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**HUMAN RIGHTS PROTECTIONS FOR  
INDIGENOUS PEOPLES IN INDONESIA IN THE  
CONTEXT OF IMPLEMENTING INTERNATIONAL  
CLIMATE CHANGE COMMITMENTS**

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## I INTRODUCTION

Forestry sector plays a pivotal role in climate change. One of emerging contributors of greenhouse gas ('GHG') emissions is forest degradation. In 2007, the Intergovernmental Panel on Climate Change ('IPCC') found that the forestry sector contributed to approximately 17.3 % of total global anthropogenic emissions.<sup>1</sup> In light of that significant share of forestry sector of total GHG emissions level, the IPCC suggested that the most effective mitigation strategies to reduce emissions in the forestry sector are 'afforestation, sustainable forest management, and reducing deforestation'.<sup>2</sup>

Notwithstanding that the significant contribution of global deforestation to worldwide GHG emissions, 'Kyoto Mechanisms' which were developed under the Kyoto Protocol, insufficiently addressed the deforestation issue.<sup>3</sup> The mechanism in question is the Clean Development Mechanism ('CDM'). It limits climate change mitigation strategies in the forestry sector through afforestation and reforestation (CDM A/R) and omits deforestation activities.<sup>4</sup> Therefore, in 2007 the 13th Conference of Parties ('COP') agreed to establish a climate change mitigation strategy by reducing deforestation, named Reducing Emissions from Deforestation and Forest Degradation ('REDD+').<sup>5</sup>

While REDD+ is being fleshed out by the COP to reduce emission from deforestation in developing countries, its implementation potentially results in resistances with indigenous people and forest-dependent communities lives inside or adjacent forests. Several conflicts between the establishment of an REDD+ program in a host country and its indigenous peoples has occurred since early negotiations of REDD+. For example, the indigenous people representation groups called for the

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\* All translations are by the author, except where otherwise indicated.

<sup>1</sup> Richard B Alley et al, 'Climate Change 2007: Synthesis Report Summary for Policymakers' in Susan Solomon et al (eds), *Climate Change 2007: The Physical Science Basis Contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, 2007) 1, 5.

<sup>2</sup> IPCC, 'Summary for Policymakers' in CB Field et al (eds), *Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part A: Global and Sectoral Aspects. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, 2014) 1, 29.

<sup>3</sup> The Kyoto Mechanisms are JI (Joint Implementation), Clean Development Mechanism (CDM), and Emission Trading. See *Kyoto Protocol to the United Nations Framework Convention on Climate Change* ('Kyoto Protocol'), signed 11 December 1997, 2303 UNTS 148, entered into force 16 February 2005, arts 6,12,17.

<sup>4</sup> Conference of the Parties serving as the Meeting of the Parties to the Kyoto Protocol (CMP), Decision 16/CMP.1, 'Land Use, Land-Use Change and Forestry' FCCC/KP/CMP/200/8/Add.3 (30 March 2006), annex ('Definitions, modalities, rules and guidelines relating to land use, land-use change and forestry activities under the Kyoto Protocol'), [13].

<sup>5</sup> See COP (UNFCCC) 'Bali Action Plan' Decision 1/CP.13 (15 December 2007) FCCC/CP/2007/6/Add.1 para 1; COP (UNFCCC) 'Reducing Emissions from Deforestation in Developing Countries: Approaches to Stimulate Action' Decision 2/CP.13 (14 March 2008) FCCC/CP/2007/6/Add.1. Preamble.

deferrals of all REDD+ initiatives during the negotiation process of COP 14 in Poznan in 2008.<sup>6</sup> The implementation of REDD+ initiatives in Indonesia also results in tenure forest conflicts between indigenous peoples and the Government of Indonesia ('GOI').<sup>7</sup>

Besides the low enthusiasm of indigenous people representatives in the REDD+ negotiation, they also have limited role in decision-making process under international climate change fora, in particular under the United Nation Framework on Climate Change Convention ('UNFCCC') forum. Although various instruments have provided their substantive and procedural rights,<sup>8</sup> indigenous peoples cannot make a legally binding instrument.<sup>9</sup>

This paper analyses the extent of international instruments on climate change can protect indigenous peoples from infringements of their rights in the context of the implementation of REDD+, notably possibilities of removal from their customary land as a result of the implementation of REDD+. It focuses on safeguarding mechanisms of REDD+ initiatives for indigenous peoples that have laid down under the Cancun Agreement.<sup>10</sup> This paper discusses some approaches that may be useful for seeking redress in violation of indigenous peoples' rights to lands and resources from the perspective of climate change regime and human rights regime.

This paper uses several case studies of the implementation of REDD+ in Indonesia to see whether the GOI can protect indigenous peoples in Indonesia while maintaining its commitment to reduce GHG emissions, notably from the forestry sector. This paper considers that the implementation of REDD+ in Indonesia as a relevant case study because of three reasons, First, the country is home to approximately fifty million indigenous peoples that predominantly live within or adjacent forests.<sup>11</sup> Secondly, previous studies suggested that deforestation rate in

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<sup>6</sup> IISD (International Institute for Sustainable Development), 'Summary of the Fourteenth Conference of Parties to the UN Framework Convention on Climate Change and Fourth Meeting of Parties to the Kyoto Protocol (1-12 December 2008)' (Reporting Service Volume 12 No. 395, IISD, 15 December 2008).

<sup>7</sup> See eg, Tracey Osborne, Laurel Bellante and Nicolena vonHedeman, 'Indigenous Peoples and REDD+: A Critical Perspective' (Compilation Report 11, Indigenous Peoples Biocultural Climate Change Assessment Initiative, November 2014) 43–7; WRF (World Rainforest Movement), *REDD: A Collection of Conflict, Contradictions, and Lies* (WRF, 1 st ed, 2015) 45–8.

<sup>8</sup> For further reference on substantive and procedural rights and jurisprudences of indigenous peoples under international laws, see S James Anaya and Steffania Errico, 'The United Nations Declaration on the Rights of Indigenous Peoples: Its Content, Status, and Practical Meaning' in S James Anaya (ed), *International Human Rights and Indigenous Peoples* (Aspen, 2009) 55, 58–9, 63–9; Alessandro Fodella, 'Indigenous Peoples, the Environment, and International Jurisprudence' in Nerina Boschiero et al (eds), *International Courts and the Development of International Law* (T. M. C. Asser Press, 2013) 349, 349–58.

<sup>9</sup> 'Vienna Convention on the Law of Treaties' opened for signature 5 September 1969 (entered into force 27 January 1980) 1155 UNTS 331 ('VCLT'), art 1.a.

<sup>10</sup> COP (UNFCCC) 'The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention' Decision 1/CP.16 (10–11 December 2010) FCCC/CP/2010/7/Add.1 paras 95–112.

<sup>11</sup> Osborne, Bellante and vonHedeman, above n 7, 43; Signe Howell and Elna Bastiansen, 'REDD+ in Indonesia 2010-2015' (Report of a Collaborative Anthropological Research Program 2B, University of Oslo) 4–5.

Indonesia was predicted to be faster than Brazil,<sup>12</sup> and the Indonesian forest loss rate regarded as the highest rate of forests loss globally.<sup>13</sup> That situation would aggravate threat to indigenous peoples' rights to lands and resources. Thirdly, in the context of REDD+, Indonesia has also made various substantial commitments to engage with REDD+ and reduce deforestation. Notably, the country has set the national emission reduction target, making cooperation with developed countries on the development of REDD+, and imposing a moratorium on granting new concessions on peatland forests and primary forests.<sup>14</sup>

This paper is organized as follows. Part I is the introductory section of the paper. Part II provides a background of conflicts between indigenous peoples and REDD+ initiatives. Part III examines the extent of REDD+ can protect rights and prevent tenure security issues of indigenous people. It then discusses relevant international human rights instruments that may apply to provide protection for violations of indigenous peoples' rights to lands and resources resulted from REDD+ initiatives. Part IV analyses the implementation of REDD+ in Indonesia. It then examines strategies, policies, and legal framework of the GOI that has created and ratified from international human rights instruments on the protection of indigenous peoples' rights to lands and resources.

This paper concludes that REDD+ safeguards sufficiently provide tenure security of indigenous peoples to a certain extent. Indonesia's experiences in implementing REDD+ show that indigenous rights protection can be achieved through the country's legal instruments on forestry. However, in the absence of a national platform on the REDD+, it is arguable that Indonesia would face difficulties to address adequately regulatory issues associating with the implementation of the REDD+.

## II REDD+ IMPLEMENTATION AND CONFLICTS WITH INDIGENOUS PEOPLES

This part provides an overview on the issues of the implementation of REDD+ on indigenous peoples and forest-dependent communities. It begins by providing an analysis of international legal framework for REDD+. It then analyses the way in which indigenous peoples reacted against the implementation REDD+ during the REDD+ negotiation process in the UNFCCC fora. Finally, this part outlines impacts of the implementation of REDD+ on indigenous peoples; notably tenure issues that could possibly arise from the implementation of REDD+. These issues are pertinent to the context of REDD+ safeguard mechanisms as advanced by the Cancun Agreement.

### A *International Legal Framework for REDD+*

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<sup>12</sup> Belinda Arunarwati Margono et al, 'Primary Forest Cover Loss in Indonesia over 2000-2012' (2014) 4 *Nature Climate Change* 730, 730–1.

<sup>13</sup> Nadya Natahadibrata, 'Map Shows Deforestation in Indonesia Is World's Fastest' *The Jakarta Post*, 16 November 2013 2; John Vidal, 'Rate of Deforestation in Indonesia Overtakes Brazil, Says Study' *The Guardian*, 30 June 2014 3.

<sup>14</sup> Osborne, Bellante and vonHedeman, above n 7, 44.

This section assesses two topics to outline the relationship between REDD+ and indigenous peoples and incurring conflicts as a result of the REDD+ implementation. First, it analyses evolving the legal framework for REDD+ into the recognition of indigenous peoples' rights. Secondly, it examines negotiations on recognising indigenous peoples' rights under the UNFCCC COPs.

## 1 *Climate Change Framework for REDD+*

Forest degradation is one of primary sources of GHG emissions. The UNFCCC respond this issue through its supreme decision-making body (COP) that has attempted to address this matter through REDD+. The schemes—outlined in several key decisions of the COP UNFCCC—provide incentives for forested countries to reduce deforestation and forest degradation, conserve and enhance their carbon stocks, and apply sustainable forestry management.<sup>15</sup>

The issues underlying REDD+ within the UNFCCC has undergone a gradual process over time. There are three substantial negotiations on REDD+. The initial proposal to reduce emissions from deforestation (abbreviated as RED) was submitted by Papua New Guinea and Costa Rica ('RED Proposal') in the COP11 in Montreal.<sup>16</sup> The RED Proposal has been expanded to include forest degradation (abbreviated as REDD) in COP13 in Bali.<sup>17</sup> COP13 also asserted that REDD is a voluntary activity under the scheme of the UNFCCC.<sup>18</sup> Then finally in the COP15 in Copenhagen included the 'sustainable management of forests and the enhancement of forest carbon stocks'(abbreviated as REDD+).<sup>19</sup>

At the COP16, the COP adopted the the Ad-Hoc Working Group on Long-term Cooperative Action under the Convention ('AWG-LCA') text and decisions made in that text are legally binding now under the UNFCCC. Among the highlights of the Cancun Agreements, Parties agreed to: first, commit to increasing of global average temperature of two degrees Celsius above pre-industrial level;<sup>20</sup> secondly, establish the new Cancun Adaptation Framework and its associated adaptation committee;<sup>21</sup>

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<sup>15</sup> For an overview of a series decision of the COP UNFCCC relating to the REDD+ scheme, see UNFCCC Secretariat, 'Key Decisions Relevant for Reducing Emissions from Deforestation and Forest Degradation in Developing Countries (REDD+): Decision Booklet REDD+' 1 <[http://unfccc.int/files/land\\_use\\_and\\_climate\\_change/redd/application/pdf/compilation\\_redd\\_decision\\_booklet\\_v1.1.pdf](http://unfccc.int/files/land_use_and_climate_change/redd/application/pdf/compilation_redd_decision_booklet_v1.1.pdf)>.

<sup>16</sup> COP (UNFCCC) 'Reducing emissions from deforestation in developing countries: approaches to stimulate action: Submissions from Parties', ('RED Proposal') Item 6 of the provisional agenda (11 November 2005) FCCC/CP/2005/MISC.1, 1.

<sup>17</sup> 'Bali Action Plan' Decision 1/CP.13, FCCC/CP/2007/6/Add.1 para 1.

