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REDD Lights: Who Owns the Carbon in Forests and Trees?

Carbon ownership as the basis of social accountability:

The case of the Philippines

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This paper argues in favor of the ownership by indigenous peoples and local communities of carbon in forests and trees and that such ownership could be the basis of social accountability that should be mainstreamed in implementing what is popularly known as the REDD-Plus mechanism.

REDD-Plus stands for Reducing Emissions from Deforestation and forest Degradation, and the conservation and enhancement of existing forest carbon stocks. The mechanism was formally adopted by the Conference of the Parties of the United Nations Framework Convention on Climate Change (UNFCCC) during its 16th session in Cancun, Mexico held last December, 2010 (La Vina et al 2011). In that meeting, governments agreed to the scope of the mechanism, the components of a national REDD-Plus program, and what could be the phases of such a program. They also agreed to a set of safeguards that would accompany REDD-Plus implementation at the national level, which included assurances that the rights of indigenous peoples and local communities will be recognized and respected. Still pending and currently being negotiated in the UNFCCC is the system of information that needs to be established to ensure that the REDD-Plus safeguards are implemented and respected.

In making the case that indigenous peoples and local communities have ownership of carbon in forests and trees, the authors review the evolution of the international law on the rights of indigenous peoples and local communities and use examples from all over the world and especially from the Philippines. While asserting such ownership, the authors recognize the authority of governments to co-manage and to exercise joint control over such carbon. Certainly,

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REDD-Plus programs are national programs and are implemented in the context of treaty and other international obligations.

The paper should be read with an accompanying monograph *Implementing the REDD-Plus Safeguards and Monitoring REDD-Plus Finance: The Role of Social Accountability* authored by Antonio G. M. La Viña and Lawrence G. Ang. In that paper La Viña and Ang explores and articulates the role of social accountability in implementing REDD-Plus safeguards and argue that, without mainstreaming social accountability mechanisms in such implementation, REDD-Plus programs are likely to fail in producing not only the desired climate change and environmental outcomes but also in avoiding unjust and inequitable results. Likewise, citizen monitoring of REDD-Plus finance is critical – to ensure integrity and accountability in these programs.²

Introduction and overview

As the threats posed by climate change worsen and the causes become clearer, creative initiatives to lessen anthropogenic emissions of carbon are multiplying. If the world is to beat this serious environmental threat, all sources of emissions must be addressed – whether it is energy based emissions or those which come from forestry, agriculture and other land uses. Reducing Emissions from Deforestation and forest Degradation (including conservation, enhancement and sustainable management of forests), aka REDD-plus should be understood in the context of this need for a comprehensive approach to mitigate climate change. The main objective is to conserve, manage and grow forests sustainably so that more carbon is stored within trees and carbon already stored is not released. The Conference of the Parties of the United Nations Convention on Climate Change (UNFCCC) has recognized this and formerly established a REDD-plus mechanism in its 16th session held in December 2010 in Cancun, Mexico (See Box 1).

While we welcome the potential of REDD-plus as a mechanism that could contribute to climate change mechanism, it raises the question as to who owns the carbon in trees, which is important because people and institutions responsible for maintaining and storing carbon in trees may be eligible for financial compensation via a market-based system of carbon trading, as well as possible payment for environmental services (PES). Most countries have yet to answer the question: who owns the carbon in trees. But concerns are not limited to carbon ownership. Other legal concepts under discussion include property rights to carbon sinks, sequestered carbon,

² The writing of these two papers were supported by the Institute of Church and Social Issues and the Affiliated Network on Social Accountability-East Asia and the Pacific (ANSA-EAP). Their support is gratefully acknowledged.

carbon sequestration potentials, title to carbon emission reductions, carbon credits, etc. This paper only addresses the question of who owns the carbon in trees.

We argue that the rightful owners of carbon in forests and trees are local communities, including and especially indigenous peoples, who have conserved and protected these forests and trees since time immemorial. Notwithstanding who owns the carbon, however, governments have the power to make decisions on REDD-plus programs. The most rational approach is probably to recognize dual control (if not ownership), i.e., governments and communities must give their consent, participate in the design and implementation, and share in the benefits of REDD-plus programs.

The Cancun Decision on REDD-plus
<p><u>Title of REDD-plus section:</u> Policy approaches and positive incentives on issues relating to reducing emissions from deforestation and forest degradation in developing countries; and the role of conservation, sustainable management of forests and enhancement of forest carbon stocks in developing countries</p>
<p><u>Scope (activities included):</u></p> <ul style="list-style-type: none">(a) Reducing emissions from deforestation;(b) Reducing emissions from forest degradation;(c) Conservation of forest carbon stocks;(d) Sustainable management of forests;(e) Enhancement of forest carbon stocks;
<p><u>Elements of a national REDD-plus program:</u></p> <ul style="list-style-type: none">(a) A national strategy or action plan;(b) A national forest reference emission level and/or forest reference level or, if appropriate, as an interim measure, subnational forest reference emission levels and/or forest reference levels, in accordance with national circumstances,;(c) A robust and transparent national forest monitoring system for the monitoring and reporting of the activities;(d) A system for providing information on how the safeguards are being addressed and respected throughout the implementation of REDD-plus activities.
<p>Source: See paragraphs 68-79 of The Cancun Decision on Long-term Cooperative Action, http://unfccc.int/resource/docs/2010/cop16/eng/07a01.pdf#page=2</p>

The main title of this paper "REDD Lights" is intended to manifest a cautionary warning that governments and others should go slow and be wary of assuming state ownership, or of behaving or encouraging others to behave as carbon cowboys trying to scam local communities into procuring fake carbon offsets involving trees within their ancestral domains. At the same time, accompanied by a solid rights-based approach that acknowledges community rights to forests and land, including the right to give or withhold Free, Prior and Informed Consent, REDD-plus

could light a way forward for dealing with the challenge of climate change. As one colleague articulates it:

In the best case scenario, REDD could bring economic development benefits to indigenous peoples and other low income groups while at the same time effectively capturing carbon from the atmosphere and protecting other ecosystem services. In the worst case scenario, REDD could spur deforestation for oil palm and other industrial plantations while impoverishing indigenous peoples and local communities, increasing social conflict, and damaging ecological services.³

It is important to stress at the outset that recognizing carbon in trees is owned by indigenous and other local communities does not preclude benefit sharing with governments on various levels. Governments have power to tax income and revenue. If a REDD-plus project proves successful everyone benefits. If participating local communities receive handsome sums for sequestering carbon or providing environmental services, it would seem appropriate that a certain percentage of the net funds be shared with local and national governments.⁴

Neither does recognizing ownership of carbon by indigenous peoples and other local communities give a blank check to such communities and peoples to implement REDD-plus programs in their territories. REDD-plus, as agreed upon in the UNFCCC, are national programs and it is national governments that are responsible for its design and implementation. REDD-plus requires a rigorous system of measuring, reporting and verifying reductions of emissions and increase in sequestration capacity. Such a system cannot be established without the active role and leadership of national governments.

