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A Legal Perspective of Carbon Rights and Benefit Sharing under REDD+: A Conceptual Framework and Examples from Cambodia and Kenya

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This article discusses two key issues in REDD+ design and implementation at the national level – carbon rights, and benefit sharing. Both carbon rights and benefit sharing can be understood as new legal concepts (although they build on existing law), and as legal concepts they offer a framework for addressing related areas of REDD+ policy. Many countries are currently considering how to manage carbon rights and benefit sharing issues, including Cambodia and Kenya. Both of these countries host existing forest carbon projects and are also in the process of designing national REDD+ programmes. This article uses a conceptual framework for carbon rights and benefit sharing derived from legal analysis to consider the cases of both Cambodia and Kenya, and also includes a general discussion of the challenges countries might encounter when considering how to manage carbon rights and benefit sharing in the context of REDD+ implementation.

I. Introduction

A mechanism for Reducing Emissions from Deforestation and Forest Degradation and the Role of Conservation, Sustainable Management of Forests and Enhancement of Forest Carbon Stocks in Developing Countries (REDD+) was officially established by the Conference of the Parties (COP) to the United Nations Framework Convention on Climate Change (UNFCCC) in 2010.[1] Subsequently, the 2013 Warsaw Framework for REDD+[2] provided guidance regarding many different elements of national REDD+ policy and dis-

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1 Decision 1/CP.16, The Cancun Agreements, Outcome of the Work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention, UN Doc. FCCC/CP/2010/7/Add. 1, 15 March 2011.

2 The Warsaw Framework for REDD+ includes Decision 9/CP.19, Decision 10/CP.19, Decision 11/CP.19, Decision 12/CP.19, Decision 13/CP.19, Decision 14/CP.19 and Decision 15/CP.19.

cussions continued in subsequent UNFCCC meetings. Although carbon rights (that is, the way that interests in carbon derived from REDD+ are allocated in a legal sense) and benefit sharing (that is, the way that carbon rights and the other benefits from REDD+ are distributed between stakeholders) are among the most contentious and legally complex areas of REDD+ policy, the current UNFCCC framework provides no explicit guidance regarding how to manage these two issues. General guidance has been given by the World Bank's Forest Carbon Partnership Facility (FCPF) and also by some voluntary standards for REDD+ project development (such as the Verified Carbon Standard, or "VCS", and the Climate, Community and Biodiversity Standards, or "CCB Standards"), however, it is left to countries to decide how to define carbon rights and manage benefit sharing within their national programmes. Where existing REDD+ activities have been project-based, rather than implemented at a subnational or national level,[3] benefit sharing arrangements have usually been designed for the unique conditions of the project in question. At present, debates regarding carbon rights and benefit sharing under REDD+ are therefore occurring in various contexts with different reference points.

Two countries currently considering both carbon rights and benefit sharing for REDD+ are Cambodia and Kenya. Both countries currently host forest carbon projects developed under voluntary market arrangements, and are simultaneously exploring how to design and implement a national REDD+ programme. In order to offer a contribution to ongoing discussions at both the project and policy levels, this article introduces how the concepts of carbon rights and benefit sharing are approached from a legal perspective and then uses this framework to explore the two issues in the context of both Cambodia and Kenya. Drawing on the experience of these two countries, a comparative perspective of the challenges that countries might encounter when considering how to manage carbon rights and benefit sharing in the context of REDD+ implementation is then offered before the concluding remarks.

II. Carbon Rights and Benefit Sharing as Legal Concepts

In legal terms, carbon rights and benefit sharing are two different concepts, although it can be helpful to think of them as part of the same process for creating and sharing benefits from REDD+ actions. For example, to date, REDD+ projects and programmes have provided a way to "monetise" rights to carbon. REDD+ project developers have sold "carbon credits" produced from a project to a buyer in the voluntary forest carbon market (requiring the rights to carbon to be transferred to a third party).[4] In future, if a country successfully generates verifiable carbon emission reductions through REDD+ activities, it might then be eligible for "results-based" payments through an international or bilateral mechanism (where the "result" is an increase in carbon sequestration or a reduction in carbon emissions achieved under certain conditions). Irrespective of the manner in which REDD+ revenue or other non-monetary benefits have been generated (and regardless of the scale at which REDD+ implementation occurs), issues about how to share that revenue (and/or other non-monetary benefits) also need to be addressed. Within this process of generating benefits from carbon, both carbon rights and benefit sharing are different but closely related legal concepts. How they will both be used in future REDD+ schemes remains to be seen, although it is possible to draw some lessons from existing developments at both the project and national levels.

Below, this section introduces both carbon rights and benefit sharing as legal concepts. The definition, creation and ownership of carbon rights are dis-

3 REDD+ can be implemented at different "scales." The options regarding scale are a *jurisdictional approach* (where the accounting "jurisdiction" in question is either at the national or subnational level), *project-level* implementation, or a multi-scale *nested* approach. Under a **jurisdictional approach**, a ***national-level approach*** is likely to result at first instance in incentives flowing to the national government based on performance against a national reference level, or a ***subnational approach*** will channel incentives to a subnational governmental entity (e.g., a state, municipality, province, or district) based on performance against a subnational reference level (unless this is overruled by a national government). A **project-level approach** means that incentives flow directly to project developers based on performance against a project baseline, and a project will not necessarily coincide with a governmental jurisdiction (noting that a government could overrule this). Under a **"nested" approach,** incentives can flow directly to subnational entities and/or project developers in addition to national governments. Source: Rane Cortez, Rick Saines, Bronson Griscom et al., *A Nested Approach to REDD+: Structuring Effective and Transparent Incentive Mechanisms for REDD+ Implementation at Multiple Scales* (The Nature Conservancy and Baker & McKenzie, 2010), at 7.

4 How international transfers under REDD+ will work and whether carbon trading schemes will exist as part of the UNFCCC's financing mechanism, or whether they will exist in parallel to it, remains to be seen.

cussed, followed by an outline of the legal aspects of benefit sharing.

