

**GOVERNING TROPICAL FORESTS:  
REDD+, CERTIFICATION AND LOCAL FOREST OUTCOMES IN MALAYSIA**

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*Attempts to prevent deforestation and to introduce more sustainable and adaptive forms of forestry management have a long history. Deforestation in tropical rainforest countries is endemic and it is recognised as a significant contributor to global climate change. In line with broader trends to harness 'new generation' environmental management, the governance of tropical forests has increasingly been shaped by non-state actors and mechanisms, such as forest certification bodies and the NGO sector. This has filled the gap left as a consequence of the inherent limitations of multilateral agreements and institutions in effectively implementing forest governance at a national and local level. This article examines the most recent manifestation of tropical forest governance in the form of the Reduced Emissions from Deforestation and Degradation Plus (REDD+) mechanism. It uses a case study of Malaysia to analyse the intersections between public law frameworks for dealing with forest loss and climate change and the private systems for tropical forest governance. Indigenous and local community rights emerge as a key area of conflict in the Malaysian forestry sector. This article draws some key lessons from the development of forest certification processes in Malaysia that need to be considered in the implementation of proposed REDD+ schemes to ensure the achievement of a range of environmental and cultural outcomes.*

I INTRODUCTION

Attempts to prevent deforestation and to introduce more sustainable and adaptive forms of forestry management have a long history. Deforestation in tropical rainforest countries is endemic and it is now recognised as a significant contributor to global climate change. The conversion of forests to non-forest uses currently contributes around 12–17% of annual global greenhouse gas emissions,<sup>1</sup> as well as having a wide

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<sup>1</sup> Timothy Herzog, *World Greenhouse Gas Emissions in 2005* (2010) World Resources Institute <[www.wri.org/publication/navigating-the-numbers](http://www.wri.org/publication/navigating-the-numbers)>. Also, Harris et al. estimate that deforestation contributes between 5–12% of total greenhouse gas emissions, or 8–14% if logging

range of other environmental impacts including biodiversity loss. Legal frameworks to address tropical deforestation have also proliferated in line with increasing concern over tropical forest decline. Early initiatives at international law, such as the ‘soft law’ forestry principles agreed at Rio Earth Summit in 1992, have proven to be influential in instituting later measures, such as forestry certification schemes. Concurrently, international funding initiatives such as ‘debt for nature swaps’ have attempted to address the socio-economic impacts of deforestation. These impacts have been most pronounced in areas characterised by high levels of customary land holding and forest-dependent local communities.

Malaysia, in line with many other tropical nations, has experienced widespread deforestation. It has adopted a range of measures over the past few decades to address the problem, with efforts to combat illegal logging, forest degradation, widespread forest clearance; and more latterly to introduce sustainable forest management.<sup>2</sup> As efforts around sustainable forestry have gathered momentum, multilateral arrangements at international law, such as the United Nations Framework Convention on Climate Change (UNFCCC)<sup>3</sup> have introduced a new range of climate mitigation incentives relevant to tropical rainforest countries like Malaysia. One prominent scheme is REDD+,<sup>4</sup> and recently this has been embraced by Malaysia. The Agreements that emerged from the Cancun Conference of the Parties to the UNFCCC encourage developing countries to initiate REDD+ activities in phases, beginning with the development of a national strategy, followed by implementation and finally, the achievement of outcomes that are measurable, reportable and verifiable.<sup>5</sup> Although the shape and form that REDD+ will take post-2012 is still being determined, scores of demonstration activities have emerged, with the financial backing of bilateral and multilateral donor agencies such as the UN-REDD Programme and the World Bank’s Forest Carbon Partnership Facility. There is also significant activity on the part of civil society and the private sector, with a small but growing voluntary offsets market for carbon sequestration within tropical forests,<sup>6</sup> usually predicated around a co-benefits model. Co-benefit models typically seek to

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emissions are included: Nancy Harris, Sassan Saatchi, Stephen Hagen, Sandra Brown, William Salas, Matthew Hansen and Alexander Lotsch, *New Estimate of Carbon Emissions from Land-Use Change* (2011) Winrock International <[www.winrock.org/ecosystems/files/Winrock%20-%20New%20Estimate%20of%20Carbon%20Emission%20from%20Land%20Use%20Change%20-%20Forest%20Day%20Poster%202010.pdf](http://www.winrock.org/ecosystems/files/Winrock%20-%20New%20Estimate%20of%20Carbon%20Emission%20from%20Land%20Use%20Change%20-%20Forest%20Day%20Poster%202010.pdf)>.

<sup>2</sup> Julia McMorrow and Mustapha Abdul Talip, ‘Decline of Forest Area in Sabah, Malaysia: Relationship to State Policies, Land Code and Land Capability’ (2001) 11 *Global Environmental Change* 217.

<sup>3</sup> *United Nations Framework Convention on Climate Change*, opened for signature 9 May 1992, 1771 UNTS 107 (entered into force 21 March 1994).

<sup>4</sup> REDD+ refers to Reducing Emissions from Deforestation and Degradation and the role of conservation, sustainable management of forests and enhancement of forest carbon stocks: see Conference of the Parties United Nations Framework Convention on Climate Change, *Report of the Conference of the Parties on its sixteenth session, Held in Cancun from 29 November to 10 December 2010 — Addendum — Part Two: Action taken by the Conference of the Parties at its sixteenth session*, UN Doc FCCC/CP/2010/7Add.1 (15 March 2011) para 70 (‘Cancun Agreements’).

<sup>5</sup> *Cancun Agreements* para 73.

<sup>6</sup> 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.

achieve multiple aims from projects, such as climate emissions reductions, environmental protection and socio-economic outcomes for forest-dependent communities.

Thus, in line with broader trends to harness ‘new generation’ environmental management, the governance of tropical forests is increasingly shaped by non-state institutions, such as forest certification bodies and the Non-Government Organisation (NGO) sector. These groups often play a critical role in instigating localised implementation of many international legal and financial initiatives for forest sustainability. The influence of these more flexible organisations have grown due to the inherent limitations of broad-scale multilateral agreements and associated institutions, in effectively establishing forest governance at a national and local level. Thus despite an inception in the UNFCCC multilateral negotiations, REDD+ to date appears to be following the trends toward strong civil society engagement that have characterised earlier forest sustainability schemes. Accompanying the rise of carbon sequestration project activity in the voluntary market has been the development of certification schemes to accredit these projects, such as the Verified Carbon Standard and the REDD+ Social and Environmental Standards. In the context of the proliferation of forest governance forms, and the increasing prominence of REDD+, this article examines the intersections between public law frameworks for addressing forest loss and climate change, the position of forest-dependent communities and the emerging certification systems for tropical forest governance in Malaysia. The experience of forest certification schemes in Malaysia provides a case study to examine the factors that may need to be considered for effective REDD+ development and implementation in order to achieve beneficial environmental and cultural outcomes. The following sections outline the history of forestry governance within wider environmental law and management regimes before turning to the specific Malaysian example.

## II TRENDS IN SUSTAINABLE FORESTRY GOVERNANCE

The emergence of adaptive management frameworks for addressing global environmental sustainability has necessitated systemic change to traditional institutional arrangements for forestry governance at the regional, national and international level. Adaptive management utilises concepts in systems thinking and social learning theory to consider outcomes of future environmental practices through a continuous feedback system. Management is based on constant monitoring, the testing of assumptions, learning and provisions for the introduction of new knowledge and understanding.<sup>7</sup> Certification and monitoring therefore are key components of sustainable and adaptive forest governance. Adaptive management also embraces the notions of risk and uncertainty as ‘natural’ phenomena which echo the diverse and changing conditions of ecosystems, environments and social dynamics. Social learning has gained momentum as a means through which to confront such complexity and uncertainty.<sup>8</sup> The integration of social learning has enabled a more

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<sup>7</sup> Crawford Stanley Holling, *Adaptive Environmental Assessment and Management sponsored by the United Nations Environmental Program* (The Blackburn Press, 2004). See also, Steven Daniels and Gregg Walker, *Working Through Environmental Conflict: The Collaborative Learning Approach* (Paeger, 2001).

<sup>8</sup> Ray Ison, Niels Röling and Drennan Watson, ‘Challenges to Science and Society in the Sustainable Management and use of Water: Investigating the role of Social Learning’ (2007) 10

diverse facilitation of knowledge of ecosystem processes reflective of the values, understandings, norms and knowledge systems of a varied social group,<sup>9</sup> including local forest dwellers. This approach is often coupled with a more deliberative process in decision making, and therefore the rise of social and institutional structures that support social networks and community engagement.

Social learning and adaptive management concepts have been progressively introduced into forest resource management, with the recognition of forest systems, *as with other ecological systems*, as complex systems requiring a more sophisticated model of multi-dimensional environmental governance than previously acknowledged.<sup>10</sup> Moreover, the recognition of environmental systems as dynamic has provided the impetus for legal models to embrace regulatory approaches that allow for greater institutional flexibility, as well as those which recognise a more diverse range of legitimate actors in environmental decision making and management than former 'state-based' structures.<sup>11</sup> Although the inclusion of indigenous peoples and local communities as significant 'actors' in natural resource management and forest sustainability regimes has had a checkered history, there is growing acceptance of the need for legal mechanisms to be cognizant and inclusive of indigenous and customary resource rights.<sup>12</sup>

Given these trends in forest management, the development of REDD+ schemes represent a contemporary regulatory mechanism that operates under the ambit of the broad patterns characterising multilateral public international law frameworks, while simultaneously accommodating more diffuse forms of environmental governance.<sup>13</sup> Central to the latter trend is the proliferation of non-state actors and market mechanisms involved in managing forest resources. Such trends have repositioned the nation state, and to varying degrees, challenged its central role in environmental governance.<sup>14</sup> This is clearly evident in tropical forest based mitigation strategies for reducing emissions. REDD+ projects have proven to be capable of development and implementation well beyond the multilateral climate change negotiations that to date

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- Environmental Science and Policy* 499–511; Claudia Pahl-Wostl, Jan Sendzimir and Paul Jeffrey, 'Resources Management in Transition' (2009) 14(1) *Ecology and Society* 46.
- <sup>9</sup> G Cundill, GS Cummings, D Biggs and C Fabricius, 'Soft Systems Thinking and Social Learning for Adaptive Management' (Published online 19 October 2011) *Conservation Biology* <<http://onlinelibrary.wiley.com/doi/10.1111/j.1523-1739.2011.01755.x/abstract>>.
- <sup>10</sup> Emily Boyd, Natasha Grist, Sirkku Juhola and Valerie Nelson, 'Exploring Development Futures in a Changing Climate: Frontier for Development Policy and Practice' (2009) 27(6) *Development Policy Review* 659.
- <sup>11</sup> Joanne Scott, 'The Multi-Level Governance of Climate Change' in Paul Craig and Gráinne de Burca (eds), *The Evolution of EU Law* (Oxford University Press, 2011) Ch 26, 805.
- <sup>12</sup> See, eg, Deborah Murphy, 'Safeguards and Multiple Benefits in a REDD+ Mechanism', *International Institute for Sustainable Development* (2011). For discussion around land tenure and collective interests see Lee Godden and Maureen Tehan (eds), *Comparative Perspectives on Communal Lands and Individual Ownership: Sustainable Futures* (Routledge-Cavendish, 2010).
- <sup>13</sup> For discussion of environmental governance trends, see for example Charles Benjamin, Steven Brechin and Christopher Thoms (eds), 'Special Issue: Networking Nature: Network Forms of Organization' (2011) 3(3) *Environmental Governance Journal of Natural Resources Policy Research* 211. See also Elinor Ostrom, 'Beyond Markets and States: Polycentric Governance of Complex Economic Systems' (2010) 100(3) *American Economic Review* 641.
- <sup>14</sup> Harriet Bulkeley and Peter Newell, *Governing Climate Change* (Routledge, 2010).

have failed to produce a binding commitment by nations for emissions reductions in the post 2012 period.<sup>15</sup> A significant number of REDD+ operations now function in tropical forest regions outside of the formal auspices of the UNFCCC with many such schemes relying on independent certification to verify carbon stocks and in some cases, to provide social and environmental safeguards.

