Forest Peoples Programme

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18 March 2013

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Comments and Concerns about Suriname's RPP (23 February 2013)

The Forest Peoples Programme notes that indigenous and tribal peoples' have previously written to the Government of Suriname and the FCPF expressing grave concerns about the exclusion of indigenous and tribal peoples from the process of developing policy instruments pertaining to REDD+. They expressed equally grave concerns about the substance of said instruments in relation to the absence of any meaningful recognition of and protection for indigenous and tribal peoples' rights. Having reviewed the latest draft R-PP prepared by Suriname, the FPP considers that many of the same concerns continue to be relevant, including the inadequate participation of indigenous and tribal peoples' freely chosen representatives in the process of developing the draft R-PP.

The FPP remains especially and deeply concerned that Suriname's pending application to the FCPF ("Suriname's R-PP" or the "R-PP") continues to be inconsistent with the rights of indigenous and tribal peoples, including as expressed in the judgment of the Inter-American Court of Human Rights in *Saramaka People v. Suriname*.[1] These concerns were also highlighted in reviews by the Participants' Committee and the TAP in January and March 2010 (see below). That Suriname has failed to implement this judgment as well as actively violated the Court's orders made therein has been confirmed by the Inter-American Court (2011), the UN Committee on the Elimination of Racial Discrimination (2009, 2012), the Inter-American Commission on Human Rights (2013), and the UN Special Rapporteur on the Rights of Indigenous Peoples (2011).[2]

[1] *Saramaka People v. Suriname*. *Preliminary Objections, Merits, Reparations and Costs*. Judgment of the I-A Ct. Human Rights, 28 November 2007. Series C No. 172; and *Saramaka People v. Suriname. Judgment of 12 August 2008.* Interpretation of the Judgment of the I-A Ct. Human Rights on Preliminary Objections, Merits and Costs. Ser C No. 185. Available at: http://www.corteidh.or.cr/casos.cfm.

[2] *See Saramaka People (Monitoring Compliance),* Orders of the Inter-American Court, 23 November 2011, p. 16-7. Available at: http://www.corteidh.or.cr/docs/supervisiones/saramaka_23_11_11_ing3.pdf; *Communication of the UNCERD to Suriname (Early Warning and Urgent Action procedures)* (9 March 2012) (reiterating its concern, in paragraph 18 of its 2009 concluding observations, about the "'ongoing delays in compliance of the most crucial aspects of the court judgment, in particular, concerning the recognition of communal and self-determination rights of the Saramaka people'"). Available at: http://www2.ohchr.org/english/bodies/cerd/docs/CERD_Suriname.pdf; *IACHR Press Release 9/13*, 'IACHR Concludes its Working Visit to Suriname', 12 February 2013 (explaining that "The Rapporteurs received ample information throughout the visit - from both State and non-State actors - on the significance of the

Indeed, Suriname has even failed to submit reports ordered by the Court, despite its repeated requests, on the measures it has taken to implement the judgment.[3] Moreover, in October 2011, Suriname explicitly rejected recommendations made during the UN Human Rights Council's Universal Peer Review that it comply with the judgment.[4] It also told the Inter-American Commission on Human Rights in January 2013 that it cannot comply with the judgment because doing so would discriminate against other ethnic groups in Suriname.[5] This manifestly ill-founded contention was twice explicitly rejected by the Inter-American Court when raised by Suriname in *Saramaka People*.[6] Significantly, in this respect,

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Inter-American Court judgments in the cases of Moiwana and Saramaka for human rights in Suriname, and considerable challenges that remain to implement the orders in those judgments. … The Rapporteurs however underscore the need for Suriname to fortify its efforts to fully comply with these judgments, in prior consultation and with the participation of the affected Maroon communities. … In this regard, the IACHR highlights the recommendations issued by several international procedures and bodies, such as the United Nations Rapporteur on the Rights of Indigenous Peoples, James Anaya, and the United Nations Committee on Racial Discrimination, on concrete ways to comply with these judgments in the areas of demarcation and titling, and the development of a law and procedure to carry out this goal"). Available at: http://www.oas.org/en/iachr/media_center/PReleases/2013/009.asp; and Report of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, Addendum, *Measures needed to secure indigenous and tribal peoples' land and related rights in Suriname*, A/HRC/18/35/Add.7 (18 August 2011), at para. 11 (stating unambiguously that it "is imperative that Suriname take steps to fully implement the judgment of the Court, in order to avoid a prolonged condition of international illegality"). Available at: http://www.ohchr.org/Documents/Issues/IPeoples/SR/A-HRC-18-35-Add7_en.pdf.

[3] *See* Letters of the Court to Suriname, dated 19 October and 23 November 2012, 13 February 2013 and 5 March 2013 (all with regard to compliance with the Court's order that Suriname submit a report on implementation measures by 30 March 2012 and every three months thereafter, and stating, most recently on 4 March 2013, that the Court "has not received the detailed report ordered").

[4] *See* UN Doc. A/HRC/18/12/Add.1, at para. 13 (recording Suriname's explicit statement that the specific recommendations calling on it to comply with and execute the judgment of the Court in *Saramaka People* "cannot be supported," referring to recommendations 73.11, 73.52-73.57). *See also* UN Doc. A/HRC/WG.6/11/SUR/1, 16 February 2011 para. 67 (stating with regard to the judgment of the Court that "Suriname needed to find a Surinamese solution, and that was why Suriname would ask for some time to deal with this matter").

[5] *See IACHR Press Release 9/13*, 'IACHR Concludes its Working Visit to Suriname', 12 February 2013 (explaining in relation to Suriname's contentions that "The principle of equality should not be equated with assimilation, and should be implemented in practice with the participation of the affected population, incorporating a gender and human rights perspective. It also demands respect for the equality of ethnic, racial, and religious groups in the law; the elimination of norms which are either discriminatory, or have a discriminatory impact on such groups; the eradication of discriminatory practices and stereotypes; and the organization of the entire state structure to confront discrimination with due diligence. The goal of equality and the correlative obligation not to discriminate should be reflected in state laws and policies geared towards the full guarantee of these groups' civil, political, economic, social, and cultural rights. The Rapporteurs recall the determination of the Inter-American Court that cultural integrity is a fundamental right and respect for cultural diversity part of a democratic society").

