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## Implementing a Greener REDD+ in Black & White: Preserving Wounaan Lands and Culture in Panama with Indigenous-Sensitive Modifications to REDD+

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## SPECIAL FEATURE

### IMPLEMENTING A GREENER REDD+ IN BLACK & WHITE: PRESERVING WOUNAAN LANDS AND CULTURE IN PANAMA WITH INDIGENOUS-SENSITIVE MODIFICATIONS TO REDD+

*Cindy Campbell\**

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*Introduction*

“If a tree falls in a forest and no one is around to hear it, does it make a sound?”<sup>1</sup> While philosophers and scientists worldwide have grappled with the answer to this question, one thing is certain—when trees fall in Darién rainforests, there is a far-reaching impact on the Wounaan tribe.<sup>2</sup> The Wounaan reside in Darién, Panama, known for having some of Central America’s richest and most spectacular rainforests.<sup>3</sup> Although these rainforests have long been a safe haven for the Wounaan to live in peace, they have now transformed into a battleground of competing interests and economic opportunism.<sup>4</sup> Deforestation from eco-trafficking, cattle ranching, and illegal logging fueled by the desire for the rainforest’s rosewood have imperiled the Wounaan’s existence and threaten to displace the entire community.<sup>5</sup> In addition to the threat of displacement, and despite many requests to local, national and international authorities for assistance, the Wounaan face an invasion of illegal loggers and the tribe has suffered violent repercussions while defending its territory.<sup>6</sup>

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1. EUGENE KELLY, *THE BASICS OF WESTERN PHILOSOPHY* 108 (2004).

2. The Wounaan are a subgroup of the Chocó family, originating from the Chocó province in Colombia. Lauren Koller-Armstrong, *Indigenous Legal Traditions, Cultural Rights, and Tierras Colectivas: A Jurisprudential Reading from the Emberá-Wounaan Community*, 9 *TRIBAL L.J.* 19, 27 (2008-2009), [http://lawschool.unm.edu/tlj/volumes/vol9/KOLLER\\_Lauren.pdf](http://lawschool.unm.edu/tlj/volumes/vol9/KOLLER_Lauren.pdf) [hereinafter Koller-Armstrong, *Indigenous Legal Traditions*]. Within Chocó, the Wounaan share many cultural similarities with the Emberás, and are collectively known as the *Emberá-Wounaan*. *Id.* at 24 n.30. Although this article focuses on the Wounaan, many of the issues discussed also affect the Emberás.

3. Pascal O. Girot, *The Darién Region Between Colombia and Panama: Gap or Seal?*, in *HUMAN RIGHTS AND THE ENVIRONMENT: CONFLICTS AND NORMS IN A GLOBALIZING WORLD* 174 (Lyuba Zarsky ed., 2002); see also Katharine Mapes, *Expanding Ecotourism: Embedding Environmental Sustainability in Panama's Burgeoning Tourist Industry*, 33 *HARV. ENVTL. L. REV.* 225, 246 (2009) (stating that the Darien rainforests are on a list of one of the world’s top twenty-five “biodiversity hotspots”).

4. See, e.g., John Ahni Schertow, *Panama: Wounaan Attacked by Loggers for Defending Endangered Cocobolo Trees*, *IC MAG.* (Apr. 4, 2012), <https://intercontinentalcry.org/panama-wounaan-attacked-by-loggers-for-defending-endangered-cocobolo-trees/> (discussing a recent conflict between the Wounaan and wood loggers).

5. See, e.g., Mimi Yagoub, *Panama Indigenous Shine Light on Deforestation Caused by Illegal Activity*, *INSIGHT CRIME* (Mar. 20, 2014), <http://www.insightcrime.org/news-briefs/panama-indigenous-shine-light-on-deforestation-caused-by-illegal-activity> (discussing environmental destruction related to drug trafficking in the Darien Gap).

6. See Veronique Pittman, *Conflicts Continue Over Resources in Panama—Two More Indigenous People Killed*, *WORLD POST* (Apr. 11, 2012, 2:38PM), [http://www.huffingtonpost.com/veronique-pittman/indigenous-peoples-in-pan\\_b\\_1263996.html](http://www.huffingtonpost.com/veronique-pittman/indigenous-peoples-in-pan_b_1263996.html).

To prevent increased deforestation and preserve indigenous territory, Panama has proposed to implement a policy known as Reduced Emissions from Deforestation and Forest Degradation (REDD+),<sup>7</sup> a program aimed squarely at reducing deforestation.<sup>8</sup> As proposed, however, REDD+ implementation threatens to dispossess the Wounaan of their land and impede traditional Wounaan practices.<sup>9</sup> By including the Wounaan within the ambit of parties REDD+ would regulate, the Wounaan's autonomy in indigenous land stewardship will be constrained.<sup>10</sup> Moreover, while REDD+ potentially may beneficially impact the environment, faulty implementation may produce unintended consequences such as forced evictions, destruction of the local ecosystem, and overall environmental deterioration.<sup>11</sup> In sum, a solution meant to preserve the rainforest may simultaneously have the effect of undermining indigenous rights by restricting land use. As forest dwellers, the Wounaan are uniquely qualified to sustainably manage forest resources without interference from the government.<sup>12</sup> Even when the Wounaan must cut down trees, the people feel an intrinsic spiritual duty to do so in a responsible and sustainable manner.<sup>13</sup>

International law provides powerful protections to shield indigenous communities like the Wounaan from public and private practices that would interfere with enjoyment of their lands. International agreements such as International Labour Organization Convention No. 169,<sup>14</sup> the United

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7. See *infra* Section I.B.1 for a discussion of REDD's evolution to REDD+.

8. Asociación Indígena Ambiental, *REDD in Panama*, GLOBAL FOREST COALITION, <http://vh-gfc.dpi.nl/img/userpics/File/REDD/REDD-in-Panama.pdf> (last visited Feb. 22, 2016) [hereinafter *REDD in Panama*].

9. See Rhett Butler, *Why Panama's Indigenous Pulled Out of the UN's REDD Program*, MONGABAY (June 25, 2013), <http://news.mongabay.com/2013/0625-panama-coonapip-redd.html#GmKcCVmP8tjxzGp6.99>.

10. "As proposed, Panama's REDD plan failed to guarantee [indigenous] rights over lands that are [theirs] under national law. The way it is written, the plan would allow future governments to invest in [indigenous] territories and remove the natural resources that remain." *Id.*; see also *infra* text accompanying note 108.

11. Holly Brentnall, *U.N.-REDD Program Criticized for Negative Impact on Indigenous Communities*, RECORD (Jan. 28, 2014), <http://www.newsrecord.co/u-n-redd-program-criticized-for-negative-impact-on-indigenous-communities/>.

12. See, e.g., Koller-Armstrong, *Indigenous Legal Traditions*, *supra* note 2, at 29-31 (discussing the unique *Emberá-Wounaan* customs that demonstrate a significant land-culture connection and endure despite the availability of modern conveniences and the development of farming techniques).

13. See *id.*

14. See *infra* Section II.A.1.

Nations Declaration on the Rights of Indigenous People,<sup>15</sup> and the Convention on Biological Diversity<sup>16</sup> provide a sweeping panoply of principles that protect indigenous rights. Despite these agreements, however, Panama is not a party to International Labour Organization Convention No. 169, and the United Nations Declaration on the Rights of Indigenous Peoples is not binding on Panama.<sup>17</sup> Additionally, the Convention on Biological Diversity, to which Panama is a party,<sup>18</sup> addresses indigenous autonomy but places substantial emphasis on state sovereignty.<sup>19</sup>

Panama is recognized as having superior protections aimed at protecting indigenous rights.<sup>20</sup> Law 22 of the Panamanian Constitution grants legal title to indigenous lands in the form of a *comarca*, a type of reservation.<sup>21</sup> Taken together, *Ley 72 de 2008* and Executive Decree 223 recognize that some indigenous lands fall outside the established *comarca* and that indigenous communities should have some means to have those lands formally recognized.<sup>22</sup> Despite these legal advancements, Panama's laws fail to address indigenous concerns because the government has yet to approve Wounaan applications that were submitted after the new laws were enacted.<sup>23</sup> The majority of Wounaan lands fall outside of their established

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15. See *infra* Section II.A.2.

16. See *infra* Section II.A.3.

17. See generally Cindy Campbell, "Give Them a Dam Break!" *Protecting the Ngäbe-Buglé Community of Panama with Clean Development Mechanism Safeguards to Promote Culturally Sensitive Development*, 2 AM. INDIAN L.J. 547, 562-68 (2014), <http://www.law.seattleu.edu/Documents/ailj/Spring%202014/Campbell.pdf>.

18. See *List of Parties*, CONVENTION ON BIOLOGICAL DIVERSITY, <https://www.cbd.int/information/parties.shtml> (last visited Feb. 22, 2016).

19. Baruch A. Brody, *Intellectual Property, State Sovereignty, and Biotechnology*, 20 KENNEDY INST. OF ETHICS J. 51, 53-54 (2010).

20. See Roque Roldán Ortega, *Models for Recognizing Indigenous Land Rights in Latin America* iii, 8 (World Bank Env't Dep't, Working Paper No. 99, 2004), <http://siteresources.worldbank.org/GLOBALENVIRONMENTFACILITYGEFOPERATIONS/Resources/Publications-Presentations/Biopublication2005ModelsforRecognizing.pdf>.

21. Koller-Armstrong, *Indigenous Legal Traditions*, *supra* note 2, at 23-24.

22. See discussion *infra* Section II.B.

23. Megan, *Native Future: Ten Years Helping Protect Wounaan Forests and Culture*, NATIVE FUTURE (Apr. 3, 2014), <https://web.archive.org/web/20150917125617/http://www.nativefuture.org/2014/04/03/native-future-ten-years-helping-protect-wounaan-forests-and-culture/> [hereinafter Megan, *Native Future*].

*comarca* boundary line.<sup>24</sup> Therefore, Panama's failure to grant the Wounaan community legal title to their *non-comarca* territory leaves the tribe vulnerable to illegal settlement on their lands, forcing the Wounaan to continuously fight to defend their territory.<sup>25</sup>

Part I of this paper discusses the history of Panama's Wounaan tribe, their struggle to protect their lands from deforestation, and their need to have lands falling outside of their *comarca* legally recognized through collective land titling initiatives. It also discusses Panama's potential implementation of the REDD+ regime and highlights REDD+'s current deficiencies in protecting indigenous rights. Part II reviews International Labour Organization Convention No. 169, the United Nations Declaration on the Rights of Indigenous Peoples, and the Convention on Biological Diversity. It discusses why these powerful indigenous protections are not sufficient to safeguard Wounaan lands, and examines Panama's *Ley 72 de 2008*, and its subsequent Executive Decree 223, focusing on their failure to adequately secure Wounaan lands. Part III proposes the following reforms: (1) enhanced land tenure rights to secure Wounaan lands prior to REDD+ implementation; (2) inclusion of free, prior, and informed consent in the REDD+ implementation decision-making process so that the Wounaan have an active voice in any initiative concerning their lands; and (3) use of indigenous knowledge as a means to achieve sustainable development. Inclusion of indigenous-sensitive reforms to REDD+ implementation in Panama will preserve Wounaan territory and culture, while adding comprehensive and environmentally conscious solutions to ongoing problems.

### *I. The Effort to Preserve Wounaan Lands Before REDD+ Implementation*

The Wounaan people who reside in Panama's fertile rainforests are in peril of losing their ancestral lands to deforestation, placing this community in jeopardy of extinction.<sup>26</sup> Panama's REDD+ initiative could potentially prevent this disaster, but without appropriate safeguards before implementation, the Wounaan could be irreparably harmed.<sup>27</sup>

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24. See *Protecting 1 Million Acres in Panama*, RAINFOREST FOUND. US, <https://web.archive.org/web/20140418205634/http://www.rainforestfoundation.org/protecting-1-million-acres-panama> (last visited Feb. 22, 2016).

25. Bureau of Democracy, Human Rights & Labor, *2013 Human Rights Reports: Panama*, U.S. DEP'T OF STATE (Feb. 27, 2014), <http://www.state.gov/j/drl/rls/hrrpt/2013/wha/220460.htm>.

26. See YAGOUB, *supra* note 5.

27. *REDD in Panama*, *supra* note 8, at 7.

A. *The Wounaan Tribe of Darién, Panama*

The Wounaan are one of seven indigenous<sup>28</sup> groups formally recognized in Panama.<sup>29</sup> Some Wounaan occupy one of Panama's five *comarcas*, an autonomous region legally reserved to indigenous groups.<sup>30</sup> Others can be found spread throughout Darién and Central Panama.<sup>31</sup> Because they generally avoid contact with outside groups, the Wounaan are known as the most isolated indigenous community in Panama.<sup>32</sup> Originating from Chocó, Colombia, the Wounaan began settling in the nearby Darién rainforests of Panama alongside the Emberás in the mid-twentieth century.<sup>33</sup> Although the Emberás and Wounaan are closely related

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28. Indigenous people include a diverse group of communities who are “*indigenous* because their ancestral roots are embedded in the lands on which they live, or would like to live, much more deeply than the roots of more powerful sectors of society living on the same lands or in close proximity. And they are *peoples* in that they comprise distinct communities with a continuity of existence and identity that links them to the communities, tribes, or nations of their ancestral past.” Randall S. Abate & Elizabeth Ann Kronk, *Commonality Among Unique Indigenous Communities: An Introduction to Climate Change and Its Impacts on Indigenous Peoples*, in CLIMATE CHANGE AND INDIGENOUS PEOPLES: THE SEARCH FOR LEGAL REMEDIES 3, 4 (Randall S. Abate & Elizabeth Ann Kronk eds., 2013) (quoting S. JAMES ANAYA, INTERNATIONAL HUMAN RIGHTS AND INDIGENOUS PEOPLES 1 (2009)).

