

## Rights and Project-Based REDD+ in Indonesia and Tanzania

### 5.1 THE TRANSNATIONAL MARKET FOR PROJECT-BASED REDD+ ACTIVITIES

There are two principal types of market interventions that are relevant to REDD+: those that focus on changing or managing the various global commodity supply chains that drive deforestation (such as timber, minerals, and agricultural products)<sup>803</sup> and those that seek to incentivize the pursuit of project-based REDD+ activities through the generation of credits for the voluntary carbon market.<sup>804</sup> While efforts to create deforestation-free supply chains remain in their infancy,<sup>805</sup> up to 350 REDD+ projects have been initiated in over fifty developing countries.<sup>806</sup> Although project-based REDD+ activities may aim to contribute to a country's jurisdictional readiness efforts and may eventually be integrated into or regulated by a national REDD+ scheme as part of a nested approach,<sup>807</sup> their primary focus lies in the reduction of carbon emissions from forestry-related sources in developing countries at the local level.<sup>808</sup> When these projects are designed, implemented, and certified in line with the methodologies and processes set by a private carbon accounting program, they can generate Verified Emission Reductions (VERs) that can be

<sup>803</sup> Christopher Meyer & Dana Miller, "Zero Deforestation Zones: The Case for Linking Deforestation-Free Supply Chain Initiatives and Jurisdictional REDD+" (2015) 34 *Journal of Sustainable Forestry* 559.

<sup>804</sup> Sills *et al.*, *supra* note 186.

<sup>805</sup> Daniel Nepstad *et al.*, "More Food, More Forests, Fewer Emissions, Better Livelihoods: Linking REDD+, Sustainable Supply Chains and Domestic Policy in Brazil, Indonesia and Colombia" (2013) 4:6 *Carbon Management* 639 at 642.

<sup>806</sup> Annex I. Overview of REDD+ activities in the developing world.

<sup>807</sup> Forest Trends and Climate Focus. *Nested Approaches to REDD+: An Overview of Issues and Options*, 2011.

<sup>808</sup> CIFOR, "Global database of REDD+ and other forest carbon projects Interactive map," available at: [www.forestclimatechange.org/redd-map/](http://www.forestclimatechange.org/redd-map/) (accessed 13 December 2013).

sold or traded on voluntary carbon markets.<sup>809</sup> In 2014, transactions of VERs generated through REDD+ projects amounted to the top-selling project type in the voluntary carbon market, supplying 25 megatons of reductions in carbon emissions and generating 115 million US dollars.<sup>810</sup>

For several years, the carbon accounting program with the greatest share of REDD+ activities worldwide has been the VCS. Launched by The Climate Group, the International Emission Trading Association, and the World Business Council for Sustainable Development in 2005, the VCS aims to “provide a robust quality assurance standard for GHG emission reduction projects with the purpose of issuing credits for voluntary markets.”<sup>811</sup> The VCS provides the rules and requirements for the validation and verification of carbon emission reduction projects and endorses specific methodologies that may be used to fulfil these requirements for a given type of project. The VCS also approves the roster of independent third party auditors that validate and verify that a carbon mitigation project has complied with a VCS methodology. The end-result of this process is the issuance of Voluntary Carbon Units (VCU), which are meant to ensure that any VERs are real, measurable, permanent, additional, and do not lead to the temporary displacement of emissions.<sup>812</sup>

The VCS has approved ten methodologies for project-scale REDD+ activities as part of its Agriculture, Forestry and Other Land Use (AFOLU) Requirements.<sup>813</sup> The VCS AFOLU requirements certify that a REDD+ project has resulted in VERs and leads to the issuance of VCUs that can be sold and traded through the voluntary carbon market. Given that the primary focus of the VCS standards and methodologies lies with the technical requirements for certifying reductions in carbon emissions and not the conditions required to generate environmental or social co-benefits, they include few references to issues relevant to the rights of Indigenous Peoples and local communities.<sup>814</sup> Instead, the VCS AFOLU requirements refer to other standards

<sup>809</sup> See Merger *et al.*, *supra* note 185. <sup>810</sup> Hamrick *et al.*, *supra* note 242 at 12–13.

<sup>811</sup> VCS, “Our Mission,” available at: <http://v-c-s.org/who-we-are/mission-history> (accessed 20 December 2013).

<sup>812</sup> VCS, “VCS Program Guide,” Version 3.5, 8 October 2013, available at: [www.v-c-s.org/sites/v-c-s.org/files/VCS%20Program%20Guide%2C%20v3.5.pdf](http://www.v-c-s.org/sites/v-c-s.org/files/VCS%20Program%20Guide%2C%20v3.5.pdf) (accessed 20 December 2013).

<sup>813</sup> VCS, “Agriculture, Forestry and Other Land Use (AFOLU) Requirements,” Version 3.4, 8 October 2013, available at: [www.v-c-s.org/sites/v-c-s.org/files/AFOLU%20Requirements%2C%20v3.4.pdf](http://www.v-c-s.org/sites/v-c-s.org/files/AFOLU%20Requirements%2C%20v3.4.pdf) (accessed 20 December 2013).

<sup>814</sup> The VCS AFOLU Requirements most notably refer to “community forestry” as an eligible REDD+ project activity (VCS AFOLU Requirements, *supra* note 813 at 7) and specifically identify the prevention of the planned conversion of “community-owned forests to other non-forest uses” as an eligible REDD+ project activity (*Ibid* at 21).

and materials, most notably including the CCB Standards, as providing appropriate guidance for the pursuit of social and environmental benefits beyond reductions in carbon emissions.<sup>815</sup> In 2012, in order to solidify their respective roles and positions in the voluntary carbon market, the VCS and the CCB collaboratively developed a streamlined process and a set of joint templates for the validation and verification of AFOLU projects (including REDD+ projects) that can issue VCU that are then tagged with the CCB label.<sup>816</sup> Dual certification under the VCS AFOLU and CCB Standards has accordingly become the leading practice in land-based climate mitigation activities around the world.<sup>817</sup>

## 5.2 RIGHTS AND PROJECT-BASED REDD+ ACTIVITIES IN INDONESIA

Since 2007, the estimated number of REDD+ projects carried out in Indonesia has varied between thirty and fifty, giving it the second largest number of REDD+ projects in the world (after Brazil) and the largest share of project-based REDD+ activities in Asia by far.<sup>818</sup> These projects have been implemented by conservation NGOs, bilateral aid agencies, international organizations, district governments, or some combination thereof,<sup>819</sup> and have been supported through amalgamations of public and private finance.<sup>820</sup>

<sup>815</sup> *Ibid* at 6.

<sup>816</sup> VCS & CCCB, "VCS+CCB Project Development Process," Version 3.0, 26 November 2012, available at: [www.v-c-s.org/sites/v-c-s.org/files/VCS%20CCB%20Guidance%20Project%20Development%20Process,%20v3.0.pdf](http://www.v-c-s.org/sites/v-c-s.org/files/VCS%20CCB%20Guidance%20Project%20Development%20Process,%20v3.0.pdf) (accessed 20 December 2013).

<sup>817</sup> Seventy-one percent of all forest carbon transactions in 2013 were certified under both the VCS and the CCB Standards (Peters-Stanley *et al.*, *supra* note 209 at 58).

<sup>818</sup> See CIFOR, "Global database of REDD+ and other forest carbon projects Interactive map" available at: [www.forestclimatechange.org/redd-map/](http://www.forestclimatechange.org/redd-map/) (accessed 10 June 2014); Institute for Global Environmental Strategies, "Indonesia REDD+ Readiness – State of Play" (November 2012), available at: <http://redd-database.iges.or.jp/redd/download/link?id=13> (accessed 21 November 2014).

<sup>819</sup> For instance, the Berau Forest Carbon Program is a REDD+ demonstration project that is being implemented by the district government of Berau, in collaboration with the Nature Conservancy, the Deutsche Gesellschaft für Internationale Zusammenarbeit, the World Agroforestry Centre, and other local NGOs. See Cut Augusta Mindry Anandi *et al.*, "TNC's initiative within the Berau Forest Carbon Program, East Kalimantan, Indonesia" in Erin O Sills *et al.*, eds., *REDD+ on the Ground. A Casebook of Subnational Initiatives across the Globe* (Bogor Barat, Indonesia: CIFOR, 2014) 362 at 364–365.

<sup>820</sup> Most REDD+ projects have relied on aid funding, at least in their initial stages. By way of example, while the main proponent and funder of the Katingan Peatland Restoration and Conservation Project is a private Indonesian company, it has benefited from bilateral, multilateral, and nongovernmental support and assistance for its preparatory activities. See Yayan Indriatmoko *et al.*, "Katingan Peatland Restoration and Conservation Project, Central Kalimantan, Indonesia," in Sills *et al.*, *supra* note 819, 309 at 312.

