7. Retreading negotiations on equity in environmental governance: Case studies contrasting the evolution of ABS and REDD+

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1. INTRODUCTION

Irrespective of the type or scale of economy, biodiversity loss and climate change are over-riding concerns for all countries. In this context, the role of tropical rainforests, which host important biodiversity and hold large reserves of carbon, cannot be overemphasised. In 2009, the Bali Action Plan recommended the development of a market-based incentive mechanism to reduce emissions from deforestation and forest degradation (REDD). Since then, there has been much discussion and debate over the ethical and equity aspects of such arrangements to various stakeholders. Concerns over equity in the realm of the environment or even specifically biodiversity are not new in the international arena. Lengthy negotiations related to the development of a protocol on access to genetic resources and equitable sharing of benefits arising from their utilisation (ABS)

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within the Convention on Biological Diversity (CBD) process were initiated in 2004.[2] What the discussions during the intervening period have taught us are useful lessons to manage expectations on rewards from incentives. These have to be tempered with realistic notions of rights of various stakeholders over bio-cultural resources, knowledge and property. Given that REDD-plus agreements can also be categorised as pertaining to bio-cultural agreements, we think that it would be useful for these discussions to take cognisance of some of the debates, especially those related to equity, within the ABS context.

To better illustrate our arguments we use specific case studies from the Peruvian Amazon and systematise the lessons learned from ABS discussions that can be useful for the negotiations for reducing emissions from deforestation in tropical rainforests, using the case of Indonesia in Southeast Asia as a case in point.[3] We selected Indonesia as a case study given the current progress in the framing of initiatives related to REDD-plus in that country. We also consider that the debates ongoing in Indonesia on REDD-plus implementation are a reflection of debates in other developing countries that are rich in biodiversity and valuable ecosystems.

In this chapter, we first address contemporary biodiversity and climate debates in the international legal arena. Second, we analyse Law 27811 of Peru and the ways in which the re-imagining of the governance of knowledge about biological diversity operates in practice. Third, we address lessons for REDD-plus initiatives and Indonesia from legal processes associated with Law 27811. The chapter ends by exploring global challenges in ensuring equity in climate change and biodiversity negotiations. The study draws on interviews and participant observations conducted during fieldwork in Peru and Ecuador, relevant literature reviews on Indonesia, as well as on the analysis of applicable national and international legal instruments.

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[2] CBD COP Decision VII/19 on Access and benefit-sharing as related to genetic resources (Article 15), available at: <http://www.cbd.int/decision/cop/?id=7756> (accessed 10 March 2012).

[3] Peru and Indonesia are among the seventeen megadiverse countries (which have more than 70% of the earth's species) and are part of the Like Minded Megadiverse Countries (LMMC).

2. CURRENT BIODIVERSITY AND CLIMATE CHANGE DEBATES AT THE INTERNATIONAL LEVEL

In the last 50 years, human actions have changed biodiversity more than ever before, having a negative impact on ecosystems and putting at risk the well-being of future generations.[4] Climate change is projected to increase the frequency of natural hazards with implications for peoples' livelihoods, including food security and human mobility.[5] Climate change mitigation to address the drivers of climate change as well as adaptation strategies to deal with its consequences need to be urgently implemented.[6]

Only recently has the literature addressed the inter-linkages in terms of lessons that can be learned in biodiversity and climate change negotiations. Moreover, the focus has been on lessons from the United Nations Framework Convention on Climate Change (UNFCCC) negotiations, to those under the CBD, and not vice versa. One such example is the negotiations and recent agreement by the UN 65th General Assembly to establish the Intergovernmental Platform on Biodiversity and Ecosystem Services (IPBES), which constitutes a science-policy mechanism that will link biodiversity, ecosystem services and human well-being similar to the Intergovernmental Panel on Climate Change (IPCC).[7] However, the experiences in ABS negotiations in tropical forest countries that can be useful in negotiations concerning REDD-plus are not fully understood.[8] In the following sections, we argue that biodiversity negotiations also have lessons that can be useful for climate change governance and associated discussions on equity.

The global biodiversity and climate change negotiations are at a turning point. Environmental negotiations on these topics are rapidly

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[4] Millennium Ecosystem Assessment (2005), 2–5.

[5] UNDP (2009).

[6] Klein et al. (2007), 745–77.

[7] See <http://ipbes.net> (accessed 7 January 2011); Larigauderie and Mooney (2010).

[8] A negotiation process does not necessarily imply that an agreement will be reached at the end of the process. In some instances, forest people have engaged in dialogue and negotiation with public and private institutions and fruitful outcomes have emerged. Yet, this is not always the case. Sometimes the term 'negotiation' between forest people, and governmental institutions and companies is used even when the result is imposed by one of the parties. In these cases, we cannot talk about an agreement reached through an equitable negotiation. Hence, caution should be made when analysing social processes that involve negotiations between heterogeneous stakeholders.

changing and politically charged. At the World Summit on Sustainable Development, Heads of States and governments called for negotiating 'within the framework of the Convention on Biological Diversity, bearing in mind the Bonn Guidelines, an international regime to promote and safeguard the fair and equitable sharing of benefits arising out of the utilization of genetic resources'.[9] The Ad hoc Open-ended Working Group on Access and Benefit-sharing made progress on the development of such a regime. In Cali, Colombia, in March 2010, this Working Group drafted a Protocol, which was accepted by the Parties as a basis for further negotiations. Finally, after intense negotiations, the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity (Nagoya Protocol on Access and Benefit Sharing) was adopted at the 10th Conference of the Parties in Nagoya, Japan.[10]

At the UNFCCC-COP15 in Copenhagen in December 2009, a non-binding Accord was reached which explicitly acknowledged the role of REDD-plus. It states:

> We recognize the crucial role of reducing emission from deforestation and forest degradation and the need to enhance removals of greenhouse gas emission by forests and agree on the need to provide positive incentives to such actions through the immediate establishment of a mechanism including REDD-plus, to enable the mobilization of financial resources from developed countries.[11]

In future negotiations, countries will need to decide a negotiation strategy, including whether they in fact support a one single legal instrument on REDD-plus, such as in the case of the Protocol on Access and Benefit Sharing linked to the CBD or the Kyoto Protocol associated with the UNFCCC negotiations.

In environmental legal practice, critical events, including tensions between countries with differentiated natural resources, have arisen. Current discussions associated with the CBD and UNFCCC include diverging positions of the parties concerning differentiated responsibilities, and divisions between more and less industrialised states and discussions over the legal principle of State sovereignty. The legal

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[9] World Summit on Sustainable Development (2002), para.44 (o).

[10] The results of the meetings of the ad hoc Open-ended Working Group on Access and Benefit-sharing and more information about the negotiation process of the Nagoya Protocol can be found at <http://www.cbd.int/abs>.

