

## Rights and Jurisdictional REDD+ in Indonesia

### 3.1 FORESTS, GOVERNANCE, AND RIGHTS IN INDONESIA

Indonesia's extensive forests constitute the third largest tropical rainforest in the world and have continued to disappear at a rate of .05 percent per year until recently.<sup>427</sup> The primary drivers of deforestation and forest degradation in Indonesia include legal and illegal logging, agricultural expansion (through the large-scale conversion of forests and peat lands for commercial oil palm plantations as well as small-holder cash-crop subsistence agriculture), mining (especially coal), and forest fires (both natural as well as human-induced in origin).<sup>428</sup> At the local level, deforestation has also been linked to lack of clarity regarding land and tenure rights; population growth; and the poverty and resource-dependence of rural communities.<sup>429</sup> Improvements in the governance of forests and land have accordingly been identified as having significant potential for reducing carbon emissions from forest-based sources in Indonesia and contributing to the world's global climate mitigation efforts.<sup>430</sup>

After achieving independence in 1949, Indonesia aggressively pursued the commercial exploitation of its forests and other natural resources on a large scale. In its *Basic Agrarian Law*, the post-independence presidency of Sukarno recognized three categories of land – state land (*tanah negara*), privately owned land (*tanah hak*), and customary lands (*hak ulayat*) – and limited the latter's recognition to the extent that it was consistent with the national

<sup>427</sup> FAO, *State of the World's Forests* (Rome, Italy: FAO, 2011) at 113.

<sup>428</sup> Giorgio Budi Indrarto *et al.*, *The Context of REDD+ in Indonesia: Drivers, agents and institutions* (Bogor, Indonesia: CIFOR Working Paper 92, 2012) at 3–9; Mairon Bastos Lima, Joyeeta Gupta, Nicolien van der Grijp & Fahmuddin Agus, "Case Study: Indonesia" in Joyeeta Gupta, Nicolien van der Grijp & Onno Kuik, eds., *Climate Change, Forests and REDD: Lessons for Institutional Design* (Abingdon, UK: Routledge, 2013) 121 at 122–123.

<sup>429</sup> *Ibid* at 124; Indrarto *et al.*, *supra* note 428 at 9–13. <sup>430</sup> *Ibid* at 13–15.

interest.<sup>431</sup> During the *New Order*, a period of authoritarian developmentalism that ran from the mid-1960s to the late 1990s, the Suharto regime consolidated the state's authority over forests and related industries as part of a national drive for economic growth and development.<sup>432</sup> In the *Basic Forestry Law* adopted in 1967, the central government asserted control over all forest areas by removing forests from the scope of application of the *Basic Agrarian Law* and by not recognizing the existence of *adat* rights and lands in forests.<sup>433</sup> For the next several decades, Indigenous Peoples and local communities were systematically excluded from the management of their traditional lands and forests and were prevented from accessing and benefiting from forest resources.<sup>434</sup>

During the *reformasi* era that followed the fall of Suharto in 1998, Indonesia rapidly transitioned from authoritarian rule to a decentralized system in which many political and administrative responsibilities, including those relating to forests and natural resources, were devolved to provincial, district, and municipal governments.<sup>435</sup> This process of liberalization and decentralization prompted rural communities across Indonesia to advocate for the recognition of their traditional rights to land and forests as part of a movement known as “*adat* revivalism.”<sup>436</sup> This period was also characterized by the emergence of an environmental movement in Indonesia and the adoption of a new set of laws and policies aimed at fostering the sustainable management of forests, including through new community-based forms of forest governance.<sup>437</sup>

<sup>431</sup> *Basic Agrarian Law* (Law 5/1960), art. 3.

<sup>432</sup> Luke Lazarus Arnold, “Deforestation in Decentralised Indonesia: What’s Law Got to Do with It?” (2008) 4(2) *Law, Environment and Development Journal* 75 at 79–81. On the continuity between colonial and post-colonial governance of forests in Indonesia, see Nancy L. Peluso, *Rich Forests, Poor People: Resource Control and Resistance in Java* (Berkeley, CA: Berkeley University Press, 1992).

<sup>433</sup> *Basic Forestry Law* (Law 5/1967), art. 5. See Sandra Moniaga, “From bumiputera to masyarakat adat: A long and confusing journey” in Jamie S. Davidson & David Henley, *The Revival of Tradition in Indonesian Politics: The Deployment of Adat from Colonialism to Indigenism* (Abingdon, UK: Routledge, 2007) 275 at 279.

<sup>434</sup> Arnold, *supra* note 432 at 79–81.

<sup>435</sup> *Ibid* at 81–82. This is not to say that the process of decentralization was entirely democratic or that Indonesia has completed its transition to democracy from authoritarianism. See Adam D. Tyson, *Decentralization and Adat Revivalism in Indonesia: The Politics of Becoming Indigenous* (Abingdon, UK: Routledge, 2010) at 8–10.

<sup>436</sup> *Ibid* at 41–59. See also Moira Moeliono & Ahmad Dermawan, “The Impact of Decentralization on Tenure and Livelihoods” in Christopher Barr *et al.*, eds., *Decentralization of Forest Administration in Indonesia: Implications for Forest Sustainability, Economic Development and Community Livelihoods* (Bogor, Indonesia: CIFOR, 2006) 108 at 111–113.

<sup>437</sup> Indrarto *et al.*, *supra* note 428 at 42–43.

In practice, the recognition of *adat* community forests as well as the establishment of various forms of community forestry has remained riddled with obstacles, such that only 1 percent of Indonesia's forests are legally managed by local communities.<sup>438</sup> Although very few of Indonesia's forests have been formally devolved to local communities, numerous communities continue to assert informal claims to own, manage, and benefit from their customary forests.<sup>439</sup> As a result, forest governance in Indonesia is characterized by a series of ongoing conflicts between local communities seeking recognition of their forest and tenure rights and other actors in the forestry sector, including central, provincial, and district governments and corporations, who are reluctant to accede to requests for greater local authority over, and access to, forests.<sup>440</sup> Many of the barriers to the full implementation of the rights of local communities to manage their forests are thus similar to those barriers that drive deforestation and forest degradation in Indonesia, such as the competing economic interests of companies engaging in the exploitation of forests and other commodities; the collusion that exists between governments and the natural resource sector; and the broader inefficiencies, resource constraints, tensions, and ambiguities that undermine the effective development and enforcement of forestry laws and regulations across multiple orders of government.<sup>441</sup>

The status and rights of Indigenous Peoples have an equally long and complicated history in Indonesia.<sup>442</sup> During the *New Order*, the Suharto regime denied the very existence of Indigenous Peoples on Indonesian territory and conceived of *adat* communities in negative terms, as “estranged and isolated communities” (*masyarakat terasing*) or as “village folk” (*orang kampung*) disconnected from the national process of development and requiring government assistance and resettlement.<sup>443</sup> The Suharto regime also adopted

<sup>438</sup> Caleb Stevens *et al.*, *Securing Rights, Combating Climate Change: How Strengthening Community Forest Rights Mitigates Climate Change* (Washington, DC: Rights & Resources Institute, 2012) at 19.

<sup>439</sup> Constance L. McDermott, Benjamin Cashore & Peter Kanowski, *Global Environmental Forest Policies: An International Comparison* (London, England Earthscan, 2010) at 217–218.

<sup>440</sup> Indrarto *et al.*, *supra* note 428 at 38–39; Laurens Bakker & Sandra Moniaga, “The Space Between: Land Claims and the Law in Indonesia” (2010) 38:2 *Asian Journal of Social Science* 187.

<sup>441</sup> Myrna Asnawat Safitri, *Forest tenure in Indonesia: The socio-legal challenges of securing communities' rights* (doctoral dissertation defended at the Faculty of Law of the University of Leiden, December 2010), available at: <https://openaccess.leidenuniv.nl/handle/1887/16242> (accessed 27 October 2014) at 239–286.

<sup>442</sup> Tyson, *supra* note 435 at 1–16.

<sup>443</sup> Tania Murray Li, “Articulating Indigenous Identity in Indonesia: Resource Politics and the Tribal Slot” (2000) 42(1) *Comparative Studies in Society and History* 149 at 154–155.

a number of policies that would have lasting and adverse consequences for the rights and well-being of *adat* communities. To begin with, the central government aggressively supported the development of the forestry, mining, agricultural, and tourism sectors and thereby facilitated, through the issuance of licenses as well as intimidation and violence, the appropriation of the traditional lands of *adat* communities by commercial interests.<sup>444</sup> Moreover, the *New Order* government created new uniform village administration structures that displaced the local institutions of *adat* communities and disrupted customary systems of land management.<sup>445</sup> Finally, the Suharto regime facilitated the relocation of more than five million Indonesians from Java, Madura, and Bali to less populated lands in the outer islands inhabited by *adat* communities. This process of migration has led to protracted disputes and violent conflicts between migrant and *adat* populations that continue to this day.<sup>446</sup>

During the 1980s and 1990s, *adat* communities began to establish organizations and networks to advocate for their rights and to develop relationships with external allies and supporters in the global Indigenous movement (such as the Ford Foundation, the Asia Indigenous Peoples Pact, the International Working Group on Indigenous Affairs, and the Forest Peoples Programme).<sup>447</sup> Taking advantage of the new opportunities for mobilization presented by the demise of the Suharto regime, more than 200 representatives of Indigenous Peoples organized the First Congress of Indigenous Peoples of the Archipelago in March 1999.<sup>448</sup> This congress marked the emergence of a new term that *adat* communities would use to describe their status as Indigenous Peoples, *masyarakat adat*, and led to the articulation of a slew of related demands and claims, most notably including recognition of their sovereignty and their rights to manage their traditional lands, forests, and resources.<sup>449</sup> This congress also resulted in the establishment of a new federation of Indigenous Peoples known as AMAN (*Aliansi Masyarakat Adat Nusantara Alliance*) that now includes 1,992 Indigenous communities throughout Indonesia.<sup>450</sup>

<sup>444</sup> David Henley & Jamie S. Davidson, "Introduction" in Davidson & Henley, *supra* note 433, 1 at 11–12.

<sup>445</sup> Tsuyoshi Kato, "Different Fields, Similar Locusts: Adat Communities and the Village Law of 1979 in Indonesia" (1989) 47 *Indonesia* 89–114.

<sup>446</sup> Davidson & Henley, *supra* note 444 at 10–11. <sup>447</sup> Moniaga, *supra* note 433 at 281–283.

<sup>448</sup> *Ibid* at 281.

<sup>449</sup> Tanya Murray Li, "Masyarakat Adat, Difference, and the Limits of Recognition in Indonesia's Forest Zone" (2001) 35(3) *Modern Asian Studies* 645; Suraya Afiff & Celia Lowe, "Claiming Indigenous Community: Political Discourse and Natural Resource Rights in Indonesia" (2007) 32 *Alternatives: Global, Local, Political* 73.