[6] Saramaka People (Monitoring Compliance), at para. 50 (observing that "States cannot invoke their domestic laws to escape pre-established international responsibility"); and Saramaka People 2007, *supra*, at para. 103 (stating that "the State's argument that it would be discriminatory to pass legislation that recognizes communal forms of land ownership is also without merit. It is a well-established principle of international law that unequal treatment towards persons in unequal situations does not necessarily amount to impermissible discrimination. Legislation that recognizes said differences is therefore not necessarily discriminatory. In the context of members of indigenous and tribal peoples, this Court has already stated that special measures are necessary in order to ensure their survival in accordance with their traditions and customs…. Thus, the State's arguments regarding its inability to create legislation in this area due to … the possible discriminatory nature of such legislation are without merit").

all other ethnic groups in Suriname have land titles or access to procedures to obtain them; indigenous and tribal peoples are the only ethnic groups that continue to have neither.

The judgment of the Court in *Saramaka People*, and the norms and procedures contained therein, interprets and comprises part of Suriname's "applicable international obligations," which are directly relevant to consideration of the R-PP by virtue of the operating principles set forth in FCPF's Charter and applicable UN-REDD policies.[7] While Suriname's R-PP claims that its policy and practice is consistent with the judgment of the Inter-American Court in *Saramaka People*, these claims do not stand up to scrutiny and were hastily added at the last minute in a self-serving attempt to secure approval for the R-PP. Moreover, its statements with regard to *Saramaka People* do no indicate that the State is attempting to implement that judgment and nor has it otherwise adopted any meaningful measures to recognize and secure indigenous and tribal peoples' rights.[8]

We observe that the *Joint FCPF/UN-REDD Guidelines on Stakeholder Engagement* clearly explain that "For REDD+ programs to succeed … stakeholders have to be involved at the project/program formulation as well as the preparation and implementation stages in order to ensure that REDD+ programs respect indigenous peoples' rights and comply with relevant international obligations."[9] Suriname claims to adhere to the Guidelines, yet the R-PP and the process by which it was developed show that this is not presently the case.[10]

I. The R-PP remains based on the discriminatory and illegitimate notion that the State owns all forests

Suriname's R-PP continues to be based on its assertion of public ownership of all forests in Suriname, including those within indigenous and tribal peoples' territories, except for a small area which the State maintains is subject to private ownership rights. This exclusive public ownership, according to the R-PP, is based on Article 41 of the 1987 Constitution that provides that the State has the inalienable right to take possession of all natural resources[11] and to use them for public purposes.[12] As pointed out by the TAP (see below), this assertion is highly problematic in the context of REDD+ and the requirements of the FCPF Charter, and contravenes the rights of indigenous and tribal peoples, for the following reasons.

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7 *Charter of the Forest Carbon Partnership Facility*, Operating Principles, 3.1(d).

8 *See e.g.*, UNCERD, *Concluding observations: Suriname*, CERD/C/SUR/CO/12, 13 March 2009, at para. 12, (concluding that "the Committee is concerned at the nonexistence of specific legislative framework to guarantee the realization of the collective rights of indigenous and tribal peoples").

9 *Guidelines on Stakeholder Engagement in REDD+ Readiness With a Focus on the Participation of Indigenous Peoples and Other Forest-Dependent Communities*, 20 April 2012, at para. 2.

10 Suriname, draft R-PP, 23 February 2013, *inter alia*, p. 80.

11 *See e.g.,* UNCERD, *Concluding Observations: Suriname*, CERD/C/64/CO/9, 28 April 2004, at para. 11 (refuting the State's contention that Article 41 allow it unfettered discretion and recommending that "While noting the principle set forth in article 41 of the Constitution that natural resources are the property of the nation and must be used to promote economic, social and cultural development, the Committee points out that this principle must be exercised consistently with the rights of indigenous and tribal peoples. It recommends legal acknowledgement by the State party of the rights of indigenous and tribal peoples to possess, develop, control and use their communal lands and to participate in the exploitation, management and conservation of the associated natural resources").

12 Suriname, draft R-PP, 23 February 2013, p. 60 and 77 (stating that "The Constitution of the Republic of Suriname … states that all forests, except private owned land, belong to the State. Forests on private land do not cover more than a total area of 50,000 ha").

First, to acknowledge that private ownership of forests is possible for some land owners but not for indigenous and tribal peoples due to a constitutionally mandated, exclusive public ownership is racially discriminatory and there is no reasonable and objective reason for this distinction. Suriname cannot maintain that its Constitution requires exclusive pubic ownership of forests in the case of indigenous and tribal peoples while at the same time asserting that private ownership is possible and, in law and fact, allowed for some non-indigenous and tribal persons. Additionally, the Inter-American Commission found in 2006 that the Saamaka – and by extension all other indigenous and tribal peoples - have endured racial discrimination precisely because Suriname has failed to recognize and regularize their customary tenure and this issue is not adequately addressed in the R-PP.[13]

Second, and in stark contrast to Suriname law, the Inter-American Court explicitly held that the forests within Saamaka territory – and again by extension the territories of the other indigenous and tribal peoples in Suriname – are lawfully owned by the Saamaka people and the State has an (as yet unfulfilled) obligation to recognise and regularise their ownership rights to their traditional territory in accordance with the Saamaka's customary tenure system.[14] This includes their ownership rights over the forests within their territories. The assertion of exclusive State ownership therefore violates the binding orders of the Inter-American Court and its jurisprudence that interprets Suriname's 'applicable international obligations', including for the purposes of understanding and applying the Charter of the FCPF and UN-REDD policies.

Third, without first delimiting and demarcating indigenous and tribal territories – and the forests owned by them therein – it will not be possible to ascertain with certitude which forests may be included in a REDD+ program, whether on the basis of applying FPIC (which is in part dependent of properly defining territorial rights and boundaries) or otherwise.[15] In this respect, the R-PP's claims that Suriname has mostly mapped these territories cannot be accepted as many of these maps are either incomplete or inadequate and, most pertinently, all are land use maps that were neither intended to (and, consequently, do not) identify territorial boundaries (see below).