In sum, this paper advocates for recognition of ownership of carbon in forests and trees by indigenous peoples and other local rural resource users globally and particularly in the Republic of the Philippines, a country that has considerable experience recognizing the legal rights of indigenous peoples to their private ancestral domains. Indigenous peoples and other rural communities in the majority world (developing countries) have contributed the least to climate change, but some may suffer the most. Indeed, despite longstanding biases about the negative impact of the rural poor on natural resources, much scholarship over the past half century has established that many local peoples are leaders in conservation and carbon storage, including in

³ J. Alcorn. Getting REDD Right: Best Practices that Protect Indigenous Peoples' Rights and Enhance Indigenous Livelihoods (mimeo). Paper prepared for the InterAmerican Development Bank (2010).

⁴ New Zealand opted for all carbon to be state owned but reversed its decision in response to widespread opposition and increased deforestation. Australia continues with its policy of government ownership of carbon and its carbon markets is better developed than in most countries.

marine areas.⁵ In addition, local communities recognized as owners of carbon in local tree stocks are appropriate recipients of payment for environmental services that benefit everyone.

It is also our view that a logical consequence of recognizing the carbon rights of indigenous peoples and local communities is the right of such peoples and communities to participate in every phase of national REDD-plus programs, from the initial stages of developing a REDD-plus strategy down to the tough process of obtaining their FPIC. In this sense, with respect to indigenous peoples and local communities, the basis of social accountability for REDD-plus programs is anchored on their ownership of the carbon in forests and trees.

Climate Change and Carbon Rights

The threat posed by climate change is profound and universally accepted. As a corollary, the role played by forests in contributing to as well as ameliorating climate change is increasingly recognized and understood. Nearly one-fifth of all carbon emission comes from deforestation and forest degradation.⁶ As acknowledged by the establishment of a REDD-plus mechanism, forests and forest communities have a vital role to play in effectively addressing an important factor contributing to climate change. Existing forests store carbon, as will reforested areas. But REDD-plus is not only concerned with reducing emissions from deforestation and forest degradation. It also includes conservation, enhancement and sustainable management of forests (the plus in REDD-plus), which already occurs in some locales.

The emergence of forests as an important area for mitigating climate change has been accompanied by a parallel movement in the recognition of indigenous peoples and other local community rights to trees and forests. Thus, it has been observed,

[U]nprecedented exposure and pressure, and risk to local people and their forests, is being met by unprecedented levels of local organization and political influence, providing nations and the world at large tremendous opportunity to right historic wrongs, advance rural development and save forests.⁷

Not everyone, however, shares such a hopeful view. Despite rights in international law to recognition of aboriginal/native title, and to FPIC, as well as prospective REDD-plus safeguards that have already been agreed to in principle at Cancun “again and again forest peoples’ rights to

⁵ One of the first scholars to identify and describe the positive aspects of swidden agriculturalists in modern times was Harold Conklin, an anthropology professor at Yale University. See *Hananoo Agriculture*. Rome: Food and Agriculture Organization (1957).

⁶ <http://www.un-redd.org/AboutREDD/tabid/582/Default.aspx>.

⁷ Rights and Resources Initiative (RRI). *The End of Hinterland Forests, Conflict and Climate Change*. Washington, DC, USA:RRI (2010).

their lands and forests, to fair benefits and FPIC are brushed aside.”⁸ Nevertheless secure tenure to forests is “an indispensable precondition to ensure the long-term permanence of forests and the carbon sequestered therein.”⁹

It has been asserted that carbon is emerging as a new and unprecedented type of property right.¹⁰ This includes carbon stored in trees. Regardless of whether it is a new property right, reducing carbon emissions from forests covered by REDD-plus will invariably result in some restriction on the rights of land and forest owners to maximize benefits from their property. In other words, REDD-plus will impact owners of land and trees whether or not if they are deemed to own the carbon in their trees. Not recognizing local carbon ownership, however, will likely minimize local incentives for REDD-plus to succeed, which would be unwise at best.

Usually (but this should be clarified), the owner of the land will *a priori* be presumed to have the right to manage that land to maximize its carbon sequestration potential; the owner would also have the right to lease the land to another entity for this purpose. In the latter case, the owner of the carbon sequestration potential would be different from the owner of the carbon, who in turn could be different from the owner of sequestered carbon.¹¹

In addition:

Carbon rights are a form of property that “commoditise” carbon and allow it to be traded. They separate the right to carbon from broader rights to forest and land, and include the right to sequester carbon into the future (“carbon sequestration rights”). Carbon rights can be created through contract ... or by national legislation, the structure of which can be influenced by international law standards.¹²

⁸ Email from the Director of the Forest Peoples Programme dated February 22, 2011.

⁹ A. Savaresi and E. Morgera. “Ownership of Land, Forest and Carbon” in *Legal Frameworks for REDD: Design and Implementation at the National Level*, J. Costenbader, ed. Gland: IUCN (2009), p. 18

¹⁰ See e.g. Charlotte Streck. *Climate Change and Forests: Emerging Policy and Market Opportunities*. Washington, DC: Brookings Institution (2008).

¹¹ D. Takacs, *Forest Carbon: Law and Property Rights*. Arlington, VA, USA: Conservation International (2009), p. 14. Other central legal questions yet to be answered include: whether only governments can sell carbon credits or will it also be permissible for individuals, indigenous peoples and other local community groups; and who bears the risk if a REDD-plus project fails?

¹² Lisa Ogle, an independent legal expert in *REDDnet: Asia and the Pacific Bulletin DRAFT* (November 2010). In the same draft bulletin Charlotte Streck of Climate Focus adds that “Regular commodities are tangible things that exist independent of any law, regulation or contract. Carbon credits on the other hand are intangible rights that are created by people carrying out certain activities under relevant laws or contracts.”

Native/Aboriginal Title in International Law

Over the past 60 plus years there has been growing attention paid to indigenous peoples and other local communities still living in forest areas originally inhabited by their forebears. This interest is prompted by various concerns, including human rights, economic development, and environmental protection and conservation.

