Introduction

Grappling with the REDD+ Paradox

BACKGROUND AND CONTEXT

“No rights, no REDD+.” This was the key message of the Indigenous Peoples caucus as it walked out of the Poznan climate conference in December 2008 to protest the exclusion of rights language in a draft negotiating text on REDD+.

This was not the first nor the last time that the new and ambitious global mechanism for reducing carbon emissions from deforestation and forest degradation, supporting the conservation and sustainable management of forests, and enhancing forest carbon stocks in developing countries (REDD+) negotiated within the United Nations Framework Conference for Climate Change (UNFCCC) would generate such controversy.

The basic idea behind REDD+ is that channeling climate finance from North to South to avoid deforestation and support carbon sequestration in developing country forests can not only contribute to the world’s global climate mitigation efforts but can also protect forests and their critical ecosystems and help alleviate poverty among forest-dependent and rural communities. Because it has been seen as a relatively inexpensive, simple, and rapid way of reducing an estimated 17 percent of global carbon emissions worldwide, the development of REDD+ has moved forward with remarkable vigor within

---

the UNFCCC and beyond. Governments, international organizations, multilateral development banks, conservation and development NGOs, and corporations have established funding, knowledge-sharing, technical assistance, and certification programs to support the pursuit of REDD+ in developing countries. Across Africa, Asia, Latin America, and the Caribbean, over sixty governments have initiated multi-year programs of research, capacity-building, and reform to prepare for the implementation of REDD+ and have begun taking national action to reduce carbon emissions originating in their forests and manage international funds received for this purpose (known as jurisdictional REDD+). In addition, up to 350 projects have been initiated by governments, international organizations, NGOs, corporations, and communities in an effort to reduce carbon emissions from forest-based sources at the local level in over fifty developing countries (known as project-based REDD+).

Having emerged as a “triple-win” solution for forests, climate change, and development, REDD+ has become increasingly entangled with complex debates over the governance of forests, land, and resources in developing countries. It has most notably attracted significant attention and scrutiny from activists, scholars, and policy-makers due to its controversial implications for the rights of Indigenous Peoples and local communities in developing countries. On the one hand, REDD+ may provide new funds and momentum for the recognition and protection of the traditional lands of Indigenous Peoples.
Peoples and local communities, as well as opportunities to foster their participation in forest governance and support their sustainable livelihoods.\textsuperscript{12} On the other hand, given their technocratic focus on carbon sequestration and potential to generate unintended incentives for land grabbing, REDD+ activities may marginalize the interests and perspectives of forest-dependent populations and dispossess them of their traditional rights to forests, lands, and resources.\textsuperscript{13} This array of potential synergies and tensions between REDD+ and Indigenous and community rights has led some scholars to speak of REDD+ as a “paradox,” since the very same set of factors that are seen as having the capacity to generate benefits for forest-dependent communities are also seen as posing significant risks to their rights, institutions, and livelihoods.\textsuperscript{14}

This book seeks to shed light on the REDD+ paradox by providing an in-depth socio-legal study of the implications of REDD+ for the rights of Indigenous Peoples and local communities in developing countries. Broadly speaking, I adopt a new legal realist perspective that draws on empirical research to uncover the limited, yet no less potent, opportunities offered in and around the law for social change and justice.\textsuperscript{15} In particular, I conceive of the development and implementation of REDD+ activities around the world as amounting to a “transnational legal process,” which I define as the construction and conveyance of legal norms across sites and levels of law that transcend the traditional territorial boundaries of sovereign states.\textsuperscript{16} I grapple with two important questions concerning the intersections between the transnational legal process for REDD+ and the rights of Indigenous Peoples and local communities. First, how have Indigenous and community rights been


\textsuperscript{16} Shaffer, supra note 62 at 234 (describing transnational legal processes as focusing on “the transnational production of legal norms and institutional forms and their migration across borders, regardless of whether they address transnational activities or purely national ones”) and 235 (defining a transnational legal process as “the process through which the transnational construction and conveyance of legal norms takes place.”)
recognized across a range of international and transnational sites of law for REDD+? Second, whether, how, and to what extent has the pursuit of jurisdictional and project-based REDD+ activities affected the recognition and protection of Indigenous and community rights in developing countries? Through a combination of international legal analysis and in-depth empirical research on the pursuit of REDD+ activities in two case study countries, Indonesia and Tanzania, from 2005 to 2014, this book contributes to our understanding of REDD+, its implications for human rights, and the influence of transnational legal processes. In what remains of this chapter, I review the existing literature on the relationship between REDD+ and rights. I then introduce the analytical framework and research design that underlie this book, discuss the significance and originality of my approach and findings, and outline the contents of the chapters that follow.

EXISTING KNOWLEDGE

The relationship between REDD+ and the rights of Indigenous Peoples and local communities has given rise to a burgeoning body of research across several disciplines. One stream of scholarship produced by legal scholars has argued that the design and management of REDD+ programs, policies, and projects should comply with the participatory rights of individuals and communities enshrined in international human rights law and recognized through the principle of public participation in international environmental law. In doing so, these scholars have emphasized that Indigenous Peoples benefit from an enhanced set of procedural rights by virtue of their recognition

---


18 Savaresi, supra note 11 at 106; Rosemary Lyster, “REDD+, transparency, participation and resource rights: The role of law” (2011) 14:2 Environmental Science & Policy 188 at 123–125.

19 The right to participation is most notably protected in the International Covenant on Civil and Political Rights, U.N. Doc. A/6316 (1966), entered into force 23 Mar. 1976, art. 25(a), which provides that every citizen has the right to “take part in the conduct of public affairs, directly or through freely chosen representatives.”

as “peoples” and their right to self-determination under international law. As is recognized in the UNDRIP, ILO Convention 169 and the decisions of numerous international and regional human rights bodies, Indigenous Peoples have the right to provide or withhold their free, prior, and informed consent (FPIC) to activities and measures that affect their rights, lands, and resources. For their part, local or forest-dependent communities do not possess a distinct status or set of rights under international law, nor do 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.

21 While there is no universal definition of the term “Indigenous Peoples” under international law, there are a number of recognized criteria that can be used to understand and apply this term: “(i) priority in time, in terms of occupation and use of specific territory; (ii) voluntary perpetuation of cultural specificity, which can include aspects of their language, social organization, religion and spiritual values, modes of production, legal forms and institutions; (iii) self-identification, as well as recognition by other groups, or by State authorities, as differentiated collectives; and (iv) an experience of subjugation, marginalization, dispossession, exclusion or discrimination, whether these conditions persist or not” (Erica-Irene Daes, Chairperson-Rapporteur, “Working Paper on the concept of ‘indigenous people’,” (United Nations Economic and Social Council, 10 June 1996), UN Doc. E/CN.4/Sub.2/AC.4/1996/2, at para. 69–70).

22 UNDRIP, art. 3, 4, and 5; ILO Convention 169, art. 6.1, 15.1, and 15.2. Article 19 of the UNDRIP most notably states that: “States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.”