Additionally, extant Suriname law neither recognizes any meaningful rights vested in indigenous and tribal peoples nor provides any mechanism for the delimitation, demarcation and titling of their traditionally owned territories. While the R-PP makes reference to potential legislative amendments to forestry and mining laws, it makes no

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[13] *Report on Admissibility and Merits No. 09/06 on the Case of the Twelve Saramaka Clans (Suriname)* (2 March 2006), at para. 235 (finding that "that indigenous and tribal peoples in Suriname "have endured racial discrimination, and that one major manifestation of such discrimination has been the failure of state authorities to recognize customary indigenous forms of land possession and use"); and at para. 237, (concluding that "[t]he Commission considers that the lack of constitutional and legislative recognition or protection of the collective rights of the Saramaka communities reflects unequal treatment in the law, which is not compatible with the guarantees of the American Convention").

[14] *Saramaka People v. Suriname* 2007*,* at para. 121 (stating that "members of tribal and indigenous communities have the right to own the natural resources they have traditionally used within their territory…").

[15] Suriname, draft R-PP, at p. 65 (stating that "Any policies that would be considered for deployment within forest areas belonging to tribal communities that are subject to FPIC according to the UN-REDD/WB guidelines will be treated as such. In other words, any activity for which FPIC is required under the program will only be introduced and enforced if the local communities that would be impacted provide their FPIC").

reference at all to the amendment or adoption of laws that would either recognize indigenous and tribal rights or otherwise provide a mechanism for regularizing and securing their rights to their territories (as ordered by the Inter-American Court in 2005 and 2007).[16] Nor is the lack of land tenure rights listed as a 'policy failure' in the R-PP. Moreover, while the R-PP explains that "stakeholders" raised "the lack of rights to land … as it is seen as a prerequisite to talk about forest protection and use,"[17] nothing specific is set forth in the R-PP in relation to this aside from a vague and unexplained reference to funding for 'land tenure studies', which may or may not have anything to do with indigenous and tribal peoples' tenure rights (the level of funding is, at any rate, grossly inadequate to properly address this issue, particular if it is to be done in a participatory way).[18]

As noted above, both the Participants' Committee and the TAP raised the issues discussed above (and below) in their January and March 2010 comments on a prior version of the R-PP. The Participant's Committee, for instance, stressed that the "Main issue seems to be that indigenous peoples lack capacity and leverage to interact with government, have unclear land rights, and are omitted from overall planning. … Important to improve the rights and empowerment of local communities (maroon and indigenous) based on a thorough analysis of current situation (which is missing)."[19] The TAP made numerous comments on this subject, including correctly opining that "an effective, efficient and equitable program must integrate … the land tenure and livelihood interests of the indigenous and Maroon communities who occupy and use the forests over most of the country's interior."[20] It further explains that

> Land tenure for forest communities remains an unresolved issue. Resolution of these issues is a high priority within the country, and raise[s] questions over compliance with international agreements on the rights of indigenous people and World Bank guidelines. These issues were raised in the first TAP review, and seem still to need further attention;[21]

and;

> [t]he recognition of land rights of indigenous and maroon peoples remains unattended, even in spite of a ruling of the Inter-American Court on Human Rights. The situation of domestically unrecognized land rights while the state's purported

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16 Suriname, draft R-PP, 23 February 2013, at p. 60 (stating that "Existing relevant policies and laws will be revised based on the REDD+ strategy and its options. For example, legislation and policies on mining and logging concessions are not coherent. Also, the Forest Management Act refers mainly to production forest, while there is a need for revision of the national definition of forests in order to establish a Forest Reference Level. Existing policies and legislation, such as the Mining Decree and the Forest Management Act will be assessed based on selected REDD+ strategy options to identify gaps where adjustment might be necessary").

17 *Id*. at p. 38.

18 *Id*. p. 62, Table 12.

19 *Review Process by the Forest Carbon Partnership Facility Participants Committee* (Comments by Peter Saile Peter, Leonel Iglesias, Jørgen Orkar and Lucio Santos), January 2010, at p. 3.

20 *Draft Synthesis Review of FCPF R-PP of Suriname: re-submission by the ad hoc FCPF Technical Advisory Panel.* Lead Reviewer: Stephen Cobb, on the basis of eight independent TAP reviews, March 4, 2010, p. 1. Available at: http://www.forestcarbonpartnership.org/sites/forestcarbonpartnership.org/files/Documents/PDF/Mar2010/Suriname_TAP_Synthesis_Review_re-submission_04_03_10%20.pdf.

21 *Id*. at p. 2.

> ownership over traditional indigenous and maroon lands and territories continues to be asserted, worries a number of the reviewers, who feel it should be dealt with more openly at this stage, as a means of preparing to resolve issues that seem likely to arise, both on the ground and in the courts, during a next phase of REDD preparation.[22]

While these comments all point to the need for further attention to indigenous and tribal peoples' rights and the risks inherent in failing to do so, Suriname's R-PP continues to be substantially deficient in this respect. Additionally, the information presented by the State on these issues is misleading insofar as it suggests that Suriname has done anything meaningful to address these rights in law and practice and to secure their exercise and enjoyment in fact. To the contrary, it must be stressed that the State has gone out of its way to do neither and it continues to ignore the judgment of the Court in *Saramaka People* and a plethora of other international statements of grave concern about the situation of indigenous and tribal peoples and their rights. We note the UN Committee on the Elimination of Racial Discrimination has adopted a number of urgent action decisions on Suriname, the last of which states that it decided to draw "the attention of the High Commissioner for Human Rights as well as the competent United Nations bodies, in particular the Human Rights Council, to the particularly alarming situation in relation to the rights of indigenous and tribal peoples in Suriname, and invites them to take all appropriate measures in this regard."[23] These are compelling factors that must be considered when reviewing Suriname's R-PP at the upcoming Participants' Committee meeting in March 2013.