One outcome of the attention is that trends in international law now evince growing support for the rights of indigenous peoples and other local communities to recognition of aboriginal/native title. Indeed, international law is moving towards (and arguably already is) mandating legal recognition of native/aboriginal title to indigenous territories and ancestral domains. The trends are evident in national legislation and jurisprudence as well as in international law instruments, particularly the 2007 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).¹³

This emerging mandate is also apparent in other international conventions and declarations, as well as at least fourteen nation states that are already obliged under domestic law, albeit in differing ways, to recognize indigenous peoples' and others' native/aboriginal titles. Since 1968 eleven African nations have recognized customary rights as including property rights in their constitutions and/or land laws.¹⁴

A growing number of international institutions and nation states are moving toward legal recognition of indigenous peoples' and some other local communities' community-based property rights (CBPRs), and in particular native/aboriginal title. A tropical forest tenure assessment in 2009 reported that 18% of forest land in 30 tropical countries is now privately owned by indigenous peoples and other local communities, an increase from 15% in 2002.¹⁵

Despite these developments, disputes concerning property rights, especially those of indigenous peoples and other local communities who live in rural areas of Africa, the Americas, Asia and the Pacific, are common. A new and emerging early 21st century variant involves potential discord over ownership of carbon in trees, including trees planted and protected in long inhabited areas. If accessory follows principle, and indigenous and other forest communities are increasingly recognized in international and domestic law as owning land and trees within their ancestral domains, then logic dictates that they would also own the carbon in trees.

¹³ O. Lynch, *Mandating Recognition: International Law and Native/Aboriginal Title*. Washington, DC: Rights and Resources Initiative (2011).

¹⁴ Lynch, *Mandating Recognition*.

¹⁵ See Tropical Forest Tenure Assessment: Trends, Challenges and Opportunities, Rights and Resources Initiative, Washington, DC, USA and International Tropical Timber Organization, Yokohama, Japan (2009), pp. 12-13.

The increasing frequency of conflicts over property rights to land, water, forests, trees, carbon and other natural resources is, in large measure, related to threatening global trends concerning human demography, consumption, pollution, violence, inequity, failed states, climate change and more. These trends increase and exacerbate already unprecedented demands on the regenerative capacities of remaining ecosystems. In widely varying degrees they jeopardize the precarious well-being of all human beings, especially and most immediately vulnerable groups directly dependent on natural resources for their very survival. Ironically, these groups have done the least to exacerbate climate change but may very well suffer the most. This is all the more reason to provide them with support and incentives for conservation and sustainable management of forest resources, including carbon in trees.

This sentiment was evident when the 10th Conference of the Parties to the Convention on Biodiversity in October 2010 adopted the Aichi Nagoya Protocol, which is expected to enter into force in 2012. Building on Article 8(j) of the convention which mandates respect for the intellectual property rights of indigenous peoples, the convention adopted “historic decisions that will permit the community of nations to meet the unprecedented challenges of the continued loss of biodiversity compounded by climate change.”¹⁶ The protocol establishes a framework for balancing access to genetic resources on the basis of prior informed consent, taking into account traditional knowledge and the need for fair and equitable sharing of benefits.¹⁷

Local Communities, Biodiversity Conservation, Carbon Storage and Carbon Rights

Local peoples’ legal rights to equitable benefit sharing in regards to traditional knowledge and biodiversity, especially in regards to pharmaceutical products, is analogous to the issue of carbon ownership and traditional and sustainable management of forests, which are often reservoirs of biodiversity. In fact “[c]arbon rights are rather comparable to intellectual property rights that are intimately associated with an activity.”¹⁸ As such it can be reasonably asserted by analogy that carbon in trees is owned by the persons who own the trees, as intellectual property is owned by its creator. This is especially true when the trees have been planted and/or conserved by indigenous and other original, long term guardians of forests.

Not recognizing indigenous and some other local communities as owners of the trees and the carbon in them would threaten to disrupt traditional systems of sustainable natural resource management. Even worse, it would tend to undermine existing local incentives to plant and conserve trees. This would be the opposite of what REDD-plus purportedly aspires to achieve

¹⁶ <http://www.cbd.int/deoc/press/2010/pr-2010-10-29-cop-10-en.pdf>.

¹⁷ For an in-depth analysis see H. Jonas, K. Bavikatte, H. Schrunn, “Community Protocols and Access and Benefit Sharing,” *Asian Biotechnology and Development Review*, Vol. 12, No. 3, pp.49-76 (2010).

¹⁸ Charlotte Streck. *REDDnet: Asia and the Pacific Bulletin DRAFT* (November 2010).

and would violate important REDD-plus standards and safeguards agreed to at COP 16 in Cancun (See Box 2).¹⁹

REDD-plus Safeguards
<p>In implementing REDD-plus activities, the following safeguards should be promoted and supported:</p> <ul style="list-style-type: none">(a) That actions complement or are consistent with the objectives of national forest programmes and relevant international conventions and agreements;(b) Transparent and effective national forest governance structures, taking into account national legislation and sovereignty;(c) Respect for the knowledge and rights of indigenous peoples and members of local communities, by taking into account relevant international obligations, national circumstances and laws, and noting that the United Nations General Assembly has adopted the United Nations Declaration on the Rights of Indigenous Peoples;(d) The full and effective participation of relevant stakeholders, in particular indigenous peoples and local communities;(e) That actions are consistent with the conservation of natural forests and biological diversity, ensuring that REDD-plus actions are not used for the conversion of natural forests, but are instead used to incentivize the protection and conservation of natural forests and their ecosystem services, and to enhance other social and environmental benefits;(f) Actions to address the risks of reversals;(g) Actions to reduce displacement of emissions. <p>Source: Appendix II of The Cancun Decision on Long-term Cooperative Action, http://unfccc.int/resource/docs/2010/cop16/eng/07a01.pdf#page=2</p>

Simply put, many rural peoples are guardians and stewards of forests and other natural resources, including biodiversity reservoirs and carbon sinks, and possess important local knowledge for managing these resources sustainably. Of course, local conditions and cultures vary and not all local people, including indigenous people, respect, protect and sustainably manage their natural environments. But all of them are human beings and have inherent rights simply by virtue of being human. What else gives meaning to the term “human rights”?

The increasing legal support for environmental justice and meaningful participation by vulnerable groups, including indigenous peoples and other local communities, is not only motivated by concerns about basic fairness. Rather, it is a rational response to a growing body of research that demonstrates the vital role local knowledge and incentives play in the conservation of biological and other resources, including carbon stored in trees.

¹⁹ A company in the state of Minas Gerais, Brazil named Plantar obtained certification from the Forest Stewardship Council (FSC) in 1997 to sell carbon credits for a eucalyptus plantation under the auspices of the Clean Development Mechanism (CDM), a precursor to REDD-plus and a mechanism of the United Nations Framework Convention on Climate Change (UNFCCC). Obviously, FSC and the Brazilian government acquiesced in Plantar’s claim of being owner of the carbon in the plantation’s trees, which if nothing else is a precedent for local community ownership of carbon in trees. In the case of Plantar, however, “[d]ozens of NGO from Brazil and around the world submitted a letter to the Executive Board of the CDM ... to protest this UN body’s official registration of the Plantar project as a CDM project.” World Rainforest Movement, Monthly Bulletin, Issue 163, February 2011

It has been demonstrated that when forest communities have a right to participate in local governance, including making rules concerning the use and management of forest resources, there is a greater likelihood of more livelihood benefits and higher levels of biodiversity.²⁰ “Fortunately, the need to prepare for climate change also brings new opportunities for sustainable policy agendas, including a broader role for CBNRM.”²¹