23 See UNDRIP, art. 10, 11(2), 19, 28, 29(2) and 32(2)).

24 ILO Convention 169, art. 4, 5 and 15–19.


27 One influential definition of forest-dependent communities is the following: “A coherent, social group of persons with interests or rights related to forests or forest resources, in a particular area, which the persons hold or exercise communally in terms of an agreement, custom or law” (South African Development Community, South African Development Community Protocol on Forestry (Luanda, 3 October 2002) entered into force 17 July 2009, art. 2(1)).
they hold explicit collective rights to their traditional lands and resources or to FPIC under any existing international instrument. They must instead assert a broad set of claims based on general international human rights law, the rights held by Indigenous Peoples, and the land and tenure rights that they may hold under national legal systems.

Legal scholars have also considered whether and how the implementation of REDD+ policies, programs, and projects may affect a range of substantive human rights protected under international law. On the one hand, avoiding deforestation through REDD+ and equitably sharing the benefits generated by climate finance may serve to protect the traditional rights and territories of Indigenous Peoples and local communities, and contribute to their sustainable livelihoods. On the other hand, any rules and restrictions imposed through a REDD+ program or project on local access to forests or use of resources may interfere with numerous human rights, including rights to personal security, freedom of movement, and freedom from racial discrimination, rights to housing, food, water, health, an adequate standard of living, and culture, and the sui generis rights to land, resources, and culture held by Indigenous Peoples under international law. In this regard, the potential creation, sale, and trading of property rights over the carbon sequestered in trees (known as “carbon rights”) through project-based REDD+ activities have been identified as especially problematic on the grounds that this process of commodification may be contrary to Indigenous conceptions of property, interfere with the unique relationship that Indigenous Peoples enjoy with nature, and serve to dispossess them of their lands and resources.

29 Sikor & Stahl, supra note 11 at 8.
30 Savaresi, supra note 11 at 105.
31 Ibid at 105.
34 Fischer & Lyster, supra note 11 at 193–206; Lemaitre, supra note 17 at 152–156.
Legal scholars have expressed a general lack of confidence in the effectiveness of the social and environmental safeguard initiatives that have emerged across multilateral, bilateral, and nongovernmental initiatives for REDD+ to prevent or mitigate its adverse social implications for local populations. It is worth remembering that the recognition of the status and rights of Indigenous Peoples under international law remains controversial in many developing countries, especially in Africa and Asia. Indeed, many governments in Africa and Asia have denied that the very concept of Indigenous Peoples apply in their countries, arguing that it is the product of European colonial settlement in the Americas and that its application is restricted to that region. In the face of these challenges, many legal scholars have called for the development of formally binding mechanisms at the international level to ensure the protection of human rights within the context of REDD+, whether through the UNFCCC or established United Nations human rights bodies.

A second strand of research, anchored in environmental studies, has focused on the extent to which REDD+ may support or detract from the recognition and protection of the collective forest and land tenure rights and institutions of local communities, particularly in terms of the pursuit and implementation of community forestry. This literature reveals three broad ways in which REDD+ may support the rights and institutions of local communities. First, REDD+ activities may in and of themselves serve as


41 Community forestry is defined in broad terms here as an approach that recognizes, protects, and supports the collective rights, authority, and capacity of local communities to govern, access, and benefit from the forests within which they live or upon which they depend. For an overview of the concept of community forestry, see J.E.M. Arnold, “Forests and people: 25 years of community forestry” (Rome, Italy: Food and Agriculture Organization of the United Nations, 2001), available at www.treesforlife.info/fao/Docs/P/25y.pdf.
a vehicle for the pursuit of community forestry\textsuperscript{42} or the recognition and protection of rights to forests and land tenure,\textsuperscript{43} due to their purported benefits for reducing deforestation and enhancing carbon sequestration.\textsuperscript{44} On a broader scale, numerous scholars have argued that the adoption and implementation of laws and schemes to clarify and regularize the forest tenure rights of forest-dependent communities should form a pre-condition or starting point for the jurisdictional REDD+ readiness efforts pursued by developing countries.\textsuperscript{45} In this regard, early studies demonstrate that REDD+ readiness efforts and projects have indeed made some contribution to forest tenure reforms\textsuperscript{46} while also highlighting the complex challenges that they face in addressing the political conflicts and technical challenges that stand in their way.\textsuperscript{47} Second, the equitable distribution of funds for REDD+ activities among local communities (a practice known as “benefit-sharing”) may support their sustainable livelihoods and provide some of the long-term finance required to sustain the implementation of community forestry arrangements.\textsuperscript{48} Third, Indigenous Peoples and local communities may also benefit from being involved in the


\textsuperscript{44} Ashwini Chhatre & Admn Agrawal, “Tradeoffs and synergies between carbon storage and livelihood benefits from forest commons” (2009) \textbf{106}(42) \textit{Proceedings of the National Academy of Sciences} 17667.

\textsuperscript{45} \textit{Ibid}. See also Ashwini Chhatre \textit{et al.}, “Social safeguards and co-benefits in REDD+: A review of the adjacent possible” (2012) \textbf{46} \textit{Current Opinion in Environmental Sustainability} 654 at 656.

\textsuperscript{46} Amy Duchelle \textit{et al.}, “Linking Forest Tenure Reform, Environmental Compliance, and Incentives: Lessons from REDD+ Initiatives in the Brazilian Amazon” (2014) \textbf{55} \textit{World Development} 53 at 64.


\textsuperscript{48} Leo Peskett, “REDD+ and Development” in Lyster, MacKenzie & McDermott, supra note 11, 230.
monitoring, reporting, and verification of forest carbon stocks in the implementation of REDD+ policies, programs, and projects.49

On the other hand, many scholars have expressed concerns that REDD+ activities are likely to have adverse consequences for local communities. Many scholars have warned that the technical complexities and national scale of jurisdictional REDD+ activities have the potential to prompt central authorities to seek to assert greater control over forests and accordingly reduce their willingness to devolve authority over forests to local communities.50 Moreover, many authors note that the potential of REDD+ funds to make a significant difference to the lives of forest-dependent communities may be constrained by the low price of carbon on voluntary carbon markets.51 Given the limitations and inequities of existing forest governance systems, scholars argue that the introduction of funds through REDD+ projects and schemes may create new opportunities for corruption, graft, and capture by central or local elites52 and thus further induce central forest authorities to maintain or increase their control over forests.53

Due to the limitations of the social and environmental safeguards that have been developed by multilateral, bilateral, and nongovernmental actors for REDD+ activities,54 a number of authors argue that REDD+ activities


52 Emma Doherty & Heike Schroeder, “Forest Tenure and Multi-level Governance in Avoiding Deforestation under REDD+” (2011) 11:4 Global Environmental Politics 66–88 at 81; Seymour, supra note 11 at 219.


are unlikely to yield fair and just outcomes for Indigenous Peoples and forest-dependent communities in the absence of broader reforms aimed at improving governance systems and creating locally accountable institutions in the forestry sector. Many scholars fear that REDD+ may function as a form of environmental governance that promotes technocratic and market-oriented approaches to forest governance and marginalizes traditional and community perspectives. In light of the entrenched political, economic, and legal asymmetries that characterize forest governance in many developing countries, Ribot and Larson raise important questions about the likelihood that REDD+ may harm, rather than benefit, local populations:

REDD is entering this slanted world with the primary objective of carbon emissions reduction – not justice or equity. If community rights are already limited (...), will they be limited in the future under REDD in the name of carbon sequestration? Who will control forests? What rules for resource use will be developed to meet carbon targets under REDD, who will create and enforce these rules and how might they limit community access to forests for livelihoods? If communities carry new burdens – such as limitations on activities permitted in forests (‘no’ imposed from above) – will they be fairly compensated? Will the rights to forest benefits – this time to carbon funds – once again be captured by outsiders?