Some REDD+ projects have been led by government officials at the provincial or district level and have aimed to contribute to Indonesia's jurisdictional REDD+ readiness efforts.<sup>821</sup> Most REDD+ projects have been established by NGOs or corporations with the goal of generating carbon credits for the voluntary carbon market, either as a means of ensuring sustainable flows of finance for forest conservation efforts<sup>822</sup> or simply to make a profit.<sup>823</sup> On the whole, the strategies and interventions adopted by the proponents of these projects to address the drivers of deforestation and forest degradation or enhance forest carbon stocks have varied considerably. They have most notably encompassed one or more of the following: providing payments for ecosystem services to local populations, rehabilitating forest ecosystems, demarcating forest boundaries, improving the monitoring and protection of forests, preventing the conversion of forests to agriculture, or developing or strengthening community forestry institutions and management practices.<sup>824</sup>

The pursuit of project-based REDD+ activities in Indonesia has been primarily regulated by the Ministry of Forestry. In 2009, the Ministry adopted a pair of regulations providing it with the power to authorize REDD+ demonstration activities as well as to issue licenses for activities that aim to sequester or store forest carbon. Although the latter regulation was not specifically designed for REDD+, it served as an initial regulatory framework for voluntary REDD+ activities in Indonesia.<sup>825</sup> In April 2012, the Ministry of Forestry adopted a new regulation on "The Implementation of Forest Carbon" that provided new criteria, guiding principles, and processes for approving, evaluating, and monitoring both demonstration and voluntary REDD+ projects.<sup>826</sup>

<sup>821</sup> NORAD, *supra* note 423 at 277. By way of example, the Berau Forest Carbon Program has been funded by multilateral and bilateral funds, has officially been designated as a REDD+ demonstration project by the Ministry of Forestry, and has been in close contact with policy-makers and experts working on Indonesia's jurisdictional REDD+ readiness efforts. See Interview 73 at 2–3; Anandi *et al.*, *supra* note 819 at 364–367.

<sup>822</sup> Interview 46 at 1; Dian Yusvita Intarin *et al.*, "Ketapang Community Carbon Pools, West Kalimantan, Indonesia" in Sills *et al.*, *supra* note 819, 329 at 333–334.

<sup>823</sup> This is most notably the case of the Rimba Raya Biodiversity Reserve Initiative, which has been implemented by a private firm, and which aims to sell carbon credits, at a profit, to foreign investors. See Yayan Indriatnoko *et al.*, "Rimba Raya Biodiversity Reserve Initiative, Central Kalimantan, Indonesia" in Sills *et al.*, *supra* note 819, 348 at 351.

<sup>824</sup> Institute for Global Environmental Strategies, "REDD+ Projects. A Review of Selected REDD+ Project Designs" (February 2013), available at: [http://redd-database.iges.or.jp/redd/REDD+\\_Project\\_Booklet\\_En.pdf](http://redd-database.iges.or.jp/redd/REDD+_Project_Booklet_En.pdf) (accessed 9 December 2014) at 22.

<sup>825</sup> Indrarto *et al.*, *supra* note 428 at 75–77.

<sup>826</sup> Ministry of Forestry of the Republic of Indonesia, "Ministerial Regulation P. 20/Menhut-II/2012 on Implementation of Forest Carbon," available at: [http://theredddesk.org/sites/default/files/ministerial\\_regulation\\_on\\_implementation\\_of\\_forest\\_carbon\\_3.pdf](http://theredddesk.org/sites/default/files/ministerial_regulation_on_implementation_of_forest_carbon_3.pdf) (accessed 9 December 2014).

This regulation most notably authorizes the proponents of voluntary REDD+ projects to sell and trade carbon credits generated through their projects on domestic and international carbon markets.<sup>827</sup> While this regulation encourages the empowerment of local communities within or beyond the forest area in which a REDD+ project is implemented, it does not include further guidance on the participation of communities, nor does it specify a mechanism for benefit-sharing.<sup>828</sup> In practice, the proponents of REDD+ projects have also applied for other types of licenses that are directly related to the strategies for addressing the drivers of deforestation and forest degradation, such as a permit for the restoration of ecosystems<sup>829</sup> or for community forestry.<sup>830</sup> Finally, several provincial governments have also adopted regulations that govern the implementation of REDD+ activities,<sup>831</sup> and are furthermore involved in the approval process for other types of forest-related licenses.<sup>832</sup>

Despite the abundance of interest and funding for project-based REDD+ activities in Indonesia, only two voluntary REDD+ projects have, as of June 2016, obtained the necessary set of licenses from the Ministry of Forestry: the Rimba Raya Biodiversity Reserve Initiative<sup>833</sup> and the Katingan Peatland Restoration and Conservation Project.<sup>834</sup> And while several projects are working toward obtaining private certification as REDD+ projects, only the former project has succeeded in being verified and validated under the VCS and the CCB Standards.<sup>835</sup> The underwhelming progress of REDD+ projects in Indonesia can be explained by several factors: the delays and complexities involved in obtaining the necessary licenses and approvals from the Ministry of Forestry and other levels of government,<sup>836</sup> limited technical and

<sup>827</sup> *Ibid* at art. 8. <sup>828</sup> *Ibid* at art. 3(5). <sup>829</sup> Indriatmoko *et al.*, *supra* note 820 at 326–327.

<sup>830</sup> Intarin *et al.*, *supra* note 822 at 334.

<sup>831</sup> Cut Augusta Mindry Anandi *et al.*, “Ulu Masen REDD+ Initiative, Aceh, Indonesia” in Sills *et al.*, *supra* note 819, 380 at 381.

<sup>832</sup> Intarin *et al.*, *supra* note 822 at 345. <sup>833</sup> Indriatmoko *et al.*, *supra* note 823 at 348.

<sup>834</sup> *Ibid* at 310.

<sup>835</sup> VCS Project Database, “Rimba Raya Biodiversity Reserve Project,” available at: [www.vcsprojectdatabase.org/#/project\\_details/674](http://www.vcsprojectdatabase.org/#/project_details/674) (accessed on 14 June 2016); CCBA, “Rimba Raya Biodiversity Reserve REDD Project,” available at: [www.climate-standards.org/2010/06/08/rimba-raya-biodiversity-reserve-redd-project/](http://www.climate-standards.org/2010/06/08/rimba-raya-biodiversity-reserve-redd-project/) (accessed 14 June 2016). Another project, the Ulu Masen Ecosystem Project had been validated under the silver level of the second edition of the CCB Standards, but its validation has since expired (CCBA, “Reducing Carbon Emissions from Deforestation in the Ulu Masen Ecosystem,” available at: [www.climate-standards.org/2007/11/02/reducing-carbon-emissions-from-deforestation-in-the-ulu-masen-ecosystem/](http://www.climate-standards.org/2007/11/02/reducing-carbon-emissions-from-deforestation-in-the-ulu-masen-ecosystem/) (accessed 14 June 2016).

<sup>836</sup> Interview 46 at 4 and 8; Interview 61 at 6; Interview 85 at 5–6; Interview 88 at 3; Observations gathered during participation in Meeting of the REDD+ Partnership (Palangkaraya, Indonesia, October 2013); Indriatmoko *et al.*, *supra* note 820 at 326–327; Intarin *et al.*, *supra* note 822 at 346; Indriatmoko *et al.*, *supra* note 823 at 359–360.

institutional capabilities at the local level,<sup>837</sup> the lack of clarity around forest and land rights,<sup>838</sup> the absence of support from local communities that have been skeptical of the relative benefits of REDD+ in comparison with other forest and land uses such as cash-crop agriculture,<sup>839</sup> and the wavering and unpredictable levels of support that provincial and district governments may offer to environmental issues due to their close relationship with powerful industries such as agriculture, logging, and mining.<sup>840</sup>

The ways in which these REDD+ projects have addressed or affected the rights of Indigenous Peoples and local communities have also varied significantly. On paper, most of the twenty-eight REDD+ projects that I reviewed were conceived in a manner that sought, directly or indirectly, to respect and support the participatory and substantive rights of Indigenous Peoples and local communities. Indeed, all of the REDD+ projects were designed to empower local communities to varying degrees or ensure their participation in some form in activities to reduce carbon emissions from forestry-based sources, and over 90 percent of projects planned to share benefits with local communities or provide them with capacity-building opportunities and alternative livelihoods. On the other hand, a much smaller share of REDD+ projects – about half – were developed with the objective of strengthening the land tenure and forest rights of local communities.<sup>841</sup>

My findings regarding the early implications of twenty-two of these REDD+ projects for the rights of Indigenous Peoples and local communities reveal the gap that may exist between commitments to rights and their implementation in the context of a REDD+ project.<sup>842</sup> While I found that close to 86 percent of projects had engaged with local communities or ensured their participation in the design and implementation of REDD+ activities, only half of these projects had managed to improve livelihoods, build capacity, engage in benefit-sharing, or strengthen community land tenure and forest rights.<sup>843</sup> All told, there is considerable variation in the approach and performance of REDD+ projects with respect to the rights of Indigenous Peoples and local

<sup>837</sup> NORAD, *supra* note 423 at 278.

<sup>838</sup> Intarin *et al.*, *supra* note 822 at 345; Anandi *et al.*, *supra* note 831 at 395; Ida Aju Pradnja Resosudarmo *et al.*, “Does Tenure Security Lead to REDD+ Project Effectiveness? Reflections from Five Emerging Sites in Indonesia” (2014) 55 *World Development* 68 at 75–76.

<sup>839</sup> Intarin *et al.*, *supra* note 822 at 346; Anandi *et al.*, *supra* note 831 at 394.

