



# TENURE RIGHTS, HUMAN RIGHTS AND REDD+: KNOWLEDGE, SKILLS AND TOOLS FOR EFFECTIVE RESULTS

## REPORT BRIEF

### INTRODUCTION

Identifying, respecting, and advancing rights associated with forest resources can help ensure effective, efficient, and equitable implementation of efforts to reduce greenhouse gas emissions related to forests, also known as REDD+. This brief<sup>1</sup> highlights key issues around tenure and human rights associated with forests and land use in the context of REDD+.

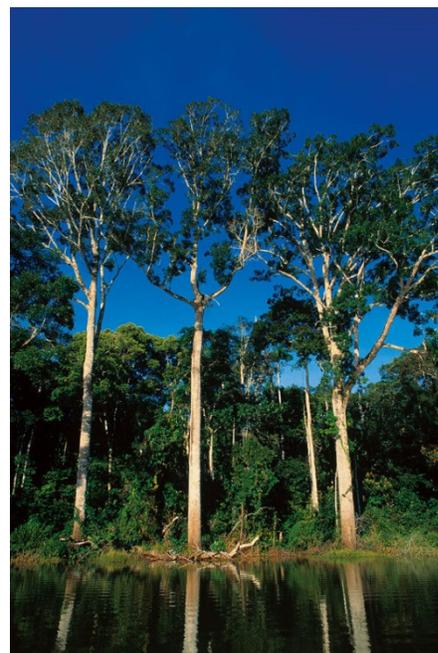
### BACKGROUND

Rights influence access, ownership, use, and management of forest resources. Clearly defined forest rights can help identify which actors need to be engaged to address drivers of deforestation and help determine benefit sharing from REDD+. Local resource management may also improve forest outcomes. Respecting human rights, such as cultural, livelihood, non-discrimination, participatory decision-making, access to justice, and resource-related rights, helps ensure that REDD+ related decisions are made in a fair and equitable manner, and supported by those with direct access to forest resources.

Parties to the UNFCCC have agreed that REDD+ activities should address land tenure issues, gender considerations, and promote and support safeguards including respecting indigenous and community rights and international obligations. These are complemented by broader institutional policies and procedures as well as national and international laws relevant to forest rights. Based on early stages of REDD+ implementation, there have been concerns expressed that many forest users – or even entire communities – have not been adequately involved in REDD+ planning, decision-making, or implementation; in other cases, REDD+ initiatives are opening new opportunities for dialogue with forest communities.

Over the past decades, many policies and laws have been implemented which help determine the scope of tenure and human rights related to forests. In many countries, people and communities have existing rights but it may be unclear how these rights apply to REDD+ and forest activities, much less how to exercise and defend them. Sources of these rights derive from international obligations found in treaties and customary international law, national legislation and common law, and customary rights associated with a specific community or people. Depending on the underlying framework, rights to forest resources can be individual (applies to a person) or collective (applies to a community), and in some cases these may overlap.

While the specific legal and policy framework that applies to a REDD+ activity will depend in part on the country, funding, activities and institutions involved, nearly all international organizations and national governments have policies and laws in place that support international obligations affirming the rights of indigenous peoples and local communities. As such, it helps to understand which conventions, agreements, and national and international obligations apply in this context. These can be broken down into tenure rights and human rights – both procedural and substantive.



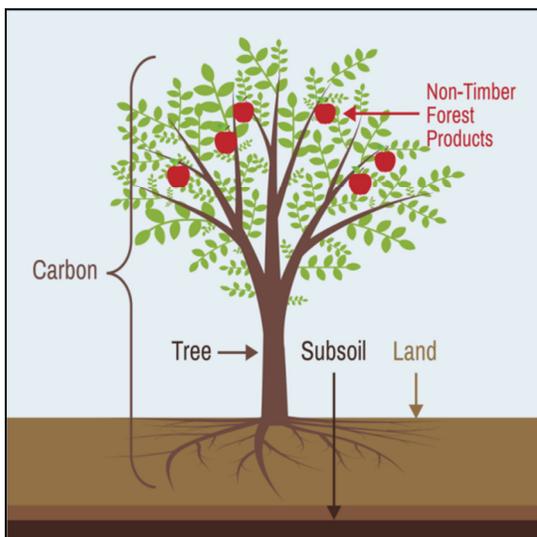
<sup>1</sup> See [www.fcmcglobal.org/ses\\_resources.html](http://www.fcmcglobal.org/ses_resources.html) for the complete report: Hite, Kristen. 2014. *Tenure rights, human rights and REDD+: Knowledge, skills and tools for effective results*. USAID-supported Forest Carbon Markets and Communities (FCMC) Program. Washington, DC, USA.