29. *The Wounaan*, NATIVE FUTURE, <http://www.nativefuture.org/the-wounaan/> (last visited Apr. 5, 2016). The other groups are the Ngabe-Bugle (viewed by some as two groups), Kuna, Emberá, Bribri, and Teribe. *Id.*; see also *Indigenous Peoples in Panama*, Int'l Work Group for Indigenous Affairs, <http://www.iwgia.org/regions/latin-america/panama> (last visited Sept. 21, 2014); *Update 2011-Panama*, INTERNATIONAL WORK GROUP FOR INDIGENOUS AFFAIRS, <http://www.iwgia.org/regions/latin-america/panama/887-update-2011-panama> (last visited Sept. 21, 2014).

30. Martin Philipp Heger & Zachary McNish, *Forest Dwellers with No Forest: The Economic and Ecological Consequences of Panama's Land Tenure System for the Wounaan People*, NZCEL CONFERENCE 2009, at 5 (2009), [http://www.nzcel-conf.auckland.ac.nz/papers/Heger\\_Martin.pdf](http://www.nzcel-conf.auckland.ac.nz/papers/Heger_Martin.pdf). The Wounaan and Embéras occupy the Emberá-Wounaan comarca, which is divided in two separate areas—Cemaco District and Sambú District. Peter H. Herlihy, *Participatory Research Mapping of Indigenous Lands in Darién, Panama*, 62 HUM. ORG. 315, 318 (2003), <http://sfaajournals.net/doi/pdf/10.17730/humo.62.4.fu05tgbkbnv2yvk8p> [hereinafter Herlihy, *Participatory Research Mapping*].

31. Peter H. Herlihy, *Central American Indian Peoples and Lands Today*, in CENTRAL AMERICA: A NATURAL AND CULTURAL HISTORY 215 (Anthony G. Coates ed., 1997).

32. *Indigenous Peoples of Panama*, MORALES MISSIONS, <http://www.moralesmissions.org/indigenous-peoples-of-panama.html> (last visited Jan. 10, 2015).

33. *The Wounaan and Embéras Indians of the Darién of Panamá*, MICHAEL SMITH GALLERY, <https://web.archive.org/web/20140718073523/http://michaelsmithgallery.com/node/80> (last visited Feb. 22, 2016).

through their Colombian roots and share similar physical characteristics and traditions, the Wounaan language remains distinct from the Emberás.<sup>34</sup> The Wounaan are forest dwellers living a nomadic lifestyle and occupy villages consisting of small groups of extended families.<sup>35</sup> As of 2010, the Wounaan numbered approximately seven thousand and were comprised of sixteen communities spread across the Eastern Panama and Darién Provinces.<sup>36</sup>

The Wounaan's culture, traditions, and very existence are inextricably tied to their land.<sup>37</sup> They view territory as central to an indigenous worldview and as the means through which they advance cultural traditions and affirm their independence as a tribe.<sup>38</sup> Spiritually, the Wounaan believe that the spirit of their ancestors reside within the land and that they, along with these spirits and all living creatures, are one with the universe.<sup>39</sup> For these reasons, the Wounaan regard their ancestral lands as sacred and essential to the preservation of their cultural identity.<sup>40</sup> Culturally, the Wounaan subsist off the land through traditional farming techniques (such as slash-and-burn) to provide their agricultural needs such as rice, plantains, bananas, and sugarcane.<sup>41</sup> Subsistence is a cooperative activity and requires

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34. Koller-Armstrong, *Indigenous Legal Traditions*, *supra* note 2, at 28.

35. *The Wounaan*, *supra* note 29.

36. J. Velasquez Runk et al., *Political Economic History, Culture, and Wounaan Livelihood Diversity in Eastern Panama*, 24 AGRIC. & HUM. VALUES 93, 94 (2007); *see also Resultados Finales Básicos*, CONTRALORÍA GENERAL DE LA REPÚBLICA DE PANAMÁ INSTITUTO NACIONAL DE ESTADÍSTICA Y CENSO (2010), [http://www.contraloria.gob.pa/inec/Publicaciones/Publicaciones.aspx?ID\\_SUBCATEGORIA=59&ID\\_PUBLICACION=360&ID\\_IDIOMA=1&ID\\_CATEGORIA=13](http://www.contraloria.gob.pa/inec/Publicaciones/Publicaciones.aspx?ID_SUBCATEGORIA=59&ID_PUBLICACION=360&ID_IDIOMA=1&ID_CATEGORIA=13) (click on "Cuadro 20").

37. *See* Abate & Kronk, *supra* note 28.

38. Koller-Armstrong, *Indigenous Legal Traditions*, *supra* note 2, at 28.

39. *Id.* at 28-29.

40. *Id.*

41. Heger & McNish, *supra* note 30, at 8. "Slash and burn farming is a form of shifting agriculture where the natural vegetation is cut down and burned as a method of clearing the land for cultivation. When the plot becomes infertile, the farmer moves to a new fresh plot . . . This process is repeated over and over." *What Is Slash and Burn Farming?*, RAINFOREST SAVER, <http://www.rainforestsaver.org/what-slash-and-burn-farming> (last updated Dec. 20, 2015). "Slash-and-burn" is also known as "swidden" or "shifting" agriculture. *Id.* For this reason, indigenous communities need considerable expanses of land to survive. Ironically, rainforest destruction has often been blamed on indigenous use of slash-and-burn techniques for survival, "effectively blam[ing] the victims for the cause of deforestation." MARTIN MOWFORTH, *THE VIOLENCE OF DEVELOPMENT: RESOURCE DEPLETION, ENVIRONMENTAL CRISES AND HUMAN RIGHTS ABUSES IN CENTRAL AMERICA* 107 (2014). In fact, studies have shown no evidence that shifting agriculture causes permanent deforestation. CAROL J. PIERCE COLFER, *BEYOND SLASH AND BURN: BUILDING ON INDIGENOUS MANAGEMENT OF BORNEO'S TROPICAL RAIN FORESTS* 149 (1997).

the Wounaan to work in unison to ensure the livelihood of the entire community.<sup>42</sup>

Additionally, because they are the poorest of indigenous communities in Panama, the Wounaan rely heavily on the natural resources of the rainforest to weave baskets and produce artwork to generate revenue for their villages.<sup>43</sup> The women of the villages collect the plants and forestry they need to create their artwork by harvesting it from the surrounding area rather than by planting the resources they need closer to home.<sup>44</sup> Some of their most famous creations are made using highly sought after cocobolo (or rosewood, a species native to Central America) from which they are able to make baskets, woodcarvings, figurines, boats, and a host of other items.<sup>45</sup>

Due to the significance of land ownership to maintain their way of life, the Wounaan waged a hard-fought battle for land recognition, and by 1983 a portion of the Emberás and Wounaan lands was granted *comarca* status.<sup>46</sup> Gaining *comarca* status was a considerable step forward, however, much of the Wounaan's land lies outside of the recognized territory and does not have the same protections afforded the lands within the *comarca*.<sup>47</sup>

The Darién province, where the Wounaan reside, is rich in biological and species diversity.<sup>48</sup> Therefore—due to lack of protection and its appeal to developers—Wounaan territory outside the *comarca* remains vulnerable to colonists, land-grabbers, and other outside incursions seeking to exploit natural resources like cocobolo for financial gain.<sup>49</sup> The Wounaan have

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42. Peter Herlihy, *Emberá and Wounaan*, ENCYCLOPEDIA.COM, <http://www.encyclopedia.com/doc/1G2-3458001347.html> (last visited Sept. 21, 2014).

43. *The Wounaan*, *supra* note 29.

44. Koller-Armstrong, *Indigenous Legal Traditions*, *supra* note 2, at 30; *see also* J. Velásquez Runk, *Wounaan and Emberá Use and Management of the Fiber Palm *Astrocaryum standleyanum* (Arecaceae) for Basketry in Eastern Panamá*, 55 *ECON. BOTANY* 72, 75 (2001), <http://www.jstor.org/stable/4256392>.

45. *Growing Demand for Cocobolo Wood*, PLANTING EMPOWERMENT (Apr. 4, 2012), <http://www.plantingempowerment.com/blog/growing-demand-for-cocobolo-wood.html>; *see also* Heger & McNish, *supra* note 30, at 9.

46. Koller-Armstrong, *Indigenous Legal Traditions*, *supra* note 2, at 24. Law 22 established the *Comarca Embera-Wounaan*, thereby granting the Emberá and Wounaan indigenous protections and title to a portion of their land. *Id.*

47. *Id.* at 33.

48. Herlihy, *Participatory Research Mapping*, *supra* note 30.

49. *See Forest Protection Plan Promoted in Panama's Darién Indigenous Zone*, IUCN (Apr. 8, 2013), [http://www.iucn.org/news\\_homepage/news\\_by\\_date/?12757/1/Darienprotection](http://www.iucn.org/news_homepage/news_by_date/?12757/1/Darienprotection). Darién forests are rich in mahogany, yellow pine, and cocobolo, all of which have high commercial value. *Id.* In fact, cocobolo was added to the list of precious hardwoods

been attacked and beaten for defending this precious resource essential to their livelihood.<sup>50</sup> Moreover, the Wounaan must frequently contend with drug cartels because the Darién rainforests are viewed as the perfect place for eco-trafficking due to the forests' density and reputation among travelers for being dangerous.<sup>51</sup> Because of these challenges to Wounaan sovereignty over their lands, the tribe has been diligently pushing for recognition of their collective lands (*tierras colectivas*).<sup>52</sup>

### B. REDD+ Solutions and REDD+ Problems

REDD+ is a climate change mitigation mechanism aimed squarely at preserving forests to prevent the release of carbon into the atmosphere.<sup>53</sup> Although REDD+ appears to be a timely solution to deforestation and forest degradation concerns in Panama's rainforests, if it lacks appropriate enhancements designed to safeguard indigenous rights, then REDD+ can do more harm than good.<sup>54</sup>

#### 1. The History of REDD+

REDD was first introduced as a sustainable means to curb unprecedented deforestation that was occurring at unprecedented rates.<sup>55</sup> Deforestation was

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requiring trade controls because of the insatiable demand for this resource. See *CITES Extends Trade Controls to 111 Precious Hardwood Species from Madagascar and Panama*, CITES (Sept. 28, 2011), [http://www.cites.org/eng/news/pr/2011/20110928\\_timber\\_appendixIII.php](http://www.cites.org/eng/news/pr/2011/20110928_timber_appendixIII.php).

50. Schertow, *supra* note 4; see also Jeremy Hance, *Featured Video: Indigenous Tribe Faces Loggers, Ranchers, and Murder in Bid to Save Their Forests*, MONGABAY (Mar. 19, 2014), <http://news.mongabay.com/2014/0319-hance-wounaan-one-video.html>; *Native Lines-La Trocha de Platanares*, VIMEO, (Dec. 23, 2013), <http://vimeo.com/82535846>.

51. Sean Mattson, *Panama's Darien Teems with FARC Drug Runners*, REUTERS (May 25, 2010, 10:31 PM), <http://www.reuters.com/article/us-panama-drugs-idUSTRE64P01720100526#ldTEZA8Fdhsq80Ae.97>.

52. Koller-Armstrong, *Indigenous Legal Traditions*, *supra* note 2, at 20, 28.

53. Joyeeta Gupta et al., *Climate Change and Forests: From the Noordwijk Declaration to REDD*, in *CLIMATE CHANGE, FORESTS AND REDD: LESSONS FOR INSTITUTIONAL DESIGN* 1, 1-2 (Joyeeta Gupta et al. eds., 2013). Deforestation is the process of clearing natural forests by way of human activities like logging. *Deforestation*, WWF, [http://wwf.panda.org/about\\_our\\_earth/about\\_forests/deforestation/](http://wwf.panda.org/about_our_earth/about_forests/deforestation/) (last visited Nov. 20, 2014). Degradation is the gradual destruction of the forest through human-induced activities like forest fires and logging. See BRONSON GRISCOM ET AL., *THE HIDDEN FRONTIER OF FOREST DEGRADATION: A REVIEW OF THE SCIENCE, POLICY AND PRACTICE OF REDUCING DEGRADATION EMISSIONS* 7 (2xt009).