II. The R-PP's assertions about respect for indigenous and tribal rights in Suriname are misleading

As discussed below, the R-PP's claims that a 2000 Presidential Decree recognizes indigenous and tribal rights and is consistent with the Court's judgment in *Saramaka People* are manifestly false and betray a fundamental misunderstanding of the terms of the judgment and Suriname's obligations to respect and protect indigenous and tribal peoples' rights. Likewise, its reference to a project that purports to identify indigenous and tribal lands and to provide the basis for the legal recognition and regularization thereof is a serious mischaracterization of that project and its results. Among other things, this project was

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[22] *Id*. at p. 8. (see also, at p. 9, stating that indigenous and tribal peoples "are the ones that practically assert management functions over the forests in Suriname, and again, because of the non-recognition of the rights of indigenous and maroon peoples, including their traditional governance systems in relation to the State, are causing substantial governance and regulatory issues. Frequent conflicts between indigenous and maroon traditional land-users and logging, mining, agriculture and other concession-holders, are regularly reported. Reviewers feel that if these issues are not confronted now, in the text of the R-PP, they will only raise their profile even higher during forthcoming phases of REDD preparation;" and, at p. 10, stating that "[a]lthough briefly mentioned on page 46, the issue of land rights seems underestimated by comparison with the Standard expected, in the analytical framework that is presented, as are the institutional and legal arrangements that will need to be in place to meet internationally recognized standards of FPIC and full and effective participation of indigenous and tribal peoples, as an integral part of land-use planning").

[23] *Decision 1(69), Suriname*. UN Doc. CERD/C/DEC/SUR/3, 18 August 2006, at para. 4. *See also Decision 3(62), Suriname*. UN Doc. CERD/C/62/CO/Dec.3, 21 March 2003; *Follow –Up Procedure, Decision 3(66), Suriname*. UN Doc. CERD/C/66/SUR/Dec.3, 9 March 2005; and, *Decision 1(67), Suriname*. UN Doc. CERD/C/DEC/SUR/2, 18 August 2005.

consistently rejected by the Association of Indigenous Village Leaders in Suriname ("VIDS"), Suriname's national representative indigenous peoples' organization, and the Saamaka people as being substandard in its methodology and objectives as well as non-participatory in its design and implementation, a fact that was prominent in the Inter-American Development Bank's decision to not extend financing for a second phase of the project. Indeed, IADB representatives felt the need to formally apologize to both the VIDS and the Saamaka about this project and the manner in which it was conducted.

The R-PP commences its discussion of indigenous and tribal territorial rights by contending that "For decades … efforts have been made by various Governments to solve land right (sic) issues."[24] The word 'efforts' is defined in dictionaries as a "vigorous or determined attempt." There is nothing in close to 40 years of policy, law and practice in Suriname that could constitute a 'vigorous or determined attempt' to resolve outstanding land rights issues for indigenous and tribal peoples and there is nothing in the R-PP that could contradict this conclusion. Indeed, Suriname has persistently argued that indigenous and tribal peoples have no rights and whatever "interests"[25] they may have are subject to an all-encompassing power vested in the State to dispossess them of their lands whenever it suits the State to do so.[26] Even a cursory review of Suriname's acts and omissions with regard to indigenous and tribal peoples demonstrates that its efforts have been primarily directed at disregarding, denying and violating indigenous and tribal peoples' rights, even to the point of explicitly rejecting non-binding recommendations that it urgently implement the legally binding *Saramaka People* judgment made by other states during the Human Rights Council's Universal Peer Review procedure in 2011.[27]

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[24] Suriname, draft R-PP, at p. 79.

[25] Saramaka People 2007, at para. 99 (explaining that "The State also acknowledged that its domestic legal framework does not recognize the right of the members of the Saramaka people to the use and enjoyment of property in accordance with their system of communal property, but rather a privilege to use land. … Finally, the State argued that its domestic legislation recognizes an "interest", rather than a right, to property of members of the Saramaka people"), and, at para. 106 (stating that "the State argued that, although it 'may be correct that land related interests of the [Saramaka] are not recognized as a subjective right in the Suriname legal system[,] it is a tendentious misrepresentation to suggest that legitimate interests of the Tribe are not recognized by the system and respected in practice.' According to the State, the existing domestic legislation recognizes certain 'interests' of members of indigenous and tribal peoples to land. … As a preliminary matter, the Court observes that an alleged recognition and respect in practice of 'legitimate interests' of the members of the Saramaka people cannot be understood to satisfy the State's obligations under Article 2 of the Convention with regards to Article 21 of such instrument").

[26] *Id*. at para. 115 (observing that "the State's legal framework merely grants the members of the Saramaka people a privilege to use land, which does not guarantee the right to effectively control their territory without outside interference. The Court has previously held that, rather than a privilege to use the land, which can be taken away by the State or trumped by real property rights of third parties, members of indigenous and tribal peoples must obtain title to their territory in order to guarantee its permanent use and enjoyment"); and, at para. 116 (concluding that "the State's legal system does not recognize the property rights of the members of the Saramaka people in connection to their territory, but rather, grants a privilege or permission to use and occupy the land at the discretion of the State").

[27] See for instance *Request for Consideration of the Situation of the Saramaka People of Suriname under the UN CERD's Urgent Action and Early Warning Procedures*, 12 February 2013. Available at: http://www.forestpeoples.org/sites/fpp/files/publication/2013/02/urgent-action-procedure-request-saramaka-surinamefeb2013.pdf.

The Presidential Decree of 2000

The R-PP makes reference to Presidential Decree PB 28/2000 as the central thrust of its contention that Suriname has not only recognized indigenous and tribal rights but also that its law, policy and practice is consistent with the criteria and norms set forth in the *Saramaka People* judgment.[28] However, and crucially, this Decree is only valid to the extent that it does not conflict with higher sources of law, such as legislation; it does so conflict in numerous respects and, as found by, *inter alia*, the Inter-American Commission[29] and Inter-American Court after reviewing numerous submissions by the State over more than seven years, extant Suriname law not only fails to recognize and respect indigenous and tribal peoples' rights, it in numerous ways negates and nullifies those rights.[30] It also fails to provide any effective judicial remedies by which those rights may be protected.[31] Moreover, at no time in any of the proceedings before various international bodies and tribunals in the past 15 years in matters concerning indigenous and tribal territorial rights has Suriname even mentioned this Decree and nor is it mentioned in domestic discussions on this subject.[32] It is therefore, to say the least, curious – and stands in stark contrast to prior practice – that it now becomes a source of rights and an indication of good faith efforts by the State for the purposes of obtaining funding pursuant to the R-PP.