As summarized in Table I.1, the existing literature provides a helpful overview of the range of potential implications of REDD+ activities for the participatory

---


59 Ribot & Larson, supra note 13 at 248.
<table>
<thead>
<tr>
<th>Type of right</th>
<th>Definition</th>
<th>Positive implications</th>
<th>Negative implications</th>
</tr>
</thead>
<tbody>
<tr>
<td>Participatory</td>
<td>Under general principles of international human rights law and international environmental law, Indigenous Peoples and forest-dependent communities have rights to fully and effectively participate in the design and implementation of programs, policies, and projects that affect their rights and to access administrative, judicial, and other accountability mechanisms in case of human rights violations. Due to their unique status under international law, Indigenous Peoples also possess the right to provide or withhold FPIC in relation to measures that affect their traditional lands and rights.</td>
<td>REDD+ activities may promote the participation and engagement of Indigenous Peoples and forest-dependent communities in the design and implementation of relevant policies, programs, and projects, including through community-based forms of MRV. This in turn may help to ensure that the knowledge of Indigenous Peoples and forest-dependent communities is integrated in design and implementation processes.</td>
<td>REDD+ may promote technocratic and market-oriented approaches that do not engage with Indigenous Peoples and forest-dependent communities, that ignore their participatory rights, and that marginalize their perspectives. REDD+ activities may reflect the priorities of governments, corporations, and NGOs rather than the needs of local populations due to entrenched political and economic asymmetries in forest governance.</td>
</tr>
<tr>
<td>Type of right</td>
<td>Definition</td>
<td>Positive implications</td>
<td>Negative implications</td>
</tr>
<tr>
<td>--------------</td>
<td>------------</td>
<td>-----------------------</td>
<td>-----------------------</td>
</tr>
<tr>
<td>Substantive Rights</td>
<td>As a result of their rights to personal security, freedom of movement, and freedom from racial discrimination as well as their economic, social, and cultural rights, Indigenous Peoples and forest-dependent communities have rights to access, govern, and benefit from the forests in which they live or upon which they depend. Due to their unique status under international law, Indigenous Peoples possess <em>sui generis</em> rights to their traditional lands and resources. Finally, international human rights law also provides Indigenous Peoples and forest-dependent communities with economic, social, and cultural rights to housing, food, water, health, an adequate standard of living, and culture.</td>
<td>REDD+ activities may in and of themselves protect the traditional territories of Indigenous Peoples and forest-dependent communities from deforestation and forest degradation. They may also provide new funding and momentum for clarifying and strengthening the forest, land tenure, and resource rights of Indigenous Peoples and forest-dependent communities, both in terms of national policy reforms as well as in the context of particular projects. Indeed, given the posited advantages of community forestry for the sustainable management of forests and carbon sequestration, community forestry policies and institutions could serve as the very basis for the design and implementation of REDD+ activities. Finally, REDD+ activities may generate new funds that could alleviate poverty among Indigenous Peoples and forest-dependent communities, support their sustainable livelihoods, and sustain the implementation of community forestry arrangements and institutions.</td>
<td>The political economy of forest governance in developing countries makes it unlikely that issues around forest and land tenure will be resolved to the benefit of Indigenous Peoples and forest-dependent communities. Due to their complexity and the new and additional rents that they will generate, REDD+ activities may induce public and private actors to maintain or increase their control over forests, to favor other types of interventions to community forestry, and to ignore, abrogate, or violate the forest, land tenure, and resource rights of Indigenous Peoples and forest-dependent communities. Moreover, to the extent that they lead to the commodification of carbon, REDD+ activities may be contrary to Indigenous conceptions of property and interfere with the unique relationship that Indigenous Peoples enjoy with nature. Finally, given the limitations and inequities of existing forest governance systems, the introduction of funds through REDD+ projects and schemes may create new opportunities for corruption, graft, and capture by central or local elites, thus further contributing to the socioeconomic marginalization of Indigenous Peoples and forest-dependent communities.</td>
</tr>
</tbody>
</table>
and substantive rights of Indigenous Peoples and local communities. Of course, much of this literature was produced in the initial stages of the global operationalization of REDD+, without the benefit of empirical research on its processes and outcomes. Given the advanced stage that REDD+ has reached around the world, the primary purpose of this book lies in subjecting these claims to empirical scrutiny in order to understand whether, how, and to what effect the pursuit of REDD+ has affected the rights of Indigenous Peoples and local communities in developing countries.

ANALYTICAL FRAMEWORK

In order to capture the diverse ways in which REDD+ has affected Indigenous and community rights, I develop and employ an interdisciplinary analytical framework for the study of transnational legal processes. Since Koh first coined this term in the mid-1990s to analyze the multiple pathways through which states internalize rules of international law, a number of socio-legal scholars, especially Shaffer and Halliday, have expanded the study of these processes by focusing on the broader set of legal norms that may be constructed and conveyed across borders, and the manifold ways in which they may influence economic, social, and political institutions and processes. This scholarship has dovetailed with work examining the diffusion, transplantation, or translation of legal norms across diverse sites of law.

While I distinguish between participatory and substantive rights for the sake of analytical clarity throughout this book, I recognize that these rights are intertwined with one another in legal and practical terms. For instance, although the right to FPIC is included here as a participatory right, it could also be framed as a substantive right because it is closely associated with the notion that Indigenous Peoples possess sui generis land and resource rights. See Jérémie Gilbert & Cathal Doyle, “A New Dawn over the Land: Shedding Light on Collective Ownership and Consent” in Stephen Allen & Alexandra Xanthaki, eds., Reflections on the UN Declaration on the Rights of Indigenous Peoples (Portland, Oregon: Hart Publishing, 2011) 289.


This rich body of scholarship has five important implications for the study of transnational legal processes. First, it suggests that a heterogeneous array of public and private actors, including international organizations, governments, nongovernmental organizations, corporations, communities, and individuals, are engaged in the construction and conveyance of legal norms across borders. Second, it posits that a transnational legal process may feature a multiplicity of sites, modes, and forms of ordering that are not subsumed within a state-centric conception of law and that encompass and cut across international, transnational, national, and subnational levels of governance. Third, it conceives of the construction and conveyance of legal norms as multidirectional – taking place horizontally between sites of law located at the same level and vertically from the “top-down” as well as the “bottom-up” across sites of law located at different levels. Fourth, far from viewing a transnational legal process as entailing the objective creation, interpretation, and application of law, this scholarship recognizes instead that the construction and conveyance of legal norms is contingent on both interest-driven and norm-driven behavior. Fifth, it stresses the importance of distinguishing between enactment, which consists of the formal acceptance of a legal norm within a site of law, and implementation, which refers to the practical application of a legal norm, as reflected in actual changes in the behavior of public and private actors. The enactment and implementation of legal norms can


Adopting a legal pluralist conception of law, I define legal norms as norms that aim to constrain and facilitate the behavior and interactions of actors to whom they are addressed and that differ from social norms by their greater degree of clarity, formalization, and binding authority. See Terence Halliday & Gregory Shaffer, “Transnational Legal Orders” in Halliday & Shaffer, supra note 62, 3 at 11; Alec Stone Sweet, Governing with Judges: Constitutional Politics in Europe (Oxford, UK: Oxford University Press, 2000) at 11; Shaffer, supra note 62 at 234.

