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Patrick J. Keenan

University of Illinois College of Law, pjkeenan@illinois.edu

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Evidence-Based Stakeholder Engagement: The Promise of Randomized Control Trials For Business and Human Rights

Patrick J. Keenan*

INTRODUCTION

In recent years, large-scale development projects have become one of the most important and contested issues in the areas of business and human rights. For many local people living in poor countries, a large development project represents a potentially transformative opportunity, coming as they often do with promises of jobs for local people, support for schools and other social services, tax and royalty payments to the government, and a number of other potential benefits.¹ Whether local people actually benefit from the project depends on a host of factors, many of

* Professor of Law, University of Illinois College of Law. I am grateful to participants in the Symposium sponsored by the Indiana Journal of Law and Social Equality at Indiana University Maurer School of Law and to Jennifer Robbennolt for helpful comments.

1. *See generally* INT'L FIN. CORP., ANNUAL REPORT 2013 at 35–37, 43, 53 (2013) (describing private sector development impact on health care, improving energy efficiency, creating jobs, and transferring knowledge and business acumen to local businesses). *See also* INT'L FIN. CORP., TWO GOALS—END EXTREME POVERTY, BOOST SHARED PROSPERITY 2 (2013) (describing private sector mining development project in Ghana financed in part by IFC as creating jobs for local people, helping local businesses grow, and contributing to community development); BP, SUSTAINABILITY REVIEW 2013, at 42–43 (2013) (describing the energy company BP's contribution to local employment in Angola, payment of taxes and royalties to host country governments around the world, and promotion of good governance and social projects).

which are not within the community's control or not susceptible to modification or manipulation.² One important factor that is—or should be—within the community's influence is the stakeholder engagement plan (SEP).³

When a large-scale development project comes to a poor country, that project typically comes with something that looks very much like its own legal system. This new legal system is meant to structure the relationship between those affected by the new project and the proponents of the project. The new rules might sort those affected by the project into categories, distribute economic benefits differentially based on those categories, allocate other benefits which can increase or decrease the social power of those affected, define the ways that people harmed by the project may seek redress for their injuries, or modify existing governance structures.⁴ Increasingly, these rules are formalized in what is often known as an SEP. In the past decade, through the efforts of large institutional lenders such as the International Finance Corporation (IFC) and an array of non-governmental organizations, stakeholder engagement plans have become more comprehensive and sensitive to the wide range of impacts that development projects can have on the communities in which those projects take place. Nonetheless, SEPs are problematic, in large part because they amount to a new legal system, plunked down in a community in which there already exists a formal legal system (in the form of national and municipal law), and the usual, non-formal mechanisms of addressing legal or quasi-legal issues that exist in every community.

Under the approach followed by the IFC, stakeholder engagement plans impose a highly legalized process, negotiated in reflection of prevailing domestic and international law, designed to implement particular policy preferences. Stakeholder engagement plans are designed to perform several functions that are important to the success of the project and to the affected community. Most SEPs rely on what is essentially conventional wisdom when it comes to determining how

2. For an illustration of the many complex factors that contribute to the success or failure of a large-scale development project, see WORLD BANK & INT'L FIN. CORP., CHAD-CAMEROON PETROLEUM DEVELOPMENT AND PIPELINE PROJECT: OVERVIEW 28–41 (2006), http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2007/09/19/000020953_20070919092837/Rendered/PDF/36569.pdf (describing in detail the many unanticipated factors that contributed to the many problems associated with the Chad-Cameroon pipeline project).

3. See, e.g., INT'L FIN. CORP., STAKEHOLDER ENGAGEMENT: A GOOD PRACTICE HANDBOOK FOR COMPANIES DOING BUSINESS IN EMERGING MARKETS 63–66 (2007) (describing when and how companies should negotiate with stakeholders with respect to issues covered in stakeholder engagement plans).

4. For an illustration of a stakeholder engagement plan, see NEWMONT GHANA, PUBLIC CONSULTATION AND DISCLOSURE PLAN: AKYEM PROJECT EASTERN REGION GHANA (2010), http://www.newmont.com/sites/default/files/Public_Consultation_and_Disclosure_Plan_May_2010_Akyem_Project_1.pdf (outlining in detail the processes by and conditions under which the company will disclose information, identify stakeholders, select community representatives, maintain records, and address grievances).

best to do these tasks. This is perhaps understandable because SEPs are themselves a relatively new phenomenon and because the issues they address are affected by a number of factors, including both hard and soft law from domestic and international sources. To be sure, the very existence of SEPs represents progress from the days when corporations and governments imposed their will with little regard for local communities.

Stakeholder engagement plans address many issues, but I will focus on three important aspects. First, SEPs must sort people into different categories, such as indigenous, affected by the project, and perhaps others. Because assignment into a category affects the benefits a person (or family or community) might claim from the project, the assignment is important both for the company and the community. Second, SEPs typically create a process by which those affected by the project either may or must resolve any complaints or claims they have regarding the project. Over time, the grievance process can become a principal means by which individuals not employed by the project interact with it. Third, SEPs define the terms by which the project's participants, typically a company and one or more units of government, provide information about the project to affected communities. Embedded in most SEPs is the assumption that information flow is an important way of managing expectations, anticipating and addressing potential problems, and ensuring long-term acceptance of the project. Related to this is the fact that SEPs often provide a mechanism by which affected communities can influence the substance of the project by, for example, indicating a preference for one possible road route over another.

What has been largely missing from the development of SEPs has been evidence as to how these tasks might be best performed. The process of designing SEPs has relied heavily on experts and focused on legal developments, but has not been guided by empirical evidence. In this Article, I put forward ways to address this deficiency. Parallel to the advent of SEPs has been a significant broadening of the use of randomized control trials (RCTs) in international development.⁵ In RCTs, researchers attempting to identify the best way to solve a particular problem randomly assign comparable individuals into groups, and each group receives a different treatment.⁶ Because the two groups are comparable, if there are different outcomes, the difference is because of the treatment. Randomized control trials have long been used to investigate public health issues, but only in the past decade have they become commonly used in economic development.⁷ What makes many of these randomized control trials interesting for my purposes is that many of them

5. *See generally* ABHIJIT V. BANERJEE & ESTHER DUFLO, POOR ECONOMICS: A RADICAL RE-THINKING OF THE WAY TO FIGHT GLOBAL POVERTY (2011).

6. *Id.* at 14 (“[In a randomized control trial] individuals or communities are randomly assigned to different ‘treatments’—different programs or different versions of the same program. Since the individuals assigned to different treatments are exactly comparable (because they were chosen at random), any difference between them is the effect of the treatment.”).

7. *Id.*

have tested approaches to solving problems or allocating costs and benefits that are also used in SEPs. I examine some of this evidence and use it to suggest that some of the conventional wisdom found in many SEPs might not be the most appropriate way to make the decisions that the plan must make.

In this Article, I propose to draw on recent research from development economics, sociology, and other disciplines that use randomized control trials to assess how specific policies work at solving specific problems. Large-scale development projects bring together companies, governments, and local communities, each of which has different resources, bargaining power, and values. To a considerable extent, SEPs determine the contours of how these relationships are structured, particularly with respect to the treatment of local communities. At present, most SEPs are shaped by legal requirements and conventional wisdom (and because they are negotiated, bargaining power plays a big role as well). I argue that this important area of development policy should not be left out of the revolution that is influencing many other areas of development policy and development scholarship.

I. THE STAKEHOLDER ENGAGEMENT PROCESSES

The IFC is the private sector development section of the World Bank Group. Since at least 1993, the IFC has been the principal engine behind the drive to incorporate social and environmental considerations into the planning, selection, and management of large-scale development projects.⁸ The IFC plays an unusual role in development projects: part beneficent anti-poverty organization and part investment fund seeking to earn a return. As part of the World Bank Group, one of IFC's explicit goals is to end extreme poverty. But because its focus is private sector development, the IFC does this by engaging directly with for-profit enterprises, not by providing grants or other services to those most in need or their governments. The IFC attempts to realize its mission by including in its loan or investment agreements social and environmental conditions. These requirements address a myriad of issues, including but certainly not limited to the kinds of issues that SEPs address.