<sup>450</sup> AMAN, "Profil Organisasi," available at: [www.aman.or.id/wp-content/plugins/downloads-manager/upload/Profil\\_AMAN.pdf](http://www.aman.or.id/wp-content/plugins/downloads-manager/upload/Profil_AMAN.pdf) (accessed 28 October 2014) at 10.

Over the last fifteen years, with the support and collaboration of international and domestic allies, AMAN has served as an important platform and network for representing the Indigenous Peoples of Indonesia, advocating for their rights vis-à-vis central and regional governments, strengthening their local capacities, institutions, and systems, and promoting the rights of Indigenous women and the education of Indigenous youth.<sup>451</sup>

In addition to the flourishing of the Indigenous movement in Indonesia, the *reformasi* era was also characterized by a number of legal and policy developments that accorded new, though limited and often ambiguous, recognition to the existence and rights of *masyarakat adat* communities.<sup>452</sup> Notwithstanding some of these important gains, Indigenous Peoples have continued to struggle for the recognition of their distinctive status and the protection of their land and forest rights in Indonesia throughout the 2000s. When Indonesia signed the *UN Declaration on the Rights of Indigenous Peoples* in 2007, the Indonesian government maintained that the concept of Indigenous Peoples was not applicable to Indonesia. It has also rejected domestic and international calls to acknowledge and protect the Indigenous rights of *adat* communities as defined under international law,<sup>453</sup> including by ensuring greater recognition of the land and forests rights and tenure systems of *adat* communities.<sup>454</sup> As a result of government inaction, Indigenous Peoples living in or near forests have suffered from a lack of tenure security<sup>455</sup> and the large-scale deprivation of their lands for commercial exploitation or natural resource conservation.<sup>456</sup> They have also routinely experienced violent clashes with police, security forces, and other rural communities due to land conflicts with other actors in Indonesia.<sup>457</sup>

<sup>451</sup> *Ibid.*

<sup>452</sup> John Bamba, "Recognition 'In Kind': Indonesian Indigenous Peoples and State Legislation" in Christian Erni, ed, *The Concept of Indigenous Peoples in Asia: A Resource Book* (Copenhagen, Denmark: IWGIA, 2008) 257 at 264–267. In 1999, the Constitution was most notably amended to incorporate references to the traditional cultural and land rights of *adat* communities, albeit with the caveat that these remained subordinate to the objective of social development and the unitary nature of the Indonesian Republic (*Constitution of the Republic of Indonesia*, art. 18(B)(2) and 28(I)(3)).

<sup>453</sup> Rukka Sombolinggi, "Country Profile: Indonesia" in Erni, *supra* note 452, 377 at 379.

<sup>454</sup> Moniaga, *supra* note 433 at 285–289. <sup>455</sup> Arnold, *supra* note 432 at 97.

<sup>456</sup> Davidson & Henley, *supra* note 444 at 34–35.

<sup>457</sup> IFAD, "Update 2011 – Indonesia," available at: [www.iwgia.org/regions/asia/indonesia/871-update-2011-indonesia](http://www.iwgia.org/regions/asia/indonesia/871-update-2011-indonesia) (accessed 28 October 2014).

### 3.2 THE PURSUIT AND GOVERNANCE OF JURISDICTIONAL REDD+ IN INDONESIA

The origins of jurisdictional REDD+ activities in Indonesia lay in the domestic and international commitments made by the government of President Yudhoyono throughout the second half of the 2000s.<sup>458</sup> At the domestic level, the Ministry of Forestry established the Indonesian Forest and Climate Alliance (IFCA) to hold an initial set of public consultations on REDD+ and develop eight studies on different aspects of the operationalization of REDD+ in Indonesia.<sup>459</sup> In addition, it also adopted regulations for the development and implementation of project-based REDD+ activities in 2008 and 2009.<sup>460</sup> Internationally, President Yudhoyono expressed his strong support for the establishment of a REDD+ mechanism within the UNFCCC, calling on developing countries to reduce their carbon emissions with the funding and support of developed countries.<sup>461</sup> In September 2009, Yudhoyono most notably committed Indonesia to reducing its emissions by 26 percent through unilateral action or by as much as 41 percent with appropriate levels of international support by 2020.<sup>462</sup>

This commitment created favorable conditions for the pursuit of jurisdictional REDD+ activities in Indonesia, and opened the door for the delivery of aid and technical assistance by multilateral and bilateral actors.<sup>463</sup> As can be seen from Table 3.1, Indonesia's jurisdictional REDD+ readiness efforts have benefited from the funding and assistance provided by a wide array of multilateral organizations, bilateral aid agencies, foreign corporations, and international NGOs.<sup>464</sup> The most significant form of support has

<sup>458</sup> Interview 85 at 1; Interview 89 at 2; Indrarto *et al.*, *supra* note 428 at 63.

<sup>459</sup> IFCA, "Reducing Emissions from Deforestation and Forest Degradation in Indonesia: REDD Methodology and Strategies. Summary for Policy Makers" (on file with the author) at 5.

<sup>460</sup> Indrarto *et al.*, *supra* note 428 at 63.

<sup>461</sup> See, e.g., Peter Gelling, "Indonesia Seeks Allies for Pay-for-Forests Plan" *New York Times*, 28 October 2007, at 14.

<sup>462</sup> Intervention by H.E. Dr. Susilo Bambang Yudhoyono, President of the Republic of Indonesia on Climate Change at the G-20 Leaders Summit, 25 September 2009, Pittsburgh, PA, available at: <http://forestclimatecenter.org/files/2009-09-25%20Intervention%20by%20President%20SBY%20on%20Climate%20Change%20at%20the%20G-20%20Leaders%20Summit.pdf> (accessed 9 September 2014) at 2.

<sup>463</sup> Interview 44 at 6; Interview 85 at 1. See also Kristine Veierland, *Inclusive REDD+ in Indonesia. A Study of the Participation of Indigenous People and Local Communities in the Making of the National REDD+ Strategy in Indonesia* (Master's Thesis, Department of Political Science, University of Oslo, October 2011) at 43.

<sup>464</sup> Indonesia is the largest recipient of funding for REDD+ in the world, with 2.4 billion US dollars having been pledged by donors, of which around 102 million US dollars have been disbursed since 2009. Forest Trends, "REDDx – Indonesia," available at: <http://reddx.forest-trends.org/country/indonesia/> (accessed 10 November 2014).

TABLE 3.1. *Overview of transnational support for jurisdictional REDD+ readiness activities in Indonesia*

Multilateral programmes	From 2010 to 2012, a dedicated UN-REDD National Programme provided Indonesia with funding, capacity-building, and technical assistance to support stakeholder participation, the development of a reference emissions level and an MRV system, the creation of a finance mechanism, and the pursuit of pilot activities at the provincial and district levels. <sup>465</sup> In addition, since 2009, the World Bank FCPF has provided funding and technical assistance for the development of reference emission levels and an MRV system. <sup>466</sup>
Bilateral aid agencies	The Norwegian government has committed to providing up to 1 billion US dollars in performance-based payments for REDD+ and 30 million US dollars in start-up funds for national REDD+ readiness activities. <sup>467</sup> Indonesia has also received funding and technical assistance from the bilateral aid agencies of Japan, France, Australia, Germany, and the UK. <sup>468</sup>
Nongovernmental actors	A number of American charitable foundations, such as the Ford Foundation, Packard, and the Climate and Land Use Alliance, multinational corporations, such as Macquarie, and international NGOs, such as Conservation International, the World Wildlife Fund, and the Nature Conservancy have contributed funding for the pursuit of REDD+ projects in Indonesia. <sup>469</sup>

come from the *Norwegian International Climate and Forests Initiative* (NICFI).<sup>470</sup> From May 2010 to March 2014, 58 percent of an initial US \$30 million was disbursed to support the development of plans, systems, and capabilities for the pursuit of jurisdictional REDD+ across Indonesia as well as in the pilot province of Central Kalimantan.<sup>471</sup> In addition, Norway has funded the programs of numerous multilateral institutions as well as the

<sup>465</sup> Letter of Intent between the Government of the Kingdom of Norway and the Government of the Republic of Indonesia on Cooperation on reducing greenhouse gas emissions from deforestation and forest degradation (26 May 2010) (on file with the author); Indonesia-Norway Partnership Joint Concept Note (3 December 2010) (on file with the author).

<sup>466</sup> NORAD, *supra* note 423 at 260. <sup>467</sup> *Ibid* at 265–266. <sup>468</sup> *Ibid* at 57–58.

<sup>469</sup> NORAD, *supra* note 423 at 264. <sup>470</sup> *Ibid* at 264–265.

<sup>471</sup> UN-REDD Programme, “National Programme Final Report – Indonesia” (18 January 2013) (on file with the author) at 4.

activities of a large number of development and human rights NGOs in Indonesia.<sup>472</sup>

Pursuant to its bilateral agreement with Norway, the government of President Yudhoyono established a REDD+ Taskforce in the Summer of 2010 that brought together representatives of the National Development Planning Agency (BAPPENAS), the Ministry of Forestry, the Ministry of Finance, the State Ministry for Environment, the National Land Agency (BPN), the Secretariats of the Cabinet and Presidential Office, and the President's Work Unit for the Supervision and Management of Development (UKP4). Reporting directly to the President, its main tasks included elaborating a National REDD+ Strategy and undertaking preparations for the establishment of REDD+ institutions, financial mechanisms, and measurement, reporting, and verification systems. This REDD+ Taskforce was also supported by a number of technical working groups, comprised of experts from government, academia, and civil society, working on key aspects of REDD+ readiness (such as governance, multi-stakeholder processes, safeguards, or finance).<sup>473</sup> This initial taskforce ended its mandate in June 2011, and was thereafter succeeded by a second and third taskforce and finally by a special team established with the express purpose of preparing for the establishment of a REDD+ Agency.<sup>474</sup> This REDD+ Agency was created in August 2013 and was tasked with the responsibility of managing and coordinating all jurisdictional REDD+ activities in Indonesia.<sup>475</sup>

### 3.3 THE RIGHTS OF INDIGENOUS PEOPLES AND LOCAL COMMUNITIES IN JURISDICTIONAL REDD+ READINESS ACTIVITIES IN INDONESIA

#### 3.3.1 *Rights in the Development of a National REDD+ Strategy*

In the early stages of Indonesia's jurisdictional REDD+ readiness efforts, various ministries and agencies engaged in policy research and planning that would lay the groundwork for the later development of a national REDD+ strategy. During the fall of 2007, the IFCA organized a series of

<sup>472</sup> World Bank – Grant Reporting and Monitoring (GRM) Report, “Indonesia – FCPF Readiness Preparation Grant” available at: <http://forestcarbonpartnership.org/sites/fcp/files/Indonesia%20GRM%20FY2013%20Recipient%20Executed.pdf> (accessed 6 January 2013).