54. See *REDD in Panama*, *supra* note 8, at 7.

55. Stephanie Baez, *The "Right" REDD Framework: National Laws that Best Protect Indigenous Rights in a Global REDD Regime*, 80 *FORDHAM L. REV.* 821, 827-29 (2011),

found to be a significant source of global carbon emissions totaling approximately eighteen percent of all annual emissions.<sup>56</sup> Despite this reality, no mechanism had been established to effectively mitigate this problem.<sup>57</sup> In response to mounting fear of the environmental disasters threatened by deforestation, REDD discussions began in the 1970s.<sup>58</sup> Various incarnations of REDD-*ish* policies emerged in the form of international environmental policy initiatives aspiring to preserve natural resources.<sup>59</sup>

Ultimately, REDD became REDD+ with the addition of sustainable practices permitting REDD+ to include forests previously experiencing degradation and forest management practices.<sup>60</sup> By 2007, REDD+ was finally adopted by the United Nations when the Conference of the Parties published the *Bali Action Plan*.<sup>61</sup>

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<http://ir.lawnet.fordham.edu/flr/vol80/iss2/14>; see also Randall S. Abate & Todd A. Wright, *A Green Solution to Climate Change: The Hybrid Approach to Crediting Reductions in Tropical Deforestation*, 20 DUKE ENVTL. L. & POL'Y F. 87, 89 (2010).

56. Abate & Wright, *supra* note 55, at 87, 87-88.

57. *Id.* at 94-96 (discussing three mechanisms aimed at combatting climate change that failed to adequately address the issue of deforestation).

58. ANTHONY HALL, *FORESTS AND CLIMATE CHANGE: THE SOCIAL DIMENSIONS OF REDD IN LATIN AMERICA* 100 (2012).

59. *Id.* at 25. Examples of these policies include: United Nations Environment Programme (1972), World Conservation Strategy (1980), the Brandt Commission Reports (1983), the Brundtland Report (1987), the United Nations Conference on Environment and Development (1992), and the Convention on Biological Diversity (1993). *Id.* at 25-31.

60. Frederik Vroom, *REDD: Offsetting Emissions to Save Natural Forests*, SILVICULTURE MAG., Winter 2010, at 10, 11, <http://www.silviculturemagazine.com/sites/silviculturemagazine.com/files/issues/2011062309/winter2010.pdf>. There are several versions of REDD depending on the REDD activities performed: 1) RED (deforestation only), 2) REDD (includes degradation), 3) REDD+ (includes afforestation and forest management initiatives), 4) REDD++ (includes emissions from other land conversions), and 5) UN-REDD (REDD as developed by the United Nations). Rowena Maguire, *Deforestation, REDD, and International Law*, in *ROUTLEDGE HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW* 697, 698 (Shawkat Alam et al. eds., 2013). Unless specifically noted otherwise, these terms may be used interchangeably in this article.

61. HALL, *supra* note 58, at 32; see also TOM GRIFFITHS, *FOREST PEOPLES PROGRAMME, SEEING 'REDD'? FORESTS, CLIMATE CHANGE MITIGATION AND THE RIGHTS OF INDIGENOUS PEOPLES AND LOCAL COMMUNITIES* 4 (advance draft Dec. 3, 2008), <http://www.forestpeoples.org/sites/fpp/files/publication/2010/08/seeingreddupdatedraft3dec08eng.pdf> (detailing the emergence of REDD in international policy discussions on climate change).

Though originally excluded from the Kyoto Protocol<sup>62</sup>, REDD+ fills a gap in targeting carbon emissions reduction by specifically addressing deforestation and forest degradation.<sup>63</sup> REDD+ provides financial incentives to participants for mitigating deforestation and forest degradation through direct monetary payments or with emissions credits that can be traded in the carbon market.<sup>64</sup> REDD+'s potential benefits include creating new revenue streams, contributing to community security through forest preservation, and empowering local communities by giving them a voice in their forests' continued survival.<sup>65</sup>

Theoretically, REDD+ presents the most direct mitigation strategy for combating deforestation; however, its acceptance has been slow as a result of concerns about the impact on the indigenous and forest-dependent communities.<sup>66</sup> These concerns were addressed in the Cancun Agreements of 2010.<sup>67</sup> The Cancun Agreements outline seven REDD+ safeguards to implement in REDD+ activities.<sup>68</sup> These safeguards are minimum

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62. Expired as of 2012, the Kyoto Protocol was an international agreement linked to the United Nations Framework Convention on Climate Change, which commits its Parties by setting internationally binding emission reduction targets. *Kyoto Protocol*, UNITED NATIONS FRAMEWORK CONVENTION IN CLIMATE CHANGE, [http://unfccc.int/kyoto\\_protocol/items/2830.php](http://unfccc.int/kyoto_protocol/items/2830.php) (last visited Nov. 20, 2014).

63. Randall S. Abate, *REDD, White, and Blue: Is Proposed U.S. Climate Legislation Adequate to Promote a Global Carbon Credits System for Avoided Deforestation in a Post-Kyoto Regime?*, 19 TUL. J. INT'L & COMP. L. 95, 96-97 (2010). REDD was originally proposed as one of the flexibility mechanisms under the Kyoto Protocol but was eliminated because of the uncertainty surrounding developing countries' sovereignty over land use. *Id.* at 98.

64. Annecoos Wiersema, *Climate Change, Forests, and International Law: REDD's Descent into Irrelevance*, 47 VAND. J. TRANSNAT'L L. 1, 4 (2014). The carbon payments are ostensibly similar to the "cap and trade" system where parties receive carbon credits that can be traded in exchange for reduced carbon emissions. *See generally Cap and Trade*, EPA.GOV, <http://www.epa.gov/captrade/> (last updated May 10, 2012).

65. ERIN MYERS MADEIRA ET AL., NATURE CONSERVANCY, SHARING THE BENEFITS OF REDD+: LESSONS FROM THE FIELD 11 (2013), [https://www.conservationgateway.org/Documents/tnc\\_benefit%20sharing\\_web.pdf](https://www.conservationgateway.org/Documents/tnc_benefit%20sharing_web.pdf).

66. Ctr. for Int'l Envtl. Law, Human Rights Analysis of the Doha Gateway (UNFCCC 18th Conference of the Parties), at 5 (last revised May 29, 2013), [http://www.ciel.org/Publications/Analysis\\_Doha\\_10Apr2013.pdf](http://www.ciel.org/Publications/Analysis_Doha_10Apr2013.pdf).

67. *Id.*; *see also* D. REY ET AL., A GUIDE TO UNDERSTANDING AND IMPLEMENTING THE UNFCCC REDD+ SAFEGUARDS: A REVIEW OF RELEVANT INTERNATIONAL LAW 11 (2013), <http://www.clientearth.org/reports/a-guide-to-understanding-and-implementing-unfccc-redd+-safeguards.pdf> ("[T]he term 'UNFCCC REDD+ Safeguards' refers to paragraph 2 of Appendix I to decision 1/CP.16 (the Cancun Agreement).").

68. Maguire, *supra* note 60, at 712.

requirements instituted by the United Nations Framework Convention on Climate Change to promote respect for the environment, preserve the forests, and protect human rights and indigenous communities who subsist within the forests.<sup>69</sup>

First, REDD+ implementation must not contravene relevant international protections.<sup>70</sup> By aligning REDD+ strategies with international conventions and treaties, REDD+ participants support the United Nations Framework Convention on Climate Change's mission to promote consistency in the international community by ensuring that parties observe existing international agreements.<sup>71</sup> Second, REDD+ initiatives must respect domestic laws.<sup>72</sup> Simply stated, REDD+ implementation must consider national sovereignty and legislation by including access to information and the right to participation in policy decisions affecting the environment.<sup>73</sup> The third safeguard can only be fully appreciated through the lens of the United Nations Declaration on the Rights of Indigenous Peoples and

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69. See ALLISON SILVERMAN, CTR. FOR INT'L ENVTL. LAW, KNOW YOUR RIGHTS RELATED TO REDD+: A GUIDE FOR INDIGENOUS AND COMMUNITY LEADERS 6 (May 2014), [http://www.ciel.org/Publications/REDD\\_Guide\\_May2014.pdf](http://www.ciel.org/Publications/REDD_Guide_May2014.pdf). The safeguards agreed to by the parties are:

- (1) The actions complement or are consistent with the objectives of national forest programmes and relevant international conventions and agreements;
- (2) Transparent and effective national forest governance structures, taking into account national legislation and sovereignty;
- (3) 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;
- (4) The full and effective participation of relevant stakeholders, in particular, indigenous peoples and local communities . . . ;
- (5) That actions are consistent with the conservation of natural forests and biological diversity, ensuring that the 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;
- (6) Actions to address the risks of reversals; [and]
- (7) Actions to reduce displacement of emissions.

Maguire, *supra* note 60, at 712 (emphasis omitted).

70. REY ET AL., *supra* note 67, at 25.

71. *Id.*

72. *Id.* at 26.

73. *Id.*

International Labour Organization Convention No. 169<sup>74</sup> that address indigenous rights.<sup>75</sup> This safeguard mandates indigenous inclusion in REDD+ initiatives by observing international conventions protecting indigenous rights, utilizing indigenous knowledge during the process, sharing the benefits gleaned from REDD+ with the indigenous and local communities, and respecting their procedural rights to remain informed.<sup>76</sup>

The fourth safeguard encourages “*full and effective participation*” of relevant stakeholders to include indigenous peoples and local communities.<sup>77</sup> Full and effective participation requires information sharing, collaboration in idea presentation and communication, and a prominent role in decision-making processes.<sup>78</sup> This ensures that *all* relevant interests are adequately represented and considered prior to implementation taking place.<sup>79</sup> Without full and effective participation, REDD+ would likely have detrimental effects on the forests it is meant to preserve and harm local communities—especially indigenous communities who are often powerless against national and corporate agendas. The fifth, and probably most self-evident, safeguard is ensuring that any actions taken in REDD+ programming are consistent with preserving natural forests.<sup>80</sup> This includes conservation of biological diversity.<sup>81</sup> Finally, the last two safeguards exist to ensure that global greenhouse gas emissions are reduced

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74. For an in-depth analysis of the United Nations Declaration on the Rights of Indigenous Peoples and International Labour Organization Convention No.169, see discussion *infra* Section II.A.

75. REY ET AL., *supra* note 67, at 38-43.

76. *See id.* at 38-47.

77. *Id.* at 49 (emphasis added).

78. *Id.* at 49-50.

79. *Id.* at 55-58 (“Consultations have to be undertaken with the objective of reaching agreement or consent to the proposed measures.”).

80. REY ET AL., *supra* note 67, at 61. There is ongoing discussion concerning the lack of an appropriate definition of “natural forest” in the UNFCCC. *Id.* at 61-62. The current definition would allow for forests germane to a territory to be cut down and replaced with plantations, eliminating biodiversity. Rhet Butler, *Weak Forest Definition May Undermine REDD Efforts*, MONGABAY (Aug. 20, 2009), <http://news.mongabay.com/2009/0819-forests.html#sthash.LKJgRQJm.dpbs>.

81. REY ET AL., *supra* note 67, at 61. “Biological diversity” is defined by article 2 of the Convention of Biological Diversity as “the variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems.” Convention on Biological Diversity art. 2, June 5, 1992, S. Treaty Doc. No. 103-20, 1760 U.N.T.S. 79, <https://www.cbd.int/doc/legal/cbd-en.pdf>. See *infra* Section II.A for a full discussion of the CBD.

and that these reductions continue long after individual project based reductions take place.<sup>82</sup> Simply stated, permanence is the *sine qua non* of any REDD+ initiative.<sup>83</sup> Therefore, REDD+ activities that do not reduce greenhouse gas emissions or prevent their return into the environment are ineffective and fail to meet the requirements of the Cancun Agreements.

While REDD+ promises tangible results in the race to curb deforestation, it is not without its share of criticisms. Among the many criticisms of REDD+, inadequate property rights and disregard for indigenous sovereignty take center stage in discussions with indigenous peoples and human rights organizations.<sup>84</sup> Because REDD+ initiatives essentially turn forests into commodities by drawing financial resources into developing countries, land tenure rights are crucial to determining who has the authority to accept or reject REDD+ projects, who can manage the forests, and who is ultimately the financial beneficiary of the program.<sup>85</sup> On a domestic level, this causes friction between the major stakeholders involved—the developing country, indigenous peoples, and various commercial entities.<sup>86</sup> Another criticism of REDD+ is that it does not effectively curb the major drivers of deforestation.<sup>87</sup> Instead, it merely diverts the prohibited activities from protected areas to non-protected areas like untitled indigenous land.<sup>88</sup>

Indigenous rights in REDD+ have long been a source of robust debate and contention among parties to REDD+ negotiations. This is because of the difficulty in clearly defining the scope of indigenous participation in its implementation.<sup>89</sup> The indigenous REDD+ movement was born out of the desire to see indigenous peoples receive: (1) a direct financial benefit from REDD+, (2) an unambiguous guarantee of indigenous land ownership, and (3) unrestricted access to forests permitting them to economically and

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82. REY ET AL., *supra* note 67, at 70.

83. *Id.* at 70-71.

84. *See* Butler, *supra* note 80.

85. *See generally id.*; Constance Haug & Joyeeta Gupta, *The Emergence of REDD on the Global Policy Agenda*, in CLIMATE CHANGE, FORESTS AND REDD: LESSONS FOR INSTITUTIONAL DESIGN, *supra* note 53, at 77, 88-90.

86. *Id.* at 89-90.

87. MOWFORTH, *supra* note 41, at 120.

88. *Id.* This is also known as “leakage” as addressed in the seventh REDD safeguard. Leakage occurs when REDD prohibits deforestation in a protected area and the driver relocates to an unprotected area. REDD: An Introduction, REDD-MONITOR (Nov. 8, 2014), <http://www.redd-monitor.org/redd-an-introduction/>.

