



## Land and carbon tenure

### Some – but insufficient – progress

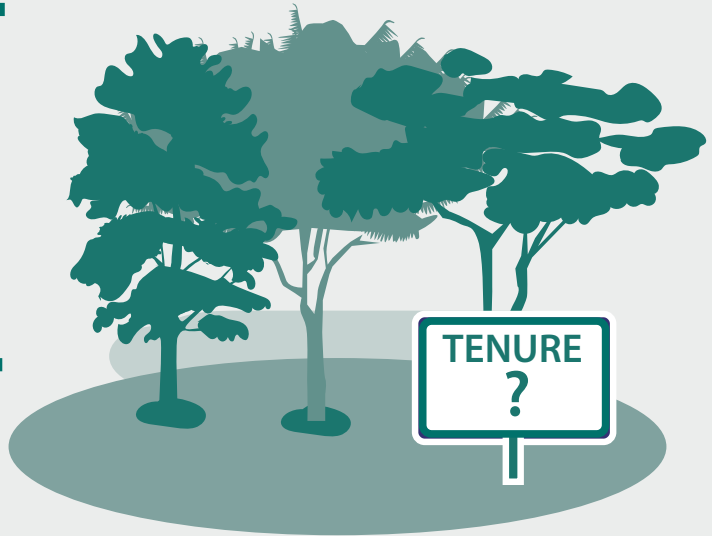
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#### Key messages

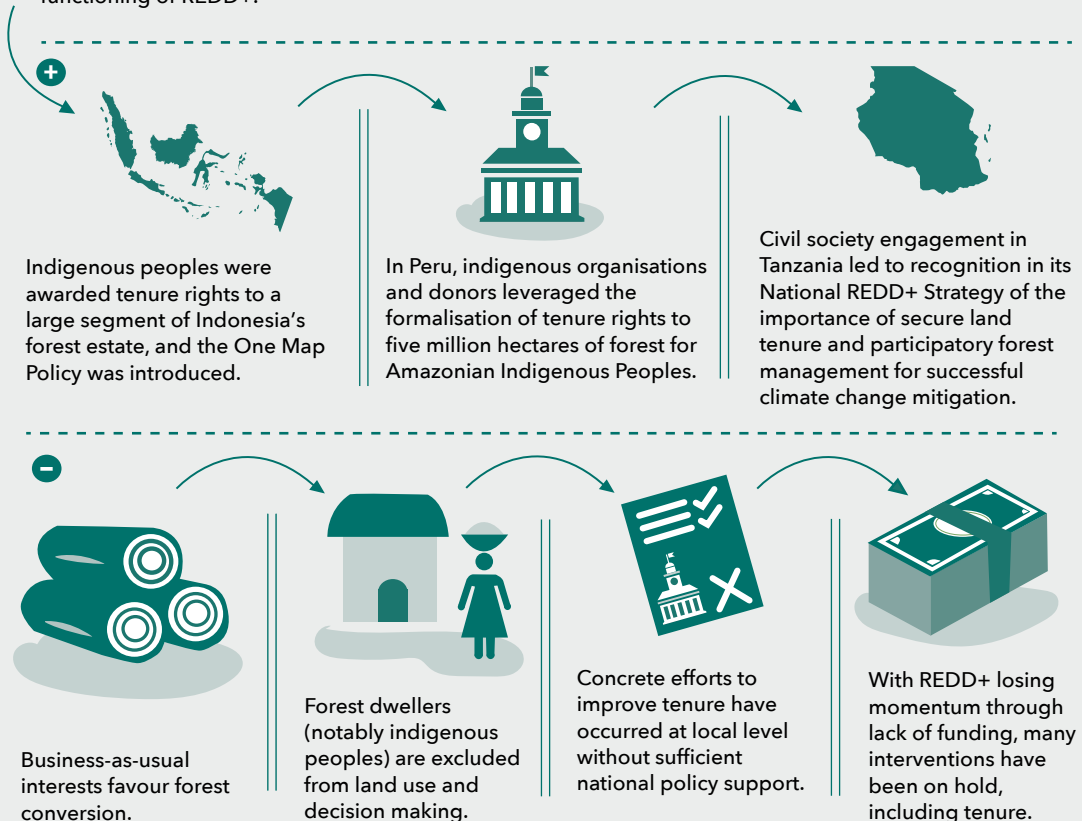
- REDD+ implementation at national, subnational and local levels has resulted in some progress on tenure, but this is far from enough to ensure the proper functioning of REDD+.
- In some countries (e.g., Peru, Tanzania and Indonesia), REDD+ implementation has raised the profile of tenure reform in national politics and policy; but it has largely failed to deliver notable gains on the ground.
- Major obstacles have been business-as-usual interests favouring forest conversion, the long legacy of exclusion of forest dwellers (notably indigenous peoples) from land-use decision-making, and the fact that concrete efforts to ameliorate tenure have occurred at local project level without sufficient national policy support.