<sup>840</sup> Interview 46 at 4; Interview 60 at 10; Interview 89 at 4; Anandi *et al.*, *supra* note 831 at 387.

<sup>841</sup> Jodoin & Hansen, *supra* note 149 at 2–22.

<sup>842</sup> This analysis is limited to the 22 REDD+ projects for which it was possible to gather information about impacts as of June 2016.

<sup>843</sup> See Jodoin & Hansen, *supra* note 149 at 2–22.

communities in Indonesia. On the positive side of the spectrum, several REDD+ projects have developed comprehensive approaches for engaging with local communities throughout the design and planning of a project, with the aim of ensuring their full and effective participation and maximizing potential social benefits.<sup>844</sup> In addition, numerous REDD+ projects have sought to empower local communities by providing them with improved livelihoods, training, and employment opportunities, or sharing economic benefits with them.<sup>845</sup> Finally, an important subset of projects have pursued the recognition and protection of the land and forest rights of Indigenous Peoples and local communities as a key intervention for reducing carbon emissions,<sup>846</sup> including by facilitating the challenging process

<sup>844</sup> See in particular Anandi *et al.*, *supra* note 819 at 368–369 (describing the approach taken by the “Berau Forest Carbon Program” (The Nature Conservancy)). See also the following projects in Jodoin & Hansen, *supra* note 149: “Promoting partnership efforts to reduce emissions from deforestation and forest degradation of tropical peatland in south Sumatra through the enhancement of conservation and restoration activities” (Regional Research Center of South Sumatra); “Poigar Forest, North Sulawesi” (ONF International and Green Synergies); “Mawas Peatland Conservation Project” (Winrock International); “Leuser Ecosystem REDD Project” (Global Eco Rescue (GER)); “Community Carbon Measurement in Kutai Barat” (WWF-Indonesia & University of Copenhagen); “Katingan Peat Forest Restoration Project, Central Kalimantan” (PT Rimba Makmur Utama Katingan); and “Ketapang Community Carbon Pools” (Fauna & Flora International).

<sup>845</sup> See the following projects in Jodoin & Hansen, *supra* note 149: “Berau Forest Carbon Program” (The Nature Conservancy); “Berkak Carbon Initiative” (Zoological Society of London (ZSL)); “Ulu Masen Ecosystem Project” (Aceh Provincial Government; Carbon Conservation; and Fauna & Flora International); “Promoting partnership efforts to reduce emissions from deforestation and forest degradation of tropical peatland in south Sumatra through the enhancement of conservation and restoration activities” (Regional Research Center of South Sumatra); “Mawas Peatland Conservation Project” (Winrock International); “REDD and Enhancing Carbon Stocks in Meru Betiri National Park, Java” (Indonesian Ministry of Forestry, the MBNP, ITTO, Seven & i Holdings and others); “REDD Project in Kutai Barat, West Kalimantan” (WWF-Indonesia); “Sulbar Habitat, West Sulawesi” (Keep the Habitat); “Avoided Deforestation Project in Malinau, East Kalimantan” (Global Eco Rescue (GER)); “Forest Resources Management for Carbon Sequestration” (CARE International Indonesia); “Rimba Raya Biodiversity Reserve Project” (InfiniteEARTH); “Katingan Peat Forest Restoration Project, Central Kalimantan” (PT Rimba Makmur Utama Katingan); “IUCN Towards Pro-poor REDD+ Project” (IUCN); and “Ketapang Community Carbon Pools” (Fauna & Flora International).

<sup>846</sup> Interview 46 at 1: “We started working with NGOs in that area in 2006, and the reason I went there was looking at how we could support NGOs more in the part in habitat management and the threat to tigers outside of the park boundary. Was also timed nicely with some regulatory changes in Indonesia which permit communities to access greater rights over state forest lands. Which allows communities to apply for a private licence over lands within the administrative boundaries of their villages. We saw that as one strategy for getting really critical areas outside of the formally protected area into new types of management and empower local communities in that process. My work really came out of a strategy for trying to take state forest lands out of the running for other potential uses. As in logging or oil palm.”

obtaining a *hutan desa* license for the communities that they work with<sup>847</sup> or supporting the participatory mapping of customary forests.<sup>848</sup> It is important to highlight that while most REDD+ projects in Indonesia have been set up in areas inhabited or used by *adat* communities that identify as Indigenous, few projects have tried to distinguish between Indigenous and non-Indigenous communities in the design and implementation of project activities. This lack of differentiation is most notably reflected in the decisions of several projects to apply the principle of free, prior, and informed consent to all communities in their project areas<sup>849</sup> and to apply for a *hutan desa* license (rather than seek legal recognition of *adat* rights to forests).<sup>850</sup>

On the negative side of the spectrum, a few REDD+ projects in Indonesia have failed to fully consider or respect the participatory rights of Indigenous Peoples and local communities. In particular, due in part to delays in the development and approval of projects, the proponents of several REDD+ projects have not effectively engaged with local communities and gained their support for the implementation of REDD+ activities.<sup>851</sup> However, these projects are essentially moribund and have not managed to become operational.<sup>852</sup> As far as livelihoods might be concerned, only two particular REDD+ projects – the Kampar Peninsula Carbon Reserve and the Tesso Nilo Bukit Tigapuluh REDD Project – have been criticized for the restrictions that they have imposed on the agricultural practices of local communities near the project area.<sup>853</sup> Beyond

<sup>847</sup> See Anandi *et al.*, *supra* note 819 at 378; Intarin *et al.*, *supra* note 822 at 346.

<sup>848</sup> See NORAD, *supra* note 423 at 277–278; Indriatmoko *et al.*, *supra* note 820 at 315; IUCN, “IUCN REDD+ Project in Indonesia Supports Customary Land Mapping,” available at: [www.iucn.org/news\\_homepage/news\\_by\\_date/?13413/IUCN-REDD-Project-in-Indonesia-Supports-Customary-Land-Mapping](http://www.iucn.org/news_homepage/news_by_date/?13413/IUCN-REDD-Project-in-Indonesia-Supports-Customary-Land-Mapping) (accessed 7 January 2014).

<sup>849</sup> Interview 46 at 9. <sup>850</sup> Interview 88 at 4.

<sup>851</sup> Indriatmoko *et al.*, *supra* note 823 at 360; Sunderlin *et al.*, *supra* note 47 at 48.

<sup>852</sup> See, in particular, with respect to the “Ulu Masen Ecosystem Project” (Aceh Provincial Government; Carbon Conservation; and Fauna & Flora International); Anandi *et al.*, *supra* note 831 at 388–389; Lesley McCulloch, “Ulu Masen REDD Demonstration Project. The Challenges of Tackling Market Policy and Governance Failures that Underlie Deforestation and Forest Degradation” (IGES, July 2010) at 15–18; Patrick Anderson & Marcus Colchester, “Local Forest Governance, Free, Prior and Informed Consent and REDD+ in Indonesia: A Case Study from Aceh, Sumatra” in Holly Jonas, Harry Jonas & Suneetha M. Subramanian, eds., *The Right to Responsibility: Resisting and Engaging Development, Conservation, and the Law in Asia* (Natural Justice and the United Nations University, 2013) 176 at 180–185.

<sup>853</sup> See Forest Peoples Programme, “Sumatra: Update on RAPP’s Activities in the Kampar Peninsula, Riau,” Rights, Forests and Climate Briefing Series (October 2011), available at: [www.forestpeoples.org/sites/fpp/files/publication/2011/10/kampar-peninsula-briefing-5.pdf](http://www.forestpeoples.org/sites/fpp/files/publication/2011/10/kampar-peninsula-briefing-5.pdf) (accessed 4 December 2014) at 2; World Growth, chapter 5: “Case Study: Failure of Protected Areas” in ‘REDD Conservation: Avoiding The New Road To Serfdom: A World Growth Report’ (December 2010), available at: [http://worldgrowth.org/site/wp-content/uploads/2012/06/WG\\_REDD\\_Conservation\\_Report\\_12\\_10.pdf](http://worldgrowth.org/site/wp-content/uploads/2012/06/WG_REDD_Conservation_Report_12_10.pdf) (accessed 11 June 2016) at 27.



these two projects, there are no known cases where the land and resource rights of Indigenous Peoples or local communities have actually been negatively affected by a REDD+ project in Indonesia.

This analysis of project-based REDD+ activities in Indonesia reveals the potent, yet limited set of opportunities offered by the transnational legal process for REDD+ for the recognition and protection of the rights of Indigenous Peoples and local communities in developing countries. On the one hand, most REDD+ projects in Indonesia have effectively extended participatory rights to both Indigenous Peoples and local communities. Many projects have also sought to empower local communities through capacity-building, livelihood programs, and benefit-sharing, but have not managed to fully implement benefit-sharing arrangements. On the other hand, most projects have neither tackled the challenges associated with recognizing and protecting the land and forest tenure rights of Indigenous Peoples and local communities, nor have they contributed to the broader struggle of Indigenous Peoples seeking to have different actors in Indonesian society recognize their distinctive status, rights, and institutions.