89. Griffiths, *supra* note 61, at 6-7.

sustainably manage forest resources.<sup>90</sup> Indigenous peoples demand that REDD+ integrate with the indigenous way of life.<sup>91</sup>

Accordingly, organizations like Coordinator of Indigenous Organizations of the Amazon Basin (COICA) have developed an indigenous REDD+ program that guarantees the rights of indigenous peoples while respecting their vision for their lands.<sup>92</sup> The program has made significant achievements to include REDD+ processes addressing important matters like land use, tenure, and holistic natural resource management.<sup>93</sup> Other tenable benefits of COICA's REDD+ proposal are: (1) international recognition and participation in the Amazon indigenous REDD+ program, (2) increased dialogue between indigenous leaders and the international community, which builds strong alliances and provides increased funding to REDD+ initiatives, and (3) strengthening of indigenous technical and political abilities through REDD+ activities, negotiations, and relationship-building with other nations.<sup>94</sup> When REDD+ is implemented in this manner, indigenous communities like the Wounaan can benefit from REDD+ because, in addition to having assurances that they will not be evicted from their land, they also gain control over how their resources are managed.<sup>95</sup>

## 2. UN-REDD+ Implementation in Panama

As a country rich in biodiversity, Panama has a strong incentive to implement a REDD+ program that would conserve the lush rainforests for which the Darién province is known.<sup>96</sup> Despite this incentive, Panama lags behind in effectively implementing REDD+ within its borders. It should be noted, however, that it has demonstrated a strong commitment towards implementation.<sup>97</sup> Although financial benefits to Panama from REDD+ are still being measured and calculated, it has been shown that REDD+ can also

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90. Abate & Kronk, *supra* note 28, at 10-11.

91. WWF, HOLISTIC MANAGEMENT OF INDIGENOUS TERRITORIES: DEVELOPMENT OF THE AMAZONIAN INDIGENOUS REDD+ PROPOSAL 1 (WWF Factsheet 2013), [http://reddcommunity.org/sites/default/files/IP\\_Holistic-Management\\_medRes.pdf](http://reddcommunity.org/sites/default/files/IP_Holistic-Management_medRes.pdf).

92. *Id.* at 3. COICA is a conglomerate of indigenous activists that advocates for indigenous demands to international agencies like World Bank. *Coordination of Indigenous Organisations of the Amazon Basin (COICA)*, REDD DESK, (Nov. 20, 2014), <http://the.redddesk.org/countries/actors/coordination-indigenous-organisations-amazon-basin-coica>.

93. WWF, *supra* note 91, at 3.

94. *Id.* at 1-4.

95. *Id.* at 3.

96. HALL, *supra* note 58, at 25.

97. *Id.* at 93.

benefit Panama monetarily by contributing to annual income of goods and services to the country and preventing soil erosion.<sup>98</sup> Thus, in an effort to assuage indigenous concerns regarding their lands and preserve forest biodiversity, Panama undertook to implement the UN-REDD+ program.<sup>99</sup>

Deforestation in Panama has been occurring for many years.<sup>100</sup> The United Nations notes that REDD+ implementation is crucial in Panama because Panama's forest cover has decreased from 70% in 1947 to 45% in 2000.<sup>101</sup> Deforestation rates in Panama are a direct result of drivers like logging, narcotics trafficking, and cattle ranching.<sup>102</sup> Incessant demand for cocobolo wood has precipitated an illegal logging epidemic in Darién rainforests.<sup>103</sup> Additionally, drug traffickers fleeing Mexico's drug enforcement initiatives push southward into many areas of Central America, including Panamanian rainforests, causing "narco-deforestation" as the dense forests provide a formidable headquarters for drug activities.<sup>104</sup>

Since the 1980s, Panama has created many protected areas on indigenous lands in a national conservation effort to protect its forests, which includes the Darién National Park.<sup>105</sup> Nevertheless, creating conservation land does not assist the Wounaan because this type of protection places limitations on

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98. ULF NARLOCH, UN-REDD PROGRAMME, THE POTENTIAL ECONOMIC VALUES OF THE MULTIPLE BENEFITS FROM REDD+ IN PANAMA: A SYNTHESIS OF EXISTING VALUATION STUDIES 11 (2014), [http://www.unredd.net/index.php?option=com\\_docman&task=doc\\_download&gid=12895&Itemid=53](http://www.unredd.net/index.php?option=com_docman&task=doc_download&gid=12895&Itemid=53).

99. *Expert Group Defines Options for Panama's REDD+ Implementation*, UN-REDD PROGRAMME (Oct. 23, 2011), [http://www.un-redd.org/Newsletter23/Panama\\_Options\\_for\\_REDD\\_Implementation/tabid/55625/Default.aspx](http://www.un-redd.org/Newsletter23/Panama_Options_for_REDD_Implementation/tabid/55625/Default.aspx). UN-REDD+ is simply a type of REDD+ initiative. *About REDD+*, UN-REDD PROGRAMME (Nov. 20, 2014), <http://www.un-redd.org/AboutREDD/tabid/102614/Default.aspx>.

100. *Panama*, UN-REDD PROGRAMME (Nov. 1, 2014), <http://www.un-redd.org/UNREDDProgramme/CountryActions/panama/tabid/1030/language/en-US/Default.aspx>.

101. *Id.*

102. Between 1992 and 2000, the net rate of deforestation in Panama was 1.1% with forest clearing occurring mainly in two provinces, one of which is the Darién province. Akiko Haruna et al., *Evolving Protected-Area Impacts in Panama: Impact Shifts Show That Plans Require Anticipation*, ENVTL. RES. LETTERS, Mar. 2014, No. 035007, at 1, 3, [http://iop.science.iop.org/1748-9326/9/3/035007/pdf/1748-9326\\_9\\_3\\_035007.pdf](http://iop.science.iop.org/1748-9326/9/3/035007/pdf/1748-9326_9_3_035007.pdf). Between 2000 and 2012, however, the rate of deforestation was measured at 0.4%. *Id.*

103. *See generally Growing Demand for Cocobolo Wood*, *supra* note 45.

104. Frédéric Saliba, *Deforestation of Central America Rises as Mexico's War on Drugs Moves South*, GUARDIAN (Apr. 15, 2014), <http://www.theguardian.com/environment/2014/apr/15/central-america-deforestation-mexico-drugs-war>.

105. Haruna et al., *supra* note 102, at 2; *see also* Herlihy, *Participatory Research Mapping*, *supra* note 30, at 318 (stating that while Panama has created these protected area in Darién, it has also opened it up to active colonization).

how the land can be used by everyone—including indigenous peoples.<sup>106</sup> Regulating resource extraction and hunting directly contravenes indigenous land management practices and places the Wounaan in a precarious position.<sup>107</sup> As one Wounaan leader indicates:

The principal thing—before development—is legal and judicial recognition and ownership of ancestral lands. Until this is accomplished, we are prevented from developing or investing in any sort of infrastructure because the land is not yet officially ours, and before we know it, we could be on private property, like what has happened with the national parks. We're imprisoned in the land essentially—land that we've occupied for three, four generations.<sup>108</sup>

This is precisely what can happen to unprotected indigenous lands when REDD+ is poorly implemented. Traditionally, the Wounaan—and other indigenous groups—sustain their way of life by farming, hunting, cutting trees and plants for medicines and construction materials.<sup>109</sup> They do so in a sustainable manner consistent with indigenous principles ensuring the forests' survival.<sup>110</sup> When developing nations implement REDD+ without secure land tenure rights, however, forests become protected areas and indigenous activities that have sustained the forests for centuries become prohibited activities, subjecting indigenous practices to governmental regulation.<sup>111</sup>

Discussions concerning REDD implementation in Panama have been underway for several years, but until indigenous concerns can be adequately addressed, indigenous leaders will continue to stand firm against

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106. Koller-Armstrong, *Indigenous Legal Traditions*, *supra* note 2, at 20.

107. *Id.*

108. Lauren Koller-Armstrong, *This Land Is Our Land: Indigenous Rights and Rural Development in Darién, Panama*, 5 FLA. A&M U. L. REV. 219, 233 (2010) [hereinafter Koller-Armstrong, *This Land Is Our Land*].

109. WHAT IS REDD?: A GUIDE FOR INDIGENOUS COMMUNITIES 58 (Asia Indigenous Peoples Pact et al. pub., 2d ed. 2010), [http://www.iwgia.org/iwgia\\_files\\_publications\\_files/0461\\_NE\\_edition\\_hat\\_is\\_REDD.pdf](http://www.iwgia.org/iwgia_files_publications_files/0461_NE_edition_hat_is_REDD.pdf) [hereinafter WHAT IS REDD?]; *see also* Kathleen Lawlor & David Huberman, *Reduced Emissions from Deforestation and Forest Degradation (REDD) and Human Rights*, in RIGHTS-BASED APPROACHES: EXPLORING ISSUES AND OPPORTUNITIES FOR CONSERVATION 271 (Jessica Campese et al. eds., 2009).

110. WHAT IS REDD?, *supra* note 109, at 58.

111. *Id.*

REDD.<sup>112</sup> The National Coordinating Body of Indigenous Peoples of Panama (COONAPIP) has met with Panamanian government officials on several occasions concerning UN-REDD+ implementation.<sup>113</sup> COONAPIP subsequently withdrew from the UN-REDD+ process because the REDD+ program as proposed does not provide for full and effective participation of indigenous peoples and Panamanian officials do not recognize indigenous ownership of approximately 75% of the forest cover in Panama.<sup>114</sup> COONAPIP's continued resistance to REDD+ stems from their concern over what they perceive to be bad faith on the part of Panamanian officials in not enshrining the indigenous protections contained in the Panamanian constitution and the principles of free, prior, and informed consent.<sup>115</sup>

COONAPIP's concerns have a valid basis given that other indigenous groups without sufficient territorial safeguards have suffered tremendously at the hands of their countries' REDD+ "readiness" activities.<sup>116</sup> For example, in Kenya, the Sengwer people were forcibly removed from their lands to prepare for REDD+ implementation.<sup>117</sup> In Peru, millions of acres of indigenous lands remain untitled, and, therefore, vulnerable to land-grabbers through REDD+ implementation.<sup>118</sup> In Brazil, an indigenous man was arrested for cutting down a tree to fix his mother's home.<sup>119</sup> Forest rights are critical to a REDD+ program that is sensitive to the plight of indigenous people.<sup>120</sup> Land tenure rights must be properly recognized to

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112. Andrew Davis, *Community Rights in Panama and Beyond: Lessons from Central America*, CMTY. LAND RTS. (Sept. 4, 2013), <http://www.communitylandrights.org/community-rights-in-panama-and-beyond-lessons-from-central-america/>.

113. Chris Lang, *COONAPIP, Panama's Indigenous Peoples Coordinating Body, Withdraws from UN-REDD*, REDD-MONITOR (Mar. 6, 2013), <http://www.redd-monitor.org/2013/03/06/coonapip-panamas-indigenous-peoples-coordinating-body-withdraws-from-un-redd/> [hereinafter *COONAPIP*].

114. *Id.*

115. *Id.* Free, prior, and informed consent principles are more fully discussed in Section II.A.

116. *REDD+*, CARBON TRADE WATCH, <http://www.carbontradewatch.org/issues/redd.html> (last visited Nov. 2, 2014).

117. *Kenya Preparing for REDD in the Embobut Forest and Forcing Sengwer People "into Extinction"*, INDIGENOUS ENVTL. NETWORK (Jan. 31, 2014), <http://www.ienearth.org/kenya-preparing-for-redd-in-the-embobut-forest-and-forcing-sengwer-people-into-extinction/>.

118. *Indigenous Peoples of the Peruvian Amazon Denounce Failure of the World Bank's Forest Investment Programme in Peru to Respect Their Rights to Lands and Territories*, FOREST PEOPLES PROGRAMME (Feb. 18, 2013), <http://www.forestpeoples.org/node/4062>.

119. Brentnall, *supra* note 11.

120. Abate & Wright, *supra* note 55, at 101.

ensure that indigenous peoples retain ownership and control over ancestral lands.<sup>121</sup> Thus, securing title to indigenous lands must be a precondition to any REDD+ implementation in Panama to prevent the government from ceding ancestral lands to local and outside interests.<sup>122</sup>

## *II. Existing Indigenous Protections Available to the Wounaan*

There are existing protections available to the Wounaan that safeguard their right to legal ownership of their collective lands. International laws recognize indigenous rights to land as well as their right to free, prior, and informed consent to any initiatives that would affect their territory.<sup>123</sup> Also, Panamanian law legally reserves ownership and control of indigenous land to the Wounaan.<sup>124</sup> Yet for all the instruments guaranteeing indigenous autonomy and survival, the Wounaan remain in peril of losing their land.<sup>125</sup>

### *A. International Indigenous Protections*

REDD+ is just one of a wide range of international protections exist to shield indigenous peoples from the negative effects of climate change. These protections include the International Labour Organization Convention No. 169, the United Nations Declaration on the Rights of Indigenous Peoples, and the Convention on Biological Diversity.<sup>126</sup> Taken together, these instruments offer access to a wide range of protections necessary to preserve indigenous culture.