<sup>18</sup> COP (UNFCCC) 'Reducing Emissions from Deforestation in Developing Countries: Approaches to Stimulate Action' Decision 2/CP.13 (14 March 2008) FCCC/CP/2007/ 6/Add.1, para 1.

<sup>19</sup> COP (UNFCCC) 'Methodological guidance for activities relating to reducing emissions from deforestation and forest degradation and the role of conservation, sustainable management of forests and enhancement of forest carbon stocks in developing countries' Decision 4/CP.15 (19 December 2010) FCCC/CP/2009/11/Add.1, Preamble.

<sup>20</sup> COP (UNFCCC) 'Copenhagen Accord' 2/CP.15 (30 March 2010) FCCC/CP/2009/11/Add.1 paras 3, 6, 10.

<sup>20</sup> COP (UNFCCC) 'The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention' ('The Cancun Agreement') Decision 1 CP.16 (15 March 2011) FCCC/CP/2010/7/Add.1, ch 1 para 1.

<sup>21</sup> The Cancun Agreement Decision 1 CP.16 (15 March 2011) FCCC/CP/2010/7/Add.1, ch 2 para 13.

thirdly, develop technology transfer and capacity building.<sup>22</sup> For the purpose of this chapter, the decisions on adaptation, technology transfer, and capacity building will not be discussed. The following paragraphs examine the decisions at COP16 and COP17 on pertinent issues relating to the implementation of REDD+.

The COP16 established commitments for developing countries to reduce global anthropogenic emissions level voluntarily through the REDD+ mechanisms. These commitments are in line with the notion of common but differentiated responsibilities that has been set out in the Preamble of the UNFCCC.<sup>23</sup>

The COP17 elaborates further the developing countries' commitment. The COP17 requires developing countries to prepare and implement nationally approved mitigation actions ('NAMAs') as the implementation of voluntary commitments of these countries under the Cancun Agreement.<sup>24</sup> REDD+ initiatives are fell under the category of legitimate activities under NAMA. Developing countries that have not made such voluntary commitments are encouraged to do so.<sup>25</sup>

In COP16 and COP17, REDD+ extend beyond deforestation and forest degradation matters. They concern with the role of forest conservation, sustainable forestry management, and enhancement of carbon stock. To achieve these general objections, the COP16 stressed developing countries to address pertinent issues related to the implementation of REDD+, inter alia, the drivers of forest degradation and deforestation, land tenure issues, and the REDD+ safeguards, when developing strategies for REDD+ or developing their NAMAs.<sup>26</sup>

The REDD+ safeguards prescribed by the Cancun Agreements emphasize the protection of indigenous people and forest-dependent communities. Significantly, on the legitimacy of the implementation of REDD+ programs, the safeguards emerging from COP16 require parties to promote and support several key objectives. There are three criteria for the actions to promote the objectives in question. First, the actions must consistent or be complement with the country's national forest programs and pertinent international instruments and entailed obligation.<sup>27</sup> Secondly, the actions must have noted that United Nations General Assembly ('UNGA') has adopted the

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<sup>22</sup> The Cancun Agreement Decision 1 CP.16 (15 March 2011) FCCC/CP/2010/7/Add.1, ch 4 pt B paras 115, 130.

<sup>23</sup> *United Nations Framework Convention on Climate Change* ('UNFCCC'), signed 9 May 1992, 1771 UNTS 107 (entered into force 21 March 1993), Preamble.

<sup>24</sup> 'The Cancun Agreements', Decision 1/CP.16 (15 March 2011) FCCC/CP/2010/7/Add.1, ch 3 pt B 'Nationally appropriate mitigation actions by developing country Parties'; COP (UNFCCC) 'Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention' Decision 2/CP.17 (15 March 2012) FCCC/CP/2011/9/Add.1, ch 2 pt B

<sup>25</sup> 'The Cancun Agreements', Decision 1/CP.16, (15 March 2011) FCCC/CP/2010/7/Add.1, ch 4 pt B para 32; COP (UNFCCC) 'Launching the Green Climate Fund' Decision 3/CP.17 (15 March 2012) FCCC/CP/2011/9/Add.1, Annex 'Governing instrument for the Green Climate Fund' ch 5 pt B para 35.

<sup>26</sup> 'The Cancun Agreements', Decision 1/CP.16, (15 March 2011) FCCC/CP/2010/7/Add.1, ch 3 pt C para 75. For further discussion whether REDD+ could be included within developing countries' NAMAs, see John Costenbade et al, *NAMAs and REDD+: Relationship and Main Issues for Consideration-with a Focus on Southeast Asia* (Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH, 2013) 15–6.

<sup>27</sup> 'The Cancun Agreements', Decision 1/CP.16, (15 March 2011) FCCC/CP/2010/7/Add.1, app I cl 2(c).

United Nations Declaration on the Rights of Indigenous Peoples ('UNDRIP').<sup>28</sup> Thirdly, the actions are inline with the national forest conservation measures and biological diversity.<sup>29</sup> The discussion about protection of indigenous peoples' rights through REDD+ safeguards and tenure issues arising from REDD+ implementation will be outlined later.

## 2 Indigenous Peoples Protection under REDD+

Indigenous peoples got an attention during the negotiation process of REDD+ after the RED Proposal at COP11.<sup>30</sup> However, the COP12 in 2006 did not accommodate the call for the protection of indigenous peoples in the context of REDD+. The 2007 COP13 started to recognise the needs of indigenous peoples and local communities through Decision 2/CP.13. However, the wording of the decision on indigenous people is relatively weak. The Decision stated that '*recognising* [...] that the needs of local and indigenous communities *should* be addressed when action is taken to reduce emissions from deforestation and forest degradation'.<sup>31</sup> It merely addressed the need for 'recognising' indigenous people rather than takes a specific action that appropriate for the needs of indigenous peoples. Furthermore, the wording of the decision used 'should' rather than 'shall' denotes that the designation of Decision 2/CP13 is not to bind Parties to the COP.

Although, Decision 2/CP13 uses a rather weak wording, it can be regarded as a landmark decision of the COP UNFCCC on the context protection of indigenous peoples' rights under the REDD+. The protection of indigenous people within REDD+ continue to evolve after the COP13, markedly with the adoption of the UNDRIP at the COP16 through Decision 1/CP16. First, the UNDRIP is referred through the context of 'economic and social consequence of measures' of the implementation of REDD+ that taking into account into relevant provisions of the UNDRIP.<sup>32</sup> Second, it is explicitly mentioned in the context of the implementation of REDD+ in developing countries.<sup>33</sup>

Having considered that REDD+ is implemented on the voluntary basis, not on a mandatory basis, the REDD+ and its protection schemes to indigenous people are being not obligations for Parties to the UNFCCC to implement these scheme. In fact, many Parties to the UNFCCC that involve in REDD+ initiatives alluded to the COP decisions when implementing their programs.<sup>34</sup> For example through the REDD+

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<sup>28</sup> 'The Cancun Agreements', Decision 1/CP.16, (15 March 2011) FCCC/CP/2010/7/Add.1, app I cl 2(c).

<sup>29</sup> 'The Cancun Agreements', Decision 1/CP.16, (15 March 2011) FCCC/CP/2010/7/Add.1, app I cl 2(c).

<sup>30</sup> IISD (International Institute for Sustainable Development), 'COP 12 AND COP/MOP 2 Highlights: Tuesday, 7 November 2006' (Reporting Service Volume 12 No. 309, IISD, 8 November 2006) 1.

<sup>31</sup> COP (UNFCCC) 'Reducing emissions from deforestation in developing countries: approaches to stimulate action' Decision 2/CP.13, FCCC/CP/2007/6/Add.1, para 10 (emphasis added).

<sup>32</sup> 'The Cancun Agreements', Decision 1/CP.16, (15 March 2011) FCCC/CP/2010/7/Add.1, ch 3 pt E, Preamble para 5.

<sup>33</sup> 'The Cancun Agreements', Decision 1/CP.16, (15 March 2011) FCCC/CP/2010/7/Add.1, app I cl 2(c).

<sup>34</sup> See below nn 123-5 and accompanying text. For an extensive discussion about the implementation of provisions under the UNDRIP in a number of REDD+ initiatives, see Handa Abidin, *The Protection*



readiness activities, notably United Nations Collaborating Programme on Reducing Emissions from Deforestation and Forest Degradation ('UN-REDD Programme') and the World Bank's Forest Carbon Partnership Facility ('FCPF'). Therefore, when the Parties decided to carry out REDD+ activities, they should make reference to the COP Decisions including to promote and support indigenous people by considering the UNDRIP as prescribed in the REDD+ safeguards in Decision 1/CP.16. REDD+ readiness and protection of indigenous peoples under the UNDRIP will be discussed in the next part.

## B *Land Tenure Issues in the Implementation of REDD+*

Tenure issues are pertinent in the implementation of REDD+ initiatives. It has been suggested that addressing land tenure insecurity at the outset is paramount to ensure effectiveness and efficiency of REDD+ activities to generate carbon offsets and reduce deforestation.<sup>35</sup> This section analyses issues on the land tenure of indigenous peoples relating to the implementation of REDD+. It begins by giving an overview of land and forest tenure issues. It then analyses several categories of tenure over the forests.

### 1 *Overview of Land and Forest Tenure*

The current state of global forest tenure does not give much room for indigenous peoples to secure their rights over the forests. A recent detailed report by the Food and Agricultural Organisation ('FAO') in 2015 stated that most forests are managed by governments or owned by private individual or companies.<sup>36</sup> The status of ownership of the global forest area consisted of 64 % was publicly owned, and 13 % was private or companies, and only a small proportion of the global forest cover was designated for indigenous people and local communities.<sup>37</sup> The study also found that the percentage of forests owned by indigenous and local communities had declined from 19% in 1990 to 15% in 2010.<sup>38</sup> Conversely, private ownership over forest are predicted to increase in the future.<sup>39</sup> The study also suggested that the outlook of global forestry management in many countries would be dominated by decentralisation in forest management from national to subnational level.<sup>40</sup>

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*of Indigenous Peoples and Reduction of Forest Carbon Emissions* (Brill, 2015) vol 21, ch 3 'Protecting Indigenous Peoples in REDD-Plus under International Law' div 4.

<sup>35</sup> Nicholas Herbert Stern, *Stern Review: The Economics of Climate Change* (HM treasury London, 2006) vol 30, 656; Johan Eliasch, *Climate Change: Financing Global Forests: The Eliasch Review* (Earthscan, 2008) 35–6, 44–7; Lisa Westholm et al, 'REDD+ and Tenure: A Review of the Latest Developments in Research, Implementation and Debate' (2011) 2 *Focali report* 1–8; Daniel Murdiyarto et al, 'Some Lessons Learned from the First Generation of REDD+ Activities' (2012) 4 *Current Opinion in Environmental Sustainability* 678, 683.

<sup>36</sup> FAO (Forest and Agriculture Organisation of the United Nations), *Global Forest Resources Assessment 2015: How Are the World's Forests Changing?* (FAO, 2015) 28.

<sup>37</sup> *Ibid* 39.

<sup>38</sup> *Ibid* 40.

<sup>39</sup> *Ibid* 41.

<sup>40</sup> *Ibid*.

The importance of forest tenure in REDD+ is apparent. As outlined above by the FAO's study, the decentralisation trend of forestry management and the clear status of ownership of the global forest area may lead to more secure tenure over forests. However, securing tenure may also result in more forest conversions unless there are adjustments in incentive structures.<sup>41</sup> In this regard, REDD+ seeks to redress deforestation and forest degradation by putting in place incentives for an avoidance of these activities. While seeking redress of these activities, REDD+ also aware of the impact of REDD+ initiatives on the indigenous peoples' rights over land tenure and natural resources through REDD+ safeguards. From a legal viewpoint, identification of tenure over forests is, therefore, necessary to protect indigenous peoples from removal resulting from REDD+ activities as well as to claim benefits arising from them.

## 2 *Types of Tenure over the Forests*

Having considered the significance of forest tenure in REDD+, it is important to identify the pertinent category of tenure over forests. Two types of classification of tenure over forests—land tenure and resources tenure—may be useful to classify types of tenure over the forest.

### (a) *Land Tenure*

Concerning land tenure, a *prima facie* question from previous studies<sup>42</sup> is whether the concept of individual property rights applies to indigenous peoples' rights because the fabric of property rights over lands and/or forests is more likely to be subjected to the management of community tenure. Several studies on community tenure suggested that the term of community tenure, which may be interchangeably used with common property, means that a self-governance institution where those participating group member may impose limits to these individual claim.<sup>43</sup> Common property can be identifiable from individual property rights in the way these rights share their private property with 'clear boundaries, rights, management and use right'.<sup>44</sup> It is also important to noting that the presence of collective management in common property is supportive for sustainable use of resources.<sup>45</sup> Thus, in case indigenous peoples and forest-dweller communities, common property or common tenure is more appropriate to define land tenure in forests.

