

Status of Legal Recognition of Indigenous Peoples', Local Communities' and Afro-descendant Peoples' Rights to Carbon Stored in Tropical Lands and Forests

COMMUNITIES AND PROPOSED NATURE-BASED SOLUTIONS AT HIGH RISK DUE TO LACK OF RECOGNITION OF LAND AND CARBON RIGHTS OF INDIGENOUS PEOPLES, LOCAL COMMUNITIES, AND AFRO-DESCENDANT PEOPLES



Policy Brief

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The push for greater climate action is yielding unprecedented interest in nature-based solutions (NBS). Many countries are now poised to implement national programs to reduce emissions from deforestation and forest degradation (REDD+),¹ as well as other land-based emissions reductions, removals and avoidance initiatives using market instruments, bilateral agreements, or results-based payment schemes.² Meanwhile, as the world anticipates the finalization of the “rulebook” for international emissions trading under Article 6 of the Paris Agreement, countries and corporations are increasingly turning to voluntary markets and other “cooperative approaches” to help meet their emissions reduction targets³ and *net zero* commitments.⁴

To further accelerate climate action, a global taskforce has been established to support the requisite scaling of voluntary carbon markets, and a growing number of countries are signing results-based payment agreements with dedicated climate financing instruments to account for both recent (e.g. Green Climate Fund) and forthcoming emission reductions (e.g., Carbon Fund).⁵ An ambitious public-private coalition (LEAF) has also been established with an aim to lower emissions by accelerating the market for forest carbon. Led by Norway, the United States, the United Kingdom, and top private sector actors such as Amazon, Bayer, and Unilever, the LEAF Coalition has an initial mobilization goal of at least \$1 billion to pay for jurisdictional REDD+ credits issued by the Architecture for REDD+ Transactions (ART) from tropical and subtropical forest countries.

To date, most of these interventions have unfolded in developing countries that include some of the poorest and most biodiverse regions of the world. More importantly, most of the lands and territories targeted for greenhouse gas (GHG) mitigation action overlap with areas customarily held by Indigenous Peoples,⁶ local communities,⁷ and Afro-descendant Peoples.⁸ Unfortunately, approximately half of community lands and territories globally have yet to be legally recognized by governments,⁹ and where land rights are legally acknowledged, rights to carbon and tradeable emission reductions are seldom explicitly defined. Given that communities hold customary rights to at least half of the world’s land area and thus a significant proportion of the terrestrial carbon sink, failure to adequately recognize their rights and role in the realization of global climate ambitions poses fundamental risks for communities, investors, and governments alike.

This brief summarizes the findings of a study by the Rights and Resources Initiative (RRI) to review the status of the legal recognition of the rights of Indigenous Peoples, local communities, and Afro-descendant Peoples to the carbon in their lands and territories across 31 countries in Africa, Asia, and Latin America.¹⁰ Together, these countries hold almost 70 percent of the world’s tropical forests¹¹ and represent at least 62 percent of the total feasible natural climate solution potential identified by McKinsey *et al.* (2021),¹² and thus the bulk of nature-based emissions reductions and carbon offset opportunities in tropical and subtropical forest countries.¹³ Findings of the study are summarized below.