#### *1. International Labour Organization Convention No. 169*

International Labour Organization Convention Number 169 on Indigenous and Tribal Peoples (ILO 169) is “a legally binding international instrument open to ratification, which deals specifically with the rights of indigenous and tribal peoples.”<sup>127</sup> ILO 169 establishes standards through which indigenous and tribal peoples are identified and through which their

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121. WHAT IS REDD?, *supra* note 109, at 59.

122. *Id.* at 59.

123. SHREE KUMAR MAHARJAN ET AL., TRAINING MANUAL ON FREE, PRIOR AND INFORMED CONSENT (FPIC) IN REDD+ FOR INDIGENOUS PEOPLES 64 (Joan Carling ed., 2012), [http://www.iwgia.org/iwgia\\_files\\_publications\\_files/0593\\_FPIC-Manual-eb.pdf](http://www.iwgia.org/iwgia_files_publications_files/0593_FPIC-Manual-eb.pdf).

124. Koller-Armstrong, *Indigenous Legal Traditions*, *supra* note 2, at 24.

125. *See generally Protecting 1 Million Acres in Panama*, *supra* note 24.

126. MAHARJAN ET AL., *supra* note 123, at 64.

127. *Convention No. 169*, INT’L LABOUR ORG., <http://www.ilo.org/indigenous/Conventions/no169/lang--en/index.htm> (last visited Nov. 2, 2013).

rights must be respected.<sup>128</sup> Indigenous and tribal peoples' rights have long been the source of extensive discussions and contention between indigenous peoples and the international community, and the significance of its adoption must be understood against this backdrop.<sup>129</sup>

ILO 169 emerged as a radical shift from 1957's Indigenous and Tribal Populations Convention (ILO 107), which did not recognize the indigenous right to self-determination, but rather portrayed indigenous and tribal peoples as "less advanced" communities that would eventually be integrated into society.<sup>130</sup> ILO 169 is superior to its predecessor because it acknowledges indigenous peoples' desire and right to maintain their culture and traditional practices.<sup>131</sup> Further, ILO 169 presumes that indigenous peoples have the right to control their own destinies and to develop on their own terms in a manner consistent with their values.<sup>132</sup> ILO 169 also refers to the indigenous as "peoples" rather than "population," and lists subjective criteria identifying indigenous peoples in lieu of a formal definition.<sup>133</sup> To date, only twenty-two countries have ratified ILO 169.<sup>134</sup> Additionally, although ILO 107 is no longer open for ratification, it remains in force in eighteen countries, including Panama, until ILO 169 is ratified.<sup>135</sup>

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128. See INT'L LABOUR STANDARDS DEP'T, ILO, INDIGENOUS & TRIBAL PEOPLES' RIGHTS IN PRACTICE: A GUIDE TO ILO CONVENTION NO. 169, at 9 (2009), [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---normes/documents/publication/wcms\\_106474.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_106474.pdf) [hereinafter ILO PRACTICE GUIDE].

129. See Lee Swepston, *A New Step in the International Law on Indigenous and Tribal Peoples: ILO Convention No. 169 of 1989*, 15 OKLA. CITY U. L. REV. 677, 689-92 (1990).

130. See *id.* at 682. See generally Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, adopted June 26, 1957, 328 U.N.T.S. 247 (entered into force June 2, 1959) [hereinafter ILO 107]; see *Convention No. 107*, INT'L LAB. ORG., <http://www.ilo.org/indigenous/Conventions/no107/lang--en/index.htm> (last visited Nov. 2, 2014). For a more in depth discussion of the distinctions between ILO 107 and ILO 169, see Campbell, *supra* note 17, at 562-66.

131. See Swepston, *supra* note 129, at 690.

132. *Id.*

133. *Convention No. 169*, *supra* note 127.

134. Countries that have ratified ILO 169 include Argentina, Bolivia, Brazil, Central African Republic, Chile, Colombia, Costa Rica, Denmark, Dominica, Ecuador, Fiji, Guatemala, Honduras, México, Nepal, Netherlands, Nicaragua, Norway, Paraguay, Peru, Spain and Venezuela. *Ratifications of C169 - Indigenous and Tribal Peoples Convention, 1989 (No. 169)*, INT'L LABOUR ORG., [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300\\_INSTRUMENT\\_ID:312314:NO](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312314:NO) (last visited Nov. 2, 2014).

135. *Convention No. 107*, *supra* note 130.

Considered to be the “heart of the Convention,”<sup>136</sup> article 6 of ILO 169 provides that governments applying the convention must: (a) consult with indigenous peoples through appropriate procedures and through their representatives on any initiatives affecting them, (b) establish ways for indigenous peoples to freely participate at all stages of decision-making, and (c) establish the means, for indigenous peoples to develop their own institutions and initiatives.<sup>137</sup> Article 6 further commands that consultations carried out in application of ILO 169 “shall be undertaken, *in good faith* and in a form appropriate to the circumstances, with the objective of achieving *agreement or consent* to the proposed measures.”<sup>138</sup>

Article 7 of ILO 169 states indigenous peoples have the right to decide their priorities for development “as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development.”<sup>139</sup> It also provides for indigenous participation in the “formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.”<sup>140</sup> Thus, article 7 fits perfectly within a true indigenous REDD+ regime, because its directives impose a standard of indigenous inclusion that honors the indigenous right to self-determination.

Article 14 of ILO 169 addresses property right concerns by demanding recognition of indigenous land ownership and possession of lands they traditionally occupy.<sup>141</sup> According to the text of article 14, “measures shall be taken . . . to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities.”<sup>142</sup> Moreover, article 14 provides, “Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect.”<sup>143</sup> This provision takes care to include indigenous peoples, like the Wounaan, that have shifting agricultural practices like slash-and-burn. Article 14 further requires that

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136. SVITLANA KRAVCHENKO & JOHN E. BONINE, HUMAN RIGHTS AND THE ENVIRONMENT: CASES, LAW, AND POLICY 163 (2008).

137. Convention Concerning Indigenous and Tribal Peoples in Independent Countries art. 6, *adopted* June 27, 1989, 28 I.L.M. 1382 (entered into force Sept. 5, 1991).

138. *Id.* (emphasis added).

139. *Id.* art. 7.

140. *Id.*

141. *Id.* art. 14, § 1.

142. *Id.*

143. *Id.*

governments take action to properly identify lands that indigenous peoples traditionally occupy, and guarantee the protection of their right to ownership and possession of the land.<sup>144</sup> Finally, the government must also establish suitable processes to resolve indigenous land claims.<sup>145</sup>

Unless exceptional circumstances are present, article 16 of ILO 169 prohibits the removal of indigenous peoples from the lands they occupy.<sup>146</sup> In recognizing that “exceptional circumstances” affecting a nation’s remaining citizens can arise, article 16 still requires the government to implement procedural safeguards to ensure appropriate indigenous notification and participation.<sup>147</sup> Article 16’s insistence on relocation carries with it an obligation that replacement lands must be provided to indigenous groups whose lands are taken.<sup>148</sup>

ILO 169 is an integral component of REDD+ implementation for the Wounaan people because it respects indigenous practices of hundreds of years of traditional institutions.<sup>149</sup> ILO 169 promotes indigenous cultural adaptation strategies and development of contemporary institutions that more appropriately meet their needs, by reinforcing indigenous self-determination and by crystallizing the freedom to choose.<sup>150</sup> According to Mr. S. James Anaya, United Nations Special Rapporteur on the Rights of Indigenous Peoples,

[A]n important advancement for the recognition of the rights of indigenous peoples would be the ratification of International Labour Organization Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries. Panama is one of the few countries in Latin America that has not yet ratified the Convention. Convention No. 169 is an instrument that

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144. *Id.* § 2.

145. *Id.* § 3.

146. *Id.* art. 16. The exception to indigenous removal is where relocation is necessary as an exceptional measure, but it should only take place with free and informed consent. But, where consent cannot be obtained, relocation shall only take place after appropriate procedures, which provide the opportunity for effective indigenous representation. Article 16 allows for the indigenous peoples to return to their lands if the reason for removal ceases to exist. *Id.* When return is not possible, indigenous peoples shall be provided with lands comparable to the land they previously occupied. Relocated communities must be fully compensated for any loss or injury sustained as a result of relocation. *Id.*

147. *See* Swebston, *supra* note 129, at 707.

148. *Id.* at 708.

149. *See* ILO PRACTICE GUIDE, *supra* note 128, at 49-50.

150. *See id.* at 50.

compliments the United Nations Declaration on the Rights of Indigenous Peoples. . . .<sup>151</sup>

Mr. Anaya recently repeated this recommendation to the UN, stating once again that Panama must ratify ILO 169 in order to cement its commitment to their indigenous peoples.<sup>152</sup> Panamanian officials recently attended the historic inaugural meeting of the World Conference on Indigenous Peoples and emerged with a renewed commitment to ratify ILO 169, but it remains unclear whether ratification will finally occur in Panama.<sup>153</sup>

## 2. UNDRIP—Free, Prior, and Informed Consent

Built upon the foundation laid in ILO 169, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) is a symbolic step forward in establishing a cognizable right to indigenous ownership of cultural lands.<sup>154</sup> UNDRIP has been described as “the most comprehensive elaboration of indigenous peoples’ rights in a single document.”<sup>155</sup> UNDRIP powerfully expresses the indigenous right to self-determination, a right that is seminal and pervasive throughout the declaration.<sup>156</sup> The indigenous right to “freely determine their political status and freely pursue their economic,

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151. *Panama: UN Expert Calls for Recognition of Indigenous Peoples’ Rights*, JAMES ANAYA (July 26, 2013), <http://unsr.jamesanaya.org/notes/panama-un-expert-calls-for-recognition-of-indigenous-peoples-rights>.

152. James Anaya (Special Rapporteur on the Rights of Indigenous Peoples), *The Status of Indigenous Peoples’ Rights in Panama*, Human Rights Council on Its Twenty-Seventh Session, at 19, U.N. Doc. A/HRC/27/52.Add.1 (July 3, 2014) [hereinafter Special Rapporteur on the Rights of Indigenous Peoples].

153. Martin Oelz, *When Indigenous and World Leaders Meet, What Does It Mean for the ILO?*, INT’L LABOUR ORG., [http://www.ilo.org/global/about-the-ilo/newsroom/comment-analysis/WCMS\\_307826/lang--en/index.htm](http://www.ilo.org/global/about-the-ilo/newsroom/comment-analysis/WCMS_307826/lang--en/index.htm) (last visited Sept. 21, 2014). The conference included many world leaders committed to further advancing the rights of indigenous people, not only through declarations but also through undertaking affirmative measures aimed at securing indigenous rights. *Id.*

154. KAROLINA KUPRECHT, *INDIGENOUS PEOPLES’ CULTURAL PROPERTY CLAIMS: REPATRIATION AND BEYOND* 76 (2014); see also G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples U.N. Doc. A/RES/61/295 (Sept. 13, 2007) [hereinafter UNDRIP]; see also Chidi Oguamanam, *Indigenous Peoples’ Rights at the Intersection of Human Rights and Intellectual Property Rights*, 18 MARQ. INTELL. PROP. L. REV. 261, 274-78 (2014).

155. Oguamanam, *supra* note 154, at 277.

156. *Id.* at 278.

social and cultural development”<sup>157</sup> provides a blueprint through which climate change regimes like REDD+ must be designed.<sup>158</sup>

UNDRIP proclaims that states shall consult with and “obtain the free, prior and informed consent” of indigenous communities before making any decision affecting their lands.”<sup>159</sup> The cornerstone of UNDRIP is the concept of free, prior, and informed consent (FPIC).<sup>160</sup> FPIC is articulated in REDD+ by ensuring that indigenous voices are heard and respected in any REDD+ implementation.<sup>161</sup> As applied to REDD+, FPIC is designed to consider potential changes to conservation areas that would affect indigenous people and local forest-dependent communities and allow the affected communities to participate and consent—or withhold consent—for potential REDD+ initiatives.<sup>162</sup> The concept of “free” denotes that indigenous consent is given free of any manipulation, coercion, threats, duress, or bribes.<sup>163</sup> Indigenous communities must have unrestricted freedom to determine whether potential projects are culturally appropriate and beneficial to their existence.<sup>164</sup> “Prior” refers to the timing of notifications given to indigenous communities when the government proposes new initiatives affecting its indigenous.<sup>165</sup> Consent of indigenous groups must be sought well in advance of the government authorizing the commencement of a new project.<sup>166</sup> Prior consent also requires that indigenous decision-making timelines are respected and not rushed, allowing affected communities time to consider, analyze, and comment on any proposals.<sup>167</sup> Prior consent also contemplates forethought in presenting

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157. UNDRIP, *supra* note 154, art. 3.

158. *See* Oguamanam, *supra* note 154, at 278.

159. UNDRIP, *supra* note 154, art. 19.

160. *See* Tara Ward, *The Right to Free, Prior, and Informed Consent: Indigenous Peoples' Participation Rights Within International Law*, 10 NW. J. INT'L HUM. RTS. 54, 58 (2011).

161. *See* William Sunderlin, *Tenure: What Will REDD Mean for Forest Communities?*, in *Learning from Experience Forest Community Approaches to Improving Livelihoods and Reducing Deforestation*, in REDD, FOREST GOVERNANCE AND RURAL LIVELIHOODS: THE EMERGING AGENDA 31, 35 (Oliver Springate-Baginski & Eva Wollenberg eds., 2010), [http://www.cifor.org/publications/pdf\\_files/Books/BWollenberg0101.pdf](http://www.cifor.org/publications/pdf_files/Books/BWollenberg0101.pdf).