<sup>473</sup> Letter of Intent between the Government of the Kingdom of Norway and the Government of the Republic of Indonesia on Cooperation on reducing greenhouse gas emissions from deforestation and forest degradation (26 May 2010) (on file with the author).

<sup>474</sup> Forest Trends, “REDDx – Indonesia” available at: <http://reddx.forest-trends.org/country/indonesia/> (accessed 10 November 2014).

<sup>475</sup> *Ibid.*



national workshops and developed eight studies on different aspects of the operationalization of REDD+ in Indonesia. These studies were eventually brought together into a consolidated report released by the Ministry of Forestry in early 2008 known as REDD-I. This report identified the emerging international consensus around the key elements of REDD+ and set out the next steps for the piloting of REDD+ mechanisms and activities in Indonesia.<sup>476</sup> Although it acknowledged the role that clarifying land tenure and forest management rights and engaging with local communities could play in the success and effectiveness of REDD+ activities,<sup>477</sup> it did not address, nor refer to, the participatory or substantive rights of Indigenous Peoples or local communities.<sup>478</sup> On the other hand, in July 2008, BAPPENAS issued a national development plan focused on Indonesia's response to climate change, in which forestry was identified as a priority area for domestic climate mitigation efforts.<sup>479</sup> This report recognized the significance of the rights of Indigenous Peoples and forest-dependent communities and most notably stated that: "Crucial for successful implementation of REDD-I will be the acknowledgement and inclusion of the rights of indigenous people and rural people who depend upon forest resources for their livelihoods, in Indonesia, this number might exceed 60 million people."<sup>480</sup> The contrast between these two reports reflected the traditional reluctance of the Ministry of Forestry to embrace participatory and substantive rights that might threaten its stranglehold on forest governance and associated revenues and the comparatively greater openness of BAPPENAS to the rights and concerns of Indigenous Peoples and rural communities.<sup>481</sup>

Another important process that fed into the development of a national REDD+ strategy was the preparation and submission of an R-PP by the Ministry of Forestry under the FCPF Readiness Mechanism. This R-PP was developed by an *ad hoc* inter-ministerial working group and drew on the studies prepared by IFCA as well as a set of consultations with national, regional, and local government representatives, NGOs, local communities, international partners, and the private sector carried out in 2008 and 2009.<sup>482</sup>

<sup>476</sup> IFCA, *supra* note 459. <sup>477</sup> *Ibid* at 11, 18, 20, 46, and 66.

<sup>478</sup> The report included no references to the terms Indigenous Peoples, customary communities, or traditional communities and did not refer to the potential application of such rights as the right to free, prior, and informed consent.

<sup>479</sup> Indrarto *et al.*, *supra* note 428 at 50.

<sup>480</sup> Cited in Patrick Anderson & Torry Kuswardono, "Report to the Rainforest Foundation Norway on REDD in Indonesia" (September 2008) (on file with the author) at 8.

<sup>481</sup> *Ibid.* Interview 61 at 2; Interview 86 at 2–3.

<sup>482</sup> Republic of Indonesia, "R-PLAN" (May 2009), available at: [www.forestcarbonpartnership.org/sites/forestcarbonpartnership.org/files/Documents/PDF/Mar2010/Indonesia\\_Rplan\\_Ma2009\\_with\\_disclaimer.pdf](http://www.forestcarbonpartnership.org/sites/forestcarbonpartnership.org/files/Documents/PDF/Mar2010/Indonesia_Rplan_Ma2009_with_disclaimer.pdf) (accessed 14 November 2014) at 13–15.

These consultations enabled Indigenous activists to raise concerns with government officials about their approach to Indigenous peoples and local communities in the drafting of the R-PP, specifically the lack of recognition of their Indigenous status and their rights to lands, resources, and to FPIC.<sup>483</sup> The R-PP submitted to the FCPF in May 2009 only partially addressed some of these rights-related issues, however. On the one hand, the R-PP acknowledged the importance of ensuring that Indigenous Peoples and forest dwellers could participate in, and benefit from, the implementation of REDD+ activities and committed to consulting them in the development of policies and programs for REDD+ in Indonesia.<sup>484</sup> On the other hand, the R-PP did not address the potential risks that REDD+ might pose to the rights of Indigenous Peoples and local communities, nor did it recognize the distinctive set of rights held by Indigenous Peoples, claiming instead that “[f]orest dwellers and indigenous people, like other Indonesian citizens, have the same rights and responsibilities as Indonesian citizens according to national regulations.”<sup>485</sup>

Unsurprisingly, the R-PP submitted by Indonesia to the FCPF in May 2009 attracted criticisms at home and abroad. In particular, AMAN and Sawit Watch<sup>486</sup> addressed a letter to the Minister of Forestry (with CCs to key officials in the FCPF and the World Bank), in which it criticized the Indonesian government for failing to fully and adequately consult with Indigenous Peoples and to recognize their participatory and substantive rights (as protected through the FCPF Charter as well as international human rights law more broadly). AMAN and Sawit Watch closed the letter by calling on the Indonesian government to “establish an effective process of consultation and collaboration with Indigenous Peoples’ organizations and authorities to enable their participation in the decisions about the development of REDD that will impact on their lives.”<sup>487</sup> In their reviews of Indonesia’s R-PP, the third-party experts from the technical advisory panel recommended that Indonesia take additional steps to ensure the involvement of Indigenous Peoples and forest-dependent communities in its REDD+ policy planning

<sup>483</sup> *Ibid* at 18. See also FCPF, “Readiness Preparation Proposal Assessment Note on a Proposed Grant in the Amount of US\$ 3.6 Million to the Republic of Indonesia for REDD+ Readiness Preparation Support” (3 February 2011) (on file with the author) at 77–78.

<sup>484</sup> Republic of Indonesia, “R-PLAN” *supra* note 482 at 26. <sup>485</sup> *Ibid*.

<sup>486</sup> Established in 1998, Sawit Watch is an Indonesian public interest law and advocacy NGO that aims to achieve environmental justice for smallholder farmers, laborers, and Indigenous Peoples in seventeen provinces across Indonesia. See FPP, “Sawit Watch,” available at: [www.forestpeoples.org/partners/sawit-watch](http://www.forestpeoples.org/partners/sawit-watch) (accessed 18 November 2014).

<sup>487</sup> AMAN & Sawit Watch, “Indonesian Draft Readiness Plan, 16 October 2008” (15 May 2009), available at: [www.forestcarbonpartnership.org/sites/forestcarbonpartnership.org/files/AMA\\_N\\_on\\_Indonesia\\_R-Plan\\_o.pdf](http://www.forestcarbonpartnership.org/sites/forestcarbonpartnership.org/files/AMA_N_on_Indonesia_R-Plan_o.pdf) (accessed 14 November 2014) at 3.

process, assess the potential negative impacts of REDD+ on the livelihoods of forest communities and Indigenous Peoples, and address the issue of the distribution of benefits.<sup>488</sup> At its third meeting in June 2009, the FCPF Participants' Committee arrived at similar conclusions and moreover discussed the application of the World Bank's social and environmental safeguards as well as the consideration of the land and forest tenure and resource rights of Indigenous Peoples and local communities.<sup>489</sup> Upon approving Indonesia's R-PP in June 2009, the FCPF Participants' Committee thus requested that the World Bank and Indonesia work closely with one another to resolve these issues before the conclusion of a grant agreement.<sup>490</sup> After two years of additional due diligence to, among other things, clarify the application of the World Bank's Operational Policy on Indigenous Peoples to Indonesia's jurisdictional REDD+ readiness efforts,<sup>491</sup> the Indonesian government and the World Bank concluded a readiness grant agreement in June 2011.<sup>492</sup>

<sup>488</sup> FCPF, "Indonesia R-PLAN: Synthesis Review by FCPF Technical Advisory Panel" (2 June 2009), available at: [www.forestcarbonpartnership.org/sites/forestcarbonpartnership.org/files/Indonesia\\_R-Plan\\_TAP\\_synthesis\\_06-2-09.pdf](http://www.forestcarbonpartnership.org/sites/forestcarbonpartnership.org/files/Indonesia_R-Plan_TAP_synthesis_06-2-09.pdf) (accessed 14 November 2014) at 2, 4, 6–8, and 10;

<sup>489</sup> FCPF, "Participants' Committee: Third Meeting (16–18 June, 2009, Montreux). PC Discussions of Indonesia's Readiness Preparation Proposal. Summary Report," available at: <http://forestcarbonpartnership.org/sites/fcp/files/Summary%20Report%20R-PP%20Indonesia%20FINAL.pdf> (accessed 14 November 2014) at 1–2.

<sup>490</sup> FCPF, "Third Participants' Committee, 16–18 June, 2009, Montreux, Switzerland. Resolution PC/3/2009/5 Indonesia Readiness Preparation Proposal." available at: <http://forestcarbonpartnership.org/sites/fcp/files/Resolution%205-%20R-PP-Indonesia%20FINAL.pdf> (accessed 14 November 2014) at 1–2.

<sup>491</sup> In February 2011, World Bank officials, acknowledging that the Indonesian government was "still reluctant to recognize the term indigenous peoples and any particular rights afforded them," specifically concluded that the Bank's Operational Policy on Indigenous Peoples would apply to communities with the status of "Masyarakat Adat" and "Masyarakat Terasing" under Indonesian law (FCPF, "Readiness Preparation Proposal Assessment: Indonesia" *supra* note 482 at 38).

<sup>492</sup> FCPF, "REDD Readiness Progress Sheet. Country: Indonesia" (October 2013), available at: <http://forestcarbonpartnership.org/sites/fcp/files/2013/Oct2013/Indonesia%20FCPF%20RED%20D%20Readiness%20Progress%20Fact%20Sheet%20Oct%202013.pdf> (accessed 18 November 2014) at 1. In the end, this two-year delay in the conclusion of a readiness grant agreement considerably limited the influence of the FCPF on the development of Indonesia's REDD+ readiness policies. Indeed, by June 2011, Indonesia's jurisdictional REDD+ readiness efforts were well underway as a result of the activities of the UN-REDD Programme and the National REDD+ Taskforce. See NORAD, "Real-Time Evaluation of Norway's International Climate and Forest Initiative Contributions to National REDD+ Processes 2007–2010. Country Report: Indonesia" (March 2011), available at: [www.norad.no/en/tools-and-publications/publications/publication/\\_attachment/333468?\\_download=true&\\_ts=12f9be6f13](http://www.norad.no/en/tools-and-publications/publications/publication/_attachment/333468?_download=true&_ts=12f9be6f13) (accessed 6 October 2014) at 55.