Key Findings

- 1. Few countries explicitly recognize communities' rights to carbon in their customary lands and forests. Even where community carbon rights can be inferred through existing laws, the nature and extent of such rights are subject to interpretation, and thus vulnerable to be claimed by state actors (see Box 1).**
 - Only 3 of the 31 countries studied explicitly recognize community rights to carbon on lands owned by or designated for communities (Ethiopia, Peru, Republic of the Congo). However, in two of these countries (Ethiopia, Republic of the Congo) the extent of lands currently owned by or designated for communities is negligible, thus undermining the legal and practical value of associated carbon rights.
 - 3 countries (Brazil, Colombia, Costa Rica) tie carbon rights to land or forest ownership (whether public, private, or collective), which include lands legally owned by Indigenous Peoples, local communities, and Afro-descendant Peoples, thereby establishing their ownership of the carbon in their lands.
 - 7 other countries (Bhutan, Fiji, Nepal, Nicaragua, Tanzania, Vietnam, Zambia) have ambiguous legal frameworks that could be interpreted to recognize community carbon rights.
- 2. Across the set of reviewed countries, only half of the total area traditionally held by Indigenous Peoples, local communities, and Afro-descendant Peoples is legally recognized,¹⁴ placing their customary land and carbon rights at risk of capture by states or other legal entities.** Where defined, rights to carbon tend to be tied to existing land and forest rights (10 out of 16 countries who define carbon rights). Failure to legally recognize customary land rights thus undermines the formal recognition of communities' carbon rights and local incentives to support nature-based climate initiatives. The situation is far worse in Africa and Asia, where 77.0 and 84.4 percent respectively of the lands held by communities lack legal recognition.
- 3. Despite more than a decade of investment in REDD+ readiness, only a handful of countries have established legal frameworks to regulate carbon-linked transactions, indicating that the majority of the countries assessed are ill-prepared to implement jurisdictional REDD+ approaches.**
 - Only 4 out of 31 countries (Colombia, Costa Rica, Peru, Republic of the Congo) have enacted laws or regulations that define: (i) carbon credits; (ii) who owns them; (iii) the entity responsible for issuing and validating them; and (iv) how these are to be traded and registered in the country. Six (6) other countries have partially done so (Brazil, Côte d'Ivoire, Democratic Republic of Congo, Indonesia, Mexico, Vietnam).
- 4. Few countries have designed and operationalized the mechanisms that define how carbon and non-carbon benefits will be shared, as required by jurisdictional REDD+ approaches.** Inadequate attention to benefit-sharing directly compromises countries' commitments to pursue actions on the basis of equity and in the context of sustainable development and poverty eradication.¹⁵
 - Only 5 countries (Costa Rica, Indonesia, Mexico, Philippines, and Vietnam) have designed benefit-sharing mechanisms, and only one of those could be verified as being partially operational (Vietnam).
- 5. Little more than half of the countries in the study have developed feedback and grievance redress mechanisms to support engagement in REDD+, protect communities and ensure fair, transparent, and robust transactions.**
 - Only 2 of the 17 countries that have developed feedback and grievance redress mechanisms have operationalized them (Costa Rica and Mexico).

These findings demonstrate that few countries have established the necessary conditions for fair, effective, and transparent carbon or REDD+ transactions. Combined with the fact that at least half of the lands customarily held by communities within analyzed countries have yet to be legally recognized by governments, the limited assurances provided by the current legal and regulatory architecture leaves communities with no effectual standing in the global surge to control terrestrial carbon sinks.

Overall, few countries explicitly recognize community carbon rights, and even fewer have tested the operational and political feasibility of established rules. The limited attention to community rights thus lies in stark contrast to the substantial investments that have thus far been made to measure the carbon located in communities' lands — a situation made worse by the generalized lack of safeguards and benefit-sharing mechanisms.

Without explicit recognition of communities' land and carbon rights, including enforcement of their rights to free, prior and informed consent (FPIC), and explicit guarantees that they can define and negotiate the terms of their engagement, including any benefits or payments arising from the sale of emission reductions credits or carbon offsets, the acceleration of jurisdictional approaches risks exacerbating the myriad challenges that Indigenous Peoples, local communities, and Afro-descendant Peoples already face, namely: *(i) exclusion from land use decisions; (ii) increasing land grabs and efforts to capture associated rents; (iii) continued dismissal of local social-ecological realities and the self-determined priorities of affected communities; and (iv) the ever-growing threats of human rights violations, criminalization, and conflicts.*

These risks are further magnified by the fact that most of the world's tropical and subtropical countries with a high potential for nature-based solutions are also amongst the weakest in terms of transparency, accountability, and effective application of the rule of law. Twenty-nine (29) of the countries studied are in the bottom 50th percentile on Transparency International's Corruption Perceptions Index,²⁰ and of the 24 countries with available data in the World Justice Project Rule of Law Index, only 6 have scores above the 50th percentile mark.²¹ From the perspective of public or private investors, the pursuit of nature-based solutions in poorly governed countries carries additional levels of risks that can largely be mitigated by ensuring that the rights and contributions of those who effectively own and manage the lands and forests targeted by emission reduction schemes are duly recognized and compensated.