162. UN-REDD PROGRAMME, GUIDELINES ON FREE, PRIOR AND INFORMED CONSENT 18 (2013), [http://www.unredd.net/index.php?option=com\\_docman&task=doc\\_download&gid=8717&Itemid=53](http://www.unredd.net/index.php?option=com_docman&task=doc_download&gid=8717&Itemid=53).

163. *Id.*

164. *See id.*

165. *Id.* at 19.

166. *Id.*

167. *Id.*

information to indigenous leaders, and not merely at the time when a project cannot begin because consent is required.<sup>168</sup> “Informed” consent requires complete, objective, and transparent disclosure of the risks and benefits of projects in a format and language that the indigenous community can understand.<sup>169</sup>

Perhaps the most controversial feature of FPIC surrounds the definition of “consent” and whether indigenous peoples have a right to give or withhold consent on proposed projects affecting their lands and culture.<sup>170</sup> Non-Governmental Organizations and indigenous groups maintain that consent necessarily implies that indigenous peoples may approve or disapprove of potential projects and that any disapproval means that governments may not proceed with the projects.<sup>171</sup> States like Panama and organizations like the World Bank, however, understand FPIC as merely requiring prior consultation.<sup>172</sup> This interpretation of consultation as consent violates UNDRIP’s principles and strips indigenous communities of their sovereignty.<sup>173</sup>

In the context of REDD+ activities, FPIC is more appropriately viewed as a right.<sup>174</sup> Indigenous groups affected by potential projects must have a right to have their concerns expressed and their ideas incorporated into strategic plans for forest conservation.<sup>175</sup> Pursuant to UNDRIP, indigenous people have an unqualified right to determine the outcome of any project that concerns their territory because indigenous cultural identity is directly linked to their land.<sup>176</sup> By observing FPIC, the relationship between indigenous peoples and their government at large is enhanced.<sup>177</sup> Moreover,

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168. *Id.*

169. *Id.*

170. See Inter-Am. Comm’n on Human Rights, Special Feature, *Indigenous and Tribal Peoples’ Rights over Their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System*, 35 AM. INDIAN L. REV. 263, 436-38 (2010-2011) [hereinafter *Indigenous and Tribal Peoples’ Rights*].

171. See CHRISTINA HILL ET AL., OXFAM, GUIDE TO FREE PRIOR AND INFORMED CONSENT 8 (2010), <http://resources.oxfam.org.au/pages/view.php?ref=528> (click on “Download” button to the right of “Original PDF File”) (defining “consent” in FPIC as the right to say “yes” or “no,” and having that determination respected).

172. See *REDD in Panama*, *supra* note 8, at 7-8.

173. *Id.*

174. PATRICK ANDERSON, FREE, PRIOR, AND INFORMED CONSENT IN REDD+: PRINCIPLES AND APPROACHES FOR POLICY AND PROJECT DEVELOPMENT 11 (2011), <http://www.forestpeoples.org/sites/fpp/files/publication/2012/08/fpicreddmanual127patrick-anderson.pdf>.

175. See *id.*

176. *Indigenous and Tribal Peoples’ Rights*, *supra* note 170, at 389-90.

177. See *id.* at 437.

there is a resounding global indigenous outcry against REDD+ without FPIC.<sup>178</sup> Unfortunately, UNDRIP is soft law and, therefore, non-binding on signatories, though its principles promote holistic indigenous ideologies and practices.<sup>179</sup> As a consequence, without FPIC protections contained within Panama's UN-REDD+ program, Panama's indigenous communities will not move forward.<sup>180</sup>

### 3. *The Convention on Biological Diversity*

Recognizing that the earth's species and ecosystems are imperiled because of human activities and that the earth's biological resources are critical to its continued development, the United Nations Environment Programme convened a working group of experts to draft a convention for the conservation of biological resources.<sup>181</sup> The Convention on Biological Diversity (CBD) was finalized in May 1992 and demonstrated the international community's commitment to conserving the earth's natural resources.<sup>182</sup> The CBD's three main objectives are: (1) conserving biological diversity, (2) sustainably using the components of biological diversity, and (3) "sharing of the benefits arising out of the utilization of genetic resources" in a fair and equitable manner.<sup>183</sup> There are currently 194 parties to this convention, including Panama.<sup>184</sup>

The CBD embraces the indispensable role that indigenous peoples play in sustainably managing forest resources.<sup>185</sup> Therefore, enshrined in article 8(j) of the CBD is its parties' commitment to respect, preserve, and maintain indigenous knowledge and practices to promote continued conservation of biological diversity.<sup>186</sup> Along with this commitment, 8(j)

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178. ANDERSON, *supra* note 174, at 9.

179. Ward, *supra* note 160, at 58.

180. COONAPIP, *supra* note 113.

181. *History of the Convention*, CONVENTION ON BIOLOGICAL DIVERSITY, <http://www.cbd.int/history/default.shtml> (last visited Sept. 13, 2015).

182. Convention on Biological Diversity, *supra* note 81, art. 1; *History of the Convention*, *supra* note 181.

183. Convention on Biological Diversity, *supra* note 81, art. 1; *see also Introduction*, CONVENTION ON BIOLOGICAL DIVERSITY, <http://www.cbd.int/intro/default.shtml> (last visited Sept. 13, 2015).

184. *List of Parties*, CONVENTION ON BIOLOGICAL DIVERSITY, <http://www.cbd.int/information/parties.shtml> (last visited Sept. 13, 2015).

185. *Working Group on Article 8(j)*, CONVENTION ON BIOLOGICAL DIVERSITY, <http://www.cbd.int/convention/wg8j.shtml> (last visited Sept. 13, 2015).

186. *Id.*; Convention on Biological Diversity, *supra* note 81, art. 8(j) ("Contracting Party shall, as far as possible and as appropriate . . . [s]ubject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local

explicitly incorporates FPIC by requiring that parties only promote the CBD's application with the approval and involvement of the holders of such knowledge—namely indigenous peoples.<sup>187</sup> Thus, “approval” in this context has been interpreted as FPIC.<sup>188</sup> Moreover, FPIC is further cemented in the CBD through the Akwé Kon Guidelines (AKG), which were established by the Conference of the Parties decision VI/7 A.<sup>189</sup> The AKG mandates “the full involvement of indigenous and local communities in the assessment of cultural, environmental and social impact of proposed developments on sacred sites and on lands and waters they have traditionally occupied.”<sup>190</sup> The AKG outlines a comprehensive ten-step procedural platform through which FPIC principles are observed including notification and consultation with indigenous peoples.<sup>191</sup> To that end, the AKG's policies recognize the need for accurate impact assessments of biological resources and the importance of the indigenous role in these assessments.<sup>192</sup>

A major criticism of the CBD by indigenous peoples has been the weight it places on state sovereignty, causing indigenous groups to lobby for the international community to observe their commitment under other international human rights declarations by respecting indigenous rights to self-determination and autonomy over their collective lands.<sup>193</sup> The CBD has been referred to as the basis for denying indigenous rights to ancestral

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communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application *with the approval and involvement of the holders of such knowledge*, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.”) (emphasis added).

187. Convention on Biological Diversity, *supra* note 81, art. 8(j); *see also* Jennifer Corpuz et al., *Indigenous Peoples' Free, Prior, and Informed Consent in the Convention on Biological Diversity: An Overview with Case Studies from Panama, the Russian Federation, and the Philippines*, in *INDIGENOUS PEOPLES' CONTRIBUTIONS TO COP-8 OF THE CONVENTION ON BIOLOGICAL DIVERSITY* 78 (Sam Grey ed., 2006).

188. Corpuz et al., *supra* note 187.

189. *See Akwé: Kon Guidelines*, CONVENTION ON BIOLOGICAL DIVERSITY, <http://www.cbd.int/traditional/guidelines.shtml> (last visited Sept. 13, 2015) (demonstrating that “Akwé Kon” is a Mohawk term for “everything in creation”).

190. *Id.*

191. *Id.*

192. Anne Perrault et al., *Partnerships for Success in Protected Areas: The Public Interest and Local Community and Rights to Prior Informed Consent (PIC)*, 19 *GEO. INT'L ENVTL. L. REV.* 475, 529-30 (2007).

193. *See* Corpuz et al., *supra* note 187, at 79.

lands in favor of state interests.<sup>194</sup> Panama has codified the CBD within its environmental law pursuant to its obligation under CBD, but there is no reference to indigenous protections and collective land rights within its text.<sup>195</sup> Consequently, Panama's exclusion of these indispensable indigenous protections and its refusal to ratify ILO 169 demonstrate Panama's preference to retain control over ancestral lands, even though these lands rightfully belong to indigenous communities.<sup>196</sup>

*B. Panama's Domestic Laws Providing Indigenous Protection*

Panama is internationally recognized as having superior protections for indigenous peoples,<sup>197</sup> but these protections do not extend to land that falls outside of the comarca. Though they are regarded as "innovative and effective,"<sup>198</sup> Panamanian laws protecting indigenous lands still fall short of providing the type of coverage the Wounaan require before REDD+ implementation.

In 1983, Wounaan lands were granted comarca status with the enactment of Law 22 of the Panama Constitution.<sup>199</sup> These comarcas were created as a means to ensure the social and economic well-being of Panama's indigenous communities.<sup>200</sup> Due in part to the Embéras and Wounaan's dispersed settlement patterns, however, most live outside of their officially demarcated territory.<sup>201</sup> Of the rights delineated in Law 22, the right to economic independence and development, and cultural discretion in the use and management of natural resources, are among the most significant.<sup>202</sup> Although Law 22 of the Panama Constitution granted *comarca* status to Embéras and Wounaan tribes, most individual Wounaan groups lived outside the comarca and did not receive the indigenous protections afforded to those living within the boundaries of legally recognized Wounaan

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194. *Id.*

195. *Id.* at 83.

196. *Id.*

197. See Heger & McNish, *supra* note 30, at 6-7 ("Panama's comarca system has been hailed as 'innovative and effective, respectful of indigenous autonomy and supportive of community initiative.'") (quoting Ortega, *supra* note 20, at 8); *id.* at 6 ("The indigenous communities that are located outside of the comarcas, in sharp contrast to those inside the comarcas, are unrecognized by the Panamanian government and have never been afforded any legal rights to their lands.").

198. Ortega, *supra* note 20, at 8.

199. Koller-Armstrong, *Indigenous Legal Traditions*, *supra* note 2, at 24.

200. Koller-Armstrong, *This Land Is Our Land*, *supra* note 108, at 234.

201. *Id.*

202. See Koller-Armstrong, *Indigenous Legal Traditions*, *supra* note 2, at 36.

lands.<sup>203</sup> In fact, when questioned concerning the areas of greatest concern, Wounaan leaders consistently referred to collective land titling (“*tierras colectivas*”) and the need to formally recognize *all* of the land to which they are entitled.<sup>204</sup>

*The significance of “tierras colectivas”* lies in the fact that approximately one quarter of the Embéras and Wounaan actually live within the boundaries of their comarca.<sup>205</sup> The remaining three quarters reside outside the *comarca* in unprotected areas.<sup>206</sup> As a result, the unprotected lands are vulnerable to outside colonists who do not understand the concept of tribal lands and desire to exploit the Darién region’s natural resources.<sup>207</sup> For this reason, Wounaan leaders were relentless for more than ten years in petitioning the government to enact legislation reserving the lands to their tribe.<sup>208</sup> *Ley 72* was finally enacted in 2008 addressing Wounaan concerns by providing recognition of indigenous lands on a collective basis.<sup>209</sup> *Ley 72* was a milestone in Panamanian indigenous land tenure rights because it recognized the concept of *tierras colectivas* and that there were lands not originally included in the *comarca* that belong to the tribe.<sup>210</sup>

Enacted in 2010, Executive Decree 223 was implemented as the procedural engine behind *Ley 72 de 2008*.<sup>211</sup> Executive Decree 223 lays out the procedure for obtaining formal title of collective lands for indigenous people.<sup>212</sup> While, in theory, *Ley 72* and Executive Decree 223 provide a workable solution to the Wounaan’s land title issues, the Panamanian government has been slow to actually grant land titles when the Wounaan have applied.<sup>213</sup> In fact, there are three villages for which the Wounaan

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203. Heger & McNish, *supra* note 30, at 6.

204. Koller-Armstrong, *Indigenous Legal Traditions*, *supra* note 2, at 20.

205. Koller-Armstrong, *This Land Is Our Land*, *supra* note 108, at 233-34; *see also* Davis, *supra* note 112.

206. Koller-Armstrong, *This Land Is Our Land*, *supra* note 108, at 234.

207. *See* Daniel Suman, *Globalization and the Pan-American Highway: Concerns for the Panama-Colombia Border Region of Darién-Chocó and Its Peoples*, 38 U. MIAMI INTER-AM. L. REV. 549, 560 (2007).

208. *Panama Enacts Indigenous Land Titling Legislation*, NATIVE FUTURE NEWSLETTER (Native Future, Makawao, Haw.), Summer 2009, <http://www.nativefuture.org/wp-content/uploads/2009/07/NF-Newsletter-Summer-2009sm.pdf>.