In this Part, I first discuss the evolution of the IFC's inclusion of social and environmental requirements for project sponsors. Although a full history of the IFC's activities in the area of social and environmental policy is well beyond the scope of this Article, it is important to at least trace the incremental but seemingly inexorable path from suggestions about good practices to what are now specific and required provisions of binding contracts. What this brief history shows is that the IFC's requirements have evolved principally by reference to law and rights, leavened by lessons drawn from prominent negative experiences in particular cases. This has all happened in the face of counter-arguments or opposition from

8. With regard to the IFC Performance Standards as soft law, see Kenneth W. Abbott & Duncan Snidal, *International Regulation Without International Government: Improving IO Performance Through Orchestration*, 5 REV. INT'L. ORG. 315 (2010).

those who viewed the requirements to be unnecessary, too expensive, or outside the remit of the IFC. To this point there has been little room for the testing of the IFC's requirements. This is perhaps to be expected, and my argument is not meant as a criticism of what the IFC has done. Nonetheless, it is important to note that the policies that exist today are largely the product of legal argument and evolution, not solutions arrived at by experimentation and correction.

After tracing the history of the IFC's social and environmental policies, I turn my attention to SEPs specifically. It is now commonplace for the IFC (and other institutional lenders) to require proponents of large-scale development projects to create a comprehensive plan to manage the project's relationship with affected communities. SEPs are the way that most companies fulfill these obligations. For example, when the international mining company Rio Tinto and its local partners initiated a mining development project in the Simandou mountain range in eastern Guinea, in West Africa, the companies created an SEP to govern the project's "engagement with external stakeholders."⁹ Similarly, the mining company AngloGold Ashanti developed an SEP to define its relationship with a wide range of stakeholders (and to indicate how it determined who the stakeholders were).¹⁰

A. *The Evolution and Content of the IFC's Social and Environmental Requirements*

The IFC's job is to fight poverty by promoting the growth of private sector enterprises in developing countries. It does this by making loans to companies investing in private sector development projects, taking equity stakes in those projects, and providing project finance, among other things. These activities have put the IFC at the center of some of the largest and most controversial development projects in recent decades. And one of the most vexing problems in many projects has been the relationship between the communities affected by the project and the project's proponents. At its core, the IFC's approach has been to link financial assistance to improvements in environmental and social standards.¹¹ The IFC's practices in this area have evolved incrementally, but it is useful to divide the

9. SIMFER SA, RIO TINTO, SIMANDOU PROJECT SEIA STAKEHOLDER ENGAGEMENT PLAN 1 (2012).

10. SRK CONSULTING, MONGBWALU PROJECT STAKEHOLDER ENGAGEMENT PLAN 1–2 (2011) (report prepared for Ashanti Goldfields Kilo SARL, a subsidiary of AngloGold Ashanti).

11. In the words of Ibrahim F.I. Shihata, who was Vice President and General Counsel of the World Bank and helped to create MIGA, "[f]inancial mechanisms should not be viewed simply as ways of providing money for environmental problems. . . . [I]nternational financial institutions can assist in developing standards and ensuring compliance with them through financial incentives." Ibrahim F.I. Shihata, *International Financing Mechanisms and Institutional Responses, Address at the American Bar Association Twentieth Annual Conference on the Environment*, in AM. BAR ASSOC., THE ROLE OF LAW IN THE 1992 UNITED NATIONS CONFERENCE ON ENVIRONMENT AND DEVELOPMENT 11, 13 (1991).

history into rough periods. It is important to note that because the legal and policy changes were not imposed in a coherent or linear way, some current projects are subject to rules developed in an earlier period, and some older projects had aspects of the rules that only later became the norm. Nonetheless, this rough history does bring into clearer focus the most important developments along the way.¹²

In the first period, the principal means of engagement was the one-way provision of information from those controlling the project to those affected by the project.¹³ This meant that the IFC required project proponents to gather information and make certain disclosures to affected communities.¹⁴ There was little that affected communities could do to give expression to their opinions on the project. The principal justifications for making these disclosures were instrumental: doing so was thought to reduce costs by reducing political risk, ensuring a congenial work environment, and avoiding potentially costly conflicts with workers, the host-country government, or other local stakeholders. This approach represented a change for the better from the days in which corporations and governments mostly did as they pleased to local people, but it did not stem the flow of complaints about projects or the IFC's participation in them.

12. My focus on the development of the IFC Performance Standards and their effect on development projects is not to suggest that this is the only factor in the increasing prominence of SEPs. Another important factor has been work done under the auspices of the United Nations to convince corporations that it is in their interests to engage with stakeholders and ensure that their projects are sustainable and do as little harm as possible. For a thorough review of this cluster of arguments in favor of stakeholder engagement, see BETH KYTLE & JOHN GERARD RUGGIE, *CORPORATE SOCIAL RESPONSIBILITY AS RISK MANAGEMENT: A MODEL FOR MULTATIONALS* (Corporate Soc. Responsibility Initiative, Working Paper No. 10, 2005). Ruggie and his colleagues ultimately produced an influential report that concluded that businesses have a duty, but not a legal obligation, to protect human rights and attempt to ensure sustainable development. See JOHN RUGGIE, *PROTECT, RESPECT AND REMEDY: A FRAMEWORK FOR BUSINESS AND HUMAN RIGHTS* (2008), <http://www.reports-and-materials.org/sites/default/files/reports-and-materials/Ruggie-report-7-Apr-2008.pdf>.

13. For a thorough history of the changes to the IFC Performance Standards in 1998 and 2006, see generally Elisa Morgera, *Significant Trends in Corporate Environmental Accountability: The New Performance Standards of the International Finance Corporation*, 18 *COLO. J. INT'L ENVTL. L. & POL'Y* 151 (2007). Morgera argues that the 1998 iteration of the Performance Standards largely focused on the incorporation of legal standards regarding environmental protection into the IFC's policies and practices. *Id.* at 155. In contrast, the 2006 iteration includes social sustainability issues as well. *Id.* at 156.

14. See, e.g., INT'L FIN. CORP., *GOOD PRACTICE NOTE: ADDRESSING THE SOCIAL DIMENSIONS OF PRIVATE SECTOR PROJECTS* (2003) (describing obligations under IFC policies to gather data on projects before and after their commencement and the requirements of providing information to affected communities).

The second period began when the IFC revised its performance standards to require not just the provision of information, but also some level of consultation.¹⁵ The policies behind this shift gave many affected communities formal opportunities to be heard. Instead of merely being the passive recipients of information passed along by the company, affected communities now could respond in meaningful ways to those developing or managing the project. The IFC's policies did not change in a vacuum, of course, and one of the most influential trends was an increased recognition of the rights of indigenous people to participate in development decisions.¹⁶ In addition, during this period the concept of sustainable development began to gain traction in tangible ways,¹⁷ such as imposing requirements that projects mitigate their environmental impacts, compensating those affected by the environmental consequences of projects, or considering altering projects so as to minimize the environmental impacts, even if doing so would make the project somewhat more costly.