A report by the World Bank no less concluded that the amount of forest cover and biodiversity within indigenous territories is higher than expected, and much higher than within strict protected zones and areas not inhabited by indigenous peoples.²² Indeed, the

Well-documented, extensive geographic overlap of forests and indigenous peoples suggest that, for REDD to be successful, it will be necessary to prioritize attention to indigenous lands in ways that strengthen, and do not undermine, opportunities for self determination and development.²³

Stated differently, a forest carbon law that is unfair because it ignores native title rights, or local people do not understand the abstract aspects of a REDD-plus project, or benefits do not flow to nearby local communities is less likely to be sustainable and effective. It might even generate anti-REDD-plus sentiments and resistance, which would adversely affect the prospects for successful REDD-plus initiatives. Especially in regards to forests that have been traditionally

²⁰ L. Persha, A. Agrawal and A. Chhatre. *Social and Ecological Synergy: Local Rulemaking, Forest Livelihoods, and Biodiversity Conservation*. Ann Arbor: International Forestry Resources and Institutions (2011). http://www.rightsandresources.org/publication_details.php?publicationID=2233.

²¹ T. LaViña and V. Yu. “CBNRM, Globalization, and International Law: Global Trends and the Foundations for a Community-Based Response: in K. Gollin and J. Kho, eds. *After the Romance: Communities and Environmental Governance in the Philippines* (2008), p. 244.

²² A. Nelson and K. Chomitz, *Do Protected Areas Reduce Deforestation? A Global Assessment with Implications for REDD*, Washington, DC: World Bank Independent Investment Group (2009). http://rightsandresources.org/publication_details.php?publicationID=1373. Included in the assessment was proof, using satellite imagery, that biodiversity conservation is higher within indigenous peoples’ territories than outside, two times higher than expected. See also A, Agrawal, *Livelihoods, Carbon and Diversity on Community Forests: Trade-offs or Win Wins*. Presented in Oslo at the Rights Resources Initiative and RFN Conference on Rights, Forests and Climate Change (October 2008) (mimeo); J. Igoe, “Measuring the costs and benefits of conservation to local communities,” *Journal of Ecological Anthropology*, Vol. 10, pp. 72-77 (2006); World Resources Institute, “The Wealth of the Poor: Managing Ecosystems to Fight Poverty,” *World Resources Report 2005*; A. Molnar, S. Scherr and A. Khare. *Who Conserves the World’s Forests? Community-Driven Strategies to Protect Forests and Respect Rights*, Washington, DC: Rights and Resources Initiative (2004); Ed Ayres. *Mapping the Nature of Diversity: A Landmark Project Reveals a Remarkable Correspondence between Indigenous Land Use and the Survival of Natural Areas* (2003) <http://www.worldwatch.org/node/533>; J. Alcorn, “Indigenous Peoples and Conservation,” *Conservation Biology* 424 (1993).

²³ J. Alcorn. *Getting REDD Right: Best Practices that Protect Indigenous Peoples’ Rights and Enhance Indigenous Livelihoods* (mimeo). Paper prepared for the InterAmerican Development Bank (2010).

protected, economic benefits flowing from REDD-plus projects will generate good will and encourage the continuation of sustainable practices. Failure to heed this cautionary insight should, by now, be obvious: “Potential conflict over rights to carbon is already emerging where national forest policy and customary forest rights are not synchronized.”²⁴

There is also new evidence that a carbon market may not work unless there is a rigorous system of safeguards that accompany its establishment. A new study by a private entity specializing in commodities markets has found that

the uncertain definition of the forest carbon commodity, the low percentage of final value to the forest carbon producers, and the lack of a production system where the commodities quality, sale and transfer can be easily and independently verified, all result in a very risky and substandard market – that will not only not reduce deforestation, but that could be easily manipulated and cause more destruction.²⁵

The specific challenge is to access private sector funding to leverage public financing for carbon storage. Clarifying property rights in favour of those who already protect forests, including the carbon stored in them, is one important step.

United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)/Free Prior Informed Consent (FPIC)

The favourable trend in international law for the legal recognition of native/aboriginal title is especially evident in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), which was adopted by the General Assembly on 13 September 2007.²⁶

²⁴ “Carbon Rights and Potential Risks to Local Communities,” *REDDNet: Asia and Pacific Bulletin DRAFT* (November 2010). When New Zealand announced in 2002 that it would retain ownership of carbon in trees planted after 1990 “a surge in deforestation figures ... was linked to forest owner’s attempts to avoid liabilities associated with the implementation of government policy.” The policy decision was subsequently reversed. A. Savaresi and E. Morgera. “Ownership of Land, Forest and Carbon” in *Legal Frameworks for REDD*, p.26.

²⁵ The Munden Project. *REDD and Forest Carbon: Market-Based Critique and Recommendations* (2011) http://www.rightsandresources.org/publication_details.php?publicationID=2215. See also M. Shapiro, “Conning the Climate: Inside the Carbon-Trading Shell Game,” *Harper’s Magazine* (February 2010).

²⁶ See www.un.org/esa/socdev/unpfii/en/drip.html. See also <http://www.un.org/News/Press/docs//2007/ga10612.doc.htm>; <http://www.iwgia.org/sw248.asp>; World Bank Operational Policy 4.10 of 2005.

The UN Declaration on the Rights of Indigenous Peoples provides a basis for demanding greater and more meaningful participation in international decision making processes. Unlike other legal instruments, the Declaration does not limit the requirement for consultation and cooperation to the national level.²⁷

In terms of property rights, Article 26 of UNDRIP is explicit. It provides that

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
2. Indigenous peoples have the right to own, use develop and control the lands territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.²⁸

Additionally, the emerging norm of FPIC is interwoven in UNDRIP, which explicitly mentions it five times. FPIC manifests another positive trend in international law that is supportive of the rights, interest and well-being of local rural communities regarding the natural resources they depend on for their lives and livelihoods.²⁹ Similar to community-based property rights (CBPRs),³⁰ the right to prior informed consent of indigenous and other local communities can be

²⁷ Foundation for International Law and Development (FIELD). Ways for Indigenous Peoples groups to advance adaptation concerns and solutions through international fora (mimeo.). Prepared for the Inuit Circumpolar Council in Alaska (2009).

²⁸ <http://www.un.org/esa/socdev/unpfii/drip.html>.

²⁹ A. Perrault, K. Herbertson and O. Lynch, "Partnerships for Success in Protected Areas: The Public Interests and Local Community Rights to Prior Informed Consent (PIC)," *The Georgetown International Environmental Law Review* Vol. XIX, No. 3 (2007). See also F. McCay, FPIC in International and Domestic Law, Address at the Briefing for World Bank Executive Directors on Free Prior Informed Consent (2004), available at http://www.bicusa.org/bicusa/issues/FPIC_briefing_documents.pdf.