1. Conceptualising carbon rights

a. Defining carbon rights

As the REDD+ concept has evolved over time from a market-based approach to incentivise private sector finance for climate change mitigation into a wider mechanism to be implemented at the national (or even regional) level using a mixture of financing options (including but not limited to market-based approaches[5]), the term "carbon rights" has come to be used in a number of different ways - including referring to a tonne of sequestered carbon,[6] the legal right to own that sequestered carbon, or, more broadly, a moral claim to benefit from carbon-based payments. Given the different interpretations of the term amongst different stakeholders, it can be useful to distinguish between the following:

- The **physical outcome** of the REDD+ action, namely, the preservation of terrestrial carbon;
- The **carbon benefit** resulting from the preservation of terrestrial carbon, which, in the context of a carbon transaction, is the **legal form** given to the sequestered carbon. This could be called a "carbon unit," "carbon credit" or an "emission reduction" depending on the legal framework or contract[7] used to provide the legal form (and each of these legal forms might be referred to as a **carbon right**). In the context of REDD+, these units/credits/emission reductions/rights usually represent the equivalent of one tonne of carbon or carbon dioxide (CO_2) avoided or sequestered[8];
- The **legal ownership of the carbon stored in forested land** as opposed to the **legal ownership of the carbon benefits** (i.e. units/credits/emission reductions/rights) created from protecting that carbon, which might not be the same. For example, the legal owner of the forested land in which the carbon is stored might be different from the entity that develops a project for the purposes of creating carbon credits[9] (it is worth noting that the issue regarding ownership of carbon is one source of controversy regarding whether REDD+ is an appropriate policy option for some countries);
- The **non-carbon benefits**, which are the non-monetary benefits arising from REDD+ implementation (such as poverty reduction, food security, the provision of ecosystem services, or improved forest governance). The Cancun decisions from COP18 alluded to non-carbon benefits by referring to REDD+ activities in the context of enhancing "other social and environmental benefits"[10]; the role of non-carbon benefits were also acknowledged by the COP the following year when it recognised "the importance of incentivising non-carbon benefits for the long-term sustainability of the implementation" of REDD+ activities.[11] From a legal

5 Results-based finance can flow from a variety of sources (Decision 2/CP.17, Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention, UN Doc. FCCC/CP/2011/9/Add. 1, 15 March 2012, para. 65, "Agrees that results-based finance provided to developing country Parties that is new, additional and predictable may come from a wide variety of sources, public and private, bilateral and multilateral, including alternative sources"; **reaffirmed by** Decision 9/CP.19, Work programme on results-based finance to progress the full implementation of the activities referred to in Decision 1/CP.16, paragraph 70, UN Doc. FCCC/CP/2013/10/Add. 1, 31 January 2014, para. 1). Both market and non-market based approaches to financing REDD+ activities are contemplated (Decision 2/CP.17, Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention, UN Doc. FCCC/CP/2011/9/Add. 1, 15 March 2012, para. 66).

6 "Sequestered" forest carbon is carbon that is removed from the atmosphere and stored in a carbon sink (such as a growing tree or in soil).

7 In the absence of any specific REDD+ law, private developers of REDD+ projects have entered into private contracts (Emissions Reduction Purchase Agreements, or "ERPAs"). This is similar to the current approach by the FCPF where emission reductions are defined in the seller's contract.

8 A carbon (C) atom is oxidised into carbon dioxide (CO_2) when burnt, or upon changing through other chemical reactions in industrial or biological processes. This gas is then released into the atmosphere, contributing to global greenhouse gas emissions. Sequestered or "trapped" carbon (when brought out of the air and into vegetation) is similarly calculated as if it were in its oxidised state. However, since carbon can pass through many chemical forms in the environment, it is common to express the flows of carbon in the carbon cycle in units representing the amount of carbon (C) moving between compartments of the system. A value for flow of carbon (C) can be converted to CO_2 by multiplying it to account for the differing molecular weights between C and CO_2, multiplying C by 44/12 to calculate CO_2. Source: Cambridge Centre for Climate Change Mitigation Research.

9 In practice, different stakeholders under this scenario could negotiate an agreement dealing with access, consent and benefit sharing arrangements, a contractual arrangement which would need to comply with existing law (for example, a provision in a national constitution or statute requiring benefits from natural resources to be shared in a particular way). Such an arrangement has been used for a number of REDD+ projects developed in the voluntary carbon market.

10 Decision 1/CP.16, para. 2(e).

11 Decision 9/CP.19, para. 22.

perspective, it is nonetheless important to note that non-carbon benefits have not been formally defined. The term is sometimes used interchangeably with **co-benefits**, although it could be possible to draw a distinction between the two: co-benefits occur as a by-product of REDD+ implementation, requiring no deliberate investment decision to provide them (for example, habitat conservation), whereas non-carbon benefits will be delivered via deliberate investment decisions (for example, using revenues generated by REDD+ to fund social infrastructure projects); and

- **Financial benefits** paid for carbon and/or non-carbon benefits, whether through a market-based or non-market-based financing mechanism.

For present purposes, the term "carbon rights" is used to refer to the legal form given to carbon, and the ownership of such rights (and whether they can be transferred to third parties) is treated as a separate question. This legal perspective represents the way carbon has come to be treated by formal legal structures linked to carbon transactions and domestic schemes, potentially providing lessons for the design of future REDD+ schemes. For countries wishing to manage existing project-level activities within a wider national programme (such as both Cambodia and Kenya), it is important to recognise that this approach to generating and selling carbon credits has been used and future legal developments will need to accommodate this reality if it is the intention of the countries to preserve the commercial viability of such projects. Nonetheless, it should be noted that the extent to which this approach to defining carbon rights will be included under future REDD+ schemes (and, if so, whether such rights would be transferable) is currently unclear.

b. Creating carbon rights

Carbon (and non-carbon) benefits are created as a consequence of a successful REDD+ action. However, on their own, such benefits have no legal or property status unless the law gives them one. In the case of carbon transactions, this has led to a variety of different approaches to creating a "legal form" for carbon (such as a "carbon unit," "carbon credit" or "emission reduction"), each of which might be referred to as a "carbon right" by those working in carbon markets.[12] To date, such rights to carbon have been created by transforming the sequestered carbon in living biomass (such as trees and other plants) into a legally defined right by formally recognising the outcome of a successful forest carbon sequestration activity under a legal mechanism such as a statutory REDD+ scheme or a contract.