The final period—and the current state of play in this area—has two dominant features.¹⁸ The first is a clear focus on environmental issues, including climate change, in development projects. This focus takes different forms in different contexts, but the common notion is that projects supported by the IFC (and other parts of the World Bank Group) should no longer cause environmental harm. For too long, environmental harms were a kind of externality that proponents of projects were not required to account for in any meaningful way. Although many people affected by development projects continue to have legitimate grievances, it is true that environmental issues are increasingly treated as a cost that must be incorporated into the project rather than left for others to bear.¹⁹

15. The IFC's efforts to change its policies also affected other important actors, none more so than the banks that provide the financing to many large-scale development projects. In the early 2000s, a group of banks came together to develop their own, voluntary standards that would set policy regarding environmental and social impact issues, and based their policies on the IFC Performance Standards. *See* Ariel Meyerstein, *The New Protectors of Rio: Global Finance and the Sustainable Development Agenda*, 12 SUSTAINABLE DEV. L. & POL'Y 15, 16 (2012) (arguing that banks developed the Equator Principles based on the IFC Performance Standards); *see also* Bert Scholtens & Lammertjan Dam, *Banking on the Equator: Are Banks that Adopted the Equator Principles Different from Non-Adopters?*, 35 WORLD DEV. 1307, 1308–09 (2007) (describing the role of banks in the history of the development of the Equator Principles).

16. *See, e.g.*, STAKEHOLDER ENGAGEMENT, *supra* note 3, at 47–52 (discussing requirements for consultation with indigenous and tribal peoples).

17. The concept of sustainable development has been part of discussions about development for at least three decades. *See* DAVID FREESTONE, *THE WORLD BANK AND SUSTAINABLE DEVELOPMENT: LEGAL ESSAYS* 8–16 (2012) (tracing the evolution of the concept of sustainable development in World Bank policies from the mid-1980s to the present).

18. For a comprehensive discussion of recent changes to the IFC Performance Standards, particularly with respect to disclosure obligations and consultation requirements, *see* Shalanda H. Baker, *Why the IFC's Free, Prior, and Informed Consent Policy Doesn't Matter (Yet) to Indigenous Communities Affected by Development Projects*, 30 WIS. INT'L L.J. 668, 678–81 (2013).

19. FREESTONE, *supra* note 17, at 10–11.

The second dominant feature of the current status of social and environmental requirements is that the area is increasingly legalized, with various groups having positive claims against the project or the government supporting it, and those supporting the project having positive obligations. For example, indigenous people have specific and cognizable claims to benefits from projects and can, under some circumstances, claim those benefits before others. Project proponents must study the social and environmental impacts of their work, develop plans to minimize or mitigate those impacts, and provide their plans to affected communities. No longer are these steps treated as merely good ideas that might have some commercial payoff for the company. Instead, they are requirements that can be enforced using hard or soft law mechanisms.

B. Stakeholder Engagement Plans in the Context of Social and Environmental Requirements

Under the IFC's approach, proponents of a new private sector development project must identify the people and areas likely to be affected by a project, specify the risks and adverse impacts on those people and places, and show how the project either tries to avoid those adverse impacts, how it tries to minimize them, or how it will provide compensation for those impacts that cannot be avoided. The IFC's Sustainability Framework is the umbrella under which all such regulations fit. The Sustainability Framework is equal parts strategic plan and operational instructions, including policy statements about the IFC's commitment to sustainability, the specific rules that govern projects, and detailed instructions about how to implement those rules.²⁰ The Sustainability Framework includes the IFC Performance Standards, which are rules governing eight categories of potential issues.²¹ Under the IFC's approach, Performance Standard 1 requires project proponents to undertake a comprehensive "assessment to identify the environmental and social impacts, risks, and opportunities" of the project.²² With this review, typically called an Environmental and Social Impact Assessment (ESIA), clients assess potential adverse social and environmental outcomes and identify a number of factors that suggest the project might cause harms to particularly vulnerable populations or pose other risks.²³ Depending on the results of the ESIA, the project is governed by other Performance Standards which have the goal of minimizing or mitigating those adverse impacts.²⁴

Once proponents of a project have completed the ESIA, it is possible to develop a stakeholder engagement plan.²⁵ Under the IFC Performance Standards, an

20. INT'L FIN. CORP., WORLD BANK GRP., *Overview to IFC PERFORMANCE STANDARDS ON ENVIRONMENTAL AND SOCIAL SUSTAINABILITY*, at i (2012).

21. *Id.* (listing the eight Performance Standards).

22. *Id.*

23. *Id.* at 3–4 (IFC Performance Standard 1).

24. *Id.* at 3, 5.

25. *Id.* at 7.

SEP is the scheme by which those promoting the development project are required to structure their relationship with the people affected by the project. It represents a number of commitments from the project's proponents to local communities. An SEP is thus the part of the overall environmental and social strategy that most directly affects local communities. The IFC Performance Standards allow for flexibility in the creation of an SEP, calling for it to be tailored to the project and the affected communities.²⁶

Even with this flexibility, the IFC suggests that an SEP should include a number of elements. First, an SEP should include an analysis of who the stakeholders are, and what kind of stake each group or community has in the project.²⁷ Implicit in this analysis is an examination of the risks that the project poses to the affected community (and to the environment). Whether any particular IFC Performance Standard applies depends on the outcome of the initial review. If the project is likely to harm public health, create dangerous working conditions, or pollute the local environment, then an SEP must include a plan to account for these risks.²⁸ Thus, one of the functions of an SEP is to allocate the social and environmental costs of the project—for example, which group will bear the costs of environmental degradation and what the compensation will be for such an impact.

Second, the ESIA must identify any social groups that are particularly vulnerable, including indigenous groups. An SEP must then describe how the project will account for the potential harms to these groups. Issues relating to indigenous groups are governed by IFC Performance Standard 7 on the theory that such groups are especially vulnerable to exploitation and unlikely to have the social power to fully advocate their concerns.²⁹ Under an SEP, members of indigenous groups may receive enhanced compensation for harms also visited upon other groups. In this way, the SEP allocates benefits among stakeholders.

Third, the ESIA must include a plan for addressing any grievances that may arise during the project. The grievance mechanism must be designed so as to “receive and facilitate resolution of . . . concerns and grievances about

26. *Id.* (requiring clients to “develop and implement a Stakeholder Engagement Plan that is scaled to the project risks and impacts and development stage, and . . . tailored to the characteristics and interests of the [sic] Affected Communities”).

27. *See id.* at 7.

28. These issues would be governed by Performance Standard 2 (Labor and Working Conditions), *id.* at 16–21, Performance Standard 4 (Community Health, Safety, and Security), *id.* at 27–30, and Performance Standard 6 (Biodiversity Conservation and Sustainable Management of Living Natural Resources), *id.* at 40–46.

29. *Id.* at 47–52 (IFC Performance Standard 7).

the client's environmental and social performance."³⁰ The IFC suggests that a grievance mechanism should be transparent, should resolve issues promptly, and should be open to the affected community.³¹ Beyond this, the IFC Performance Standards do not specify the structure or content of the grievance mechanism. Closely related to the grievance mechanism is the requirement that an SEP must include a plan by which the project's proponents and managers communicate with affected communities. As with other issues, the IFC Performance Standards do not specify the structure and content of the communication apparatus. Instead, what is required is that the communications process function effectively.³²

One of the strategic objectives of SEPs is to further the interests of those promoting the new development project. This is often framed in terms of attempting to create a social license to operate (SLO). An SLO exists when a project "is seen as having the broad, ongoing approval and acceptance of society to conduct its activities."³³ Only recently have scholars studied SLOs in earnest, but there is already a burgeoning literature on how a project's proponents can secure an SLO, the normative and theoretical aspects of different levels or types of SLOs, and the costs and benefits to companies of securing, or not securing, an SLO.³⁴ What is important for my purposes is that my argument is entirely consonant with this approach. When those involved in a project are able to do the tasks contained in an SEP efficiently and in a way that satisfies everyone involved, the project is more likely to succeed and more likely to actually improve the welfare of those involved. When there are contentious and sustained disagreements over those issues that are incompletely or unsatisfactorily resolved, the project is less likely to prosper and much less likely to improve the lives of those affected by it.

30. *Id.* at 9.

31. *Id.*

32. *See id.* (discussing requirements for external communications).