### 5.3 RIGHTS AND PROJECT-BASED REDD+ ACTIVITIES IN TANZANIA

As part of Norway and Tanzania's bilateral climate change partnership, the Norwegian Embassy and the National REDD+ Taskforce agreed to fund a number of pilot projects to experiment with the implementation of REDD+ at the local level and generate lessons for the development of Tanzania's National REDD+ Strategy.<sup>854</sup> The priority areas pursued in these projects included resolving local governance and tenure challenges; designing incentive and benefit-sharing schemes; testing methods for measuring deforestation and carbon sequestration, including participatory approaches; identifying and addressing the drivers of deforestation and degradation; and building capacity for climate adaptation and mitigation.<sup>855</sup> Through a competitive application process, the Norwegian Embassy and the National REDD+ Taskforce

<sup>854</sup> Interview 52 at 7. See also Deloitte, *Mid-term Review Report of Nine NGO REDD+ Pilot Projects in Tanzania – Higher-Level Overview of NGO REDD+ Portfolio*, (17 August 2012) (on file with the author) at 4.

<sup>855</sup> National Taskforce for Developing the National REDD Strategy, "Guidelines for Review of NGOs/CSOs Proposals to be Funded by the Norway-Tanzania REDD Initiative" in URT, "National Framework for REDD," *supra* note 684, 34 at 35.

worked together to selected ten pilot projects from among forty-six proposals submitted by conservation and development NGOs. Nine of these pilot projects eventually became operational, each covering a different region of Tanzania.<sup>856</sup>

While two of the pilot projects focused on experimenting with methodologies for measuring forest carbon stocks and changes therein,<sup>857</sup> the other seven projects focused on reducing carbon emissions from forest-based sources through a range of interventions, such as the adoption of alternative livelihoods, technologies, and agricultural practices, the development of forest management plans, and the formalization of village land rights over forests.<sup>858</sup> Most of these projects originally aimed to generate carbon credits in line with the verification and validation processes set by the VCS and the CCBA. According to an independent review, project developers had underestimated the technical challenges, costs, and delays associated with the certification process and were moreover constrained by the low cost of carbon on voluntary markets.<sup>859</sup> From 2009 to 2015, only one of these pilot projects managed to prepare and submit a project design document for validation and verification by third-party auditors under the VCS and CCB certification programs.<sup>860</sup> In addition to the REDD+ projects funded through the Norwegian-Tanzanian bilateral agreement, a Tanzanian NGO succeeded in designing and implementing a REDD+ project in the Yaeda Valley in Northern Tanzania.<sup>861</sup> This REDD+ project was developed and validated under the *Plan Vivo Standard*, which “is a certification framework for community-based Payments for Ecosystem Services (PES) programmes supporting rural smallholders and community groups with improved natural resource management.”<sup>862</sup>

<sup>856</sup> Interview 20 at 3; Interview 52 at 6–7. National REDD+ Secretariat, “Tanzania’s REDD Readiness Sites for REDD Pilot Projects” (on file with the author).

<sup>857</sup> These two projects were the “REDD Readiness in Southwest Tanzania” (Wildlife Conservation Society) and “Enhancing Tanzanian Capacity to Deliver Short and Long Term Data on Forest Carbon Stocks across the Country” (WWF Tanzania). See Jodoin & Hansen, *supra* note 149 at 29–31.

<sup>858</sup> Deloitte, *supra* note 854 at 5–6.

<sup>859</sup> Merja Mäkelä *et al.*, “Lessons learned from the implementation of REDD Pilot Projects in Tanzania, 2009–2014” (NIRAS, July 2015) (on file with the author) at 28–31.

<sup>860</sup> This is the project by the Tanzanian Forest Conservation Group. See CCB Standards Project Database, “MJUMITA Community Forest Project (Lindi),” available at: [www.climate-standards.org/2014/05/08/mjumita-community-forest-project-lindi/](http://www.climate-standards.org/2014/05/08/mjumita-community-forest-project-lindi/) (accessed 4 November 2014).

<sup>861</sup> Carbon Tanzania, “Reducing Emissions from Deforestation and Forest Degradation in the Yaeda Valley, Northern Tanzania. Project Design Document” (January 2015), available at: [www.planvivo.org/docs/Yaeda\\_REDD\\_PDD\\_Jan15.pdf](http://www.planvivo.org/docs/Yaeda_REDD_PDD_Jan15.pdf) (accessed 21 April 2016).

<sup>862</sup> Plan Vivo Foundation, “The Plan Vivo Standard For Community Payments for Ecosystem Services Programmes” (2013), available at: [www.planvivo.org/wp-content/uploads/Plan-Vivo-Standard-2013.pdf](http://www.planvivo.org/wp-content/uploads/Plan-Vivo-Standard-2013.pdf) (accessed 21 April 2016) at 2. Unlike the CCB standards, *Plan Vivo* serves as a standalone, comprehensive certification program that not only demonstrates the delivery of

My analysis of these ten REDD+ projects reveals that all but one has had some positive implications for local communities.<sup>863</sup> To begin with, a concern for communities, rights, participatory forest management, or the equitable sharing of benefits formed part of the very purpose of eight of these ten projects.<sup>864</sup> With respect to participatory rights, nine of the ten projects<sup>865</sup> were ultimately implemented in a manner that sought to engage with communities and benefit from their input and participation.<sup>866</sup> While only two projects explicitly incorporated the principle of FPIC in their initial design,<sup>867</sup> at least two other projects integrated this principle in the course of implementing their activities.<sup>868</sup> Other projects engaged with local communities through a range of participatory practices such as consultations and the provision of information regarding the pursuit of REDD+ activities.<sup>869</sup>

Seven of the ten REDD+ projects pursued in Tanzania had positive implications for the substantive rights of local communities, by providing them with alternative livelihoods, employment, or capacity-building.<sup>870</sup> Only five projects were able to successfully test benefit-sharing mechanisms in the form of direct payments to communities,<sup>871</sup> a finding that reflects the costs and complexities of REDD+ projects and the limited financial opportunities offered by voluntary carbon markets.<sup>872</sup> One REDD+ project, pursued by the African

significant benefits for climate mitigation, community well-being and biodiversity but also generates VERs in the form of Plan Vivo Certificates.

<sup>863</sup> The exception is the project by the Wildlife Conservation Society of Tanzania. See Jodoin & Hansen, *supra* note 149 at 30–31.

<sup>864</sup> *Ibid* at 15–23.

<sup>865</sup> The exception being the project by the Wildlife Conservation Society of Tanzania.

<sup>866</sup> *Ibid* at 15–23. See also Mäkelä *et al.*, *supra* note 859 at 18–20 and Deloitte, *supra* note 854 at 11: “The projects within the portfolio have worked successfully to include all relevant stakeholders in the design and implementation of project activities.”

<sup>867</sup> See Kate Forrester Kibuga, Nuru Nguya, Hassan Chikira, Bettie Luwuge & Nike Daggart, “Integrating the principles of free, prior and informed consent in the establishment of a REDD project: a case study from Tanzania” (Making REDD work for communities and forest conservation in Tanzania, TFCC Technical Report 27, February 2011) (on file with the author) and Carbon Tanzania, *supra* note 861 at 19.

<sup>868</sup> Mäkelä *et al.*, *supra* note 861 at 19.

<sup>869</sup> Deloitte, *supra* note 854 at 13: “The entire portfolio conducted widespread community engagement activities as part of the FPIC process. Due to past experiences in some of the project areas related to resettlement, there was initial hesitation from communities to participate. The NGO’s made it clear that communities not wishing to participate had this choice available to them.” See also Interview 12 at 10; Interview 22 at 2; Interview 29 at 7.

<sup>870</sup> Jodoin & Hansen, *supra* note 149 at 23–33.

<sup>871</sup> Mäkelä *et al.*, *supra* note 859 at 22; Deloitte, *supra* note 854 at 5–6; and Carbon Tanzania, *supra* note 861 at 21–22.

<sup>872</sup> Zahabu & Malimbwi, *supra* note 51 at 145.

Wildlife Foundation, was found to have positive implications for some communities (through enhancements in sustainable agriculture), but negative implications for other individuals (specifically cattle owners and the poorest members in these communities).<sup>873</sup> The disappointing outcomes of this project highlight the challenges of implementing REDD+ projects in complex environments involving multiple communities and individuals that use and depend upon resources in different, sometimes conflicting ways.

To be sure, the most important benefit provided by the projects related to enhancements in land tenure security and the devolution of authority over forests.<sup>874</sup> Five of the nine pilot projects directly or indirectly led to the clarification of the land and tenure rights of local communities through the establishment of new village land-use plans and village forest reserves under the CBFM regime or joint management plans under the JFM regime laid out in the *Forest Act*.<sup>875</sup> An independent review of the pilot projects completed in 2012 found as follows:

The projects in the portfolio are achieving significant success in securing formal legal acknowledgement of local forest resources. This incentive scheme is based on the assumption that people will protect and invest in the forest if they can later benefit from the results. Pilot projects have successfully supported communities in gaining land tenure and user rights for significant areas of forest on a range of land types including general land, community land, and government forest reserves. In some projects, formal land tenure was granted to individual farmers. The projects have also developed, in collaboration with communities, forest management plans that regulate resource extraction and ensure that benefits from resource extraction flow not only to elites. Communities, through the use of patrols, have sought to protect and conserve their forest resources now that they have formal rights to these areas. To date, this incentive scheme is working well and has yielded significant conservation results as communities are taking a more active role in forest management. Community members also expressed high levels of gratitude for this component of the projects and view it as a tangible benefit of project activities.<sup>876</sup>

In addition, the Yaeda Valley REDD+ Project has also strengthened the land tenure held by the Hadza people through a certificate of customary ownership

<sup>873</sup> NIRAS Finland Oy, "Final Review of the Project African Wildlife Foundation Advancing REDD in the Kolo Hills forest" (June 2015) (on file with the author) at 22.