# Land and carbon tenure in a nutshell

Tropical countries have a history of forest dweller rights violations - notably when forest products or land are exploited commercially, and landless people migrate into areas claimed as traditional territories by indigenous peoples.



REDD+ implementation at national, subnational and local levels has resulted in some progress on tenure, but this is insufficient to ensure the proper functioning of REDD+.



## 8.1 Introduction

Violation of the rights of forest dwellers is historically common in tropical countries, particularly where forest products or land are exploited commercially through mining, logging or the expansion of commercial agriculture (Peluso 1992; Schwartzman *et al.* 2013; Kelly and Peluso 2015; Human Rights Council 2018) and when landless people migrate into areas claimed as traditional territories by indigenous peoples (Roy 2000; Alexiades 2009). In this chapter, we assess the extent to which the implementation of REDD+ at national, subnational and local levels has strengthened or weakened tenure rights, and propose a course of action. Our analysis focuses on both land and carbon tenure rights, excluding other rights such as free, prior and informed consent (FPIC) and gender, which are discussed in Chapter 11.

### Box 8.1 Carbon rights: A legal quandary

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Carbon rights define which parties have the right to sell, trade and purchase a carbon credit (i.e., a fixed quantity of carbon) in the world's voluntary and compulsory markets, or through bilateral agreements (Chapman and Wilder 2013; Wieland 2013; Karsenty *et al.* 2014). Carbon rights can be tied to the ownership or control over land and trees. Alternatively, they can be defined as self-contained, intangible assets with a monetary value – similar to an intellectual property right, a company's brand, or a title to a mortgage (Greenleaf 2010; Peskett and Brodnig 2011; Loft *et al.* 2015).

Many tropical countries are involved in some form of carbon trade, either at project level or at a subnational or national scale (RRI 2018a). But efforts to clarify carbon rights are progressing slowly (Loft *et al.* 2015). A study by the Rights and Resources Initiative (RRI 2018a) analysed national-level laws and legally binding regulations in 24 countries that collectively hold more than 50% of global tropical and subtropical forests. To date, only five countries (Brazil, Costa Rica, Ethiopia, Guatemala and Peru) have explicitly defined carbon rights in their national laws. Landowners or legally recognised concession holders “may lawfully claim the rights to the carbon contained within their parcel. In Brazil however, carbon rights are vested in the legally recognised owner of the trees holding said carbon, per the country's legal interpretation of forest rights” (RRI 2018a:5). At the time of the study, 17 countries were considering laws and/or regulations to clarify carbon rights.

The unclear legal situation of land and carbon rights poses a major source of risk for the implementation of results-based REDD+ (Loft *et al.* 2017b), and its elusiveness may lead to competing claims among stakeholders. The settlement of these claims relies on legal interpretations of existing resource laws and regulations from other sectors, under the national legal circumstances. This is a time-consuming and costly process for all stakeholders (Chapman and Wilder 2013; Wieland 2013). It poses a particular risk to the efforts of less powerful actors, such as attempts by indigenous peoples and local communities to secure land and resource rights that are not yet formally recognised (Larson 2011; Sarmiento Barletti and Larson 2017). Although inherent power imbalances cannot be eliminated entirely, processes of legal clarification such as lawmaking and court decisions – which are highly formalised and tend to be more transparent – can help to reduce them.