33. Jason Prno & D. Scott Slocombe, *Exploring the Origins of "Social License to Operate" in the Mining Sector: Perspectives from Governance and Sustainability Theories*, 37 RES. POL'Y 346, 346 (2012).

34. *See generally* Ana Maria Esteves, Daniel Franks & Frank Vanclay, *Social Impact Assessment: The State of the Art*, 30 IMPACT ASSESSMENT & PROJECT APPRAISAL 34 (2012) (critically assessing the goals of the various processes and mandates to manage the social issues associated with development projects and arguing in favor of enhanced means to assess the impact of such programs); Silva Larson, Thomas G. Measham & Liana J. Williams, *Remotely Engaged? Toward a Framework for Monitoring the Success of Stakeholder Engagement in Remote Regions*, 53 J. ENV'T PLAN. & MGMT. 827 (2010) (reviewing the literature on the measurement of stakeholder engagement and arguing in favor of a set of qualitative and quantitative indicators of the effectiveness of stakeholder engagement processes in resource extraction sites); John R. Owen & Deanna Kemp, *Social License and Mining: A Critical Perspective*, 38 RES. POL'Y 29 (2013) (documenting the near ubiquity of the concept of "social license to operate" in the rhetoric of resource extraction firms and analyzing the causes and consequences of acquiring or not acquiring an SLO).

The conventional approach to SEPs is likely a function of their history. In large measure, the conventional approach to SEPs reflects an improvement in the ways that corporations and governments view and treat members of poor communities. Indeed, the existence of SEPs shows an increase in the importance given to the welfare of local and host communities.³⁵ I do not argue that SEPs are wrong in theory or inevitably flawed. Instead I argue that there are ways to make them better.

The concept which unifies the requirements for SEPs discussed in the previous section is that each is a functional requirement: the goal is for an SEP to accomplish particular tasks, not for an SEP to conform to a rigid or formal template. This flexibility is important because it opens the door to reconceive SEPs as a means to solve specific (albeit complex) problems. If the goal of an SEP is to solve specific problems, rather than to conform to a specific template, then the next step should be to investigate the tasks an SEP must perform, and identify ways that it can do those tasks more effectively and efficiently.

II. IMPROVING STAKEHOLDER ENGAGEMENT PLANS

SEPs have become legalized documents that often speak of rights and obligations, create entities with many of the characteristics of a court, and provide for the resolution of legal claims and the enforcement of those decisions. Despite these appearances, it is more helpful to conceive of stakeholder engagement documents as complex work plans. They describe how those affected by the project—the company, government, and local people—will allocate the benefits and costs of the project, make important decisions, and resolve disputes. The goal of this Article is to argue that SEPs can do their assigned tasks better, and the way to accomplish this is to look to existing empirical research on similar issues and to identify areas for empirical research on SEPs directly.

Before moving on, it is important to acknowledge the potential benefits and very real limitations of my approach, and to explain why it is worthy of consideration. Rigorous RCTs are tightly constructed. At the outset of any study there is, of course, a general research question. An example of such a question is, “*what is the best way to reduce the spread of malaria?*” or “*what should local governments do to increase school attendance?*” But the real insights come from the construction of a very specific research question, for example, “*will this specific*

35. For a comprehensive analysis of the evolution corporate-community relations in the context of development and human rights, see Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 452–60 (2001). Ratner identifies the relationships among four key actors as the principal determinants of the role of human rights in international business: the home state, the host state, the corporation, and the affected population of the host state. *Id.* at 452. One of the consequences of the increase in importance of the welfare of the affected population is the development of the ESIA process and the use of SEPs.

intervention do a better job of reducing the spread of malaria than that specific intervention?” Thus, the best studies test specific propositions or treatments.

Researchers must also attend to the selection of their test populations. The RCTs that are most useful for issues related to stakeholder engagement are the ones that test policies on many communities. Researchers attempt to pick places or populations that are as similar to each other as possible, in as many ways as possible. If the two test populations are sufficiently similar, this helps researchers conclude that any difference in outcome is the result of the specific intervention, and not the result of some other difference between the two populations.

One consequence of this specificity is that researchers can take the results seriously. In the language of the social sciences, this refers to the internal validity of the study: whether the research design allows “the drawing of valid inferences about the relationships between variables.”³⁶ All of the studies that I rely on in this Article were done in such a way as to maximize their internal validity, meaning that the results may be reliably held to explain the relationship between the variables under examination.

But, strictly speaking, the results of any particular RCT mean that *this* intervention, used in *this* context, at *this* time, produced *this* result.³⁷ Of course, the results of individual RCTs do not answer the general question once and for all.³⁸ More importantly, the results of any particular RCT do not mean that the intervention found most efficacious will work everywhere, or even elsewhere in the same country. Because the best RCTs are specific and test narrow questions, they have a high degree of internal validity. But one consequence of this specificity is that it can be difficult to generalize—to use the results of a particular RCT to draw inferences about whether a similar intervention would work in a different context. This is a separate question—that of external validity³⁹—and, crudely speaking, it

36. ROBERT M. LAWLESS, JENNIFER K. ROBBENOLT & THOMAS S. ULEN, *EMPIRICAL METHODS IN LAW* 36 (2010).

37. See RACHEL GLENNERSTER & KUDZAI TAKAVARASHA, *RUNNING RANDOMIZED EVALUATIONS: A PRACTICAL GUIDE* 392 (2013) (noting that a study can be said to have “internal validity” if “we can be reasonably confident that the impact we measure is an unbiased estimate of the true impact in this context”).

38. See Michael J. Saks, *Improving APA Science Translation Amicus Briefs*, 17 *LAW & HUM. BEHAV.* 235, 240 (1993) (arguing that there is a “nearly universal consensus that a single study is not sufficient” to answer most research questions); see also LAWLESS ET AL., *supra* note 36, at 47 (noting that “no individual study will be dispositive of a given research question”).

39. See LAWLESS ET AL., *supra* note 36, at 36–40.

is the point of conducting RCTs in the first place.⁴⁰ RCTs would be of little utility in the development context if it were impossible to apply the lessons learned from studies done in one place to problems in a different place.

This does not mean that RCTs should not be used to inform general policy discussions; they should and are used in this way. But it does mean that it is important to acknowledge that results from RCTs do not provide the final answer to general policy questions, and that generalizing based on results from these sources must be done with some caution. Despite this limitation, RCTs are useful to policymakers and, I argue, should inform policy debates about stakeholder engagement plans. RCTs are part of a larger trend in development policy: the use of nuanced, rigorously obtained evidence to influence development decisions.⁴¹ The use of data in development is not new, of course, but evidence of the type that RCTs produce is relatively new and undeniably important.

A. *Distributing Benefits and Burdens*

One of the tasks that an international development project must perform is to categorize people. Categorization decisions can be profoundly important to people affected by the project: they can determine who benefits from the project, who can be asked to bear the costs of the project, who will be displaced by the project, and who will keep his or her land. Under the approach followed by the

40. See generally GLENNERSTER & TAKAVARASHA, *supra* note 37, at 392 (“[T]he questions most relevant to policy go beyond the specifics of one program: If the program was tested and worked well in one district of the country, will it work in other districts? If it worked in one country, will it work in another country? If it worked at one point in time, will it work at other times when conditions may have changed? If it worked at a small scale, will it work at a large scale?”).