Emerging REDD+ projects form a new ‘web’ of forestry management operating through various civil society and NGO activities.<sup>16</sup> The ‘actors’ in this governance web comprise amongst others major stakeholders in the forestry resource sector: local and national government departments of various countries, donor states, environmental and associated NGOs, timber companies, international certification bodies, as well as local and indigenous peoples dwelling in, and using, forests in a largely subsistence manner. It is through this myriad of interconnections that REDD+ has developed its capacity to pervade economic, social and environmental spheres in a manner which may often parallel but also transcend the traditional international, public law forms of forestry governance.<sup>17</sup> REDD+ projects therefore can be understood as operating through informal processes of forestry governance, as well as an outcome that is being promoted through more formalised international multilateral agreements.

However, REDD+ projects have climate change mitigation rather than forestry governance as their primary outcome. Indeed, REDD+ is a relative latecomer in the field of tropical forestry management being preceded by many regimes that have sought to address entrenched problems of deforestation, illegal logging and consequent ecosystem and socio-cultural impacts. Since the first global consensus on forest governance in 1992<sup>18</sup> there has been rapid development of international forestry principles (and associated obligations) which were designed to facilitate more sustainable forest management. Such initiatives comprise measures that are legally binding and non-binding.<sup>19</sup> The reliance on non-binding principles at international law

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<sup>15</sup> Daniel Bodansky, ‘The Copenhagen Climate Change Conference: A Post Mortem’ (2010) 104(2) *American Journal of International Law* 230.

<sup>16</sup> Tom Griffiths, ‘Seeing “REDD”? Forests, Climate Change Mitigation and the Rights of Indigenous Peoples and Local Communities’ *Forest Peoples Programme* (2009).

<sup>17</sup> For discussion on the role of REDD+ as a governance mechanism see Esteve Corbera and Heike Schroeder, ‘Governing and Implementing REDD+’ (2011) 14(2) *Environmental Science and Policy* 89. See also Mary Thompson, Manali Baruah and Edward Carr, ‘Seeing REDD as a Process of Environmental Governance’ (2011) 14(2) *Environmental Science and Policy* 100.

<sup>18</sup> *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3 - 14 June 1992, Annex III Non-legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests*, UN Doc A/CONF.151.26 (Vol. III) (14 August 1992) (‘The Forest Principles’).

<sup>19</sup> These include but are not limited to *The Forest Principles*, UN Doc A/CONF.151.26 (Vol. III); *General Agreement of Tariffs and Trade*, opened for signature 30 October 1947 55 UNTS 187 (entered into force 1 January 1948); *United Nations Framework Convention on Climate Change*, opened for signature 9 May 1992, 1771 UNTS 107 (entered into force 21 March 1994); *The Convention Concerning the Protection of the World Cultural and Natural Heritage*, opened for signature 16 November 1972, 1037 UNTS 151 (entered into force 17 December 1975); *United Nations Convention on International Trade in Endangered Species of Wild Fauna and Flora*, opened for signature 3 March 1973, 993 UNTS 243 (entered into force 1 July 1975); *United Nations Convention on Wetlands of International Importance especially as Waterfowl Habitat*,

to govern forestry matters, rather than more prescriptive measures in formal treaties, can be partly understood as resulting from the importance placed on forest exploitation in the economies of many developing countries in the tropical zone.<sup>20</sup> As a corollary, a fundamental constraint to the resolution of robust international forestry law is the reluctance of many developing nation states to allow their national sovereignty over forest resources to be encroached upon by such agreements.<sup>21</sup> Indeed, the 'Forestry Principles' agreed in 1992 in themselves highlight tensions between developing and developed countries around forestry management agendas.<sup>22</sup> These issues are germane to understanding the context for Malaysia's efforts around forest governance that are explored in later sections.

Given the lack of robust multilateral, binding obligations for forest protection at an international level, various organisations, including the World Bank, private timber enterprises and timber certification bodies such as the Forest Stewardship Council, provide international principles to regulate the trade and sustainable management of timber at the regional level. For example, the Forest Law Enforcement Governance and Trade (FLEGT) is an influential program in the international timber trade. The FLEGT action plan was released in 2003 as a policy tool to reduce illegal logging and to control the subsequent illegal timber trade between exporting states and the European Union through voluntary partnership agreements (VPAs). These agreements are devised via a participatory multi-stakeholder process in which VPAs become legally binding bilateral trade agreements.<sup>23</sup> The VPA is recognised as a governance tool in that it promotes improved participation by all stakeholders in forestry governance. In addition, it has proven useful in addressing land tenure issues and corruption levels in forest management and trade. Such programs and organisations exemplify the web of interconnected civil society forms of governance that operate in the interstices between public international law and regulation. Yet the continuing rate of tropical deforestation would suggest that the outcomes from such quasi-regulatory frameworks are 'unimpressive'.<sup>24</sup>

### III CERTIFICATION SCHEMES

Numerous voluntary forest and carbon certification schemes have built on the platform of this civil society-based 'forest principles' framework. Each scheme has a

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opened for signature 2 February 1971, 996 UNTS 245 (entered into force 21 December 1975); *United Nations Convention on Biological Diversity*, opened for signature 5 June 1992, 1760 UNTS 142 (entered into force 29 December 1993) ('CBD'); *International Tropical Timber Agreement*, opened for signature 26 January 1994, 1955 UNTS 81 (entered into force 1 January 1997).

<sup>20</sup> See, eg, David Humphreys, *Forest Politics: The Evolution of International Cooperation* (Earthscan, 1996).

<sup>21</sup> Peter Kanowski, Constance McDermott and Benjamin Cashore, 'Implementing REDD+ Lessons From Analysis of Forest Governance' (2011) 14 *Environmental Science and Policy* 111.

<sup>22</sup> See, eg, John Lemons and Donald Brown, *Sustainable Development, Ethics and Public Policy* (Springer, 1995).

<sup>23</sup> Forest Law Enforcement Governance and Trade, 'FLEGT Voluntary Partnership Agreements' (2011) *European Commission*, <<http://ec.europa.eu/environment/forests/flegt.htm>>.

<sup>24</sup> David Takacs 'Forest Carbon Projects and International Law: A Deep Equity Legal Analysis' (2011) 22 *Georgetown International Environmental Law Review* 521.

range of objectives that include, inter alia, combating illegal logging, encouraging sustainable forest management, improving forest governance and achieving co-benefits through the implementation of REDD+. The proliferation of certification schemes is indicative of more diffuse forms of environmental regulation that rely on market and consumer pressure to achieve governance objectives. The appeal of a certification scheme is the effective use of 'eco labeling', as a way of differentiating timber or carbon products and therefore offering a market advantage to certified timber or REDD+ programs.<sup>25</sup>

One of the most prominent forest certification schemes, the Forest Stewardship Council (FSC), already effectively operates as a non-state governance institution in the development and identification of sustainable timber for international trade. Since the establishment of the scheme, the program has certified over 146 million hectares of forest via its chain of custody or forest management certification programs. The directive of the FSC is to promote environmentally and socially appropriate management of global timber through implementing a standard based on the organisation's 10 principles and criteria for sustainable forest management at national and sub-national levels.<sup>26</sup> The FSC logo is given to timber suitable for export that has been verified through a third party assessment independent of timber and state organisations, to certify that all relevant forestry activities comply with the FSC standard.<sup>27</sup> Support for the scheme in the early 1990s was mixed, with a number of states and timber organisations either in strong support or actively opposing the immediate adoption of the measures. The appeal of the later FSC certification program has been attributed to its alignment with a period of increased investment in market environmentalism and subsequent eco-labeling. The NGO sector during the early 1990s also was broadly supportive of the certification scheme, marshalling the political support in those timber importing countries that were characterised by a comparatively high level of environmental awareness.<sup>28</sup> The FSC continues to receive an increasing level of input and support from the NGO sector, enhancing the reputation of the certification scheme as a transparent and rigorous standard.<sup>29</sup>

While there have been a range of timber certification schemes, to date there is no single scheme that is universal to all forestry projects and also applicable to carbon projects.<sup>30</sup> Therefore, it is within the patchwork of various cooperative frameworks for

<sup>25</sup> Andrew Long, 'Global Climate Governance to Enhance Biodiversity and Well-Being; Integrating Non-State Networks and Public International Law in Tropical Forests' (2011) 14 *Environmental Law* 95.

<sup>26</sup> Forest Stewardship Council, 'FSC International Standard, FSC Principles and Criteria for Forest Stewardship, FSC-STD-01-001 Version 4.0' (1996) <[http://www.fsc.org/fileadmin/web-data/public/document\\_center/international\\_FSC\\_policies/standards/FSC\\_STD\\_01\\_001\\_V4\\_0\\_EN\\_FSC\\_Principles\\_and\\_Criteria.pdf](http://www.fsc.org/fileadmin/web-data/public/document_center/international_FSC_policies/standards/FSC_STD_01_001_V4_0_EN_FSC_Principles_and_Criteria.pdf)>.

<sup>27</sup> Forest Stewardship Council, 'About FSC' (2011) <<http://www.fsc.org/about-fsc.html>>.