<sup>874</sup> Mäkelä *et al.*, *supra* note 859 at 12.

<sup>875</sup> Jodoin & Hansen, *supra* note 149 at 23–33. See also Deloitte, *supra* note 854 at 7; Mäkelä *et al.*, *supra* note 859 at 16.

<sup>876</sup> Deloitte, *supra* note 854 at 6. See also findings by Sunderlin *et al.*, *supra* note 47 at 46 and Therese Dokken *et al.*, "Tenure Issues in REDD+ Pilot Project Sites in Tanzania" (2014) 5(2) *Forests* 234 at 250–251.

that they had previously obtained under the *Village Land Act*.<sup>877</sup> While most of the REDD+ projects in Tanzania succeeded in providing communities with enhanced rights and tenure security over their lands and forests, it is important to stress that the potential of REDD+ projects operating at the local level to transform the system for land tenure in Tanzania was naturally contingent on the collaboration of district officials as well as legal and policy developments at the national level.<sup>878</sup>

While the majority of these REDD+ projects enhanced the participatory and substantive rights of local communities, they had few direct implications – whether positive or negative – for the rights of Indigenous Peoples. Indeed, none of the pilot projects funded through the Norwegian-Tanzanian bilateral agreement were implemented on or near forests or lands managed, occupied, or used by Indigenous hunter-gatherers or pastoralists. The neglect of Indigenous Peoples in the overall portfolio of the pilot projects resulted from the bias in the selection process for projects that would operate through CBFM or JFM<sup>879</sup> regimes under the *Forest Act*, which are generally considered inaccessible to Indigenous Peoples under Tanzanian law.<sup>880</sup> As a result, in their implementation of rights such as the right to free, prior, and informed consent, the proponents of REDD+ pilot projects were largely unconcerned with the status of the local communities they worked with and sought instead to apply this right to all local communities that might be affected by their interventions.<sup>881</sup> The sole and important exception is the Yaeda Valley REDD+ Project, which was pursued by Carbon Tanzania in collaboration with the hunter-gatherer Hadzabe and pastoralist communities in Mongo Wa Mono and Domanga villages.<sup>882</sup> Unlike

<sup>877</sup> Carbon Tanzania, *supra* note 861 at 14–15.

<sup>878</sup> This is identified as a key lesson of the implementation of the REDD+ pilot projects in Tanzania. See IUCN Tanzania Office, “Lessons Learned and Best Practice from REDD+ Pilot Projects” (12 September 2013) (on file with the author) at 6 and Mäkelä *et al.*, *supra* note 859 at 14. This is also a point made by Sunderlin *et al.*, in their broader review of the implications of REDD+ projects for tenure problems: Sunderlin *et al.*, *supra* note 47 at 49.

<sup>879</sup> Interview 52 at 13; Interview 65 at 3. <sup>880</sup> See Section 4.1.

<sup>881</sup> Interview 12 at 11. See Kibuga, *supra* note 867 at 16: “Much of the literature about FPIC deals with indigenous peoples however there is growing recognition that the principles should also be applied to local communities, particularly in the context of REDD. For example, the draft UN-REDD programme guidelines for FPIC, refer to both indigenous peoples and forest dependent communities. Similarly the LCA negotiating text refers to both indigenous peoples and local communities and recently published guidelines on FPIC in REDD+ by RECOFTC and GIZ discuss FPIC in the context of both local communities and indigenous peoples. Nonetheless, much of the literature, and in particular several reports produced by Forest Peoples Programme, who support the rights of peoples who live in forests and depend on them for their livelihoods, are focused specifically on indigenous peoples. One challenge in applying FPIC to local communities is that the term can be legally imprecise in some contexts.”

<sup>882</sup> Carbon Tanzania, *supra* note 861 at 13–14.

the REDD+ pilot projects funded through the Norwegian-Tanzania bilateral agreement, the Yaeda Valley REDD+ Project was designed and implemented in a manner that recognized the traditional rights and knowledge held by Indigenous Peoples.<sup>883</sup>

The exclusion of Indigenous Peoples from the development of most REDD+ projects in Tanzania has meant that their lands and rights have not been threatened by the pursuit of REDD+, as might have been feared based on their political and economic marginalization. At the same time, Indigenous Peoples have not significantly benefited from the pursuit of project-based REDD+ activities in Tanzania. With the exception of the Yaeda Valley REDD+ Project, Indigenous Peoples have not been able to take advantage of the opportunities that REDD+ has created for securing or strengthening rights to land and tenure or enhancing livelihoods. In addition, the relegation of Indigenous Peoples from the selection of REDD+ pilot projects significantly limited their ability to advocate for the recognition and protection of their rights within the National REDD+ Strategy. None of the proponents of the pilot projects emphasized the importance of Indigenous rights in their discussions with the National REDD+ Taskforce<sup>884</sup> and representatives from Carbon Tanzania – the only NGO that was collaborating with Indigenous Peoples – were ignored by the National REDD+ Taskforce.<sup>885</sup> Even as they called for greater respect for the rights of local communities and the participation of civil society in the development of the National REDD+ Strategy, the proponents of the pilot projects omitted any references to the status and rights of Indigenous Peoples in their policy briefs on the National REDD+ Strategy.<sup>886</sup>

Consequently, the ultimate implications of the implementation of REDD+ projects in Tanzania are thus largely consistent with the outcomes of jurisdictional REDD+ readiness activities. In essence, most REDD+ projects provided the means and impetus to implement the CBFM and JFM regimes under the *Forest Act* and thus provided forest-dependent communities with greater rights to govern and manage their forests as a result. Most REDD+ projects also achieved gains in livelihoods and income for forest-dependent

<sup>883</sup> Interview 30 at 3; and Jodoin & Hansen, *supra* note 149 at 32–33.

<sup>884</sup> *Ibid* at 39: “In particular, to correspond to the Tanzanian situation, TFCG could advocate for the debate on FPIC to be broadened to include local communities, rather than just indigenous peoples.”

<sup>885</sup> Interview 30 at 2.

<sup>886</sup> See generally MJUMITA & Tanzania Forest Conservation Group, “A one-step guide to making the National REDD strategy more pro-poor” *supra* note 718; Tanzania Forest Conservation Group, “Feedback on the Tanzania National REDD Strategy, prepared by the REDD Pilot Projects” *supra* note 718; MJUMITA and Tanzania Forest Conservation Group, “Five Steps to Get REDD Right(s)” *supra* note 718.

communities. Conversely, Indigenous Peoples were ignored by the interventions and policy activities pursued by REDD+ pilot projects and were thus not provided with an important opportunity to use project-based REDD+ as a vehicle to gain greater recognition for their status, role, and rights in the governance of forests in Tanzania.

#### 5.4 EXPLAINING THE CONVEYANCE AND CONSTRUCTION OF RIGHTS IN PROJECT-BASED REDD+ ACTIVITIES IN INDONESIA AND TANZANIA

My analysis of the design and outcomes of REDD+ projects in Indonesia and Tanzania shows that while most of these REDD+ projects have enacted and implemented legal norms relating to the participatory rights of local communities and the need to generate and share socioeconomic benefits, there is considerable variation across both countries in terms of the recognition and protection of forest, land tenure, and resource rights. While it is not feasible for me to explain why and how these rights were conveyed and constructed across every single one of these thirty-eight REDD+ projects, I can nonetheless formulate probable explanations that may account for these broad trends in the recognition and protection of rights across these two countries.

On the whole, I posit that the conveyance of legal norms relating to participatory rights and benefit-sharing in the design and implementation of a majority of REDD+ projects in Indonesia and Tanzania can be primarily explained by the causal mechanisms of cost-benefit adoption, elite internalization, and cost-benefit commitment. In the first instance, the requirements set by the CCB Standards appear to have been an important instrumental motivation for the proponents of REDD+ projects in Indonesia to enact and implement exogenous legal norms relating to participation of, and benefit-sharing with, Indigenous Peoples and local communities. In particular, given that most of these REDD+ projects were established with the aim of eventually generating carbon credits that could be sold on the voluntary carbon market through dual certification under the VCS and CCB, respecting standards in relation to participation and benefit-sharing was seen as necessary in order to retain or gain access to most private and public sources of international carbon finance.<sup>887</sup> In this context, it seems likely that many project developers believed the benefits of complying with exogenous legal norms

<sup>887</sup> With respect to Indonesia, see Interview 46 at 9; Interview 60 at 4. With respect to Tanzania, see Interview 12 at 11; Interview 22 at 2; Interview 23 at 9; Interview 29 at 7; Interview 52 at 6; and Mäkelä *et al.*, *supra* note 859 at 20.

relating to the right to free, prior, and informed consent or benefit-sharing exceeded the costs of doing so.