41. The increasing and increasingly sophisticated use of evidence to inform development decisions has taken many forms, three of which bear mention. The first is the use of large-*n* econometric studies to draw conclusions about development policies and their effect on individuals, regions, and countries. This is not new, of course, but it is increasingly prominent and is being done in a more sophisticated and nuanced way than ever before. The second is the reliance on indicators to influence development (and governance) decisions. Kevin E. Davis, Benedict Kingsbury & Sally Engle Merry, *Introduction: Global Governance by Indicators*, in GOVERNANCE BY INDICATORS: GLOBAL POWER THROUGH QUANTIFICATION AND RANKINGS 3 (Kevin E. Davis et al. eds., 2012). Davis et al. critically assess the increasing use of collections of “rank-ordered data that purports to represent the past or projected performance of different units.” *Id.* at 6. Finally, for an example of the use of randomized control studies, see generally JONATHAN BAUCHET, CRISTOBAL MARSHALL, LAURA STARITA, JEANETTE THOMAS & ANNA YALOURIS, LATEST FINDINGS FROM RANDOMIZED EVALUATIONS OF MICROFINANCE (2011). Bauchet et al. report, under the auspices of the World Bank, on a wide range of randomized control studies of various ways to structure microfinance programs. *Id.* at 20–23. Bauchet et al. describe the results of the studies and note that, taken together, the studies “provide a more nuanced and precise set of information on how to better design, price, and market microinsurance products.” *Id.* at 19.

IFC and most other large-scale development projects, such decisions are made using a highly legalized process. There are explicit rules, negotiated in reflection of prevailing domestic and international law, designed to implement particular policy preferences. Because these rules are then implemented in a community with its own norms, dynamics, and dysfunctions, the results on the ground are inevitably different than a proponent of the rules might have anticipated. Nonetheless, the rules themselves are important because embedded in them are judgments about how best to construct the categories into which people are sorted.⁴² These judgments take two forms: substantive conclusions about what the categories should be and procedural conclusions about how best to make categorization decisions.

One of the first decisions that must be made with respect to any development project is to determine who is affected by it. Those who are in the category of “affected” typically receive a proportionately higher share of benefits than would other citizens who, for whatever reason, are not in the “affected” category. People in affected communities might be entitled to more compensation for their land, assistance in the event that their livelihoods are adversely affected by the project, or preferred status when they apply for jobs with the project. The rules governing these decisions are typically based on two principal factors: identifying people who live in geographic proximity to the project area and will presumably be affected by it, and by determining who has strong ties to the area such that their interests in the area might be stronger than those of others.⁴³

A second and closely related decision that must be made in most development projects is to determine who is “indigenous” to the affected area. Under the law, those who are placed in the “indigenous” category are entitled to even more rights and benefits than others in the “affected” category. The practical importance of indigeneity is related almost entirely to the law.

The task of assigning members of a community into meaningful categories is one that occurs frequently in development endeavors. For example, when governments create social benefit programs to provide support to those in need, the program must determine who in the population is eligible for the benefits. To do this, governments might rely on formal criteria, such as tax records to verify household income, or land ownership to determine who lives in a particular area. Because such formal indicia are often incomplete or absent, development programs sometimes use proxy-means tests or other second-order criteria to draw the same conclusions. These tests rely on the collection of data on individuals or families that

42. To be sure, it is entirely possible that the rules reflect received wisdom rather than actual decisions about how best to construct categories or what the categories should be.

43. There are likely additional reasons that those living closest to the project area are treated differently. For example, because they are in the best position to cooperate with or resist the project, their relationship to the project might influence an investor’s views as to the relative riskiness of the project.

is then objectively assessed.⁴⁴ For example, a proxy-means test to determine which members of a community are poor enough to qualify for social benefit programs might collect information on observable characteristics of a household, such as the condition of the dwelling, the types of goods the household consumes, the location of the dwelling, and the like.

An alternative to proxy-means testing (or the use of formal criteria) is what is often called “community-based targeting.”⁴⁵ To do this, the government or development agency enlists community members, often community leaders, to identify who in the community should receive the benefits. This is thought to rely on local knowledge and definitions of poverty or wealth. Because the process relies on the subjective impressions of people who are themselves embedded in the community and connected to those whose eligibility they assess, this method can be open to abuse. In the literature on community engagement processes, the conventional wisdom is that elites will capture the process and allocate more benefits to their families or friends, or direct benefits away from people who belong to disfavored groups or are otherwise without social power.⁴⁶ For development professionals, this has meant choosing between the benefits of a community-based process, with the presumed risk of elite capture, or using an imperfect, proxy-based process without the presumed risk of elite capture.

To test this proposition, researchers conducted a randomized evaluation to assess how well each method worked, whether elite capture was a significant risk, and how acceptable the results of each process were to community members.⁴⁷ The objective of the program under assessment was to provide cash assistance to poor families in Indonesia.⁴⁸ One problem the program confronted was identifying who should receive the benefits. The program attempted to ensure that as many truly needy families as possible received benefits, while guarding against the possibility that ineligible households did not receive benefits.⁴⁹ Another objective was to ensure that the program’s beneficiaries were selected pursuant to neutral and defensible criteria, not because of personal relationships or social or political power.⁵⁰

To assess how best to identify the appropriate beneficiaries of the transfers, researchers tested three targeting methods. Researchers divided households in 640 Indonesian villages into three groups, and used a different method to identify

44. *Proxy Means Testing*, THE WORLD BANK, <http://go.worldbank.org/SSMKS9WUT0> (Dec. 30, 2014).

45. *Community-Based Targeting*, THE WORLD BANK, <http://go.worldbank.org/T9FCYR-WWO0> (Dec. 30, 2014).

46. *Id.*

47. Vivi Alatas, Abhijit Banerjee, Rema Hanna, Benjamin A. Olken & Julia Tobias, *Targeting the Poor: Evidence from a Field Experiment in Indonesia*, 102 AM. ECON. REV. 1206 (2012).

48. *See id.* at 1208.

49. *Id.* at 1218–19.

50. *Id.* at 1227–29.

beneficiaries in each group.⁵¹ One method was to survey the households on a variety of measures, including such things as the combined assets of those living in the household, their education level, and their jobs.⁵² This method, called proxy-means testing (PMT), used various indicators to construct a numerical score for each household; those Indonesian test households with the lowest scores received assistance from the program. For many researchers, PMT is the gold standard because it is ostensibly objective.⁵³ If researchers ask the right questions and accurately record the answers, then the results are free of personal biases or political considerations. The second method was what researchers called “community-based targeting.”⁵⁴ For this group, researchers asked residents to rank the households in their community from richest to poorest. Community members used their own criteria and were asked to assess every household in the village. The final method was a hybrid of the first two.⁵⁵ For villages in this group, residents first ranked the households and then researchers verified “1.5 times the ‘beneficiary quota’ of households” to conduct PMT surveys.⁵⁶

Researchers found that PMT was the most accurate method of identifying poor households, but that community-based targeting was likely to produce a more efficient and satisfactory program.⁵⁷ Researchers also found that, compared with community targeting, PMT had the lowest error rate when errors were defined as incorrectly determining whether a household lived on two dollars per day or less.⁵⁸ Community-based targeting, in which villagers were asked to rank themselves and their neighbors, was nearly as accurate as PMT and produced results that were much more satisfactory to the community than either PMT or the hybrid method.⁵⁹ Communities were able to construct meaningful categories about who was poor enough to appropriately benefit from the program and who was not.⁶⁰

There are two questions from the study that merit particular attention for my purposes: why did community members come up with different beneficiary lists than the PMT method, and why were community members more satisfied with the lists produced by community targeting? Both are relevant to applying this evidence to SEPs and suggestive of ways to construct controlled trials specifically for the SEP context.

51. *Id.* at 1211–15.

52. *Id.* at 1212.

53. *See id.* at 1207.

54. *Id.* at 1212 (classifying as “community-based targeting” and “community targeting” interchangeably).

55. *Id.* at 1213–14.

56. *Id.* at 1213.

57. *Id.* at 1227.

58. *Id.* at 1208, 1218–20.

59. *Id.* at 1208, 1225–27.

60. *See id.* at 1212–13.