<sup>28</sup> Heiko Liedeker and Michael Spencer 'Forest Stewardship Council' in Dietrich Burger, Jürgen Hess and Barbara Lang (eds), *Forest Certification: An Innovative Instrument in the Service of Sustainable Development* (GTZ, 2005).

<sup>29</sup> Donald Scheper, 'Challenges to Legitimacy at the Forest Stewardship Council' (2010) 92 *Journal of Business Ethics* 279.

<sup>30</sup> Edward Merger, Michael Dutschke and Louis Verchot, 'Options for REDD+ Voluntary Certification to Ensure Net GHG Benefits, Poverty Alleviation, Sustainable Management of Forests and Biodiversity Conservation' (2011) 2(2) *Forests* 550.

forestry governance, undertaken by a myriad of institutions and private and non government organisations, that REDD+ schemes will need to operate, in addition to meeting the REDD+ specific compliance requirements. Concurrently such schemes will need to comply with guiding forestry certification principles where applicable. In these situations of multi-level forest and climate change governance, current and future REDD+ operations will need to comply with multiple procedures to ensure that the goals of social and ecological benefits are effectively and equitably delivered, as well as climate mitigation outcomes achieved. In effect, these certification standards produce international, national and regional rules for such projects which are overseen by various formal and informal actors with varying degrees of authority and power.<sup>31</sup>

In a recent review of the 10 most appropriate forest and carbon certification programs that seek to achieve outcomes consistent with co-benefit activities for REDD+, the authors observe that many pilot projects are using several standards as a means of attracting further investment.<sup>32</sup> The Verified Carbon Standard,<sup>33</sup> initiated in 2005, provides a greenhouse gas accounting program for the validation of associated greenhouse gas mitigation projects. The standard also provides a number of methodologies to be used for the quantification of emissions from deforestation and degradation that are applicable and currently operating in various REDD+ programs.<sup>34</sup> In June 2010 the Climate Community and Biodiversity Alliance released a voluntary certification standard scheme (REDD+ S&E standard) that is specifically designed to meet REDD+ objectives. The emergence of such a scheme may indicate that existing certification bodies (in both timber and carbon trade) are expanding their current standards to include criteria that meet the desired outcomes of REDD+, including key safeguards pertaining to local and indigenous rights.

#### IV REDD+ AND INDIGENOUS AND LOCAL COMMUNITY RIGHTS

Regardless of the expansion of more flexible and transparent forestry management arrangements, many nations experiencing a substantial degree of deforestation and illegal logging are still beset by issues of poor forest governance and they lack robust compliance ‘on the ground’. Even though REDD+ has ostensible objectives in ensuring more equitable and inclusive outcomes for local forest dependent communities, it has the potential to reinforce existing disparities in power and access that characterise many national forestry governance arrangements. REDD+ certification procedures are principally directed to ensuring nationally comprehensive standards. Thus, REDD+ procedures will typically seek to integrate national values and forestry governance systems into the international market place, thereby re-trenching in various ways the existing inherent problems in achieving sustainable forestry practices that simultaneously can meet social and cultural objectives. Furthermore, in areas of poor forest governance REDD+ activities, however laudable

<sup>31</sup> Julia Black, ‘Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes’ (2008) 2(2) *Regulation and Governance* 137.

<sup>32</sup> Merger, Dutschke and Verchot, above n 30.

<sup>33</sup> Voluntary Carbon Standard Association, *Voluntary Carbon Standard—Specification for the Project-Level Quantification, Monitoring and Reporting as well as Validation and Verification of Greenhouse Gas Emission Reductions or Removals* (2008).

<sup>34</sup> For example see operation of VCS in Kenya at <<http://www.v-c-s.org/news-events/news/kenya-project-issues-first-redd-credits-under-vcs>>.



their goals, still add another layer of complexity into forestry governance structures that have to be negotiated by local, indigenous forest dependent communities. The very complexity of the emerging multilevel forestry governance and certification arrangements raises concerns as to how indigenous and local communities' interests and rights will be protected.<sup>35</sup>

The dilemma emerging — on the one hand mandating that robust certification processes are implemented; and on the other hand, ensuring that such procedures are inclusive of, and sensitive to, indigenous and local community interests — has many parallels in situations of communally-held land and resources across the globe.<sup>36</sup> A prominent example comes from the moves to individuate land and resource titles, over what were previously communally-held resource interests. Individuation and formalisation of title, while allowing for recognition of indigenous and communal interests, can also be insensitive to the traditional communal interrelationships upon which the viability of such systems depends. Thus, 'for many indigenous peoples and local communities, whose access to land and resources has traditionally been associated with race and cultural identity, the capacity to build viable futures is premised upon retaining and enhancing communally held land and resources'.<sup>37</sup> The capacity of indigenous and local peoples to retain and enhance communally-held forest resources is under significant challenge in the face of pressures from commercial forest exploitation, illegal logging, and at times, ineffectual national governance. Sustainable forestry certification and REDD+ schemes present yet another dimension of challenge for these groups to navigate and negotiate, in order to ensure effective protection of their communal interests.

#### A *Safeguarding Indigenous and Local Community Rights*

It has been acknowledged that safeguards need to be in place as a way of preventing undesirable effects on indigenous and local communities. It is envisaged that such safeguards can be adopted through implementing policies and processes that act as a risk management strategy. Safeguards are currently available at multiple levels, ranging from multilateral forums such as the UNFCCC, multilateral initiatives like the UN-REDD programme and the Forest Carbon Partnership Facility, through to bilateral partners making REDD+ funding conditional on certain governance requirements.<sup>38</sup> Clearly though, many of these safeguards are yet to be tested in a grounded manner and are not legally binding.

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<sup>35</sup> See, eg, IIPFCC 2009 'Statement of Shared Vision', <<http://indigenouspeopleissues.com>>. See also Harriet Schroeder, 'Agency in International Climate Negotiations: The Case of Indigenous Peoples and Avoided Deforestation' (2010) 10 *International Environmental Agreements Politics, Law and Economics* 317.

<sup>36</sup> Lee Godden and Maureen Tehan, 'Introduction' in Lee Godden and Maureen Tehan (eds), *Comparative Perspectives on Communal Lands and Individual Ownership: Sustainable Futures* (Routledge-Cavendish, 2010) 1.

<sup>37</sup> Ibid.

<sup>38</sup> Murphy, above n 12. The safeguard requirements of the UN-REDD programme and the FCPF are not canvassed in this article since Malaysia is not a member of either scheme. For discussion of these safeguards, see Nicholas Moss and Ruth Nussbaum, 'A Review of Three REDD+ Safeguard Initiatives', *Forest Carbon Partnership Facility and UN-REDD Programme* (2011).

The Cancun Agreements outline a number of safeguards in Appendix I, including transparency in forestry governance, respecting indigenous and local knowledge, rights and practices as well as providing for indigenous and local communities as engaged and informed stakeholders.<sup>39</sup> In particular the Agreement stipulates that nation states must address issues of land tenure and ensure the participation of indigenous and local communities in REDD+ schemes:

When developing and implementing their national strategies or action plans, to address, inter alia, the drivers of deforestation and forest degradation, land tenure issues, forest governance issues, gender considerations and the safeguards identified in paragraph 2 of appendix 1 to this decision, ensuring the full and effective participation of relevant stakeholders, inter alia indigenous peoples and local communities.<sup>40</sup>

A number of other international obligations and legal instruments also pertain to the interests of indigenous peoples in environmental governance which are relevant to the effective operation of REDD+. Although not strictly legally binding upon nations, the *United Nations Declaration on the Rights of Indigenous People*<sup>41</sup> outlines indigenous and local community interests pertaining to rights to access, use and develop their lands and resources,<sup>42</sup> rights to protect indigenous peoples from actions that would remove them from their traditional lands and resources,<sup>43</sup> rights for participation and decision making in matters that affect their lands and/or rights,<sup>44</sup> rights to free and informed consent in environmental decision making,<sup>45</sup> as well as rights to fair, equitable and adequate compensation.<sup>46</sup> The latter provision, it is suggested here, would apply to the equitable distribution of REDD+ related benefits.<sup>47</sup> The *Convention on the Conservation of Biological Diversity* requires nation states to not only respect, but to maintain the knowledge and practices of local communities relevant to the conservation of biodiversity.<sup>48</sup> The Ad Hoc Expert Group of this Convention also provides a platform for indigenous peoples to engage with and

<sup>39</sup> *Cancun Agreements* app I para 2. The decision adopted by the Conference of Parties 17 in Durban, December 2011, recalls the safeguards contained in Appendix I of the Cancun Agreements and requires developing country Parties undertaking REDD+ activities to provide information on how these safeguards are being addressed and respected. See Conference of the Parties United Nations Framework Convention on Climate Change, *Draft decision on guidance on systems for providing information on how safeguards are addressed and respected and modalities relating to forest reference emissions levels and forest reference levels as referred to in decision 1/CP.16, appendix I*, Draft Decision -/CP.17 (advance unedited version 2011) paras 1–6.

<sup>40</sup> *Cancun Agreements* para 72.

<sup>41</sup> *United Nations Declaration on the Rights of Indigenous People*, GA Res 61/295, UN GAOR, 61<sup>st</sup> sess, 107<sup>th</sup> plen mtg, UN Doc A/Res/61/295 (13 September 2007) ('UNDRIP'). While not legally binding on states, the UNDRIP is nevertheless important in developing international legal norms relating to the responsibilities of states towards indigenous peoples rights.

<sup>42</sup> UNDRIP art 26.

<sup>43</sup> UNDRIP arts 8(b), 10, 19.

<sup>44</sup> UNDRIP art 18.

<sup>45</sup> UNDRIP art 19.

<sup>46</sup> UNDRIP arts 20.2, 28.1 and 28.2.

<sup>47</sup> Emily Gerrard, 'Impacts and Opportunities of Climate Change: Indigenous Participation in Environmental Markets' in Jessica Weir (ed), *Country, Native Title and Ecology* (AIATSIS, forthcoming).