[11] The Accord can be found at <http://unfccc.int/resource/docs/2009/cop15/eng/11a01.pdf >.

principle of State sovereignty mentioned in the CBD (article 15) and UNFCCC (preamble) calls into question its possible articulation with public participation in local decision-making. Similarly, this principle raises challenges concerning international cooperation to solve environmental problems in transboundary contexts, and may counter the establishment of institutions for governing common resources adequately.[12] The question of whether sovereignty implies property rights over genetic resources (which is not explicitly mentioned in the CBD) remains both politically and academically contested.[13] Yet, to reiterate a point made at the outset, all countries, whether rich in forests and biodiversity or considered more industrialised, are affected by climate change and biodiversity loss, with linked consequences to one another. For instance, the Peruvian Amazon rainforest adjoining Brazil, Ecuador and Colombia has remarkably diverse flora and various endemic species,[14] and holds forest biomass with large reserves of carbon. Biodiversity loss, including the loss of tangible and intangible resources, as well as the negative impacts of climate change, goes beyond State borders.

In biodiversity and climate governance, a fruitful dialogue between diverging positions is needed in order to advance the negotiation of policies and legal mechanisms that protect biodiversity and enable climatic resilience. In 2007, Parties of the UNFCCC and the Kyoto Protocol negotiated the Bali roadmap, which includes mechanisms by which tropical forest countries would receive financial compensation for decreasing their deforestation rates. At UNFCCC COP-15, the Ad Hoc Working Group on Long-term Cooperative Action progressed on the endorsement of REDD-plus. At COP-16 in Cancun 2010, this Working Group acknowledged the need to implement safeguards in policies associated with REDD in order to ensure the full and effective participation of relevant stakeholders and the rights of indigenous peoples and local communities.[15] Negotiation processes in the international environmental arena are important but not sufficient to address interrelated

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[12] Ebbesson (2010).

[13] Elvin-Lewis (2007); Caneiro-da-Cunha (2008).

[14] Croat et al. (2005).

[15] Annex 1 of the COP decision concerning the work of the Ad Hoc Working Group on long-term Cooperative Action under the Convention mentions safeguards for policy approaches on REDD, see <http://unfccc.int/files/meetings/cop_16/application/pdf/cop16_lca.pdf>. The safeguards include: '1.(c) Respect for the knowledge and rights of indigenous peoples and members of local communities, by taking into account relevant international obligations, national circumstances and laws, and noting that the United Nations General Assembly

equity challenges at the national and local level of relevance to REDD-plus activities; for example, those associated with land and forest property rights. Moreover, the fact that a policy mechanism such as REDD-plus is agreed at this level does not necessarily mean that poverty alleviation and environmental goals such as biodiversity conservation will follow automatically. In order to highlight the particularities of national and local priorities within the global context and the equity challenges that emerge, we use the example of the Peruvian Law 27811 enacted on 24 July 2002.

3. ABS: LESSONS LEARNED FROM THE PERUVIAN LAW 27811

This section analyses the Peruvian 'Law introducing a protection regime for indigenous peoples' collective knowledge associated with biological resources', called Law 27811. It explores critical events which crisscross institutions, prompt new ways of thinking and thereby create a *sui generis* intellectual property rights (IPR) regime. It is a *sui generis* regime because it includes new types of rights and responsibilities, which are distinct from the Western-inspired IPR system. Law 27811 establishes a regime that includes, on the one hand, licence agreements, and on the other hand, public, confidential and local registers of knowledge. Peru was the first country with a large indigenous population to create such a regime.[16] Among the objectives of Law 27811 are: promoting the respect and protection of collective knowledge associated with biological resources, guaranteeing that its use is made with the prior informed consent of indigenous peoples, and promoting just and equitable benefits sharing derived from the use of collective knowledge associated with biological resources.[17]

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has adopted the United Nations Declaration on the Rights of Indigenous Peoples; (d) The full and effective participation of relevant stakeholders, in particular, indigenous peoples and local communities, in actions referred to in paragraphs 70 and 72 of this decision'.

[16] Alexander et al. (2004).

[17] Law 27811, Ley que establece el régimen de protección de los conocimientos colectivos de los pueblos indígenas vinculados a los recursos naturales /Law 27811, 'Law introducing a protection regime for indigenous peoples' collective knowledge associated with biological resources (2002), Diario Oficial 'El Peruano', 10 August 2002, art. 5, see <http://www.elperuano.com.pe> (accessed 17 May 2010).

3.1 Holders of ABS Rights and Responsibilities

A *sui generis* dimension of Law 27811 is the possibility of recognising diverse individuals and collectivities as holders of rights, including natural and legal persons, such as individual leaders and associations, but also other aggregates; for example, indigenous peoples and people in voluntary isolation. Legal personality of a collective implies that more than one individual can act as a single entity for legal purposes, such as signing a contract, suing or getting sued. Law 27811 attributes various rights and responsibilities to collectivities as well as to certain individual leaders associated with indigenous organisations.

One of the central elements of IPR in Peruvian Law is that the holder of the right has to be either a natural or a legal person. A natural person is an individual, while a legal person generally implies a collective. Article 10 of Peruvian Copyright Law, entitled 'Owners of Rights', states: 'The author is the original owner of the exclusive rights in the work, both moral and economic, that are provided for in this Law. However, the protection accorded to the author by this Law may benefit other *natural persons* or *legal entities* where it expressly so provides' (emphasis added). Similarly, Article 146 explicitly refers to the requirement of the *legal personality* of civil associations for the defence of their economic rights related to copyright.[18]

One of the main features of IPR under international law is that the holder of the right has to be a legal person. Article 39 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement 1994) stipulates such a requirement: '*Natural* and *legal persons* shall have the possibility of preventing information lawfully within their control from being disclosed to, acquired by, or used by others without their consent in a manner contrary to honest commercial practices' (emphasis added).

The procedures involved in obtaining the status of a legal person do not necessarily coincide with peoples' customary decision-making. Evaristo Nugkuag, former head of *Consejo Aguaruna y Huambisa* (CAH),[19] a non-governmental organisation (NGO) composed of Aguaruna and

[18] The original Spanish version together with an English and French translation can be found at <http://www.wipo.int/wipolex/en/details.jsp?id=3412>.

[19] Evaristo Nugkuag obtained the Rights Livelihood Alternative Nobel Prize in 1986 and Goldman Environmental prize in 1991 in recognition of his leadership in the Coordinator of Indigenous Organizations of the Amazon Basin (COICA) and his work in indigenous people's rights and environmental conservation.