³⁰For definition and description of CBPRs see Chapter One of O. Lynch and E. Harwell, *Whose Natural Resources? Whose Common Good? Towards a New Paradigm of Environmental Justice and the National Interest in Indonesia*. Washington, DC: Center for International Environmental Law (CIEL) (2002). www.ciel.org/Publications/Whose_Resources_3-27-02.pdf. See also O. Lynch, Promoting Legal Recognition of Community-Based Property Rights, Including the Commons: Some Theoretical Considerations. Presented at a Symposium of the International Association for the Study of Common Property and the Workshop in Political Theory and Policy Analysis, Indiana University, Bloomington, 1999 www.indiana.edu/~iascp/symposium99.html. CBPRs could include customary use, collective rights, usufruct rights that may or may not also include rights to underlying land, easements, and in some cases fee simple title; and may or may not be recognized by national or local authorities, and may or may not overlap or conflict with other property rights or claims. For more on customary tenure see R. Crocombe, "An

viewed as a human right that derives its authority from and is recognized not only by international law, but also natural law concepts. As such the existence of a right to FPIC is not necessarily dependent on governments or any creation, grant or recognition by a particular nation state.³¹

Besides UNDRIP, the International Labour Organization (ILO) Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries also bolsters the assertion that indigenous people own the carbon in the trees within their ancestral territories. Article 15 provides that

The right of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources³²

A consortium of leading international environmental NGOs, including the World Conservation Union (IUCN), the World Commission on Protected Areas (WCPA) and the World Wide Fund for Nature/World Wildlife Fund (WWF), promulgated a Joint Policy Statement on Principles and Guidelines on Indigenous and Traditional Peoples and Protected Areas. In it they agreed that “rights should be respected in relation to the lands, territories, waters, coastal seas and other resources which they traditionally owned or otherwise occupy or use, and which fall within protected areas.”³³

These institutions and many more, including other NGOs and the World Bank and other multilateral lending entities, are publicly committed to honour UNDRIP and comply with its provisions on FPIC. And there has been some success in the Philippines, Indonesia and beyond.

NGO supported efforts to support customary communities’ assertion of their right to FPIC through awareness-raising, human rights training, assistance with participatory mapping and negotiations have met with some success.³⁴

Approach to Analysis of Land Tenure Systems,” in *Land Tenure in the Pacific*, R. Crocombe, ed. Melbourne: Oxford University Press (1971).

³¹ O. Lynch, Promoting Legal Recognition of Community-Based Property Rights *ibid.*

³² <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C169>. Article 15, Section 2 addresses “cases in which the State retains ownership of mineral or sub-surface resources or rights to other resources pertaining to lands” does not apply. Most states have never claimed ownership of carbon in trees and therefore they cannot be said to have “retained” ownership.

³³ IUCN, WCPA & WWF, Joint Policy Statement on Indigenous and Traditional Peoples and Protected Areas: Principles and Guidelines (1996). http://www.wwf.org/wwf/uploads/pdf/indigenous_people_policy.pdf.

³⁴ M. Colchester. *Free, Prior and Informed Consent: Making FPIC work for forests and peoples*. New Haven: The Forest Dialogue, Research Paper No. 11 (2010).

Human Rights and International Law

The human rights dimension of climate change is receiving more attention.³⁵ More generally, the broadening concept of international environmental justice and the duty to promote and protect it reflects an ever more globally acknowledged basic minimal moral principle: human beings, including those belonging to indigenous and other local communities, have a basic human right to participate effectively in official decision-making processes that directly impact the natural resources they conserve and depend on.

As recognized in a growing number of international law instruments and judicial decisions, human rights are an indivisible bundle of rights that should be acknowledged and respected.³⁶ By now it is likewise evident that sustainable development and environmental justice are symbiotically related, compatible, and need be jointly pursued.³⁷ These legally cognizable and often complementary rights constitute a progressive and impressive array of 20th Century advances in legal norms within and among our human community.

The UN Universal Declaration of Human Rights best expresses the right to human existence and dignity.³⁸ Other human rights relevant to processes for securing legal recognition of native/aboriginal title including the right to carbon in trees, include the right to development,³⁹

³⁵ See e.g. International Council on Human Rights Policy. *Climate Change and Human Rights: A Rough Guide*. Geneva (2008).

³⁶ The UN Covenant on Civil and Political Rights states unequivocally in Part Three, Article 6 that "Every human being has an inherent right to life." For a list of internationally recognized human rights instruments see <http://umn.edu/humanrts/links>.

³⁷ The 1993 Vienna Declaration and Program of Action states in Part I, para. 11 that "The right to development should be fulfilled so as to meet equitably the developmental and environmental needs of present and future generations.

³⁸ The Preamble of the UN International Convention of Civil and Political Rights affirms that this right to human life "arises "from the inherent dignity of the human person."

³⁹ www.un.org/documents/ga/res/41/a41r128.htm The charter of the UN includes development as among the goals of its agenda for economic and social development. Article 23 of the Declaration on the Rights of Indigenous Peoples elaborates: "Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions." The [African Charter on Human and Peoples' Rights](#) states in its Preamble "it is henceforth essential to pay a particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights."

the right to participate,⁴⁰ the right to assemble,⁴¹ the right to information,⁴² the right to fair adjudication and equitable redress of grievances,⁴³ the right to share the benefits of genetic resources located within indigenous territories,⁴⁴ the right to the conservation and protection of the environment,⁴⁵ the right to freedom of religion,⁴⁶ and the right to cultural integrity.⁴⁷ Some of these rights, and others, are expanded upon in Agenda 21 that emerged from the UN Conference on Sustainable Development held in Rio de Janeiro during 1992.⁴⁸

Rights Based Approaches, Payment for Ecological Services, Access and Benefit Sharing

Although not explicitly concerned with carbon or property rights, the following three initiatives are concerned with human rights, participation and environmental justice. These concerns animate this paper, including its purpose and objectives, and have at least indirect relevance to the question of who owns the carbon in trees.

As noted previously, human rights are often complex and overlapping. One way to avail of them more effectively is by invoking Rights Based Approaches (RBAs). RBAs are emerging processes for learning and exploring, mostly by the conservation community that is not widely

⁴⁰ Article 25 of the UN Covenant on Civil and Political Rights promotes democratic government based on the consent of people and in conformity with the principles of the Covenant. The Covenant is largely concerned with elections, rights to vote, run for office, assemble, etc. Remarkably, except for UNDRIP and the Aarhus Convention for Europe, as of 2010 there is no widely recognized right in international law ensuring that individuals and local communities can participate in environmental decisions that directly impact on their lives and livelihoods.