<sup>48</sup> CBD art 8.

influence future REDD+ negotiations. The *Rio Declaration* promotes indigenous interests by acknowledging the vital role of local and indigenous knowledge in environmental management.<sup>49</sup> Given the important role for traditional knowledge in maintaining sustainable forestry, it is in the interest of the State to support measures that allow local and indigenous peoples to not only continue to engage in land management practices, but also to adopt meaningful participatory processes to improve environmental governance. This notion of ‘environmental democracy’<sup>50</sup> is also reflected by the *International Labour Organisation Convention (169)*<sup>51</sup> which promotes access to information by indigenous and local groups and rights to participate in environmental decision making. However as Birrell et al. stipulate:

These broad requirements, however, often of a procedural nature, are insufficient to protect and promote the specific, in-situ interests of affected indigenous peoples and local communities, where this “participatory” rhetoric may not ensure the equitable and sustainable operation of this initiative including the capacity to reap tangible benefit.<sup>52</sup>

This backdrop of international principles recognising indigenous and local interests, as well as encouraging the participation of indigenous and local communities in environmental governance, provides a basis against which to evaluate current certification measures. Many standards have been developed without explicit reference to such principles and with minimal input from indigenous and local community representation. The majority of certification schemes, such as the Verified Carbon Standard, are limited to provisions for the quantitative verification of greenhouse gas related emissions and methodologies to ensure correct carbon accounting,<sup>53</sup> however the REDD+ Social & Environmental standard (S&E) does consider social as well as environmental co-benefits.<sup>54</sup> The REDD+ S&E standard was developed to support government and private sector-led REDD+ programs in a range of participating states after consideration of the potential risks that such programs may pose, in particular to indigenous peoples and local communities.<sup>55</sup> The standard provides a series of principles, criteria and indicators that are designed to integrate with REDD+ programs. Principles 1 – 3 specifically outline various criteria in regards to the rights, benefits and long term sustainable outcomes of REDD+ programs in relation to indigenous peoples and local communities.

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<sup>49</sup> *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3 - 14 June 1992, Annex I Rio Declaration on Environment and Development, UN Doc A/CONF.151/26 (Vol.I) (12 August 1992), Principle 22.*

<sup>50</sup> For discussion on REDD+ and provisions for improved democratic participation in environmental decision making around the converging norms of environmental and human rights law, see Takacs, above n 25.

<sup>51</sup> *International Labor Organization Convention (No 169) Convention Concerning Indigenous and Tribal Peoples in Independent Countries*, opened for signature 27 June 1989 1650 UNTS 383 (entered into force 5 September 1991) art 6 part II, arts 13–15.

<sup>52</sup> Kathleen Birrell, Lee Godden and Maureen Tehan, ‘Global Climate Change and REDD Prisms for Conceiving Indigenous Peoples Engagement’ (forthcoming 2012) 3(2) *Journal of Environment and Human Rights*.

<sup>53</sup> Merger, Dutschke and Verchot, above n 30.

<sup>54</sup> Some other certification standards that incorporate social co-benefits are the SOCIALCARBON Standard and the Plan Vivo Standards, see Merger, Dutschke and Verchot, above n 31.

<sup>55</sup> REDD+ SES, *REDD+ Social and Environmental Standards: Version 1 June 2010*, <[www.redd-standards.org](http://www.redd-standards.org)>.

Principle 1 of the standard requires participating nation states to identify different rights holders and the differing land use, occupation and tenure rights (statutory and customary) of those rights holders. In addition the principle promotes the conversion to statutory forms of customary rights to lands and resources that are traditionally owned, used, occupied or acquired by indigenous peoples.<sup>56</sup> Furthermore, the standard requires for any REDD+ program to ensure the full, effective participation of rights holders, including indigenous and local community representatives, whereby their free and informed prior consent must be obtained, in accordance with their customs and traditions, prior to the development of any such project.<sup>57</sup> In addition to the recognition of and promotion of such rights, Principle 3 of the standard requires any REDD+ program to improve the long term livelihood, security and well being of indigenous Peoples and local forest dependent communities, in so far as this relates to generating additional resources for such communities.<sup>58</sup> The REDD+ S&E standard is currently operating in five pilot partnership programs across Brazil, Ecuador, Nepal and Tanzania, and most recently in Indonesia. While these are the pilot countries utilising the standard, it remains open to REDD+ projects in other countries, like Malaysia, to use this certification standard.

Given the rising prominence of certification standards in international and national forestry contexts, and their growing momentum in REDD+ schemes, the following sections analyse the implementation of forestry certification in Malaysia. This national case study will allow insights from general certification processes in order to inform suggestions for how REDD+ frameworks and projects could most effectively be implemented to achieve co-benefits for indigenous peoples and local communities. Malaysia presents a pertinent and timely case study since it has a strong record of existing forest certification, alongside a high proportion of forest-dependent indigenous communities. The interaction between these two factors in the national context is particularly important given that Malaysia is at a relatively early stage in the adoption of carbon offset models, and in light of the forthcoming REDD+ activities scheduled for the country.

## V MALAYSIAN FORESTRY SECTOR

Malaysia is a federation comprising of thirteen States and three Federal Territories. Two states, Sabah and Sarawak, are located in East Malaysia on the island of Borneo, and the remaining States and Territories form West Malaysia, otherwise known as Peninsular Malaysia. Article 74(2) of the Constitution specifies that the Malaysian States have jurisdiction over land and natural resources. This provision empowers each State to independently regulate forests through enacting laws and formulating policy.

The forestry sector has played a pivotal role in underpinning Malaysia's strong economic growth over the past few decades, although in recent years its significance has diminished. In 1967 agriculture and forestry accounted for 55 percent of the

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<sup>56</sup> Ibid, Principle 1.1, 1.2; Indicator 1.2.3.

<sup>57</sup> Ibid, Principle 1.3.

<sup>58</sup> Ibid, Principle 3; Indicators 3.14–3.2.2.

country's Gross Domestic Product (GDP), which declined to 38 percent in 1990.<sup>59</sup> In 2000, the forestry sector alone contributed approximately 4.7 percent towards GDP.<sup>60</sup> Indigenous people groups, who traditionally rely heavily on forest resources, comprise 11.7 per cent of Malaysia's population.<sup>61</sup> The majority of these groups, referred to as natives,<sup>62</sup> are located on the island of Borneo in Sabah and Sarawak and these peoples make up close to 50 per cent of the population in those states. Indigenous groups on Peninsula Malaysia are referred to as the Orang Asli, and represent a tiny proportion of the population at just 0.6 percent.<sup>63</sup> Their rights to forest areas have often been infringed in favour of commercial exploitation of forest resources.

#### A *Forests and Deforestation in Malaysia*

There are different definitions of what constitutes forest in Malaysia and varying figures on the amount of land covered by forest. Officially, Malaysia claims 19.6 million ha, almost 60 percent of the country's land area, as forestland.<sup>64</sup> However Malaysia defines forest rather broadly, and as a result the quality of this 'forest' area is unclear. The Food and Agriculture Organization's estimates show that primary forests only covered 12 percent of the country's surface in 2005, with the remaining forestland consisting of semi-natural forests such as timber plantations, and productive tree plantations.

The total forested area is classified into the following categories:

1. Totally protected areas: national parks, wildlife reserves and a network of Virgin Jungle Reserves (1.9 million ha);
2. Permanent Reserved Forest (PRF): this consists of production and protection forest (14.3 million ha); and
3. Stateland forests: land reserved for future development purposes (3.45 million ha).

Malaysia's Prime Minister has set a goal of maintaining 50 percent of forest cover in the future. One of the major threats to the achievement of this goal is the encroachment of oil palm plantations on natural forests and deforestation for timber purposes. Although officially Malaysia claims that its rate of deforestation has remained fairly stable over the last decade, other statistics point to an increasing rate of deforestation. A study released in January 2011 based on satellite imaging showed that the deforestation rate in Sarawak increased from 1.89 percent over the period 2005–2007 to 2.14 percent in the period 2009–2010.<sup>65</sup> These different figures may

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<sup>59</sup> McMorrow and Talip, above n 2, 217.

<sup>60</sup> Mohd Shahwahid, 'Forest Certification in Malaysia' in Benjamin Cashore et al (eds), *Confronting Sustainability: Forest Certification in Developing and Transitioning Countries* (Yale School of Forestry and Environmental Studies, 2006).

<sup>61</sup> Carol Yong, *Forest Governance in Malaysia: An NGO Perspective* (FERN, 2006).

<sup>62</sup> *Federal Constitution* (Malaysia) art 161A.

<sup>63</sup> SR Aiken and CH Leigh, 'Seeking Redress in the Courts: Indigenous Land Rights and Judicial Decisions in Malaysia' (2011) 45(4) *Modern Asian Studies* 825, 830.

<sup>64</sup> Food and Agriculture Organization of the United Nations, *Global Forest Resources Assessment 2010 Country Report Malaysia* (FAO, 2010).

<sup>65</sup> SarVision, *Impact of Oil Palm Plantations on Peatland Conversion in Sarawak 2005-2010* (2011).

arise because Malaysia does not consider the conversion of forests to plantations as deforestation.

### B *Legal, Policy and Institutional Frameworks relating to Forestry*

Although the states are responsible for regulating the forestry sector, the federal government does have some power over specific aspects of forestry such as resource conservation and local government plans, and it retains oversight over matters like Environmental Impact Assessments and regulations on forested catchments.<sup>66</sup> The National Forestry Council (NFC) was established in 1971 to enhance cooperation between the federal and state governments and to ensure a coordinated approach in the implementation of policies and programs related to forestry.

The NFC introduced the National Forestry Policy (NFP) in 1978, which inter alia outlines principles for sustainable forest management, forest harvesting, regeneration, rehabilitation and management of non-wood forest products; the constitution of sufficient areas of Permanent Reserved Forest; and the establishment of downstream processing industries. Each state has applied the NFP.

The Federal Parliament passed the *National Forestry Act* in 1984, which builds on existing state law. While all states in the Peninsula have enacted this Act, Sabah and Sarawak continue to regulate their forestry sectors using their own regulations. As a result, there are three separate jurisdictions in relation to forest resources: the Peninsula, Sabah and Sarawak.<sup>67</sup>

The NFP was revised in 1992 in an attempt to make the policy ‘greener’ and now it comprises state policy on the development of community forestry, the establishment of Permanent Forest Estates, law enforcement, education, conservation, tree plantations and agro-forestry; together with the commercial maximisation of timber resources.<sup>68</sup> This aim of commercial ‘maximisation’ of timber resources has had particular ramifications for indigenous communities in Malaysia.

### C *Indigenous People and Land Rights*

Indigenous peoples’ land rights are protected in the federal constitution,<sup>69</sup> federal and state legislation<sup>70</sup> and at common law.<sup>71</sup> Despite the legal recognition of indigenous land rights, the various governments retain ownership over almost all of Malaysia’s forested land as Crown lands,<sup>72</sup> except for some privately owned plantation forests.<sup>73</sup>

<sup>66</sup> Carol Yong, *Logging in Sarawak and the Rights of Sarawak’s Indigenous Communities* (JOANGO HUTAN, 2010) 61–64.

<sup>67</sup> Chip Fay (ed), *Review of Legal Frameworks for Community-based Natural Resource Management in Selected Asian Countries*, (World Agroforestry Centre, 2007) 51.

<sup>68</sup> Yong, above n 61, 25.