## TENURE RIGHTS

Tenure rights derive from multiple sources. They may be granted as statutory rights through the power of the State as sovereign and ascribed in constitutions, laws, and regulations or enforced through common law as decided by the courts. They may also derive from customary rights based on traditional or historic use which may be affirmed under international law even if not formally recognized under national law. Land and forest resources have many different uses and values. For this reason, tenure rights are often referred to as a “bundle of sticks” because various actors can have different (and sometimes overlapping) claims to forest resources. Often, the tenure “bundle” is broken down into the following rights:

- **Access** - the ability to visit a resource and use it on location, without depleting it.
- **Withdrawal** - the right to extract a resource without necessarily replenishing it.
- **Exclusion** - the power to control access rights to a resource.
- **Alienation** - the right to sell or otherwise transfer a tenure right.
- **Resource management** - the power to regulate the use of a resource.

While the specific laws will vary between countries, tenure rights holders generally include governments, individuals, communities and other groups (collective rights), or legal entities such as companies. A rights holder may hold only one or may enjoy multiple “sticks” in the bundle. It may also be that multiple rights holders claim the same type of right (for example, multiple individuals or groups may have the right to access a resource). It is also useful to consider who has the authority to sanction based on the infringement of any of these rights. Overlapping tenure rights in particular may take time to sort out, particularly where national laws have not fully integrated customary rights and international obligations in their national framework. While tenure rights and human rights often have different sources and frameworks, there is a notable relationship between customary tenure rights and international human rights.



### UNPACKING THE BUNDLE OF FOREST RIGHTS: AN EXAMPLE

**Non-Timber Forest Product (NTFP):** local users collect forest fruits and use some leaves for medicinal purposes (may be based on customary and human rights).

**Carbon:** government or a private developer may assert a forest carbon claim (basis may be statutory, e.g., national legislation)

**Tree:** State may issue a timber license to a company (statutory basis).

**Land:** State may claim ownership of the land (statutory basis); communities may live nearby or use the area for subsistence or spiritual purposes (customary and human rights basis).

**Subsoil:** private company may claim mineral rights based on government lease (statutory basis).

## HUMAN RIGHTS

Human rights can be procedural or substantive. Procedural rights often relate to inputs into decision-making, and include access to information, access to and transparency of proceedings, the right to be consulted or consent to decisions that may affect certain rights holders, and access to justice. Substantive rights pertain more to outcomes and underlying interests and include, e.g., cultural, spiritual, and natural resource rights (including forests). Sources of these rights derive from international obligations found in treaties and customary international law (i.e. broadly accepted norms based on widespread practice), national legislation and common law, and customary rights associated with a specific communities or people.

These diverse sources create a legal framework of privileges and responsibilities that apply to a broad set of actors. Beneficiaries of rights protections are sometimes referred to as “rights holders,” while actors with a responsibility to uphold and respect these rights are “duty bearers.” For tenure rights, a rights holder would be an actor who can make a customary or statutory claim to forest lands or resources. In the context of human rights, rights holders are those whose rights are affirmed under national, international customary law or treaty; national governments are generally considered the primary duty bearers, though private actors and international organizations also play an important role. National governments have a primary responsibility to protect their citizens. Transnational actors, including international organizations and private parties have an obligation to respect these rights.

## RECOMMENDATIONS AND TOOLS FOR IMPLEMENTATION

In furtherance of rights obligations, duty bearer and rights holders alike may employ a suite of tools at different stages of REDD+ design and implementation to help realize rights in the context of REDD+. Combined, these tools help to identify, apply, clarify, and remedy rights.

### IDENTIFY

As early as possible – especially in the planning stages – it is important to clearly identify the geographic reach of a potential REDD+ activity and engage potential rights holders to clarify the scope of applicable rights. If this is not undertaken in early stages, it may be necessary to undertake this analysis in the case of any alleged rights violation. In any event, the scope of rights identified should include:

- (a) the statutory framework governing forest/land tenure to understand the scope of nationally recognized rights;
- (b) customary forest rights asserted by communities and traditional users of forest areas (which may not be written); and
- (c) relevant international norms (including relevant treaties and customary international law) that the national government is obliged to follow in the context of REDD+.

Impact assessments and participatory design can be employed to identify the geographic reach of activities and associated rights. Online databases can help identify the relevant treaties and statutory framework, but may omit important customary rights. Judicial decisions are more helpful and their interpretation may require assistance from a legal professional. Recognizing that rights can derive from a variety of sources, multi-stakeholder dialogues can serve to help clarify relevant rights and associated rights holders.