⁴¹ Article 20, UN Universal Declaration of Human Rights. Article 20 of the UN Covenant on Economic, Social and Cultural Rights contains some of the most significant international legal provisions relevant to this paper, including rights to social protection, to an adequate standard of living, to education and enjoyment of the benefits of cultural freedom and scientific progress. It also provides equal rights for women and men; the right to just and favorable conditions of work; the right to protection and assistance to the family; the right to adequate standard of living; the right to education; the right to take part in cultural life; and the right to enjoy the benefits of scientific progress and its applications. These rights were reaffirmed anew a half century later in the 2007 UN DRIP.

⁴² Article 19, UN Universal Declaration of Human Rights.

⁴³ Article 6(1), European Convention on Human Rights.

⁴⁴ Article 8(j), UN Convention on Biodiversity. See also P. Gepts. "Who Owns Biodiversity and How Should the Owners Be Compensated," *Plant Physiology*, Vol. 134, pp. 1295–1307 (April 2004) <http://www.plantphysiol.org>.

⁴⁵ UN Declaration on the Right of Indigenous Peoples, Article 29.

⁴⁶ Article 18, UN Universal Declaration of Human Rights.

⁴⁷ See D. Ayton-Shenker, *The Challenge of Human Rights and Cultural Diversity*, United Nations Background Note (1995) <http://www.un.org/rights/dpi1627e.htm>.

⁴⁸ <http://www.un.org/esa/dsd/agenda21>.

known for appreciating local knowledge and its contribution to sustainable development and environmental justice. RBAs encompass holistic initiatives to address human rights and environmental justice on the project level. They are premised on the assumption that human rights are integrally and symbiotically interrelated, and that human beings have rights by virtue of being human. RBAs are also not limited to just promoting participation.

If successful rights-based approaches are to be developed, they must be evaluated against criteria that differentiate them from efforts to tweak the system to promote “participation” within the existing conservation management paradigm.⁴⁹

Some environmental organizations have begun to invoke RBAs to explore and learn from the relationships between biodiversity conservation and upholding human right.⁵⁰ The Safeguards for REDD-plus can be seen as promoting a RBA by establishing standards of just behaviour and outcomes that are expected to be complied with.

Conceptually payment for ecosystem services (PES) is somewhat more akin to what the designers of REDD-plus have in mind. In return for reforesting and conserving existing forests, as well as conserving biodiversity and providing hydrological services, individuals are financially rewarded. The program is based on the notion that those who maintain and preserve environmental services should be paid by those who benefit without also preserving. It merits emphasizing, however, that at present most ecosystem services that are already being provided by indigenous and other local communities are undervalued or, more commonly, are accorded no financial value whatsoever. In fact, local providers of ecosystem services are still more often blamed for environmental degradation than appreciated for the services provided.⁵¹

Payments for Ecosystem Services are being made in Costa Rica, Bolivia, Ecuador, Mexico, South Africa, India and the United States. Costa Rica may provide the best practical and tested example of payment for environmental services. Its experience “shows that a government can reduce deforestation and provide direct economic benefits to poor rural dwellers at low costs.”⁵² The program was introduced in 1996. Forestry Law 7575 established FONAFIFO (National Forest Financing Fund). It pays landowner conserving forests about US\$64 per year, those reforesting receive approximately \$US 816 per hectare, per year. Between 1997 and 2004

⁴⁹ J. Alcorn and A. Royo, “Conservation’s engagement with human rights: “Traction”, “slippage”, or avoidance? *Policy Matters*, Vol. 15 (2007).

⁵⁰ See e.g. J. Campese, T. Sunderland, T. Greiber and G. Oviedo, eds. *Rights Based Approaches: Exploring issues and opportunities for conservation*. Bogor: Center for International Forestry Research (2009); T. Greiber, M. Janke, M. Orellana, A. Savaresi and D. Shelton. *Conservation with Justice: A Rights-based Approach*. Gland: IUCN (2009).

⁵¹ Forest Trends, the Katoomba Group and United Nations Environment Programme. *Payments for Ecosystem Services: Getting Started A Primer* (2008)

⁵² D. Takacas, *Forest Carbon: Law and Property Rights*, p. 40.

FONAFIFO spent US\$200 million on approximately 7000 individual landowners covering 460,000 ha under its PES program. The demand to participate in Costa Rica's PES program, however is high and only 25 percent of demand is met.

By making undifferentiated payments no matter what the quality of land and what the threat of deforestation, Costa Rica streamlines its process ... but at the same time may not be making wise, targeted use of its limited carbon sequestration PES funds.⁵³

Costa Rica is now shifting to a strategy of identifying carbon buyers first and then finding sellers of sequestration services in contrast to the reverse strategy that has originally guided the program.

Access and benefit sharing (ABS) was previously mentioned in the context of the Aichi Nagoya Protocol. The 2010 protocol to the UN Biodiversity Convention of 1992 is based on Article 8(j) of the convention and establishes a framework for balancing access to genetic resources on the basis of prior informed consent, traditional knowledge and fair and equitable sharing of benefits, mostly derived from pharmaceutical products.⁵⁴ ABS is still mostly centered on biodiversity conservation and environmental justice concerns, but it is also relevant to climate justice issues. Its relevance however is yet to be articulated and applied in the context of who owns or has access to and opportunities for benefit sharing of carbon in trees.⁵⁵

The Philippines Experience

According to the Department of Environment and Natural Resources (DENR) Forest Management Bureau (FMB) and the National Mapping and Resources Information Authority (NAMRIA) in 2003 the amount of forest cover in the Philippines was only 7.17 million ha out of 30 million ha. With an annual forest loss of 157,000 ha or 2.1 % between 2000 and 2005, the Philippines deforestation rate remains among the highest in the world.

A comprehensive policy and institutional framework on natural resource management, including forests, exists in the Philippines. Despite enactment of the 2009 Climate Change Act⁵⁶ and the creation of the Climate Change Commission, however, there is still no specific legal framework

⁵³ *Ibid.*

⁵⁴ See H. Jonas, K. Bavikatte, H. Schrunn, "Community Protocols and Access and Benefit Sharing," *Asian Biotechnology and Development Review*, Vol. 12, No. 3, pp.49-76 (2010)

⁵⁵ For background on ABS see Biodiversity Access and Benefit-Sharing Policies for Protected Areas: An Introduction http://ias.unu.edu/binaries/UNUIAS_ProtectedAreasReport.pdf. See also <http://www.icimod.org/abs>.

⁵⁶ Republic Act No. 9729 (2009).

yet on REDD-plus.⁵⁷ Representatives from Government and citizen organizations have drafted The Philippine National REDD-plus Strategy (PNRPS, See Box 3) which is awaiting official adoption by the Climate Change Commission. While the PNRPS is a progressive and community rights-friendly document, one area that still needs specific attention is the clarification and elaboration of carbon ownership and tenure. On this, there is no need to reinvent the wheel, as the saying goes.