<sup>69</sup> According to Article 13(1), ‘No person shall be deprived of property save in accordance with law.’ Article 13(2) states that ‘No law shall provide for the compulsory acquisition or use of property without adequate compensation.’

<sup>70</sup> *Aboriginal Peoples Act 1954* (revised 1974); *Land Ordinance 1930* (revised 1996) in Sabah; *Land Code 1958* in Sarawak.

<sup>71</sup> *Adong bin Kuwau v Kerajaan Negeri Johor* [1997] 1 MLJ 418 (‘Adong’); *Nor Anak Nyawai & Ors v Borneo Pulp Plantations & Ors* [2001] 2 CLJ 769 (‘Nor Anak Nyawai’).

<sup>72</sup> Land administered under the *National Forestry Act 1984*, *National Parks Act 1980*, and *Protection of Wildlife Act 1972* and Forest Enactments in various states.

State governments lease large areas of publicly owned (i.e. Crown) land out to timber companies. The recognition of indigenous peoples' rights in forest areas is a matter for each state to determine and it varies from state to state, as outlined below. In addition to statutory law, customary law (*adat*), which is passed down from generation to generation, governs both personal matters and land and resources, often entailing communal forms of use. Generally customary rights do not include the right to alienate land, and exclusive individual rights exist only in relation to the collection of forest products.<sup>74</sup> Customary law has been codified to some extent but despite the degree of formal recognition, indigenous communities' rights in forest areas are often disregarded in practice.

Although Malaysia has thrice voted in favour of the *United Nations Declaration on the Rights of Indigenous Peoples* ('*UNDRIP*'),<sup>75</sup> there is little evidence that the government takes these obligations seriously. There is a concern that Malaysia views the obligations as non-binding or unenforceable since the *UNDRIP* is only a declaration and not an international treaty.<sup>76</sup> Indigenous communities' have made a number of complaints to the Human Rights Commission of Malaysia (SUHAKAM) about infringement of their customary land rights, prompting the Commission to initiate a National Inquiry into the land rights of indigenous peoples.<sup>77</sup>

### 1 Peninsula

The *National Land Code*, which only applies on the Peninsula, does not provide recognition of collective ownership, consequently excluding the right of indigenous people to obtain land title. Instead, s 6 and 7 of the *Aboriginal Peoples' Act* 1954 recognises 'Aboriginal Areas' and the gazettal of 'Aboriginal Reserves'. Although Permanent Reserved Forests cannot be established in 'Aboriginal Reserves', the Act does not seem to exclude the establishment of Permanent Reserved Forests in 'Aboriginal Areas'. There is some limited authority for this position as an unreported case<sup>78</sup> has acknowledged the first right of Aboriginals in 'Aboriginal Areas' where these overlap with Permanent Reserved Forests. The Ipoh High Court in that case found that even though the land had not been gazetted as an 'Aboriginal Area', the approval of the State government was sufficient to create the area, establishing the exclusive rights of the Orang Asli to gather forest products in the Permanent Reserved Forest area. Nevertheless the priority for Aboriginal interests has yet to be upheld in practice.<sup>79</sup>

As of December 2003, the area of Aboriginal Reserves that had been gazetted was 19 223 ha. There are approximately 29 000 ha pending gazettal and 80 000 ha proposed

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<sup>73</sup> FAO, above n 65, 12.

<sup>74</sup> Aiken and Leigh, above n 63, 883.

<sup>75</sup> *UNDRIP*, UN Doc A/Res/61/295.

<sup>76</sup> Colin Nicholas, Jenita Engi and Teh Yen Ping, *The Orang Asli and the UNDRIP: From Rhetoric to Recognition* (Center for Orang Asli Concerns, 2010).

<sup>77</sup> SUHAKAM, *Background Paper: SUHAKAM'S National Inquiry into the Land Rights of Indigenous Peoples in Malaysia* (2011).

<sup>78</sup> *Koperasi Kijang Mas & 3 Ors v State Government of Perak*, Ipoh High Court.

<sup>79</sup> Fay, above n 67, 58.

for Aboriginal Reserves pending approval. The Aboriginal Areas located in forest/wildlife reserves or national parks covered 9873 ha.<sup>80</sup>

## 2 Sarawak

Sarawak recognises Native Communal Reserves and Native Customary Rights under s 5(1) of the *Sarawak Land Code* 1958. The communal reserves concept is similar to many other forms of 'native' land-holding that were instituted in the post-colonial phase of the mid twentieth century as the Native Communal Reserves remain under state ownership.<sup>81</sup> To date, these reserves have not been widely implemented in Sarawak. Indigenous groups who wish to claim Native Customary Rights which are similar to usufruct style rights of access and use of forest resources must have held these rights prior to 1958 and the group must obtain a permit from the Superintendent of Land. Section 5(2) of the *Land Code* sets out six ways to establish Native Customary Rights. These methods include: the felling of virgin jungle and occupation of the land, planting of land with fruit trees, and occupation of cultivated land.

The *Sarawak Forest Ordinance* 1954 governs Native Customary Rights in forest areas, and prohibits indigenous people from creating customary rights in forest reserves and State lands (ie. by virgin felling) without authorisation of the District Officer. Indigenous communities are able to enter their respective Native Customary Rights on the boundary register that is maintained by the District Forest Office. Registration must occur within 60 days from when the forest areas are first gazetted, otherwise the rights are extinguished.<sup>82</sup> This policy of the Sarawak administration has been criticised as not allowing sufficient time for natives to register claims, especially those groups living in remote areas with limited access to formal information.<sup>83</sup>

The questions of what constitutes continuous occupation sufficient to establish Native Customary Rights and what evidence must be submitted to support such a claim have formed the basis of much case law. The landmark case in Sarawak, *Nor Anak Nyawai*, involved the plaintiffs' claim that the defendants, timber companies, had trespassed and damaged their ancestral land. The High Court of Sabah and Sarawak ruled that the plaintiffs' had pre-existing rights which had not been extinguished by legislation. However this decision was overturned by the Court of Appeal on the basis that there was insufficient grounds to show occupation.<sup>84</sup>

While these matters remain without legal resolution, it will be difficult to provide certainty for the establishment of Native Customary Rights in forest areas. This situation of uncertainty has direct ramifications for attempts to effectively incorporate customary tenures and rights into timber certification and REDD+ processes. Where Native Customary Rights have been established, companies exploiting forest

<sup>80</sup> Lyn Teck Wyn, 'Critical Review of the Forest Regulatory Framework and its Implementation in Malaysia' in Henry Scheyvens (ed), *Critical Review of Selected Forest-Related Regulatory Initiatives: Applying a Rights Perspective* (Institute for Global Environmental Strategies, 2011).

<sup>81</sup> For example in Australia, the 'deeds of grant in trust' adopted in Queensland operated under a similar model.

<sup>82</sup> *Sarawak Forest Ordinance* 1954 s 6.

<sup>83</sup> Adrian Wells, Thang Hooi Chiew and Chen Hin Keong, *Systems for Verification of Legality in the Forest Sector, Malaysia: Domestic Timber Production and Timber Imports* (VERIFOR, 2008) 15.

<sup>84</sup> *Superintendent of Lands & Surveys, Bintulu v Nor Anak Nyawai & Ors and another* [2006] 1 MLJ 256.



resources are obliged to compensate any violation or disturbance of traditional rights of agricultural areas belonging to local communities.<sup>85</sup>

Despite the recognition of Native Customary Rights, the *Sarawak Land Code* and *Forest Ordinance* have been repeatedly amended to increasingly restrict and create vulnerability in respect of the rights.<sup>86</sup> In addition, new laws such as the *Land Surveyors Ordinance* 2001 have been enacted to criminalise activities, such as community mapping,<sup>87</sup> and to remove from the courts the power to decide on the admissibility of community-made maps as evidence in court.<sup>88</sup> Again, these amendments will make it increasingly difficult to ascertain exactly what customary rights exist; and how any rights might be formally incorporated into timber certification and REDD+ activities.

### 3 Sabah

Part IV of the *Land Ordinance Sabah* 1930 regulates native tenure in Sabah. Section 65 defines customary land as land in lawful possession by natives either in continuous occupation or cultivation for three or more consecutive years or by title. There are two ways native title can be registered: proclamations for land settlement are issued under s 81 and all natives must submit land claims within a specified time frame to receive compulsory registration; or under s 70 natives can apply for native title to untitled land for agriculture plots no more than 20 hectares. In 2005 there were a reported 14 301 native title applications still pending, some decades old.<sup>89</sup>

The *Sabah Forest Enactment* 1968 does not allow for native title in Permanent Reserved Forest areas. Nevertheless under s 14 of the enactment, indigenous communities can register certain rights and privileges over forest reserves within 3 months from when the forest area was gazetted. These rights are extinguished if not registered and subject to cancellation if they are not used for three years.

Additionally, Sabah's 100 year Sustainable Forest Management License Agreements obliges forestry license holders to respect the rights and privileges that have been included in the gazettal process, including rights to gather forest products for subsistence and the designation of community forestry areas. These provisions were included to assist the transition of the Sustainable Forest Management License

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<sup>85</sup> Wells, Chiew and Keong, above n 83, 16.

<sup>86</sup> In 1996 a number of amendments were made to the *Land Code* 1958 to shift the burden of proof onto the native claimant to prove the existence of customary rights and insert a presumption that the state owned the land without the presence of Native Customary Rights until those rights are proved: Ramy Bulan and Amy Locklear, *Legal Perspectives on Native Customary Rights in Sarawak* (SUHAKAM, 2008). Most recently the Chief Minister of Sarawak changed the definition of 'native' so that any party entering into a joint-venture with the Land Custody and Development Authority of Sarawak to develop plantations would be considered a 'native' in order to legalize their transactions under the *Land Code*: see Keruah Usit, 'Taib changes definition of "native" after NCR defeat', *Hornbill Unleashed* (online) 25 June 2011 <<http://hornbillunleashed.wordpress.com/2011/06/25/19877/>>.

<sup>87</sup> Community mapping uses traditional knowledge and anthropological evidence to establish the patterns of traditional customary use of areas and/or resources. It is often used as evidence to establish the elements of traditional use of resources in native 'title' claims.

<sup>88</sup> Yong, above n 61, 26.

<sup>89</sup> Wyn, above n 80, 58.