National policy attention to tenure in REDD+ is motivated by institutional factors, such as the commitment of Norway and other donors to conform to rights-related norms, regulations and protections. These include the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), FPIC, various UN declarations on the rights of women and on land and forest tenure rights (e.g., the United Nations' Voluntary Guidelines on the Responsible Governance of Tenure and the UNFCCC Cancún Agreements on REDD+), third-party certification mechanisms, and social safeguards. Subnational REDD+ implementers have set out to clarify and strengthen tenure rights to forests and, to a lesser extent, forest carbon rights (Box 8.1). Their motivations are both instrumental (clarifying and strengthening tenure are essential to meet REDD+'s carbon effectiveness goal) and ethical (many REDD+ projects are guided by concerns of equity and justice for their local partners).

However, success in creating an appropriate tenure foundation for REDD+ is not guaranteed. Early on, scholars and grassroots representatives highlighted the potential threat that REDD+ poses to tenure rights, as it often aims to restrict access to, and conversion of forests by, local people (Sunderlin *et al.* 2009). Resource competition introduced by the sale of forest carbon credits can also put REDD+ participants at a disadvantage. These complications have led to strong grassroots scepticism towards REDD+ (e.g., the 'No rights, no REDD' movement). Still, in principle REDD+ may benefit local people by placing tenure rights on global or national agendas, by clarifying and strengthening local forest tenure to prevent the conversion of forests by outside competitors, by enabling a beneficial reward system for forest protection, and by producing equitably distributed rewards through the sale of forest carbon credits or other community benefits.

## 8.2 The key issues

Providing increased tenure security for local forest custodians *vis-à-vis* external claimants on forests is key to the success of REDD+ objectives. Organisations implementing REDD+ are motivated to create an appropriate tenure foundation, but there are tall obstacles to doing so.

In addition to addressing ethical concerns, there are six instrumental goals that REDD+ implementers can achieve by clarifying tenure: (i) identifying the right-holders to REDD+ rewards; (ii) lessening potential harm from restricted forest access and competition for REDD+ benefits; (iii) introducing or bolstering community forestry; (iv) introducing or assuring enforcement of rights of exclusion; (v) resolving intersectoral and interministerial tenure contestation (Sunderlin 2014a; Sunderlin *et al.* 2018); and (vi) collaborating, consulting and negotiating with local REDD+ stakeholders on matters of mutual interest, such as design, implementation and monitoring.

However, there are various obstacles to achieving significant progress on tenure clarification and security. Implementing organisations must often compensate for restriction of forest access through alternative income sources, performance-based rewards, and increased rights in non-tenure spheres. Notably, REDD+ projects are often sited in areas of high tenure contestation or conflict (Sarmiento Barletti and Larson 2017; Gauthier 2018), where more powerful actors have historically had stronger tenure rights than smallholders. Even if REDD+ programmes or projects seek to recognise indigenous and/or collective land rights, there is often deep-rooted opposition to doing so. Larson and Springer (2016, 12) note that such opposition may come “from those who see national development and ‘progress’ as driven by large-scale private investments, and from those who fear that communities will act as drivers of resource degradation” (see also Monterroso *et al.* 2017; Monterroso and Larson 2018a). In many developing countries, this has escalated into violence against those who seek to defend their lands against claims by powerful actors (Box 8.2).

### **Box 8.2 The human costs of defending territory and resources**

In recent years, local and indigenous peoples in areas rich in natural resources have been subject to a growing number of murders, death threats, acts of sexual violence, and legal and illegal intimidation. In her most recent report, Victoria Tauli-Corpuz, the UN Special Rapporteur on the rights of indigenous peoples, notes: “A crucial underlying cause of the current intensified attacks is the lack of respect for indigenous peoples’ collective land rights and the failure to provide indigenous communities with secure land tenure” (Human Rights Council 2018). This trend reinforces the importance of clear land and resource tenure legislation, and of indigenous peoples’ access to the rights set in such legislation and in relevant international agreements, e.g., the United Nations Declaration on the Rights of Indigenous Peoples and the International Labor Organization’s Convention No. 169.