In the second instance, I argue that the proponents of REDD+ projects also enacted these legal norms and sought to implement them because they had internalized the view that doing so was integral to the success of their projects. As a result of a broader process of persuasive argumentation that has reshaped the field of conservation over the last two decades, project developers have increasingly understood that ensuring the participation of communities and sharing benefits with them is critical for guaranteeing their collaboration<sup>888</sup> as well as securing the sustainability of REDD+ projects in the long-term.<sup>889</sup> This belief was likely reinforced in the context of the design and implementation of REDD+ projects in Indonesia because of the possibility for communities to benefit from employment and other forms of income provided by competing activities that reduce forest cover such as those on palm oil plantations.<sup>890</sup> In Tanzania, the commitment to participatory rights and community empowerment was instead reinforced by existing norms relating to the appropriateness of community-based approaches to forest governance that have taken hold since the early 2000s.<sup>891</sup>

In the third instance, I argue that the conveyance of legal norms relating to participation and benefit-sharing ultimately triggered a process of construction in which these legal norms were adjusted to the particular context in which REDD+ projects were designed and implemented through the causal mechanism of cost-benefit commitment. Although most REDD+ projects in both countries sought to respect the participatory rights of local communities and share benefits with them, the specific modes and interventions through which they did so varied considerably.<sup>892</sup> In general, there are multiple tools, approaches, and methodologies for ensuring the participation of local and

<sup>888</sup> See Interview 46 at 9: "In terms of our license to operate and not be involved in any kind of conflict, FPIC is very important. For our conservation objectives, unless there is buy in (either from the managers of the land or from others who are involved in using that land) then it's going to be very difficult to be successful. It's about levels of acceptance of the project."

<sup>889</sup> See Interview 12 at 11: "We can't move forward on any of these projects unless the communities are with us. (...) This has to be a community driven thing so we have to get the community on our side. The key thing is to ensure the sustainability. These projects are thirty or forty year programs. We are only going to be there with our Norwegian funding for a few years. What happens when that goes. We have to make sure that the community right from the beginning are aware of that. When so many aid projects just fizzle when the donor money disappears. REDD is one of those which . . . it needs to last for a long time." See also Interview 23 at 4; Interview 52 at 6; and Interview 60 at 4.

<sup>890</sup> Interview 88 at 4. <sup>891</sup> See Section 5.1.

<sup>892</sup> See Jodoin & Hansen, *supra* note 149 at 2–22.



conceiving benefit-sharing arrangements.<sup>893</sup> Whether and how to engage and empower local communities in the design and implementation of a REDD+ project can be expected to depend on numerous factors, including the resources available to project proponents, the extent to which the collaboration of local communities is required to address the underlying drivers of deforestation and forest degradation, the needs and priorities of local communities in terms of social development and poverty alleviation, and existing institutional arrangements for participation and benefit-sharing.<sup>894</sup> As such, I posit that the design of many REDD+ projects results from the construction of hybrid legal norms in which exogenous legal norms are rationally calibrated and adjusted in order to craft redesigned solutions to achieve the objective of addressing the local drivers of deforestation and reducing carbon emissions from forest-based sources.<sup>895</sup>

These three causal mechanisms also help explain why REDD+ projects in Indonesia and Tanzania have accorded almost no attention to the distinctive status and rights of Indigenous Peoples.<sup>896</sup> First, as was discussed in Section 2.5, the CCB Standards have extended similar rights and protections to both Indigenous Peoples and local communities. This effectively eliminated any market incentive for project developers to distinguish between these two categories in the design and implementation of REDD+ projects. Second, the shared understanding that many conservation practitioners held regarding the importance of engaging with and empowering local communities in REDD+ was primarily based on whether their collaboration was essential to the success of a project. As such, the distinctive status of Indigenous Peoples was simply not germane to the underlying instrumental logic that is reflected in this broader belief in the benefits of participation and benefit-sharing.<sup>897</sup> Third, the

<sup>893</sup> See, e.g., Essam Yassin Mohammed, “Pro-poor benefit distribution in REDD+ Who gets what and why does it matter?” IIED REDD Working Paper (2011), available at: <http://pubs.iied.org/pdfs/16508IIED.pdf>. See also Lawlor *et al.*, *supra* note 12 at 304–305 and 313–314.

<sup>894</sup> See generally on the varying approaches and outcomes of REDD+ projects: Awono, Abdon *et al.*, “Tenure and participation in local REDD+ projects: Insights from southern Cameroon” (2014) 35 *Environmental Science & Policy* 76; Davide Pettenella & Lucio Brotto, “Governance features for successful REDD+ projects organization” (2011) 18 *Forest Policy & Economics* 46; Sunderlin *et al.*, *supra* note 47.

<sup>895</sup> Of course, this micro-level process of cost-benefit commitment is itself shaped by the norms generated through macro-level processes of persuasive argumentation.

<sup>896</sup> Indeed, with the notable exception of “REDD Project in Kutai Barat, West Kalimantan” (WWF-Indonesia), which refers to “local and Indigenous communities,” other REDD+ projects in Indonesia and Tanzania eschewed references to the term “Indigenous” in their design documents. See Jodoin & Hansen, *supra* note 149 at 2–22.

<sup>897</sup> See, e.g., Interview 61 at 5: “From an instrumental approach, communities are better managed than governments are. That evidence has been borne out. The whole notion is to keep the forest standing carbon wise. The notion is that indigenous and other communities

distinction between Indigenous Peoples and local communities was not particularly relevant to the local context in which many REDD+ projects were implemented. In particular, given the fact that most of the REDD+ projects in Tanzania were implemented on or near lands occupied or used by Indigenous Peoples, there was little need for the proponents of these projects to distinguish between Indigenous and non-Indigenous communities in their work.<sup>898</sup>

Although most REDD+ projects have enacted or implemented legal norms relating to participation and benefit-sharing in broadly similar proportions in Indonesia and Tanzania, the way in which they have addressed forest, land tenure, and resource rights has varied considerably. Indeed, while 80 percent of REDD+ projects in Tanzania included the strengthening of the forest and tenure rights of local communities as a key project outcome, only 50 percent of REDD+ projects in Indonesia did so. In addition, REDD+ projects in Tanzania have generally been much more successful in securing and clarifying land tenure for local communities than the REDD+ projects pursued in Indonesia. I argue that this disparity in outcomes may be explained by the weaker recognition of community forest rights in the CCB Standards and the enduring influence of national factors in shaping the design and implementation of REDD+ projects.

Whereas the third edition of the CCB Standards requires that project developers respect the participatory rights of local communities (criterion G3) and generate net positive community impacts (criterion CM2), the obligations they set in relation to forest, land tenure, and resource rights are less stringent. The third edition of the CCB Standards requires that project developers respect the statutory and customary land and forest rights of local communities (indicator G5.1–3), identify unresolved land rights and tenure conflicts, and describe the measures needed or adopted to help resolve these conflicts (indicator G5.4). The CCB Standards do not, however, actually require a REDD+ project to

are given a set of governance mechanisms, are better managers.” See also Interview 87 at 6; Interview 88 at 4.

<sup>898</sup> Interview 25 at 8: “You know, there are political statements and there are technical statements. The political statement is that we don’t have Indigenous people in Tanzania but we know there are. But the government does not recognize those. We do work through our pastoralist program with those people. Particularly the pastoralists and agro-pastoralists. Essentially on land rights. We know that given the demand on land, given the tendency of land grabs by foreign companies or whatever, given that in many areas you don’t have the land use plans, pastoralists are having problems. Mobility for this group of people is essential. For us, mobility is a statement of their livelihood. We are helping them to be able to advocate for that. We also advocate for the pastoralist policy. [...] But we are not saying that we do really work with Indigenous communities. Our impact population is people who are living in rural, underserved areas. Women and girls. It is mainly those who have their lives affected by environmental restrictions.”

work toward the recognition and protection of the rights of local communities to access, govern, or benefit from their forests and lands. While the CCB Standards do include a criterion that indeed requires a project to be implemented on land that is owned or managed by communities, this is an optional criterion on exceptional community benefits (GL2). In sum, while the CCB Standards create a clear market incentive to respect the participatory rights of local communities, to share benefits with them, and to not violate their forest and land tenure rights, the extent to which they actually incentivize the promotion of community forest rights and institutions is more limited. These key differences in market incentives may help explain why cost-benefit adoption played an important role in the conveyance of legal norms relating to participation and benefit-sharing, but was not operative with respect to the promotion of forest, land, and tenure rights.

In addition, the divergent manner in which REDD+ projects have addressed forest and land rights across these two countries has much to do with the costs and benefits of community forestry in comparison with other types of project interventions.<sup>899</sup> Unlike participatory rights and benefit-sharing arrangements that can generally be implemented in one form or another across a range of project designs and contexts, the extent to which the proponents of a REDD+ project may be able and willing to promote the recognition and protection of forest, land tenure, and resource rights can be expected to depend on the legal, political, social, and economic realities that shape the prospects for community forest governance in a particular context.