Agreements towards FSC certification. These obligations are unique to Sabah and they are not mandated in forestry concession licenses in the Peninsula or Sarawak.<sup>90</sup>

#### D *What Constitutes 'Legal' Timber?*

For many customary and subsistence users of the forest defining the 'legal' and 'illegal' taking of timber and timber products is critical. If such subsistence activities of the indigenous people are to fall within definitions of illegal activities, it has major repercussions for indigenous livelihoods—and also for recognition of customary tenure rights. In Malaysia, the state identifies timber taken without official permission and without rent as illegal.<sup>91</sup> However the concept of legality has many dimensions as far as indigenous and local communities are concerned. Their concerns, a recent NGO report has suggested, must be accommodated in order to, 'meaningfully resolve issues of their native rights at three levels.'<sup>92</sup> The report indicates that these are firstly inadequacies in the land and forestry legislation in the different states, which allow logging and plantation licences to be held over indigenous communities' customary land without their consent. Secondly, the laws are regarded as lacking mechanisms to resolve conflicts between entities undertaking commercial utilisation of the forests and indigenous groups. Finally, the procedures for granting forestry licences lack transparency.<sup>93</sup> Given that state declarations about what constitutes illegal logging typically take precedence over the claims for customary forest rights made by forest dependent communities, it has generated conflict as indigenous communities seek to protect their traditional lifestyles, resources and territories.<sup>94</sup> It is within the history of ongoing conflicts around forests that recent certification measures will need to be implemented.

#### VI *Forest Certification Schemes in Malaysia*

As forest certification schemes have developed globally over the past decades, Malaysia has not only embraced these schemes, but has developed its own national programs. The development of domestic schemes has been seen as driven by international market pressures, but also due to Malaysia's desire not to have international schemes imposed irrespective of its national situation.<sup>95</sup>

The Malaysian Timber Certification Scheme (MTCS) was established in 2001, and is overseen by the Malaysia Timber Certification Council (MTCC). The initial standard, based on the International Tropical Timber Organization's Criteria and Indicators on Sustainable Forest Management, has since evolved into the Malaysia Criteria and Indicators for forest management certification (MC&I 2002). It comprises nine principles, 47 criteria and 96 indicators. This standard is now subject to its first review and the revised standard will be known as the MC&I (Natural Forest). A third draft of the standard was released at the time of writing and it is expected to be implemented in October 2012.

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<sup>90</sup> Fay, above n 67, 54.

<sup>91</sup> Yong, above n 61, 9.

<sup>92</sup> Ibid.

<sup>93</sup> Ibid.

<sup>94</sup> Ibid.

<sup>95</sup> Shahwahid, above n 60, 88.

The MTCS now operates in 4.67 million hectares of permanent reserved forest in Peninsular Malaysia, and 55 949 hectares in Sarawak. A number of European countries, including Denmark, France and the United Kingdom have included the MTCS as one of its accepted schemes for timber importation.<sup>96</sup> In contrast, the Timber Procurement Assessment Committee in the Netherlands have decided that the MTCS does not meet its standards for sustainable timber, largely due to concerns about the recognition of indigenous peoples' rights relating to the control of external activities in certified forest areas.<sup>97</sup>

The FSC is also active in Malaysia but on a much smaller scale than the MTCS. Some of the Forest Management Units that have obtained FSC certification in Malaysia are the Perak Integrated Timber Complex, with an area of 9000 hectares in 2002; and Deramakot Forest Reserve covering 55 000 hectares in Sabah, 2007.<sup>98</sup> There appears to be a price premium for FSC certified timber which is not enjoyed by MTCS certified areas.<sup>99</sup> This may be due to the perceived differences between FSC and MTCS accreditations, which have been widely disseminated by NGOs. Although initially envisioned that the MTCS would evolve towards FSC endorsement, they have so far been unable to gain this endorsement. The main obstacle has been indigenous groups' claims to land ownership in forest areas and the lack of participation of stakeholders in the formulation of the MTCS.

#### A *Participation in Forest Certification Schemes*

The development of the MC&I involved a process of consultation with 85 organisations and companies in October 1999. A National Steering Committee was formed in 2001 to revise the existing MC&I standards. Three indigenous peoples groups that were members of the committee later withdrew their membership as they felt their views were not being respected, particularly in regards to native customary land claims.<sup>100</sup> These resignations were followed by WWF Malaysia, who was concerned that the MC&I 2001 did not provide a clear pathway to obtaining endorsement from FSC, and that the input received from the consultations was not incorporated into the standards.

The MTCC then invited other social and environmental groups to be involved in the consultation process that had little to do with the protection and recognition of indigenous peoples' rights. One peak indigenous representative group, JOANGO, questioned whether the presence of these groups was being used to merely meet the requirement of involving forest communities in the process of developing the standards but with little direct incorporation of benefits for these groups.<sup>101</sup>

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<sup>96</sup> Malaysia Timber Certification Council, 'Malaysian Timber Certification Scheme' (2011) <[http://www.mtcc.com.my/mtcc\\_scheme\\_intro.asp](http://www.mtcc.com.my/mtcc_scheme_intro.asp)>.

<sup>97</sup> Timber Procurement Assessment Committee, 'Summary: of the Revised Judgment of the Timber Procurement Assessment Committee (TPAC) on the Malaysia Timber Certification System (MTCS) dated 22 October 2010' <<http://www.tpac.smk.nl/webadmin/files/Summary%20revised%20TPAC%20judgement%20MTCS%20FINAL.pdf>>.

<sup>98</sup> Shahwahid, above n 60, 88.

<sup>99</sup> Ibid, 89.

<sup>100</sup> Greenpeace, *Missing Links: Why the Malaysian Timber Certification Council Certificate Doesn't Prove that MTCC Timber is Legal nor Sustainable* (Greenpeace, 2005) 14.

<sup>101</sup> Yong, above n 61, 26.

## B *Treatment of Indigenous Peoples' Rights and Tenure*

Nonetheless, despite the withdrawal of some groups, both the MTCS and FSC contain references to indigenous peoples' rights and tenure in their certification criteria. In fact the MC&I are based on the FSC principles and criteria, but go further in articulating indicators and verifiers that relate specifically to implementation in Malaysia.

Principles 2 and 3 of the FSC and MC&I 2002 relate to tenure and indigenous peoples' rights respectively. Principle 2 mandates that 'long-term tenure and use rights to the land and forest resources shall be clearly defined, documented and legally established' followed by more specific obligations to:

- Demonstrate clear evidence of long-term forest use rights to the land (for example, land title, customary rights, or leased agreements);
- Ensure local communities with legal or customary tenure or use rights maintain control, to the extent necessary to protect their rights and resources, over forest operations, unless they delegate control with free and informed consent to other agencies; and
- Employ appropriate mechanisms to resolve disputes over tenure claims and use rights. The circumstances and status of any outstanding disputes will be explicitly considered in the certification evaluation. Disputes of substantial magnitude involving a significant number of interests will normally disqualify an operation from being certified.

Principle 3 states that 'the legal and customary rights of indigenous peoples to own, use and manage their lands, territories and resources shall be recognised and respected.' Specific criteria state that:

- Indigenous peoples shall control forest management on their lands and territories unless they delegate control with free and informed consent to other agencies;
- Forest management shall not threaten or diminish, either directly or indirectly, the resources or tenure rights of indigenous peoples; and
- Sites of special cultural, ecological, economic or religious significance to indigenous peoples shall be clearly identified in cooperation with such peoples, and recognised and protected by forest managers.
- Indigenous peoples shall be compensated for the application of their traditional knowledge regarding the use of forest species or management systems in forest operations. This compensation shall be formally agreed upon with their free and informed consent before forest operations commence.

At one level, the MC&I purports to offer equal, if not more substantive protections than, FSC standards with respect to indigenous peoples' rights and tenure. In reality though, the MTCC does not consider that its role is to address these issues; stating that 'land ownership and tenure rights for indigenous peoples lie outside the mandates of MTCC, forest and timber certification.'<sup>102</sup> An artificial division of responsibility

<sup>102</sup> MTCC, 'MTC Information Note on the Malaysian Timber Certification Scheme' (2005) [www.mtcc.com.my](http://www.mtcc.com.my), cited in Greenpeace, above n 101, 8.

fails to comprehend the nexus between forest areas and indigenous peoples' land rights. Although the MTCC has purported to address this matter through the issuance of additional instructions to ensure that the traditional uses of the forest by indigenous peoples are respected,<sup>103</sup> this does not provide an adequate mechanism to deal with conflicting land claims that arise in areas where companies are involved in timber operations and indigenous peoples may also hold customary rights.

One example is the Samling Sela'an Linau FMU, which was MTCC certified in October 2004. This certification occurred despite the area overlapping territories claimed by the Penan indigenous peoples group, which have been the subject of litigation since 1998.<sup>104</sup> Five cases have now been launched in the Upper Baram by Penan communities.<sup>105</sup> The initial case argues that the government issued a logging licence to Samling Plywood, a subsidiary of the Samling group of companies, in an 'unlawful'<sup>106</sup> manner without consideration of the native customary rights in the area. In response, the Government of Sarawak, as the First Defendant, denied that the plaintiffs hold native customary rights over the land, and even if they did, these rights were extinguished when no claims or privileges were made within 60 days of the notification being published.<sup>107</sup> To date, none of these cases have been resolved and this litigation is only one claim of an estimated 100 filed by native plaintiffs in Sarawak.<sup>108</sup>

Although courts are generally supportive of indigenous plaintiffs, and receptive to their claims,<sup>109</sup> the subsequent judgments have not led to significant changes in state or federal government policy or legislation. Instead, Malaysian governments continue to take a strong adversarial stance against any indigenous litigants. As the Samling case illustrates, courts can take years to resolve a particular case, especially when appealed. In the meantime, there is the possibility that indigenous leaders, who can provide vital witness testimonies, may pass away and the pressure on other members of the community, who find it hard to attend long hearings, becomes too great.<sup>110</sup> The barriers to successful indigenous claims to customary forest areas are numerous from both a practical and legal perspective.

Accordingly, while strictly speaking, it may be outside the remit of forest certification schemes to resolve conflicting land claims, arguably standards should provide stronger guidance on how forestry companies should proceed if such conflicts exist. Otherwise it is in the interests of companies to forestall litigation, and in the meantime

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<sup>103</sup> Malaysian Timber Certification Council, 'Efforts Towards Sustainable Forestry Management Undermined by SMK decision' (2011) <<http://www.mtcc.com.my/fullstory.asp?ID=143>>.

<sup>104</sup> Yong, above n 66, 35.

<sup>105</sup> World Wire, 'Penan Go to Court to Defend Heart of Borneo Rainforests', December 21 2010, <<http://www.world-wire.com/news/1012210001.html>>.

<sup>106</sup> Writ of Summons, *Kelasau Naan & 3 Ors vs Sarawak Government & 2 Ors*, High Court Suit Number 22-46-98 (MR).

<sup>107</sup> Defence of 1<sup>st</sup> Defendant, *Kelasau Naan & 3 Ors vs Sarawak Government & 2 Ors*, High Court Suit Number 22-46-98 (MR).