Expressed simply, a successful REDD+ action will avoid the release of carbon dioxide from a tree (by preventing burning or felling), or provide a new opportunity for carbon sequestration by growing trees and/or restoring habitat. In the context of project-level actions that have occurred under the voluntary carbon market, the legal owner of the forested land storing the carbon has been given a legal entitlement to a quantity of "carbon units" (calculated as either the equivalent volume of carbon dioxide that would have been released into the atmosphere or the equivalent amount of new carbon sequestered).[13] In order for these carbon units to have been assigned to a person or other entity, they have needed to be defined under the law; once specific criteria under the relevant legislative framework or contract were met, the unit (which might also be called a carbon credit, emission reduction or carbon right) has been issued by the scheme's regulator, thereby transforming the physical carbon into formal statutory or contractual rights. For example:

- In the voluntary market, "Verified Carbon Units" (VCUs), have been issued under the VCS;
- Units have been issued under domestic schemes, such as "Australian Carbon Credit Units" (ACCUs) issued under the Carbon Farming Initiative, an Australian scheme implemented by the *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth); and
- Units have also been issued under international schemes, such as forestry-based credits called Temporary Certified Emission Reductions (tCERs) issued under the Clean Development Mechanism (CDM).

It remains to be seen whether a global REDD+ mechanism under the UNFCCC will establish a process for

12 In some cases, these "legal forms" have been given a value within an emissions trading scheme.

13 To date, such units have normally been measured in one tonne parcels - therefore, a REDD+ action will generate an amount of carbon dioxide equivalent (CO_2e) defined in one tonne "carbon units."

creating carbon units in a legal form similar to the examples above. If a different approach is taken, the term "carbon rights" could come to be used for a different purpose, such as the broad use of the phrase to refer to a general entitlement to claim benefits from REDD+ implementation. Nonetheless, in order to avoid confusion, it is important to understand the specific meaning of the term in the context of previous and ongoing practice.

c. Ownership of carbon rights

As noted above, a distinction can be drawn between the ownership of the physical carbon stored in forested land and the ownership of the emission reduction units created under a REDD+ scheme (where such a scheme seeks to protect the carbon stored in the forested land).

Unless a country's laws state otherwise, it has generally been presumed that the owner of the land owns the forest and, therefore, owns the carbon and non-carbon benefits attached to the forest, following an assumption that carbon is another type of forest resource. However, it might not be clear who owns the forest and many forest users in developing countries lack formal rights under the law (to either ownership or use); in addition, statutory laws, customary laws and traditional practices could be in conflict. Where land and forest tenure[14] are unclear, and there are multiple stakeholders involved (noting that the relative power between stakeholders might not be equal), decisions regarding how to divide carbon rights between the different stakeholders are not straightforward. Options include vesting carbon rights in governments, land owners, forest users, or have them exist as separate property (where a carbon right is "detached" from other land and resource rights to facilitate carbon trading).[15]

A REDD+ scheme would normally outline requirements for recognising an emission reduction unit, and could impose conditions on how the unit is created (for example, a condition that the Cancun Safeguards[16] should be respected in the process of creating an emission reduction unit). A scheme could also determine whether such emission reductions could be transferred to a third party (for example, a private buyer or a multilateral fund), in which case it might be necessary for technical reasons to create a separate right to the emission reductions. Such a separate right would be conditional on ensuring that the forest carbon would be stored for a given period of time, and would lose its value should the carbon be released back into the atmosphere (i.e. "permanence" requirements). The issue of whether to make the ownership of carbon rights transferable, and under what conditions, is currently being discussed in the context of both project-based activities and wider jurisdictional programmes.

Where they are defined in law, carbon rights have an influence on how benefits from REDD+ are shared. However, their ownership is not the only basis for a benefit claim from REDD+ projects and programmes - indeed, it is possible that centrally managed national programmes could be designed to distribute carbon-based payments between stakeholders using criteria other than carbon rights. This draws attention to a wider set of issues regarding benefit sharing for REDD+, which are discussed further below at a conceptual level.

2. Benefit sharing under REDD+

a. Definition of benefit sharing

In practical terms, benefit sharing is a means to identify the outcomes from an activity (financial or non-

14 Different kinds of rights can be found within a land tenure system, such as:
- Right to ownership: the owner is entitled to use, control and dispose of the property.
- Right to use:
  - Right to access: for example, an easement confers the right to use the real property of another for a specific purpose (for example, access to another property).
  - Usufructuary right: refers to the right of one individual to use and enjoy the property of another, provided its substance is neither impaired nor altered (for example, rights to use water from a stream for household use).
  - Right to exploit: for example, a *profit a prendre* is the right of persons to share in the land owned by another, enabling a person to take part of the soil or produce of land that someone else owns (i.e. a logging concession).
- Right to control, i.e. entitled to make decisions about how land should be used.
- Right to transfer, i.e. entitled to sell, inherit and/or reallocate property rights.

15 Patrick Wieland, "Building Carbon Rights Infrastructure with REDD+ Incentives: A Multi-Scale Analysis in the Peruvian Amazon", 43 *Environmental Law Reporter* (2013), at 10274-5.

16 The "Cancun Safeguards" are a set of policies and measures outlined in the Cancun decisions that are intended to guard against the negative social or environmental impacts that REDD+ implementation could create. See UNFCCC, *The Cancun Agreements: Outcome of the Work of the Ad Hoc Working Group on Long-Term Cooperative Action Under the Convention*, Decision 1/CP.16, FCCC/CP/2010/7/Add.1. Cancun Agreements, paragraph 70/Appendix 1.

financial), and then distribute those outcomes amongst stakeholders.[17] It has been defined as the distribution of both the monetary and the non-monetary benefits generated through the implementation of REDD+ projects[18] and programmes, and has also been described as the sum of many different mechanisms.[19] It is important to note that a moral claim to benefits (how benefits *should* be shared) might be very different from a legal claim to benefits, but this is not to say that the moral claim is less relevant; from a practical perspective, it is important to acknowledge that an understanding of the formal legal bases for benefit claims provides the starting point for any new policy or law reforms with respect to benefit sharing arrangements.

