

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+.¹ 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 Change² (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.³ Because it has been seen as a relatively inexpensive, simple, and rapid way of reducing an estimated 17 percent of global carbon emissions worldwide,⁴ the development of REDD+ has moved forward with remarkable vigor within

¹ Christopher Lang, “No rights, no REDD’: Indigenous Peoples protest in Poznan” *REDD-Monitor*, 9 December 2008, available at: www.redd-monitor.org/2008/12/09/no-rights-no-redd-indigenous-peoples-protest-in-poznan/ (accessed 1 August 2014).

² *United Nations Framework Convention on Climate Change*, 9 May 1992, 1771 U.N.T.S. 107, entered into force 21 March 1994, art. 4(1)(d).

³ Marleen Buizer, David Humphreys & Wil de Jong, “Climate change and deforestation: The evolution of an intersecting policy domain” (2013) 35 *Environmental Science & Policy* 1.

⁴ Arild Angelsen & Desmond McNeill, “The evolution of REDD+” in Arild Angelsen *et al.*, eds., *Analysing REDD+: Challenges and Choices* (Bogor Barat, Indonesia: CIFOR, 2012) 31 at 35. H-Holger Rogner *et al.*, “Introduction” in Bert Metz *et al.*, eds., *Climate Change: The IPCC Scientific Assessment. Report of Working Group III to the Intergovernmental Panel on Climate*

the UNFCCC and beyond.⁵ Governments, international organizations, multi-lateral 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.⁶ 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+).⁷ 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+).⁸

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.⁹ 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 communities¹⁰ in developing countries.¹¹ On the one hand, REDD+ may provide new funds and momentum for the recognition and protection of the traditional lands of Indigenous

Change: Mitigation of Climate Change, available at: www.ipcc.ch/pdf/assessment-report/ar4/wg3/ar4-wg3-chapter1.pdf (2007) at 105–106.

- ⁵ Constance L. McDermott, Kelly Levin & Benjamin Cashore, “Building the Forest-Climate Bandwagon: REDD+ and the Logic of Problem Amelioration” (2011) 11:3 *Global Environmental Politics* 85.
- ⁶ Gillian A. Cerbu, Brent M. Swallow & Dara Y. Thompson, “Locating REDD: A global survey and analysis of REDD readiness and demonstration activities” (2011) 14(2) *Environmental Science & Policy* 168.
- ⁷ Annex I. Overview of REDD+ activities in the developing world. ⁸ *Ibid.*
- ⁹ Chukwumerije Okereke & Kate Dooley, “Principles of justice in proposals and policy approaches to avoided deforestation: Towards a post-Kyoto climate agreement” (2010) 20:1 *Global Environmental Change* 82.
- ¹⁰ I use the term “local communities” interchangeably with the term “forest-dependent communities” throughout this book.
- ¹¹ See Frances Seymour, “Forests, climate change and human rights: managing risks and trade-offs” in Stephen Humphreys, ed., *Human Rights and Climate Change* (Cambridge, UK: Cambridge University Press, 2009) 207–237; Annalisa Savaresi, “The Human Rights Dimension of REDD” (2012) 21:2 *Review of European Community & International Environmental Law* 102; Thomas Sikor & Johannes Stahl, eds., *Forests and People. Property, Governance, and Human Rights* (London, UK: Earthscan, 2011) 237; Heike Schroeder & Constance McDermott, “Beyond Carbon: Enabling Justice and Equity in REDD+ Across Levels of Governance” (2014) 19:1 *Ecology & Society* 31; Robert Fischer & Rosemary Lyster,

Peoples and local communities, as well as opportunities to foster their participation in forest governance and support their sustainable livelihoods.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.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.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.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.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

“Land and resource tenure: The rights of indigenous peoples and forest dwellers” in Rosemary Lyster, Catherine Mckenzie & Constance K. McDermott, eds., *Law, Tropical Forests and Carbon: The Case of REDD+* (Cambridge, UK: Cambridge University Press, 2013) 187.

¹² Kathleen Lawlor *et al.*, “Community Participation and Benefits in REDD+: A Review of Initial Outcomes and Lessons” (2013) 4:2 *Forests* 296.

¹³ Jesse Ribot & Anne M. Larson, “Reducing REDD risks: Affirmative policy on an uneven playing field” (2012) 6(2) *International Journal of the Commons* 233.

¹⁴ Chris Sandbrook, Fred Nelson, William M. Adams & Arun Agrawal, “Carbon, forests and the REDD paradox” (2010) 44:03 *Oryx* 330.

¹⁵ Howard Erlanger *et al.*, “Is It Time for a New Legal Realism?” (2005) 2 *Wisconsin Law Review* 335; Sally Engle Merry, “New Legal Realism and the Ethnography of Transnational Law” (2006) 31:4 *Law & Social Inquiry* 975.