The FAO's report in 2015 purported that there was a declining rate of the relative proportion of forest owned by indigenous people and local communities.<sup>46</sup> It

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<sup>41</sup> Arild Angelsen, *Realising REDD+: National Strategy and Policy Options* (CIFOR, 2009) 139.

<sup>42</sup> See Deborah Barry, Anne M Larson and Carol J Pierce Colfer, 'Forest Tenure Reform: An Orphan with Only Uncles' in Deborah Barry et al (eds), *Forests for People: Community Rights and Forest Tenure Reform* (Earthscan, 2010) 19, 19.

<sup>43</sup> See eg, Elinor Ostrom et al, 'Revisiting the Commons: Local Lessons, Global Challenges' (1999) 284 *Science* 278, 279; Ostrom Elinor, 'Self-Governance and Forest Resources' [1999] *CIFOR Occasional Paper* 1, 7–9; Rosemary Lyster, 'REDD+, Transparency, Participation and Resource Rights: The Role of Law' (2011) 14 *Environmental Science and Policy* 118, 121.

<sup>44</sup> Lyster, above n 43, 121.

<sup>45</sup> Ostrom et al, above n 43, 278; Lyster, above n 43, 121.

<sup>46</sup> See above nn 55-7 and accompanying text.

indicates that indigenous peoples' tenure over forests may be extinguished unilaterally by government, if indigenous peoples and local communities do not have legally cognisable customary tenure. In some jurisdictions, customary tenure may be asserted by a way of statutory framework or judicial process.

Through a way of statutory framework, the Indonesian land law may provide an example for acknowledgement of customary tenure. The Indonesian *Basic Agrarian Law* ('BAL') 1960 provides legal protection for customary land rights insofar customary systems exist, and their practices do not contradict with national and state interest.<sup>47</sup>

Besides recognition of customary tenure by statute, judicial processes may also provide a way for indigenous peoples to assert their tenure. There are a number cases, such as *Mabo v Queensland (No 2)* (1992) 175 CLR 1, and *Case of Saramaka People v Suriname*.<sup>48</sup> These cases concluded that where indigenous peoples or forest communities had continued their customary law practices based on the traditions of that group, and they had substantively preserved their traditional link with the land, their traditional community land title continued to exist.

As indicated by the 2015 FAO's report, the global land tenure of indigenous people only covered a small proportion of global tropical rainforest, and their private ownership claim over tropical rainforests declined to approximately 15% in 2010.<sup>49</sup> It may appropriate to conclude that such a type of ownership claim can only barely cover million indigenous peoples<sup>50</sup> live in forests. Therefore, to claim forest tenure indigenous people arguably need more than 'land' tenure. Previous studies proposed the concept of 'resource' tenure to identify forest tenure in publicly owned forests.<sup>51</sup>

### (b) Resources Tenure

The dominance of state ownership of forests indicates that frameworks for the implementation of REDD+ are necessary to acknowledge indigenous peoples' rights to their customary land arise chiefly as a result of 'resource' tenure. From a legal perspective, the notion of 'resource' tenure is more consistent with the majority forest tenure reforms, because these initiatives scarcely transfer the full package of rights to 'access, sell or otherwise alienate, manage, withdraw resources and exclude others' access, use, management and exclusion rights'.<sup>52</sup> Aside that perspective, the

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<sup>47</sup> *Undang-Undang No. 5 Tahun 1960 tentang Peraturan Dasar Pokok-Pokok Agraria* [Law No. 5 of 1960 on *Basic Agrarian Law*] art 3 [Oku Associates' trans]

<sup>48</sup> See eg, *Mabo v Queensland (No 2)* (1992) 175 CLR 1 1, 68–70 (Brennan J); *Case of Saramaka People v Suriname* ('*Saramaka People v Suriname*') (Preliminary objections, merits, reparations and costs) (Inter-American Court of Human Rights, Series C no 172, [56], [86], [95].

<sup>49</sup> FAO (Forest and Agriculture Organisation of the United Nations), above n 36, 40–1.

<sup>50</sup> See eg, RJ Fischer, Somjai Srimongkontip and Cor Veer, 'People and Forests in Asia and the Pacific: Situation and Prospects' (FAO Regional Working Paper No. APFSOS/WP/27, Regional Community Forestry Training Centre for Asia, December 1997) 7–8; Victor M Toledo, 'Indigenous Peoples and Biodiversity' in Simon Asher Levin (ed), *Encyclopaedia of Biodiversity* (Elsevier, 2001) 451, 451–2.

<sup>51</sup> Lyster, above n 43, 122–3; Rosemary Lyster and Robert Fisher, 'Land and Resource Tenure' in Rosemary Lyster, Catherine MacKenzie and Constance McDermott (eds), *Law, Tropical Forests and Carbon: The Case of REDD+* (Cambridge University Press, 1st ed, 2013) 187, 12–3.

<sup>52</sup> Barry, Larson and Colfer, above n 42, 22–3.

typical of state conduct is withhold separation of these rights in question while recognising the rights of indigenous peoples to use forest resources.<sup>53</sup>

Given the structure of resource tenure, therefore, it is necessary to take into account the property rights of indigenous peoples over carbon sequestered in the forests. A question that might arise is that whether indigenous peoples who exercise their rights to use forest resources can have property rights over carbon sequestered in the forests, and also enforceable rights of tenure over the forests resources in which they are settled. On this issue, Gray and Gray revisited the theory of property law by asserting that ‘every claim of ‘property’ comprises the assertion of some quantum of socially approved power as exercisable in respect of some socially valued resource’.<sup>54</sup> Thus, it can be argued that indigenous peoples who are exercising their rights to ‘resource’ tenure right might have the capacity to maintain the power. Indigenous peoples that use the power over socially valued resources is socially accepted, notably in the case in which indigenous peoples have property rights over the forests carbon rights where they have ‘resource’ tenure. The FAO’s analysis is akin to that position. The FAO asserted that forest carbon is owned by the person who is the owner of forestlands, and covering ‘forest user rights’—in this regard is indigenous peoples who own ‘resource’ tenure.<sup>55</sup> In the context of REDD+, resource tenure is covered under the REDD+ safeguards.

### III PROTECTION OF INDIGENOUS PEOPLES FROM THE REDD+ IMPACTS

This part analyses protection of indigenous peoples’ rights over their land and resources. It begins by discussing REDD+ safeguards and their role in providing protection for indigenous peoples from removal from their land resulted from REDD+ activities. It then analyses an interplay between REDD+ safeguards and international human rights regime to protect indigenous peoples’ rights to lands and resources from negative impacts of REDD+ initiatives.

#### A *Indigenous Peoples Protection under REDD+ Safeguards*

Having considered tenure security issues as outlined in the previous part, this section discusses REDD+ safeguards and their associated activities, notably financial approaches of the UN-REDD Programme and the FCPF that produced so-called ‘non-carbon benefits’. The term of ‘non-carbon benefits’ has been widely acknowledged in the UNFCCC’s negotiations to refer social and environmental benefits resulted from REDD+ activities that go beyond simple carbon sinks and carbon storage, notably resources tenure security. This section focuses on issues concerning tenure security as one of features of REDD+ social safeguards. This section begins by assessing legal status REDD+ safeguards. It then analyses

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<sup>53</sup> Peter Cronkleton et al, ‘The Devolution of Management Rights and the Co-Management of Community Forests’ in Anne M Larson et al (eds), *Forests for People: Community Rights and Forest Tenure Reform* (Earthscan, 2010) 45–6.

<sup>54</sup> Kevin J Gray and Susan Francis Gray, *Elements of Land Law* (Oxford University Press, 5th ed, 2009) 90.

<sup>55</sup> Francesca Felicani-Robles, ‘Forest Carbon Tenure In Asia-Pacific: A Comparative Analysis of Legal Trends to Define Carbon Rights in Asia-Pacific’ (FAO Legal Paper Online No. 89, FAO) 14.

whether REDD+ safeguards can provide tenure security for indigenous peoples. It also discusses whether REDD+ safeguards may provide protection for indigenous peoples from tenure insecurity.

## 1 *Legal Status of REDD+ Safeguards*

The Cancun Agreements has outlined REDD+ safeguards as a mechanism to avoid negative outcomes of REDD+ activities. To date negotiations on REDD+ safeguards are still ongoing. Similarly, the negotiation under the UNFCCC on the establishment of framework on non-carbon benefits is still in progress.

The UNFCCC Parties under the Subsidiary Body for Scientific and Technological Advice ('SBSTA') are still debating on determination what sort of activities encompass non-carbon benefits; whether they should be monitored and reported; and whether non-carbon benefits may entail payments.<sup>56</sup> At the time of writing, the latest negotiation of the SBSTA regarding REDD+ safeguards and non-carbon benefits has not yet resulted in definitive guidance concerning these issues.<sup>57</sup> Instead, the SBSTA concluded that issues concerning safeguards and non-carbon benefits of REDD+ initiatives were open agenda, and forwarded these issues in its draft decisions for adoption in the next COP21 negotiations in Paris.<sup>58</sup>

Concerning safeguards and non-carbon benefits two questions arise. First, a question about the legal status of REDD+ safeguards. Second, a question whether REDD+ safeguards can address issues on tenure security. The latter question will be addressed in the next subsection.

Concerning the status of REDD+ safeguards in international law, at the first place there is no standard definition of safeguard stemming from general international law. However, that term is widely used in state practices and international organisations. For example, the World Bank defines safeguards as measures to make conditional financial aid prevent and mitigate undue 'harm to people and environment' that may result from funded activities.<sup>59</sup> Thus, typically countries

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<sup>56</sup> See SBSTA (UNFCCC), 'Report of the Subsidiary Body for Scientific and Technological Advice on its thirty-eighth session', 38<sup>th</sup> sess, UN Doc FCCC/SBSTA/2013/3 (29 August 2013), paras 45–47; SBSTA (UNFCCC), 'Methodological guidance for activities relating to reducing emissions from deforestation and forest degradation and the role of conservation, sustainable management of forests and enhancement of forest carbon stocks in developing countries', UN Doc FCCC/SBSTA/2014/L.8, para 6

<sup>57</sup> SBSTA (UNFCCC), 'Methodological guidance for activities relating to reducing emissions from deforestation and forest degradation and the role of conservation, sustainable management of forests and enhancement of forest carbon stocks in developing countries: Draft conclusions proposed by the Chair', 42<sup>nd</sup> sess, UN Doc FCCC/SBSTA/2015/L.5 (9 June 2015), paras 1–5; SBSTA (UNFCCC), 'Further guidance on ensuring transparency, consistency, comprehensiveness and effectiveness when informing on how all the safeguards referred to in decision 1/CP.16, appendix I, are being addressed and respected', Draft decision -/CP.21, UN Doc FCCC/SBSTA/2015/L.5/Add.1, (9 June 2015), paras 1, 4–5.

<sup>58</sup> IISD (International Institute for Sustainable Development), 'Summary of the Bonn Climate Change Conference (1-11 June 2015)' (Reporting Service Volume 12 No. 638, IISD, 14 June 2015) 18. See also The REDD Desk, *What Is REDD+? A Collaborative Resource for REDD Readiness* <<http://theredddesk.org/what-is-redd>>.

<sup>59</sup> The World Bank, *Safeguard Overview* (2012) Safeguard Policies <<http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTSAFEPOL/0,,menuPK:584441~pagePK:64168427~piPK:64168435~theSitePK:584435,00.html>>.

receiving aid need to implement safeguards as part of conditions imposed upon the aid, and their fulfilment is a necessary condition for providing the funding. The attached consequences to non-compliance of safeguards are typically depended on policy discourse, agreement and support, or rather implying option to aid withdrawal or sanctions.<sup>60</sup>

It is not a habit under the fabric of the UNFCCC to adopt conditionalities or safeguard mechanisms for financing climate change mitigation strategies. The current financing activities under the UNFCCC has instead been to leave such guidance to bodies assign to manage climate finance, such as the Global Environmental Facility ('GEF').<sup>61</sup> The UNFCCC has adopted safeguards for REDD+ activities that have been prescribed under the Cancun Agreements. These safeguards use broad wording. They merely say that REDD+ safeguards should be 'promoted and supported' with no specific sanctions for non-compliance with the safeguards.<sup>62</sup> Nonetheless, in the COP17, the UNFCCC clarified that, regardless the type or sources of funding, all REDD+ initiatives should be 'consistent with' the REDD+ safeguards.<sup>63</sup>

The COP UNFCCC also has set out a system to monitor and verify the implementation of REDD+ safeguards. The UNFCCC Parties from developing countries intending to undertake REDD+ initiatives are required to adopt an information system on how REDD+ safeguards are being 'addressed and respected'.<sup>64</sup> The provision of information concerning the implementation of REDD+ by countries in question is a prerequisite to receiving REDD+ 'results-based payments'.<sup>65</sup>

As of COP19 in Warsaw, the COP UNFCCC attempted to include information on compliance with REDD+ safeguards in national periodical communications to the COP UNFCCC.<sup>66</sup> The frequency of submission of that type of information needs to be consistent with the developing countries' arrangement for national communications to the COP UNFCCC.<sup>67</sup> Therefore, it can be concluded that reporting requirements relating to the implementation of REDD+ safeguards fall into

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<sup>60</sup> Cesare Pinelli, 'Conditionality' in *Max Planck Encyclopaedia of Public International Law* (Oxford University Press, 2013) 2.