<sup>108</sup> Marcus Colchester et al, *Land is Life: Land Rights and Oil Palm Development in Sarawak* (Forest Peoples Programme and Perkumpulan Sawit Watch, UK and Indonesia, 2002) 35.

<sup>109</sup> Andrew Harding, 'Practical Human Rights, NGOs and the Environment in Malaysia' in Anderson and Boyle (eds), *Human Rights Approaches to Environmental Protection* (Oxford University Press, Oxford, 1996) 227, 246.

<sup>110</sup> Aiken and Leigh, above n 63, 973.

continue to exploit the forest resources. Indeed, Samling's response to NGO reports criticising the forest certification that was obtained is that it is the state government's responsibility to regulate and verify land claims.<sup>111</sup> Meanwhile, the government has little incentive to process native customary claims since they often view this land as 'idle' or 'waste' land that can be put to productive use by commercial forestry exploitation.<sup>112</sup> Given the difficulties already experienced in effectively incorporating customary interests into timber certification schemes, there are clear challenges for the instigation of REDD+ schemes in Malaysia. Critics of REDD+ characterise it as yet another scheme that aims to utilise this land in a 'productive' way, while supporters point to the potential of these projects to deliver co-benefits to communities. The following section examines the progress on REDD+ activities in Malaysia and explores potential challenges that may arise in ensuring effective co-benefit outcomes in forest areas.

## VII *Overview of REDD+ Policy and Projects in Malaysia and Potential Governance Problems*

Malaysia is regarded as one of the leading countries for its record on implementing sustainable forest management,<sup>113</sup> and it has a historically low emissions baseline from deforestation in the 1990s when compared to other tropical forest nations like Indonesia, ironically thereby limiting the scope for its involvement in REDD+ schemes. Nonetheless, although Malaysia displayed some initial reservations about REDD,<sup>114</sup> the expansion of REDD to REDD+ to include the role of conservation, sustainable management of forests and enhancement of forest carbon stocks has provided greater opportunities for Malaysia's participation in the scheme.

### A *Development of REDD+ Policy and Projects in Malaysia*

Unlike many other tropical forestry nations, Malaysia is not part of the UN-REDD Programme or the Forest Carbon Partnership Facility. As a relative latecomer to REDD+, this initial absence may be explained in part by the fact that Malaysia simply missed the early opportunities to become involved in these initiatives, or alternatively Malaysia may, until recently, have been of the view that it did not require the capacity building assistance offered by these programs. Nonetheless, Malaysia has now become a more active participant in REDD+.

REDD+ policy developments are coordinated on a national level, under the Ministry of Natural Resources and Environment (NRE). Malaysia is taking a phased approach to implementing REDD+:

<sup>111</sup> Malaysian Timber Certification Council, *Samling Response to NGOs – Finalised* (2005) <<http://www.mtcc.com.my/fullstory.asp?ID=41>>.

<sup>112</sup> Fadzilah Majid Cooke, 'Expanding State Spaces using 'Idle' Native Customary Land in Sarawak' in Fadzilah Majid Cooke (ed), *State, Communities and Forests in Contemporary Borneo* (Australian National University Press, 2006) 45.

<sup>113</sup> PD Hardcastle et al, *Capability and Cost Assessment of the Major Forest Nations to Measure and Monitor their Forest Carbon* (Office for Climate Change, 2008).

<sup>114</sup> In its submission to the COP12, Malaysia expressed a concern that REDD, as it was known at the time, might lead to countries perversely increasing logging activities in order to benefit from a higher baseline against which emission reductions would be calculated in the future: see Submission by Malaysia to the UNFCCC Subsidiary Body for Scientific and Technological advice, Twenty-fourth session Bonn, 18–26 May 2006, FCCC/SBSTA/2006/MISC.5, 93–95.

1. Readiness, including development of the national REDD+ strategy and capacity building;
2. Implementation of the national REDD+ strategy, which includes pilot projects; and
3. Full-scale REDD+ implementation that would achieve quantified changes in greenhouse gas emissions and removals.

Working groups have been established to address matters like baselines, monitoring, verification and reporting (MRV), institutional arrangements, governance, payment of benefits and capacity building.<sup>115</sup> It is expected that the final draft of the national REDD+ strategy will be finalised by the end of 2012.<sup>116</sup> Most recently, a Task Force on REDD+ was established in January 2011.<sup>117</sup> Given that Malaysia has only just begun the process of developing REDD+ frameworks, it is not surprising that to date, there have been no laws or regulations enacted relating specifically to REDD+ activities.

On the sub-national level, Sabah has been taking an active lead in developing a REDD+ roadmap for the state. The Sabah Forestry Department is coordinating REDD+ development and hosted a workshop in August 2011, with the assistance of WWF, to facilitate stakeholder consultation on the proposed REDD+ roadmap. This roadmap will form the basis for the state's sub-national strategy and support participation in any international REDD+ mechanism.<sup>118</sup>

On top of the policy developments, Sabah will also receive funding from the European Union to develop a number of pilot projects over a three year period, commencing in 2012. The focus will be on carbon enhancement activities such as sustainable forest management, reduced impact logging and forest restoration.<sup>119</sup> Sabah already has several years experience in forest carbon projects, as the host of the world's first tropical Improved Forest Management project to be certified by VCS.<sup>120</sup> The conservation project covers an area of 25 000 hectares in the Lahad Datu District and has been in operation since 1992.<sup>121</sup>

In Sarawak, Tropical Offsets Pty Ltd is developing a small REDD+ project in Long Bangan, which will consist of 3000 hectares of land as communal forest and 2400 hectares as agriculture land and a 'buffer zone' for the carbon offsets created. The

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<sup>115</sup> Abdul Rahman, Elizabeth Philip and Pan Khang Aun, 'REDD Plus Framework for Malaysia' <<http://www.cbd.int/doc/meetings/for/wscbredd-apac-01/other/wscbredd-apac-01-malaysia-en.pdf>>

<sup>116</sup> Samsudin Musa, Mohd Hizamri Mohd Yasin, Elizabeth Philip and Khali Aziz, 'Reducing Emissions from Deforestation and Degradation (REDD+) – Malaysia' International Technical Seminar on REDD+, Tokyo 16-17 Feb 2011 <[http://www.ffpri.affrc.go.jp/redd-rc/en/seminars/reports/2011/02/16/01/09\\_Samsudin\\_Bin\\_Musa.pdf](http://www.ffpri.affrc.go.jp/redd-rc/en/seminars/reports/2011/02/16/01/09_Samsudin_Bin_Musa.pdf)>

<sup>117</sup> Ibid.

<sup>118</sup> Joe Leong, 'Sabah moves forward with REDD+ road map', *Borneo Post* (online), August 24 2011 <<http://www.theborneopost.com/2011/08/24/sabah-moves-forward-with-redd-road-map-latest/>>.

<sup>119</sup> Ibid.

<sup>120</sup> Face the Future, *First forest project on Sabah, Borneo, registered under the VCS* (2011) <<http://www.face-the-future.com/en/first-forest-project-sabah-borneo-registered-under-vcs>>.

<sup>121</sup> Ibid.

developers have gained the support of the Sarawak government and are currently waiting on approval from company who holds a forest concession over the area.<sup>122</sup>

There has been some controversy surrounding REDD+ projects in Malaysia, specifically relating to Shift2Neutral, an Australian company who announced in August 2010 that they had signed an agreement with nine indigenous leaders in Sarawak to certify carbon offsets from a forest area of more than 100 000 hectares.<sup>123</sup> Subsequently, there have been reports that Shift2Neutral has issued false carbon offset certificates, making it unlikely that there is any substance to their proposed REDD+ project.<sup>124</sup> In addition, the peak indigenous peoples' group in Sarawak, *Jaringan Orang Asal SeMalaysia* (Indigenous Peoples' Network of Malaysia or JOAS) released a statement declaring they were not involved and had no knowledge of the indigenous groups who were involved in the proposed REDD+ project. The speculative activities of companies in the REDD+ sphere makes it even more difficult to ensure that sustainable and equitable outcomes will be achieved.

## B 'REDD+ FLAGS'

Malaysia's past record of respecting and protecting indigenous peoples' rights in forest areas in forest certification schemes raises some red flags when considering the implementation of REDD+ projects. There is the concern that as the government once again has the major responsibility for developing REDD+ policy, it will favour the interests of those wanting to capitalise on carbon sequestration opportunities without incorporating adequate safeguards for the rights of indigenous people and local communities. It remains to be seen whether Malaysia will develop a national REDD+ certification scheme, akin to the MTCS, or will support international standards, such as the REDD+ S&E.

The inability or reluctance of MTCS to engage in, and adequately recognise indigenous land claims, does not set an encouraging foundation upon which REDD+ certification schemes can progress further on these issues. While FSC has more stringent standards when it comes to recognition of indigenous peoples' rights, the lack of uptake and implementation in Malaysia may foreshadow a similar pattern in REDD+ international and domestic certification schemes, in that only the weaker standards may be relied upon.

More generally, there are concerns that development of REDD+ policy in Malaysia will follow similar practices to that of the MTCC in only superficially involving indigenous groups in order to legitimate the process, without seriously taking their concerns into account. Moreover, REDD+ certification schemes are similar to forest certification schemes in that both seek to have the carbon/timber certified as quickly as possible. In many instances the desire for rapid certification is at odds with the objectives of indigenous peoples' groups wishing to pursue claims to customary land.

<sup>122</sup> Email from Brett Pritchard to Jessica Rae, 15 September 2011.

<sup>123</sup> David Fogarty, 'Australian Firm Signs CO2 Deal with Malaysia Tribes' *Reuters* (online), August 6 2010 <<http://uk.reuters.com/article/2010/08/06/us-malaysia-carbon-forests-idUKTRE6750LZ20100806>>.

<sup>124</sup> Ben Cubby, 'Revealed: Scandal of Carbon Credit Firm' *Sydney Morning Herald* (online), April 8 2011 <<http://www.smh.com.au/environment/revealed-scandal-of-carbon-credit-firm-20110407-1d6a4.html>>.



Nevertheless, there are more compatible goals between indigenous groups and the private sector arising out of REDD+ than from the timber production, especially given the increasing recognition of the role traditional knowledge can play in forest conservation.<sup>125</sup>

Turning to the national governance sphere, the independence of Malaysian states in forming forestry policy and legislation could be problematic for achieving robust environmental and socio-economic goals, as REDD+ tends to require a high degree of federal control, especially if projects are to be accounted for on a national, rather than sub-national, scale.<sup>126</sup> In the context of forest certification, the MTCC, a national body, was reluctant to include indigenous peoples' rights when formulating the Malaysian standard on the basis that it was a matter for the Malaysian states to determine.<sup>127</sup> If this approach is taken in the development of REDD+ frameworks and standards, it could prove detrimental to the incorporation of strong obligations for the states with respect to indigenous peoples' rights under a future UNFCCC regime for REDD+.