There are significant differences in the array of opportunities and challenges offered for community forestry rights and institutions in Indonesia and Tanzania. For one, the legal process for clarifying and resolving land and forest tenure issues in Indonesia is complex, cumbersome, and ineffective<sup>900</sup> and is moreover pitted against powerful economic interests that stand to lose from the recognition and protection of community forest and resource rights.<sup>901</sup> Although it is beset by its own complications, the process for securing community rights to forest lands and resources is nonetheless much more straightforward in Tanzania under the

<sup>899</sup> Although my explanation focuses here on the cost-benefit commitment that underlies the construction of legal norms in the design of a REDD+ project, this process is of course embedded in existing norms that shape the appropriateness of different interventions. One could thus argue that the selection of interventions by conservation NGOs in Tanzania was also influenced by their shared understandings concerning the importance of community forestry in conservation efforts.

<sup>900</sup> I am referring here to the existing formal legal mechanisms that exist for granting communities the power to govern and manage their forests. The legal challenges associated with the recognition and protection of *adat* rights to forests is even greater. See Section 3.1.

<sup>901</sup> Interview 85 at 5; Sunderlin *et al.*, *supra* note 47 at 44, 46, and 48–49.

*Forest Act*. And while providing communities with greater rights over their forests may conflict with the material interests of district officials, the expansion of community management of forests does not currently threaten any influential economic or political lobby groups in Tanzania.<sup>902</sup> For another, while strengthening community tenure or implementing community-based forest management makes eminent sense in a least-developed country like Tanzania where most drivers of deforestation are local in nature (such as local demand for energy and food),<sup>903</sup> it does not necessarily amount to an effective strategy for addressing the large-scale drivers of deforestation in a middle-income country like Indonesia (such as palm oil plantations, logging, or mining).<sup>904</sup>

All told, I argue that the key divergences in the promotion of community tenure and forest rights across project-based REDD+ activities in Indonesia and Tanzania can thus be explained by the rational manner in which project developers designed their projects in the light of market incentives provided through the CCB Standards and the particular challenges and opportunities offered for community forestry versus other types of interventions in each country. In Tanzania, the legal process set out in the *Forest Act* and the local nature of drivers of deforestation meant that the promotion of community forest rights and tenure appeared to be a viable solution for reducing carbon emissions through a REDD+ project. Conversely, the very different legal and political economic conditions that characterize forest governance in Indonesia have made community forestry a much less effective basis for the design of a REDD+ project.<sup>905</sup>

## 5.5 THE FUTURE OF INDIGENOUS AND COMMUNITY RIGHTS IN THE TRANSNATIONAL MARKET FOR REDD+

This chapter has shown how legal norms relating to the rights of Indigenous Peoples and local communities have been conveyed and constructed across local sites of law for project-based REDD+ activities. I uncovered broad trends in the recognition and protection of rights in the context of project-based REDD+ activities in Indonesia and Tanzania. By and large, I found that most REDD+ projects had enacted or implemented legal norms

<sup>902</sup> See Section 4.1. <sup>903</sup> Dokken *et al.*, *supra* note 876 at 247–248.

<sup>904</sup> Resosudarmo *et al.*, *supra* note 838 at 78–80.

<sup>905</sup> See WWF, “Fact Sheet: WWF Forest and Climate Programme, REDD+ Inspiring Practices: Building REDD= Readiness through participatory land use mapping and planning in Indonesia” (2014), available at: [http://d2ouvy59podg6k.cloudfront.net/downloads/final\\_ip\\_in\\_do\\_land\\_map\\_english\\_web.pdf](http://d2ouvy59podg6k.cloudfront.net/downloads/final_ip_in_do_land_map_english_web.pdf) (accessed 17 June, 2016) at 5 (noting that the legal framework in Indonesia “offers inadequate recognition or protection for customary rights and traditional land uses limits the effectiveness of participatory land use mapping and planning.”)

relating to participation and benefit-sharing in response to market incentives (cost-benefit adoption) and broader norms about the instrumental value of participation and empowerment for the success of their projects (élite internalization). I also found that while most REDD+ projects in Tanzania have sought to enhance the rights of communities to access, manage, and benefit from their forests, only half of projects in Indonesia had done so. This divergence in outcomes results from the particular set of challenges and benefits arising from existing laws for the recognition and implementation of community and tenure forest rights and the political economy of forest governance in both countries. In general, I emphasized the key role that the mechanism of cost-benefit commitment tends to play in the design of REDD+ projects on the ground.

These findings speak to both the potential and limitations of project-based REDD+ activities for supporting the recognition and protection of the rights of Indigenous Peoples and local communities in developing countries. On the one hand, my analysis of the design and implementation of REDD+ projects in Indonesia and Tanzania shows that project developers have indeed accorded significant attention to the participatory and substantive rights of local communities. This is consistent with emerging evidence on the ways in which REDD+ projects have sought to engage and empower communities around the world.<sup>906</sup> On the other hand, my analysis also reveals the enduring relevance of national laws as well as the critical role played by the underlying political economy of forestry in shaping the willingness and capacity of the proponents of REDD+ projects to promote the forest, land tenure, and resource rights of Indigenous Peoples and local communities. This, too, is consistent with existing research on the limited ability of project-based REDD+ activities to address and resolve long-standing tenure issues that originate in national legal systems and challenges in developing countries.<sup>907</sup>

Notwithstanding a divergence in the extent to which REDD+ projects have promoted community forest rights and institutions, it is striking that the overwhelming majority of the thirty-eight REDD+ projects have had some positive impacts on the rights of local communities and that very few appear to have engendered the sort of human rights violations that were feared by scholars and practitioners in the earlier stages of the global emergence of REDD+. This raises the critical question of whether and how REDD+ project-based activities are likely to influence the rights of Indigenous Peoples and local communities in ways that go beyond their immediate impacts at the local

<sup>906</sup> See Lawlor *et al.*, *supra* note 12; Sunderlin *et al.*, *supra* note 47.

<sup>907</sup> Sunderlin *et al.*, *supra* note 47.

level. I argue that there are three pathways through which the domain of project-based REDD+ may affect the prospects for the rights of Indigenous Peoples and local communities in the long-term.

The first pathway through which REDD+ projects may affect the recognition and protection of Indigenous and community rights in the long-term has to do with the extent to which these projects may or may not empower Indigenous Peoples and local communities. My review of thirty-eight REDD+ projects in Indonesia and Tanzania as well as Lawlor *et al.*'s global survey of community participation and benefits in forty-one REDD+ projects suggests that most projects have sought to build the capacity of local communities to sustainably use and manage their forest resources and that many projects have sought to strengthen the forest, land tenure, and resource rights of local communities in doing so.<sup>908</sup> Likewise, a review of NICFI's support of civil society also evinces that many recipients of REDD+ funds have seen REDD+ as an opportunity to focus on community development and livelihoods or to tackle related issues in forest governance and policy.<sup>909</sup> If a REDD+ project has meaningfully built the capacity of Indigenous Peoples and local communities to understand and exercise their participatory and substantive rights in relation to forests and their resources, one could hypothesize that these groups may be more likely to mobilize for the recognition and protection of their rights in the future. REDD+ projects may also, inadvertently, provide an opportunity for local populations to mobilize around the protection of their land and resource rights.<sup>910</sup> The key to this sort of empowerment is what socio-legal scholars call "rights consciousness" – the understanding that actors may develop of their identities and their relations with others on the basis of rights.<sup>911</sup> Such consciousness is critical as it provides individuals with additional motivations to join interest groups and advocate for their rights<sup>912</sup>, and provides interest groups with

<sup>908</sup> See Sections 5.3 and 5.4 and Lawlor *et al.*, *supra* note 12 at 304–311. An industry survey from 2016 uncovered that a significant share of forest carbon projects had built the capacity of local populations, shared and generated benefits with them, and resulted in the clarification of land tenure: Allie Goldstein, "Not So Niche: Co-benefits at the Intersection of Forest Carbon and Sustainable Development" (Forest Trends, March 2016), available at: [www.forest-trends.org/documents/files/doc\\_5153.pdf](http://www.forest-trends.org/documents/files/doc_5153.pdf).

<sup>909</sup> NORAD, *supra* note 673 at 22–23 and 34–36.

<sup>910</sup> For instance, two REDD+ projects in Tanzania initially generated resistance among local communities. These communities were provided with independent legal advice, negotiated with the proponents of REDD+ projects, and succeeded in having the terms of the proposed contracts altered. See Mäkelä *et al.*, *supra* note 859 at 20.

<sup>911</sup> Michael McCann, *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization* (Chicago, IL: University of Chicago Press, 1994) at 5–9.

<sup>912</sup> Michael McCann, "Law and Social Movements: Contemporary Perspectives" (2006) 2:1 *Annual Review of Law and Social Science* 17 at 25. See also Francesca Polletta, "The

powerful symbols with which they may pressure authorities in a site of law.<sup>913</sup> On the other hand, if a REDD+ project has not managed to alter the way in which Indigenous Peoples and local communities see themselves or understand their relations with other actors, the empowerment of local populations may be circumscribed and short-lived.