209. Megan, *Native Future*, *supra* note 23.

210. Koller-Armstrong, *Indigenous Legal Traditions*, *supra* note 2, at 32.

211. *Id.*

212. *Id.*

213. Letter from Leonides Quiroz, Counsel of the Nat’l Congress Wounaan, to Attorney Lord of the Administration of the Republic Of Panama (n.d.), <http://injusticeinpanama.files>.

have applied and have not received land title in accordance with *Ley 72*: Rió Hondo, Platanares, and Majé-Chimán.<sup>214</sup> Consequently, the Wounaan's land continues to be susceptible to outsiders, cattle ranchers, and illegal logging.<sup>215</sup> To date, only two Wounaan communities have received collective land titles, leaving many more to be issued and leaving the Wounaan exasperated.<sup>216</sup> Moreover, without application approval, any potential REDD+ implementation leaves the Wounaan without legal standing to defend against any post-REDD+ challenge to ownership of their territory.<sup>217</sup> In fact, legal experts in REDD+ readiness initiatives highly encourage settling land title issues before implementation to ensure certainty regarding land ownership.<sup>218</sup>

In order to ensure accurate demarcation, the Wounaan (and other indigenous groups in Panama) have even enlisted the assistance of expert cartographers, non-governmental organizations, and researchers.<sup>219</sup> Using participatory mapping techniques, these groups have memorialized the boundaries of their land into maps.<sup>220</sup> In fact, their team of experts received assistance from state agencies without whose support it may have been impossible to implement their project.<sup>221</sup> Despite these efforts, Panama has yet to approve the Wounaan's applications. Consequently, hundreds of thousands of acres of Wounaan land remain untitled.<sup>222</sup> Implementing REDD+ before these titles are issued could result in the Wounaan's forced eviction and cause a shift in deforestation from protected areas to these unprotected areas.<sup>223</sup> For these reasons, indigenous peoples will continue to oppose a Panamanian UN-REDD+ project, even though REDD+ as a

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[wordpress.com/2012/03/peticion-to-panamanian-congress-for-justice.pdf](http://wordpress.com/2012/03/peticion-to-panamanian-congress-for-justice.pdf); *see also* Megan, *Native Future*, *supra* note 23.

214. *See* Letter from Leonides Quiroz, *supra* note 213.

215. Special Rapporteur on the Rights of Indigenous Peoples, *supra* note 152, at 11.

216. Megan, *Native Future*, *supra* note 23.

217. *COONAPIP*, *supra* note 113.

218. ANDERSON, *supra* note 174, at 9 (quoting COVINGTON & BURLING LLP & BAKER & MCKENZIE, BACKGROUND ANALYSIS OF REDD REGULATORY FRAMEWORKS 22-23 (2009), [http://theredddesk.org/sites/default/files/resources/pdf/2010/Background\\_Analysis\\_of\\_REDD\\_Regulatory\\_Frameworks.pdf](http://theredddesk.org/sites/default/files/resources/pdf/2010/Background_Analysis_of_REDD_Regulatory_Frameworks.pdf)).

219. *See generally* Herlihy, *Participatory Research Mapping*, *supra* note 30.

220. Herlihy, *Participatory Research Mapping*, *supra* note 30, at 324-25.

221. *Id.* at 325.

222. Megan, *Native Future*, *supra* note 23.

223. *COONAPIP*, *supra* note 113.

mitigation strategy could be very effective in protecting Panama's rainforests.<sup>224</sup>

### *III. How to Avoid Whitewashing Wounaan Problems in a Redd+ Solution*

Given the potential for REDD+ to positively impact the Wounaan's status, the following solutions would allow Panama to balance the potential benefits it receives from REDD+ with indigenous rights to preserve their culture. To cement its commitment to the Wounaan and institute a REDD+ program that would benefit the nation as a whole and ensure Wounaan survival, Panama must: (1) issue the Wounaan's collective land titles and strengthen its indigenous land tenure rights, (2) enshrine FPIC principles into its UN-REDD+ platform, and (3) employ indigenous knowledge in applying its deforestation mitigation strategies. By committing to and taking action to ensure these outcomes, Panama would make a tremendous leap forward in ensuring the protection of Wounaan sovereignty and cultural integrity.

#### *A. Strengthening Land Tenure Rights to Protect Wounaan Lands*

*From a legal perspective, the biggest hurdle to overcome in the development of REDD policy is linked to reform of land tenure and the appropriate recognition of all interests within forest areas.*<sup>225</sup>

Various REDD+ instruments recognize the need to work out land tenure issues before REDD+ implementation.<sup>226</sup> Strong community forest rights coupled with strong governmental action aimed at preserving those rights have a directly positive affect on reducing deforestation.<sup>227</sup> In other words, the rights must be properly documented and enforced in order for indigenous communities to remain in possession of their lands. Yet this seemingly simple solution is often overlooked or downplayed as insignificant.<sup>228</sup> In a 2014 report, the World Resources Institute (WRI)

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224. *See, e.g., id.*

225. Maguire, *supra* note 60, at 697.

226. *Id.* at 715; *see also* KATE DOOLEY ET AL., SMOKE AND MIRRORS: A CRITICAL ASSESSMENT OF THE FOREST CARBON PARTNERSHIP FACILITY 16 (2011).

227. CALEB STEVENS ET AL., WORLD RESOURCES INST., SECURING RIGHTS, COMBATING CLIMATE CHANGE: HOW STRENGTHENING COMMUNITY FOREST RIGHTS MITIGATES CLIMATE CHANGE 3 (2014). This report presents findings demonstrating that countries like Bolivia, Brazil, Guatemala, Mexico, Niger, Tanzania, and Nepal that have affirmative legal land rights and strong governmental action have the best forest outcomes. *Id.*

228. *Id.* at 7.

details several examples of governmental actions that can protect community forest rights like mapping and registration of community forests.<sup>229</sup> It also describes actions that undermine indigenous rights including siding with intruders, granting commercial concessions to forests, or placing insurmountable bureaucratic hurdles in the way of land tenure rights.<sup>230</sup> These are precisely the challenges that the Wounaan face in a REDD+ implementation containing deficient land tenure protections.

Before Panama strengthens land tenure rights, it is imperative that the Wounaan receive collective title to all their territory as most of their land falls outside of the *comarca*.<sup>231</sup> Because Panama has already established the mechanism through which collective land title can be granted, all that remains is for the Wounaan's applications to be approved. Once Wounaan collective lands are legally titled, there are several measures Panama can take to finally secure accurate demarcation of Wounaan lands, including: (1) utilizing participatory mapping techniques to properly identify collective indigenous lands, (2) codification of the mapping results, and (3) permitting flexible boundaries based on indigenous knowledge and practices. Use of these techniques, which are within Panama's reach, will place the Wounaan in a position to assert their sovereignty over their territory and demonstrate Panama's commitment to the Wounaan.

The first piece to this solution utilizes participatory mapping, which involves a collaborative approach to traditional cartography that involves indigenous people, who have the traditional knowledge of the land, and scientific experts on map drawing.<sup>232</sup> Participatory mapping is a modern approach to mapping that allows indigenous peoples to participate in drawing the boundary lines for their land.<sup>233</sup> It is extremely useful because it gives indigenous people, who are typically marginalized, the opportunity to have a voice in determining which lands they possess and occupy.<sup>234</sup> Participatory mapping presents dual benefit to the government because indigenous peoples use their traditional knowledge of the land and its characteristics (including monuments, drawings, and markings) that

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229. *Id.* at 15.

230. *Id.* WRI further advocates that these rights should include the full "bundle of rights" bestowed on landowners including the right of access, exclusion, alienation, and due process and just compensation. *Id.* at 14.

231. Koller-Armstrong, *Indigenous Legal Traditions*, *supra* note 2, at 33.

232. *Participatory Mapping*, MAPPING FOR RIGHTS, [http://www.mappingforrights.org/participatory\\_mapping](http://www.mappingforrights.org/participatory_mapping) (last visited Sept. 13, 2015).

233. *Id.*

234. *Id.*

accurately outline the boundaries of their territory,<sup>235</sup> and, it also provides certainty in identifying who the stakeholders are so that they can be consulted before beginning new projects.<sup>236</sup>

For indigenous peoples, it ensures that their lands are completely accounted for and demarcated in a fair and accurate manner because they are participants in the mapping process.<sup>237</sup> It also demonstrates a level of FPIC consent in the mapping process.<sup>238</sup> For the government, it provides a vital source of credible land intelligence. The groundwork for this project has already taken place, because the Wounaan people have taken part in participatory mapping projects aimed at determining the boundaries of their property.<sup>239</sup> In 1993, the Wounaan and several other Panamanian indigenous tribes completed a participatory research mapping project that demonstrates in cartographic format all of the lands they possess and occupy.<sup>240</sup> Some of these maps have already been presented to Panamanian officials in conjunction with collective land title applications.<sup>241</sup> The Panamanian government, however, has yet to incorporate the results into the Wounaan *comarca's* official demarcation. Therefore, although participatory mapping provides a revolutionary method to establish indigenous land boundaries, its effects remain superficial so long as those results are not officially recognized through legal title.

Second, Panama must codify the results of the participatory mapping scheme. If the Panamanian government works alongside the Wounaan to identify and agree on the boundaries of the Wounaan's collective lands, then there should be no hindrance to codification of these results as the official Wounaan *comarca*. Codifying the results of participatory mapping projects into formal collective titles in accordance with Executive Decree 223 would ensure that all Wounaan lands are accounted for. This project's benefits, however, will only be officially realized if Panama partners with the indigenous peoples as a participant. Gaining the indigenous community's trust is an essential piece to successful participatory mapping as it encourages full indigenous disclosure of their resources and

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235. *Id.*

236. ANDERSON, *supra* note 174, at 32.

237. *Participatory Mapping*, *supra* note 232.

238. ANDERSON, *supra* note 174, at 22.

239. *See, e.g., Herlihy, Participatory Research Mapping*, *supra* note 30, at 315.

240. *Id.* at 320.

241. *See id.* at 324, 327.

territory.<sup>242</sup> This type of modern mapping technique, and the resulting codification, has been used in the Philippines to receive formal land title from the government to prevent incursion from illegal loggers and colonizers, making it a potentially viable solution for Panama.<sup>243</sup> Specifically, the Philippine Association for Intercultural Development (PAFID) has developed and employed a 3-D mapping system that uses actual pictures to reflect important landmarks and water boundaries.<sup>244</sup> In another example, the Mindanao Peacebuilding Institute in the Philippines developed a training program that integrates traditional indigenous practices into existing laws.<sup>245</sup> Panama has already taken significant measures to protect its indigenous communities, but its delay in ratifying ILO 169 and approving pending Wounaan land title applications only bolsters indigenous concerns that Panamanian officials are acting in bad faith.<sup>246</sup> In fact, according to COONAPIP, Panamanian officials have refused to acknowledge that approximately 75% of Panama's forest cover is located on indigenous territory.<sup>247</sup> Therefore, if the Panamanian government is committed to indigenous land tenure rights, it will both employ the modern mapping strategy, and codify the results. This will create a clear demarcation of Wounaan lands in accord with their input on boundary

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242. MAC CHAPIN & BILL THRELKELD, *MAPPING INDIGENOUS LANDS: A PRACTICAL GUIDEBOOK* 72-73 (2008), [http://pgis-tk.cta.int/m07/docs/M07U02\\_handout\\_mapping\\_indigenous\\_lands\\_guidebook.pdf](http://pgis-tk.cta.int/m07/docs/M07U02_handout_mapping_indigenous_lands_guidebook.pdf); see also GOOD PRACTICES IN PARTICIPATORY MAPPING: A REVIEW PREPARED FOR THE INTERNATIONAL FUND FOR AGRICULTURAL DEVELOPMENT (IFAD) 25-26 (2009), [http://www.ifad.org/pub/map/pm\\_web.pdf](http://www.ifad.org/pub/map/pm_web.pdf).

243. STEFANO DI GESSA, *PARTICIPATORY MAPPING AS A TOOL FOR EMPOWERMENT: EXPERIENCES AND LESSONS LEARNED FROM THE ILC NETWORK* 25-26 (2008), [http://dlc.dlib.indiana.edu/dlc/bitstream/handle/10535/3647/08\\_ILC\\_Participatory\\_Mapping\\_Low.pdf?sequence=1&isAllowed=y](http://dlc.dlib.indiana.edu/dlc/bitstream/handle/10535/3647/08_ILC_Participatory_Mapping_Low.pdf?sequence=1&isAllowed=y).

244. Philippine Ass'n for Intercultural Dev. & Philippine P'ship for the Dev. of Human Res. in Rural Areas, *GPS and 3-D Mapping: Effective Tools to Establish Ancestral Domain Claims*, in *A RESOURCE BOOK ON ENHANCING ACCESS OF THE POOR TO LAND AND COMMON PROPERTY RESOURCES 1* (Asian NGO Coalition for Agrarian Reform & Rural Development ed., 2006).

245. Tito Fiel, *Wisdom Weaving: Defending Ancestral Domains Through Integrating Indigenous People's Practices with Philippine Laws*, MINDANAO PEACEBUILDING INST. (Mar. 18, 2014), <http://www.mpiasia.net/allnews/latest-news-from-mpi/88-wisdom-weaving-defending-ancestral-domains-through-integrating-indigenous-people-s-practices-with-philippine-laws.html>.