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 scholars¹⁷ has argued that the design and management of REDD+ programs, policies, and projects should comply with the participatory rights of individuals and communities¹⁸ enshrined in international human rights law¹⁹ and recognized through the principle of public participation in international environmental law.²⁰ In doing so, these scholars have emphasized that Indigenous Peoples benefit from an enhanced set of procedural rights by virtue of their recognition

¹⁷ Savaresi, *supra* note 11; Fischer & Lyster, *supra* note 11; Annalisa Savaresi, “REDD+ and Human Rights: Addressing Synergies between International Regimes” (2013) 18:3 *Ecology and Society* art. 5; Rosemary Lyster, “REDD+, transparency, participation and resource rights: The role of law” (2011) 14:2 *Environmental Science & Policy* 118; Sophie Lemaitre, “Indigenous Peoples’ Land Rights and REDD: A Case Study” (2011) 20:2 *Review of European Community & International Environmental Law* 150; Sébastien Jodoin, “The Human Rights of Indigenous Peoples and Forest-Dependent Communities in the Complex Legal Framework for REDD+” in Christina Voigt, ed., *Research Handbook on REDD-plus and International Law* (Cheltenham, UK: Edward Elgar, 2016) 157–185.

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* 118 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.”

²⁰ See, e.g., *Declaration on Environment and Development*, Report of the United Nations Conference on Environment and Development, U.N. Doc. A/CONF.151/6/Rev.1 (1992), Principle 10 (“Environmental issues are best handled with the participation of all concerned

as “peoples”²¹ and their right to self-determination under international law.²² As is recognized in the UNDRIP²³, ILO Convention 169²⁴ and the decisions of numerous international and regional human rights bodies,²⁵ 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.²⁶ For their part, local or forest-dependent communities do not possess a distinct status²⁷ 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 13–19.

²⁵ See, e.g., I/A Court H.R., *Maya Indigenous Communities and Their Members against Belize* (Case No. 12.053), Report No. 40/04, 12 October 2004, at para. 142; I/A Court H.R., *Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Judgment of 28 November, 2007, Series C No. 172, at para. 134; African Commission on Human and Peoples Rights, Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council (Case 276 / 2003), Judgement (2009) at para. 291.

²⁶ Savaresi, *supra* note 11 at 106–107; Fischer & Lyster, *supra* note 11 at 190–191. See also Jessica Rae, Mahala Gunther & Lee Godden, “Governing Tropical Forests: REDD+, Certification and Local Forest Outcomes” (2011) 7:2 *Macquarie Journal of International & Comparative Environmental Law* 40 at 66.

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.²⁸ 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.²⁹

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.³⁰ 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,³¹ including rights to personal security, freedom of movement, and freedom from racial discrimination,³² rights to housing, food, water, health, an adequate standard of living, and culture,³³ and the *sui generis* rights to land, resources, and culture held by Indigenous Peoples³⁴ under international law.³⁵ 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.³⁶

²⁸ See David Takacs, “Environmental Democracy and Forest Carbon (REDD+)” (2014) 44 *Environmental Law* 71 at 92–94.

²⁹ Sikor & Stahl, *supra* note 11 at 8. ³⁰ Savaresi, *supra* note 11 at 105. ³¹ *Ibid* at 105.

³² International Covenant on Civil and Political Rights, adopted 16 Dec. 1966, UNGA Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force 23 Mar. 1976, art. 9(1), 12(1), and 26(1).

³³ International Covenant on Economic, Social and Cultural Rights, adopted 16 Dec. 1966, UNGA Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force 3 Jan. 1976, art. 11, 12, and 15.

³⁴ Fischer & Lyster, *supra* note 11 at 193–206; Lemaitre, *supra* note 17 at 152–156.

³⁵ See, e.g., UNDRIP, art. 10, 11, 12, 13, 15, 20, 25, 26, 27, 29, 31, and 32; Inter-American Court of Human Rights 31 August 2001, *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Series C, No. 79, at 153; *Yanomami Indians v. Brazil*, IACtHR Case 7615, OEA/ser. L/V/II.66, doc. 10 rev. 1 (1985), 1984–1985 Annual Report 24; *Case of the Indigenous Community Yakye Axa v. Paraguay*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 125 (17 June, 2005).

³⁶ Kathleen Birrell, Lee Godden & Maureen Tehan, “Climate change and REDD+: Property as a prism for conceiving Indigenous peoples’ engagement” (2012) 3:2 *Journal of Human Rights and the Environment* 196.

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.³⁷ 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.³⁸ 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.³⁹

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,⁴⁰ particularly in terms of the pursuit and implementation of community forestry.⁴¹ 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

³⁷ See, e.g., Grit Ludwig, "Property Rights and Participation in REDD+: The Case of Mozambique" (2012) 1:2 *Transnational Environmental Law* 381 at 398–401; Lemaitre, *supra* note 17 at 160–162.

³⁸ Benedict Kingsbury, "'Indigenous Peoples' in International Law: A Constructivist Approach to the Asian Controversy" (1998) 92:3 *American Journal of International Law* 414; Alexandra Xanthaki, *Indigenous Rights and United Nations Standards: Self-Determination, Culture and Land* (Cambridge, Cambridge University Press, 2007) at 34.