Nor, as the R-PP belatedly and incorrectly maintains, is this Decree consistent with the rights and procedures set forth in the *Saramaka People* judgment and other relevant international jurisprudence that interprets Suriname's "applicable international obligations". For instance, the Decree does not specify what 'collective rights' are recognized and since indigenous and tribal peoples, as collectivities, do not even enjoy legal personality under extant law (despite the order of the Inter-American Court that Suriname legislate to provide for collective personality), it is difficult to see how any such rights could vest or be enforceable at present.[33] Second, this Decree only refers to 'use rights' whereas

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[28] Suriname, draft R-PP, 23 February 2013, p. 79-80.

[29] See *Report on Admissibility and Merits No. 09/06 on the Case of the Twelve Saramaka Clans (Suriname)* (2 March 2006), at para. 241-2 (where the Inter-American Commission observed that the public interest doctrine in Suriname "substantially limit[s] the fundamental rights of the indigenous and Maroon peoples to their land *ab initio*, in favor of an eventual interest of the State that might compete with those rights. What is more, according to Suriname's laws, mining, forestry, and other activities classified as being in the general interest are exempted from the requirement to respect customary rights. In practice, the classification of an activity as being in the "general interest" is not actionable and constitutes a political issue that cannot be challenged in the Courts. What this does in effect is to remove land issues from the domain of judicial protection").

[30] *Id.* and notes 25-6 *supra*.

[31] *See inter alia* Saramaka People 2007, para. 159-85; and Inter-American Commission on Human Rights, *Report No. 76/07, Admissibility, The Kaliña and Lokono Peoples (Suriname),* 15 October 2007, at para. 59 (stating that "the Commission found that Suriname failed to provide any remedies under domestic law for the petitioners, and accordingly, they were exempted from the requirement to demonstrate exhaustion of domestic remedies. The Commission considers that the situation of the Lower Marowijne Peoples with respect to this issue is indistinguishable from that of the Twelve Saramaka Clans. Consequently, the Commission concludes that the domestic legal system does not provide adequate, effective remedies to respond to the complaints presented, and for this reason they are exempt from the requirement of exhaustion of domestic remedies"). Available at: http://cidh.org/annualrep/2007eng/Suriname198.07eng.htm.

[32] *See e.g.,* Saramaka People 2007.

[33] Saramaka People 2007, para. 159-75, and, at para. 214(2) and (6) (ordering that the "State shall grant the members of the Saramaka people legal recognition of the collective juridical capacity, pertaining to the

indigenous and tribal peoples' territorial rights are much more extensive and comprise rights to the effective possession, control and ownership of their territories and, in order to freely determine, pursue and enjoy their own development, the right, effectuated through their own institutions, to make authoritative decisions about how best to use that territory.[34] Third, the criteria specifically identified by the R-PP as consistent with *Saramaka People* are only some of the measures that the State is required to comply with should it seek to validly restrict territorial rights. This begs the question: does Suriname see REDD+ activities as restrictions to indigenous and tribal peoples' property rights and, if so, considering that its existing law on this point has been found to be wholly incompatible with its international obligations and racially discriminatory, is it its intention to restrict these rights in REDD+ activities?

Last, the environmental and social impact assessment requirement set forth in *Saramaka People* is not even presently provided for and required by law – nor is it explained why another two years is required to enact a framework environmental law, which was drafted in 1998 and has not been considered since – and the assertion that the (unenforceable) NIMOS ESIA Guidelines conform to the Akwe:Kon Guidelines is simply false.[35] Further, in *Saramaka People*, the Court stressed that the conduct of an independent and participatory ESIA, that fully addresses the cumulative impact of other current and proposed activities, is one of the conditions precedent to ensuring the survival of the Saamaka. There is no provision of law or otherwise in Suriname that requires indigenous and tribal participation in ESIA processes, and NIMOS is a State-agency that does not qualify as independent.[36]

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community to which they belong, with the purpose of ensuring the full exercise and enjoyment of their right to communal property, as well as collective access to justice, in accordance with their communal system, customary laws, and traditions…"); and UNCERD, Concluding Observations: Suriname, CERD/C/64/CO/9, 28 April 2004, at para. 14 (stating that "the Committee is concerned that indigenous and tribal peoples cannot as such seek recognition of their traditional rights before the courts because they are not recognized legally as juridical persons" and recommending that "indigenous and tribal peoples should be granted the right of appeal to the courts, or any independent body specially created for that purpose, in order to uphold their traditional rights and their right to be consulted before concessions are granted and to be fairly compensated for any damage").

[34] Saramaka People 2007, at para. 194 (ordering that recognition of the Saramaka people's territorial rights must include recognition of "their right to manage, distribute, and effectively control such territory, in accordance with their customary laws and traditional collective land tenure system").

[35] Suriname, draft R-PP, p. p. 80 and p. 89 (stating that "the NIMOS guidelines have been based also on the AKWE KON guidelines Voluntary guidelines for the conduct of cultural, environmental and social impact assessments regarding developments proposed to take place on, or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities").

[36] Saramaka People, Interpretation of the Judgment, at para. 41. *See also Kichwa Indigenous People of Sarayaku,* Judgment of 27 June 2012, Ser. C No. 245, at para. 206 (affirming the Court's jurisprudence in *Saramaka* and explaining that "the Court has established that Environmental Impact Studies must be carried out in conformity with international standards and best practices, must respect the indigenous peoples´ traditions and culture and must be completed prior to the granting of the concession, given that one of the purposes for requiring such studies is to guarantee the right of indigenous people to be informed about all proposed projects in their territory. Therefore, the State's obligation to supervise the Environmental Impact Assessment is consistent with its duty to guarantee the effective participation of indigenous people in the process of granting concessions. Furthermore, the Court considers that one of the points that should be addressed by the environmental and social impact assessment is the cumulative impact of existing and proposed projects") (footnotes omitted).