The legal basis for a benefit claim could be linked to land/carbon ownership or other eligibility criteria (such as participation in a REDD+ action). Formal beneficiaries could include different levels of government, communities, civil society and/or project developers, depending on the different kinds of legal structures in place. Effective benefit sharing arrangements should create incentives for different stakeholders (including national and subnational governments, communities and businesses) to initiate and support action to reduce emissions from deforestation and forest degradation, and in order to encourage participation in REDD+ (and minimise the potential for conflicts resulting from its implementation) the basis for benefit claims should be clearly outlined in law.

b. Requirements and guidance for benefit sharing

Although the UNFCCC emphasises the need for REDD+ implementation to enhance social and environmental benefits,[20] it does not prescribe a particular approach to doing this. In a similar way, the Nagoya Protocol under the Convention on Biological Diversity[21] addresses benefit sharing, but does not define a particular benefit sharing mechanism.[22] This reflects a general recognition in international agreements and conventions that countries will implement measures in a way that is consistent with their unique national circumstances (which is reiterated for climate change mitigation and adaptation measures under the UNFCCC, including for REDD+). Another example of benefit sharing guidance at the international level is the FCPF Readiness Fund,[23] which requires countries to have a Benefit Sharing Plan when applying to its Carbon Fund (which purchases emission reductions). The FCPF has also commented that a prescriptive approach to benefit sharing is unlikely to be effective.[24]

Within the voluntary carbon market, the holder of carbon rights (whether they are linked to ownership or use rights) will most likely be the recipient of carbon-based payments, which would then be shared between participants according to a pre-determined benefit sharing agreement (for example, the model used by Wildlife Works' Kasigau Corridor REDD Project in the Tsavo region of Kenya). However, under a national or subnational programme (noting that national and subnational programmes constitute a "jurisdic-

17 Sophie Chapman, Martijn Wilder and Ilona Millar, "Defining the Legal Elements of Benefit Sharing in the Context of REDD+", 4 *CCLR* (2014) at 270.

18 Thu T. Pham et al., *Approaches to Benefit Sharing: A Preliminary Comparative Analysis of 13 REDD+ Countries* (Bogor: CIFOR, 2013) 1, at para. 2.

19 Cecilia Luttrell, Lasse Loft, Maria Fernanda Gebara et al., "Who Should Benefit from REDD+? Rationales and Realities", 18:4 *Ecology and Society* (2013) at 51-52.

20 Appendix 1 of the *Cancun Agreement* (Decision 1/CP.16/2010), at (2): "When undertaking the activities referred to in paragraph 70 of this decision, the following **safeguards should be promoted and supported**: … (e) That actions are consistent with the conservation of natural forests and biological diversity, ensuring that the actions referred to in paragraph 70 of this decision are not used for the conversion of natural forests, but are instead used to incentivise the protection and conservation of natural forests and their ecosystem services, and to **enhance other social and environmental benefits [taking into account the need for sustainable livelihoods of indigenous peoples and local communities and their interdependence on forests in most countries,** reflected in the UN Declaration on the Rights of Indigenous Peoples, as well as international Mother Earth Day]" (emphasis added).

21 *Convention on Biological Diversity* (opened for signature 5 June 1992, entered into force 29 December 1993) 1760 UNTS 79; 31 ILM 818 (1992).

22 Instead, it encourages national action by requiring Parties to (i) take legislative, administrative and policy measures to ensure that indigenous and local communities gain fair and equitable benefits from the utilisation of genetic resources (Art. 5:2); (ii) create a national focal point on access and benefit sharing (Art. 13); and (iii) develop and update voluntary codes of conduct, guidelines and best practices/standards in relation to access and benefit sharing (Art. 20). *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilisation to the Convention on Biological Diversity* (adopted 29 October 2010 at the Conference of the Parties to the Convention on Biological Diversity, Nagoya, Japan).

23 The Readiness Fund is designed to be a capacity-building fund for assisting developing countries to prepare for REDD+ participation and implementation.

24 Forest Carbon Partnership Facility (FCPF), *Carbon Fund Discussion Paper #9* (2013).

tional"[25] approach to REDD+ implementation, in contrast to a localised "project-level" approach), the stakeholders who participate in creating emission reductions might not have any connection to the forested land where the emission reductions are calculated. For a national programme, benefit distribution mechanisms might therefore need to base benefit claims on criteria other than land or resource rights. Nonetheless, tenure arrangements related to the land/forest storing the carbon need to be clear and those holding the rights to such an area will be an important stakeholder in the implementation of any REDD+ action.

c. Elements of benefit sharing

In the absence of explicit benefit sharing requirements within the UNFCCC or other frameworks, countries need to decide what approach to benefit sharing will be most appropriate for their REDD+ programmes (and any project-level activities within them). Drawing on practical experience in natural resource management and early forest carbon projects, different "elements" of benefit sharing[26] can be identified. These are:

- **Definition of the benefit:** What is the benefit that will be shared? This is usually discussed in terms of the revenue flowing from carbon (delivered as either cash or "in kind" investments), irrespective of how that revenue is created (i.e. via the monetisation of carbon rights in a carbon market, or via other financing mechanisms to be developed in future). Such payments could flow to project-based activities or jurisdictional activities, and to a range of different stakeholders. Non-carbon benefits could also be delivered using REDD+ revenues (e.g. using the results-based payments generated by carbon benefits to pay for social infrastructure or improved forest governance), or could exist as co-benefits of REDD+ implementation (such as the ecosystem services that are protected by avoiding deforestation);
- **Allocation of the benefits between stakeholders:** What is the legal basis for a benefit claim, and who are the beneficiaries?;
- **Distribution of the benefits:** How will the payment be distributed to different beneficiaries (i.e. what practical vehicle will be used to distribute benefits)?; and
- **Accountability of the benefit sharing system:** How will public participation in decisions related to benefit sharing be supported (including with respect to dispute resolution), and what transparency measures will be put in place to ensure that benefit sharing is managed in a fair and equitable manner?

In the next section, the concepts of carbon rights and benefit sharing outlined above will be used to consider the unique national contexts of Cambodia and Kenya.

III. Cambodia

1. REDD+ developments in Cambodia

Over half of Cambodia's land area is covered by forest,[27] and the Royal Government of Cambodia is currently considering how to align national development objectives with the sustainable management of its forest resources. Major drivers of deforestation include large-scale agricultural conversion and illegal logging.[28] Cambodia already hosts project-level REDD+ activities, including a large project in Oddar Meanchey Province that has been developed under both the VCS and CCB standards to generate carbon credits for the voluntary forest carbon market. In parallel, the Forestry Administration is currently leading the development of a national REDD+ programme with support from UN-REDD, the FCPF and other bilateral donors.

2. Carbon rights in Cambodia

In Cambodia, carbon is not explicitly defined in the law and there is no domestic scheme for creating carbon units. *If* carbon is defined as part of the land or forest, or as a type of natural resource, then constitutional provisions may and should help to determine who owns it.

25 This article uses the term "jurisdictional" to refer to accounting boundaries drawn at either the national or subnational level. This is different to measuring the emission reductions achieved within the boundaries of a specific project-area.

26 For a more comprehensive discussion of the different elements of benefit sharing under REDD+, see generally: *Defining the Legal Elements of Benefit Sharing*, supra, note 17, at 269-280.