Huambisa peoples, reflected upon the challenges concerning the requirement to become a legal person.[20] He mentioned that in order to obtain legal personality they had to have a formally established group of people for directing and executing the activities of the organisation (*directiva ejecutiva*). He framed this as external to peoples' dynamics and customary decision-making. Nonetheless, CAH constituted such a *directiva ejecutiva* in order to have legal recognition.[21]

Situations of conflict with non-rainforest people concerning access to the rainforest prompted CAH to become a legally recognised entity. Evaristo Nugkuag mentioned the implications of the fact that their organisation was not legally recognised by the Peruvian law during conflicts with non-Amazonian people.[22] He referred to a conflict in the 1970s with Herzog, a film director who aimed to make a film of Fitzgerald, a man who worked in the rubber industry (*cauchero)*:

> Herzog accused the Consejo of not having *legal recognition*, hence (he argued that) 'the organisation does not exist'. When he said so, it was in fact an insult for us. If he (Herzog) says Aguarunas do not exist, therefore do Aguarunas not exist?…We have resisted 7 months, Herzog has done everything to make us tired, but we have resisted … while one commission of the *Consejo* was in Lima, another commission was in another city, trying to talk and dialogue with the authorities, in order to make them understand that the Aguaruna people are not provoking but claiming a right.[23]

Currently, CAH, like many other indigenous organisations in Peru and in other Amazonian countries, has used the institutional form of a NGO. Amazonian indigenous NGOs in Peru have been influential in the drafting of Law 27811 and in developing initial steps for its implementation. Similarly, in Brazil indigenous groups have opted to form indigenous NGOs as a convenient form to deal with external actors, such as governments, non-indigenous NGOs and companies, and conduct activities like ABS-related projects and conclude legal agreements.[24]

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[20] The Aguaruna and Huambisa peoples are among the many ethnic groups that inhabit the Peruvian Amazon. For an atlas of indigenous people in the Peruvian Amazon, see <http://www.hemisphericinstitute.org/cuaderno/praxis/pages/escenario.html>.

[21] Nugkuag (1981).

[22] *Ibid.*

[23] *Ibid,* 18. For more information about Nugkuag's views on CAH and development policies in the Amazonia, see Nugkuag (1989); Nugkuag (1990).

[24] Caneiro-da-Cunha (2008).

Legal requirements in State law and international law such as the status of a legal person affect the landscape for environment-related property rights claims, including the rights and responsibilities of different actors in bio-prospecting activities to be conducted in Peru. Yet, beyond legal persons, other social groups exist, which do not have a legally recognised personality. Moreover, extended families without a legally recognised personality are the key social unit within rainforest Amazonian peoples. Kinship ties and a shared history often inform extended family relationships. The norms for bio-cultural resource governance, such as secrecy rules to regulate knowledge closure and disclosure, operate at this level. Entities governing the bio-cultural resources are not only groups with a formally recognised status, as is often assumed in the legal arena. Other collectivities without legal personality also have a stake in the governance of these resources. Therefore, an equity challenge arises in ensuring the participation of social groups without a formally recognised status in environmental decision-making.

3.1.1 Representative organisations

Some collectivities embedded in the definition of representative organisations under Law 27811 exist as legal persons while others do not have this legal characterisation. Law 27811 attributes rights and responsibilities to the so-called representative organisations. An example of rights and responsibilities of the representative organisations of indigenous peoples is to grant or deny consent concerning the access of outsiders to collective knowledge for scientific, commercial or industrial applications.[25] During a workshop in Pucallpa in 2005, which formed part of the project 'Rescue, Defense and Protection of Traditional Knowledge of Native Amazonian Communities Through the Creation of a Register of Knowledge and Biodiversity' (TK-BD Registers Project), the notion of representative organisations was discussed. Forty people attended this meeting, most of whom played a leading role in Amazonian organisations. In response to the question which is the representative organisation, one of the groups at the workshop acknowledged the co-existence and articulation of various organisational layers: 'in our region we have many representative organisations of each people … these indigenous organisations could be requested by the community, at a general assembly, to register their collective knowledge'.[26]

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[25] Law 27811, art. 6.

[26] Within a group containing a majority of Shipibo participants, they proposed the creation of a new collective: 'conform a committee for the protection

In terms of the distinct collectivities that function as representative organisations, Amazonian people use both Western-inspired and their own notions for re-interpreting individual and collective personhood in their negotiation of intellectual property. Law 27811 states: 'For the purposes of this regime, indigenous peoples shall be represented by their representative organisations, respecting the traditional organisational forms of indigenous peoples.'[27] Hence, Law 27811 does not view representative organisations as independent of or separate from the traditional organisational forms of indigenous peoples that are linked to customary norms.

Certain Amazonian people re-interpret their traditional organisational forms in the negotiation of IPR related to bio-prospecting projects. For example the notion of *ipaamamu* ('invitation' in the Aguaruna language) is stated in the Know-how Licence of the International Cooperative Biodiversity Group (ICBG)-Peru project and reinterpreted to mean assembly of organisational and community leaders for dealing with a project proposed by outsiders. The notions of *ipaamamu* of the Aguaruna people in the Amazon and *ani tsinquiti* of the Shipibo people constitute convening institutions and are used in decision-making of *Confederación de Nacionalidades Amazónicas del Perú (*CONAP) an Amazonian NGO. In 1997, CONAP, in its public declaration celebrating its 10th anniversary, stated its aim to stimulate the traditional decision-making institutions:

> CONAP shall continue working towards the revalorisation of 'IPAAMAMU-JIBARO'[28], maximum entity for the consultation and decision-making of the traditional organisational system of the Jibaro People (and) the vindication of the 'ANI TSINQUITI', great convening (institution) for reaching agreements among the Shipibo-Conibo because we recognise their importance for securing our rights and sustainable development.[29]

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of the collective traditional knowledge of the Shipibo people'. To the question of 'How is the representativeness accredited?', one group answered: 'being a legal person (*personería jurídica*)', and a second group: 'with a document; an *Acta* signed by the representative authorities of the community and the *comuneros* in general': SPDA (2005).

[27] Law 27811, art. 14.

[28] The Awajun, Wampis, Achuar and Shuar peoples belong to the Jivaro ethnic group. In spite of some aspects of shared identity, they may differ in kinship structure and language even within the Jivaroan groups; in particular the status of Huambisa, as an independent dialectical group from the Jivaro, is still not clear, see Taylor (1993).

[29] CONAP (1997).

Law 27811 regulates the activities of outsiders who aim to access the biological resources and the associated knowledge in the rainforest, and not necessarily the exchanges and organisational forms, such as the above-mentioned *ipaamamu* and *ani tsinquiti*, which are used within the same Aguaruna people or with other indigenous peoples. Law 27811 makes an exception in the scope of its application by excluding exchanges within indigenous peoples.[30] The Law does not aim to affect peoples' own mechanisms for access and sharing within the rainforest villages and among distinct Amazonian people.

3.1.2 Indigenous peoples

Besides the representative organisations, Law 27811 also recognises, as holders of rights, various collectivities that are embedded in the category of 'indigenous peoples'. Distinct collectivities beyond natural and legal persons are mentioned in the Law. We shall use the terms provided by the legal text in order to analyse the co-existent collectivities which hold some of the bundles of IPR that are related to biodiversity use. In this section we start by analysing the category of indigenous peoples, then the notion of peoples as related to communities, and finally the diverse types of communities.