The second pathway has to do with the broader take-up and effectiveness of the CCB Standards among the public and private actors developing REDD+ projects. Since their emergence in 2005, the CCB Standards have become the dominant scheme for certifying that a REDD+ project has achieved multiple social and environmental benefits beyond carbon sequestration (with 71 percent of REDD+ projects certified through VCS also employing CCB in 2013).<sup>914</sup> The widespread adoption of the CCB Standards for REDD+ projects is due, in large part, to the current structure of the demand for REDD+ credits on the voluntary carbon market.<sup>915</sup> The low price of certified emissions reductions on voluntary carbon markets<sup>916</sup> has significantly reduced interest among private actors in pursuing REDD+ projects for profit-related motivations alone.<sup>917</sup> In addition, the main motivation for purchasing REDD+ credits on the voluntary carbon market has been corporate social responsibility, and this has generated demand for REDD+ credits that have been certified as providing significant social and environmental benefits.<sup>918</sup> Finally, a significant share of the start-up funding for REDD+ projects has come from development aid, and this has meant that many REDD+ projects have

Structural Context of Novel Rights Claims: Southern Civil Rights Organizing, 1961-1966" (2000) 34:2 *Law & Society Review* 367 at 401.

<sup>913</sup> Goodman & Jinks, *supra* note 72 at 144-150.

<sup>914</sup> Peters-Stanley *et al.*, *supra* note 209 at 58.

<sup>915</sup> It is beyond the scope of this chapter to explain, in detail, why the CCB Standards have emerged as the dominant multiple-benefit certification scheme for REDD+ projects. For my purposes, I am primarily interested in considering why the use of multiple benefit schemes like the CCB has become so prevalent, as opposed to explaining why the CCB itself has emerged as the dominant standard in competition with similar schemes such as Plan Vivo, the Gold Standard, or Social Carbon. That said, it is worth mentioning that other important factors that may explain the widespread adoption of the CCB Standards might include its early entry in the market for certifying land-based carbon sequestration projects, the role of five of the largest conservation NGOs in its creation, the deliberative and inclusive process through which it has developed its standards, and the streamlined process that it has established with the VCS for dual certification.

<sup>916</sup> In 2013, the certification emissions reductions issued through the validation and verification of projects using the VCS AFOLU methodology yielded an average price of 4.1 US dollars per ton of carbon. Peters-Stanley *et al.*, *supra* note 209 at 57.

<sup>917</sup> Interview 34 at 1-2; Interview 47 at 7; Interview 73 at 6; Interview 77 at 3; Interview 80 at 1.

<sup>918</sup> Peters-Stanley *et al.*, *supra* note 209 at 50; Hamrick *et al.*, *supra* note 242 at 17; Goldstein, *supra* note 908 at 19-20.

had a pro-poor bias and sought to support and empower forest-dependent communities undertaking or committed to sustainable forest management practices.<sup>919</sup>

As the leading survey of the forest carbon market suggests, dual certification under the VCS and another multiple-benefit certification scheme like the CCB Standards has become an industry practice for REDD+ projects.<sup>920</sup> While the take-up of multi-benefit schemes like the CCB Standards has been primarily driven by the structure of the voluntary carbon market, their effectiveness will ultimately depend on their emergence as legitimate and authoritative sites of law for REDD+ projects.<sup>921</sup> Can the CCBA and similar programs achieve and maintain standing as sites of law for project-based REDD+ activities and continue to protect Indigenous and community rights, even if the price of carbon increases in the future? On the one hand, it is entirely possible that a future increase in the price of carbon could attract new project developers and buyers. Because these actors would not have participated in the institutionalization of these socially and environmentally responsible certification schemes and practices, they might develop or support REDD+ projects that would prioritize carbon sequestration to the detriment of the rights of local communities and Indigenous Peoples. On the other hand, there is emerging evidence that norms concerning the importance of generating social benefits are beginning to take hold in the voluntary carbon market, even for projects that are not seeking certification under the CCBA and similar schemes. If the use of a scheme like the CCB Standards is seen as critical to the very design and implementation of a REDD+ project, this might ensure its enduring influence in the voluntary carbon market.<sup>922</sup>

The third pathway through which project-based REDD+ activities may exert broader influence pertains to their indirect effects on the adoption of

<sup>919</sup> Seymour & Angelsen, *supra* note 15 at 320; Angelsen & McNeill, *supra* note 4 at 43. This is certainly the case for the REDD+ projects that I analyzed in Tanzania (which were all funded by NORAD) and to a lesser extent in Indonesia.

<sup>920</sup> Peters-Stanley *et al.*, *supra* note 209 at 16.

<sup>921</sup> See generally Bernstein & Cashore, *supra* note 93 (describing how nongovernmental certification programs can transition from influencing behavior through the provision of market incentives to steering behavior as a legitimate form of authority).

<sup>922</sup> See Goldstein, *supra* note 908 at 26 (“even without strong demand signals, project developers see several benefits to measuring and verifying co-benefits”) and Peters-Stanley *et al.*, *supra* note 209 at 16 (“More than an added bonus, these ‘co-benefits’ are increasingly becoming a baseline expectation. This is especially true for REDD projects, since co-benefits such as local jobs, alternative income streams, and community trainings are exactly the project activities that will successfully reduce deforestation.”)



REDD+ policies by governments at the national or international levels.<sup>923</sup> Many scholars have argued that REDD+ projects may generate “lessons for national policies by pointing to the most critical institutional and legal reforms that will be needed to implement REDD+ at the local level.”<sup>924</sup> These lessons are not simply valuable within the context of a country’s jurisdictional REDD+ readiness efforts, but may also be conveyed widely to inform the efforts of other developing countries as well as the design of multilateral and bilateral initiatives that govern jurisdictional REDD+ activities.<sup>925</sup> All the same, a number of factors might limit the potential of REDD+ projects to generate and disseminate lessons that may be of value for jurisdictional REDD+ policy-making. Many REDD+ projects “are simply old wine in new REDD+ wineskins: existing projects or approaches that have been rebranded as ‘REDD+’ to attract new finance.”<sup>926</sup> Such projects are of limited utility to policy-makers “because their results may not scale up (precisely because they have picked the ‘low-hanging fruit,’ i.e., the lowest cost and least controversial projects) and because they may restrict access to information about the site selection process and the early phases of project development (due to concerns over moral hazard, competitors and creating unrealistic expectations).”<sup>927</sup> Most importantly, there is considerable variation in the ability and commitment of project proponents to effectively share lessons with other stakeholders,<sup>928</sup> and policy-makers may simply not be receptive to the lessons and inputs of project

<sup>923</sup> Laura Bozzi *et al.*, “The role of climate private voluntary programs affecting forests: Assessing their direct and intersecting effects” in *Business and Climate Policy: The Potentials and Pitfalls of Private Voluntary Programs* (Tokyo, Japan, United Nations University Press, 2012) 113–142 at 134–136.

<sup>924</sup> Seymour & Angelsen, *supra* note 15 at 297.

<sup>925</sup> Jagger *et al.*, *supra* note 253 at 281–282 (arguing that “REDD+ is a unique opportunity to share the lessons we learn, because of the global distribution and relatively coordinated timing of projects, significant allocation of financial resources, and clear objectives and explicit mandate set by international negotiators.”) The global significance of REDD+ projects also derives from the fact that most such activities are carried out through partnerships involving domestic governmental actors, bilateral aid agencies, local communities and NGOs, international NGOs, international organizations, and private sector actors, thereby enhancing opportunities for knowledge transfer across sites and levels of law (Sills *et al.*, *supra* note 185 at 276–277).

<sup>926</sup> Seymour & Angelsen, *supra* note 15 at 297. <sup>927</sup> Sills *et al.*, *supra* note 186 at 269.

<sup>928</sup> See NORAD, *supra* note 673 at 49 (“Some projects, particularly the research projects and several of the large INGOs, have a central focus on identifying and communicating lessons learned, while other projects appear to predominantly communicate lessons learned internally and amongst partners.”) and 55 (“Within the INGOs, information flows well up to HQ level and also from HQ down to field level. In some cases, the cross flow of information is less efficient and there is only limited evidence of cross-learning.”)

developers.<sup>929</sup> This is illustrated in many different ways by my case study of the development of the National REDD+ Strategy in Tanzania, in which the proponents of REDD+ pilot projects had little influence on several aspects of the policies adopted for jurisdictional REDD+, despite their participation in and engagement with the National REDD+ Taskforce.<sup>930</sup> Finally, given that the construction and conveyance of legal norms in the transnational legal process for REDD+ is shaped by the competing ideas and interests of actors as well as the resilience of existing endogenous norms, there is no reason to believe that the “lessons” generated by REDD+ projects may simply and straightforwardly be accepted and adopted by actors in other sites of law.<sup>931</sup>

<sup>929</sup> See Interview 54 at 7 (describing the perspective held by a UN-REDD staff member regarding project-based REDD+ activities: “REDD projects aren’t REDD. REDD is a national process under the UNFCCC. We are the ones developing REDD. What you are doing is something else of no interest.”); Interview 82 at 9 (describing the fragmentation in the landscape of REDD+ initiatives and activities: “we saw two worlds – the project world and the national discussions on REDD. And under the UNFCCC, everything was focused very much at the national level. The project world was obviously project focused. And a massive gap in terms of how these two were ever going to come together.”)

<sup>930</sup> See Sections 4.3 and 4.4.

<sup>931</sup> See, in relation to the obstacles that stand in the way of the transfer of policy ideas: Diane Stone, “Transfer and translation of policy” (2012) 33:6 *Policy Studies* 1.