<sup>61</sup> For climate change funding scheme that may offer protection of indigenous peoples, see GEF (Global Environment Facility), 'Agency Minimum Standards on Environmental and Social Safeguards' (Policy Paper No SD /PL/03, GEF, 19 February 2015) 5–6, 14–5.

<sup>62</sup> 'The Cancun Agreements', Decision 1/CP.16, (15 March 2011) FCCC/CP/2010/7/Add.1, ch 3 pt C, para 69.

<sup>63</sup> 'Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention' Decision 2/CP.17 (15 March 2012) FCCC/CP/2011/9/Add.1, ch 2 pt C para 63.

<sup>64</sup> 'The Cancun Agreements', Decision 1/CP.16, (15 March 2011) FCCC/CP/2010/7/Add.1, ch 3 pt C, para 71.

<sup>65</sup> COP (UNFCCC), 'Work programme on results-based finance to progress the full implementation of the activities referred to in decision 1/CP.16, paragraph 70', Decision 9/CP.19 (31 January 2014) FCCC/CP/2013/10/Add.1, para 4.

<sup>66</sup> 'Work programme on results-based finance to progress the full implementation of the activities referred to in decision 1/CP.16, paragraph 70', Decision 9/CP.19 (31 January 2014) FCCC/CP/2013/10/Add.1, paras 3–4.

<sup>67</sup> COP(UNFCCC), 'The timing and the frequency of presentations of the summary of information on how all the safeguards referred to in decision 1/CP.16, appendix I, are being addressed and respected', Decision 12/CP.19 (31 January 2014) FCCC/CP/2013/10/Add.1, para 4.

the broad category of obligations of developing countries parties concerning measuring, reporting, and verification ('MRV') of REDD+ activities.

Under the UNFCCC, developing countries parties are required to submit their MRV along with their first national communication to the COP UNFCCC within three years after entered the convention, and every four years thereafter.<sup>68</sup> Later, the UNFCCC also established the more stringent process by requiring developing countries parties to provide biennial update reports ('BUR') as of December 2014.<sup>69</sup> These BURs will be subjected to expert review processes and multilateral assessments of international consultation and analysis.<sup>70</sup> To date, only sixteen developing countries parties have submitted their BURs.<sup>71</sup> Therefore, it is too early to say how an implementation of REDD+ safeguards are being reported and reviewed in international consultation and analysis processes. Moreover, the COP UNFCCC does not provide a detailed guidance on the types of evidence that developing countries might show to ensure compliance with the safeguards. These matters have been discussed under the SBSTA since 2011, but until the forty-second session of the SBSTA in June 2015 the issue of types of information on how REDD+ safeguards are being addressed and respected remained inconclusive.<sup>72</sup>

These elements as discussed above are important, but leaving matters of the legal status of REDD+ safeguards unresolved. REDD+ safeguards have a broad wording that leave much room for discretion over their implementation. Previous studies suggested that whether REDD+ safeguards obtain the guise of legally binding law is a matter of interpretation of the UNFCCC parties intending to undertake REDD+ activities.<sup>73</sup> Amidst these inconclusive legal statuses of REDD+ safeguards, these safeguards and its associated elements prescribed in the Cancun Agreements and subsequent COPs may be interpreted as actual legal obligations to developing countries parties to the UNFCCC that decide to implement REDD+ activities.

While parties to the UNFCCC have not yet resolved the legal status of REDD+ safeguards, REDD+ readiness practices may provide sufficient illustration of the various way in which REDD+ safeguards can be interpreted. These practices have been chiefly driven by the two ad hoc international agencies, the UN-REDD

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<sup>68</sup> United Nations Framework Convention on Climate Change ('UNFCC') signed 9 May 1992, 1771 UNTS 107, entered into force 21 March 1994, arts 12.5.

<sup>69</sup> 'Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention' Decision 2/CP.17 (15 March 2012) FCCC/CP/2011/9/Add.1, paras 39–44.

<sup>70</sup> 'Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention' Decision 2/CP.17 (15 March 2012) FCCC/CP/2011/9/Add.1, paras 56–62, annex IV 'Multilateral Assessment' paras 8–12.

<sup>71</sup> UNFCC (United Nations Framework Convention on Climate Change), *Submitted BURs from Non-Annex I Countries National Reports* <[http://unfccc.int/national\\_reports/non-annex\\_i\\_natcom/reporting\\_on\\_climate\\_change/items/8722.php](http://unfccc.int/national_reports/non-annex_i_natcom/reporting_on_climate_change/items/8722.php)>.

<sup>72</sup> IISD (International Institute for Sustainable Development), 'Summary of the Bonn Climate Change Conference (1-11 June 2015)', above n 58, 17–9.

<sup>73</sup> See eg, Harro Van Asselt, Francesco Sindico and Michael A Mehling, 'Global Climate Change and the Fragmentation of International Law [article]' [2008] *Law & Policy* 423, 30; Harro van Asselt, Michael Mehling and Clarisse Kehler Siebert, 'The Changing Architecture of International Climate Change Law' in Geert Van Calster, Wim Vandenberghe and Leonie Reins (eds), *Research Handbook on Climate Change Mitigation Law* (Edward Elgar Publishing, 2015) 5–6; Annalisa Savaresi, 'The Legal Status and Role of REDD-Plus Safeguards' (Edinburgh Law School Working Papers No. 2015/24, University of Edinburgh, 31 July 2015) 6 <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2638394](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2638394)>.

Programme and the FCPF. These international bodies have partnered with a large number of the UNFCCC parties intending to participate in REDD+ activities.<sup>74</sup> These agencies also have adopted standards to guide their partner countries to implement REDD+ readiness processes, notably in dealing with indigenous peoples' rights to lands and resources, and on how to operate REDD+ safeguards effectively. Therefore, the UN-REDD Programme and the FCPF could assist in filling regulatory gaps in REDD+ safeguards. The next subsection will outline protection of indigenous peoples under the two agencies.

## 2 *Protection of Indigenous Peoples' Rights under the UN+ REDD Programme and the FCPF*

REDD+ safeguards require developing countries willing to undertake REDD+ activities to promote and support efficient and transparent, inter alia, public participation, and rights of indigenous peoples.<sup>75</sup> The UNFCCC and REDD+ safeguards have recognised that their parties should fully respect human rights 'in all climate change related actions',<sup>76</sup> including REDD+ financial approaches to the UN-REDD Programme and the FCPF. This assertion shows a mutual interplay between REDD+ regime<sup>77</sup> and human rights instruments. This section examines the UN-REDD Programme and the FCPF in turn.

### (a) *The UN-REDD Programme*

The UN-REDD Programme has supported indigenous peoples' protection in various ways. To ensure substantive and procedural rights of indigenous peoples,<sup>78</sup> in the agency's governing body—Policy Board—there is one full member from

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<sup>74</sup> At the time of writing the UN-REDD Programme has entered into arrangements with sixty-four countries, see UN-REDD Programme, *Regions and Countries Overview* (2015) UN-REDD Programme Collaborative Online Workspace <[http://www.unredd.net/index.php?option=com\\_unregions&view=overview&Itemid=495](http://www.unredd.net/index.php?option=com_unregions&view=overview&Itemid=495)>. To date there are forty-seven developing countries of the UNFCCC parties have partnered with the FCPF, see FCPF, *REDD+ Country Participants* (2015) REDD+ Countries <<https://www.forestcarbonpartnership.org/redd-country-participants>>. Indonesia is included in both of these REDD+ agencies.

<sup>75</sup> 'The Cancun Agreements', Decision 1/CP.16, (15 March 2011) FCCC/CP/2010/7/Add.1, Appendix I, paras 29(c)–(e).

<sup>76</sup> 'The Cancun Agreements', Decision 1/CP.16, (15 March 2011) FCCC/CP/2010/7/Add.1, para 8.

<sup>77</sup> See eg, Margaret A Young, 'REDD+ and Interacting Legal Regimes' in *Human Rights, Environmental Sustainability, Post-2015 Development, and the Future Climate Regime* (UNITAR, 2014) 2–5 <<http://conference.unitar.org/yale2014/session-3-strengthening-international-regimes-human-rights-and-environment>>; Mi Sun Park, Esther Sekyoung Choi and Yeo-Chang Youn, 'REDD+ as an International Cooperation Strategy under the Global Climate Change Regime' (2013) 9 *Forest Science and Technology* 213, 219–222.

<sup>78</sup> Such as those embedded in the *International Covenant on Civil and Political Rights* ('ICCPR'), opened for signature 16 December 1966, 999 UNTS 171, (entered into force 23 March 1976); *International Covenant on Economic, Social and Cultural Rights* ('ICESCR'), opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976); the *International Labour Organization Convention 169 Concerning Indigenous and Tribal Peoples in Independent Countries* ('ILO/C 169') opened for signature 27 June 1989, [1989] 28 ILM 1382 (entered into force 5 September 1991), as well as in several regional human rights treaties.



indigenous peoples represented by the Chair United Nations Permanent Forum on Indigenous Issues ('UNPFII').<sup>79</sup> Aside representation in the Policy Board, three indigenous peoples also have status as observers in the UN-REDD Programme (one each from Africa, Asia-Pacific, and Latin America-Caribbean).<sup>80</sup>

The involvement of indigenous peoples within the fabric of the UN-REDD Programme shows a notable feature of the agency to give 'voice' to indigenous peoples. The configuration of this membership of the UN-REDD Programme is essential because the agency will make all decisions by a consensus of the full members and alternate members—not by voting.<sup>81</sup> Therefore, although indigenous peoples only have one representation in the UN-REDD Policy Board, this one member can play a seminal role in the decision-making process of the UN-REDD Programme.

Besides supportive institutional structure of the UN-REDD Programme for indigenous peoples, the agency also has a collaborative interplay among the UNFCCC regime, and international instruments concerning to the protection of indigenous peoples. There are three reasons for such a close linkage. First, the UN-REDD Programme works consistently with the pertinent decisions of the COP UNFCCC on REDD+, including matters about indigenous peoples in the context of REDD+ implementation strategies.<sup>82</sup> Secondly, almost all members from developing countries of the UN-REDD Programme as well as the donator countries (developed countries) are signatory parties to the UNFCCC.<sup>83</sup> Thirdly, the UNFCCC Secretariat is one of the observer institutions of the Policy Board of the UN-REDD Programme.<sup>84</sup>

Concerning issues of indigenous peoples' participation in the UN-REDD Programme, in its meeting the Policy Board can produce terms of reference and guidelines on issues in question, including tenure security matters. The Policy Board has also released guidelines that may be pertinent for assisting and encouraging the implementation of REDD+, particularly to the implementation of REDD+ that inextricably linked to tenure security of indigenous peoples. For example, the UN-REDD Programme and the FCPF have issued a joint instrument on involvement in REDD+ initiatives, such as Guidelines on Stakeholder Engagement in REDD+ Readiness with a Focus on the Participation of Indigenous Peoples and Other Forest-Dependent Communities.<sup>85</sup> The agency also has acknowledged that tenure security

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<sup>79</sup> See UN-REDD Programme, 'Policy Board Terms of Reference' (March 2009) 3; UN-REDD Programme, 'Rules of Procedure and Operational Guidance' (March 2009, Revised in May 2014) 4-5.

<sup>80</sup> UN-REDD Programme, 'Rules of Procedure and Operational Guidance', above n 79, 4.

<sup>81</sup> Ibid 6. See also FAO, UNDP, UNEP, 'UN Collaborative Programme on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries (UN-REDD): FAO, UNDP, UNEP Framework Document' Annex 2 'Multi-Donor Trust Fund (MDTF) Terms of Reference' 2.