Features of the Philippine National REDD-plus Strategy
<p>1. The PNRPS assumes a nested, scaling-up approach to REDD-plus, recognizing that a substantial readiness phase is critical yet time-consuming. The plan is to build on existing data sets, capacity and initiatives and develop sub-national REDD-plus initiatives that can be scaled-up in 3-5 years time.</p> <p>2. The PNRPS targets projects on sites where emissions reductions can be achieved at a reasonable scale and cost, while also seeking to maximize co-benefits. It does this by focusing initial sub-national projects in priority areas. Tenured areas such as ancestral domains, protected areas, and community-based forest management areas represent the majority of remaining forests in the Philippines and offer greatest opportunities to deliver social and environmental co-benefits. The PNRPS also targets biodiversity conservation priority areas, often the last remaining forest blocks in the country. In the Philippines, these three priorities—rural development, carbon sequestration and biodiversity conservation—overlap at a number of sites.</p> <p>3. The PNRPS proposes a governance approach to REDD-plus that recognizes the need for national-level REDD-plus oversight and management, but prioritizes the decentralization of natural resource management (rights, responsibilities and benefits). The PNRPS recognizes the need for local government unit (LGU) and community engagement to ensure REDD-plus operationalization. It seeks to create opportunities to engage local actors in decision-making and management, and allows for locally-led REDD-plus.</p> <p>4. Although REDD-plus implementation will require new institutional arrangements, programs and policies, the PNRPS seeks opportunities to strengthen and align existing structures, rather than unnecessarily introduce new bodies and regulations. It also endeavours to streamline REDD-plus related processes to facilitate project development and avoid ‘red tape’.</p> <p>5. The PNRPS focuses on the roles, responsibilities and benefits of REDD-plus to local communities. It seeks to catalyze REDD-plus resources to deliver multiple social benefits including sustainable rural livelihood development; promoting community-based management and monitoring activities, and emphasizing equitable benefit sharing. It also prioritizes community rights to determine how and whether they engage with REDD-plus.</p> <p>6. The PNRPS will utilize participatory planning, multi-stakeholder and multi-level approaches as main methods to strategy planning and implementation. It prioritizes engagement of local resource users and managers, notably Indigenous Peoples and local communities, which is key to ownership and effective and adaptive planning and management.</p>

⁵⁷ The Philippine National REDD-plus Strategy, p. v (2010). Uncertain and contested land tenure is identified in the strategy as a major driver of deforestation, p. 19.

7. The PNRPS assumes an inter-sectoral approach to REDD-plus development, seeking to increase communication and coordination among agencies and sectors with links to deforestation and forest degradation. It views REDD-plus as a catalyst for significant, necessary reforms.

8. The PNRPS recognizes the central importance of establishing credible national and sub-national emissions reference levels and a robust national measuring, reporting and verification (MRV) system for carbon accounting. It prioritizes the research, capacity building and institutional structures required to establish rigorous forest carbon accounting.

9. The PNRPS assumes watershed, natural ecosystem and landscape-level approaches to REDD-plus development in order to ensure multiple benefits.

The Philippines is an international leader in respect to legal recognition of native title over ancestral domains held by Indigenous Cultural Communities/Indigenous Peoples (ICCs/IPs), which presumably includes the carbon stored in trees. It already has a legal and institutional framework in place for delineating the perimeters of privately held ancestral domains, where much of the country's remaining forests are located. This legal accomplishment was supported by a broad-based civil-society movement and included the enactment of several pro-indigenous-peoples provisions in the 1987 (post-martial law) Constitution of the Republic of the Philippines. Building on several sections in the constitution, the Philippine Congress enacted the Indigenous Peoples Rights Act (IPRA) of 1997,⁵⁸ which was upheld by the Philippine Supreme Court in a landmark decision in December 2000.⁵⁹

IPRA is a legal milestone in the global struggle to gain recognition of indigenous and other community-based property rights. After fourteen years of implementation there is much to be learned – both positive and negative – from IPRA that is relevant to REDD-plus and the question of who owns the carbon in trees.

IPRA provides that legal rights of ownership and possession held by ICCs/IPs (aka tribal groups) to their ancestral domains shall be recognized and protected. This includes the inherent right to self-governance and self-determination, and respect for indigenous values, practices, institutions and CBPRs. Consequently, the state must guarantee the right of ICCs/IPs to freely pursue their economic, social and cultural development.

The Republic of the Philippines is likewise legally obliged to prevent by law any form or coercion against ICCs/IPs. It shall also respect, recognize and protect the right of ICCs/IPs to preserve and protect their culture, traditions and institutions. All rights recognized under the IPRA shall be considered in the formulation and application of national plans and policies.

⁵⁸ Republic Act No. 8371 (1997) www.humanrights.gov.ph/index.php?categoryid=34.

⁵⁹ Cruz vs. Secretary of Environment and Natural Resources
<http://www.sc.judiciary.gov.ph/jurisprudence/2000/dec2000/135385.html> (2000).

The National Commission on Indigenous Peoples (NCIP) is the government institution responsible for implementation of IPRA.⁶⁰ Among the most widely used provisions of the IPRA are those which pertain to the concept and definition of ancestral domains (ADs). Under Section 3, ADs cover

lands, inland waters, coastal areas, and natural resources therein, held (by indigenous peoples) under a claim of ownership, occupied or possessed since time immemorial, continuously to the present except when interrupted by war, force majeure or displacement by force, deceit, stealth or as a consequence of government projects or any other voluntary dealings entered into by government and private individuals, corporations, and which are necessary to ensure their economic, social and cultural welfare.

Concurrent with this, the law likewise recognizes the indigenous concept of ownership, such that “ancestral domains are the (indigenous peoples’) private but community property which belongs to all generations and therefore cannot be sold, disposed or destroyed.”⁶¹

Among the rights included under the right to ancestral domain is the right to develop the lands and natural resources within indigenous territories. This encompasses the right to negotiate the terms and conditions for exploration of the area’s natural resources (presumably including carbon in trees), the right to participate in the formulation and implementation of projects that will impact on ADs (which among other things means REDD-plus projects), the right to compensation for damages sustained as a result of any externally initiated project and the right to demand government efforts to prevent interference, alienation and encroachment by outsiders.⁶²

Moreover, under NCIP implementing rules and regulations (IRR), IPs right to manage and develop their AD, and “freely pursue their economic, social, political and cultural development” is exercised through the formulation of “plans for the sustainable management and development of the land and natural resources as well as human resources within their ancestral domains,” which may be contained in an Ancestral Domain Sustainable Development and Protection Plan (ADSDPP). The ADSDPP serves as the basis for the formulation of five year master plans.⁶³ Again, the language of the law is permissive, indicating that this Plan is an option, not a requirement.

As of 2011, huge obstacles remain in terms of legally delineating, documenting and otherwise recognizing ancestral domains, primarily in terms of adequate funding and political will. Nevertheless, as of 2010, 156 CADTs covering over 4,259,616 ha have already been delineated

⁶⁰ <http://www.ncip.gov.ph/>.