Halliday & Shaffer, supra note 65 at 43–44. Shaffer, supra note 62 at 257.


This reflects the classic distinction between law-on-the-books and law-in-practice (Mathieu Deflem, Sociology of Law: Visions of a Scholarly Tradition (Cambridge, UK: Cambridge University Press, 2008) at 100–101) or what Halliday and Carruthers call the politics of enactment and the politics of implementation (Halliday & Carruthers, supra note 62 at 456).
have wide-ranging effects within a site of law, by engendering changes in the substance of law and policy, affecting institutions, and shaping the ideas, identities, and behavior of public and private actors.\textsuperscript{70}

My analytical framework builds on this socio-legal literature by specifying the key causal mechanisms\textsuperscript{71} that drive the construction and conveyance of legal norms in a transnational legal process. Drawing on the findings of political scientists regarding the emergence and effectiveness of international norms,\textsuperscript{72} the domestic influence of international law,\textsuperscript{73} and the nature of transnational processes of policy change,\textsuperscript{74} I identify a range of rationalist\textsuperscript{75} and constructivist\textsuperscript{76} causal mechanisms that underlie the development of legal norms by actors within a site of law (construction) and their transmission in a


\textsuperscript{73} Beth A. Simmons, \textit{Mobilizing for Human Rights: International Law in Domestic Politics} (Cambridge: Cambridge University Press, 2010).


\textsuperscript{75} Rationalist explanations posit that incentive structures or material constraints affect the behavior of actors. They assume that actors have fixed identities and interests, that they are rational, and that they seek to maximize their preferences in contexts in which they are constrained by the competing preferences of other actors, the checks imposed by institutions, and their limited capabilities (see generally Duncan Snidal, “Rational Choice and International Relations” in Carlsnaes, Risse & Simmons, \textit{supra} note 73, 85).

relatively reified manner from one site of law to another (conveyance). As such, I assume that both rationalist and constructivist approaches are needed to provide a full account of how law relates to society, in large part because the relationship between interest-driven behavior and norm-driven behavior often plays a determinative role in the emergence, evolution, and effectiveness of institutions. That said, I accord little importance to whether a mechanism is best understood as rationalist or constructivist, nor do I aim to prove that one type of mechanism is more causally significant than the other. In presenting these causal mechanisms in the paragraphs that follow, I explain how they operate, specify their scope conditions, and highlight the importance of understanding how they may interact with one another in concurrent or sequential ways. I conclude this presentation of my analytical framework by discussing the relationship between the construction and conveyance of legal norms and delineating how transnational legal processes may result in the transplantation as well as translation of legal norms across sites of law (Table I.2).

This analytical framework is ideally suited for understanding the implications of REDD+ for the rights of Indigenous Peoples and local communities in developing countries. It enables me to trace the causal mechanisms that can explain whether and how legal norms relating to these rights have been constructed and conveyed across multiple forms, sites, and levels of law in the context of REDD+, and to what extent they may meaningfully affect the lives of Indigenous Peoples and local communities on the ground. To be sure, my analytical framework does not do justice to the richness of the many scholarly sources that it draws upon, nor does it dwell on the many important ways in which they may conflict with one another. Rather, its purpose lies in providing the key elements that can be used to analyze and understand a complex transnational legal process like REDD+ that originates in, operates

77 It is important to recognize that distinguishing between the construction and conveyance of legal norms reflects a simplified representation of most transnational legal processes. In practice, the construction and conveyance of legal norms may be intertwined or overlap with one another. See Shaffer, supra note 62 at 257–258.


through, and exerts influence upon a diversity of sites of law at the international, transnational, national, and local levels.

The Construction of Legal Norms in a Transnational Legal Process

I understand the construction of legal norms as resulting from the concurrent or sequential operation of two causal mechanisms: cost-benefit commitment and persuasive argumentation. I define cost-benefit commitment as the causal mechanism whereby actors commit to abiding by a certain standard of future behavior in order to maximize utility and achieve cooperative solutions to a collective action problem. This mechanism posits that self-interested actors develop legal norms based on a rational calculation that the expected benefits of commitment outweigh its costs. The construction of legal norms through cost-benefit commitment does not take place in a vacuum, however, and builds upon the legal norms and practices present in a site of law in order to craft redesigned solutions to achieve existing objectives or resolve existing problems (what Campbell calls substantive bricolage). In addition, the development of legal norms through cost-benefit commitment may also take place on the basis of legal norms transmitted from other sites of law. In this

---


Campbell, supra note 71 at 69.
context, cost-benefit commitment will involve the rational adjustment or calibration of these legal norms in light of existing legal practices prevailing in a site of law.  

I define persuasive argumentation as the causal mechanism whereby actors construct and internalize a legal norm because they are convinced of its validity and appropriateness as a result of the shared understandings that they have developed with other actors. Existing research tells us that the construction of legal norms through persuasive argumentation depends upon the purposeful efforts of actors who seek to actively construct persuasive normative frames on the basis of legal norms prevailing in a site of law or originating from another site of law – a creative process known as framing. The existing literature also suggests that the effectiveness of persuasive argumentation is facilitated by three important conditions: the existence of a new situation or crisis in which actors are especially open to new normative understandings; the alignment between emergent or proposed legal norms and the existing legal norms internalized by actors; and a context in which actors engage in a primarily deliberative or participatory, rather than coercive, form of discourse.

Notwithstanding the very different causal logics that these two mechanisms embody and the different time frames in which they may operate, I view them as complementary explanations for the construction of legal norms within a site of law. For one, the construction of legal norms can result from the concurrent

83 Campbell, supra note 71 at 69.
84 Other terms that can be broadly considered equivalent with the notion of persuasive argumentation are socialization (Jeffrey T. Checkel, “International Institutions and Socialization in Europe: Introduction and Framework” (2005) 59:4 International Organization 861) and social learning (Peter Hall, “Policy Paradigms, Social Learning, and the State: The Case of Economic Policymaking in Britain” (1993) 25:3 Comparative Politics 275).
86 Finnemore & Sikkink, supra note 72 at 896–899.
87 Rodger Payne, “Persuasion, Frames and Norm Construction” (2001) 7:1 European Journal of International Relations 37 at 38–39. See also Campbell, supra note 71 at 70.
90 Risse, supra note 85 at 10–11; Checkel, supra note 85 at 563; Shaffer, supra note 62 at 249.
91 Kenneth W. Abbott et al., “The Concept of Legalization” (2000) 54:3 International Organization 401 (discussing the complementarity of legal discourse based on reason and argument and political bargaining driven by self-interest); Gulbrandsen, supra note 80 at 28 (discussing the
operation of both the causal mechanism of cost-benefit commitment (in that they embody the legal norms that actors have developed on a cost-benefit basis) and that of persuasive argumentation (in that they reflect the shared understandings that actors have constructed together). For another, the construction of legal norms can be seen as resulting from a specific temporal sequence in which one causal mechanism may be more important than another at different stages in the construction of legal norms. For my purposes, it suffices to note that the construction of legal norms within a site of law may be understood as a cycle that may combine or move back and forth between the causal mechanisms of cost-benefit commitment and persuasive argumentation.