³⁹ See generally Christoph Schwarte, "Social Safeguards in REDD: A review of possible mechanisms to protect the rights and interests of indigenous and forest-dependent communities in a future system for REDD" (2010) 6:1 *McGill Journal of Sustainable Development Law & Policy* 57; David J. Kelly, "The Case for Social Safeguards in a Post-2012 Agreement on REDD" (2010) 6:1 *Law, Environment and Development Journal* 61; Savaresi, *supra* note 11 at 112–113; Savaresi, *supra* note 17 at 5–6; Naomi Roht-Arriaza, "Human rights in the climate change regime" (2010) 1:2 *Journal of Human Rights and the Environment* 211 at 234.

⁴⁰ Thomas Sikor *et al.*, "REDD-plus, forest people's rights and nested climate governance" (2010) 20:3 *Global Environmental Change* 423.

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 forestry⁴² or the recognition and protection of rights to forests and land tenure,⁴³ due to their purported benefits for reducing deforestation and enhancing carbon sequestration.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.⁴⁵ In this regard, early studies demonstrate that REDD+ readiness efforts and projects have indeed made some contribution to forest tenure reforms⁴⁶ while also highlighting the complex challenges that they face in addressing the political conflicts and technical challenges that stand in their way.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.⁴⁸ Third, Indigenous Peoples and local communities may also benefit from being involved in the

⁴² Tanya Hayes & Lauren Persha, “Nesting local forestry initiatives: Revisiting community forest management in a REDD+ world” (2010) 12(8) *Forest Policy & Economics* 545; Maria Fernanda Tomaselli & Reem Hajjar, “Promoting Community Forestry Enterprises in National REDD+ Strategies: A Business Approach” (2011) 2:1 *Forests* 283; Peter Cronkleton, David Barton Bray & Gabriel Medina, “Community Forest Management and the Emergence of Multi-Scale Governance Institutions: Lessons for REDD+ Development from Mexico, Brazil and Bolivia” (2011) 2:2 *Forests* 451 at 465; Randy Bluffstone, Elizabeth Robinson & Paul Guthiga, “REDD+ and community-controlled forests in low-income countries: Any hope for a linkage?” (2013) 87 *Ecological Economics* 43; Harini Nagendra & Elinor Ostrom, “Polycentric governance of multifunctional forested landscapes” (2012) 6:2 *International Journal of the Commons* 104.

⁴³ Kathleen Lawlor *et al.*, *supra* note 12 at 304–311. See also André Rodrigues de Aquino, André Aasrud & Leticia Guimarães, “Can Forest Carbon Finance Influence Land Tenure Security in Project Areas? Preliminary Lessons from Projects in Niger and Kenya” (2011) 8 *Advances in Agroforestry* 231.

⁴⁴ Ashwini Chhatre & Adrun Agrawal, “Tradeoffs and synergies between carbon storage and livelihood benefits from forest commons” (2009) 106(42) *Proceedings of the National Academy of Sciences* 17667.

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

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

⁴⁷ Esteve Corbera *et al.*, “Rights to Land, Forests and Carbon in REDD+: Insights from Mexico, Brazil and Costa Rica” (2011) 2 *Forests* 301; William D. Sunderlin *et al.*, “How are REDD+ Proponents Addressing Tenure Problems? Evidence from Brazil, Cameroon, Tanzania, Indonesia, and Vietnam” (2014) 55 *World Development* 37.

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

⁴⁹ Ben Palmer Fry, "Community forest monitoring in REDD+: The 'M' in MRV?" (2011) 14:2 *Environmental Science and Policy* 181; Margaret Skutsch, ed., *Community Forest Monitoring for the Carbon Market: Opportunities Under REDD* (London, UK, Earthscan, 2011); Alejandra Larrazábal, Michael K. McCall, Tuyeni H. Mwampamba & Margaret Skutsch, "The role of community carbon monitoring for REDD+: a review of experiences" (2012) *Current Opinion in Environmental Sustainability* 707.

⁵⁰ Jacob Phelps, Edward L. Webb & Arun Agrawal, "Does REDD+ threaten to recentralize forest governance?" (2010) (80) *Science* 312. See also Betsy A. Beymer-Farris & Thomas J. Bassett, "The REDD menace: Resurgent protectionism in Tanzania's mangrove forests" (2012) 22:2 *Global Environmental Change* 332.

⁵¹ Eliakimu Zahabu & Rogers E. Malimbwi, "The Potential of Community Forest Management under REDD+ for Achieving MDG Goals in Tanzania" in Margaret Skutsch, ed., *Community Forest Monitoring for the Carbon Market: Opportunities Under REDD* (London, UK, Earthscan, 2011) 134 at 146.

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.

⁵³ Anne M. Larson, "Forest tenure reform in the age of climate change: Lessons for REDD+" (2011) 21:2 *Global Environmental Change* 540 at 547.

⁵⁴ Constance L. McDermott *et al.*, "Operationalizing Social Safeguards in REDD+: Actors, Interests and Ideas" (2012) 21 *Environmental Science & Policy* 63; Theresa de la Fuente & Reem Hajjar, "Do current forest carbon standards include adequate requirements to ensure indigenous peoples' rights in REDD projects?" (2013) 15:4 *International Forestry Review* 1; Isabel Melo, Esther Turnhout & Bas Arts, "Integrating multiple benefits in market-based climate mitigation schemes: The case of the Climate, Community and Biodiversity certification scheme" (2014) 35:2009 *Environmental Science & Policy* 49; Sango Mahanty & Constance L. McDermott, "How does 'Free, Prior and Informed Consent' (FPIC) impact social equity? Lessons from mining and forestry and their implications for REDD+" (2013) 35 *Land Use Policy* 406.