The R-PP's contention that a series of activities have been undertaken to "implement" the 2000 Presidential Decree, "often with support of organizations working directly with indigenous peoples and maroons" (but not with indigenous peoples and Maroons themselves in most instances), is equally misleading, not the least as the majority of the activities it refers to have been entirely inconsequential and have not led to any changes in its policy, law or practice in the past 13 years.[37] For instance, it states that the Government has completed a number of studies on the legal aspects of recognizing indigenous and tribal rights, yet nowhere indicates what the conclusions were or the actions taken to follow up on these studies – indeed, none have been taken (see below). Likewise, it refers to a Presidential Commission on Land Rights constituted in 2006 that issued a report with recommendations in 2008, yet nowhere specifies what has been undertaken to implement these recommendations in the more than five years since that report was issued – again, none have been implemented.[38] It is also well documented that this Commission exercised its mandate without any meaningful participation by indigenous and tribal peoples. Nor is it explained why the State must "identify and demarcate indigenous and maroons [lands] (current process)" prior to making legislative amendments to recognize their rights or what the "current process" for doing this entails. It is also well documented that Suriname is not pursuing any of these measures in reality.[39]

Similarly, the so-called 2011 negotiations with indigenous and tribal leaders were unilaterally terminated by the State because it did not like a joint statement read out on behalf of the assembled indigenous and tribal leaders on the first day of the conference.[40] The claim that during 2010-2011 "consultation with indigenous peoples and maroon umbrella organizations (VIDS and VSG) was on a weekly basis, as they represented the indigenous peoples and maroons" is inaccurate and these meetings have been intermittent

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37 Suriname, draft R-PP, at p. 79.

38 *See also* UNCERD, *Concluding observations: Suriname*, CERD/C/SUR/CO/12, 13 March 2009, at para. 13 (recommending that "In the Committee's opinion, the State Party's consideration of the report of the Presidential Commission should not be to the detriment of its full compliance with the orders of the Inter-American Court of Human Rights in the *Saramaka People* case").

39 See e.g., Saramaka (Monitoring of Compliance), at para. 12 (concluding that "this Court finds that the State has not complied with this obligation and must thus submit updated and detailed information on the specific measures it is implementing in order to delimit, demarcate, and title Saramaka territories as indicated in the Judgment") and, at para. 19 (observing that "given that the titling of Saramaka lands has not yet been carried out (*supra* Considering clause 12), the Court considers that the granting of any new concessions in those territories after December 19, 2007, the date on which the Judgment was served, without the consent of the Saramaka and without prior environmental and social impact assessments, would constitute a direct contravention of the Court's decision and, accordingly, of the State's international treaty obligations"); and, note 2 *supra*.

40 Suriname, draft R-PP, p. 80. According to reports of a press conference held by the President on 23 October 2011, the President cancelled the conference because he believes that the mention of the right to self-determination and property rights in the indigenous and tribal leaders' statement is "contrary to the Constitution." 'Bouterse livid over "manipulation" of land rights conference, *Stabroek News*, 24 October 2011. Available at: http://www.stabroeknews.com/2011/news/breaking-news/10/24/bouterse-livid-over-manipulation%E2%80%99-of-land-rights-conference/. *See also* 'Suriname Parliament also against self-determination tribal peoples', *Stabroek News*, 27 October 2011. Available at: http://www.stabroeknews.com/2011/news/breaking-news/10/27/suriname-parliament-also-against-self-determination-tribal-peoples/.

at best.[41] Why the VIDS, given its acknowledged important status, was not even invited to the February 2013 meeting on the R-PP is not explained anywhere in its text.

A. The SSDI Project: substandard, rejected by indigenous and tribal peoples, and inconclusive

The R-PP's claims about the State's mapping of indigenous and tribal lands is equally misleading. In the first place, all of the maps referenced in the R-PP are land use maps that are of limited utility in determining the boundaries of indigenous and tribal territories and many of them were made by indigenous and tribal peoples themselves (without any state involvement) on limited budgets and are specifically defined as 'provisional' given that all areas were not mapped. Also, land use mapping by itself is an insufficient reflection of traditional tenure systems and the customary laws that govern these systems. Often areas left blank on such maps are integral and vitally important parts of these customary tenure systems (traditional protected areas, for instance). By itself, land use mapping cannot therefore be the basis for delimitation and demarcation of indigenous and tribal territories.

Some maps were made in the course of the IADB-funded Support for Sustainable Development of the Interior project ("SSDI"), mentioned in the R-PP.[42] As noted above, the IADB declined to fund a second phase of this project and formally apologized to the Saamaka and others about the manner in which it was conducted. Suriname itself explained to the Inter-American Court that the SSDI project was cancelled due to a lack of "consultation" with and a lack of "alignment" by the Saramaka with maps of their territory generated by that project; in the State's words, there was "no adequate stakeholder support for the project."[43] Consistent with this, the SSDI project was formally rejected by the VIDS, the national indigenous peoples' organization, and by the Saamaka people, a fact that is confirmed in two of the reports produced by the SSDI project.[44] As a consequence, at least 85 percent of the indigenous communities in Suriname are not accounted for at all in the project; nor are the Saamaka people, one of the two largest tribal peoples in Suriname. It is therefore very difficult to understand why Suriname now cites this project as a positive example of how it is making progress to resolve indigenous and tribal rights issues.

The SSDI project report demonstrates that an additional number of significant areas were not mapped at all, including, as noted above, almost all of the indigenous peoples' territories. At present, only two indigenous territories – partially mapped prior to the project – are included (and this is primarily because the project executor is in possession of those maps). The Matawai Maroon territory was not fully mapped because the people

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41 Suriname, draft R-PP, p. 80.

42 *Id*. p. 79, footnote 11 (referencing "Ministry of Regional Development/Inter-American Development Bank/Amazon Conservation Team. (2010). Land rights, tenure and use of indigenous peoples and maroons in Suriname support for the sustainable development of the interior-collective rights").

43 *Communication of Suriname to the Inter-American Court of Human Rights, re. the Case of the Saramaka People*, 29 July 2011, at p. 3, para. 4.