246. *COONAPIP*, *supra* note 113.

247. *Id.*

locations, and would likely garner Wounaan support for UN-REDD+ implementation in Panama.<sup>248</sup>

Finally, any mapping and subsequent codification must allow flexibility based on indigenous environmental knowledge for modifications to the established boundaries.<sup>249</sup> There is some concern over fixing boundaries with respect to indigenous lands because indigenous knowledge is holistic and personal and cannot be fixed on permanent maps.<sup>250</sup> As to the Wounaan, flexibility is required because their traditional land usage does not consider absolute boundaries or specific periods of time. Rather, their collective land use is more of a benefit sharing arrangement in which there is mutual gain.<sup>251</sup> Therefore, Panama's goal should be to accurately determine boundaries—with boundary flexibility for subsequent boundary changes—to preserve indigenous lands so that a UN-REDD+ program can move forward.

#### *B. REDD+ Program to Include Free, Prior, and Informed Consent*

The effects of climate change are particularly onerous on indigenous peoples, who are often the poorest and most marginalized in society.<sup>252</sup> Accordingly, any climate change mitigation strategy should embrace the participation of indigenous communities and their representatives. Under UNDRIP, Panama is legally obligated to seek the participation of its indigenous communities; however, there is a history in Panama of excluding indigenous people from the decision-making process.<sup>253</sup> Absent FPIC, indigenous peoples like the Wounaan are vulnerable to losing access to the forests, human rights violations, possible criminal prosecution, and even death for violation of the new land regulations.<sup>254</sup>

FPIC is not exclusively a safeguard for indigenous peoples. For REDD+ project participants, lack of indigenous engagement can result in a *de facto* veto, even where this veto power is not formally recognized, resulting in economic repercussions for not observing FPIC in REDD+ activities.<sup>255</sup>

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248. Herlihy, *Participatory Research Mapping*, *supra* note 30, at 320.

249. *See generally* Deborah McGregor, *Representing and Mapping Traditional Knowledge in Ontario Forest Management Planning*, in *RECLAIMING INDIGENOUS PLANNING* 414, 417-19 (Ryan Walker et al. eds., 2013).

250. *Id.* at 422-23.

251. Koller-Armstrong, *Indigenous Legal Traditions*, *supra* note 2, at 33-34.

252. Abate & Kronk, *supra* note 28, at 3.

253. *REDD in Panama*, *supra* note 8.

254. ANDERSON, *supra* note 174, at 9-10.

255. JASMINE CAMPBELL, *ENGAGING WITH FREE, PRIOR, AND INFORMED CONSENT* 16 (2011); *see also* ANDERSON, *supra* note 174, at 17.

Lack of FPIC in implementation procedures can cause numerous delays and needless project modifications simply because indigenous voices were not heard and respected at the outset.<sup>256</sup> For indigenous peoples, FPIC in REDD+ is crucial to preserving their right of self-determination and a lack of FPIC is viewed as an affront to indigenous sovereignty. In Ecuador, indigenous peoples have reported precisely the outcome that the Wounaan fear as a result of being excluded from the REDD+ process.<sup>257</sup> Because they were not properly consulted and informed, their lands were taken, resulting in their displacement and, in some cases, resulted in the community bearing the cost of the project's damage to the land.<sup>258</sup> For these reasons, FPIC is a crucial and beneficial element to REDD+ implementation.

FPIC's addition to REDD+ programs should be understood as an ongoing obligation to receive indigenous consent through every stage of the project's inception and implementation.<sup>259</sup> Experts encourage three levels of indigenous consent: (1) consent in project discussions, (2) consent in project development, and (3) consent in implementation.<sup>260</sup> While consent is important in all stages of a project's cycle, it is most essential before the development and implementation phases beginning, as this is when considerable time and financial investments are made. Once this occurs it becomes extremely difficult for indigenous people like the Wounaan to assert their rights.

While indigenous consultation and participation appears to impose burdensome procedural hurdles for state actors and corporations, it presents numerous beneficial outcomes. Indigenous consultation and participation in REDD+, as in participatory mapping, is a sensible tool that can be used to assess whether a particular project produces sustainable solutions to forest

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256. See, e.g., ANDERSON, *supra* note 174, at 11 (citing AMY K. LEHR & GARE A. SMITH, IMPLEMENTING A CORPORATE FREE, PRIOR, AND INFORMED CONSENT POLICY: BENEFITS AND CHALLENGES (2010) (ebook), <http://foleyhoag.com/NewsCenter/Publications/eBooks/~media/2AF1DB5B36FF46A39C18E2C7AA8F6D2A.ashx>). Some examples of these types of financial setbacks and delays have occurred in Peru, Ghana, Thailand, Laos, and Cambodia where communities were not consulted before REDD+ project commencements. *Id.*

257. See ANDERSON, *supra* note 174, at 12 (citing PATRICIA GRANDA, ACCIÓN ECOLÓGICA, CARBON SINK PLANTATIONS IN THE ECUADORIAN ANDES: IMPACTS OF THE DUTCH FACE-PROFAFOR MONOCULTURE TREE PLANTATIONS' PROJECT ON INDIGENOUS AND PEASANT COMMUNITIES (2005), [http://wrm.org.uy/wp-content/uploads/2013/04/Carbon\\_Sink\\_Plantations\\_in\\_the\\_Ecuadorian\\_Andes.pdf](http://wrm.org.uy/wp-content/uploads/2013/04/Carbon_Sink_Plantations_in_the_Ecuadorian_Andes.pdf)).

258. GRANDA, *supra* note 257.

259. ANDERSON, *supra* note 174, at 18.

260. *Id.* at 19.

preservation measures.<sup>261</sup> It also uncovers potential issues with land tenure rights, allowing the state and its indigenous peoples to correct any problems before substantial time and financial resources are expended. Given the potential benefits of REDD+ implementation in Panama, the state must welcome full and effective participation of the Wounaan people. When indigenous peoples are properly informed and consulted as part of REDD+, all participants become partners with a common purpose, because it is crucial to have the support of forest dwellers in order to ensure the program is successful.<sup>262</sup>

*C. Integration of Indigenous Environmental Knowledge in Adaption and Mitigation Practices*

*The forest is our life and our existence. In the forest we find our food, our medicines, our housing and our knowledge. How can they think that we, the indigenous people, could destroy our life, destroying forests? We have used the forests for a truly sustainable development, only taking what we needed.*<sup>263</sup>

It is well-recognized that rainforests under indigenous management are a strong deterrent to deforestation and forest degradation.<sup>264</sup> In fact, scholars indicate that it is “difficult to imagine much REDD without indigenous peoples’ participation.”<sup>265</sup> For this reason, states that do not give their indigenous peoples the authority to freely manage forest resources are missing out on arguably the most successful inhibitor of deforestation—indigenous environmental knowledge (IEK).<sup>266</sup> The indigenous communities possess knowledge about the earth that is virtually

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261. CAMPBELL, *supra* note 255, at 19.

262. Bharat Jagdeo, *Foreword* to CHARLIE PARKER ET AL., *THE LITTLE REDD+ BOOK: AN UPDATED GUIDE TO GOVERNMENTAL AND NON-GOVERNMENTAL PROPOSALS FOR REDUCING EMISSIONS FROM DEFORESTATION AND DEGRADATION* 4, 5 (2009), <http://theredd.org/sites/default/files/resources/pdf/2009/The-Little-Redd-Book.pdf>.

263. MARCIAL ARIAS GARCÍA, *FORESTS, INDIGENOUS PEOPLES AND FORESTRY POLICY IN PANAMA: AN ASSESSMENT OF NATIONAL IMPLEMENTATION OF INTERNATIONAL STANDARDS AND COMMITMENTS ON TRADITIONAL FOREST RELATED KNOWLEDGE AND FOREST RELATED ISSUES* 1 (n.d.), <http://www.binal.ac.pa/panal/downloads/fipdoc.pdf> (quoting Gilberto Arias, the first Kuna Cacique) (emphasis omitted).

264. JAKOB KRONIK & DORTE VERNER, *THE WORLD BANK, INDIGENOUS PEOPLES AND CLIMATE CHANGE IN LATIN AMERICA AND THE CARIBBEAN* 111-12 (2010), <https://openknowledge.worldbank.org/bitstream/handle/10986/2472/555400PUB0Indi1EPI1958810601PUBLIC1.pdf?sequence=1>.

265. *Id.* at 112.

266. *Id.*

undiscoverable through traditional, or even modern, means outside of indigenous participation.<sup>267</sup>

Because indigenous communities are often marginalized and are the most vulnerable members of society, their knowledge of how to survive in their rapidly changing environment is of paramount importance to understanding how best to manage forest resources.<sup>268</sup> IEK includes a mélange of many different factors like common indigenous spiritual traditions, folklore, stories, ceremonies, and oral traditions.<sup>269</sup> Thus, an adequate definition of IEK is “a system of knowledge, practice, and belief that describes the relationship of living beings and their environment.”<sup>270</sup> IEK is fostered through experiential learning opportunities to which the indigenous peoples are regularly exposed by virtue of their position as forest dwellers.<sup>271</sup> This learning method is deeply personal and holistic resulting in diversity of knowledge across tribal communities.<sup>272</sup> It is this personal knowledge that enhances local forest management practices because it is a type of custom guide that is unique to a particular forest area, rather than forests in general.

Scholars advocate an integrated approach to implementing conservation plans that incorporate IEK.<sup>273</sup> In recent years, IEK has become a significant resource to researchers, scientists, and governmental agencies seeking to ameliorate the imminent effects of climate change.<sup>274</sup> International law also supports respect for and incorporation of IEK in ILO 169, UNDRIP, and CBD into national land management practices.<sup>275</sup> Like other indigenous communities, the Wounaan maintain their own traditional knowledge of the Darién forests and embrace an understanding of how the land sustains those who dwell on it.<sup>276</sup> Their traditional knowledge is central to their worldview

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267. DANIEL R. WILDCAT, RED ALERT!: SAVING THE PLANET WITH INDIGENOUS KNOWLEDGE 55 (2009).

268. See Maxine Burkett, *Indigenous Environmental Knowledge and Climate Change Adaptation*, in CLIMATE CHANGE AND INDIGENOUS PEOPLES: THE SEARCH FOR LEGAL REMEDIES, *supra* note 28, at 96, 98.

269. *Id.* at 100.

270. *Id.*

271. *Id.* at 109.

272. *Id.*

273. Koller-Armstrong, *Indigenous Legal Traditions*, *supra* note 2, at 38.

274. See Burkett, *supra* note 268, at 102-03.

275. See Convention Concerning Indigenous and Tribal Peoples in Independent Countries, *supra* note 137, arts. 14, 23; see also UNDRIP, *supra* note 154, art. 31; Convention on Biological Diversity, *supra* note 81, art. 8(j).

276. See Koller-Armstrong, *Indigenous Legal Traditions*, *supra* note 2, at 21.

and would only serve to improve on any climate change mitigation strategy that Panama could undertake on its own. To that end, Panama must empower the Wounaan by granting legal title to their collective lands to promote community forest management. By partnering with indigenous communities in forest conservation initiatives, Panama can realize appreciable gains in the fight to preserve biological diversity.

### *Conclusion*

The Wounaan of Panama have been faithful stewards to the Darién rainforests, which have been entrusted to them for hundreds of years. Yet, deforestation and forest degrading activities persistently threaten to displace and imperil the culture and very existence of this vulnerable group. Although Panama's REDD+ solution has the potential of being a tremendous remedy to this rapidly increasing problem, the Wounaan do not have legal title to more than 75% of the lands they possess and occupy, even after having sustainably managed this territory for hundreds of years. Because Panama has failed to legally demarcate Wounaan *tierra colectivas* and issue their land title, the Wounaan are placed in an uncertain arrangement that deprives them of their right to complete autonomy over their livelihoods.

While Panama has made great strides in the indigenous human rights movement, there is much more to be done to fulfill its obligation to protect its indigenous people. Ratification of ILO 169 is crucial first step to Panama's UN-REDD+ program. Without ratification of ILO 169, Panama continues to demonstrate legally that it believes that Panama's indigenous will eventually assimilate into society, rather than exist with assurances of their right to self-determination. Becoming a party to UNDRIP was a significant step forward but still falls short because the declaration is non-binding. Additionally, even though the CBD has been codified in Panama's environmental laws, state sovereignty continues to be the loophole used to avoid the state's duties to its indigenous peoples.

The solutions proposed here provide attainable advances toward rectifying the imminent injustices presented by a REDD+ program that lacks appropriate safeguards to indigenous land ownership. There is an undeniable correlation between strong land tenure rights and indigenous protection against displacement resulting from the global fight to combat climate change through climate change mitigation efforts like REDD+.<sup>277</sup> By instituting a participatory mapping strategy, codifying the results, and

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277. STEVENS ET AL., *supra* note 227, at 42.

issuing legal title based on these results, the Wounaan gain a seat at the table in determining the appropriate use of the territory. Having secure title would empower them to be active participants in their land use rather than helpless bystanders. Additionally, they would be eligible to benefit financially from any monetary payments. In addition to securing land rights, integrating FPIC and indigenous knowledge would ensure that indigenous culture and tradition are protected, while forests are sustainably managed and conserved. With the implementation of these proposals, Panama's REDD+ program can be a true indigenous REDD+ regime that undergirds indigenous rights.