<sup>82</sup> See eg, UN-REDD Programme, 'Policy Board Terms of Reference', above n 81, 4; UN-REDD Programme, 'The UN-REDD Programme Strategy 2011-2015' (2011), 1, 20; UN-REDD Programme, 'Support to National REDD+ Action Global Programme Framework 2011-2015' (adopted as of 9 August 2011), 10-1.

<sup>83</sup> See UN-REDD Programme, above n 74.

<sup>84</sup> UN-REDD Programme, 'Rules of Procedure and Operational Guidance', above n 79, 5.

<sup>85</sup> UN-REDD Programme and FCPF, 'Guidelines on Stakeholder Engagement in REDD+ Readiness with a Focus on the Participation of Indigenous Peoples and Other Forest-Dependent Communities' (20 April 2012).

is a critical success factor for REDD+.<sup>86</sup> Concerning to that matter, the agency has adopted the FAO's Voluntary Guidelines on the Responsible Governance of Tenure of Land Fisheries and Forests.<sup>87</sup>

To establish a compliance and detect violations of the international instruments concerning the protection of indigenous peoples in the context UN-REDD Programme are not difficult. The UN-REDD Programme is a collaborative initiative formed among participating United Nations ('UN') organisations, namely the FAO, the United Nations Environment Programme ('UNEP'), and the United Nations Development Programme ('UNDP'). Most of the FAO members are State Parties to the UNFCCC and pertinent international instruments on protection indigenous peoples' rights, notably the *International Covenant on Civil and Political Rights* ('ICCPR'), the *International Covenant on Economic, Social and Cultural Rights* ('ICESCR'), the *International Convention on the Elimination of All Forms of Racial Discrimination* ('ICERD'), and the UNDRIP.<sup>88</sup> Therefore, it is not hard to link the FAO with these international instruments that are designated to protect indigenous peoples' rights due to the commitments of the FAO members that have ratified the treaties. Moreover, there are the necessities of the FAO as one of the UN specialised agencies<sup>89</sup> and the UN Programme<sup>90</sup> (UNEP and UNDP) within the structure of the UN-REDD Programme to support their members' obligation to comply with these respective treaties.

#### *(b) The World Bank's FCPF*

Similar to the UN-REDD Programme, the governance structure of the FCPF has representatives from indigenous groups. Indigenous peoples have the position as one of the observers at the Participant Committee.<sup>91</sup> However, the status of Indigenous peoples in the FCPF's structure as being one of the observers does not undermine their role in the decision-making process. The Charter Establishing the FCPF states that the Participant Committee 'shall make any effort to make decisions by consensus'.<sup>92</sup>

The Participant Committee has significant roles in REDD+ readiness activities. For example, it has the role of approving the Readiness Preparation Proposal ('R-

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<sup>86</sup> UN-REDD Programme, *UN-REDD Highlights Tenure as a Success Factor for REDD+* (12 March 2013) UN-REDD Programme Newsletter Issue 36 February/March 2013 <[http://www.un-redd.org/Newsletter36/Tenure\\_for\\_REDD\\_Success/tabid/106078/Default.aspx](http://www.un-redd.org/Newsletter36/Tenure_for_REDD_Success/tabid/106078/Default.aspx)>.

<sup>87</sup> FAO, *Voluntary Guidelines on the Responsible Governance of Tenure of Land Fisheries and Forests in the Context of National Food Security* (FAO, 2012) pt 6 'Responses to Climate Change and Emergencies', 35–8. For inclusion of the guidelines in the policy of UN-REDD Programme, see Ann-Kristin Rothe and Paul Munro Faure, 'Tenure and REDD+: Developing Enabling Tenure Conditions for REDD+' (Policy Brief Issue 6, UN-REDD Programme, April 2013) 2, 6.

<sup>88</sup> FAO, *FAO Members* (10 June 2015) Legal Office <<http://www.fao.org/legal/home/fao-members/en/>>.

<sup>89</sup> *Charter of the United Nations*, art 22.

<sup>90</sup> *Charter of the United Nations*, arts 56–7.

<sup>91</sup> FCPF, *Participants Committee Members and Observers* (June 2015) Participants <<http://www.forestcarbonpartnership.org/participants-committee-members-and-observers>>.

<sup>92</sup> International Bank for and Reconstruction and Development, 'Charter Establishing The Forest Carbon Partnership Facility' art 11 s 11.4.

PP') and the Readiness Plan Idea Note ('R-PIN'), and making decisions on the allocation of World Bank's grants.<sup>93</sup> In the context protection of indigenous peoples' rights, the Participant Committee has promoted the rights of indigenous peoples in its various decisions, notably on submissions of R-PPs from REDD+ participant countries.<sup>94</sup>

The funding scheme for the FCPF and its participant countries is an essential aspect of financing REDD+ activities. The fund from the FCPF takes the form of a grant that will be negotiated on through the use of a legally binding agreement between the World Bank and the participant state.<sup>95</sup> The FCPF was established under the International Bank for and Reconstruction and Development ('IBRDA')—one of the World Bank institutions.<sup>96</sup> Therefore, grants provided by the FCPF for the purpose of financing REDD+ activities need to comply with the operational policies ('OP') and bank procedures('BP') of the World Bank.<sup>97</sup> On indigenous peoples in REDD+, the state that is receiving the grant requires to comply fully with the 2005 World Bank OP 4.10 and the 2005 World Bank BP 4.10 concerning indigenous peoples.<sup>98</sup> Failure to comply with the two instruments could lead to termination of the grant by the FCPF.<sup>99</sup>

A further question that might arise concerning the World Bank OP4.10 and the World Bank BP4.10 is whether these policies respect tenure security of indigenous peoples. Both policies implicitly support the international human rights law instruments that relevant to provide protection for indigenous peoples, inter alia, the UNDRIP. The World Bank OP4.10 uses the same formulation as the UNDRIP to determine the status of indigenous peoples.<sup>100</sup>

The World Bank's OPs also have crucial shortcomings. Notably, they do not support free, prior, and informed consent ('FPIC') as stated in the UNDRIP<sup>101</sup> and had established in the various decisions of human rights courts, for example in the

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<sup>93</sup> International Bank for and Reconstruction and Development, 'Charter Establishing The Forest Carbon Partnership Facility' art 6 s 6.2–3, art 11 s 11.

<sup>94</sup> See eg, Participants Committee 'Republic of Congo's Readiness Preparation Proposal', 6<sup>th</sup> mtg, Res PC/6/2010/3 (28 June–1 July 2010) Annex, para 1; Participants Committee 'Colombia's Readiness Preparation Proposal, 10<sup>th</sup> mtg, Res PC/10/2011/3 (18–19 October 2011) Annex, para 1.

<sup>95</sup> See e.g. Letter from International Bank for and Reconstruction and Development (Trustee of the Readiness Fund of the Forest Carbon Partnership Facility to Rahmat Waluyanto (Director General of Debt Management Ministry of Finance Republic Indonesia), 'Republic of Indonesia: FCPF Readiness Fund Grant: REDD+ Readiness Preparation Grant No. TF99721-ID', Letter No. CD-228/FCPF/V/2011, 27 May 2011, 1–2 <<http://bit.ly/IndonesialBRDletterFCPF>>. See also International Bank for and Reconstruction and Development, above n 92, ch XI.

<sup>96</sup> International Bank for Reconstruction and Development art 1 s 1.1 para 83–7.

<sup>97</sup> IBRD and IDA 'The World Bank Inspection Panel' Res No. IBRD 93–10 and Res No. IDA 93–6 (22 September 1993), para 12.

<sup>98</sup> World Bank, *OP 4.10 - Indigenous Peoples* (July 2005 (revised April 2013)) External Operational Manual <<http://go.worldbank.org/TE769PDWN0>>; World Bank, *BP 4.10 - Indigenous Peoples* (July 2005 (revised April 2013)) External Operational Manual <<http://go.worldbank.org/OPF8AXJXH0>>.

<sup>99</sup> International Bank for and Reconstruction and Development, above n 92, ch XI. Cf above n 64 and accompanying text.

<sup>100</sup> World Bank, above n 98, para 4. Cf *United Nations Declaration on the Rights of Indigenous Peoples* ('UNDRIP'), GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007) arts 3, 5, 13, 20, 26(1)–(2), 27.

<sup>101</sup> *UNDRIP*, UN Doc A/RES/61/295, arts 10, 19, 29 (2).

case *Saramaka People v Suriname*<sup>102</sup> and *Maya Indigenous Communities of the Toledo District v Belize*.<sup>103</sup> In its 'own version' of 'FPIC', the OP 4.10 and BP 4.10 use the term 'consultation' instead 'consent'.<sup>104</sup> That difference of FPIC can potentially weaken the protection of indigenous peoples, notably when they enter into negotiation on their lands or resources tenure.<sup>105</sup> In that situation, when a state applies the World Bank's policies and receives the FCPF' funds for financing its REDD+ activities, it can merely apply *consultation* without obtaining full consent from indigenous peoples in which their customary lands may be affected from these activities.

Another point that should be noted is consistency between the World Bank policies with the REDD+ regime. In this regard, the World Bank's policies concerning the protection of indigenous peoples arguably need adjustments. The World Bank's policies respect the international environmental law as one of the World Bank's conditionalities for granting loans. For example, under the World Bank OP 4.36 concerning forests, the World Bank will refuse to 'finance projects that contravene applicable international environmental agreements'.<sup>106</sup> This conditionality is essential in the context of safeguarding indigenous peoples from possibilities of infringement of their rights to land. Thus, when implementing REDD+, the FCPF should comply with the UNFCCC as one of the environmental treaties that supported the notion of FPIC with 'consent'.<sup>107</sup> Moreover, the Special Rapporteur on the Rights of Indigenous Peoples has also supported the revision of the notion of FPIC with 'consultation' in the World Bank OP 4.10 and BP 4.10 to be FPIC with 'consent' as prescribed under the UNDRIP.<sup>108</sup>

## B *Protection of Indigenous Peoples Under Applicable Human Rights Instruments*

This section discusses protection of indigenous peoples from violations of their rights to land under the UNDRIP. This paper is aware that there are several suitable human rights instruments that relevant in the context protection of indigenous peoples. For example, a legally binding international instruments and open to ratification—the ILO/C 169 on Indigenous and Tribal Protection—that appropriate to recognise of rights of indigenous peoples and to implement FPIC in the context of REDD+.<sup>109</sup> This section focuses on the UNDRIP because Indonesia has not yet

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<sup>102</sup> *Saramaka People v Suriname (Preliminary Objections, Merits, Reparations, and Cost)* No 172 Inter-Am Court HR (ser C) (28 November 2007) para 154.

<sup>103</sup> *Maya Indigenous Communities of the Toledo District v Belize (Merits)* Report No. 40/04, Case 12.053, Inter-Am Court HR (12 October 2004) para 194.

<sup>104</sup> World Bank, above n 98, paras 6 (c), 8–12, 18–22; World Bank, above n 98, paras 2–4, 6–8.

<sup>105</sup> UNPFII, 'Report on the tenth session (16-27 May 2011)', ECOSOC Official Records 2011, supp No. 23, E/2011/43-E/C.19/2011/14, paras 34-8.

<sup>106</sup> World Bank, *OP 4.36 - Forests* (November 2002 (revised April 2013)) External Operational Manual para 6 <<http://go.worldbank.org/6NQDXLHG10>>.

<sup>107</sup> See below nn 114-6 and accompanying text.

<sup>108</sup> James Anaya, *Report of Special Rapporteur on Rights of Indigenous Peoples*, UN GAOR, 67th sess, Agenda Item 67(a), UN Doc A/67/301 (13 August 2012) paras 75, 78.

<sup>109</sup> *ILO/C 169*, arts

ratified the ILO/C 169, but has ratified the UNDRIP,<sup>110</sup> a non-binding instrument that requests its signatories to show their political commitment to adhere to the principle therein.