27 M. C. Hansen, P. V. Potapov, R. Moore et al., "High-Resolution Global Maps of 21st-Century Forest Cover Change", 342(6160) *Science* (2013) at 850.

28 *Cambodia R-PP* (Country Revision), 4 March 2011.

The Constitution of Cambodia 1993 (the "Constitution") defines "state property" to include land, forest and natural resources,[29] and states that the "control, use and management of State properties will be determined by law."[30] Under the Constitution, both the Land Law 2001 and the Forestry Law 2002 govern tenure arrangements and together determine ownership and use rights for forest areas and resources. The Forestry Law 2002 divides the Permanent Forest Estate[31] into Private Forests[32] and the Permanent Forest Reserves,[33] and the Permanent Forest Reserves are further sub-divided into different categories. Current Cambodian law provides that:

- Private Forests generally belong to the landholder[34];
- forest in the Permanent Forest Reserves belongs to the State,[35] noting that use rights can be allocated); and
- communities can be granted limited communal *use rights* to forests (for example, via Community Forestry arrangements[36] or indigenous land titling[37]), but they do not *own* that land – actual ownership is retained by the State.

If carbon is determined to be included as part of the "land, forest and natural resources" for the purposes of the Constitution, then, based on the assumption that carbon attaches to the land in the absence of any legal authority to the contrary, the ownership and use rights attaching to carbon would follow current forest tenure arrangements. For example, forest carbon in the Permanent Forest Reserves would belong at first instance to the State, forest carbon in Private Forests would generally belong to the landholders, and whether communities hold a use right to carbon via the operation of an existing regime would need to be determined.

It is often argued that the very long period of possession and customary use by communities of tracts

29 *Constitution of Cambodia, 1993* (Cambodia) Art. 58: "State property notably comprises **land**, mineral resources, mountains, sea, underwater, continental shelf, coastline, airspace, islands, rivers, canals, streams lakes, **forests, natural resources,** economic and cultural centres, bases for national defence and other facilities determined as State property. The control, use and management of State properties shall be determined by law" (emphasis added).

30 Ibid.

31 *Forestry Law, 2002* (Cambodia), Glossary: 'Permanent Forest Estate' is defined as *"The overall forest complex, natural and planted, in the Kingdom of Cambodia, including State and Private, designated as two main categories: the Permanent Forest Reserve and Private Forest, to be maintained to ensure a sustainable permanent forest cover and use."* In addition, the *Forestry Law, 2002* (Cambodia), Article 11 provides that *"the Permanent Forest Estates shall be managed with the objective to increase to the maximum extent the social, economic, environmental and cultural heritage benefits for the Kingdom of Cambodia and its people according to the principle of sustainable forest management [etc.]"* (emphasis added).

32 *Forestry Law, 2002* (Cambodia), Glossary: 'Private Forest' is defined as *"forest plantation or trees, whether planted or naturally grown on private land under registration and legal title in pursuant to authorised legislation and procedures"* (emphasis added).

33 *Forestry Law, 2002* (Cambodia) Article 12 permits the Permanent Forest Reserves to be declassified by the Government if it serves the public interest and is consistent with the National Forest Sector Policy and the National Forest Management Plan. Further, the *Forestry Law, 2002* (Cambodia) Article 24 states that *"all Forest Products and By-products located and originating from the Permanent Forest Reserves are state property, unless the rights of these products have been conveyed to an individual or legal entity"* under this law, and *"any individual, legal entity or community that intends to harvest Forest Products and By-products for commercial purposes must possess a harvest permit issued by the Forestry Administration*."

34 *Forestry Law, 2002* (Cambodia) Article 10: Private Forest shall be maintained by the owners, who hold rights to manage, develop, harvest, use, sell and distribute forest products.

35 The *Constitution of Cambodia, 1993* (Cambodia) Article 58 provides that 'state property' includes land, forest and natural resources and that the *"control, use and management of State properties will be determined by law."* This is affirmed by the *Land Law, 2001* (Cambodia) Article 12. Under Article 14, 'state property' can be managed as either public land (referred to as *state public property*) or private land (referred to as *state private property*).

36 Community Forest, a sub-category of Production Forest, refers to *"state forest subject to an agreement to manage and utilise the forest in a sustainable manner between the Forestry Administration and a local community or organised group of people living within or nearby the forest area that depend upon it for subsistence and customary use" Forestry Law, 2002* (Cambodia), Glossary. Article 41 of the same Law authorises the Minister of Agriculture, Forestry and Fisheries to *"allocate any part of the Permanent Forest Reserve to a community living inside or near a forest area in the form of a Community Forest."* Article 43 provides that Community Forests must be managed according to a Community Forest Management Plan, and the rules (*Anu-kret* on Community Forestry Management) and guidelines on Community Forestry (*Prakas* regarding Guidelines on Community Forestry). **Under *Forestry Law,* 2002 (Cambodia) Article 42, the Forestry Administration has the authority to sign a Community Forest Agreement (CFA); CFAs are valid for a maximum of 15 years and can be renewed by the Forestry Administration if monitoring and evaluation reports are satisfactory. Under *Forestry Law, 2002* (Cambodia) Article 44, a CFA can grant user rights to maintain, develop, use, sell and distribute [forest] products; however, a local community cannot use Community Forest for concession arrangements and cannot sell, barter or transfer its rights to a third party.**

37 *Land Law, 2001* (Cambodia) Article 23 provides that *"an indigenous community is a group of people that resides [in Cambodia] whose members manifest ethnic, social, cultural and economic unity and who practice a traditional lifestyle, and who cultivate the lands in their possession according to customary rules of collective use."* Further, it provides that *"the measurement and demarcation of boundaries of immovable properties of indigenous communities shall be determined according to the factual situation as asserted by the communities, in agreement with their neighbours, and as prescribed by procedures in Title VI of this law and relevant sub-decrees"* (Article 25). **Ownership is granted as collective ownership, which includes the rights and protections enjoyed by private owners with the exception that communities do not have the right to dispose of the state public property (Article 26).**

of land and forest creates a form of title, termed customary title. This argument recognises that community settlement predates the existence of the Cambodian State, and raises questions regarding the legitimacy of the formal law. This is an important debate in the context of REDD+ implementation because if formal legal structures do not match customary use, a resulting conflict could impede the effectiveness of REDD+ to deliver either carbon or non-carbon benefits.[38] A comparison of formal and customary law will be a lengthy exercise which is not undertaken here; instead, an analysis of the formal law provides a starting point for further work.