As to the first question, one possible answer is that the members of the community did not have the same amount or type of information as that available to the researchers who conducted the extensive PMT interviews. Interviewers obtained extensive and wide-ranging information about individual households and relied on this to determine eligibility for the assistance program. Interestingly, the evidence suggested that members of the community relied on essentially the same information as the PMT researchers.⁶¹ The community-based targeting method produced a different result because members of the community appeared to rely on a “systematic, broadly shared notion of welfare” to produce a beneficiary list that reflected this “different concept of welfare.”⁶² Thus, community members appeared to use the same information but assigned different weight to the various factors to arrive at their determinations.

Although the results of the study did not permit researchers to draw definitive conclusions, the evidence did suggest that there was a cluster of factors that were particularly important to community members.⁶³ For the PMT method, researchers used per capita consumption to determine eligibility. They used various indicators to construct the measure of poverty, including the size of the household, whether the head of the household was a widow, and the number of children in the household (including who was entitled to their labor). When they compared the results of the community targeting method to the PMT method, researchers found that the evidence suggested that community members understood households differently than the way the PMT model might suggest.⁶⁴ First, community members appeared to believe that there were economies of scale within households, such that larger households (with access to more labor but sharing costs) would fare better than smaller households. Second, community members also appeared to recognize that some households would have an easier time weathering shocks than other households. For example, households with strong ties to economic elites that were poor according to the PMT method—meaning that their per capita consumption was consistent with that of other poor households—were viewed as less poor by community members than households not similarly connected to elites.⁶⁵ Community members may have reasoned that elite-connected households could rely on their connections as a kind of emergency insurance policy. Similarly, the community targeting method ranked households headed by widows as poorer than their consumption baskets would have otherwise suggested. This result might be explained by the belief that persons with lower social power were less capable of withstanding shocks, or that their long-term economic potential was lower than their current consumption patterns might suggest. Either way, it appears that community members consistently brought their understanding of the importance of social power to their conclusions about poverty and benefits.

61. *Id.* at 1234–37.

62. *Id.* at 1234.

63. *Id.* at 1236 tbl.12.

64. *Id.* at 1231–34.

65. *Id.* at 1237 & n.38.

The second important question from the Indonesia study is why community members were more satisfied with targeting decisions made according to the community-based model as opposed to the PMT or hybrid models. At first blush these results might appear difficult to understand. One of the purported benefits of the PMT method is that the results are free from any allegations of subjectivity. Individuals should know that beneficiaries were chosen because of objective, non-political factors. The method is also thought to account for the risk of elite capture—the potential for political or social elites to take over the process and direct benefits to their relatives or supporters. Despite this, members of the community were more satisfied with the results from the community-based method. One possible reason is that the results were more aligned with what members of the community thought were the important factors.

The difference in community satisfaction had potentially powerful practical effects. First, when community members were more satisfied with the distributional results, there were fewer complaints about the program.⁶⁶ Fewer complaints should mean lower administrative costs over the long run—important for any program and particularly important for a large-scale development project designed to last for many years. The second practical effect of higher community satisfaction is that it produced an easier disbursement process.⁶⁷ Higher community satisfaction meant that those in charge of disbursing the benefits could do so more quickly and efficiently. As when there are fewer complaints, a more efficient disbursement process should produce lower administrative costs over the long run.

Consider how the insights from this study might be applied to SEPs. Recall that one of the important issues that an SEP must address is indigeneity: determining who fits into this category and, therefore, will receive additional benefits (or avoid costs borne by non-indigenous affected persons). The results of the Indonesia trial suggest that community members might be capable of making this decision based on multiple, locally contingent factors. If the principal reasons to require that indigeneity decisions be made according to formal criteria are to avoid the corruption of the process by those with more social power and to ensure that those affected by the project are satisfied with the result, this study suggests that a different process might work just as well or better. This would be in contrast to a legalized approach relying on ostensibly objective determinations made according to formal (and perhaps arbitrary) indicators of indigeneity.⁶⁸ Put slightly differently, the evidence suggests that communities used an alternative definition of poverty that considered

66. *Id.* at 1225–26.

67. *Id.* at 1227.

68. For a fuller discussion of the many problems with the concept of indigeneity, and the effect of these conceptual problems on policy, see Patrick J. Keenan, *Business, Human Rights, and Communities: The Problem of Community Consent in Development*, 37 *FORDHAM INT'L L.J. ONLINE* 44, 66–69 (2014) (arguing that the concept of indigeneity has confused scholars and policymakers alike).

social power as well as wealth or analogous criteria. Researchers suggested that the community's judgments appeared to be "informed by a better understanding of factors that affect a household's earning potential or vulnerability."⁶⁹

Decisions with respect to indigeneity in the SEP context might well turn on similar factors. It is plausible that these same communities might use an alternative definition of indigeneity, or of "who is affected," that reflects a "better understanding of . . . vulnerability,"⁷⁰ such as the kind of social power that can come from (or be reduced by) family networks or widowhood. The current approach does not leave room for consideration of social power or similar factors, relying as it does on the formal application of a legal definition.

Insights from the study might be applied to SEPs in an additional way. Community satisfaction is an important factor in both contexts and would likely have similar practical benefits. In the context of the Indonesia study, community satisfaction would likely reduce administrative costs in a variety of ways. In the context of SEPs, community satisfaction might directly contribute to enhancing the social license to operate. This should be appealing to the project's proponents because it would likely reduce the risk that the project would fail, and would accomplish this in a way that might be less costly than other methods of developing a social license to operate. The more community support there is, the deeper the satisfaction runs, and the more sustained that satisfaction is, the more likely it is that a project will receive favorable financing and face fewer social and political risks.

B. Grievance Processes and Information Flow

Stakeholder engagement plans developed as a way to both ensure that affected communities had access to information about development projects, and a means to bring their grievances to the attention of the projects' managers. These two functions are required by the IFC Performance Standards and were considered a "best practice" even before they were required. Despite the ubiquity and importance of these provisions, there has been relatively little attention to their design or effectiveness. Most grievance and information processes, at their core, amount to an open-door policy in which community members are given information and are free to come to the project's managers with their complaints with the assurance that those complaints will be addressed under the rules prescribed in the SEP. To be sure, the existence of disclosure policies and grievance mechanisms represents substantial progress from the days in which there were no effective means for community members to receive information about projects or to bring complaints to the attention of the project's managers. In this Section, I analyze recent research to show that the current models, appealing as they may be, may not be the optimal means to accomplish what they are designed to accomplish. Although the flaws

69. Alatas et al., *supra* note 47, at 1239.

70. *Id.*

in each process are similar, I analyze them separately to show how each might be changed to better serve its intended purpose.

1. Grievance Processes

All SEPs create a process to resolve complaints or grievances that community members might have regarding the project. The typical grievance process is a company-controlled process in which community members are permitted to bring complaints. On the surface such a model looks appealing: there are typically no barriers regarding the type of claim, pleading standards are minimal, and complainants are promised that their complaints will at least be heard. Nonetheless, recent research suggests that such a process is flawed in important ways.

A principal flaw with most grievances processes is that they ensure that for most people, their first meaningful engagement with the project is a confrontation. Grievance mechanisms are used only by people with an existing complaint about the project. At first blush, this seems both obvious and trivial; it should come as no surprise that grievance mechanisms are used by those with grievances. But recall that the purpose of most grievance mechanisms is to improve community engagement by providing people affected by the project with a point of access to the project's managers. Often, the grievance process is the only point of access for members of the affected community. This means that before using the grievance process, members of the community are likely to have come to a negative opinion about at least some aspect of the project, and that this opinion is often so strong that it may overcome any disinclination to engage with the project.

Two implications flow from this analysis. First, it might be better for members of the community to have an introduction to the project that does not involve the filing of a grievance. To be sure, because the IFC Performance Standards require that community members are provided with information about the project, a grievance is not literally the first encounter with the project for most people. However, it certainly can be the first meaningful engagement with the project, and it takes place in a confrontational posture.