In any case, the development of a national REDD+ strategy for Indonesia truly began after its inclusion as a key deliverable in the Letter of Intent Indonesia concluded with Norway in May 2010.<sup>493</sup> This task was initially entrusted to BAPPENAS, which worked with other ministries to create a process and structure for this purpose.<sup>494</sup> This led to the establishment, in July 2010, of a Steering Committee bringing together government officials from several ministries<sup>495</sup> as well as an Implementation Team comprised of representatives from government, international organizations, and civil society.<sup>496</sup> Given that the Letter of Intent specified that “all relevant stakeholders” (including “Indigenous Peoples, local communities and civil society”) should be given the opportunity to fully and effectively participate in the design of REDD+ policies and plans,<sup>497</sup> BAPPENAS worked closely with the UN-REDD Programme to develop a plan for holding a series of multi-stakeholder consultations at the national and regional levels.<sup>498</sup>

Throughout the summer of 2010, several drafts of the strategy were produced and discussed by various officials and stakeholders as well as presented for public feedback in August 2010.<sup>499</sup> These efforts culminated in a first complete draft released to the public in September 2010. In comparison with the R-PP submitted to the FCPF in May 2009, this draft national strategy was much more attentive to the prevalence of conflicts over land tenure and forest rights<sup>500</sup> and the lack of recognition of the traditional rights held by

<sup>493</sup> Letter of Intent, *supra* note 465 at 2. <sup>494</sup> Veierland, *supra* note 463 at 44–47.

<sup>495</sup> The ministries represented on the steering committee included: BAPPENAS, the Ministry of Forestry, the Ministry of Agriculture, the Ministry of Mining and Energy and the National Council on Climate Change.

<sup>496</sup> The Implementation Team included representatives from the Ministry of Forestry, the Ministry of Agriculture, and BAPPENAS, UNDP, Bogor Agricultural University, CIFOR, ICRAF, AMAN, the Indonesian Center for Environmental Law, The Partnership for Governance Reform, The Nature Conservancy, the World Wildlife Fund, and Conservation International.

<sup>497</sup> Letter of Intent, *supra* note 465 at 1.

<sup>498</sup> Veierland, *supra* note 463 at 46–47. See UN-REDD Programme News, “Indonesia’s National REDD+ Strategy: UN-REDD Indonesia is collaborating with the National Development Planning Agency (BAPPENAS) to conduct an intensive multi-stakeholder consultation process that will produce the world’s first fully participatory National REDD+ Strategy” (12 September 2010), available at: [www.un-redd.org/Newsletter12/Indonesia\\_National\\_REDD\\_Strategy/tabid/5533/Default.aspx](http://www.un-redd.org/Newsletter12/Indonesia_National_REDD_Strategy/tabid/5533/Default.aspx) (accessed 17 November 2014).

<sup>499</sup> Veierland, *supra* note 463 at 47–48.

<sup>500</sup> BAPPENAS, Indonesia National REDD+ Strategy (Draft 1 – September 2010) (on file with the author) at 52 (“Forest lands with its diversity of ownership rights, status and faction have become battlefields for stakeholders with various interests which are not yet finished by now. Conflicts and disagreements on who should be controlling and managing forest and State Forest Area are sources of various anxieties, which often result in vandalisms. The sources of these anxieties can be found in the interpretation of definitions and forest locations in

“Indigenous communities”: “Legal dualism on the acknowledgement of traditional rights in forest area and non-forest area becomes one of the tenurial issues. The inexistence of formal rights for traditional societies result in the inability to make a natural resource-based decision in their traditional territory weakens their potential abilities in supervising forest area. At the same time, procedures which enable them to be acknowledged as legal society seem very difficult and long.”<sup>501</sup> This draft strategy also identified the unjust distribution of economic benefits from forestry between governments and forest-dependent communities as a driver of deforestation and forest degradation<sup>502</sup> and thus proposed an economic empowerment program to strengthen and diversify their livelihoods and sources of incomes.<sup>503</sup> Finally, the draft strategy noted that the establishment of a REDD+ mechanism in Indonesia should “[n]ot only consider the economic aspect but also the environment and social aspects, including the traditional and local community rights as well as the participation role of various parties to ensure that the reduction of deforestation and forest degradation is effective and permanent.”<sup>504</sup> To these ends, it envisaged various forms of cooperation with local communities<sup>505</sup> and anticipated the development of a “non-carbon” MRV system that would include social and environmental safeguards.<sup>506</sup> Despite its greater acknowledgement of the importance of land rights and tenure security and the need to work collaboratively with local communities, this first draft did very little to advance the recognition and protection of the rights of Indigenous Peoples as such.

This first draft was subsequently discussed through public consultations held with multiple stakeholders (including CSOs working with Indigenous Peoples) across six regions in Indonesia in October 2010.<sup>507</sup> In response to the release of the first draft strategy, a coalition of Indonesian CSOs working at the intersections of human rights and environmental issues offered a number of recommendations to BAPPENAS.<sup>508</sup> First, these organizations called for the

Indonesia and its authority. Different interpretations cause basic differences on the roles of controlling the forest resources by different actors and institutions. Conflicts over the role of controlling area and natural resources caused by unclear tenurial rights must be finalized through a serious attempt in a clear action strategy.”)

<sup>501</sup> *Ibid* at 52.   <sup>502</sup> *Ibid* at 65.   <sup>503</sup> *Ibid* at 35.   <sup>504</sup> *Ibid* at 30.   <sup>505</sup> *Ibid* at 36.

<sup>506</sup> *Ibid* at 46.

<sup>507</sup> These regional consultations were held in Bali, Java, Kalimantan, Papua, Sulawesi, and Sumatra. Five of the consultations were facilitated and funded by the UN-REDD Programme and the other two were facilitated and funded by Kemitraan. In all, 387 individuals participated and hailed from government, academia, civil society, and the private sector. See Veierland, *supra* note 463 at 48–50.

<sup>508</sup> HuMa *et al.*, Proposal of Civil Society Networking for the First Draft of National REDD+ Strategy Jakarta, 25 October 2010 (on file with the author).

protection of the forest rights of Indigenous Peoples and local communities to serve as one of the main objectives of Indonesia's national REDD+ strategy.<sup>509</sup> Second, they requested that the strategy refer to, and incorporate, standards set by international human rights instruments, including the *UN Declaration on the Rights of Indigenous Peoples*.<sup>510</sup> Third, they advocated for the recognition of the role and contribution of Indigenous Peoples and local communities in the sustainable management of forests, citing academic research on the effectiveness of community forestry in supporting carbon sequestration.<sup>511</sup> Finally, they noted that the strategy did not actually provide solutions for the lack of forest tenure clarity and thus proposed the adoption of measures that could actually resolve forest tenure conflicts.<sup>512</sup>

After one final expert's meeting, a revised draft of the national REDD+ strategy was prepared in November 2010.<sup>513</sup> This revised draft responded to many of the demands formulated by the Indonesian CSOs, especially with respect to the participatory rights of Indigenous Peoples and local communities. Indeed, the second draft strategy consistently emphasized the importance of ensuring the participation of Indigenous Peoples and local communities in the development and implementation of REDD+ activities<sup>514</sup> and, most notably, endorsed the view that their involvement in forest management was an effective way of reducing carbon emissions from forest-based sources.<sup>515</sup> In particular, the involvement of "indigenous peoples and forest communities" was presented as "essential" due to the potential role that local knowledge can play in the reduction of carbon emissions as well as the need to avoid the adverse consequences that can be caused by how forests are utilized by other parties.<sup>516</sup> As a result, the strategy committed to a range of activities

<sup>509</sup> *Ibid* at 2. <sup>510</sup> *Ibid*. <sup>511</sup> *Ibid* at 2–3. <sup>512</sup> *Ibid* at 3.

<sup>513</sup> Veierland, *supra* note 463 at 51.

<sup>514</sup> BAPPENAS, Indonesia National REDD+ Strategy (Draft 2 – 18 November 2010) (on file with the author) at 12, 15, and 37.

<sup>515</sup> *Ibid* at 42–43.

<sup>516</sup> *Ibid* at 43: "Involving indigenous peoples and forest communities who live in the surrounding forests is essential for socio-cultural conditions in a diverse society such as Indonesia. Different socio-cultural conditions often have local knowledge in utilizing forests in sustainable ways. In the context of the community and modern rules, local knowledge, with all its informal rules, becomes less consistent and less compatible with modern rules which are equipped with indicators and measurement mechanisms which facilitate the transaction mechanism/market place. Accordingly, local knowledge with its customary laws must be recognized and internalized into the modern legal system. It is important to accommodate local knowledge into the system of modern rules without losing the strength and spirit of informal traditions or losing the noble values in it. It is important to maintain the local knowledge, so it will not be eroded, but can be implemented as a unit, so that actors of local knowledge would obtain results/rewards which are proportional to the forest utilization carried out by anyone. Involving these groups in forest management and utilization needs

that aimed to increase the participation and capacity of Indigenous Peoples (among other stakeholders) in the implementation of REDD+ activities, maintain and build upon their local knowledge in relation to sustainable forest management, establish fair and effective mechanisms to resolve conflicts between the multiple actors that use or depend upon forests, and ensure the application of the principle of free, prior, and informed consent of local communities.<sup>517</sup> On the other hand, while the second draft strategy reiterated the problems associated with conflicts over forest tenure and use and the lack of recognition of Indigenous rights<sup>518</sup> and identified the settlement of these issues as integral to the operationalization of REDD+,<sup>519</sup> it did not provide much clarity on the way in which disputes over forest tenure might be resolved. Although international and domestic NGOs welcomed the formal introduction of rights language and principles in the development of Indonesia's national REDD+ strategy, they also highlighted the challenges associated with the lack of access to land and resources experienced by Indigenous Peoples and local communities and the need to establish "effective and accessible mechanisms of redress that would help resolve the numerous and protracted land feuds across the country."<sup>520</sup>

In late 2010, the second draft of the national REDD+ strategy was then handed over by BAPPENAS to the REDD+ Taskforce, which established a working group comprising senior government officials and nongovernmental experts to prepare a final draft.<sup>521</sup> This working group held an additional series of national and subnational consultations with multiple stakeholders in several provincial capitals in 2011 and 2012.<sup>522</sup> It also had to contend with an alternative draft REDD+ strategy that was released by the Ministry of Forestry in April 2012.<sup>523</sup>

to consider the principle of consent of local communities (free prior informed consent/FPIC). Furthermore, involvement of forest communities is very important to avoid and prevent them from becoming strangers in their own region, and even become negatively affected by forest utilization activities carried out by parties. Involvement of forest communities is also necessary for emission reduction processes, and moreover, if there is local knowledge which is applied as a normal rule; they then will obtain results/rewards from the use of instruments they have created. Therefore, indigenous peoples and communities in the surrounding of forests will become important actors and responsible users."