In order to align with the UNFCCC framework and respect the Cancun Safeguards, measures to respect indigenous rights and ensure the "full and effective participation"[39] of communities will need to be incorporated into Cambodia's national REDD+ programme. New policies with respect to carbon rights and benefit sharing arrangements for REDD+ could therefore provide an opportunity to formally clarify both the entitlements of communities and the mechanisms through which such entitlements will be distributed. Existing carbon rights generated by project-level activities will need to be acknowledged within the process of building a national approach to REDD+ implementation.

3. Benefit sharing for REDD+ in Cambodia

Government Decision No. 699 of 2008 provides that, inter alia, revenue from the sale of carbon should be used to maximise benefits for local communities.[40] It should be noted, however, that this Decision only applies to the sale of carbon from REDD+ projects and so, in its current form, might not provide a legal basis for a benefit claim from other forms of REDD+ payments (such as international transfers made to the national Government). When this Decision was drafted, the international framework for REDD+ had not yet evolved into the current rules and REDD+ was contemplated mostly as a project-level mechanism; therefore, the current applicability of the Decision in the context of wider jurisdictional approaches should be considered.

If a key concern for Cambodia's REDD+ projects and programmes is to deliver benefits for communities, then the current legal status of communities' rights with respect to carbon could be reviewed. For example, communities could be regarded as:

- holders of a use right, where such rights have been granted by the State (for example, under a Community Forestry Agreement);
- providers of a service to a REDD+ project or initiative, via a contractual relationship; or
- beneficiaries under a formal scheme or trust. For example, in the case of a REDD+ project, a benefit sharing agreement could specify how benefits will be divided. If funds are received at the national or subnational level, payments could be based on certain allocation arrangements, agreed via consultation, which could be formalised in a governing law. Such arrangements could be explored in the context of a REDD+ Benefit Distribution System[41] as part of a jurisdictional programme of activities.

38 For a discussion of some of the difficulties that can be encountered in legal systems that have both formal and informal elements (in the context of REDD+ implementation), see generally Sango Mahanty, Wolfram Dressler, Sarah Milne and Colin Filer, "Unravelling property relations around forest carbon", 34(2) *Singapore Journal of Tropical Geography* (2013), 188-205.

39 Cancun Safeguards, supra, note 16, at (d).

40 *Sar. Chor. Nor 699*, 2008 [*Government Decision No. 699,* May 2008)] (Cambodia) was specifically issued to endorse the Oddar Meanchey Community Forestry REDD+ Project. It designated the Forestry Administration as the seller of forest carbon for the project and also defined how revenue from the project's carbon credit sales could be used to: (1) improve the quality of the forest, (2) maximise the benefit flows to the local communities participating in the project, and (3) study potential sites for new REDD+ projects.

41 UN-REDD identifies several elements that should be incorporated into an effective Benefit Distribution System (BDS). These are:
Timeliness: performance can be measured and reported some time after the interventions have been made. It is unrealistic to expect poor rural stakeholders to "carry" the costs of those interventions, so the BDS needs to offer incentives more regularly than the measurement intervals.
Adequacy: Interventions will not be made or sustained if the incentives provided do not match the potential values generated through alternative uses of the forest land (the "opportunity costs"). In some cases, the BDS may need to incorporate "bundling" of benefits from several sources to make them more attractive.
Flexibility: Diverse biophysical, cultural and socio-economic circumstances means that there is no "one-size-fits-all" BDS that will satisfy stakeholders in every locality. The design of the BDS needs to incorporate local decision-making on the form that the positive incentives should take.
Equity: Stakeholders need assurance that other groups are not receiving disproportionate benefits. Measures to promote equity are greatly facilitated by transparency and broad-based participation.
Efficiency: If costs incurred in managing a REDD+ programme are too high, the total benefits available for providing positive incentives is reduced, and the conditions of adequacy will be compromised.
Segregation: The process by which benefits are allocated to stakeholders must be independent of REDD+ fund management and financial transactions, and from technical, financial and management quality assurance.

Clarifications regarding the status of community rights to both carbon (as a resource) and any revenue resulting from monetising that carbon (irrespective of the scale of REDD+ implementation or the financing mechanism used for this purpose) would help to inform the design of benefit sharing arrangements.

4. Key considerations for policy-makers

Although Cambodia's current legal framework could be used as a starting point for building a definition of carbon and determining its ownership, the current legal status of emission reductions is unclear. In addition, different laws speak to certain aspects of benefit sharing (such as Government Decision No. 699 of 2008) and emission reduction sales more generally (such as Government Decision No. 62-1552 of 2013, setting the minimum price for emission reductions from a REDD+ project), but do not provide comprehensive principles for designing benefit sharing mechanisms at either the project or wider jurisdictional levels. In order to provide greater certainty for stakeholders, the Royal Government of Cambodia could consider developing clear policy positions on the following issues (at a minimum):

- how carbon and emission reductions are defined in law;
- whether ownership of carbon is linked to existing land and tree tenure, or should be treated differently;
- the ways in which communities can claim payments from REDD+ schemes - whether as landholders, service providers, or scheme or trust beneficiaries; and
- how to ensure that the Cancun Safeguards are respected, particularly with respect to the protection of indigenous rights and the full and effective participation of stakeholders (including communities).

VI. Kenya

1. REDD+ Developments in Kenya

Although Kenya is classified as a low forest cover country, it loses a substantial amount of forest cover every year due to conversion of forested land (for agriculture, settlements and other uses), unsustainable utilisation of forest products (including charcoal), forest fires, and shifting cultivation.[42] Kenya already hosts a number of land-based carbon projects, including Wildlife Works' Kasigau Corridor REDD Project that has sold carbon credits in the voluntary market. In addition, various "REDD+ readiness" activities are ongoing through partnerships with multilateral agencies, bilateral donors and civil society groups.

Moving forward, Kenya seeks to attract both public and private REDD+ investments that will contribute to the wider "green growth" agenda under *Vision 2030* (Kenya's economic development strategy for 2008-2030).[43] Kenya's REDD+ programme is being developed within the context of widespread legal reforms following the adoption of a new Constitution in 2010 (the "2010 Constitution"). Many policy, legislative and institutional changes have already occurred, including *Vision 2030*, the Arid and Semi Arid Lands Policy, and the National Climate Change Response Strategy (NCCRS) and Climate Change Action Plan (NCCAP). Forest governance reforms are also ongoing.