**The Conveyance of Legal Norms in a Transnational Legal Process**

There is rich and extensive literature in law and political science on the various causal mechanisms that can explain the transmission or diffusion of laws, norms, policies, and institutions from one context to another. In Table I.3, I draw on this existing scholarship to identify six causal mechanisms “interplay between the internalization of norms and rules and strategic-calculative decisions about participation in certification schemes and compliance with rules.”


93 See, e.g., Stone Sweet, supra note 80 (offering an account of judicialization that posits a shift from strategic behavior under dyadic modes of governance to normative structure under triadic modes of governance); Steven Bernstein & Benjamin Cashore, “Can non-state global governance be legitimate? An analytical framework” (2007) 1 *Regulation & Governance* 347 (developing a framework that posits a shift from a logic of consequences to a logic of appropriateness in the context of nonstate market-driven systems).

94 Leading typologies of the mechanisms of the diffusion of law include: Terence C. Halliday & Pavel Osinsky, “Globalization of Law” (2006) 32 *Annual Review of Sociology* 447 (identifying modeling, nonreciprocal adjustment, capacity-building, suasion, coercion, and systems of rewards as mechanisms for the propagation of law); Brake & Katzenstein, supra note 63 (identifying emulation, coercion, competition, and learning as mechanisms of the transnational movement of law); Halliday & Carruthers, supra note 68 at 1153 (identifying coercion, persuasion, and modelling as modes of influence in the propagation of global norms); and Morin & Gold, supra note 63 (identifying emulation, coercion, contractualization, regulatory competition, and socialization as causal mechanisms of the transplantation of law).

95 Leading typologies of mechanisms of transmission, diffusion, or influence include: Dobbin, Simmons & Garrett, supra note 74 (identifying emulation, coercion, competition, and learning as causal mechanisms of policy diffusion); Orenstein, supra note 74 at 66 (identifying norms creation, norms teaching, and resource leveraging as modes of transnational policy influence); and Goodman & Jinks, supra note 72 (describing material inducement, persuasion, and acculturation as mechanisms of social influence).
### Table 1.3. The causal mechanisms of the conveyance of legal norms in a transnational legal process

<table>
<thead>
<tr>
<th>Causal mechanism</th>
<th>Causal focus and scope conditions</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Coercion</strong></td>
<td>The conveyance of legal norms is driven by the exercise of material leverage by exogenous actors that forces endogenous actors into enacting or implementing an exogenous legal norm. Its effectiveness depends on asymmetries in material power between exogenous and endogenous actors and on the capacity and willingness of exogenous actors to detect and sanction deviance, especially with respect to the implementation of exogenous legal norms.</td>
</tr>
<tr>
<td><strong>Cost-Benefit Adoption</strong></td>
<td>The conveyance of legal norms is driven by the decision of endogenous actors to enact or implement an exogenous legal norm because the benefits of doing so exceed its costs (in terms of reciprocity, reputation or economic gain). Its effectiveness depends on the precision and obligatory force of exogenous legal norms and the availability of information about their implementation.</td>
</tr>
<tr>
<td><strong>Instrumental Learning</strong></td>
<td>The conveyance of legal norms is driven by the decision of endogenous actors to enact or implement an exogenous legal norm because they have acquired knowledge of the utility of doing so from the experience of others. Its effectiveness depends on the ability of intermediaries to communicate and promote this knowledge in a site of law.</td>
</tr>
</tbody>
</table>

---

96 This responds to one of the criticisms made by Halliday and Shaffer about causal mechanisms, which they see as suggesting that law spreads in a necessarily “top-down” manner (Halliday & Shaffer, supra note 65 at 37–38).

97 For a similar use of the terms endogenous and exogenous in relation to legal norms and processes, see, Halliday & Carruthers, supra note 68.

98 Goodman & Jinks, supra note 72 at 25 and 31–32; Orenstein, supra note 74 at 66.

99 Thomas Risse & Stephen C. Ropp, “Introduction and Overview” in Risse, Ropp & Sikkink, supra note 72, 3 at 20; Shaffer, supra note 62 at 253; Dobbin, Simmons & Garrett, supra note 74 at 454–460; Bernstein & Cashore, supra note 74 at 9–10; Halliday & Carruthers, supra note 62 at 342.

100 Halliday & Carruthers, supra note 62 at 351–354.


102 Ibid. at 81.

103 Dobbin, Simmons & Garrett, supra note 74 at 457–460; Brake & Katzenstein, supra note 63 at 746; Fabrizio Gilardi, “Transnational Diffusion: Norms, Ideas, and Policies” in Carlsnaes, Risse & Simmons, supra note 73, 453–477 at 462–463.

<table>
<thead>
<tr>
<th>Causal mechanism</th>
<th>Causal focus and scope conditions</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Mobilization</strong></td>
<td>The conveyance of legal norms is driven by the political or legal pressure exerted upon endogenous actors by other endogenous actors. Its effectiveness depends on the institutional, ideational, and material conditions that may favor or constrain the emergence and mobilization of endogenous interest groups and coalitions in favor of the conveyance of exogenous legal norms.</td>
</tr>
<tr>
<td><strong>Elite Internalization</strong></td>
<td>The conveyance of legal norms is driven by the internalization of exogenous legal norms by endogenous elite as a result of their participation in persuasive argumentation with exogenous actors. Its effectiveness depends on whether endogenous elites have the authority and capacity to enact and implement legal norms in a site of law.</td>
</tr>
<tr>
<td><strong>Acculturation</strong></td>
<td>The conveyance of legal norms is driven by the social and cognitive need for endogenous actors to enact or implement the exogenous legal norms widely accepted within their broader transnational reference group. Its effectiveness depends on the importance that the endogenous actor accords to their transnational reference group for their identity and the intensity and duration of their exposure to this group.</td>
</tr>
</tbody>
</table>

105 Dobbin, Simmons & Garrett, *supra* note 74 at 461–462; Brake & Katzenstein, *supra* note 63 at 747. This causal mechanism can be seen as related to the first type of legal transplant identified by Miller: the “cost-saving transplant” (Miller, *supra* note 63 at 845–846).