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.⁵⁵ Many scholars fear that REDD+ may function as a form of environmental governance that promotes technocratic and market-oriented approaches to forest governance⁵⁶ and marginalizes traditional and community perspectives.⁵⁷ In light of the entrenched political, economic, and legal asymmetries that characterize forest governance in many developing countries,⁵⁸ 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?⁵⁹

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

⁵⁵ See, e.g., Kathleen Lawlor, Erika Weinthal & Lydia Olander, "Institutions and Policies to Protect Rural Livelihoods in REDD+ Regimes" (2010) 10:4 *Global Environmental Politics* 1; Anne M. Larson & Elena Petkova, "An Introduction to Forest Governance, People and REDD+ in Latin America: Obstacles and Opportunities" (2011) 2:1 *Forests* 86–111; Anna Knox *et al.*, "Land Tenure and Payment for Environmental Services: Challenges and Opportunities for REDD+" (2011) 11:2 *Land Tenure Journal* 17–55.

⁵⁶ See Mary C. Thompson, Manali Baruah & Edward R. Carr, "Seeing REDD+ as a project of environmental governance" (2011) 14:2 *Environmental Science & Policy* 100; Thomas Sikor, "REDD+: Justice effects of technical design" in Thomas Sikor, ed., *Justices and Injustices of Ecosystem Services* (Abingdon, UK: Routledge, 2013) 46.

⁵⁷ Irmeli Mustalahti *et al.*, "Can REDD+ Reconcile Local Priorities and Needs with Global Mitigation Benefits? Lessons from Angai Forest, Tanzania" (2012) 17:1 *Ecology & Society* 16; Pablo Reed, "REDD+ and the Indigenous Question: A Case Study from Ecuador" (2011) 2:2 *Forests* 525; Matthew Leggett & Heather Lovell (2012) "Community perceptions of REDD+: A case study in PNG" (2012) 12:1 *Climate Policy* 115.

⁵⁸ Maxwell Gomera, Liz Rihoy & Fred Nelson, "A Changing Climate for Community Resource Governance: Threats and Opportunities from Climate Change and the Emerging Carbon Market" in Fred Nelson, eds., *Community Rights, Conservation and Contested Land: The Politics of National Resource Governance in Africa* (London, UK: Earthscan, 2010) 293.

⁵⁹ Ribot & Larson, *supra* note 13 at 248.

TABLE 1.1. *Overview of the potential implications of REDD+ for the rights of Indigenous Peoples and forest-dependent communities*

Type of right	Definition	Positive implications	Negative implications
Participatory Rights	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.	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.	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.

TABLE I.1. (continued)

Type of right	Definition	Positive implications	Negative implications
Substantive Rights	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 <i>sui generis</i> 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.	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.	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.

and substantive rights of Indigenous Peoples and local communities.⁶⁰ 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,⁶¹ 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.⁶² This scholarship has dovetailed with work examining the diffusion, transplantation, or translation of legal norms across diverse sites of law.⁶³

⁶⁰ 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.

⁶¹ Harold Hongju Koh, “Transnational Legal Process” (1996) 75 *Nebraska Law Review* 181.

⁶² Gregory Shaffer, “Transnational Legal Process and State Change” (2012) 37:2 *Law & Social Inquiry* 229; Terence C. Halliday & Bruce Carruthers, *Bankrupt: Global Lawmaking and Systematic Financial Crisis* (Stanford, CA: Stanford University Press, 2009); Terence Halliday & Gregory Shaffer, eds., *Transnational Legal Orders* (Cambridge, UK: Cambridge University Press, 2015).

⁶³ See, e.g., William Twining, “Diffusion of Law: A Global Perspective” (2004) 49 *Journal of Legal Pluralism & Unofficial Law* 1; Alan Watson, *Legal Transplants* (Athens, GA: University of Georgia Press, 1993); Jonathan Miller, “A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process” (2003) 51 *American Journal of Comparative Law* 839; Toby S. Goldbach, Benjamin Brake & Peter J. Katzenstein, “The Movement of U.S. Criminal and Administrative Law: Processes of Transplanting and Translating” (2013) 20:1 *Indiana Journal of Global Legal Studies* 141; Benjamin Brake & Peter

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.⁶⁴ 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 law⁶⁵ and that encompass and cut across international, transnational, national, and subnational levels of governance.⁶⁶ 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.⁶⁷ 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.⁶⁸ 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.⁶⁹ The enactment and implementation of legal norms can

J. Katzenstein, “Lost in Translation? Nonstate Actors and the Transnational Movement of Procedural Law” (2013) 67:4 *International Organization* 725–757; Jean-Frédéric Morin & Richard Gold, “An Integrated Model of Legal Transplantation: The Diffusion of Intellectual Property Law in Developing Countries” (2014) 58 *International Studies Quarterly* 781.