2. Carbon Rights in Kenya

Kenya needs to reconcile the approach adopted to defining carbon rights in existing project-level activities (developed under the VCS, creating VCUs) with the still hypothetical prospect of identifying, allocating and distributing REDD+ benefits between a large number of stakeholders under a national programme. As such, the term "carbon rights" is often used to refer to a perceived moral entitlement to claim financial benefits from the exploitation of a new natural resource (carbon), which is a different conversation to the "legal forms" for carbon created according to VCS requirements and anchored in contractual arrangements. This provides a good example of the confusion often inherent in discussions about carbon rights, and the need for common terms of reference between different stakeholders.

42 Information provided by the Kenya Forest Service (KFS).

43 Government of Kenya, *Vision 2030: The Popular Version* (2007).

From a legal perspective, sequestered forest carbon appears to be consistent with the 2010 Constitution's definition of both property and natural resources,[44] meaning that existing regimes regarding land and forests would apply to its management and use. It also appears that soil carbon could be defined as part of the land (and so soil tenure runs with land tenure). Therefore, forest carbon could be owned by the State, local authorities or private owners under Kenya's current land regime (which recognises public land, private land and community land categories.[45] It should be technically possible to hold use rights to the carbon (for example, via a leasehold arrangement) without holding full ownership rights, relevant for communities who would not expect to hold full ownership rights under the current land laws. In addition, the ownership of soil carbon would be determined by its technical definition as either *part of* the land or as a *mineral component* of the land.

Whether to vest the ownership of emission reduction units created under a REDD+ scheme in holders of land and/or resource rights or choose a different option (such as the retention of ownership by the State, or allocation between different participants according to a pre-determined benefit sharing formula) needs to be clarified as an element of REDD+ policy.

3. Benefit sharing for REDD+ in Kenya

Equitable benefit sharing and community engagement in natural resource management are emphasised as principles of both law and policy in Kenya. The 2010 Constitution places the obligation to ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources on the State, also obliging the State to ensure that there is equitable sharing of the accruing benefits.[46] Under Article 69(1)(h) and (d), the State is also mandated to utilise the environment and natural resources for the benefit of the people of Kenya as well as to encourage public participation in the management, protection and conservation of the environment. In a broad sense, the 2010 Constitution therefore contains principles regarding benefit sharing (in terms of both equitable distribution and public participation) that should apply to REDD+.

With respect to non-carbon benefits, it can be noted that the Forests Act defines both monetary benefits[47] and non-monetary benefits[48] and recognises that benefits from forest resources could be either in cash or "in kind." It is possible that a REDD+ benefit sharing scheme in Kenya could use this precedent to help create a model for defining the "non-carbon benefits" from REDD+. It should also be noted that a new Natural Resources Management Bill (Senate, 2014) could also influence benefit sharing arrangements for REDD+ given that it applies to the exploitation of forest resources[49]; it is noteworthy that this new Bill contemplates benefit sharing agreements at the county level,[50] acknowledging the devolution of power to county governments under the 2010 Constitution.

Constitutional principles provide a strong basis to promote "equitable" sharing of REDD+ revenues. However, the manner in which such broad principles should be implemented is not clearly specified and how it will be applied in practice needs to be clarified. In order to provide greater certainty for the different stakeholders likely to be involved in REDD+ implementation across Kenya, it will be necessary to clearly state the eligibility criteria for claiming benefits from REDD+, and irrespective of which options are chosen the constitutional requirements pertain-

44 The 2010 Constitution defines property to include "any vested or contingent right to, or interest in or arising from [..] land, or permanent fixtures on, or improvements to land," (Article 260, "property"), defining land to include "the surface of the earth and the subsurface rock" (ibid, Article 260, "land" – subparagraph a) and also "natural resources completely contained on or under the surface" (ibid, Art. 260, "land" – subparagraph d). Section 2 of the Land Act and Section 2 of the Land Registration Act refer to this description in their definition of Land and also define "unexhausted improvements" to include fixtures on the land as well as trees, crops and growing produce. The 2010 Constitution defines natural resources as "physical, non-human factors and components, whether renewable or non-renewable" (Article 260, "natural resources") including forests and biodiversity (ibid, "natural resources" – subparagraph c).

45 For an overview of Kenya's land regime under the 2010 Constitution (including in Table form), please refer to Sophie Chapman et. al., *Creating an Enabling Legal Environment for REDD+ Implementation in Kenya* (Report for the Ministry of Environment, Water and Natural Resources of Kenya; Cambridge Centre for Climate Change Mitigation Research, July 2014), available on the Internet at <http://www.4cmr.group.cam.ac.uk/research/projects/reddpluslawproject>, at 102.

46 See Article 69(1)(a) of the 2010 Constitution.

47 *Forests Act,* 2005 (Kenya). Monetary benefits are defined in Section 20(3).

48 *Forests Act,* 2005 (Kenya). Non-monetary benefits are defined in Section 20(4).

49 Under Clause 3(1)(d).

50 Under Part V, Clause 27(1).

ing to land and equitable benefit sharing must be respected. Acknowledging the current constitutional framework, land regimes and forest regime, it appears that benefit claims could be based upon one or a combination of the following:

- land rights (including use rights); and/or
- participation in REDD+ actions, either via direct contribution (such as providing labour or a service for the REDD+ action), or, by omission (such as compensation for actions foregone).

4. Key considerations for policy-makers

For claims based on land rights, the ownership of the carbon is important. *If* carbon is defined as part of the land/forest, and assuming that the carbon attaches to the land in the absence of any legal authority to the contrary, the ownership and use rights attaching to carbon would follow current forest tenure arrangements. This means that carbon would be owned by the owners of the land/forest in Kenya; as noted above, given that land can be public land, private land or community land, carbon would therefore be owned by the State, local authorities or private owners. The extent to which use rights could be assigned in order to create a formal basis for benefit claims by land users without formal legal entitlements should be explored and clarified.

For claims based on participation in REDD+ actions (rather than on land rights), a variety of approaches could be adopted to fit the particular circumstances of the area and population affected. Deciding who is entitled to benefit from REDD+ in these cases should be a participatory process (in order to support compliance with the Cancun Safeguards), and various "eligibility criteria" could be adopted. Basing claims on opportunities foregone is likely to be more controversial and difficult to assess, a factor that should be taken into consideration when designing REDD+ actions; for example, it might be possible to provide a substitute for the foregone activity as an alternative income opportunity (such as producing "eco-charcoal" as an alternative to traditional charcoal production). Options for benefit distribution vehicles should also be considered. The scale of REDD+ implementation in Kenya will affect this, and it appears likely that both project-level mechanisms and disbursement structures linked to a jurisdictional programme will be necessary.