Firstly, within the definition of indigenous peoples under Law 27811, diverse entities are mentioned. Nonetheless, the Peruvian legal system does not recognise the category of 'indigenous people' as a legal person. Other collectivities embedded in the definition of indigenous peoples which do not have a legal personality include: peoples in voluntary isolation and non-contacted peoples, humanity and present and representatives of future generations.[31] Nevertheless, the notion of indigenous peoples may include representative organisations in the form of indigenous NGOs which, in fact, do have a legal personality. Hence, according to the Peruvian legal system, some of the collectivities embedded in the definition of indigenous peoples exist as legal persons while others do not. Law 27811, in its Article 2(a), entitled 'Definitions', states that 'indigenous peoples', for the purpose of this legislation, means:

> *Pueblos originarios* holding rights which precede the Peruvian State's formation, who maintain their own culture, occupy a specific territorial area and recognise themselves as such. Peoples in voluntary isolation and non-contacted peoples as well as *campesino* (peasant) and native communities are included within them (indigenous peoples). The term 'indigenous' shall

[30] Art. 4.
[31] See arts. 2, 5 and 9 respectively.

encompass, and may be used as a synonym of '*originarios*,' 'traditional,' 'ethnic,' 'ancestral,' 'native' or other terms.

The term 'indigenous peoples' has a powerful symbolic and political meaning.[32] In some instances, this term has a wide interpretation that goes beyond an aggregate of individuals and is based on territorial and cultural dimensions, such as self-identification. Similar to the 169 International Labour Organisation (ILO) Convention on Indigenous and Tribal Peoples (1989), the definition under Law 27811 has a wide scope, taking into account such diverse dimensions.[33]

The construction of the definition of indigenous peoples under the Peruvian Law 27811 was a result of negotiations between various actors in a particular political and historical context (i.e. other countries may choose distinct paths). The use of the 'indigenous people' notion as a type of collective which holds rights is not only a phenomenon in Peru but also within the indigenous movement in Latin America. Yet there are diverse views among Latin American countries about the use of this term. Not everybody agrees that the collective 'indigenous peoples' should have prevalence over other categories such as *campesinos,* or be the umbrella notion for collectivities. The use of the term indigenous peoples varies from country to country. For example, in Ecuador, some organisations with a national scope, such as the *Federación Nacional de Organizaciones Campesinas, Indígenas y Negras* (FENOCIN), advocates the use of the terms for various collectivities over using the umbrella category of indigenous peoples.[34]

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[32] People may define themselves as 'indigenous' and claim to be representative of such a category or express solidarity with this collective. Yet, they do not consider themselves as belonging to an undifferentiated group. There are additional problems associated with the 'indigenous people' notion (see Coronel-Molina (1999); Bowen (2000); Burnham (2000); Strathern (2001)).

[33] The 169 ILO Convention refers to 'indigenous peoples' in the following way: 'peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions' (art. 1.1(b)); 'Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply' (art. 1.2).

[34] In the 1960s, the naming of the organisation included only *campesino*s (peasant) but, in 1988, the organisation changed its naming to include *indigena* (indigenous), and in 1997, the term *negro* (black). Hence, for FENOCIN, the terms *campesino*s, *indigena* and *negro* are acceptable since they include them in

However, the category of indigenous peoples is often used as an umbrella category by another Ecuadorian organisation with a national scope, the *Confederación de Nacionalidades Indígenas del Ecuador* (CONAIE).[35] Some FENOCIN members see *indigenizar* (to make or perform indigenousness) as a problem and a source of division between people. Furthermore, the use of the 'indigenous peoples' category instead of other notions such as *campesino* has had practical implications for the political life of the organisation. According to an Ecuadorian scholar with ongoing relationships with both organisations (FENOCIN and CONAIE), it has had implications in terms of the criteria for electing the representatives of governmental institutions, such as the Ecuadorian institution devoted to indigenous education (DINEIB). The criteria included a diversity of nationalities or indigenous peoples as representatives, which resulted in the criteria favouring CONAIE in relation to FENOCIN.[36]

Amazonian people in the Peruvian rainforest tend to view the concept of community as an external notion.[37] Yet, they have appropriated this notion to a certain extent, specifically to claim rights over resources related to a defined geographical place (in fact a 'territorial space' is one of the criteria for being considered as indigenous people, according to the definition under Law 27811, Article 2). At the community level, the procedures such as communal assemblies' *Actas* function as important elements for convening the results of the negotiation of bio-cultural

their organisation's name (and do not have the negative connotation these terms may have in English).

[35] CONAIE also uses the category of 'Nationalities'.

[36] In a workshop with members of FENOCIN (June 2007), co-facilitated by members of *Facultad Latinoamericana de Ciencias Sociales* (FLACSO) and the lead-author, one of the participants argued that even though social movements are developed by all sectors, not all sectors get the benefits which result from their mobilisations. One individual complained that 'other social groups appropriate projects, nothing is left for the *campesinos*'. For more information about FENOCIN, see <http://www.fenocin.org>, and for CONAIE see <http://www.conaie.org>.

[37] In contrast, Amazonian peoples' own political system tends to be rooted in kinship ties. For instance, Brown (1985) describes the political system of Aguaruna people as customarily egalitarian and cephalous (i.e. lacking a head or a leader). They see themselves as members of loosely controlled kindred, related to both mother's and father's kin, but without a formal kin organisation. At the household level, consanguinity and marriage ties function as the relational link.

rights.[38] For example, one of the requirements for collective knowledge registration under Law 27811 at *Instituto Nacional de Defensa de la Competencia y la Propiedad Intelectual* (INDECOPI) is an *Acta*. Article 20 states: 'Applications for the registration of collective knowledge of indigenous peoples shall be filed with INDECOPI through their representative organisations, and shall contain the following: (a) Identification of the indigenous people applying for their knowledge registration; (b) Identification of the representative … ; (f) *Acta* in which indigenous people agree to register the knowledge'.

Beyond the distinction between indigenous peoples and the community, Law 27811 mentions two types of communities embedded in the category of 'indigenous peoples'. Law 27811 considers that '***campesino*** and **native communities** are included within them (indigenous peoples)'.[39] People in Peru refer to *comunidades nativas* as those communities located in the *selva* (rainforest) and distinguish them from *comunidades campesinas* in the *sierra* (mountain region).[40] Law 27811 treats these types of communities (*campesino* and native communities) as encompassed by indigenous peoples. This is not a fact but a political and legal decision, which is important when implementing the Law. The definition of the term 'indigenous peoples' under Law 27811, encompassing *campesino* and native communities, is actually one of the reasons why this law is *sui generis.* In contrast, the CBD distinguishes between indigenous and local communities. The latter is often used in the CBD as synonymous of *campesino,* or rural, and distinct from indigenous. Similarly, what is *sui generis* about the notions in Law 27811 is that the concepts such as indigenous, *campesino*, *sierra* and *selva* come to inhabit novel arenas. For instance, INDECOPI, the national institution concerned with IPR and generally working in urban areas is now in charge of implementing Law 27811.