In 2016, at least 201 forest defenders were murdered worldwide, followed by 197 defenders in 2017, in different conflicts over land and resources; 40% of the victims were indigenous (Global Witness 2017). One example is the murder of Ashaninka leader Edwin Chota and three other community leaders in 2014, as they travelled from the Ashaninka indigenous settlement of Saweto in the Peruvian region of Ucayali to Apiwtxa, an Ashaninka community across the border in Brazil, to meet with other leaders. Chota had recently returned from Lima, where he had denounced threats by people working for timber companies. His murder is not an isolated incident in Peru. In 2017, six local farmers were murdered in Ucayali by a criminal gang that intended to sell their land to palm oil businesses (The Guardian 2017). Female land and human rights defenders are less likely to be murdered, but are more often subject to sexual violence – and they are less likely to denounce these abuses (UN OHCHR. n.d.).

In 2017, a letter from rights defenders in 29 countries demanded that the United Nations press governments for better legal protection from violence. The letter states: “We need global action to counter the threats we face. This is not just a struggle for resources, it’s a struggle for justice and social equality” (Human Rights Defenders 2017). This context of violence and lack of access to rights underscores the need for REDD+ and similar initiatives implemented in the territories of local and indigenous peoples to actively promote the defence of human rights in order to avoid worsening the current situation (Sarmiento Barletti and Larson 2017).

Land shortages, migration and population growth have also led to tenure conflicts among smallholders (Gauthier 2018). These obstacles are exacerbated by the fact that, in some REDD+ countries, indigenous peoples are not recognised as groups with distinct rights; in other countries, neighbouring non-indigenous local communities may not have the same tenure rights as indigenous peoples.

## 8.3 The REDD+ experience

### 8.3.1 Achievements

There have been successes at the level of the global REDD+ framework and national policies. Attention to clarifying and strengthening local tenure rights is enshrined in the tenure requirements of the UNFCCC's Cancún Agreements, in the REDD+ safeguards of the UNFCCC Warsaw Framework, and in the policies and activities of major donor, multilateral and international organisations that have laid the groundwork for REDD+, e.g., the Norwegian International Climate and Forest Initiative, the World Bank and FAO. Partly due to their interactions with international donors, some REDD+ country governments have given more attention to forest tenure, including major recognition of indigenous land rights. In 2013, Indonesia established the basis for the recognition of indigenous tenure rights to a large segment of the country's forest estate through its Constitutional Court Decision 35 (Kahurani *et al.* 2013; Butt 2014), and introduced the One Map Policy to resolve interministerial contestation over forest tenure (Samadhi 2013). Engagement with civil society and indigenous organisations led to recognition of rights protection (including tenure) in Indonesia's National REDD+ Strategy and safeguards (Jodoin 2017). Similarly, civil society engagement in Tanzania prompted its National REDD Framework to recognise the centrality of securing land tenure and participatory forest management for climate change mitigation (Jodoin 2017). In Peru, leverage from Amazonian indigenous organisations such as the Interethnic Association for the Development of the Peruvian Rainforest (AIDESEP) and from donors (e.g., Norway, the Forest Investment Program, and the Inter-American Development Bank) led to a series of initiatives targeting the formalisation of tenure rights to about five million hectares of land for Amazonian Indigenous Peoples (Espinosa and Feather 2018; Monterroso and Larson 2018b).

At the subnational level, jurisdictional programmes and local REDD+ projects have made progress in establishing commitments to address tenure issues, and have achieved modest concrete gains. Recognising tenure as a priority challenge, most implementers at the sample of sites in CIFOR's Global Comparative Study on REDD+ (GCS REDD+) have devoted significant resources to addressing rights issues (Sunderlin *et al.* 2014b). In this sample, which encompasses 22 subnational initiatives in 6 countries and half the area under REDD+, households report a net favourable outlook on the well-being outcome of tenure interventions in their villages (Sunderlin *et al.* 2018). In Cameroon, REDD+ had a measurable positive influence on tenure security at two sites (Sunderlin *et al.* 2018).