<sup>517</sup> *Ibid* at 43–44. <sup>518</sup> *Ibid* at 23. <sup>519</sup> *Ibid* at 40.

<sup>520</sup> FPP, PUASAKA & HUMA, "National Update on REDD+ in Indonesia" (October 2011) (on file with the author) at 4.

<sup>521</sup> Indrarto *et al.*, *supra* note 428 at 57.

<sup>522</sup> UN-REDD Programme, "The Role of UN-REDD in the Development of REDD+ in Indonesia" (2012) (on file with the author) at 11.

<sup>523</sup> Ministry of Forestry, "Draft National Strategy on Enhancing and Maintaining Forest Carbon Stock through Sustainable Forest Management Activities: A Strategic Assessment" (April 2012) (on file with the author).

In the end, this working group produced a comprehensive draft strategy that sought to integrate the drafts prepared by BAPPENAS and the Ministry of Forestry<sup>524</sup> as well as the feedback received from various governmental representatives and nongovernmental stakeholders.<sup>525</sup> The strategy was then finalized by the REDD+ Taskforce and officially released in June 2012.<sup>526</sup>

Indonesia's National REDD+ Strategy is built on five pillars: (1) the creation of an institutional system for REDD+ (including a REDD+ agency and the development of a funding instrument known as FREDD-I as well as an MRV system); (2) the establishment of a sound legal and regulatory framework for forest governance and the implementation of REDD+ activities at the jurisdictional and project levels; (3) the implementation of strategic programs focused on the conservation and rehabilitation of forests and the sustainable management of agriculture, forestry, and mining activities across landscapes; (4) the promotion of a paradigm shift in the way in which land and forests are used and governed by relevant actors; and (5) the inclusion and involvement of multiple stakeholders in the design and operationalization of REDD+ activities.<sup>527</sup> Each of these pillars addresses in significant and concrete ways the rights and concerns of Indigenous Peoples and local communities.<sup>528</sup> With respect to land and resource rights, the strategy states that “[t]he people have a constitutional right to certainty over boundaries and management rights for natural resources” and that “[l]and tenure reform is an important prerequisite to create the conditions required for successful implementation of REDD+.”<sup>529</sup> Accordingly, the strategy provides for the Indonesian government to have the National Land Agency undertake “a survey of land occupied by indigenous peoples and other communities,” resolve disputes over land tenure “using existing statutory out-of-court settlement mechanisms,” and ensure that “the principle and processes of Free, Prior, and Informed Consent (FPIC) are internalized in the issuance of all permits for the exploitation of natural resources.”<sup>530</sup> In addition, the strategy commits to reducing the bottlenecks of “processes to delineate forest areas (. . .) as a sign of respect towards parties with rights to land,”<sup>531</sup> supporting the development of “sustainable local

<sup>524</sup> Indrarto *et al.*, *supra* note 428 at 70; Julian Caldecott *et al.*, “Indonesia-Norway REDD+ Partnership: Second Verification of Deliverables. Final Report” (8 November 2013), available at: [www.regjeringen.no/upload/KLD/KL/Klima-og-skogprosjektet/IndonesiaNorwayREDD+SecondVerificationFinalReport.pdf](http://www.regjeringen.no/upload/KLD/KL/Klima-og-skogprosjektet/IndonesiaNorwayREDD+SecondVerificationFinalReport.pdf) (accessed 10 November 2014) at 17.

<sup>525</sup> Interview 86 at 13. See also Indrarto *et al.*, *supra* note 428 at 83. <sup>526</sup> Interview 86 at 13.

<sup>527</sup> Indonesian REDD+ Task Force, “REDD+ National Strategy” (June 2012) (on file with the author) at 7.

<sup>528</sup> The strategy uses the term *masyarakat adat* to refer to Indigenous Peoples – the term conceived and preferred by adat activists in Indonesia.

<sup>529</sup> *Ibid* at 18. <sup>530</sup> *Ibid*. <sup>531</sup> *Ibid* at 21.



economies based on alternative livelihoods, expanded job opportunities, and the management of forests by local communities,”<sup>532</sup> and implementing sustainable forest management, including in “timber areas cultivated by local communities, communal forests, village plantations.”<sup>533</sup>

As far as participatory rights are concerned, the strategy clearly recognizes the importance of facilitating and supporting public participation in the design and implementation of REDD+<sup>534</sup> and most notably provides that the REDD+ Agency “will implement and apply the principles of FPIC in all REDD+ programs and projects” in order to “ensure fairness and accountability for indigenous and local peoples whose lives and rights will be affected by REDD+ activities.”<sup>535</sup> The strategy also sets out a series of detailed principles that should guide the implementation of FPIC in the context of Indonesia’s jurisdictional REDD+ activities.<sup>536</sup> In this regard, it is worth noting that the principle of FPIC is conceived as applying not only to Indigenous Peoples (as would be the case under international law), but also to local communities who are affected by the implementation of REDD+.

With respect to the development of a framework and information system for social and environmental safeguards, the strategy specifies the protection of human rights as a core objective: “it is imperative to specifically design the social safeguards framework for the protection and benefit of vulnerable groups, including indigenous peoples and local communities living in and around forests, whose livelihoods depend on forest resources; women, who face the full brunt of changes in family income; and other societal groups, whose social, economic, and political status put them in a weak position in terms of fulfillment of their human rights.”<sup>537</sup> Further, the strategy sets a

<sup>532</sup> *Ibid* at 22.   <sup>533</sup> *Ibid* at 23.   <sup>534</sup> *Ibid* at 25–27.   <sup>535</sup> *Ibid* at 27.

<sup>536</sup> *Ibid* at 28. This strategy most notably provides that consultations with Indigenous Peoples and local communities affected by REDD+ programs or activities should: be “carried out without force, intimidation, manipulation, or pressure in any form to seek [their] consent”; involve them “in every step and process that affects them either directly or indirectly (...) through traditional authorities, or through representative organizations selected on the basis of traditional systems adhered to by the given indigenous community”; aim “to achieve broad consensus or the specific agreement of the indigenous and local communities potentially affected (...) through legal mechanisms, indigenous law practices, or local traditions and habits”; be “based on complete, balanced, honest, unbiased, and easily understood information concerning the alternatives and choices existing for the public within the implementation of REDD+ activities, along with the consequences of each alternative choice”; be “within an adequate frame of time before permits are legalized or activities commenced”; serve as “the beginning of ongoing or regular communication between members of the community and the would-be implementers of REDD+ activities”; and be guided by “agreement on the manner of public consultations, its protocols and mechanisms, including those for complaints and conflict resolution relating to each stage of REDD+ activities.”

<sup>537</sup> *Ibid* at 29.

number of minimal requirements for the preparation of the criteria and indicators in Indonesia's safeguards framework.<sup>538</sup> The strategy also provides the National REDD+ Agency with the responsibility of further developing and implementing a safeguards information system, which should acknowledge the “the right of the public to land and forests that accommodates not only formal legal recognition, but also indigenous law rights and historical claims.”<sup>539</sup>

Finally, Indonesia's National REDD+ Strategy discusses the importance of developing fair, transparent, and accountable systems and mechanisms for benefit-sharing.<sup>540</sup> Here again, the strategy accords significant importance to the land and resource rights of local communities, specifying that parties with “rights over the area off the REDD+ program/project/activity location have the right to payment” and requiring the clarification of the status of land rights in a given area and the distribution of benefits to communities that hold these rights or otherwise contribute to the reduction of carbon emissions.<sup>541</sup> The eventual development of this system also falls to the National REDD+ Agency, which is tasked with formulating and operationalizing a funding instrument for REDD+.<sup>542</sup>

The National REDD+ Strategy has been greeted with cautious enthusiasm by Indonesian CSOs advocating for the rights and interests of Indigenous Peoples and local communities. For the most part, the National REDD+ Strategy has been seen as a promising development in the recognition and protection of the participatory and resource rights of Indigenous Peoples and local communities.<sup>543</sup> Recognizing that the National REDD+ Strategy

<sup>538</sup> *Ibid* at 30: “[a]cknowledgement and protection of the basic rights of indigenous peoples and local communities to: (i) state their opinions about whether they approve REDD+ activities in the areas in which they live; (ii) participate; (iii) get information; (iv) object to or criticize public decisions relating to REDD+ projects; (v) have full rights to natural resources, not only on the basis of documents, but based on historical use; and (vi) an equitable level of benefits.”

<sup>539</sup> *Ibid.* <sup>540</sup> *Ibid* at 32. <sup>541</sup> *Ibid.* <sup>542</sup> *Ibid* at 8–9 and 11–12.

<sup>543</sup> See, e.g., Anja Lillegraven & Rukka Sombolinggi, “Neither cheap nor quick, but critical” *Development Today* (26 March 2014), available at: [www.development-today.com/magazine/2014/dt\\_3\\_2014/opinion](http://www.development-today.com/magazine/2014/dt_3_2014/opinion) (accessed 18 November 2014) (“Indonesia has developed a progressive national REDD+ strategy that targets underlying causes of deforestation previously outside the public discourse, such as corruption, weak governance, lack of law enforcement and unclear tenure. (...) The recognition of indigenous peoples has improved since Norway signed the agreement with Indonesia. Their crucial role in forest management has been officially acknowledged. The national REDD+ strategy recognises that tenure reform is a prerequisite for successful implementation of REDD+.”); Leo Wajyudi & Sopril Amir, “REDD+ National Strategy, Way to Indigenous Peoples’ Rights and Existence” (7 August 2012), news item on website of the Indonesian REDD+ Task Force (on file with the author) (quoting the Secretary-General of AMAN as stating that “[t]he most important for AMAN is how far REDD+ national Strategy in Indonesia gives opportunity to get what they have

remains a nonbinding policy document, the advocacy efforts of these organizations has thus shifted to pressing for its application as well as lobbying for the integration of rights in the subnational REDD+ strategies being developed in several provinces.<sup>544</sup> In January 2013, a coalition of forty-eight Indonesian NGOs, including AMAN and several regional branches of AMAN, called on the Indonesian government to implement the National REDD+ Strategy, arguing that: “was prepared with an aim to improve Indonesian forest governance fundamentally and comprehensively,” its preparation “was relatively transparent” and “involved relevant stakeholders,” and that its comprehensive implementation would “respect the rights of indigenous peoples and local communities.”<sup>545</sup> The fact that a wide coalition of Indonesian NGOs including IPOs and human rights NGOs would call for the implementation of the National REDD+ Strategy is perhaps the best indicator of the progressive manner in which this strategy recognizes and aims to protect the rights of Indigenous Peoples and local communities in the context of REDD+.