A governmental official from INDECOPI acknowledged the equity challenges derived from implementing this Law in distinct cultural and ecological settings.[41] She referred to Peruvian diversity and the challenges of applying a general law to such distinct regions as the *sierra* and *selva*:

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[38] An *Acta* at the communal level implies a written document with the agreements reached in an assembly signed by the representative authorities of the community and the *comuneros* (adults belonging to the community) in general.

[39] Law 27811, art. 2(a).

[40] For more details on the legal status of native communities in the Peruvian Amazon, see Urteaga-Crovetto (2002).

[41] Interview 31 January 2007.

> The law is for indigenous people in general, and everything has been 'lumped into that sack' (the indigenous peoples' category).[42] Yet, if one sees reality, we have marked differences between the mountain region (the Andes) and the *selva* (the Amazon). The people are distinct in terms of their customs and cosmology (*cosmovisión),* in everything. Hence, you have to make the materials (to diffuse the Law) distinct: you cannot develop material for somebody in the *selva* and give it to the Andes because they would not recognise themselves there. The landscape is another; this is a difficulty. If you see the material, the characters are different, the faces are different.

In a workshop on intellectual property organised by INDECOPI and *Instituto de Investigaciones de la Amazonía Peruana* (IIAP), INDECOPI mentioned that from 2007 to 2010 it has continued providing capacity building to *campesino* and Amazonian communities on local and national registers.[43]

Through the analysis of the content of Law 27811, we have shown that the type of personhood that the law recognises (e.g. individuals, associations and communities) affects the mechanisms available to multiple bio-cultural rights holders for making their claims enforceable.

3.2 Implementation of an ABS Regime: Equity Dimensions

The equity dimensions of laws concern not only the respective legal content but also the way in which they are implemented. The social life of Law 27811 serves to explore the way in which it criss-crosses institutions, including governmental organisations. Law 27811 has specificities in terms of how the public institutions implement it. For instance, Law 27811 attributes to INDECOPI, an institution which does not normally relate to Amazonian organisations, responsibilities concerning the Law. INDECOPI is responsible for the National Public Register of Collective Knowledge of Indigenous Peoples and the National Confidential Register of Collective Knowledge of Indigenous People under article 15, including the associated responsibilities for diffusing the content of the law and the characteristics of such registers among collective knowledge holders.

A dual process of standardisation and diversification takes place when implementing the Law; the former is common to other types of IPR and

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[42] She used the expression '*metieron todo en el mismo saco*'. A common saying in Spanish is '*son completamente distintos, no los puedes meter en el mismo saco*' ('they're totally different, you can't lump them together as if they were the same'): Diccionario Espasa (2000).

[43] INDECOPI (2010).

the latter is a specific element of the *sui generis* IPR regime. Through administrative procedures that are common to all public administrative affairs, Law 27811 was formalised but this process also has certain specificities. In 2002, INDECOPI began the formalisation process through the so-called 'unique text of administrative procedures', (*texto único de procedimientos administrativos* (TUPA)). The term 'unique' reflects the aim of standardising various laws regardless of their particularities. In any type of procedure of this nature, for example in filing a patent, the person ought to pay a fee. The fee for registering collective knowledge, as with any other public procedure, was stated in the TUPA for Law 27811. However, what is *sui generis* is the social process associated with this legal requirement. After the governmental official responsible for the registers under Law 27811 in INDECOPI interacted with Amazonian and Andean individuals during information workshops about the Law, she realised that the content of TUPA was inadequate in terms of charging people for registering traditional knowledge.[44] Consequently, she conducted additional administrative procedures for eliminating such a payment. A new formalisation ritual occurred, in which the exoneration of the payment was published in the gazette '*El Peruano*'.

The standardisation dimension of the law-making process in Peru includes that all laws ought to be published in the gazette *El Peruano,* which constitutes a necessary procedure for the law to enter into force .[45] In the case of Law 27811, once the Congress had approved it, this Law was published in *El Peruano* in 2002. In the preparation of Law 27811 a diversification process occurred which included publications in *El Peruano* concerning what would be the content of Law 27811. In a presentation at the *Instituto Ecuatoriano de Propiedad Intelectual,* Ruiz from Sociedad Peruana de Derecho Ambiental (SPDA) argued that this constituted a means of promoting peoples' participation and transparency in the process followed in Peru.[46] Two publications prior to the adoption of Law 27811 were made: the second draft published included peoples' comments to the first draft.

While all of the laws in Peru ought to be made public, diversification in the socio-legal process takes place in the dissemination of Law 27811. INDECOPI developed various kinds of materials including booklets containing cartoons, radio spots and a micro-programme in order to communicate the content of Law 27811 to the public. Although the

[44] Interview 30 January 2007.
[45] See <http://www.elperuano.com.pe>.
[46] The presentation took place 30 May 2007.

theme of the information concerned traditional knowledge, these means of communication also had dissemination of socio-legal information as their main aim. The INDECOPI representative mentioned that the governmental information flows about Law 27811 started in the Amazon, followed by the Andes: 'we have, for example, radio spots and a micro-radio programme in Spanish which were then translated into Quechua and a native language from the Amazon to encompass *sierra* and *selva* respectively'.[47] Likewise, the booklets containing cartoons were translated into certain peoples' languages; for example, Ashaninka and Quechua. Additionally, publications were developed in order to diffuse the law's content among diverse audiences.[48] The INDECOPI representative considers that such material had to respond to the very diverse geographical areas in Peru so that people would identify with it.

In general, the implementation of laws requires the investment of governmental funds. What is particular to the implementation of Law 27811 is how the government acquires some of these economic resources. In 2002, INDECOPI began taking the first steps to collect financial resources. An INDECOPI member who works for the Peruvian National Commission (against Biopiracy) agreed that economic resources for implementing laws is an important issue: 'In spite of the fact of being created by law and all that, it (the Commission) does not count with economic resources. That is the great theme.'[49] This is related to the metaphor of laws having 'legs' in order to make the first steps and take us somewhere. In other words, INDECOPI searched in the international arenas for the means of providing legs to the law.

The entities that the government approached in order to obtain resources for the implementation of the Law, specifically foreign institutions and NGOs, is another aspect that makes this Law *sui generis*. The fact that the CBD, in its Article 15, states 'the sovereign rights of the State' over genetic resources has not caused the debate about traditional knowledge and biodiversity to become restricted to national borders. In fact, the trend has been quite the opposite. The southern countries and NGOs use legal provisions, such as Article 8(j) of the CBD, as negotiating tools[50] for accessing the economic resources of Northern

[47] Interview 31 January 2007.

[48] See the handbook for local registers at INDECOPI (2006).

[49] He recalled that 'in the first year, the Commission "maintained itself" with the support of a Canadian institution. Consequently when such resources were exhausted, and since it could not remain an orphan, INDECOPI asigned some resources' (interview 17 January 2007).

[50] Dutfield (2001).

institutions and intergovernmental organisations, such as the United Nations Development Programme (UNDP).