108 There are two broad explanations that account for the effectiveness of mobilization in the existing literature: resource mobilization theory and opportunity structure. Resource mobilization theory posits that the effectiveness of mobilization depends on the capacity of interest groups to access and aggregate the array of ideational and material resources that they generate themselves or obtain from other actors (Bob Edwards & Patrick F. Gillham, “Resource Mobilization Theory” Published online in *The Wiley-Blackwell Encyclopaedia of Social and Political Movements* (2013)). Opportunity structure, whether legal or political in nature, refers to the set of institutional, ideational, and material conditions that may favor or constrain the emergence and mobilization of interest groups and coalitions in favor of change and reform (Doug McAdam, “Conceptual Origins, Current Problems, Future Directions” in Doug McAdam, John D. McCarthy & Mayer N. Zald, eds., *Comparative Perspectives on Social Movements: Political Opportunities, Mobilizing Structures and Cultural Framing* (Cambridge, UK: Cambridge University Press, 1996) 23–40).


that may support the conveyance of legal norms from one site of law to another: coercion, instrumental learning, cost-benefit adoption, mobilization, elite internalization, and acculturation. These causal mechanisms are expressed in generic terms that are sensitive to the pluralism of transnational legal processes, characterized as they may be by public, private, and hybrid forms of law and the multiple directions in which the conveyance of legal norms may operate – horizontally and vertically, from the top-down and the bottom-up, from, and to, multiple sites of law at different levels. 111 In describing these mechanisms, I accordingly distinguish legal norms and actors based on whether they are “endogenous” (in that they are primarily affiliated with a given site of law) or “exogenous” (in that they originate outside this given site of law). 112

As a result of the plurality of actors that may be involved in a given transnational legal process and the various strategies that they may pursue to support the transmission of legal norms across sites of law, transnational legal processes may feature the concurrent or sequential operation of numerous causal mechanisms of conveyance. 113 Two factors underlie the importance of distinguishing between different causal mechanisms. First, as argued by Morin and Gold, these causal mechanisms may interact with one another in symbiotic ways to make the conveyance of legal norms more likely in a given case as well as across a population of cases over time. 114 Second, these causal mechanisms may have differing implications for the enactment and implementation of exogenous legal norms. Many causal mechanisms of conveyance may result in an initial gap between how legal norms are formally enacted in a site of law and how they are implemented through actual changes in the practices of actors. 115 The study of the transnational conveyance of legal norms thus requires paying attention to how interactions between causal mechanisms may, whether concurrently or sequentially, explain how and to what extent legal norms may be conveyed to, and eventually implemented in, a site of law. 116

112 Ibid at 28; Checkel, supra note 84 at 811.
114 Morin & Gold, supra note 63 at 783–785.
115 Halliday & Carruthers, supra note 62 at 406.
116 Risse & Ropp, supra note 99 at 13; Goodman & Jinks, supra note 72 at 180–182.
The Causal Pathways of a Transnational Legal Process

As is reflected in the various causal mechanisms discussed above, my analytical framework assumes that legal norms in a transnational legal process can operate both as “works-in-progress” that actors may construct together within sites of law as well as “fixed entities” whose meaning and effects remain relatively stable as they are conveyed from one site of law to another.\(^{117}\)

Understanding that legal norms can be dynamic as well as static enables me to identify two broad types of causal pathways that a transnational legal process may follow.

In the first pathway shown in Figure I.1, a transnational legal process begins with the construction of legal norms in an initial site of law. The subsequent conveyance of legal norms from this site of law to another then functions as an “exogenous shock”\(^{118}\) that results in the enactment and implementation of exogenous legal norms. This pathway is consistent with accounts of legal transplantation and explains how transnational legal processes may result in the broad diffusion of legal norms and engender the convergence of law across multiple sites.\(^{119}\)

In the second pathway illustrated in Figure I.2, the transnational legal process does not end with the initial conveyance of exogenous legal norms from one site of law to another. Instead, the conveyance of exogenous legal norms triggers the construction of hybrid legal norms,\(^{120}\) thereby reflecting the mediating influence of sites of law.\(^{121}\) There are several factors that can account for the potential of transnational legal processes to engender hybridity: the natural ambiguity of legal norms,\(^{122}\) the differing interests and norms


\(^{118}\) The notion that legal norms may serve as an “exogenous shock” is inspired by research on the internationalization of public policy. See Michael Howlett & M. Ramesh, “The Policy Effects of Internationalization: A Subsystem Adjustment Analysis of Policy Change” (2002) 41 Journal of Comparative Policy Analysis 31.

\(^{119}\) Morin & Gold, supra note 63; Miller, supra note 63.

\(^{120}\) See Sally Engle Merry, “Transnational Human Rights and Local Activism: Mapping the Middle” (2006) 108:1 American Anthropologist 38 at 44 (discussing the concept of hybridity as “a process that merges imported institutions and symbols with local ones, sometimes uneasily”).

\(^{121}\) Shaffer, supra note 62 at 260; Goldbach, Brake & Katzenstein, supra note 63 at 184; Brake & Katzenstein, supra note 63 at 730.

that may shape the engagement of actors in the construction and conveyance of legal norms, and the political struggles that the conveyance and translation of legal norms may trigger. This second pathway is antithetical to the notion that legal norms can be easily transplanted in a unidirectional manner from one site of law to another, without variations in their substance or effectiveness and without generating dynamic feedback effects. It is instead consistent with scholarship that focuses on the translation of legal norms and helps explain how the effects of transnational legal processes across sites of law may be heterogeneous. Given that many scholars view the construction

---

124 Halliday & Carruthers, supra note 62 at 1149–1152; Dezalay & Garth, Dealing in Virtue, supra note 88 at 3–4.
125 For the classic theory of “legal transplants,” see Watson, supra note 63 at 98–114.
127 Goldbach, Brake & Katzenstein, supra note 63 at 184. Translation should be understood here as encompassing the construction of a hybrid legal norm through the causal mechanisms of cost-benefit commitment, persuasive argumentation, or both.
128 Ibid at 184. Brake & Katzenstein, supra note 63 at 730; See also Campbell, supra note 71 at 80 and 127; Finnemore & Sikkink, supra note 72 at 893.
of hybrid legal norms as integral to the durability and effectiveness of exogenous legal norms in a site of law, this second pathway provides an important way of analyzing the impacts of transnational legal processes on the behavior of actors in the long-term.

The takeaway point here is that the causal mechanisms of the construction and conveyance of legal norms may interact with one another in a dynamic cycle that can yield a variety of different outcomes, at different stages, within a particular site of law. This view makes it possible to account for both the divergent and the convergent outcomes to which a transnational legal process may give rise as well as to develop complex causal pathways that can explain how transnational legal processes may emerge, evolve, and exert influence across one or more sites of law over time.130

RESEARCH DESIGN

My study of the construction and conveyance of the rights of Indigenous Peoples and local communities in the domain of REDD+ employs a research method known as “explaining-outcome process-tracing.” Process-tracing is generally used for making within-case inferences about the role of causal mechanisms in the processes that link causes and outcomes. Explaining-outcome process-tracing specifically aims to trace the complex combination of systematic and nonsystematic causal mechanisms that produced a particular outcome in a single case. It tends to be characterized by theoretical eclecticism rather than parsimony. It “offers complex causal stories that incorporate different types of mechanisms as defined and used in diverse research

129 David Szablowski, Transnational Law and Local Struggles: Mining, Communities and the World Bank (Oxford, UK: Hart Publishing, 2007) at 13; Campbell, supra note 71 at 79–85. See generally Brake & Katzenstein, supra note 63; Merry, supra note 120.


133 Beach & Pedersen, supra note 131 at 19. 134 Ibid at 63–67.
 traditions” as well as “seeks to trace the problem-specific interactions among a wide range of mechanisms operating within or across different domains and levels of social reality.”

Process-tracing is especially appropriate for research that involves a particularly interesting or puzzling outcome that cannot be explained by existing theories.