As outlined above, the REDD+ safeguards note the adoption of the UNDRIP.<sup>111</sup> The provisions under the UNDRIP enshrine the gist of substantive and procedural environmental rights.<sup>112</sup> In the perspective of substantive environmental rights, the UNDRIP asserts that indigenous peoples have rights to land.<sup>113</sup> This kind of rights is crucial for indigenous people. It has been suggested that when the connection of indigenous peoples with their land loss, it is tantamount to the loss of economic rights to natural resources and the loss of cultural and spiritual rights essential for their social structure.<sup>114</sup>

Concerning procedural environmental right, previous studies suggested that recognition of procedural rights is necessary for combating climate change, notably through the inclusion of important aspects of procedural rights language into the AWG-LCA text in COP15.<sup>115</sup> The UNDRIP states that '[i]ndigenous people shall not forcibly removed from their lands and territories [and they cannot be] [relocated] without [their] free, prior and informed consent [...], and after agreement on just and fair compensation'.<sup>116</sup> This declaration also requires the government to ensure procedural rights for indigenous people to participate in decision-making process, consult and cooperate in good faith, and obtain their free, prior, and informed consent ('FPIC') before adopting administrative measures that may affect their rights.<sup>117</sup>

It is necessary to adhere to the UNDRIP in ensuring the protection of substantive and procedural environmental rights of indigenous peoples in the context of the implementation of REDD+ initiatives and their safeguard mechanisms. To analyse that position, the fabric of the implementation of REDD+ under the UN-REDD Programme and the FCPF may provide some examples. Under the REDD+ Programme, the implementation of the REDD+ initiatives needs to 'uphold the principle of FPIC as stated in the UNDRIP'.<sup>118</sup> Several participating countries of the

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<sup>110</sup> *Undang-Undang No. 29 Tahun 1999 Pengesahan Konvensi Internasional Tentang Penghapusan Segala Bentuk Diskriminasi Rasial 1965* [Law No. 29 of 1999 on the Ratification of the UNDRIP 1965] (Indonesia).

<sup>111</sup> 'The Cancun Agreements', Decision 1/CP.16, (15 March 2011) FCCC/CP/2010/7/Add.1, ch 3 pt b para 72.

<sup>112</sup> See eg, Linda Hajjar Leib, *Human Rights and the Environment: Philosophical, Theoretical and Legal Perspectives* (Martinus Nijhoff Publishers, 2011) 76. For some criticisms over proponents of substantive environmental rights, see Gunther Handl, 'Human Rights and Protection of the Environment: A Mildly Revisionist View' [1992] *Human rights approaches to environmental protection*. Oxford University Press, Oxford 117, 117–8, 129–30.

<sup>113</sup> UNDRIP, UN Doc A/RES/61/295, art 26.

<sup>114</sup> Leib, above n 112, 76.

<sup>115</sup> Svitlana Kravchenko, 'Procedural Rights as a Crucial Tool to Combat Climate Change' (2010) 38 *Georgia Journal of International and Comparative Law* 644–7.

<sup>116</sup> UNDRIP, UN Doc A/RES/61/295, art 10.

<sup>117</sup> UNDRIP, UN Doc A/RES/61/295, art 17.

<sup>118</sup> UN-REDD Programme, 'The UN-REDD Programme Strategy 2011–2015', above n 82, 4, 9, 15. For inclusion of the UNDRIP in the next term of UN-REDD Programme, see UN-REDD Programme, 'UN-REDD Programme Strategic Framework 2016-2020 (Revised Draft - 7 May 2015)' (Policy Board Meeting Report UNREDD/PB14/2015/III/3, UN-REDD Programme, 22 May 2015) 12, 27–29, 33.

UN-REDD Programme, such as Indonesia, Ecuador, and Bolivia, have also supported the UNDRIP explicitly in the context of the implementation of REDD+.<sup>119</sup>

The FCPF operating guidelines also state their consistency to the UNDRIP. They mention indirectly to support the implementation of the UNDRIP by '[ensuring] consistency with the UNFCCC Guidance on REDD',<sup>120</sup> which allude to Decision 1/CP.16. The participating countries of the FCPF have also been required to adhere to the UNDRIP when implementing the FCPF initiatives.<sup>121</sup> In the recent Global Action Plan of Indigenous Peoples Relating to the FCPF, the agency acknowledged that land tenure security of indigenous people as a pre-requisite for any REDD+ initiatives and provided the financial support to ensure the legality of indigenous peoples' territories using land demarcation.<sup>122</sup>

Protection of indigenous people under the UNDRIP also have some issues. To be legally enforceable, the UNDRIP uses the UNGA as a legal vehicle. A UNGA resolution has non-binding legal status.<sup>123</sup> However, some provisions under the UNDRIP that correlate to the fulfilment of substantive and procedural environmental rights, notably the right to self-determination,<sup>124</sup> and the right to lands traditionally owned and natural resources,<sup>125</sup> have normative characteristics. Therefore, they could be materialised into a customary international law if they are widely practised among states, and if they are applied as if they were law.<sup>126</sup>

In the context of the legal status of the implementation of the UNDRIP within the fabric of REDD+, a previous study conducted by the Committee on the Rights of Indigenous Peoples of the International Law Association ('ILA') analysed whether provisions of the UNDRIP could be classified as customary international law. The ILA did not give a definite answer on this issue. In its assessment of the legal status of the UNDRIP, the ILA alluded to several key provisions that have normative characteristic under the UNDRIP, inter alia, the rights to traditional lands, the rights

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<sup>119</sup> See Ministry of Forestry of Indonesia, 'Semi-Annual Report 2011 ourne Programme Indonesia' (Annual Report, Ministry of Forestry of Indonesia, 2 August 2011) 30; UN-REDD Programme, 'National Programme Document - Ecuador' (Policy Board Meeting Report UNREDD/PB6/2011/V/1, UN-REDD Programme, 28 February 2012) [228]; UN-REDD Programme, 'National Programme Document - Bolivia' (Policy Board Meeting Report UN-REDD/PB4/4ai/ENG, UN-REDD Programme, 3 March 2010) [64], [70].

<sup>120</sup> International Bank for and Reconstruction and Development, above n 92, art 3 s 3.1 (c), (d).

<sup>121</sup> See eg, Ministry of Forestry of Indonesia, 'Indonesia - Forest Carbon Partnership Facility Readiness Grant Project' (Integrated Safeguards Data Sheet 61902, World Bank, 25 February 2015) 7-9; National Climate Change Program Bolivia, 'Bolivia- The FCPF Readiness Plan Idea Note (R-PIN)' (FCPF R-PIN Template, World Bank, 8 March 2008) 10, 14, 16.

<sup>122</sup> FCPF, 'Global Action Plan of Indigenous Peoples Relating to FCPF (2013-2015)' (Action Plan Report, FCPF, December 2012) paras 8, 26.

<sup>123</sup> *Charter of the United Nations*, opened for signature 26 June 1945, 1 UNTS XVI (entered into force 24 October 1945), art 10.

<sup>124</sup> UNDRIP UN Doc A/RES/61/295, art 3, 4.

<sup>125</sup> UNDRIP UN Doc A/RES/61/295, art 26.

<sup>126</sup> *1945 Statute of the International Court of Justice*, opened for signature 26 June 1945, 1 UNTS XVI (entered into force 24 October 1945), art 38.1. See also *North Sea Continental Shelf* (Germany v Denmark) (Judgment) [1969] ICJ Rep 3, paras [72]-[73]; S James Anaya and Siegfried Wiesner, 'The UN Declaration on the Rights of Indigenous People: Towards Re-Empowerment' in S James Anaya (ed), *International Human Rights and Indigenous Peoples* (Aspen, 2009) 99, 99.;

to self-determination, and the rights to protect cultural identity.<sup>127</sup> The ILA's analysis based on inputs of the committee propounded that the UNDRIP '[...] as a whole cannot yet be considered as a statement of existing international law. However, it includes several key provisions which correspond to existing State obligations under customary international law'.<sup>128</sup>

#### IV CASE STUDY: REDD+ IN INDONESIA

Indonesia contributes for approximately a third of GHGs, notably, sourced from deforestation and forest degradation.<sup>129</sup> That factor makes the country as one of primary candidates for the REDD+.<sup>130</sup> This part begins with a brief discussion of pertinent Indonesian legal framework on climate change and REDD+. It then assesses the framework on the protection of indigenous peoples. It also analyses difficulties in implementing safeguards for indigenous peoples from detrimental effects as a result of the implementation of REDD+ initiatives.

##### A Indonesian Legal Framework for Climate Change and REDD+

This part will assess two legal frameworks for climate change and REDD+ activities in Indonesia. It then discusses on the implementation of REDD+ safeguards in Indonesia.

###### 1 Climate Change Legal Framework in Indonesia

The Government of Indonesia ('GOI') has passed some meaningful pieces of legislation on climate change through ratification of a number of international climate change central legal frameworks. Among others, these include the UNFCCC<sup>131</sup> and the Kyoto Protocol<sup>132</sup>. However, among those pieces of legislation and policies on climate change, key initiatives to deal with crucial issues such as those associated with the REDD+ program are often embodied in ministerial decrees and executive

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<sup>127</sup> ILA (International Law Association), Committee on the Rights of Indigenous Peoples, 'Rights of Indigenous People (Sofia Conference)' 3–23.

<sup>128</sup> ILA (International Law Association), Committee on the Rights of Indigenous Peoples, 'Rights of Indigenous People Resolution No.5/2012' (ILA, 2012) [2]–[10]; ILA (International Law Association), Committee on the Rights of Indigenous Peoples, above n 127, 29–31.

<sup>129</sup> 'Indonesia and Climate Current Status' (Professional Report, World Bank-Pelangi Energi Abadi Citra Enviro, 2007) 1–2; Mariah Measey, 'Indonesia: A Vulnerable Country in the Face of Climate Change' (2010) 1 *Global Majority E-Journal* 31, 31–3; Naomi Johnstone, 'Indonesia in the "REDD": Climate Change, Indigenous Peoples and Global Legal Pluralism' (2010) 12 *University of Hawaii Asian-Pacific Law & Policy Journal* 93, 105.

<sup>130</sup> Johnstone, above n 129, 106.

<sup>131</sup> The UNFCCC has been ratified by the GOI through *Undang-Undang Nomor 6 Tahun 1994 tentang Pengesahan United Nations Framework Convention on Climate Change* [Law No 6 of 1994 on the Ratification of the UNFCCC (Law 6 (1994))] (Indonesia).

<sup>132</sup> The Kyoto Protocol has been ratified by the GOI through *Undang-Undang Nomor 17 Tahun 2004 tentang Pengesahan Protokol Kyoto atas Konvensi Kerangka Kerja Perserikatan Bangsa-bangsa tentang Perubahan Iklim* [Law No 17 of 2004 on the Ratification of the Kyoto Protocol (Law 17 (2004))] (Indonesia).

regulations, which sometimes overlap with high-level legislation. Overlap is also evident at the institutional level, such as between the National Council on Climate Change ('DNPI'), the REDD+ task force ('BP-REDD+') and the Ministry of Environment and Forestry ('MEF'). To date, these related institutions for dealing with climate change and REDD+ have been fused to create more efficient coordination.<sup>133</sup> However, some institutional issues after the amalgamation of these bodies remain unresolved. These issues will be outlined in the next section.

The GOI enacted a national action plan to reduce emissions (the 'RAN-GRK') in 2011.<sup>134</sup> It has important functions to oversee cross-sectoral national climate change programs. It also catalyses the formulation of subnational mitigation strategies at the provincial level,<sup>135</sup> and accordingly the RAN-GRK is responsible for a series of NAMAs. Furthermore, concerning subnational mitigation strategies the RAN-GRK also obliged governors to develop a local action plan for reducing their GHG emissions at the local level (the 'RAD-GRK').<sup>136</sup>

In line with these initiatives, the GOI adopted a presidential regulation in 2011 relating to the GHG inventory system, to ensure the availability of GHG emissions data.<sup>137</sup> Complementing these efforts, in 2014 the GOI issued a set of national adaptation strategies in an initiative known as the 'RAN-API'. Though the RAN-API does not contain any actual regulations, it has been integrated into Presidential Regulation Number 2 of 2015 ('RPJMN 2015-2019'), which prescribes medium-term Indonesian development planning.<sup>138</sup> Indonesia's domestic mitigation and adaptation strategies in the RAN-GRK and the RAN-API are incorporated into the RPJMN 2015-2019, which covers five key sectors; forestry and peatlands, agriculture, energy and transportation, industry, and waste.<sup>139</sup> Individual strategies within these sectors are aimed at contributing to the country's target of reducing carbon emissions to 26% below business-as-usual ('BAU') baselines by 2020 based on unilateral actions, and

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<sup>133</sup> *Peraturan Presiden Nomor 16 Tahun 2015 tentang Kementerian Lingkungan Hidup dan Kehutanan* [Presidential Regulation No 16 of 2015 on the Ministry of Environment and Forestry ('GR 16 (2015)') (Indonesia) art 59.

<sup>134</sup> *Peraturan Presiden Nomor 61 Tahun 2011 tentang Rencana Aksi Nasional Penurunan Emisi Gas Rumah Kaca* [Presidential Regulation No 61 of 2011 on the National Action Plan for GHG Emission Reduction ('RAN-GRK')] (Indonesia), arts 4, 5, 6. For further explanation about RAN-GRK as the Indonesian NAMA, see State Minister for National Development Planning Republic of Indonesia ('BAPPENAS'), *Indonesia's Framework for Nationally Appropriate Mitigation Actions* (BAPPENAS, 2013) 10-1.