### APPLY

To assist with implementation of rights obligations, duty bearers can utilize guidance, standards, or even their own policies and procedures to help protect and respect rights during the planning and implementation phases of REDD+ activities. For example, international standards such as the Voluntary Guidelines on Land Tenure<sup>2</sup> and the REDD+ Social and Environmental Standards<sup>3</sup> provide elements of good/best practices related to forests. Transnational actors generally undertake due diligence and evaluation procedures to avoid unintended oversights that could lead to significant rights violations. In a number of cases, international organizations and private actors have adopted their own formal policies and procedures associated with planning and implementation of activities.

### CLARIFY

Clarity around forest resources rights – decision-making, ownership and use rights – has the potential to enhance the long-term sustainability of efforts and facilitate equitable benefit-sharing. When the full suite of applicable rights is identified for a specific geographic area, it is not uncommon to discover situations of overlapping or contested rights. Where REDD+ activities are expected to occur in areas with overlapping forest claims, it may become necessary to assess and clarify the basis of underlying rights claims. While it is possible that REDD+ activities may generate new conflicts, it is also possible that REDD+ can provide new opportunities to help resolve longstanding conflicts. Overlapping tenure rights in particular may take time to sort out, particularly where national laws have not fully integrated customary rights and international obligations in their national framework. In these cases, it is particularly important to consider not only the statutory basis for claims but also the customary and human rights basis. In this context, participatory mapping provides one means by which customary claims can be considered alongside statutory title. In any case, it is important that REDD+ activities do not exacerbate existing conflicts.

### REMEDY

Where disputes arise, utilize available recourse mechanisms to advance rights, resolve disputes and remedy violations in order to facilitate meaningful, equitable, and legal outcomes. Clear identification of the source of the rights can help identify options for a remedy in the event of overlapping claims or alleged rights violations. In the event of disputes, judicial and non-judicial mechanisms at scales ranging from the project to international levels can help resolve disputes related to tenure and human rights.

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<sup>2</sup> In 2012, the FAO Committee on Food security adopted the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security, a comprehensive set of standards on tenure and related human rights. Since that time, a number of governments and institutions such as the World Bank have been working to implement and apply the guidelines.

<sup>3</sup> The REDD+ Social and Environmental Standards aim to promote high social and environmental performance of government-led REDD+ programmes that contribute to human rights, poverty alleviation, and biodiversity conservation. They support development of a country-led, multi-stakeholder safeguards information system and are complementary to carbon accounting standards. See <http://www.redd-standards.org/>

### Examples of dispute resolution options at different scales of REDD+ implementation

	Project/ community	Jurisdiction	Country	Regional	International
Judicial	Community or municipality, and in some cases national courts (e.g., constitutional issues) may provide forum	Provincial or federal court	Specialized, constitutional, or national court	Inter-American and African Courts of Human Rights; European Court of Justice	International Court of Justice
Non-judicial	Ombudsman Hearing at a provincial agency or office		National agency or office (e.g., National REDD+ Committee); National human rights contact point	African Commission on Human Rights; North American Free Trade Agreement (NAFTA) Commission for Environmental Cooperation – Submissions on Enforcement Matters; Aarhus Compliance Committee	World Bank Inspection Panel Committee on the Elimination of all forms of Racial Discrimination; UN Human Rights Council

Examples where forest rights have been addressed include:

- *Saramaka People v. Suriname*, at the Inter-American Court of Human Rights (international judicial mechanism)<sup>4</sup>.
- A World Bank Inspection Panel case regarding timber concessions and pygmy communities in the Democratic Republic of the Congo (international non-judicial grievance mechanism)<sup>5</sup>.
- Indonesian courts recognizing indigenous lands in decisions regarding forest zoning and licenses (national judicial mechanism)<sup>6</sup>.

It is important to note that resolution of complaints is time- and cost-intensive for everyone involved. The more rights can be clarified, protected, and respected throughout design, planning and implementation phases, the less likely implementation of activities will trigger a rights complaint. Early identification, clarification, and proactive protection of rights can substantially reduce the incidence of violations. Utilization of tools such as impact assessments, participatory methodologies, due diligence procedures, guidance and standards can help duty bearers engaged in REDD+ operations avoid costly disputes, support national and international rights obligations, and achieve more sustainable outcomes.

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<sup>4</sup> Marcos Orellana, *Saramaka People v. Suriname*, 102 Am. J. Int'l L. 841 (2008)

<sup>5</sup> Democratic Republic of the Congo: Transitional Support for Economic Recovery Credit and Emergency Economic and Social Reunification Support Project (2005).

<sup>6</sup> Review of Law Number 41 Year 1999 concerning Forestry against the 1945 Constitution of the State of the Republic of Indonesia, Indonesia decision number is 35/PUU-X/2012 (2013)