### 3.3.2 *Rights in the Development of Social and Environmental Safeguards for REDD+*

The development of social and environmental safeguards in Indonesia began at the end of 2010. It was triggered by the pressure exerted by Norway and domestic civil society actors as well as the adoption of the *Cancun Agreements*, which made them a necessary component of jurisdictional REDD+ readiness.<sup>546</sup> The efforts to develop safeguards for REDD+ have unfolded in a fragmented manner, with the REDD+ Taskforce meant to be focusing on the

dreamt for a long time” and “REDD+ Task Force is thus far considered as government institution which is very close to indigenous peoples.”)

<sup>544</sup> Christopher Lang, “Interview with Bernadinus Steni, HuMa: ‘REDD should be a way of supporting and strengthening the tenure of local communities and indigenous peoples that manage forests sustainably’” (17 April 2012), available at: [www.redd-monitor.org/2012/04/17/interview-with-bernadinus-steni-huma/](http://www.redd-monitor.org/2012/04/17/interview-with-bernadinus-steni-huma/) (accessed 18 November 2014); Bernadinus Steni, “Ha Masyarakat Atas Tanah dan Sumber Daya Alam Dalam Strategi REDD+” (HuMa, 2013) (on file with the author). See generally on the shift in focus of Indonesia’s jurisdictional REDD+ readiness efforts: Caldecott *et al.*, *supra* note 524 at 17–18; Indrarto *et al.*, *supra* note 427 at 71.

<sup>545</sup> AMAN *et al.*, “Saving Indonesia’s Remaining Forests Can No Longer be Delayed,” available at: [www.downtoearth-indonesia.org/sites/downtoearth-indonesia.org/files/Call%20to%20save%20forests-final.pdf](http://www.downtoearth-indonesia.org/sites/downtoearth-indonesia.org/files/Call%20to%20save%20forests-final.pdf) (accessed 18 November 2014) at 2.

<sup>546</sup> Bernadinus Steni and Nadia Hadad, “REDD+ Safeguards in Indonesia” (HuMa and Bank Information Center, March 2012), available at: [www.bicusa.org/wp-content/uploads/2013/03/REDD-Indonesia-Case-Study.pdf](http://www.bicusa.org/wp-content/uploads/2013/03/REDD-Indonesia-Case-Study.pdf) (accessed 20 November 2014) at 11–15; NORAD, *supra* note 492 at 100–101. See also Indonesian REDD+ Task Force, “REDD+ National Strategy” *supra* note 526 at 35 (providing that “[t]he development of an Information System for REDD+ Safeguards Implementation (SIS-REDD+) is a mandate of COP-16 UNFCCC.”)

substance of the safeguards themselves and the Ministry of Forestry expected to take the lead in establishing an information system for reporting on the safeguards to international donors. As a result, the development of social and environmental safeguards has taken place through parallel processes and led to inconsistent outcomes.<sup>547</sup>

During 2011 and 2012, a multi-stakeholder working group of the REDD+ Taskforce developed a first draft of a policy for the *Principles, Criteria, and Indicators for REDD+ Safeguards in Indonesia* (known as PRISAI). These safeguards drew on several sources, including international human rights law and policy, the standards set by the Community, Climate & Biodiversity Alliance, and relevant elements of Indonesian law.<sup>548</sup> This initial draft was subsequently revised on the basis of consultations involving representatives from government, civil society, multilateral donors, and the private sector as well as the feedback gathered from four pilot projects that tested a preliminary version of the safeguards at the local level.<sup>549</sup> This process resulted in a set of ten social and environmental safeguards that are meant to apply to all REDD+ activities, whether carried out at the jurisdictional or project level.<sup>550</sup> The social safeguards included in principles 4 to 7 address the participatory and substantive rights of Indigenous Peoples and local communities.<sup>551</sup> Principle 4 includes criteria and indicators that provide for the identification, recognition, and protection of the land and resource rights of Indigenous Peoples and local communities, including the requirement of the right to free, prior, and

<sup>547</sup> In addition to these two efforts, there are a number of other processes that support the development of REDD+ safeguards in Indonesia. First, in Central Kalimantan, the Office of Environment of the Government of Central Kalimantan, the University of Palangkaraya, several local NGOs, and the Clinton Climate Initiative have produced a report providing local interpretation of REDD+ SES and have submitted it for adoption by the governor of Central Kalimantan. Second, the National Forest Council will be carrying out a SESA process in accordance with the FCPF requirements and thus assess its potential role in the eventual development of a full-fledged safeguards information system for REDD+. Third, the UN-REDD Programme has carried out multiple activities to develop and test protocols for respecting the right to free, prior, and informed consent (FPIC) of Indigenous Peoples and local communities in Central Sulawesi. For the most part, these various efforts have had little influence on the development of social and environmental safeguards at the national level (Interview 59 at 5; Interview 61 at 6–7).

<sup>548</sup> Interview 59 at 2.

<sup>549</sup> See Bernadinus Steni & Iwan Wibisono, “Principles, Criteria and Indicator for REDD+ Safeguards Indonesia – PRISAI” (Bangkok, 6 March 2013) (on file with the author).

<sup>550</sup> SATGAS REDD+, “Prinsip Kriteria dan Indikator Safeguards REDD+ Indonesia – PRISAI” (version 3.1) (May 2013) (on file with the author) at 5. This document is yet to be officially translated and all of the quotations below are translations of the original Indonesian document.

<sup>551</sup> *Ibid* at 5.

informed consent in accordance with the *UN Declaration of the Rights of Indigenous Peoples* and mechanisms to resolve conflicts and address grievances in relation to land rights issues in the context of REDD+ activities.<sup>552</sup> Principle 5 requires respect for the traditional knowledge, values, and rights of Indigenous Peoples and local communities and their integration into the design and implementation of REDD+ activities.<sup>553</sup> Principle 6 mandates the full and effective participation of all stakeholders at all stages in the design, implementation, and evaluation of REDD+ activities, with a special focus on women and marginalized communities.<sup>554</sup> Finally, Principle 7 provides for the equitable, transparent, and participatory sharing of the benefits of REDD+ among all rights holders and relevant stakeholders, based on their rights as well as their contribution to reductions in carbon emissions.<sup>555</sup> All told, these social safeguards are largely consistent with the National REDD+ Strategy's expansive approach to the recognition and protection of the rights of Indigenous Peoples and local communities.

Further, in line with the requirements set by the UNFCCC COP at its sixteenth and seventeenth sessions in Cancun and Durban, the Ministry of Forestry has led efforts to develop a system for providing information on how social and environmental safeguards have been addressed and respected in the context of the implementation of REDD+ activities in Indonesia.<sup>556</sup> Throughout 2011 and 2012, the Centre for Standardization and Environment of the Ministry of Forestry, with the bilateral assistance provided by the German government, led a process to prepare *Principles, Criteria, and Indicators for a System for Providing Information on REDD+ Safeguards Implementation in Indonesia*. The Centre for Standardization and Environment commissioned independent analysis of Indonesia's laws and their compatibility with the safeguards included in the *Cancun Agreements*, and organized an iterative series of national workshops, focus group discussions, and interviews with multiple stakeholders on various drafts and elements of such a system.<sup>557</sup> The safeguards information system developed by the Centre for Standardization and Environment includes seven principles, seventeen criteria and thirty-two indicators that were developed on the basis of the guidance provided by the *Cancun Agreements*, relevant strands of Indonesian law, and the standards applicable under the Forest Stewardship Council and the World Bank Strategic

<sup>552</sup> *Ibid* at 10–12. <sup>553</sup> *Ibid* at 13. <sup>554</sup> *Ibid* at 14–15. <sup>555</sup> *Ibid* at 16.

<sup>556</sup> Centre for Standardization and Environment, and Pusat Standardisasi Dan Lingkungan, *Principles, Criteria and Indicators for a System for Providing Information on REDD+ Safeguards Implementation in Indonesia* (Jakarta, March 2013), available at: [www.stane.clime.org/](http://www.stane.clime.org/) (accessed 31 December 2013) at 1.

<sup>557</sup> *Ibid* at 2–29.

Environmental and Social Assessment procedure.<sup>558</sup> Of particular relevance to the rights of Indigenous Peoples and local communities are Principle 3 on the rights of “Indigenous and local communities” and Principle 4 on the effectiveness of stakeholder participation. Principle 3 includes criteria that provide that REDD+ activities shall “include identification of the rights of indigenous and local communities, such as tenure, access to and utilization of forest resources and ecosystem services, with increasing intensity at sub-national and site-level scales”; “include a process to obtain the free, prior, informed consent of affected indigenous and local communities before REDD+ activities commence”; “contribute to maintaining or enhancing the social economic wellbeing of indigenous and local communities, by sharing benefit fairly with them, including for the future generations”; and “recognize the value of traditional knowledge and compensate for commercial use of such knowledge where appropriate.”<sup>559</sup> Principle 4 is comprised of criteria that aim to ensure that REDD+ activities “shall be based on proactive and transparent identification of relevant stakeholders, and the engagement of them in planning and monitoring processes, with an increasing level of intensity from national level to site level scales” and “include procedure or mechanisms for resolving grievances and disputes.”<sup>560</sup>

While these criteria would appear to provide an important recognition of participatory and substantive rights, this document is equivocal in its approach to the status and rights of Indigenous Peoples. First, although it uses the term *Masyarakat adat*, the English translation uses the term Indigenous communities, rather than Indigenous Peoples, raising questions regarding whether international protections accorded to the latter are intended to apply. Second, the document specifies in its glossary that “[o]n signing the *UN Declaration on the Rights of Indigenous Peoples*, Indonesia’s Ministry of Foreign Affairs has clarified that the concept of ‘indigenous peoples’ in Indonesia must be interpreted on the basis that almost all Indonesians (with the exception of ethnic Chinese) are considered indigenous and thus entitled to the same rights” and that “the government has rejected calls for special treatment by groups identifying themselves as indigenous.”<sup>561</sup> This further suggests an unwillingness to recognize that Indigenous Peoples hold a particular status and set of rights under international law. Moreover, its glossary also provides an ambivalent definition of the right to FPIC, which is described in the following terms: “Free, Prior, and Informed Consent (or Consultation, per Government of USA and WB), a process that provides opportunity for indigenous and/or local communities to reject or approve activities in forests to which they have rights.”<sup>562</sup>

<sup>558</sup> *Ibid* at 10.    <sup>559</sup> *Ibid* at 34–35.    <sup>560</sup> *Ibid* at 35.    <sup>561</sup> *Ibid* at 39.    <sup>562</sup> *Ibid* at 38.