<sup>135</sup> *Peraturan Presiden Nomor 5 Tahun 2010 tentang Rencana Pembangunan Jangka Menengah Nasional 2010-2014* [Presidential Regulation No 5 of 2010 on the National Mid-Term Development Planning 2010-2014 ('RPJM 2010-2014')] (Indonesia) annex I ('National Priority') pp 20, 32-3, 45, 62.

<sup>136</sup> RAN-GRK art 6.

<sup>137</sup> *Peraturan Presiden Nomor 71 Tahun 2011 tentang Penyelenggaraan Inventarisasi Gas Rumah Kaca* [Presidential Regulation No 71 of 2011 on the GHG Inventory System ('PR 71/2011')] (Indonesia), arts 4, 5, 6.

<sup>138</sup> *Peraturan Presiden Nomor 2 Tahun 2015 tentang Rencana Pembangunan Jangka Menengah Nasional 2015-2019* [Presidential Regulation No 2 of 2015 on the National Mid-Term Development Planning 2015-2019 ('RPJM 2015-2019')] (Indonesia) annex I ('National Development Agenda') chs II, V pp 39-40, 73, 228-9.

<sup>139</sup> RPJM 2015-2019, National Development Agenda ch V pp 228-9.



emissions are expected to undergo a further reduction to 41% below BAU baselines with adequate international financial assistance.<sup>140</sup>

It can be argued that Indonesia has an adequate general legal framework for dealing with climate change, and a strong commitment to participation in voluntary emissions reductions schemes, in accordance with the current international climate change regime. However, the implementation of that general framework is not standardized across related ministries including matters about indigenous peoples. This fragmentation may impede Indonesia's adaptation and mitigation efforts.

## 2 REDD+ Legal Framework in Indonesia

A significant milestone to reduce deforestation was initiated in 2010 by the Letter of Intent ('LoI') between the GOI and the government of Norway to finance the implementation of REDD+ in Indonesia.<sup>141</sup> As a part of the LoI, the GOI issued the Presidential Instruction 10/2011 concerning moratorium on new permits to clear primary forests and peatlands throughout Indonesia.<sup>142</sup>

The aforementioned LoI established a bilateral partnership between the two countries on issues on climate change, supporting development and implementation of Indonesia's REDD+ strategy.<sup>143</sup> The initiative also resulted in the establishment of a new agency, the BP-REDD+, to carry out the monitoring, reporting, and verification ('MRV') functions of Indonesia's REDD+ strategies for anthropogenic forest and peatland-related GHG emissions.<sup>144</sup> While the deforestation moratorium and bilateral REDD+ program are important strategies, there are several unresolved issues regarding the coverage area and status of land covered by the moratorium. Notably, exemptions of the forest moratorium on mining concession acreages, and several other commercial activities such as electricity generation, and rice production, which

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<sup>140</sup> Susilo Bambang Yudhoyono's (the sixth President of Republic Indonesia) declaration at the G-20 United National Conference on Sustainable Development ('UNCSD') Summit in 2009 United National Conference on Sustainable Development, *Address by His Excellency Susilo Bambang Yudhoyono, President of the Republic of Indonesia* (22 June 2009) United Nations Conference on Sustainable Development, Rio + 20 <<https://rio20.un.org/content/address-his-excellency-susilo-bambang-yudhoyono-president-republic-indonesia>>.

<sup>141</sup> Michael Nachmany et al, 'Climate Change Legislation in Indonesia' in *The 2015 Global Climate Legislation Study A Review of Climate Change Legislation in 99 Countries* (the London School of Economics and Political Science and The Grantham Research Institute on Climate Change, 1 st ed, 2015) 6.

<sup>142</sup> Masnellyarti Hilman (ed), *Indonesia Second National Communication to the United Nations Framework Convention on Climate Change (UNFCCC)* (Ministry of Environment and Forestry, 2010) 10–1. The GOI promulgated its policy on forest moratorium through Instruksi Presiden Nomor 10 Tahun 2011 tentang *Penundaan Pemberian Izin Baru dan Penyempurnaan Tata Kelola Hutan Alam Primer dan Lahan Gambut* [President Instruction No 10 of 2011 on Moratorium on New Permit and Governance Improvement on Primary Forests and Peatlands ('President Instruction 10/2011')] (Indonesia), as amended by *Instruksi Presiden Nomor 6 Tahun 2013* [President Instruction No 6 of 2013] (Indonesia). The 2013 forest moratorium had ceased in May 2015.

<sup>143</sup> Stig Traavik, *Letter of Intent Norway-Indonesia* ('the LoI between Indonesia-Norway') (26 May 2010) Royal Norwegian Embassy II <[http://www.norway.or.id/PageFiles/404362/Letter\\_of\\_Intent\\_Norway\\_Indonesia\\_26\\_May\\_2010.pdf](http://www.norway.or.id/PageFiles/404362/Letter_of_Intent_Norway_Indonesia_26_May_2010.pdf)>

<sup>144</sup> the LoI between Indonesia-Norway, VI.b.

are deemed to be 'vital national development projects'.<sup>145</sup> Several other criticisms of the deforestation moratorium have arisen. During the moratorium, plantations and mining activities continued within forests and peatlands;<sup>146</sup> hence the moratorium had a modest effect on the reduction of GHG emissions.<sup>147</sup> Despite various criticisms of the deforestation moratorium, the current president has endorsed his predecessor's policy regarding Indonesia's emission reduction targets and maintained a ban on deforestation.<sup>148</sup>

### 3 Implementation of REDD+ Safeguards in Indonesia

Indonesia is a partner country in both REDD+ safeguards, the UN-REDD Programme and the FCPF. Both initiatives do not involve in the establishment of REDD+ projects in Indonesia, but they have essential roles in developing REDD+ readiness. The UN-REDD Programme in Indonesia has finished its first operational phase. It was commenced in 2009 and was closed in 2012.<sup>149</sup> Key outcomes of the UN-REDD Programme include the development of forest reference level ('FREL') as a crucial element of REDD+ MRV and the development of rigorous FPIC mechanisms in its pilot province in Central Sulawesi, which led to the inclusion of the province as one of province partners under Indonesia-Norway Lol.<sup>150</sup> Concerning the development of safeguard strategies on indigenous peoples protection, the UN-REDD Programme implemented FPIC in REDD+ activities in the Central Sulawesi.<sup>151</sup> This process also approaching civil society organisations to participate in the incorporation of FPIC<sup>152</sup> in REDD+-related decision-making process at the local government level.

The FCPF focuses on the development of readiness strategies in Indonesia, include institutional setting, capacity building, and developing a regulatory framework for REDD+.<sup>153</sup> Though the FCPF do not involve in REDD+ activities in Indonesia, a

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<sup>145</sup> Daniel Murdiyarso et al, 'Indonesia's Forest Moratorium: A Stepping Stone to Better Forest Governance?' (Working Paper 76, Center for International Forestry Research (CIFOR), 2011) 4, 6.

<sup>146</sup> Forest Watch Indonesia, *Forest Watch Indonesia: Hutan Indonesia Yang Terus Tergerus [Forest Watch Indonesia: Indonesian Forests That Continue to Erode]* (The Forest Watch Indonesia and The Asia Foundation, 1 st ed) 6–7. See also Tessa Toumbourou, *An Ongoing Environmental Challenge* (March 2015) Inside Indonesia <<http://www.insideindonesia.org/an-ongoing-environmental-challenge>>;

<sup>147</sup> Jonah Busch, *Is Indonesia's Flagship Forest Policy Lowering Emissions by Enough to Meet National Climate Targets?* (16 January 2015) Centre For Global Development <<http://www.cgdev.org/blog/indonesias-flagship-forest-policy-lowering-emissions-enough-meet-national-climate-targets>>.

<sup>148</sup> *Instruksi Presiden Nomor 8 Tahun 2015 tentang Penundaan Pemberian Izin Baru dan Penyempurnaan Tata Kelola Hutan Alam Primer dan Lahan Gambut* [President Instruction No 8 of 2015 on Moratorium on New Permit and Governance Improvement on Primary Forests and Peatlands] (Indonesia), cls 1, 2.

<sup>149</sup> Simon Butt, Rosemary Lyster and Tim Stephens, *Climate Change and Forest Governance: Lessons from Indonesia* (Routledge, 2015) 8–9.

<sup>150</sup> Ibid 9; UN-REDD Programme, *Key Results and Achievements Indonesia* (2015) UN-REDD in Indonesia <[http://www.un-redd.org/Key\\_results\\_achievements\\_Indonesia/tabid/106623/Default.aspx](http://www.un-redd.org/Key_results_achievements_Indonesia/tabid/106623/Default.aspx)>.

<sup>151</sup> UN-REDD Programme, above n 78.

<sup>152</sup> World Bank, above n 102, para 16.

<sup>153</sup> The REDD Desk, *Forest Carbon Partnership Facility (Indonesia)* (2015) A Collaborative Resource for REDD Readiness <<http://theredddesk.org/countries/initiatives/forest-carbon-partnership-facility-indonesia>>.

preliminary assessment indicated that the following World Bank safeguards developed from the Indonesian FCPF probably determine the shape of REDD+ activities in Indonesia.<sup>154</sup> A key outcome of the FCPF in Indonesia includes assisting the formulation of Indonesia's REDD+ National Strategy.

The national strategy prescribes 'Indonesia's version of REDD+ safeguards', which share resemblances with the World Bank's safeguards, notably in rights to information, public participation, and redress mechanism.<sup>155</sup> However, there are noticeable differences between the two safeguards, notably in the context of tenure security and FPIC. In the context of tenure security, the national strategy acknowledges the rights of indigenous peoples not only alludes to the State law, but also to indigenous peoples' or local laws.<sup>156</sup> The World Bank's safeguards on land tenure only are referring to state law, which does not acknowledge indigenous peoples' land tenure.<sup>157</sup> In the context of FPIC, the Indonesian National REDD+ Strategy uses FPIC, with 'consent', whereas the World Bank's safeguards apply FPIC with 'consultation'.<sup>158</sup>

## B *Indonesian Legal Framework to Protect Rights to Land of Indigenous People*

This section provides an overview of Indonesian legal framework to protect indigenous land tenure. The protection of indigenous peoples and statutory recognition of customary land tenure in Indonesia are guaranteed by the *1945 Constitution of Republic Indonesia* ('Constitution'). There are various laws, subordinate regulations, and ministerial regulations that pertinent to protect indigenous peoples' rights to land. However, in practice, such protection is already fragmented in various laws and these laws sometimes contravene with the Constitution.

This section examines national framework to protect indigenous peoples, notably those embedded in the Constitution, the *1999 Forestry Law*, and other pertinent laws. Given the importance of tenure security in the context of REDD+ implementations, this section highlights protection of indigenous land tenure that embedded in these laws.

### 1 *The 1945 Constitution of Republic Indonesia and Customary Law*

International human rights instruments are largely incorporated into the Constitution. The Constitution prescribes human rights in Articles 28 to 28J of Chapter XA. This chapter was substantively drawn from the Universal Declaration of Human Rights.<sup>159</sup> It covers both types of human rights, substantive and procedural human

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<sup>154</sup> Ibid.

<sup>155</sup> Bernard Steni and Nadia Hadad, 'REDD+ Safeguards in Indonesia', Bank Information Centre and Word Resources Institute, 20–3.

<sup>156</sup> UN-REDD Programme, above n 74.

<sup>157</sup> World Bank, above n 102, para 16.

<sup>158</sup> See above nn 103-7 and accompanying text.

<sup>159</sup> *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3<sup>rd</sup> sess, 183<sup>rd</sup> plen mtg, UN Doc A/810 (10 December 1948). For a historical and detailed analysis of human rights provisions in the *1945 Constitution of Republic Indonesia*, see Denny Indrayana, *Indonesian Constitutional Reform*,

rights. The Constitution provides protection of cultural identity and traditional rights, and 'recognises and respects [indigenous peoples] along with their traditional customary rights'.<sup>160</sup> However, in practice the recognition and the guarantee of customary rights are very weak. State law typically prevailed over customary law due to the nature of the customary law that is highly inconsistent. Given this situation, customary law autonomously applies only in the absence of state law. Thus, it makes customary law has a difficult position in the Indonesian formal legal system as well as in the context of REDD+. The following paragraphs examine weaknesses of customary law in the context of REDD+.