In order to implement Law 27811, INDECOPI planned a broad project after the approval of the Law.[51] However, INDECOPI lacked the resources to implement it. Hence, INDECOPI formed some strategic alliances, both with NGOs and international cooperation agencies, to start a pilot project to assess the viability of the actions proposed in a project with a wider scope on implementation. INDECOPI submitted the project to the Peruvian governmental agency responsible for applying for international funds (Agency for International Cooperation, APSI) and to INDECOPI's technical cooperation section, which applies for funds from other countries, such as Canada and Sweden. To complement resources for the project, the government also approached NGOs that had obtained economic resources from the Global Environment Facility (GEF).[52]

One of INDECOPI's activities was the development of indigenous facilitators' meetings. The objectives of these meetings were to diffuse the content of Law 27811, including the above-mentioned public, confidential and local registers of knowledge, which aim to protect collective knowledge. INDECOPI invited participants to the workshop not only through indigenous organisations, as they had done previously, but also through their website. For the facilitators' meeting, INDECOPI received 170 applications, of which only 25 were accepted.[53] Thus, the internet allowed some men and women, at the community level living in the Amazon rainforest, to be in direct contact with governmental institutions such as INDECOPI without intermediate indigenous NGOs. The exercise also showed the effectiveness of involving various tools and mediums of communication with different stakeholders.

4. ABS LESSONS FOR REDD PLUS

In the above section we highlighted the complexities involved in ensuring that the process of implementing an incentive-based regulation is fair and

[51] Interview 31 January 2007.

[52] Sometimes, it is assumed that the government has more economic resources compared to NGOs in order to comply with the responsibilities stated in the laws. Yet, under some circumstances, the NGOs may have obtained more economic resources from international agencies for performing activities which are paradoxically the competence of governmental institutions.

[53] INDECOPI meeting 16 January 2007. This does not mean, however, that all indigenous people and organisations had access to the information.

effective. Given that REDD-plus also qualifies as an economic incentive to ensure environmental objectives in forest ecosystems, possibly under the governance of multiple stakeholders, it is possible to forestall conflicts if we pay attention to the course of development of debates within ABS negotiations. Towards this end, we shall use the case of Indonesia, where much debates are ongoing on implementing REDD-plus provisions, and contrast it with the ABS discourse in Peru. The issues are examined in the same order as the ABS discussions related to Peru.

4.1 Holders of ABS Rights and Responsibilities

Legal categories in State law draw the landscape for property rights claims regarding forest resources. These categories affect the legal arena for forest use and are relevant for implementing REDD-plus programmes in a way that promotes equity.

4.1.1 Legal personality

Equity at the local level may require that forest people enjoy specific capabilities and power (*contextual equity)* in legal negotiations.[54] In a policy document concerning REDD, the Ministry of Forestry of the Republic of Indonesia mentions that contractual agreements are essential in forestry carbon projects for both buyers and sellers.[55] The effective participation of forest-dependent people is indispensable for the development of REDD-plus strategies that respond to peoples' needs. Their participation in REDD-plus may involve engaging in contractual agreements between a rainforest community and one or a combination of the other parties, such as national or local governments, environmental NGOs and the private sector. In order to sign formal contractual agreements with other parties, forest-dependent communities would need to have legal personality. Hence, contextual equity is intrinsically linked to distributive and procedural dimensions.

For forest people in Indonesia, becoming a legal entity may be a complicated process. Contreras-Hermosilla and Fay note that the process that communities need to undergo in Indonesia in order to acquire legal personality is complex and forest people may not have the legal means to

[54] For a multidimensional framework for defining equity, see McDermott et al. (2012).

[55] Ministry of Forestry of the Republic of Indonesia (2008).

acquire such legal status.[56] Moreover, according to these authors communities without recognised land titles but customary rights over forestland are often affected nowadays by land invasions that exploit forest and land resources in unsustainable ways.

Hence, forest-dependent communities without legal personality may not be able to participate on an equitable basis and be in a disadvantaged position in REDD legal negotiations *vis á vis* those entities that have legal personality. Therefore, mechanisms for the participation of social groups without legal personality should be considered before, during and after a legal negotiation associated with REDD-plus. Otherwise, relevant stakeholders, especially people who depend on the forest for their livelihood, risk exclusion. Sikor et al. argue that only if the design of REDD-plus includes safeguards against elite capture of benefits, will it avoid exacerbating the historical dispossession of forest people.[57]

4.1.2 Legal negotiations and customary norms

Tensions and articulation between the Western-style legal system and non-Western-style legal systems may arise in REDD-plus legal negotiations. In Indonesia, the considerations of *adat* on the relevant social units and associated forest rights and responsibilities may be important in decision-making associated with REDD-plus.

Adat refers to the cultural beliefs, rights and responsibilities, customary laws and courts, customary practice and self-governance institutions shared by an indigenous group prior to incorporation into a colonial or post-colonial State. *Adat* is location-specific and changes over time. *Adat* governs behaviour between individuals as well as within and between families, communities and outsiders. It also governs the relationships between people and nature.[58]

In legal negotiations on bio-prospecting the relevance of customary norms to deal with outsiders would be of greater importance than those used among forest peoples because of the fact that access of non-forest people to biological resources and traditional knowledge does not necessarily imply an impact on forest peoples' use of these resources in their everyday life. In contrast, customary norms (*adat* in Indonesia) that govern peoples' own access to the forest and those that refer to relations with outsiders will both be significant in REDD-plus legal agreements, since these agreements are more likely to imply restrictions on peoples'

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[56] Contreras-Hermosilla and Fay (2005), p. 37.
[57] Sikor et al. (2010).
[58] Contreras-Hermosilla and Fay (2005), p. 7.

regular use of the forest. Therefore, it would be important to focus on the enforceability of such norms in the context of policy implementation.

4.1.3 Communicating and disseminating laws and regulations

In the development, diffusion and implementation of laws and regulations associated with REDD-plus, cultural and biological diversity should be considered.[59] In Bahasa, Indonesian *adat* leaders rarely use the term 'indigenous' since most Indonesians can claim to be indigenous.[60] Yet, *adat* may share characteristics associated with the term 'indigenous' used by Amazonian people, including referring to social groups that have maintained systems of customary law and local governance.

An awareness of diversity in Indonesia is not new. Across its 17,508 islands, Indonesia has distinct ethnic, linguistic and religious groups, and various ecosystems. The national motto of Indonesia is *Bhinneka Tunggal Ika*. This phrase is in Old Javanese and is often loosely translated as 'Unity in Diversity'.[61] What would be distinctive in REDD-plus legal negotiations, is that the concepts such as *adat*, *Bhinneka Tunggal Ika*, rainforest and carbon emissions would come to jointly inhabit new arenas, for example legal agreements between forest-dependent people with one or a combination of other stakeholders. National or local governmental institutions, NGOs, private and financial sectors and international mechanisms such as the United Nations Environment Programme (UNEP) Finance Initiative, the UN Global Compact and the World Bank's Forest Carbon Partnership Facility are examples of these stakeholders. REDD-plus legal agreements may include even more international players than ABS legal agreements.