⁶⁴ Shaffer, *supra* note 62 at 236; Brake & Katzenstein, *supra* note 63 at 731–737; Koh, *supra* note 61 at 183–184; Edward S. Cohen, “The Harmonization of Private Commercial Law: The Case of Secured Finance” in Christian Brütsch & Dirk Lehmkuhl, eds., *Law and Legalization in Transnational Relations* (Abingdon, UK: Routledge, 2007) 58 at 63.

⁶⁵ 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.

⁶⁶ Halliday & Shaffer, *supra* note 65 at 43–44. ⁶⁷ Shaffer, *supra* note 62 at 257.

⁶⁸ Koh, *supra* note 61 at 205; Terence C. Halliday & Bruce G. Carruthers, “The Recursivity of Law: Global Norm Making and National Lawmaking in the Globalization of Corporate Insolvency Regimes” (2007) 112:4 *American Journal of Sociology* 1135 at 1153.

⁶⁹ 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 406).

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.⁷⁰

My analytical framework builds on this socio-legal literature by specifying the key causal mechanisms⁷¹ 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,⁷² the domestic influence of international law,⁷³ and the nature of transnational processes of policy change,⁷⁴ I identify a range of rationalist⁷⁵ and constructivist⁷⁶ causal mechanisms that underlie the development of legal norms by actors within a site of law (construction) and their transmission in a

⁷⁰ Shaffer, *supra* note 62 at 243–247; Harold Hongju Koh, “1998 Harris Lecture: How Is International Human Rights Law Enforced?” (1999) 74 *Indiana Law Journal* 1397 at 1413.

⁷¹ John Campbell, *Institutional Change and Globalization* (Oxford, UK: Oxford University Press, 2004) at 61–64 (discussing the importance of causal mechanisms to social scientific explanations of institutional change).

⁷² Martha Finnemore & Kathryn Sikkink, “International Norm Dynamics and Political Change” (1998) 52:4 *International Organization* 887–917; Ryan Goodman & Derek Jinks, *Socializing States: Promoting Human Rights Through International Law* (Oxford, UK: Oxford University Press, 2013); Thomas Risse, Stephen C. Ropp & Kathryn Sikkink, eds., *The Persistent Power of Human Rights: From Commitment to Compliance* (Cambridge, UK: Cambridge University Press, 2013).

⁷³ Beth A. Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (Cambridge: Cambridge University Press, 2010).

⁷⁴ Frank Dobbin, Beth Simmons & Geoffrey Garrett, “The Global Diffusion of Public Policies: Social Construction, Coercion, Competition, or Learning?” (2007) 33 *Annual Review of Sociology* 449–472; Mitchell A. Orenstein, *Privatizing Pensions: The Transnational Campaign for Social Security Reform* (Princeton, NJ: Princeton University Press, 2008); Steven Bernstein & Benjamin Cashore, “Complex Global Governance and Domestic Policies: Four Pathways of Influence” (2012) 88:3 *International Affairs* 585–604.

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, *supra* note 73, 85).

⁷⁶ Constructivist explanations focus on the role that norms, including legal norms, play in shaping the behavior of actors. Norms in this context are understood as the intersubjective understandings that set standards of appropriate behavior for actors (Finnemore & Sikkink, *supra* note 72 at 891), constitute their identities and their interests (Peter Katzenstein, ed., *The Culture of National Security: Norms and Identity in World Politics* (New York, NY: Columbia University Press, 1996); Martha Finnemore, *National Interests in International Society* (Ithaca, NY: Cornell University Press, 1996)), and enable them to give meaning to the world (Nicholas G. Onuf, *World of Our Making* (Columbia, SC: University of South Carolina Press, 1989); Alexander Wendt, “Anarchy is What States Make of It: The Social Construction of Power Politics” (1992) 46 *International Organization* 391; Peter Berger & Thomas Luckmann, *The Social Construction of Reality* (London, UK: Penguin Books, 1996).

relatively reified manner from one site of law to another (conveyance).⁷⁷ As such, I assume that both rationalist and constructivist approaches are needed to provide a full account of how law relates to society,⁷⁸ 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.⁷⁹ 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 1.2).

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.

⁷⁸ Stone Sweet, *supra* note 65 at 6–20; Jaye Ellis, “Fisheries Conservation in an Anarchical System: A Comparison of Rational Choice and Constructivist Perspectives” (2007) 3 *Journal of International Law & International Relations* 1.

⁷⁹ Jeffrey T. Checkel, “International Norms and Domestic Politics: Bridging the Rationalist–Constructivist Divide” (1997) 3:4 *European Journal of International Relations* 473; James G. March & Johan P. Olsen, “The Institutional Dynamics of International Political Orders” (1998) 52:4 *International Organization* 943; Peter Hall, “Historical Institutionalism in Rationalist and Sociological Perspective” in James Mahoney & Kathleen Thelen, eds., *Explaining Institutional Change: Ambiguity, Agency, and Power* (Cambridge, UK: Cambridge University Press, 2009) 204.