### 8.3.2 Shortfalls

At the national level, governments face challenges in turning policy recognition of the importance of tenure into concrete improvements for REDD+. These include resistance by policy-makers to incorporating changes of the kind and scope needed. In Indonesia, there has been reluctance to acknowledge the legitimacy of indigenous peoples' claims to forest lands (Jodoin 2017) and a lack of follow-through on Constitutional Court Decision 35 at provincial and district levels (Nababan and Arizona 2016). And the transfer of day-to-day management of REDD+ from Indonesia's National REDD+ Agency to the Ministry of Environment and Forestry may also lead to setbacks for rights recognition (Jodoin 2017). In Tanzania, there has been a failure to recognise indigenous rights and to incorporate international norms into the National REDD+ Strategy (Jodoin 2017). In Peru, current titling processes do not reveal a shift towards a wider recognition of indigenous rights by the central government, nor is there evidence of any change to the government's preference for a conservation model that overlaps exclusive protected areas with indigenous territories (Espinosa and Feather 2018). Further, the ongoing titling process is slow and risks being undermined by bureaucratic obstacles (Monterroso and Larson 2018a). In Ecuador, as in many other countries, there is a lack of political will to assure that rights over land and resources translate into effective access to resources in the context of REDD+ (Loaiza *et al.* 2016; Loaiza *et al.* 2017).

At subnational and local levels, REDD+ has had little success in establishing an appropriate tenure foundation (Sunderlin *et al.* 2018). Across the GCS REDD+ sample of sites (Sills *et al.* 2014), tenure insecurity decreases only negligibly across the whole sample of villages in the aftermath of tenure interventions (Sunderlin *et al.* 2018). Being located in a REDD+ site significantly reduced tenure insecurity at village level at only two sites (in Cameroon), and actually increased the insecurity of smallholder agricultural land tenure in Brazil at household level (Sunderlin *et al.* 2018). Among the reasons cited was inadequate government support for implementing organisations. A recent systematic review of the literature on REDD+ projects throughout the world found that, although REDD+ discourse places great emphasis on recognition of tenure clarity and security, this is not reflected in practice (Saeed *et al.* 2017). Likewise, there have been allegations of tenure rights violations in areas where REDD+ has been, and will be, implemented, as documented by Sarmiento Barletti and Larson (2017). Although it is not clear whether REDD+ is responsible for these violations, it highlights the importance of clear safeguards to avoid exacerbating existing inequalities.

### 8.3.3 Outcome on balance

Despite some measurable achievements, little has been done to clarify and strengthen local-level tenure conditions in REDD+ activities, or to lay a tenure foundation for REDD+ that matches the high expectations of the programme.

There are several major reasons for this shortfall:

- Business-as-usual interests – such as soy and livestock in the Amazon and oil palm in Indonesia – continue to have the upper hand in land-use decision-making in the tropics and are the main threat to tropical forests, the viability of REDD+, and the tenure rights of forest dwellers (Cotula and Meyers 2009; Edwards *et al.* 2012; Brockhaus *et al.* 2014; Enrici and Hubacek 2016).
- REDD+ project implementers, often unassisted by government, are trying to resolve tenure problems at the local level whose origin and scope are at the national level (Sunderlin *et al.* 2014a).
- As REDD+ loses momentum because of lack of funding, many interventions have been put on hold, including tenure.
- Generally speaking, securing tenure rights faces challenges at all governance levels, ranging from resistance and opposition by business-as-usual interests to deficits in human, technical and financial resources. This also includes broader governance problems such as corruption, weak rule of law, or burdensome rules and regulations for formalisation that carry high time and financial costs (Tacconi *et al.* 2009; Notess *et al.* 2018). Efforts to secure tenure rights need to be attentive to these challenges, which affect whether new statutory rights will translate to rights in practice (Larson *et al.* 2011).
- New resources such as carbon, which is associated with novel emissions reduction schemes such as REDD+, have not yet been addressed appropriately by national laws (Loft *et al.* 2015). This means that people from outside a community may have legal rights to resources within that community, and that carbon may fall under the often onerous regulations governing community access to valuable resources. In many cases, forest regulations make it difficult for communities to benefit from valuable resources without substantial external support (Cronkleton *et al.* 2012; Larson and Pulhin 2012).

The failure of REDD+ to advance is a reflection of worldwide ambivalence and hesitation towards addressing climate change (de Sassi *et al.* 2014; see also Chapter 2). In the same way, the failure to make more progress on tenure in REDD+ is largely a reflection of worldwide ambivalence and hesitation towards addressing inequality and righting historical wrongs.