44 *See Participatory Mapping in Lands of Indigenous Peoples and Maroons in Suriname*, Draft Report, Amazon Conservation Team Suriname, 27 August 2009, at sec. 1.1 (stating that the "communities of the *Lokono* and *Kaliña* tribes expressed concern about the methodology used for gathering community information and withdr[ew] from the collective rights mapping project"). See also *Draft Report on Community Planning and Consultation*, Suriname International Partners, November 2009, p. 6.

asked the mapping team to leave the area.[45] In the case of the N'djuka Maroons living between Albina and Pakira Kreek, the mapping appears to have consisted only of asking "the names, locations of the camps, villages, and agricultural sites [from] local people that passed by boat during March 9-12, 2009."[46]

The SSDI report entitled *Land Rights, Tenure and Use of Indigenous Peoples and Maroons in Suriname*, which is the primary legal study referred to by the State in the R-PP, contains merely four pages of discussion on the rights of indigenous and tribal peoples, of which only two paragraphs concern a general discussion on obligations derived from international instruments. It is the only SSDI report that contains any direct mention of the *Saramaka People* judgment, stating that:

> Recently, different tribal groups have appealed to international organisations in seeking support for and protection of their customary rights. Among these groups were the Saramaka Maroons from the Upper Suriname River, which [*sic*] filed a case with the Inter-American Court of Human Rights…. In November 2007 the Court ruled in their favour obliging the state to demarcate and grant collective titles over their lands. Today the Saramaka are still waiting for these and other parts of the Court ruling to be executed.[47]

With respect to the demarcation and titling of indigenous and tribal peoples' territories, the SSDI project simply recommends that "a methodology needs to be developed" for: 1) boundary demarcation; 2) creation, storage and updating of map data; 3) the adjudication of land rights; and 4) the recording of "'ownership'" rights.[48] On this basis, it may be concluded that after almost three years work, that the SSDI project decided merely that various methodologies should be developed to delimit, demarcate and title indigenous and tribal lands. It does not say what these methodologies are, or should be, and nor does it explain what the next steps may be to develop such methodologies. Also, precisely why the SSDI project chose to put the term 'ownership' in quotation marks is not known or explained.

That Suriname again seeks to rely on this inconclusive, discredited and badly implemented project as evidence of its efforts to secure indigenous and tribal peoples' rights is indicative of the State's long-standing lack of serious attention to these issues. It is also indicative of its persistent failure to secure the effective participation of indigenous and tribal peoples and to base its actions on a meaningful treatment of their rights. These failures are repeated in the R-PP and this should be fully considered when considering the measures proposed therein.

III. Indigenous and Tribal Participation and Representation

There are two main concerns related to indigenous and tribal participation in the R-PP: 1) the development of the R-PP itself; and 2) how the R-PP characterizes indigenous and tribal

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45 *Participatory Mapping in Lands of Indigenous Peoples and Maroons in Suriname*, Draft Report, Amazon Conservation Team Suriname, 27 August 2009, sec. 2.5.

46 *Id*. at sec. 2.2.

47 *Land Rights, Tenure and Use of Indigenous Peoples and Maroons in Suriname*, Draft Report, Amazon Conservation Team Suriname, 10 April 2009, at p. 38.

48 *Id*. at p. 50-1.

representation for the purposes of decision-making. With respect to the first, while Suriname belatedly held a number of meeting in indigenous communities in late 2012 to early 2013 and had a broader meeting with civil society and some indigenous and tribal leaders in February 2013, meaningful and effective indigenous and tribal participation has been lacking throughout the process of elaborating the R-PP. This includes the unilateral determination of when FPIC would be required set forth in the R-PP[49] and the determination that FPIC will only apply depending on "whether a proposed activity/policy will significantly impact on the lands, territories and/or resources of indigenous peoples and/or other relevant rights-holders."[50] This also excludes effective participation in decision making about policy and legislative instruments, a fact that seems to be confirmed in the R-PP itself.

This is deeply troubling given the comments made about the need to secure participation by the Participant's Committee and the TAP in October 2009 and January and March 2010 and does not inspire confidence that Suriname will act differently in the future.[51] Considering that Suriname law does not in any way require consultation with, participation by or the FPIC of indigenous and tribal peoples, there is compelling need for such laws and remedies to enforce them to be enacted as part of any further development of REDD+ initiatives, yet this is nowhere provided for in the R-PP.

On the second point, the R-PP states that "In Suriname, the *granman* (chief) has supreme authority over all members of the tribe within the tribal territory. … With this mandate, the tribal leaders are legally considered the formal representatives of their tribes; as such, they will be among those participating most directly in the REDD+ planning process."[52] There is no extant law in Suriname on this point and it difficult to see why the R-PP makes this assertion. Also, while consulting with one person may be most convenient for the Government, this is not how decisions are made in accordance with indigenous and tribal customary laws and it is not for the State to designate who shall represent indigenous and tribal peoples in any given situation. The example of the Saamaka and the jurisprudence of the Inter-American Court are instructive in this respect.

The State's insistence that the *Gaama* has full authority to speak for and make decisions on behalf of the Saamaka – even without consulting the other traditional Saamaka authorities – was the subject of much discussion before the Inter-American Court.[53] The Saamaka explained that in accordance with their customary laws and political structures, the *Gaama* owns no land as such and has no authority to make unilateral decisions about the use of Saamaka lands or territory.[54] They further explained –and the Court concurred –

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49 *Id*. p. 81, Table 17.

50 *Id*.

51 Note also in this respect that Suriname's R-PP, at p. 28, acknowledges that "Because indigenous and Maroon groups were excluded from the earlier process of REDD+ development in 2009-2010, there may be feelings of discontent about the effort."

52 *Id*. at p. 27-8.

53 *See* Saramaka People 2007, at para. 170 (observing that "the State has constantly objected to whether the twelve captains of the twelve Saramaka clans (*lös*) truly represent the will of the community as a whole (*supra* paras. 19-24). The State additionally asserted that the true representative of the community should be the *Gaa'man*, and not others"). The State persisted with this line of argument in the proceedings related to the interpretation of the judgment (*see* Saramaka People, Interpretation of the Judgment, *supra*, para. 11), in the compliance hearing before the Court, and in domestic discussions.