As of August 2014, the National REDD+ Agency is moving forward with the development and coordination of a REDD+ safeguards information system. In doing so, it will need to reconcile some of the inconsistencies between the safeguards included in the PRISAI prepared under the auspices of the REDD+ Taskforce and those that are included in the SIS policy document drafted by the Centre for Standardization and Environment of the Ministry of Forestry.<sup>563</sup> All told, the development of social and environmental safeguards for REDD+ reflect two broader trends in the relationship between the rights of Indigenous Peoples and local communities and the pursuit of jurisdictional REDD+ activities in Indonesia. For one, these two sets of safeguards aim to recognize and protect an expanded set of participatory and substantive rights for both Indigenous Peoples and local communities. For another, a comparison of the safeguards adopted by the REDD+ Taskforce and the Ministry of Forestry reveals the latter's reluctance to accord an extensive set of rights to Indigenous Peoples and local communities or to acknowledge the international protection accorded to them under international law.

#### 3.4 EXPLAINING THE CONVEYANCE AND CONSTRUCTION OF RIGHTS THROUGH JURISDICTIONAL REDD+ ACTIVITIES IN INDONESIA

At the outset of Indonesia's jurisdictional REDD+ readiness efforts in 2008 and 2009, the policy documents developed by the Ministry of Forestry largely ignored the participatory and substantive rights of Indigenous Peoples.<sup>564</sup> While this attracted significant criticism from domestic NGOs as well as the various international actors associated with the review and approval of an R-PP within the FCPF,<sup>565</sup> critical responses did not engender any immediate shifts in Indonesian policy. The clearest evidence that this initial pressure from below and from above had little immediate effect is that Indonesia strongly opposed the inclusion of any references to the rights of Indigenous Peoples in the Letter of Intent that it signed with Norway in May 2010<sup>566</sup> and, moreover, failed to recognize Indigenous rights in the first draft National REDD+ Strategy that it released in September 2010.<sup>567</sup>

<sup>563</sup> Interview 86 at 4. <sup>564</sup> IFCA, *supra* note 459. <sup>565</sup> See fn. 486–489 above.

<sup>566</sup> Letter of Intent, *supra* note 465. See also Interview 39 at 4 (“Letter was written in a tough negotiation process. As you know, Indonesia hasn't recognized that it has Indigenous people so a lot of the references that we put in on the Norwegian side were taken out by Indonesia. There were several tough points in the negotiation and one of them was the rights of Indigenous people. We ended up with the compromise that both countries could live with. If it had a rights language we wouldn't have had the letter of intent.”)

<sup>567</sup> Indonesia National REDD+ Strategy (Draft 1), *supra* note 500.

Although Norwegian officials failed to persuade Indonesian officials to change their policies with respect to Indigenous Peoples in the Letter of Intent itself, they did require that Indonesia ensure the full and effective participation of stakeholders (specifically including “Indigenous Peoples, local communities and civil society”) in the design and implementation of REDD+.<sup>568</sup> In this context, Indonesian officials adopted legal norms relating to the full and effective participation of stakeholders as part of the Letter of Intent because the material benefits of obtaining funding exceeded the political costs associated with adopting these norms (cost-benefit adoption).<sup>569</sup> This instrumentally motivated commitment opened the door for international and domestic actors to work closely with BAPPENAS to plan and hold a series of multi-stakeholder consultations regarding the development of a REDD+ strategy at the national and regional levels.<sup>570</sup> In turn, the public release of the first National REDD+ Strategy in September 2010 provided an additional window for a coalition of Indonesian NGOs to advocate for the recognition and protection of the participatory and substantive rights of Indigenous Peoples and local communities.<sup>571</sup> This advocacy paid immediate dividends, as the second draft National REDD+ Strategy released in November 2010 included new references to the term “Indigenous Peoples,” emphasized the importance of their participation, and recognized the existence of the principle of FPIC.<sup>572</sup> This draft also recognized the problems associated with the lack of recognition of the land and resource rights of Indigenous Peoples and the need to resolve conflicts over land tenure as part of the domestic operationalization of REDD+.<sup>573</sup> As was discussed above, the final version of Indonesia’s National REDD+ Strategy as well as its safeguards policy built upon these initial gains in the recognition of the participatory and substantive rights of Indigenous Peoples, and even extended them to local communities.<sup>574</sup>

I argue that the conveyance of the rights of Indigenous Peoples and local communities in Indonesia’s jurisdictional REDD+ readiness efforts can be primarily explained by the mobilization of domestic NGOs that succeeded in pressuring the National REDD+ Taskforce to enact these legal norms in its jurisdictional REDD+ policies.<sup>575</sup> In their mobilization, these NGOs drew on

<sup>568</sup> Letter of Intent, *supra* note 465 at 1. <sup>569</sup> Interview 34 at 5; Interview 57 at 4.

<sup>570</sup> Interview 93 at 2; Veierland, *supra* note 463 at 46–50. <sup>571</sup> HuMa *et al.*, *supra* note 508.

<sup>572</sup> Indonesia National REDD+ Strategy (Draft 2), *supra* note 514 at 43–44.

<sup>573</sup> *Ibid* at 23 and 40.

<sup>574</sup> REDD+ National Strategy (June 2012), *supra* note 527 at 18–28; *Principles, Criteria, and Indicators for REDD+ Safeguards in Indonesia*, *supra* note 550 at 10–16.

<sup>575</sup> Interview 59 at 3; Interview 87 at 4.



the symbolic leverage provided by exogenous legal norms relating to the status and rights of Indigenous Peoples enshrined in the *UN Declaration on the Rights of Indigenous Peoples* and other key legal instruments applicable to REDD+, such as the World Bank's operational safeguards and the *Cancun Agreements*.<sup>576</sup> The effectiveness of these advocacy efforts were also enhanced by the broad and well-connected nature of the coalition of Indonesian NGOs that emerged as important actors in Indonesia's jurisdictional REDD+ readiness efforts. For one, these NGOs represented or worked with both Indigenous Peoples and other forest-dependent communities, and emanated from Indonesia's human rights and environmental movements.<sup>577</sup> For another, they received substantial financial support from international NGOs (particularly through funding provided by Norway to support civil society actors)<sup>578</sup> and benefited from their participation in transnational networks focusing on advancing the rights of Indigenous Peoples and forest-dependent communities around the world.<sup>579</sup>

In addition, these Indonesian NGOs were able to take advantage of the openings provided by the particular opportunity structure of the jurisdictional REDD+ readiness policy process in Indonesia.<sup>580</sup> Specifically, they took advantage of the consultative and inclusive manner in which the REDD+ strategy and safeguards were developed,<sup>581</sup> the reformist officials

<sup>576</sup> Interview 59 at 2–3.

<sup>577</sup> See HuMa *et al.*, *supra* note 508. See also Miriam Harjati Sanmukri, "Mobilities of Indigeneity: Intermediary NGOs and Indigenous Peoples in Indonesia" (2013) 7 *Göttingen Studies in Cultural Property* 115 at 121–124 (describing AMAN's collaboration with other NGOs in the context of REDD+ in Indonesia).

<sup>578</sup> NORAD, *supra* note 423 at 293–296. <sup>579</sup> Interview 61 at 3; Interview 87 at 4 and 6–7.

<sup>580</sup> Interview 40 at 9. See particularly Interview 87 at 1: "We are engaging with government in terms of making the policy for REDD+. That's how we see REDD+. It is our main goal is to use this opportunity . . . because there is a window of opportunity to push forward for the recognition of rights of indigenous peoples. We politically engage in the process. For us, it is beyond carbon. We don't think about carbon at all. In terms of our political and engagement with the state, we see REDD issues opening up the . . . broadening the windows of opportunity to engage with government."

<sup>581</sup> Interview 57 at 4; Interview 87 at 3; Lillegraven & Sombolinggi, *supra* note 543. See also Rainforest Foundation Norway, "Supporting indigenous and forest-dependent peoples,' interests," available at: [www.norad.no/en/support/climate-and-forest-initiativ-support-scheme/grants-2009-2012/\\_attachment/407553?\\_ts=141ee889e2e&download=true](http://www.norad.no/en/support/climate-and-forest-initiativ-support-scheme/grants-2009-2012/_attachment/407553?_ts=141ee889e2e&download=true) (accessed 16 December 2014) at 2: "Unlike similar processes in the past, the national REDD+ strategy was developed through a transparent process where civil society input was welcomed by the Government. (...) The process resulted in a REDD+ strategy that was well-received by most actors as it was open on several challenging issues such as free, prior and informed consent (FPIC), tenure, conflict, indigenous peoples and biodiversity. Decision makers now accept that these at times controversial issues need to be addressed if REDD+ is to succeed. An important achievement is that one of RFN's partners in Indonesia, the

and experts that were appointed to the National REDD+ Taskforce,<sup>582</sup> and the relative marginalization of the Ministry of Forestry as a policy actor.<sup>583</sup> Ultimately, the ability of domestic NGOs to mobilize and exert influence in the jurisdictional REDD+ readiness process spoke both to their skills and resources as intermediaries sitting at the intersections of Indonesian and international law as well as to the role played by exogenous actors in providing resources and creating openings that supported their mobilization.<sup>584</sup>

While the mechanism of mobilization played a key role in triggering the conveyance of rights in Indonesia's jurisdictional REDD+ readiness efforts, the way in which these rights were eventually constructed in Indonesia's National REDD+ Strategy and its *Principles, Criteria, and Indicators for REDD+ Safeguards* can be best explained by the mechanism of persuasive argumentation. As a result of Indonesian government officials' participation in an extensive series of multi-stakeholder consultations and informal contacts with domestic NGOs throughout Indonesia over several years,<sup>585</sup> internal discussions within the National REDD+ Taskforce and its drafting groups working on the REDD+ strategy and safeguards,<sup>586</sup> and their ongoing dialogue with international interlocutors (particularly officials from Norway and other bilateral agencies, the UN-REDD Programme, the FCPF readiness mechanism, and other developing countries in Asia working on jurisdictional REDD+ readiness such as the Philippines),<sup>587</sup> government officials developed and internalized a new norm about the appropriateness of respecting the rights of Indigenous Peoples and local communities in the

Community and Ecological Based Society for Law Reform (HuMa), helped draft the national REDD+ safeguards that cover issues such as rights, governance, transparency, benefit sharing and biodiversity. The safeguards are now adopted by the Government and have been included in the national REDD+ strategy."

<sup>582</sup> Interview 59 at 3; Interview 87 at 1–3.

<sup>583</sup> Interview 59 at 6; Interview 87 at 2; Interview 93 at 2. The opportunities provided the relegation of the Ministry of Forestry in the development of policies for jurisdictional REDD+ readiness in Indonesia are perhaps most evident when one considers the many ways in which its various policy contributions with respect to REDD+ have tended to advance a more limited recognition of the rights of Indigenous Peoples and local communities. See, e.g., IFCA, *supra* note 459; Ministry of Forestry, *supra* note 523; Centre for Standardization and Environment and Pusat Standardisasi Dan Lingkunkan, *supra* note 556.

<sup>584</sup> Interview 59 at 3; Lillegraven & Sombolinggi, *supra* note 543.