Hence, it is important to consider justice and equity dimensions at the local as well as global level, and in all cases of environmental law from the law-making process to the application of the law.[62] In implementing its REDD-plus activities, Indonesia, through its Ministry of Forestry, has provided some opportunities for public consultation. Yet, some organisations question its adequacy in promoting equitable participation. For instance, in 2009, two Indonesian NGOs wrote a letter to the Ministry of Forestry expressing their concerns about the limited possibilities for an informed, effective and self-determined discussion of indigenous peoples

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[59] For Indonesia's legal framework for REDD-plus, see Scheyvens and Setyarso (2010).

[60] Contreras-Hermosilla and Fay (2005), p. 15.

[61] Marks (2010).

[62] Ebbesson and Okowa (2009).

in the Readiness Preparation Proposal for the World Bank's Forest Carbon Partnership Facility.[63]

4.1.4 Implementation

In the implementation of ABS and REDD-plus legal agreements there are differences. A first difference between REDD-plus and ABS is that REDD-plus is often based on forest people's continuous involvement throughout the REDD-plus initiative, while in ABS, the process of developing, for example, a pharmaceutical product or process with recognised patent right based on genetic material would normally not enable local people's continuous involvement.[64] A second difference is that the time span between the agreement and the flow of money is relatively shorter in REDD than in ABS.

Yet, in both ABS and REDD-plus legal agreements, forest-dependent peoples may face specific challenges which raise equity concerns. Forest-dependent people may have particular difficulties in complying with the procedural requirements stated in REDD-plus related laws and policies, certification systems and contractual agreements. For instance, costs may be involved in hiring a lawyer to become a party to a contract. In addition, other specialists' support may be needed in complying with the IPCC's Good Practices Guidelines and other internationally recognised standards, such as Verifiable Carbon standards (VCS) to estimate the net change in carbon stocks (sequestration, baseline, emissions, leakage among others). Similarly, if forest people aimed to engage in legal negotiations related to a future UNFCCC REDD Mechanism or a potential UN Cap & Trade System, they may be asked to prove additionality (UNFCCC Additionality Tool), and obtain validation by Scientific Certification Systems (SCS). A project in the Peruvian Amazon (Madre de Dios REDD project), supported by various NGOs (WWF, CESVI, ProNaturaleza and AIDER) is aiming to comply with those requirements.[65] However, not every forest community in Peru may have the economic and technical resources to comply with such procedures, which raises equity challenges in access to technical capacity and resources.

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[63] Scheyvens and Setyarso (2010), p. 46.

[64] REDD, however, is also dependent on the market conditions (e.g. carbon prices) and subject to political situations.

[65] See <http://www.greenoxx.com/downloads/summary.pdf>.

5. LOOKING AHEAD: GLOBAL CHALLENGES IN ENSURING EQUITY IN CLIMATE CHANGE AND BIODIVERSITY LEGAL NEGOTIATIONS

Various types of equity dimensions are involved in the CBD and UNFCCC debates concerning fairness and equity in relation to access to resources and with respect to the value of resources exchanged between stakeholders.[66] In the development of *legal definitions* such as the term 'representative organisations', as well as in defining the criteria to become a legal person addressed in previous sections, equity considerations need to be taken into account. Hence, in global REDD-plus related international agreements, national laws or bilateral contracts, it is important to negotiate legal definitions that promote equitable legal relations. An example would be a definition of 'technology' that includes both external industrial technology and forest peoples' own knowledge and technology. This would imply examining the appropriateness of both types of technology in terms of ensuring resilience and sustainability. Often it has been observed that forest people have own technological capacity and expertise in order to adapt and remain resilient in complex environmental contexts. For example, Inuit people in the Arctic continue to adapt to changes in the environment, including those in sea ice, snow, animal populations and vegetation, and take precautions such as carrying extra supplies in anticipation of bad weather.[67]

Technology transfer, as a non-monetary benefit, is under discussion in ABS cases[68] in the new ABS international regime (Nagoya Protocol on Access and Benefit Sharing) as well as in the development of Bio-cultural Community Protocols (BCPs). The BCPs are statements of self-determination of a particular community, based on their own values and priorities; they describe local procedures as well as terms and conditions for engaging with other actors, such as governmental institutions and conservation agencies, on issues related to their bio-cultural resources.[69] In parallel, the BCPs imply that the community is made aware of existing national and international laws that can be used

[66] For an example of these discussions under the CBD, see e.g. Schroeder and Pisupati (2010).
[67] Weatherhead et al. (2010).
[68] Laird and Wynber (2008).
[69] Bavikatte and Jonas (2010).

strategically to make effective their rights associated with in-situ conservation.[70] One of the questions that arises in ABS debates is whether technology transfer is a benefit in itself. In ABS discussions, the definition of technology has a relatively broad definition and there tends to be an explicit recognition of the contribution of forest peoples' own technological practices. Moreover, some authors[71] argue that treating traditional knowledge as information technology in bio-prospecting agreements provides a basis for developing contractual models in which indigenous and local communities exercise more control over use of traditional knowledge.

In REDD-plus discussions, technology transfer has also been an issue of debate. Evidence of this is the framing of the drafting groups of the Ad Hoc Working Group on Long-term Cooperative Action under the UNFCCC, which focuses on finance, technology and capacity building.[72] However, there are also differences between REDD-plus debates and ABS. In REDD-plus debates, the focus has been on external technology (i.e. not forest peoples' technology). In order to promote equity in the development of laws and normative processes associated with REDD-plus, it is necessary to talk not only about technology but about appropriate technology considering peoples' understandings of well-being and livelihoods. The local environmental conditions and culturally differentiated normative processes will affect these understandings.

One of the challenges in the development of equitable negotiations in REDD-plus is synergistic *articulation between various legal systems* including customary norms. Moreover, tensions and the need for implementing mechanisms to articulate legal systems not only arise between the Western-style legal system and culturally differentiated legal systems but also within the same Western-style legal systems at the national and international levels. At the national level, a good example is the announcement in March 2010 by the Indonesian Ministry of Forestry of its intention to review national laws governing REDD-plus in order to identify and remove overlapping and contradictory elements, including the reassessment of the revenue distribution system.[73] At the international level, human rights legal instruments related to non-discrimination and

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[70] Kohler-Rollefson (2010).

[71] See e.g. Tobin and Taylor (2009).

[72] Ad Hoc Working Group on Long-term Cooperative Action under the Convention (2010). The other drafting groups are on a shared vision for long-term cooperative action; enhanced action on adaptation, and enhanced action on mitigation.

