ED rights are crucial for REDD+'s success, and the advances in ED made under REDD+'s aegis are crucial for advancing ED in all international contexts where local people are to be partners—rather than victims—in environment-development projects.

REDD+ stakeholders should continue to make progress to implement and realize ED rights, taking the widest possible reading of ED norms, and visualizing that wide reading may be legally required in the future, in ways that lead to the most deeply equitable results for the health and potential of individuals, human communities, and nonhuman communities.