<sup>585</sup> Interview 59 at 4; Interview 87 at 3; Interview 89 at 3. See also Monica Di Gregorio *et al.*, "Equity and REDD+ in the Media: a Comparative Analysis of Policy Discourses" (2013) 18:2 *Ecology & Society* art. 39 at 10.

<sup>586</sup> Interview 59 at 2.

<sup>587</sup> Interview 57 at 5; Interview 85 at 4; Interview 89 at 6; Interview 93 at 2.

context of REDD+.<sup>588</sup> The construction of this norm was most notably facilitated by the novelty of the pursuit of jurisdictional REDD+ efforts in Indonesia as well as the fact that several members of the National REDD+ Taskforce did not have a background in forestry (or for that matter in international law),<sup>589</sup> which enabled them to be open to the development of new norms concerning the importance and extent of Indigenous rights in the context of REDD+.<sup>590</sup>

In addition, although international law only accords a distinctive and enhanced set of rights (such as the right to free, prior, and informed consent) to Indigenous Peoples, the outcomes of the jurisdictional REDD+ readiness process in Indonesia reflect the construction of a new shared understanding regarding the application of these exogenous legal norms to both Indigenous Peoples and local communities. In line with the Indonesian government's traditional reluctance to recognize the distinctive status of Indigenous Peoples (as it is understood under international law), exogenous legal norms relating to Indigenous rights were translated by Indonesian officials into hybrid legal norms that apply to *masyarakat adat*<sup>591</sup> as well as to local communities.<sup>592</sup> As such, the legal norms relating to the participatory and substantive rights of Indigenous Peoples and local communities in the context of Indonesia's jurisdictional REDD+ readiness efforts reveal the enduring influence of an endogenous norm<sup>593</sup> that has acted as a barrier to the internalization of international norms that define Indigenous Peoples as holding a particular status and set of rights under international law.

<sup>588</sup> Observations gathered through participation in the 19th session of the UNFCCC (Warsaw, Poland, November 2013); a design workshop for the UN REDD+ Academy (Jakarta, Indonesia, May 2014); a Meeting of the REDD+ Partnership (Palangkaraya, Indonesia, October 2013); and the 20th session of the UNFCCC (Lima, Peru, December 2014). See also NORAD, *supra* note 423 at 295: "There has been a distinct shift in the discourse on Indigenous Peoples rights in Indonesia, some of which has been made possible through the activities supported by NICFI."

<sup>589</sup> Interview 85 at 7: "Forestry is a new issue for me. I'm not a forester. When I came to this issue I see: wow, there is something wrong with the way this country is governed with this issue."

<sup>590</sup> Interview 59 at 3 and 6–7; Interview 61 at 5; Interview 85 at 4.

<sup>591</sup> Although the English version of Indonesia's REDD+ policy documents uses the term "Indigenous Peoples," the Indonesian version uses the term *masyarakat adat*. Some Indonesian officials argue that these two terms are not equivalent and that the concept of Indigenous Peoples does not actually apply to Indonesia (Interview 87 at 2–3; Interview 89 at 5–6).

<sup>592</sup> Interview 59 at 3. <sup>593</sup> Interview 87 at 2–3; Interview 89 at 5–6.

### 3.5 REDD+ AND THE FUTURE OF INDIGENOUS AND COMMUNITY RIGHTS IN INDONESIA

This chapter has argued that the pursuit of jurisdictional REDD+ activities has resulted in the conveyance and construction of the rights of Indigenous Peoples and local communities in Indonesia. The process for developing a strategy and safeguards policy for jurisdictional REDD+ was shown to have provided a unique opportunity for Indigenous Peoples and other civil society actors to pressure the Indonesian government into recognizing the legitimacy of legal norms relating to Indigenous Peoples and their rights in the context of REDD+. The jurisdictional REDD+ policy-making process also led Indonesian officials to develop new hybrid legal norms that extended rights accorded to Indigenous Peoples under international law to all local communities. In a country that has traditionally not recognized the rights of Indigenous Peoples and other local communities in the context of its forest laws and policies, the emergence of these legal norms in Indonesia's National REDD+ Strategy and safeguards policy is nothing short of groundbreaking. In the words of two leading activists working on the rights of Indigenous Peoples and forest-dependent communities in Indonesia: "We would argue that more has been achieved in forest protection and the rights of indigenous peoples in Indonesia since the signing of the Indonesia-Norway agreement than over the course of the previous 15 years."<sup>594</sup>

The key question that remains is whether these newly recognized participatory and substantive rights will in fact be respected and implemented by the Indonesian government in the context of the operationalization of its jurisdictional REDD+ policies and institutions and, more broadly, within the field of forest governance. In particular, the fact that many government officials and politicians and other segments of Indonesian society have not wholeheartedly accepted these rights may limit their ability to lead to concrete improvements in the lives of Indigenous Peoples and local communities. One striking example of the broader set of views that exist with respect to the rights of Indigenous Peoples is the official statement made by the Indonesian Ministry of Affairs before the UN Human Rights Council in September 2012, which stated that "[g]iven its demographic composition, Indonesia, however, does not recognize the application of the indigenous people concept as defined in the UN Declaration on the Rights of Indigenous Peoples in the country."<sup>595</sup>

<sup>594</sup> Lillegraven & Sombolinggi, *supra* note 543.

<sup>595</sup> Indonesia, "Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review," Report of the Working Group on the Universal Periodic Review, UN Human Rights Council, 21st session (5 September 2012) UN Doc. A/HRC/21/7/Add.1 at para. 6.3.

Most importantly, the decision made by the administration of President Joko Widodo to close the National REDD+ Agency and to transfer responsibility for the implementation of the National REDD+ Strategy over to a newly amalgamated Ministry of Environment and Forestry may significantly encumber the concrete implementation of the rights of Indigenous Peoples and local communities, especially in terms of the recognition and protection of their community land tenure and forest rights.<sup>596</sup> Indeed, given the manner in which the Ministry of Forestry has traditionally supported the agricultural, logging, and mining industries and its hesitant embrace of the rights of Indigenous Peoples and local communities in the context of REDD+, it is reasonable to expect that this decision may hamper efforts to clarify, recognize, and secure the forest tenure rights of local communities.<sup>597</sup> As such, it is entirely possible that the ways in which the broader politics of land and forest governance have hindered the progress of several REDD+ projects as well as affected their capacity to strengthen community rights to land and forests may ultimately impede the implementation of the rights that have been enacted in Indonesia's policies for jurisdictional REDD+ readiness.<sup>598</sup>

All the same, there are several reasons to think that the recognition of rights in the context of jurisdictional REDD+ policies may ultimately have durable and significant effects. First, the recognition of rights in Indonesia's policies on jurisdictional REDD+ provides new opportunities and rhetorical tools for the mobilization of Indigenous Peoples and local communities around the protection of their rights. In fact, domestic Indonesian NGOs have already begun taking advantage of the gains achieved through REDD+ by, most notably, calling on the Indonesian government to implement the National REDD+ Strategy.<sup>599</sup>

Second, and perhaps most importantly, the emergence of rights in Indonesia's jurisdictional REDD+ readiness policies has fed into, and been accompanied by, broader legal and political developments in Indonesia. The most important such development is a landmark ruling of the Indonesian Constitutional Court in May 2013, which interpreted the *Revised Forestry Law* as providing that *adat* forests exist as a standalone form of forest tenure and are

<sup>596</sup> Rhett Butler, "Indonesia kills first-of-its-kind REDD+ Agency" (11 February 2015), available at: <http://news.mongabay.com/2015/02/indonesia-dissolves-agency-charged-with-forestry-refo-rm/> (accessed 17 October 2015).

<sup>597</sup> Interview 87 at 5. <sup>598</sup> See Section 5.3.

<sup>599</sup> Wajyudi & Amir, *supra* note 543; AMAN *et al.*, *supra* note 545. For an example of how Indonesian activists refer to REDD+ in their broader advocacy efforts relating to their rights, see, The Jakarta Post, "Govt urged to pass bill on indigenous people's rights" (23 March 2014), available at: [www.thejakartapost.com/news/2014/03/23/govt-urged-pass-bill-indigenous-people-s-rights.html](http://www.thejakartapost.com/news/2014/03/23/govt-urged-pass-bill-indigenous-people-s-rights.html) (accessed 17 December 2014).

therefore owned by *masyarakat adat*, rather than the State.<sup>600</sup> There are a number of ways in which this ruling has been connected to the pursuit of REDD+ in Indonesia.<sup>601</sup> In concrete terms, this ruling stemmed from a petition filed by AMAN, which was supported, in part, by funding provided by the Rainforest Foundation Norway as well as mapping conducted by the Samdhana Institute – both of which were financed by the Norwegian International Climate and Forests Initiative.<sup>602</sup> While the Ministry of Forestry has been equivocal in its response to this constitutional ruling, the actors and institutions associated with the operationalization of jurisdictional REDD+ in Indonesia have served as a vehicle for its implementation. Indeed, in September 2014, nine government ministries and institutions launched a “National Programme for the Recognition and Protection of Customary Communities (PPMHA) through the REDD+ mechanism” that will be spearheaded by the National REDD+ Agency.<sup>603</sup> To the extent that this program replicates many of the factors that contributed to the conveyance and construction of rights in the jurisdictional REDD+ policy-making process in the first place, it has significant potential for ensuring that the participatory and substantive rights of Indigenous Peoples and local communities are fully respected, protected, and fulfilled on the ground.

<sup>600</sup> Decision Number 35/PUU-X/2012, Constitutional Court of the Republic of Indonesia, 16 May 2013, available at: [www.aman.or.id/wp-content/plugins/downloads-manager/upload/Constitutional\\_Court\\_Ruling\\_16\\_May\\_2013.pdf](http://www.aman.or.id/wp-content/plugins/downloads-manager/upload/Constitutional_Court_Ruling_16_May_2013.pdf) (accessed 7 January 2014).

<sup>601</sup> A number of Indonesian government officials will even go so far as to claim that the decision of the Constitutional Court was inspired by the example set by the National REDD+ Taskforce: Observations gathered during a Meeting of the REDD+ Partnership (Palangkaraya, Indonesia, October 2013).

<sup>602</sup> NORAD, *supra* note 423 at 294.

<sup>603</sup> The Samdhana Institute, “Nine Ministries-Institutions Agree to Launch National Programme for the Recognition and Protection of Customary Communities through REDD+,” available at: [www.samdhana.org/index.php/news-detail/nine-ministries-institutions-agree-to-launch-national-programme-for-the-recognition-and-protection-of-customary-communities-through-redd-](http://www.samdhana.org/index.php/news-detail/nine-ministries-institutions-agree-to-launch-national-programme-for-the-recognition-and-protection-of-customary-communities-through-redd-) (accessed 17 December 2014).