[73] Scheyvens and Setyarso (2010), p. 62.

development, such as the United Nations International Covenant on Economic, Social and Cultural Rights,[74] need to be articulated with environmental international treaties such as the CBD and the UNFCCC. For example, the Forest Peoples Programme (and others) in its request to the United Nations Committee on the Elimination of Racial Discrimination, argues that REDD-plus activities need to respect the rights of indigenous people related to their well-being and that 'without effective measures to secure indigenous peoples' rights, REDD concessions and activities can be expected to cause additional and further irreparable harm'.[75]

Another issue at stake is if forest-rich States in the South will accept the intervention of a global debate on their self-determination. While Indonesia's decision to engage in REDD-plus legal agreements can be seen as an exercise of State sovereignty, the terms and conditions included in the agreements can also be viewed as interfering with its self-determination and possibilities of defining its own development priorities.[76] In forest-rich countries in the South such as Peru and Indonesia, biodiversity and climate change often remain a global priority that then influences national politics. In the implementation of laws and policies, national priorities of these countries tend to be related to topics such as development and basic needs of the population. Currently, the co-benefit approach on climate change debates has tried to address the linkages between human development and climate change.[77]

REDD-plus can learn lessons not only from the similarities with ABS processes but also from its differences. Currently in ABS, there are relatively more realistic expectations about the benefits that may derive from ABS agreements (i.e. more in terms of rights recognition than of money that can actually be derived from them) than in REDD-plus. In REDD-plus a challenge would be to ensure that monetary resources derived from REDD-plus projects promote equitable distributions of rights and responsibilities concerning forest resources, and that economic resources flow in a way that the economy develops in an integral way and in a manner that responds to the life people aspire to.

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[74] United Nations International Covenant of Economic, Social and Cultural Rights, (1966), see <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en> (accessed 10 May 2010).

[75] Forest Peoples Programme et al. (2009), p. 2; see also Indigenous People Alliance of the Archipelago (2007).

[76] See <http://www.norway.or.id/PageFiles/404362/Letter_of_Intent_Norway_Indonesia_26_May_2010.pdf> (accessed 20 July 2010).

[77] UNDP (2007).

In REDD-plus the flow of economic resources is relatively more certain than in ABS. An example is the Letter of Intent between Norway and Indonesia, in which Norway offered one billion dollars for Indonesia's REDD-plus efforts.[78] The Letter of Intent states:

> Norway has the intention to contribute funds to Indonesia's REDD+ efforts in the order of magnitude of one billion USD (given an exchange rate of six Norwegian kroners per USD). *Such a contribution will be subject to* the establishment of a financial mechanism as described in this Letter of Intent and agreed by the Parties, as well as *adequate deliverables* as described in this Letter of Intent (emphasis added).

Hence, while a specified amount of economic resources is committed, their flow is not completely certain because its realisation depends upon complying with the conditions stated in such letters of intent, including the so-called 'adequate deliverables'. These deliverables go from the implementation of the province-wide REDD-plus strategy to appropriate measures to address land tenure conflicts and compensation claims. Moreover, the issue is not only that economic resources deriving from the Norway–Indonesia agreement flow to Indonesia but also the challenge of distributing the rights and obligations associated with forest governance in an equitable manner considering the well-being of forest-dependent people.

6. CONCLUSION

This chapter illustrates that ABS has important lessons for REDD-plus in terms of the various equity challenges in the implementation of laws and policies that aim to link environmental conservation and social development in tropical bio-diverse countries. The chapter has shown the need to go beyond the assumption that parties in legal agreements always exchange rights and obligations reciprocally. Under international and national law, individuals and collectivities that enter into a legal agreement are imagined to be equal partners who reciprocally exchange rights and duties. This is based on the law of contracts and the legal principle of reciprocity.[79] However, empirical data has revealed that equitable legal relationships between forest-dependent people with one or a combination

[78] 'The pledged funding comes in addition to the $3.5 billion promised for conserving forest carbon by world leaders at the UN's Copenhagen Climate Change Conference in December 2009': CIFOR (2010).

[79] Murphy (2004).

of other ABS actors will not develop automatically. Instead, equitable environment-related legal negotiations and policies need to be actively fostered. In ABS and REDD-plus, this implies effective mechanisms to overcome power imbalances in negotiations and difficulties of forest-dependent people in complying with legal requirements.

Schroeder and Pisupati (2010) highlight the various types of equity involved, especially in CBD discussions that relate to fairness and equity with respect to the value of resources exchanged between stakeholders, and with respect to access to resources. In both the ABS and REDD-plus contexts, the ethic of justice in exchange that deals with equitable partnerships is an important element. In the REDD context, the role of distributive justice merits greater definition, as it involves the use (and non-use) of scarce resources (or ecosystems) by different partners and specific rights and responsibilities are demanded from them. An example of State responsibilities derived from a REDD-plus agreement is the duty of Indonesia to implement policies including a 'two year suspension on all new concessions for conversion of peat and natural forest' mentioned in the Letter of Intent between Norway and Indonesia (2010: 3). A REDD-plus project may imply restrictions over forest peoples' use of natural resources in their daily life. In the ABS context, engagement between stakeholders is often specific to a set of resources and associated knowledge. Hence, the proportion of resources subject to use or non-use agreement in ABS is much less and the scarcity of resources is not generally a central concern of the parties involved. ABS engagement is usually at a sub-national and local level while REDD-plus projects have a national or even regional scale. Either way, decisions in both have an impact on resource use rights and capacities and livelihood opportunities of indigenous and local communities and on business practices of different intermediaries. Both approaches aim to link conservation priorities with development goals.

Successful implementation of policies and regulations rests on several factors in the socio-political landscapes. A critical factor is augmenting awareness amidst the different actors on their obligations and consequences. As demonstrated by the relative success of communication tools used during the development of the Peruvian Law 27811 in gaining the participatory involvement and support of indigenous and local communities, investments in efforts at dissemination of information are as important as designing the policies and regulations. This raises the capacity of stakeholders to make informed choices based on reasoned arguments. Experience from ABS negotiations tells us that obtaining their free and prior informed consent is important to ensure a fair deal. Not recognising this important principle in the REDD-plus context could

threaten smooth implementation of any relevant regulation due to potential conflicts with various domestic stakeholders (communities, farmers, small businesses, etc.). Moreover, REDD-plus related commitments appears to increasingly be being met through development assistance channels (as seen in the Norway–Indonesia Letter of Intent). If done through a participatory process between the countries, it poses an opportunity for achieving common environmental goals. However, if development assistance furthers an uneven partnership, it would also imply an inequitable relationship, as a dimension of equity is that negotiations occur between two competent[80] entities.[81] This is not to imply that such mechanisms are inherently bad or good but rather to highlight that related decisions should be made with caution and with the participation of various stakeholders, particularly forest people. Exercising this caution would be important in both the ABS and REDD-plus contexts, as their success has implications in meeting the different socio-economic (related to poverty and building partnerships) and environmental targets of the Millennium Development Goals.

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[80] Competence here refers to equal bargaining or negotiating powers and capacity to make informed decisions by the stakeholders.

[81] Schroeder and Pisupati (2010).

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