54 *See e.g., Affidavit of Fiscali and Head Captain Eddie Fonki*, Case 12.338, para. 11-4 (stating, at para. 15, that "If the *Gaama* gives permission for someone to work on Matjau land, that is one thing, and the

that this power is vested in the Saamaka land owning clans and their traditional authorities (the Head Captains and the Captains in consultation with their communities), and the modalities of the exercise of these powers under various circumstances pursuant to Saamaka customary law.[55]

In response, the Court held unambiguously that "By declaring that the consultation must take place 'in conformity with their customs and tradition', the Court recognized that it is the Saramaka people, not the State, who must decide which person or group of persons will represent the Saramaka people in each consultation process ordered by the Tribunal."[56] It further explained that "the Tribunal reiterates that all issues related to the consultation process with the Saramaka people, as well as those concerning the beneficiaries of the 'just compensation' that must be shared, must be determined and resolved by the Saramaka people in accordance with their traditional customs and norms…."[57] To be sure, it explained these same points in four separate paragraphs, stating that "it reiterates that the State has a duty to consult with the Saramaka people … and that the Saramaka must determine, in accordance with their customs and traditions, which tribe members are to be involved in such consultations."[58]

It is clear therefore that each indigenous and tribal people has the right to determine its own representatives in accordance with its own procedures and the State, as it seeks to do in the R-PP, may not usurp this right. Moreover, it is important to consider that only one indigenous *granman* (Trio) has been invited to participate in REDD+ meetings and that Trio and Wayana are the only indigenous peoples that employ the office of the *granman*. How does the State propose that all other indigenous peoples will participate, particularly considering that it has failed more than once to invite and include the VIDS, the body that represents the village leaders of all the indigenous villages in Suriname?

Captain for the affected area must still agree, but the *Gaama* cannot give permission for people to work on the land of another *lö,* He cannot do this. If someone asks his permission, he must talk with and get the permission of the Captains of the first. If he does not do this, there will be a big problem. This happened before when *Gaama* Songo asked for a concession on the land of the Dombi, Nasi and Awana *lös.* The Captains were very angry about it because this is against Saramaka law").

55 Saramaka People 2007, at para. 100 (where the Court concurred, finding that "From the evidence and testimonies submitted before the Court, it is clear that the *lös,* or clans, are the primary land-owning entities within Saramaka society. Each *lö* is highly autonomous and allocates land and resource rights among their constituent *bëë* (extended family groups) and their individual members in accordance with Saramaka customary law").

56 Saramaka People, Interpretation of the Judgment, at para. 18.

57 *Id*. at para. 27 (stating that ""as to who can benefit from development projects, the Court observes that … in the event that any internal conflict arises between members of the Saramaka community regarding this issue, it 'must be resolved by the Saramaka people in accordance with their own traditional customs and norms, not by the State or this Court in this particular case'"). This reasoning applies *mutatis mutandis* to (perceived) disputes about who may represent the Saramaka in any particular instance with regard to granting consent.

58 *Id*. at para. 15 (*see also*, at para. 19, explaining that "the Saramaka people must inform the State which person or group of persons will represent them in each of the aforementioned consultation processes. The State must then consult with those Saramaka representatives to comply with the Court's orders. Once such consultation has taken place, the Saramaka people will inform the State of the decisions taken, as well as their basis;" and, at para 22, that "the decision as to whom should be consulted regarding each of the various issues mentioned above … must be made by the Saramaka people, pursuant to their customs and traditions. The Saramaka people will then communicate to the State who must be consulted, depending on the issue that requires consultation").

Further, while the use of 'REDD+ Assistants' to inform communities about REDD proposals is useful, it is a serious mischaracterization of their functions to, as the R-PP does, refer to them "as representatives of local tribes."[59] REDD+ Assistants were selected to be facilitators of information provision, not to represent the persons or entities who selected them. Also, it is unclear why the R-PP provides that "Civil Society (CS) will be involved to guide the protection of rights of forest-dependent communities, specifically land rights, and to ensure that implementation of R-PP and REDD+ are in line with the results of the Consultation and Participation activities."[60] Indigenous and tribal peoples have their own representative institutions and organizations that can provide this function and, in accordance with their right to self-determination, can independently seek advice from 'civil society' or others should they deem it necessary. This is especially pertinent given that most of civil society is not familiar with indigenous and tribal peoples' rights and some (in the SSDI project, for instance) have acted inconsistently with those rights, even to the point of assisting in the undermining of the judgment of the Court in *Saramaka People*.

IV. Grievance Mechanisms

The R-PP states that "For addressing grievances and conflicts a temporary three-tier approach will be set up, starting with the REDD+ Steering Committee. If issues cannot be resolved at this level, they can be submitted to the Bureau for Contact with the People in the Cabinet of the President and as an ultimate solution to the Parliamentary Commission on Climate Change."[61] These bodies are neither independent or non-partisan and additional measures are required if effective remedies are to be in place.

As noted above, there are no effective remedies in extant domestic law for the protection and enforcement of indigenous and tribal peoples' rights, whether in the context of REDD+ or otherwise. This fact, confirmed by a variety of international mechanisms, including the Inter-American Court, is a glaring omission from the list of policy failures and the specification of proposed legislative reforms in the R-PP. Any grievance mechanisms in REDD+ initiatives therefore must be accompanied by the participatory development and adoption of effective judicial and other remedies through which indigenous and tribal peoples may seek protection for their collective and other rights should the need arise. The Inter-American Court ordered Suriname to adopt such remedies in *Saramaka People*, an order that remains unimplemented to this day.

V. Conclusion

The FPP recognizes that there are some positive statements in the R-PP – the self-selection of members of the REDD Steering Committee and greater clarity about FPIC (albeit subject to the concerns raised above), for instance – but these improvements do not outweigh the negatives discussed above. Continued State assertions of absolute ownership of forests, for instance, squarely contradict the judgment of the Court in *Saramaka People* and substantially undermine the validity of the entire basis for the R-PP and its sustainability. The same is also the case with respect to Suriname's ongoing and willful disregard for the rights of indigenous and tribal peoples to own and control their traditional territories and its failure to delimit, demarcate and title the same, which, as a practical matter, will make it

[59] Suriname, draft R-PP, at p. 20.
[60] Suriname, draft R-PP, at p. 15.
[61] Suriname, draft R-PP, *inter alia*, Executive Summary.

very difficult to determine with any certitude which forests may be included in REDD+ initiatives. This also greatly complicates how the State may apply FPIC in practice. The State's assertions about is efforts to address indigenous and tribal lands rights are misleading at best and there remain substantial obstacles in Surinamese law and practice to securing and ensuring effective protection for these rights. These obstacles are not even acknowledged in the R-PP let alone addressed in any meaningful way.

Applicable FCPF and UN-REDD requirements and guidelines mandate effective participation by indigenous and tribal peoples and effective protection for their rights in accordance with applicable international obligations. As it stands presently, Suriname's R-PP fails on both counts and requires participatory revision.

Yours sincerely

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