TABLE 1.2. *The causal mechanisms in transnational legal processes*

The Construction of Legal Norms	Cost-Benefit Commitment Persuasive Argumentation
The Conveyance of Legal Norms	Coercion Cost-Benefit Adoption Instrumental Learning Mobilization Élite <i>Internalization</i> Acculturation

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.⁸⁰ This mechanism posits that self-interested actors develop legal norms based on a rational calculation that the expected benefits of commitment outweigh its costs.⁸¹ 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).⁸² 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

⁸⁰ Matthew Potoski & Aseem Prakash, "A Club Theory Approach to Voluntary Programs" in Matthew Potoski & Aseem Prakash, eds., *Voluntary Programs: A Club Theory Approach* (Cambridge, MA: MIT Press, 2006) 17–39; Ralph H. Espach, *Private Environmental Regimes in Developing Countries: Globally Sown, Locally Grown* (New York, NY: Palgrave Macmillan, 2009) at 18–22; Lars H. Gulbrandsen, *Transnational Environmental Governance: The Emergence and Effects of the Certification of Forests and Fisheries* (Cheltenham, UK: Edward Elgar Press, 2010) at 18–20; Alec Stone Sweet, "Judicialization and the Construction of Governance" (1999) 32:2 *Comparative Political Studies* 147 at 152–154.

⁸¹ Judith Goldstein & Lisa Martin, "Legalization, Trade Liberalization, and Domestic Politics," (2000) 54:3 *International Organization* 603–632. See also Beth A. Simmons, "International Law and State Behavior: Commitment and Compliance in International Monetary Affairs" (2000) 94:4 *American Political Science Review* 819.

⁸² 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.⁸³

I define persuasive argumentation⁸⁴ 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.⁸⁵ 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 frames⁸⁶ 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.⁸⁷ 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,⁸⁸ the alignment between emergent or proposed legal norms and the existing legal norms internalized by actors,⁸⁹ and a context in which actors engage in a primarily deliberative or participatory, rather than coercive, form of discourse.⁹⁰

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.⁹¹ 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* 801) 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).

⁸⁵ Goodman & Jinks, *supra* note 72 at 24–25; Checkel, *supra* note 84 at 812–813; Thomas Risse, “Let’s Argue!: Communicative Action in World Politics” (2000) 54:1 *International Organization* 1; Jeffrey T. Checkel, “Why Comply? Social Learning and European Identity Change” (2001) 55:3 *International Organization* 553–588 at 562. See also Gulbrandsen, *supra* note 80 at 25–27.

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.

⁸⁸ Checkel, *supra* note 79 at 562; Yves Dezalay & Bryant Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (Chicago, IL: University of Chicago Press, 1996) at 5; Halliday & Shaffer, *supra* note 65 at 35–36.

⁸⁹ Shaffer, *supra* note 62 at 256. See also Richard Price, “Reversing the Gun Sights: Transnational Civil Society Targets Land Mines” (1998) 52:3 *International Organization* 613–644 at 622–630.

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).⁹² 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.⁹³ 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 law⁹⁴ and political science⁹⁵ 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.”)

⁹² Jutta Brunée & Stephen Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge, UK: Cambridge University Press, 2010) at 55 (arguing that international law results from “shared understandings of what [actors] want to accomplish through law, and of specific candidate norms.”). See also Janet K. Levin, “Bottom-Up Lawmaking: The Private Origins of Transnational Law” (2008) 15 *Indiana Journal of Global Legal Studies* 49.

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*

Causal mechanism	Causal focus and scope conditions
<i>Coercion</i>	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. ⁹⁶ Its effectiveness depends on asymmetries in material power between exogenous and endogenous actors ⁹⁷ and on the capacity and willingness of exogenous actors to detect and sanction deviance, especially with respect to the implementation of exogenous legal norms. ⁹⁸
<i>Cost-Benefit Adoption</i>	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, ⁹⁹ reputation ¹⁰⁰ or economic gain). ¹⁰¹ Its effectiveness depends on the precision and obligatory force of exogenous legal norms and the availability of information about their implementation. ¹⁰²
<i>Instrumental Learning</i>	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. ¹⁰³ Its effectiveness depends on the ability of intermediaries to communicate and promote this knowledge in a site of law. ¹⁰⁴

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 23 and 31–32; Orenstein, *supra* note 74 at 66.

⁹⁹ Thomas Risse & Stephen C. Ropp, “Introduction and Overview” in Risse, Ropp & Sikink, *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.

¹⁰¹ Beth A. Simmons, “Compliance with International Agreements” (1998) 1:1 *Annual Review of Political Science* 75–93 at 80–81.

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.

¹⁰⁴ Abbott *et al.*, *supra* note 91 at 408–415; Kenneth W. Abbott & Duncan Snidal, “Hard and Soft Law in International Governance” (2009) 54:3 *International Organization* 421–456 at 426–427; Potoski & Prakash, *supra* note 80 at 22; Shaffer, *supra* note 62 at 251; Emilie Hafner-Burton, *Forced to Be Good: Why Trade Agreements Boost Human Rights* (Ithaca, NY: Cornell University Press, 2009) at 160.

TABLE 1.3. (continued)

Causal mechanism	Causal focus and scope conditions
<i>Mobilization</i>	The conveyance of legal norms is driven by the political or legal pressure exerted upon endogenous actors by other endogenous actors. ¹⁰⁵ 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. ¹⁰⁶
<i>Élite Internalization</i>	<i>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.</i> ¹⁰⁷ Its effectiveness depends on whether endogenous elites have the authority and capacity to enact and implement legal norms in a site of law. ¹⁰⁸
<i>Acculturation</i>	<i>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.</i> ¹⁰⁹ 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. ¹¹⁰

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).