The second implication of this analysis is that the current process is more open to elite capture than would be the case under an alternative grievance mechanism. Recall that grievance mechanisms are part of a package of engagement tools. In many projects, local elites are provided more and better information about the project; elites end up being the primary repositories of information about the project. And because they have more opportunities for engagement with project managers, they often have the best information connections to project managers and employees.

My argument draws on insights from a randomized control trial conducted in Malawi.⁷¹ In this study, researchers were attempting to determine how best

71. Ariel BenYishay & A. Mushfiq Mobarak, *Social Learning and Communication*, (Nat'l Bureau of Econ. Research, Working Paper No. 20139, 2014).

to transmit information about new technologies or innovations to farmers in poor communities. The conventional approach was to use external agents to communicate with farmers about new technologies. Researchers tested three different approaches.⁷² In the first, government agents transmitted the information to local farmers.⁷³ The second relied on lead farmers to transmit information to local farmers. Lead farmers were selected because they were better educated and had more resources than typical local farmers.⁷⁴ The final approach relied on peer farmers, selected because they were members of the target community, and because they had similar experiences and needs as the rest of the population.⁷⁵

Researchers found that peer farmers were, under the appropriate conditions, more effective.⁷⁶ Researchers concluded that peer farmers were more effective because: (1) they educated themselves about the new technology or method and did a good job of learning its relevant features; (2) they were very persuasive to other farmers, especially those who were similarly situated; (3) they communicated effectively with the target audience; and (4) they adopted the new technologies themselves, creating a demonstration effect.⁷⁷

This research suggests that it might be possible to transform the grievance mechanism into something more like a “problem identification and resolution process.”⁷⁸ This might be done by assigning roles to members of the community, which might be more effective than simply opening the doors to the grievance process and awaiting complaints. To accomplish this, the project would enlist members of the community to work as monitors of various aspects of the project. For example, farmers whose fields were near a pipeline could be invited to monitor the soil and water quality as a way to identify leaks or spills. Traders could monitor road conditions to ensure that increased use of roads by those associated with the project did not degrade road conditions. Others could be enlisted to monitor the receipt of benefits from the project to local government officials or the like. Regardless of the role, the point would be to assign members of the community to roles before any complaints or grievances arise, with the twin goals of preventing small problems from becoming larger problems and generating trust and good will to facilitate the resolution of the inevitable grievances.

72. *Id.* at 7–10.

73. *Id.* at 7.

74. *Id.* at 7–8.

75. *Id.* at 8.

76. *Id.* at 2. Interestingly, peer farmers were not more effective when asked to do the task for free. But when given even a small monetary incentive, the peer farmers *were* more effective than the other methods. *Id.*

77. *Id.* at 1–2, 23–24.

78. To be sure, I do not suggest that there is no place for a grievance mechanism. It is imperative that any project has a legitimate, accessible, and reliable dispute resolution mechanism. My argument is that the dispute resolution component of the community engagement process should be small and not take center stage.

Insights from this research might be applied to SEPs in several ways. One of the most important conclusions is that effective communication requires a connection. Farmers were slower to take new information from government agents or prosperous, educated farmers. The fact that these two groups were presumably knowledgeable about the new technology and were in possession of accurate information about its use and benefits was not enough to convince the target community to try it. Instead, targeted farmers were more receptive to new technology when there was some connection to the person describing it.⁷⁹ Consider this in the context of SEPs. The new grievance process that accompanies a development project is like a new technology—untried by those being encouraged to use it, different from the norm, and pushed by powerful entities. Project managers should enlist local peers to be involved with the project’s governance mechanisms, including the grievance process, as a way of making it more accessible to all of its intended users. This would also help alleviate the problems that arise when a community member’s first meaningful encounter with the project is a confrontation. If peers were already involved with the project’s governance mechanisms, then other members of the community would likely be more willing to engage with the process.

This research, and other studies, suggests that enlisting community members in a “problem identification and resolution process” might help mitigate or reduce the problem of elite capture. Elite capture occurs when members of the community use existing social power, status, wealth, or relationships to dominate the new process. Elite capture can have a number of negative effects. It can reinforce existing social hierarchies, which is problematic when those hierarchies disempower women, minorities, or poor people. Elite capture can also have the effect of distorting a project, bending its benefits toward elites and away from less powerful members of the community. When the goal is to alleviate poverty, then those who are poorest should receive the most benefits, broadly speaking. If elites distort this goal, then those most in need will not receive benefits and the program will be less effective than it might have otherwise been. Elite capture can also distort a project in a different way—by depriving the project of the insights, local knowledge, and preferences of a wide swath of the community.

Development policymakers often encounter the problem of how best to improve the quality of services provided by the project, and thereby improve the outcomes that the services are designed to produce. To see the problem, and an innovative and instructive solution, consider recent research from Uganda. There, the general question was to determine why so many people continued to suffer from diseases that could be easily prevented or treated using “a small set of proven, inexpensive services.”⁸⁰ One possible answer to this question was that the intended

79. BenYishay & Mobarak, *supra* note 71, at 24.

80. Martina Björkman & Jakob Svensson, *Power to the People: Evidence from a Randomized Field Experiment on Community-Based Monitoring in Uganda*, 124 Q.J. ECON. 735, 735 (2009). For description of the research design and implementation, see *id.* at 736–41.

beneficiaries of these services—members of local communities—were unable to hold accountable the providers of these services, which reduced the quality of the services.⁸¹ The specific research question was whether “more extensive community-based monitoring . . . [would] increase[] effort by the health unit staff” in the community, and, as a result, produce better health outcomes for community members.⁸² Thus, the study’s intervention was designed to increase community engagement with health workers to determine if this would create an incentive for the workers to perform better.⁸³

Most interesting and relevant for the design of SEPs is the intervention that researchers designed and found to be effective. To enhance community participation, researchers conducted extensive community surveys to determine the utilization of health facilities, the quality of services provided, and comparisons with other facilities.⁸⁴ Researchers then assembled this information in report cards (in a format and language appropriate to the target population) and provided the report cards to members of the community.⁸⁵ Researchers disseminated the information in the report cards to the community in highly interactive meetings, which included information about patients’ rights, and asked members of the community to arrive at an action plan for improving health services.⁸⁶ Later, some members of the community who had participated in this process met with health workers, and together they arrived at a “community contract” covering a number of issues, including how community members could monitor the health workers.⁸⁷ After a year, researchers found “large increases in utilization and improved health outcomes.”⁸⁸ They also found “communities became more involved in monitoring” providers⁸⁹ and the amount of effort put forth by health workers.⁹⁰

An approach that engages community members in grievance processes before problems arise could build on these insights. Instead of relying on individuals to bring claims when they were sufficiently disgruntled, SEPs might prescribe monitoring roles

81. *Id.* at 735–36.

82. *Id.* at 740, 744.

83. The researchers relied on two important hypotheses that are worth noting, but are not directly relevant to understanding how the study’s results might inform SEPs. First, researchers hypothesized that health worker effort would improve health outcomes. Second, researchers hypothesized that health worker effort could be influenced by community monitoring and engagement, as opposed to pecuniary rewards for health workers, institutional sanctions against workers who exerted too little effort, or other factors. *Id.* at 739–40.

84. *Id.* at 740–41.

85. *Id.* at 741–42.

86. *Id.* at 741–43.

87. *Id.* at 743.

88. *Id.* at 735, 767.

89. *Id.* at 748. It is important to note that, although researchers had a high degree of confidence in this finding, it was based on an assortment of evidence including reports from community organizations and surveys.

90. *Id.* at 748–52.

to members of the community as a way to engage more participation. This would likely have the effect of mitigating the potential effects of elite capture. Consider what would occur if community members were enlisted to perform monitoring functions: If the project merely opens its doors and declares that anyone can bring a grievance while engaging with local elites on other issues, then local elites are the only members of the community with formal connections to the project, thereby replicating their existing social power with respect to the new project. If, instead, members of the community were enlisted to perform monitoring roles with regard only to their ability to actually perform the function and not to their social status or power, then a person's existing social power would not predict his or her role in the new process. Members of the community would not assume that their existing social role, or lack of social power, would determine how their grievance would be treated, or whether their voice would be heard and taken seriously.