In addition, the states, in particular Sarawak, have been reluctant to provide statistics on forest areas to the federal government since forestry is regarded as a sector under state control. As REDD+ will likely require accounting on a national basis to determine whether overall levels of carbon emissions have increased or decreased, difficulties may arise if the Malaysian states continue to withhold data. Sarawak is opposed to concluding a VPA in the context of FLEGT for a number of reasons, including what it perceives as an intrusion of sovereignty in attempting to resolve conflicts over customary land rights.<sup>128</sup> Similarly, it may be unwilling to negotiate any REDD+ framework that would potentially infringe its autonomy over forest resources, particularly if such a policy or certification scheme required formal recognition of natives' customary land rights in more than a nominal way.

## VIII LESSONS FROM FOREST CERTIFICATION FOR REDD+

Malaysia is at a critical moment in forest governance and management as it is just beginning to develop REDD+ frameworks and processes. Malaysia is well advanced along the path of adopting sustainable forestry principles and more adaptive management practices, even though the actual implementation of discrete parts of those standards has not always been as robust as the principles might intend. There is also considerable variation across the country given the federated government

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<sup>125</sup> *CBD* art 8(j): Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices. Malaysia ratified the *CBD* in 1994. See also Andrew Nelson and Kenneth M Chomitz, 'Effectiveness of Strict vs. Multiple Use Protected Areas in Reducing Tropical Forest Fires: A Global Analysis Using Matching Methods' (2011) 6(8) *PLoS ONE* 1.

<sup>126</sup> Jacob Phelps, Edward L Webb and Arun Agrawal, 'Does REDD+ Threaten to Recentralize Forest Governance?' (2010) 328 *Science* 312.

<sup>127</sup> Fay, above n 67, 57.

<sup>128</sup> Sarawak Timber Association, *Myth, Facts & Reality of EU FLEGT VPA: Sarawak's Perspective* (2009) 30.

structure. Further, Malaysia has engaged in international timber certification processes; mindful of the international trade implications for the country if it fails to participate in these quasi-governance forms. Given the expansive aims of the REDD+ projects, together with the extent of tensions still surrounding forest sustainability and customary tenures in the country, it is important that the new frameworks learn from the forest certification experience.

Perhaps most importantly there is an overriding need to ensure *genuine* participation of indigenous peoples and local communities in REDD+ processes. While there is general acknowledgment that this is a laudable goal, achieving meaningful community engagement in practice often can prove more elusive. The pattern of inadequate indigenous inclusion has been repeated in many other resource management contexts across the globe,<sup>129</sup> so the problems are not just confined to the Malaysian situation. However Malaysia does appear to have a patchy record on local community engagement in respect of its earlier MTCC procedures. More effective inclusion of indigenous and local community interests would require at a minimum that consultation and negotiation occurs with these groups. Interestingly, indigenous groups report that they have not to date been invited to REDD+ discussions in Malaysia. Part of the explanation may be that in the preliminary stages, REDD+ is being characterised largely as a technical activity and the focus is primarily placed on issues like carbon accounting rather than how to deliver co-benefits to communities. However, unless there is active consideration of the inclusion of co-benefits, including recognition of customary rights to forest areas, in the initial stages, the design of REDD+ procedures may prove incapable of effectively including these aspects at later stages. Sustainability agendas for REDD+ procedures must be holistic in aligning environmental and cultural factors with the requirements for ensuring market integrity through baseline setting, monitoring and verification.

The status of customary land rights remains one of the most intractable problems to be addressed if REDD+ is to achieve long term co-benefits. To date, Malaysia's forest certification scheme only recognises customary land rights in accordance with existing Malaysian law. Subsequently, some forest areas have been certified under the timber certification schemes, even though there are disputes pending in the courts regarding customary land rights to these areas. Increasingly timber importing countries are no longer satisfied with the justification given by forest exporting countries of existing legal and institutional arrangements acting as an impediment to the recognition of customary land rights. The rejection of MTCS by the Netherlands, as described above, sends an important signal to Malaysian authorities that REDD+ projects, like timber operations, need to be able to demonstrate a respect for indigenous peoples' rights otherwise they risk rejection by potential international purchasers of REDD+ carbon credits and the sequestration credits generated will not be commercially viable. The role of emissions trading markets which allow bio-sequestration credits to be used as offsets, such as those emerging in California, USA

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<sup>129</sup> Godden and Tehan, above n 12; Emily Gerrard, 'Impacts and Opportunities of Climate Change: Indigenous Participation in Environmental Markets' (2008) 3(13) *Land, Rights, Laws: Issues of Native Title* (Native Title Research Unit, AIATSIS); John Costenbader (ed), 'Legal Frameworks for REDD: Design and Implementation at the National Level', *International Union for the Conservation of Nature*, Environmental Policy and Law Paper No. 77 (2009); Griffiths, above n 17; Rights and Resources Initiative, *The End of the Hinterland: Forests, Conflict and Climate Change* (2009–2010).

and in Australia, will be important in this regard as these markets can set high benchmarks for the bio-sequestration credits that can incorporate strong co-benefit outcomes.

Thus the emerging REDD+ activities potentially provide an opportunity for international leverage around these issues in that REDD+ frameworks should mandate respect for, and the effective implementation of, customary land rights. Validation procedures should not occur without free, prior and informed consent of local communities in accordance with international principles for best practice resource management. Such principles are contained in international instruments such as the *UNDRIP*. As noted, more generally, the Malaysian federal government is obliged to uphold international treaties on indigenous peoples' rights. Yet the past experience in forest certification in Malaysia suggests that the national government may be reluctant to enforce these obligations on states due to forestry governance being regarded as a state competence. This is a significant difficulty as it demonstrates that there remain considerable legal and policy barriers to ensuring that states respect international obligations.

The question of statutory recognition of customary rights also is a vexed one. On the one hand, schemes such as the REDD+ S&E certification require statutory recognition of customary land rights and many schemes promote formal title and tenure arrangements; this position could be mandated for REDD+ schemes. A minimal requirement for inclusion of customary rights would be a useful safety net. However as the experience with the forest certification schemes can demonstrate, it is possible for indigenous and local communities to be defeated by the procedural requirements for such statutory recognition of rights. Further, the formalisation process that occurs with statutory tenures can distort dynamic communal relationships within forest-dependent communities. REDD+ certification will need to operate across both informal and formal land tenure and land rights systems, as well as the systems that operate to grant concessions and licences if it is to be effective in achieving co-benefits in this sphere.

Another important ingredient in the success of REDD+ in Malaysia will be to seek to achieve cooperation between the federal government and the states in the readiness and implementation phases as this will be vital to ensure the operation of REDD+ is able to achieve *actual* emission reductions. Even though REDD+ activities and frameworks will need to develop on a sub-national level, countries will most likely still need to report on a national basis in any future multilateral agreement under the UNFCCC.<sup>130</sup> This national platform of accounting and auditing will be necessary for monitoring, reporting and verification purposes, to prevent leakage and importantly,

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<sup>130</sup> Conference of the Parties United Nations Framework Convention on Climate Change, *Draft decision on guidance on systems for providing information on how safeguards are addressed and respected and modalities relating to forest reference emissions levels and forest reference levels as referred to in decision 1/CP.16, appendix I*, Draft Decision -/CP.17 (advance unedited version 2011) para 11, which 'acknowledges that subnational forest reference emissions levels and/or forest reference levels may be elaborated as an interim measure, while transitioning to a national forest reference emission level and/or forest reference level.'

obtain finance.<sup>131</sup> Therefore any formulation of REDD+ frameworks in Malaysia must be able to facilitate cooperation between federal and state governments around very conflicted issues such as the degree of regional autonomy in forest management and status of customary land rights, in order to ensure the federal government will be able to meet its international commitments regarding the commercial integrity of credits generated as well as in terms of co-benefits for indigenous and local communities. Similar considerations will apply with respect to bilateral arrangements for REDD+ style projects where donor countries typically require national governments to be accountable for REDD+ outcomes, even though the programs may be delivered in areas under regional governments.

## IX CONCLUSION

REDD+ promises much potential to address the long term interrelated problems of tropical deforestation, local community impoverishment and loss of habitat for forest species, while simultaneously offering mitigation of greenhouse gas emissions. The emphasis upon climate change global outcomes at times obscures the critical issues that operate at the local levels where REDD+ measures must be adopted and implemented. While there is optimism that this form of forest governance involving a mixture of public international law frameworks and non-state actors adopting alternative forms of standard setting can be more responsive to the rights of indigenous peoples and local communities, there remains an underlying tension between national sovereignty and international standards that must be overcome.<sup>132</sup>

REDD+ schemes can build upon a range of experiences gained from the implementation of a numerous measures designed to achieve sustainable forestry. Timber certification provides an important forerunner to REDD+ and offers both synergies with and lessons for REDD+ activities. The emergence of certification schemes tailored to REDD+ programs reflect the voluntary carbon market's attempts to bridge the intersection between REDD+ governance and the delivery of co-benefits to forest dependent communities. Carbon certification schemes will remain a key feature of the REDD+ landscape in years to come, despite the development of multilateral and bilateral safeguard initiatives in more formal international schemes, since they offer an independent method of verification to consumers.

In Malaysia, the lines of independence have been blurred in the development of a national timber certification scheme. While these national standards have ostensibly adopted a range of environmental, social and cultural outcomes, the implementation of these standards has faced challenges in light of customary land rights in forest areas. Without robust engagement with indigenous and local communities, any certification procedures run the risk of re-entrenching existing disparities in the access

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<sup>131</sup> *Cancun Agreements* para 71 (c) and Conference of the Parties United Nations Framework Convention on Climate Change, *Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention*, Draft Decision -/CP.17 (advance unedited version 2011) para 64.

<sup>132</sup> This tension is apparent in the preamble to the Conference of the Parties United Nations Framework Convention on Climate Change, *Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention*, Draft Decision -/CP.17 (advance unedited version 2011), which notes that 'guidance on systems for providing information on how safeguards referred to in appendix I to decision 1/CP.16 are addressed and respected should be consistent with national sovereignty, national legislation and national circumstances.'

to and use of the forest resources in a manner which may jeopardize sustainable outcomes and disadvantage local forest dependent communities. The development of REDD+ in Malaysia must seek to consult indigenous people from the outset and to provide substantive outcomes for these groups from REDD+ projects in order to avoid encountering some of the difficulties that have emerged in the implementation of forest certification schemes.