⁶¹ Section 5.

⁶² Section 7b.

⁶³ Rule VIII, Part II, Sec. 1.

and covered by Certificate of Ancestral Domain Titles (CADTs).⁶⁴ The number of beneficiaries exceeds 912,000.⁶⁵ There may be some discrepancy between approved and awarded CADTs and those approved and not yet awarded. In addition under IPRA the legal presumption is that ancestral domains are private community-based property and this presumption is not contingent on whether or not a particular CADT has been approved or awarded.

The Philippines' National Integrated Protected Areas System (NIPAS) law likewise provides for less formal recognition of ancestral domain rights, including restitution if an ancestral domain has been illegally usurped. The NIPAS law also prohibits the involuntary resettlement of indigenous peoples from areas designated for conservation protection.⁶⁶

Bureaucratic Processes Limit Access and Public Participation

IP communities who wish to gain formal legal recognition of their rights to ADs, including presumably the carbon in trees, with a CADT face a lengthy, bureaucratic and expensive process. Under the National Commission on Indigenous Peoples (NCIP) Administrative Order No. 1, i.e. the Implementing Rules and Regulations (IRR) for the IPRA, "self delineation" is mandated.⁶⁷ The "official" delineation of ancestral domains requires a petition filed with the Ancestral Domains Office of the NCIP, as well as a community census, and written documentation and accounts of customs, traditions, anthropological and genealogical data, which serve as proof of the AD claim.⁶⁸ These are required for evaluation and screening by the NCIP, and will help determine whether issuance of CADT is eventually approved or denied.

Similar processes are likewise provided for the drafting of an ADSPP. Under the implementing rules and regulations the NCIP is to assist the Council of Elders/Leaders in preparing a baseline survey and development needs assessment, before validation and submission of the document to the NCIP.⁶⁹ Formal documents such as CADTs and ADSPPs are significant in that they show the national government's willingness to recognize indigenous ownership over ancestral lands and resources, which is a welcome departure from previous natural resource policies.

⁶⁴ The Philippines might consider the issuance of CADTs as having some relevance to "conservation concessions," which are found in Mozambique and a growing number of other countries, drawing a legal analogy from logging concessions. D. Takacs, *Forest Carbon: Law and Property Rights*, p. 55. Although unlike logging concessions CADTs are privately owned by indigenous communities.

⁶⁵ Certificates of Ancestral Domain Title (CADT) issued from 2002-2010. National Commission on Indigenous Peoples Ancestral Domain Information System. <http://www.202.57.46.78/adis/Public/ApprovedCADTSummary.aspx>. N.B. These figures seem inflated to the author.

⁶⁶ Republic Act 7586 (1992).

⁶⁷ Rule VIII, Sec. 2.

⁶⁸ Rule VIII, Part I, Sec. 2.

⁶⁹ Rule VII, Part II, Section 3.

This need for documentation and paperwork, however, can severely limit local participation and procurement of formal legal recognition. Many IP communities in the Philippines lack access to social services, including, and arguably most significantly, education. Although the IRR provides that the exercise of rights is to be based on indigenous knowledge systems, ultimately, the documents need to be written, processed and codified to conform to the government's "mainstream" standards.

Engaging in governmental processes requires resources at an early stage and beyond as expenses are incurred at the outset for the preparations and manpower that go into delineating, mapping and documenting an ancestral domain. With the meagre budget of the NCIP from the national government, finances can only stretch so far. It is therefore not uncommon for many CADT or ADSDPP drafting processes to be stalled by lack of funds, especially within IP communities that are unable to source their own independent financing.

Furthermore, on the ground, it is not uncommon for private entities, and often government officials, to demand documents from indigenous communities. They are ostensibly sought as "shields" against encroachment, which begs the question of why encroachment takes place to begin with, especially given the strong and progressive wording of the IPRA and the protection provided under the Constitution. Thus, it is potentially dangerous that these formal sources of recognition become the prevailing norm. Protecting the property rights of indigenous peoples cannot be reduced to documents or paper based protection.

Another outstanding concern in the Philippines, and also by comparison elsewhere, involves the legal personality of the community organization that holds the CADTs and prospectively the rights of carbon in trees. Individuals are legal personalities in their own right. But local communities are not. In many cases, groups have incorporated into non-stock, non-profit corporations which become the legal owners of CADTs. The problem is that many local non-profit corporations lack the capacity to file annual reports detailing a general membership meeting, a financial report and a meeting by the organizations board of directors at the Securities and Exchange Commission in Manila. It is recommended that a census of all adults in the community be appended to any CADT, and this census will provide a second definition of the legal personality.

Conclusion

The trend towards community-based private ownership of ancestral domains, including forests, is clear and growing in many parts of the world.⁷⁰ This paper strives to make the case that

⁷⁰ W. Sunderlin, J. Hatcher and M. Liddle. *From Exclusion to Ownership? Challenges and Opportunities in Advancing Forest Tenure Reform*, Washington, DC: Rights and Resources Initiative (2008); A. White and A. Martin, *Who Owns*

indigenous peoples and some other local communities also own the carbon in forests and trees, especially within ancestral domains. This is especially true in countries, such as the Philippines, where national laws already recognize that ancestral domains are privately owned by local indigenous communities.

When drafting new laws related to REDD-plus and the ownership of carbon in trees, policy makers are advised: first, to ensure that the REDD-plus social, governance and environmental safeguards adopted in Cancun are strictly enforced; second, to foster incentives for sustainable carbon-storage activities. In other words legal regimes should foster forest carbon projects that are:

1. *effective* – work without complication and deliver and maintain the desired carbon benefits over a long term;
2. *synergistic*: maximizes benefits for all local communities, climate, biodiversity, and investors; and,
3. *equitable*: benefits are fairly and equitably shared with special emphasis paid to the poor and marginalized.⁷¹

In addition, governments are encouraged to establish and implement social accountability mechanisms that allow citizens to participate in REDD-plus decision-making and implementation. In fact, for indigenous peoples and local communities, social accountability is an imperative given the direct impact of REDD-plus programs on the resources they have protected and on which they depend on, and as argued in this paper, given their ownership rights over the carbon in forests and trees,

Whatever the future of REDD-plus, and however various governments decide who owns the carbon in forests and trees, the integral role of indigenous peoples and local communities is increasingly recognized. This fact alone offers hope that more equitable, environmentally sound and sustainable outcomes are within reach. In recognizing the carbon rights of indigenous peoples and local communities, REDD-plus may be able to achieve its potential not only for climate mitigation but also for sustainable development and environmental justice.

the World's Forests? Forest Tenure and Public Forests in Transition. Washington, DC: Forest Trends and Center for International Environmental Law (2002).

⁷¹ D. Takacas, *Forest Carbon: Law and Property Rights*, p.58. Takacas' paper at pp. 58-66 has an array of recommendations that merit consideration by those designing REDD-plus policies and projects.