There is an additional insight from the Uganda study that bears on this issue. One of its findings is that community members need information in order to effectively interact with local institutions.⁹¹ That much is not surprising. What is significant is the evidence that information alone is not enough. It is important to provide information in a format that local people can understand. More significantly, if information is to be of any value, local people must have that information and have access to mechanisms that allow them to put the information to use. Without a means to use the information, it is not at all clear that the information itself is of much value to local citizens.

Before moving on, it is important to address one potential objection. One of the fears of those involved in the SEP process is that enhancing a grievance mechanism will cause an increase in the number and seriousness of claims. This "claims generation" problem can be a reason to make it difficult to use a grievance mechanism. Creating a new forum is thought to generate additional, and perhaps weaker, claims that will be costly to adjudicate and a nuisance to the company. This concern, though plausible, is unlikely. Instead, the grievance process should be normalized and conceived as a process by which to address issues that arise, rather than as a formal, court-like structure in which to pick who wins or loses an existing and difficult dispute. It may well turn out to be true that such a grievance process addresses more initial claims, but I would expect that these claims will be smaller, easier to resolve, and ultimately less costly to the relationship between the project's proponents and those affected by it. The best metaphor might be to the use of health services. If all health services are costly, then people will only go to the doctor when there is a substantial problem. Alternatively, it might be better to reduce the costs of fitness programs, preventative care, and care provided by nurses. In this model, the total number of people who use health services might rise, but the overall cost and complexity of the entire system might be lower. This analogy is imperfect, to be sure, but the idea of making it easier to quickly address small issues is promising.

91. *Id.* at 766.

2. Information Flow

A separate but closely related problem has to do with the ways that information flows between members of the community and the proponents and managers of a development project. One of the principal arguments in favor of stakeholder engagement is that community participation will help to increase the benefits flowing to the community. In the development literature, there are two plausible mechanisms by which this might happen. First, community members exert influence on the details of the project such as where the project will be located, where necessary inputs such as water or energy will come from, and similar issues. The theory is that community influence can help identify potential problems and push the final project closer to a shape that is more consistent with community values or, at the very least, avoid or mitigate some of the worst potential harms. The second avenue through which community might influence the project is to decrease the likelihood of corruption. On this theory, community members might serve as watchdogs to ensure that the company, local government, and other actors fulfill their promises. This theory relates to the problem of elite capture in that the involvement of members of the community might serve as a sort of check on elites—or others—tempted to take more than their share of the project's benefits.

The problem of how best to engage an affected community is one that arises frequently in economic development work, and it is one that has been the subject of some evaluation. Much of the time, the process of community engagement means that the project's proponents and managers provide information to members of the community and remain receptive to community input. This approach assumes that the information is provided in a form that members of the community will understand and, in time, allow community members to digest and respond to the information. Most development projects also assume that enhanced community involvement, by itself, will serve as a check on many forms of corruption, namely those involving other members of the community or local government.

There have been a number of RCTs seeking to determine how best to involve members of an affected community in development decisions. One of the key findings is that community involvement does not necessarily reduce the incidence of corruption, and there is evidence to support the inference that community involvement, when it takes the form of receiving information and responding to that information, does not necessarily improve the project.

One of the problems with the information flow processes in many SEPs is that they implicitly assume that local governments—likely to be controlled by existing elites—are adequate representatives of the local community.⁹² There

92. See Robert Goodland, *Free, Prior and Informed Consent and the World Bank Group*, 4 SUSTAINABLE DEV. L & POL'Y 66, 68 (2004) (noting that “it is essential that truly legitimate representatives [of affected communities] be sought and involved . . . rather than the usual easier-to-identify village elites”).

is substantial evidence that local governments should not be considered proxies for local communities.⁹³ Some local governments are unrepresentative, some are controlled by individuals who wish to enrich themselves, and most are simply too small to adequately represent the diversity of viewpoints and experiences of real communities.⁹⁴ In addition, the Malawi study⁹⁵ highlights another problem with treating local governments as proxies. If true, as it appears from the Malawi study, local citizens absorb new information best when they have some connection to the person sharing the information. If companies transmit information to local people through the local government, then there is a risk that people do not absorb it any meaningful way. Again, enlisting citizens to play a role in the project, even if just as dispersers of information, might mitigate this risk.

A closely related problem with many SEPs is that those associated with the project assume that information flows best through existing, formal networks. Local governance structures are one example of such networks, but many projects rely on local civic organizations as well.⁹⁶ As with reliance on local government, the use of formal organizations can be inadequate. When outreach is done in this top-down, formalized way, there is little use of existing non-formal networks. Members of all communities are also members of any number of networks, and they receive

93. Some of the most powerful and telling evidence comes from recent, innovative studies of corruption. *See, e.g.,* Ritva Reinikka & Jakob Svensson, *Local Capture: Evidence from a Central Government Transfer Program in Uganda*, 119 Q.J. ECON. 679 (2004). In that study, the authors surveyed 250 primary schools to determine the extent to which funds from an education grant from the central government to local schools actually reached the schools. Researchers discovered that on average, “schools received only 13 percent of central government spending” on education programs. *Id.* at 680. They found that “[t]he bulk of the grants was captured by local government officials (and politicians).” *Id.* Local government officials, the nominal representatives of the targeted community, instead enriched themselves. *Id.* at 681. Interestingly, the same researchers also concluded that Uganda was far from unique. Indeed, in “four out of the five educational programs” funded similarly in other countries in Africa, “local capture [was] a serious problem.” *Id.* at 698.

94. *See* Goodland, *supra* note 92, at 68 (noting that “it has been common practice for proponents [of a development project] to latch onto a certain representative and deal only with them” instead of broadly engaging the affected population).

95. *See* BenYishay & Mobarak, *supra* note 71.

96. *See, e.g.,* Anne M. Larson & Jesse C. Ribot, *Democratic Decentralization Through a Natural Resources Lens: An Introduction*, 16 EURO. J. DEV. RES. 1, 6, 18 (2004) (describing the problems that result when local institutions, including NGOs and civil society organizations, are incorrectly assumed to be representative and capable of receiving and administering substantial power over development projects or funds).

information through myriad sources.⁹⁷ Treating informational or social networks as fixed or formalized is likely a mistake. One implication of the Malawi research is that those proposing a new technology should think like pollinators: introduce the technology to members of the community, rely on them to distribute it through their own non-formal networks, and only manipulate the process to the extent necessary to ensure that the pollinators have an incentive to do their work.

CONCLUSION

When proponents of large-scale development projects work with affected communities to develop a stakeholder engagement plan, the result should be something that addresses the issues that will arise as well as possible. As I have argued, there is an emerging body of research that suggests that the current provisions of many stakeholder engagement plans may not reflect the best possible approaches to solving the problems that the plans are designed to solve. Because stakeholder engagement plans address issues that are critically important to poor people in developing countries, scholars and advocates should apply lessons from existing research, and develop research projects that directly investigate stakeholder engagement in real communities affected by real projects.

97. For an analysis of the contributions of informal networks to governance and economic activity, see Kate Meagher, *Informal Economies and Urban Governance in Nigeria: Popular Empowerment or Political Exclusion?*, 54 AFR. STUD. REV. 47 (2011). In addition to a theoretical discussion of the roles of informal networks, the author documents the contribution of informal networks to economic activity in three areas in Nigeria. *Id.* at 52–56. To be clear, the results do not support the claim that local, informal networks are in all cases better than other governance mechanisms. Instead, the point is that informal networks are vibrant and important components in the lives of people in all communities, including communities targeted by development programs, and to ignore them is unwise.