V. Comparative perspective

Both carbon rights and benefit sharing under REDD+ have prompted the use of legal concepts developed for carbon markets (i.e. tradeable carbon credits) and other areas of natural resource management (i.e. benefit sharing mechanisms) to be applied to the case of forest carbon sequestration. These legal concepts must then be applied within the unique rules and circumstances of a country's legal system, and might also need to be modified depending on the development of the international framework and the needs of national programmes. Both Kenya and Cambodia host forest carbon projects that have been developed under voluntary market standards, where the process began prior to the establishment of the UNFCCC's REDD+ mechanism and subsequent guidance. This means that, at present, both Cambodia and Kenya need to decide how to manage individual forest carbon projects operating in a market context alongside national programmes designed to address the drivers of deforestation at the national level. For example, whether existing projects need to comply with the same UNFCCC standards as their subnational/national REDD+ schemes will need to be clarified, and how they will be incorporated into wider programmes needs to be determined. Perhaps as a result of the different schemes and levels of implementation, different stakeholders might not have the same understanding of carbon rights and benefit sharing, and a legal perspective might assist to highlight the different practical issues that must be addressed in order to create legitimate governance arrangements for REDD+ (i.e. arrangements anchored in the law).

The importance of community participation in REDD+ and the intention to ensure that communities benefit from REDD+ is a common concern for both countries. However, the differences between the current legal structures of both Cambodia and Kenya demonstrate the importance of dealing with the issues of carbon rights and benefit sharing on a country-by-country basis, rather than "transplanting" universal rules into a country's unique legal system. In this respect, the general obligations found within the UNFCCC framework provide appropriate flexibility for countries to define their own approaches. In Kenya, different types of land tenure and devolved governance structures are likely to influence both how carbon rights and defined and how benefit sharing mechanisms are constructed. A constitutional re-

quirement to enact new legislation with respect to community land is likely to affect the legal basis on which communities could claim benefits, although this will apply only to this category of tenure. In Cambodia, a community's basis for a benefit claim is likely to rely on the benefit sharing arrangement adopted by the State as opposed to an independent right based on land or carbon ownership.

This article has used existing, formal legal structures to analyse carbon rights and benefit sharing – a necessary process if the goal is to review the current legal status of entitlements under REDD+, and for the purposes of any future REDD+ reform. However, it is important to note that land regimes in both Cambodia and Kenya incorporate informal institutions and practices that could create different expectations for communities regarding both land ownership and use. It should be remembered that the success of REDD+ initiatives will rely on the participation of communities, meaning that there is a risk associated with relying on formal laws that might not reflect informal practices. The presence of land conflicts and informal land management practices (such as how property relations are managed within and between communities) should be taken into consideration when designing REDD+ programmes and governance arrangements, together with existing formal law (even if it is under dispute). Requirements for Free, Prior and Informed Consent (FPIC)[51] and other safeguarding principles found in both the UNFCCC framework and other standards (such as the CCB Standards) could provide entry points for considering gaps between formal and informal institutions, and should be explored further.

VI. Conclusion

This article has provided a conceptual framework for discussing carbon rights and benefit sharing for REDD+ from a legal perspective, and has demonstrated how it can be applied to the cases of Cambodia and Kenya. It can be used to explore these debates in any country considering how to design and manage its REDD+ initiatives, remembering that carbon rights and benefit sharing are just two of the issues that need to be addressed by countries when designing their national legal frameworks. Given their important role in creating incentives for REDD+ participation (by all stakeholders, whether governments, communities or the private sector), the issues of carbon rights and benefit sharing have received a good deal of attention in both international and national policy debates, including in both Cambodia and Kenya. To date, neither country has addressed these issues comprehensively through legal regimes or well defined policies, although given the stage of development of each country's REDD+ programmes this is not surprising.

The law has an important role to play in clarifying the basis of benefit claims and such clarity is likely to encourage stakeholder confidence and participation. The starting point for any country addressing these issues needs to be a review of existing legal structures in order to indicate the policy space for defining new rights (if this option is taken) or for distributing finance between different stakeholders. Once policy choices have been made with respect to implementation strategies, the most appropriate legal options to implement these strategies can then be assessed; in the cases of carbon rights and benefit sharing, it is likely that new rules will build upon existing regimes for land and forest management but will also need to address new concerns and elements in order to create a comprehensive approach.

51 Both UN-REDD and the FCPF have identified the importance of FPIC in their guidelines on stakeholder engagement [UN-REDD/FCPF, *Guidelines on Stakeholder Engagement in REDD+ Readiness With a Focus on the Participation of Indigenous Peoples and Other Forest-Dependent Communities* (April 20, 2012; revision of March 25th version)], and UN-REDD has provided guidance regarding the substance and application of FPIC in the context of REDD+ [UN-REDD Programme, *Guidelines on Free, Prior and Informed Consent* (January 2013)]. UNFCCC decisions regarding REDD+ do not directly reference FPIC, however, the Cancun decisions outline a set of safeguarding principles (the "Cancun Safeguards") that Parties should respect when implementing REDD+ (see supra, note 16). These include, inter alia, promoting and supporting respect for the rights of indigenous peoples and members of local communities (Appendix 1/paragraph 2c), in addition to the "full and effective participation" of relevant stakeholders, including indigenous peoples and local communities (Appendix 1/paragraph 2d). The Cancun Safeguards also ask Parties to take note of the United Nations Declaration of the Rights of Indigenous Peoples (UNDRIP; UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples: resolution/adopted by the General Assembly*, 2 October 2007, A/RES/61/295) in Appendix 1/paragraph 2c. As a resolution of the UN General Assembly, UNDRIP does not impose binding obligations on its signatories but rather provides guidance with respect to State relations with indigenous peoples. UNDRIP references "free, prior and informed consent" in several contexts, including: Article 10 – regarding relocation; Article 11(2) regarding access to grievance mechanisms regarding cultural, intellectual, religious and spiritual property; Article 19 regarding consultation with respect to law-making and administration; Article 28(1) regarding redress with respect to dispossession of lands and resources; Article 29(2) regarding use of land for disposal of hazardous materials; and, Article 32(2) regarding the approval of projects that will affect land and resources.