¹⁰⁶ Halliday & Carruthers, *supra* note 62 at 302–306.

¹⁰⁷ Checkel, *supra* note 79 at 557–558; Simmons, *Mobilizing for Human Rights*, *supra* note 73 at 7; Goodman & Jinks, *supra* note 72 at 144–150.

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).

¹⁰⁹ Checkel, *supra* note 79 at 478–479.

¹¹⁰ Elizabeth Boyle & Sharon E. Preves, “National Politics as International Process: The Case of Anti-Female-Genital-Cutting Laws” (2000) 34:3 *Law & Society Review* 703 at 715–721.

that may support the conveyance of legal norms from one site of law to another: coercion, instrumental learning, cost-benefit adoption, mobilization, élite 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

¹¹¹ Goodman & Jinks, *supra* note 72 at 27–28. ¹¹² *Ibid* at 28; Checkel, *supra* note 84 at 811.

¹¹³ See Lisa Vanhala, “The Diffusion of Disability Rights in Europe” (2015) 37:4 *Human Rights Quarterly* 831 (recognizing the role that structural as well agent-centered mechanisms may play in the diffusion of norms).

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

¹¹⁷ Mona Lena Krook & Jacqui True, “Rethinking the life cycles of international norms: The United Nations and the global promotion of gender equality” (2010) 18:1 *European Journal of International Relations* 103 at 106–110.

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) 4:1 *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.

¹²² Krook & True, *supra* note 117 at 109–110; Halliday & Carruthers, *supra* note 62 at 18. See generally Wayne Sandholtz & Kendall Stiles, *International Norms and Cycles of Change* (Oxford, UK: Oxford University Press, 2009).

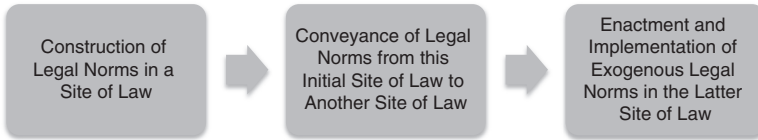


FIGURE 1.1 The transplantation of legal norms through a transnational legal process

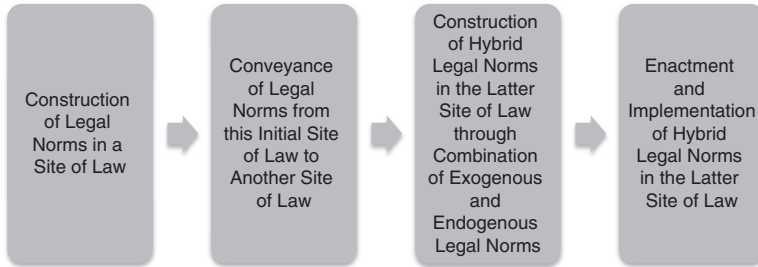


FIGURE 1.2 The translation of legal norms through a transnational legal process

that may shape the engagement of actors in the construction and conveyance of legal norms,¹²³ and the political struggles that the conveyance and translation of legal norms may trigger.¹²⁴ 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,¹²⁵ without variations in their substance or effectiveness and without generating dynamic feedback effects.¹²⁶ It is instead consistent with scholarship that focuses on the translation of legal norms¹²⁷ and helps explain how the effects of transnational legal processes across sites of law may be heterogeneous.¹²⁸ Given that many scholars view the construction

¹²³ Shaffer, *supra* note 62 at 255–256; Halliday & Carruthers, *supra* note 62 at 337–362.

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.

¹²⁶ For a critique of Watson’s theory of legal transplants, see Roger Cotterrell, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (Aldershot, UK: Ashgate Press, 2006) at 109–116. On the challenges of transplantation and the ubiquity of translation, see Goldbach, Brake & Katzenstein, *supra* note 63.

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,¹²⁹ 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.”¹³¹ Process-tracing is generally used for making within-case inferences about the role of causal mechanisms in the processes that link causes and outcomes.¹³² 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.¹³³ It tends to be characterized by theoretical eclecticism rather than parsimony.¹³⁴ 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.

¹³⁰ Two of the best known causal pathways that relate to the domestic influence of international norms are the ones specified by Koh (Koh, *supra* note 70 at 1409–1411) and by Risse, Ropp and Sikkink (Thomas Risse & Kathryn Sikkink, “The Socialization of International Human Rights Norms into Domestic Politics: Introduction,” in Thomas Risse, Stephen C. Ropp & Kathryn Sikkink, eds., *The Power of Human Rights: International Norms and Domestic Change* (Cambridge, UK: Cambridge University Press, 1999) 1–38).

¹³¹ Derek Beach & Rasmus Brun Pedersen, *Process-Tracing Methods: Foundations and Guidelines* (Ann Arbor, Michigan: University of Michigan Press, 2013) at 18–21.