## 8.4 Lessons and ways forward

Land tenure reform (in particular, the recognition of customary rights) and a serious commitment to REDD+ must both challenge the deep-rooted economic and political interests of business-as-usual exploitation of forests (Larson *et al.* 2013; Sunderlin *et al.* 2018). This is also true of rights over forest carbon.

National-level forest tenure reforms are needed to support REDD+; proponents often try to resolve local-level problems that are actually national in origin and



scope (Sunderlin *et al.* 2014a). There must also be cross-scale integration between the efforts of proponents and national actions, and an authentically participatory approach to REDD+ (a key factor in the Cameroon success stories) (Rothe and Munro-Faure 2013; Awono *et al.* 2014; Sunderlin *et al.* 2018).

Achieving this goal must be based on recognition of indigenous peoples' rights to self-determination and to their full inclusion in decisions that affect them. In

### **Box 8.3 Direct benefits of tenure security for achieving forest-based climate change mitigation**

There is an emerging body of research – and a related advocacy movement – linking the tenure rights of indigenous peoples and local communities (IPs/LCs) with forest-based climate change mitigation. The following are the core elements of this outlook/philosophy:

- Indigenous peoples occupy about a quarter of world's land surface (Garnett *et al.* 2018).
- Most of the world's remaining tropical forests are in areas that are managed under customary tenure and/or legally owned by IPs/LCs (RRI 2018a), and they manage "at least 24 percent (54,546 MtC) of the total carbon stored above ground in the world's tropical forests" (RRI *et al.* 2016:1).
- Forests under the management of IPs/LCs that have legal and secure tenure rights tend to be relatively well protected (Stevens *et al.* 2014; Ding *et al.* 2016; RRI 2018b).
- Matching analysis suggests this success in forest protection is not explained by the remoteness of remaining tropical forests (Stevens *et al.* 2014; Vergara-Asenjo and Potvin 2014).
- Most IPs/LCs that live in forests lack secure tenure rights, in spite of modest gains made in recent decades (RRI 2016; RRI *et al.* 2016; RRI 2018b).
- Formal recognition of customary forest tenure rights will significantly boost the performance of Indigenous peoples in protecting remaining tropical forests against conversion to non-forest uses (Stevens *et al.* 2014).
- There are strong economic (cost-benefit) arguments for improving the tenure rights of IPs/LCs as a climate change mitigation strategy (Hatcher 2009; RRI 2014; Ding *et al.* 2016).
- Although this outlook/philosophy is beginning to get traction in national and international policy circles (RRI 2014), the 2015 Paris Agreement failed to give significant attention to the tenure rights of IPs/LCs (RRI 2016).

Among the concrete actions being proposed to remedy deficiencies and accomplish the goals of this advocacy agenda are to:

- provide IPs/LCs with legal recognition of rights to their forests (RRI 2014; Stevens *et al.* 2014; Ding *et al.* 2016; RRI 2018b) and protect their existing legal rights (Stevens *et al.* 2014; RRI 2018b);
- provide technical assistance and training to IPs/LCs (Stevens *et al.* 2014), for example help in mapping, registering and titling lands (RRI 2014);
- compensate communities for climate and non-climate benefits provided by protected forests (Stevens *et al.* 2014);
- encourage donor organisations to have dedicated funding streams for forest tenure reform (RRI 2016; RRI *et al.* 2016); and
- improve the tenure component of Nationally Determined Contributions (NDCs) in fulfilment of the Paris Agreement (Ding *et al.* 2016; RRI 2016; RRI *et al.* 2016), including through monitoring the climate performance of forests managed by IPs/LCs (RRI 2016).

the context of REDD+, this means engaging indigenous peoples and local communities as right-holders and bearers of climate solutions, not as project beneficiaries (Sarmiento Barletti and Larson 2017). It also requires placing UNDRIP rights at the core of REDD+ and recognising the management of territories in accordance with indigenous approaches.

Finally, it needs to be acknowledged that, in some parts of the forest estate, recognition and strengthening of tenure rights in and of itself - without recourse to additional reward systems such as compensation for opportunity costs or conditional payments - can be a viable approach to forest-based climate change mitigation (Box 8.3).