Concerning traditional rights over land, most of Indonesian forest and rural land is held and used under customary law. Most of the land likely to be reserved for REDD+ projects, therefore it will be subject to customary law. Indonesian customary law encompasses fundamental issues of land include land ownership, land use, and land management.<sup>161</sup>

Tenure security and legal status of land are paramount in the context of REDD+ as prerequisites to an effective implementation of REDD+ activities. However, customary lands are not entirely suitable for REDD+. There are three major reasons for that incompatibility. First, with some exceptions, a customary land law is significantly varied throughout Indonesia. In most cases, customary land law in some places providing entirely different types of land title and land use than in others. For example, a previous study suggested that in the province Aceh there is highly inconsistency in customary land rules on the use of forest resources.<sup>162</sup> Second, many different indigenous communities are likely to claim entitlements over forests that designated for REDD+ purposes, because of varieties of customary laws adhered to these indigenous groups. For a practical implementation of REDD+, all these rights are necessary to be identified. Third, discovering precisely the content of customary law is difficult, since it is typically orally passed throughout generation and highly fluid. Therefore, it is hard to apply customary law as a ground for determining entitlements over land tenure as well as resources tenure in the context of REDD+.

To address these issues, a collaborative approach among government agencies is necessary. The next section will outline that approach.

## 2 *The 1999 Forestry Law and other Pertinent Laws*

The *1999 Forestry Law* play an essential role in the implementation of REDD+ and the determination of the status of customary forests. It is a primary legal framework for REDD+. The *1999 Forestry Law* also provides a basis for a number

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*1999-2002: An Evaluation of Constitution-Making in Transition* (Penerbit Buku Kompas, 2008) ch 5 'the Second Amendment: Further Reforms. Continued Delays'.

<sup>160</sup> *Undang-Undang Dasar Negara Republik Indonesia Tahun 1945* [The 1945 Constitution of Republic Indonesia] (Indonesia) arts 28I(3), 18B(2) [ILO's trans].

<sup>161</sup> For an in-depth analysis of customary law in Indonesia, see MB Hooker, *Adat Law in Modern Indonesia* (Oxford University Press, 1978) 82–118.

<sup>162</sup> Jane Dunlop, 'REDD, Tenure and Local Communities: A Study from Aceh, Indonesia' [2009] *International Development Law Organization* 21–3, 34–41.

ministerial regulations on the operation of REDD+, notably REDD+ demonstration activities, REDD+ mechanism, REDD+ carbon sequestration and carbon storage.<sup>163</sup>

On the determination of the status of customary forests, some provisions for the status of state forest in the *1999 Forestry Law* have been annulled by the Indonesian Constitutional Court. In 2012, the Court repealed the GOI's authority in the customary forest.<sup>164</sup> The Court held that the term 'state' of the *1999 Forestry Law's* definition of the customary forest no longer legally binding,<sup>165</sup> several related provisions for the conditional acknowledgement of customary forests voided.<sup>166</sup> The Court also ruled that the contested provisions for the determination of the status of customary forests in the *1999 Forestry Law* were contrary to the Constitution.<sup>167</sup>

That decision may have the effect of the limitation on the involvement of the national and local governments and their ensuing laws, in forests where the customary law exists. Thus, in the absence of state power in customary forests, government programs including REDD+, which have an intersected acreage with a customary forest, are likely delayed. To avoid such situation and maintain the government's obligation to protect their citizens, including indigenous peoples who live within customary forests, the government has issued a regulation on the management of customary forests and customary forests mapping across Indonesia ('*2014 Joint Ministerial Regulation*').<sup>168</sup> Three ministers promulgated the 2014 Joint Ministerial Regulation; the Minister of Internal Affairs, the Minister of Agrarian Affairs and Spatial Planning, and the MEF. It has key objectives to resolve property rights and land tenure issues in forest areas and set up a joint committee at the national level and local levels on the cadastral mapping of customary forests. The result of the committee would be integrated into the spatial planning regulation at the national and local government levels.<sup>169</sup> This approach would give a stronger legal basis for indigenous peoples' land tenure and provide legal certainty for REDD+ activities.

### C *Difficulties in the Implementation of REDD+ Projects and Some Feasible Solutions*

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<sup>163</sup> See Butt, Lyster and Stephens, above n 156, 94–100.

<sup>164</sup> *Aliansi Masyarakat Adat Nusantara (AMAN) dan Negara* [Nusantara Indigenous People Alliance (AMAN) v State] Constitutional Court of Indonesia, 35/PUU-X/2012, (26 March 2012). Previously, under 1999 Forest Law, the definition of customary forest was state forests within the territory of indigenous communities; after the Constitutional Court removing the term 'state' in the definition of customary forest become forests within the territory of indigenous communities [author's trans].

<sup>165</sup> *AMAN* [2012] 35/PUU-X/2012 185.

<sup>166</sup> *AMAN* [2012] 35/PUU-X/2012 185-6.

<sup>167</sup> *AMAN* [2012] 35/PUU-X/2012 186-7.

<sup>168</sup> *Peraturan Bersama Menteri Dalam Negeri, Menteri Agraria dan Tata Ruang, Menteri Kehutanan dan Lingkungan Hidup Nomor 79 Tahun 2014 Nomor PB. 3 Menhut-11/2014, Nomor 17 PRT/M/2014, Nomor 8/SKB/X/2014 tentang Tata Cara Penyelesaian Penguasaan Tanah Yang Berada Dalam Kawasan Hutan* [Joint Regulation the Minister of Internal Affairs, the Minister of Agrarian Affairs and Spatial Planning, the Minister of Environment and Forestry No 79 of 2014, No PB. 3 Menhut-11/2014, No 17 PRT/M/2014, No 8/SKB/X/2014 of 2014 on Settlement Procedures of Property Rights and Land Tenure Issues in Forest Areas ('2014 Joint Ministerial Regulation')] (Indonesia) ch V.

<sup>169</sup> *2014 Joint Ministerial Regulation*, ch V.

This section outlines several challenges that may impede the implementation of REDD+ and the protection of indigenous peoples' rights to land. It also provides some possible options that might be applicable to redress the difficulties. The problem and solution outlined in this section are not an exhaustive list; it highlights pertinent issues relating to the institutional problem in the implementation of REDD+ in Indonesia, lack of the national platform on REDD+, and the weak protection of indigenous peoples' rights to land.

First, problems concerning the institutional arrangement for REDD+ projects in Indonesia are complex. There are many government agencies and ministries taking part in REDD+ projects. This situation might cause ineffective coordination and jeopardize key objectives of REDD+ to reduce GHG emissions from deforestation and forest degradation. It also disproportionately treats indigenous peoples.<sup>170</sup> For example, complexity in institutional arrangement potentially leads to protracted claims on their rights to lands that might be infringed by REDD+ activities.

To address the problem of institutional arrangement, the GOI has combined ministries that have overlapped mandate, notably for forestry, climate change, and land-use affairs. This measure has two objectives: first, to apply the National Bureaucracy Reform;<sup>171</sup> secondly, to avoid periodic alterations in ministerial and government bodies' architecture for dealing with climate change.

In January 2015, the DNPI and the BP-REDD+ were dissolved and subsequently became part of the Directorate General of Climate Change in the MEF.<sup>172</sup> However, the amalgamation of both institutions into the MEF may put Indonesia's climate change in limbo, because the DNPI and the BP-REDD+ each had seminal roles including dealing with overarching issues of indigenous peoples, and it is probably difficult for a single ministry to fulfil both of these roles. When the task of the BP-REDD was dissolved, it is likely that the distortion of issues relating to REDD+ and land tenure rights of indigenous peoples ensued.

The merger of government agencies through a single ministry might lead to an inefficient bureaucracy that could thwart the management of the REDD+ program, including that of endeavours related to protection of rights to land of indigenous peoples. Similarly, abrogation of the DNPI and reallocation of its functions to the MEF may create uncertainty around the management of climate change issues in Indonesia. This first issue may be addressed by creating a national platform for REDD+. It might overcome ensuing issues after the amalgamation of government agencies.

Secondly, formulating a national platform for REDD+ likely to be a feasible solution to deal with fragmented national legal responses to REDD+. It can be argued that solution might produce positive outcomes, because to date formulation of a national REDD+ scheme into a precise legal form, like various ministerial

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<sup>170</sup> 'The Cancun Agreements', Decision 1/CP.16, (15 March 2011) FCCC/CP/2010/7/Add.1, ch 2 paras 12, 72.

<sup>171</sup> *Peraturan Presiden No. 81 Tahun 2010 tentang Grand Design Reformasi Birokrasi 2010-2025* [Presidential Regulation No. 81 of 2010 on Grand Design Bureaucracy Reform 2010-2025] (Indonesia) annex I pp 3, 8.

<sup>172</sup> *Peraturan Presiden Nomor 16 Tahun 2015 tentang Kementerian Lingkungan Hidup dan Kehutanan* [Presidential Regulation No 16 of 2015 on the Ministry of Environment and Forestry (Indonesia) art 59.

regulations,<sup>173</sup> may produce a counterproductive result. They lack legal power vis-à-vis other types of secondary legislation below primary laws in the Indonesian legal system. The capacity of a ministerial regulation is also problematic, notably whether it can override local laws passed by regional parliaments.

Thirdly, poor protection of indigenous peoples' land rights might be addressed by strengthening the implementation of procedural rights, notably FPIC processes. FPIC is a key feature of REDD+ readiness, such as in the UN-REDD Programme and the FCPF. Thus, bolstering REDD+ readiness could give rise to a better implementation in REDD+ projects.<sup>174</sup> A previous study by Kravchenko found that FPIC as a part of procedural rights may assist the implementation of rights to land of indigenous peoples in the context of climate change including REDD+. <sup>175</sup> Furthermore, in a broad sense, FPIC may be associated with public participation in various aspects, such as law-making, forestry matters, formulation of spatial planning. The *2011 Law-Making Regulation*,<sup>176</sup> the *1999 Forestry Law*,<sup>177</sup> and the *2007 Spatial Planning Law*<sup>178</sup> have guaranteed such public participation. Each of these laws has its dispute settlement mechanism on violations of public participation. Therefore, if there were infringements of rights to land of indigenous peoples and they related to the implementation of FPIC, indigenous peoples might seek redress to the court or other dispute settlement bodies by claiming that public participation, which has guaranteed by these aforementioned laws had breached.

## V CONCLUSION

Both of REDD+ safeguards, the UN-REDD Programme and the FCPF, have provided protection for indigenous peoples' rights. While they provide financial support for REDD+ readiness in their participating countries, they also provide various belt-and-suspender plans for protecting rights to the land of indigenous peoples to a certain extent. They also offer protection from the probabilities of removal from their land that may result from the implementation of REDD+ initiatives through safeguarding policies, and mutual interplay between REDD+ safeguards and relevant human rights instruments.

Indonesia has meaningful experiences in the implementation of REDD+. The country may seek redress for undesirable effects of REDD+ to indigenous peoples, notably, removal from their territory as a result of REDD+ activities by virtue the *1999 Forestry Law* and its subordinate legislation. The *1999 Forestry Law* along with other pertinent legal instruments for REDD+, notably the *2011 Law-Making Regulation* and the *2007 Spatial Planning Law*, may provide promising avenues for strengthening the

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<sup>173</sup>See above n 167 and accompanying text.

<sup>174</sup> See eg, Gillian A Cerbu, Brent M Swallow and Dara Y Thompson, 'Locating REDD: A Global Survey and Analysis of REDD Readiness and Demonstration Activities' (2011) 14 *Environmental Science and Policy* 168, 172–8; Mary C Thompson, Manali Baruah and Edward R Carr, 'Seeing REDD+ as a Project of Environmental Governance' (2011) 14 *Environmental Science and Policy* 100, 105–8.

<sup>175</sup> Kravchenko, above n 119, 645–6.

<sup>176</sup> *Undang-Undang No. 12 tahun 2011 tentang Pembentukan Peraturan Perundang-Undangan* [Law No. 12 of 2011 on Law-Making Regulation ('2011 Law-Making Regulation')] (Indonesia) art 96.

<sup>177</sup> *1999 Forestry Law*, art 70.

<sup>178</sup> *Undang-Undang No. 26 Tahun 2007 tentang Penataan Ruang* [Law No. 26 of 2007 on Spatial Planning ('2007 Spatial Planning Law')] (Indonesia) arts 65, 66.

implementation of FPIC in the context of REDD+ and tenure security of customary land of indigenous peoples.

The country arguably needs a national legal platform for REDD+. Such a national framework may avoid fragmentation, inefficiencies, and poor indigenous protection when dealing with REDD+. It should be not a daunting task for the MEF, because the MEF now has an overarching authority on REDD+, and has a useful material on 'Indonesia's version of REDD+ safeguards',<sup>179</sup> which probably beneficial when formulating the national framework for REDD+.

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<sup>179</sup> See nn 160-4 and accompanying text.



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