¹³² *Ibid* at 1–4. See also Alexander George & Andrew Bennett, *Case Studies and Theory Development in the Social Sciences* (Cambridge, MA: MIT Press, 2005) at 138 and 206 and Jeffrey T. Checkel, “Process Tracing” in Audie Klotz & Deepa Prakash, eds., *Qualitative Methods in International Relations. A Pluralist Guide* (New York, NY: Palgrave Macmillan, 2008) 114 at 116 and 121.

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.”¹³⁵ Process-tracing is especially appropriate for research that involves a particularly interesting or puzzling outcome that cannot be explained by existing theories.¹³⁶

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).¹³⁷ I selected Indonesia and Tanzania as two case studies for this book from among the more than sixty countries¹³⁸ 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.¹³⁹ 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.¹⁴⁰

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

¹³⁵ Rudra Sil & Peter J. Katzenstein, *Beyond Paradigms: Analytical Eclecticism in the Study of World Politics* (Basingstoke, UK: Palgrave MacMillan, 2010) at 419. See also George & Bennett, *supra* note 132 at 215.

¹³⁶ *Ibid.* at 67–72.

¹³⁷ Beach & Pedersen, *supra* note 131 at 146–154; Gary Goertz & James Mahoney, *A Tale of Two Cultures: Qualitative and Quantitative Research in the Social Sciences* (Princeton, NJ: Princeton University Press, 2012) at 187–188.

¹³⁸ See Annex I. Overview of REDD+ activities in the developing world.

¹³⁹ The REDD+ Desk, “REDD Countries,” available at: <http://theredddesk.org/countries> (accessed 24 November 2014).

¹⁴⁰ Audie Klotz, “Case Selection” in Klotz & Prakash, *supra* note 132, 43 at 52.

of forest governance.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.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,¹⁴³ Tanzania has developed one of the most favorable policy environments for the pursuit of community forestry in Africa.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.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.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 2014.¹⁴⁷ 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

¹⁴¹ Mairon Bastos Lima, Joyeeta Gupta, Nicolien van der Grijp & Fahmuddin Agus, “Case Study: Indonesia” in Joyeeta Gupta, Nicolien van der Grijp & Onno Kuik, eds., *Climate Change, Forests and REDD: Lessons for Institutional Design* (Abingdon, UK: Routledge, 2013) 121 at 122–124.

¹⁴² Neil D. Burgess *et al.*, “Getting ready for REDD+ in Tanzania: A case study of progress and challenges” (2010) 44:3 *Oryx* 339 at 341.

¹⁴³ Lima *et al.*, *supra* note 141 at 125–133.

¹⁴⁴ See Tom Blomley & Said Iddi, “Participatory Forest Management: 1993–2009: Lessons learned and experiences to date” (United Republic of Tanzania, Ministry of Natural Resources and Tourism, Forestry and Beekeeping Division, 2009), available at: www.tzonline.org/pdf/participatoryforestmanagement2009.pdf (accessed 8 October 2014).

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).

¹⁴⁶ On the concept of elite interviews and their role in process-tracing, see Oisín Tansey, “Process Tracing and Elite Interviewing: A Case for Non-probability Sampling” (2007) 40(4) *PS: Political Science & Politics* 765.

¹⁴⁷ See Jodoin, *supra* note 145.

implications for rights.¹⁴⁸ 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 38 REDD+ projects for the rights of Indigenous Peoples and local communities in Indonesia and Tanzania.¹⁴⁹ By triangulating across these different sources of data¹⁵⁰ and carefully assessing their reliability,¹⁵¹ 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

¹⁴⁸ On the utility of participation/observation, see Hugh Gusterson, “Ethnographic Research” in Klotz & Prakash, *supra* note 132, 93 at 99–103. See also Kathleen M. DeWalt & Billie R. DeWalt, *Participant observation: a guide for fieldworkers* (Walnut Creek, CA: AltaMira Press, 2002) at 92.

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,¹⁵² 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.¹⁵³ With a view to capturing the ways in which law may offer limited, yet no less potent, support for change in transnational contexts,¹⁵⁴ 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+.¹⁵⁵ 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+.¹⁵⁶ 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,¹⁵⁷ 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

¹⁵⁵ Lyster, MacKenzie & McDermott, *supra* note 11; Voigt, *supra* note 17; Visseren-Hamakers, Ingrid *et al.*, “Interdisciplinary perspectives on REDD+ Editorial overview” (2012) 4 *Current Opinion in Environmental Sustainability* 1; Peter J. Kanowski, Constance L. McDermott & Benjamin Cashore, “Implementing REDD+: lessons from analysis of forest governance” (2010) 14:2 *Environmental Science & Policy* 111–117; Simon Butt, Rosemary Lyster & Tim Stephens, eds., *Climate Change and Forest Governance: Lessons from Indonesia* (Abingdon, UK: Routledge, 2015).

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,¹⁵⁸ the other for forestry)¹⁵⁹ 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,¹⁶⁰ 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.¹⁶¹

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,

¹⁵⁸ Kenneth W. Abbott, "The Transnational Regime Complex for Climate Change" (2012) 30 *Environment and Planning C: Government and Policy* 571; Lilianna B. Andonova, Michele M. Betsill & Harriet Bulkeley, "Transnational Climate Governance" (2009) 9:2 *Global Environmental Politics* 52.

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.