Rather than focus on the presence of dependent or independent variables, case selection in the context of process-tracing requires selecting cases that make it possible to trace the causal mechanisms that link one or more causes (X) to a particular outcome (Y). I selected Indonesia and Tanzania as two case studies for this book from among the more than sixty countries engaged in the pursuit of REDD+ on the basis of three criteria. First, both Indonesia and Tanzania have made significant progress in their jurisdictional REDD+ readiness activities, have been actively involved in the principal multilateral, bilateral, and nongovernmental initiatives for REDD+, and have hosted multiple REDD+ projects. Second, Indigenous and community rights were ultimately recognized or protected as part of the jurisdictional REDD+ laws, policies, and programs that these countries have adopted or the project-based REDD+ activities that they have hosted, thus enabling me to study the causal mechanisms linking X and Y. Third, given the historical resistance of the governments of Indonesia and Tanzania to the recognition and protection of these rights in other contexts, these two cases form the sort of “least-likely” case that is often the focus of in-depth qualitative research.

Although I did not select these two countries based on comparative logic, they do differ in a number of ways. Indonesia is a middle-income country where the principal drivers of deforestation are expanding forestry, mining, and agricultural sectors that are integrated into global supply chains. The underlying causes of deforestation in Indonesia include the resource-driven economic policies of national and regional governments, growing international demand for commodities, and the high levels of collusion and corruption that encumber the effectiveness of the country’s institutions and systems.
of forest governance.\textsuperscript{141} By contrast, Tanzania is a least-developed country in which forests and their resources support the livelihoods of rural communities. The main drivers of deforestation in Tanzania are thus local in nature, and most notably include the conversion and use of forests for subsistence-based agriculture, livestock grazing, firewood and charcoal production, and small-scale logging.\textsuperscript{142} Furthermore, whereas the governance of forests in Indonesia remains highly centralized and gives rise to frequent disputes between governments and local communities over the recognition of local forest tenure, resource rights, and institutions,\textsuperscript{143} Tanzania has developed one of the most favorable policy environments for the pursuit of community forestry in Africa.\textsuperscript{144} As I explain in Chapter 6, these differences are relevant to understanding the scope conditions of the causal mechanisms that explain whether, how, and to what effect actors may construct and convey Indigenous and community rights in the context of REDD+ activities in a developing country.

I employed multiple methods and sources of data collection to operationalize the explaining-outcome process-tracing for this book.\textsuperscript{145} First, I analyzed the ninety-four semi-structured elite interviews that I conducted with individuals affiliated with international organizations, developing and developed country governments, corporations, and NGOs actively working on REDD+ around the world.\textsuperscript{146} Second, I drew on the observations I gathered through my participation as a civil society delegate and legal expert in multiple legal and policy processes relating to REDD+ from 2007 to 2014.\textsuperscript{147} This participation-observation across multiple sites over time enabled me to get a better sense of the evolving views of different actors with respect to REDD+ and its


\textsuperscript{143} Lima \textit{et al.}, supra note 141 at 125–135.


\textsuperscript{145} For a complete overview of my approach to the collection and analysis of data, including a list of interviews and sites, see Sébastien Jodoin, “On-Line Appendix on REDD+ Fieldwork,” (March 2015), available at: www.sjodoin.ca/data (accessed 12 March 2015).


\textsuperscript{147} See Jodoin, supra note 145.
implications for rights. Third, I analyzed the extensive collection of laws, policies, reports, contracts, and other documentation relevant to REDD+ produced by international organizations, developing and developed country governments, corporations, and NGOs that I gathered during my fieldwork. Fourth, I drew on the emails that I exchanged with several of my interviewees and other sources to obtain documents as well as clarify points of information throughout my fieldwork and the process of drafting my dissertation. Fifth, I relied on the secondary literature that has been produced by scholars on REDD+ and more broadly on the international organizations, developing and developed country governments, corporations, and NGOs that have played a key role in its development and implementation. Sixth and finally, I built an original data set on the implications of 58 REDD+ projects for the rights of Indigenous Peoples and local communities in Indonesia and Tanzania. By triangulating across these different sources of data and carefully assessing their reliability, I was able to trace the role of different causal mechanisms in the construction and conveyance of Indigenous and community rights in the transnational legal process for REDD+ in my two case study countries.

ORIGINALITY AND SIGNIFICANCE

The original analysis and findings in this book make several contributions to the existing literature. First and foremost, this book contributes to literature examining the implications that REDD+ activities may hold for the rights of Indigenous Peoples and local communities in developing countries. Much of the existing scholarship on REDD+ and rights is replete with theoretically plausible, yet no less speculative, claims and arguments about the effects of REDD+ on Indigenous and community rights. The little empirical research that does exist on this topic has focused on the processes and outcomes

---


149 This data set was developed through the collection and independent coding of the design documents of projects, third-party evaluations of their impacts and outcomes, and secondary sources retrieved online. For a complete overview of my approach to the collection and analysis of project data, including a list of projects, see Sébastien Jodoin & Kathryn Hansen, “On-Line Appendix on the Implications of REDD+ Projects for Indigenous and Community Rights in Indonesia and Tanzania” (June 2016), available at: www.sjodoin.ca/data (accessed 16 June 2016).

150 Checkel, supra note 132 at 119. 151 Beach & Pedersen, supra note 131 at 120–143.
associated with REDD+ projects implemented at the local level, leaving the question of how rights have been considered within the context of jurisdictional REDD+ activities at the national level largely unexplored. Given the advanced stage that REDD+ has reached around the world, I have been able to undertake novel empirical research and analysis to understand how and to what effect the rights of Indigenous Peoples and local communities have been constructed and conveyed at national and local levels.

Many scholars hypothesize that REDD+ outcomes are being driven by entrenched power asymmetries in forest governance that new interventions or instruments like REDD+ are incapable of changing and may, worse still, exacerbate. With a view to capturing the ways in which law may offer limited, yet no less potent, support for change in transnational contexts, I have sought to understand the risks as well as the opportunities that REDD+ offers for the recognition and protection of the rights of Indigenous Peoples and local communities in developing countries. On the whole, I argue that the pursuit of REDD+ has functioned as something of an exogenous shock disrupting the traditional patterns of the development and implementation of legal norms relating to the rights of Indigenous Peoples and local communities in Indonesia and Tanzania. My findings demonstrate that jurisdictional and project-based REDD+ activities have, through different causal pathways, provided meaningful opportunities for developing and developed country governments, international organizations, Indigenous Peoples, local communities, NGOs, and even private firms to convey, from above and from below, these rights to national and local sites of law. For instance, both the Indonesian and Tanzanian governments have, for the first time, recognized rights such as the right to free, prior, and informed consent in the context of their national REDD+ policy processes. These developments have not taken place in a vacuum and have been facilitated by broader developments relating to the global emergence of Indigenous rights, the growing relevance of human rights to the fields of climate change and forest conservation, and ongoing processes of democratization in Indonesia and Tanzania.

At the same time, my findings do not suggest that REDD+ has functioned as a panacea either. Across Indonesia and Tanzania, the transnational legal process for REDD+ has resulted in the translation of new hybrid legal norms that reflect the resilience and mediating influence of national legal systems

---

152 See, e.g., Duchelle et al., supra note 46; Corbera et al., supra note 47; Sunderlin et al., supra note 47; Mustalahti et al., supra note 57; Pablo Reed, supra note 57; Leggett & Lovell, supra note 57.

153 See, e.g., Ribot & Larson, supra note 13 at 236.

154 Merry, supra note 15.
and politics. Traditional resistance against the concept of Indigenous Peoples has meant that their rights have either been recognized alongside the rights of forest-dependent communities (as has been the case in Indonesia) or that they have been translated as applying to forest-dependent communities only (as has been the case in Tanzania). Moreover, the recognition and implementation of the participatory rights of Indigenous Peoples and local communities (such as rights to full and effective participation or to free, prior, and informed consent) has been relatively more effectual than the recognition and implementation of their substantive rights (such as rights to forests, land tenure, and resources, or livelihoods). These disparities in outcomes give some credence to the expectations of scholars regarding the limitations of REDD+ for the promotion of the rights of Indigenous Peoples and local communities.

By answering important questions about the construction and conveyance of Indigenous and community rights in the context of REDD+, this book also makes a timely and important contribution to an emerging body of knowledge on the law and governance of REDD+. Indeed, understanding how the pursuit of REDD+ has been and can be reconciled with important social objectives such as the protection of human rights speaks to larger debates about the objectives, challenges, opportunities, effectiveness, and prospects of REDD+. Rather than argue that there is an inherent trade-off between the broader effectiveness of REDD+ and the protection of human rights, my research suggests that the underlying ineffectiveness of REDD+ as an instrument has provided unexpected opportunities for the recognition and protection of the rights of Indigenous Peoples and local communities in developing countries.

Lastly, as one of the first major empirical studies of a transnational legal process to build on the recent work of Shaffer and Halliday, this book contributes to the socio-legal study of law in a number of ways. To begin with, my research confirms the methodological importance of adopting a legal pluralist perspective for the study of transnational legal processes. Legal

---


156 Schroeder & McDermott, supra note 11.

157 Shaffer, supra note 62; Halliday & Shaffer, supra note 62.
pluralism is critical for uncovering whether and how public and private actors may construct and convey legal norms within a complex transnational legal process like REDD+ that emanates from the intersections of two transnational regime complexes (one for climate change, the other for forestry) and features a multiplicity of forms, sites, and levels of normativity. Moreover, this book illustrates the value of understanding a transnational legal process as a cycle that moves back and forth between the construction and conveyance of legal norms, having the potential to yield homogeneous as well as heterogeneous outcomes across sites of law. Whereas there tends to be a bias in favor of finding evidence for the diffusion of norms in much of the political science literature, my careful study of the interpretation and application of the status and rights of Indigenous Peoples across multiple sites of law reveals that transnational legal processes may, among other outcomes, lead to the translation of legal norms rather than their transplantation or may fail to engender their transmission altogether. Finally, this book illustrates the utility of identifying and studying the various causal mechanisms that drive the construction and conveyance of legal norms to produce a complex and theoretically eclectic account of a transnational legal process. By developing an analytical framework that builds bridges between political science and socio-legal studies and rigorously employing process-tracing to draw causal inferences about the nature and influence of legal norms in a transnational context, it offers a number of important methodological lessons for the study of legal phenomena in a globalizing world.

OVERVIEW

The book proceeds as follows. In Chapter 1, I provide an overview of the transnational legal process for REDD+. I begin by presenting the origins and scope of the transnational legal process for REDD+. I then identify the multiplicity of sites of law through which it has evolved at the international, transnational, national, and local levels. I conclude by discussing the increasingly complex character of the transnational legal process for REDD+ and,


159 Jeremy Rayner, Alexander Buck & Pia Katila, eds., Embracing Complexity: Meeting the Challenges of International Forest Governance (Vienna, Austria, 2010).

160 For more on this critique, see Vanhala, supra note 113 at 838–839.

161 On the need for additional empirical research on transnational legal processes, see Shaffer, supra note 62.
most notably, by outlining the different pathways that exist for the conveyance of legal norms to developing countries participating in or hosting REDD+ activities.

In Chapter 2, I examine how the rights of Indigenous Peoples and local communities have been addressed by some of the most influential international and transnational sites of law for REDD+. To begin with, I describe how human rights issues first emerged in the transnational legal process for REDD+. Next, I analyze the recognition of Indigenous and community rights in the context of the UNFCCC; the two leading multilateral programs for REDD+ (the World Bank Forest Climate Partnership Facility and the UN-REDD Programme); a multi-stakeholder safeguards initiative for jurisdictional REDD+ (the REDD+ SES); and a leading nongovernmental certification program for project-based REDD+ (the Climate, Community & Biodiversity Alliance (CCBA)). I conclude by highlighting some of the key differences that have emerged in relation to rights-related issues across these different sites of law.

In Chapters 3 and 4, I trace the conveyance and construction of the rights of Indigenous Peoples and local communities through the implementation of jurisdictional REDD+ activities in Indonesia and Tanzania. I begin by reviewing the broader context in which jurisdictional REDD+ activities have been pursued in these countries, discussing the nature and importance of forests, the principal drivers of deforestation, the role of local communities in forest governance, and the status and rights of Indigenous Peoples. I then describe the history and governance of the jurisdictional REDD+ readiness phase in both countries, outlining the roles played by various domestic and international actors in its design and implementation. Next, I provide an account and explanation of the conveyance and construction of legal norms relating to the rights of Indigenous Peoples and local communities in the context of the development of their national strategies and safeguard policies for REDD+. I conclude by reflecting on the outcomes of the pursuit of jurisdictional REDD+ in Indonesia and Tanzania and their implications for the recognition and protection of the rights of Indigenous Peoples and local communities in the long-term.

In Chapter 5, I analyze the conveyance and construction of legal norms relating to the rights of Indigenous Peoples and local communities in the context of project-based REDD+ activities implemented at the local level. I begin by providing an overview of the nature, scale, and operation of the transnational market for project-based REDD+. I then examine how the rights of Indigenous Peoples and local communities have been recognized and protected through the pursuit of project-based REDD+ activities in
Indonesia and Tanzania. Next, I offer an explanation of the conveyance and construction of these rights within REDD+ projects implemented in both countries. I conclude by reflecting on the broad outcomes of the pursuit of project-based REDD+ activities and their implications for the recognition and protection of the rights of Indigenous Peoples and local communities in the long-term within the carbon market.

In Chapter 6, I compare the conveyance and construction of rights through REDD+ activities developed and implemented in Indonesia and Tanzania. Although I did not select these two countries on the basis of variations in initial conditions or eventual outcomes relevant to the recognition and protection of rights, a number of lessons can nonetheless be drawn from a comparison of experiences across sites and levels of law in these two countries. I begin by discussing findings that relate to rights in the context of the pursuit of jurisdictional REDD+ activities at the national level, before turning to the development and implementation of project-based REDD+ activities at the local level. I conclude with a global comparison of the intersections between rights and various REDD+ activities in these two countries, and highlight the mediating influence of national laws and politics in the pursuit of REDD+ at various levels.

In the concluding chapter, I build on my research findings in three ways. I begin by reviewing and discussing the main findings from this book that pertain to the complex relationship between the transnational legal process for REDD+ and the rights of Indigenous Peoples and local communities. Next, I identify the questions and implications that my findings raise for scholarship on REDD+ as well as the nature and influence of transnational legal processes. I conclude by addressing the implications of this book for practitioners and activists working to build synergies between the pursuit of REDD+ and the promotion of human rights.