To date, comparatively little support has been given to the crucial agenda of recognizing and securing the land rights of Indigenous Peoples and local communities, **with barely 0.1 percent** of official development assistance for climate mitigation and adaptation dedicated to such purposes.²² And yet, as recognized by the IPCC and the global research community, recognizing, securing

Community Carbon Rights in Brazil

In Brazil, carbon rights are tied to forest rights and not to land rights.¹⁶ States and the federal government have concurrent jurisdiction to legislate on forests, and states may exercise full legislative authority in this regard where no federal law on general rules exists (Article 24 of the Brazilian Constitution). Carbon, as an environmental service (Article 41 (I) (A) Brazilian Forestry Code), also falls within the jurisdiction of states. The states of Amapá, Maranhão, and Tocantins have therefore asserted jurisdiction over the reduction of emissions from deforestation and degradation as a public service, interpreting the law to imply that title to "carbon credits" is attributable to the state.¹⁷ This interpretation poses a serious risk to the recognition of land rights and the right to self-determination of Indigenous Peoples, local communities, and Afro-descendant Peoples if states implement jurisdictional carbon programs in forests located on communities' lands without their free, prior and informed consent, and without the proper development and implementation of a Safeguard Information System (SISREDD+). This is a major concern in Amapá, Maranhão, and Tocantins, where 8-9% of the land area is classified as Indigenous Lands,¹⁸ and where land grabbing and human rights violations are already prevalent.¹⁹

and respecting community rights is essential to the successful implementation of nature-based solutions, and likely the most cost-efficient, effective and just strategy in the fight against climate change and global efforts to protect Earth's biodiversity.

The recent initiative by the LEAF Coalition, other jurisdictional REDD+ approaches, and voluntary carbon markets schemes affecting lands customarily held by Indigenous Peoples, local communities, and Afro-descendant Peoples, should meet several prerequisite conditions before any transaction occurs:

1. That communities' customary lands, forests and carbon rights are explicitly and formally recognized and protected in law (either through statute, regulation, or case law) or in all jurisdictional programs or project contracts.
2. That those rights are respected, FPIC is ensured, and a robust and accessible feedback and grievance redress mechanism is established.
3. That a clear benefit-sharing mechanism is transparently developed with communities to fairly compensate land and forest rights holders for their contributions to GHG mitigation and allow them to opt in or out of the proposed jurisdictional program.

Not meeting these conditions risks irreparable harm to local peoples, their forests, and global efforts to address the ensuing climate crisis. At the same time, requiring these steps would incentivize governments to advance the recognition of rights and strengthen governance across tropical forest areas – an essential step for the success of all nature-based solutions and development outcomes at scale.

These findings are based on a forthcoming study by the Rights and Resources Initiative and scholars based at McGill University. For more information, please contact [Madiha Qureshi](#).

¹ REDD+ stands for “Reducing emissions from deforestation and forest degradation and the role of conservation, sustainable management of forests and enhancement of forest carbon stocks in developing countries.”

² Rights and Resources Initiative. 2018. Uncertainty and Opportunity: The Status of Forest Carbon Rights and Governance Frameworks in Over Half of the World's Tropical Forests. RRI: Washington, DC. 4. Available at: <https://rightsandresources.org/publication/uncertainty-opportunity-status-forest-carbon-rights-governance-frameworks-half-worlds-tropical-forests/>. To date, 11 countries have signed Emission Reductions Payment Agreements with the Forest Carbon Partnership Facility, with a total contract value in excess of \$550 million. See: World Bank. 2021. Press Release: Madagascar Signs Landmark Agreement with the World Bank to Reduce Poverty, Deforestation and Carbon Emissions. Available at: <https://www.worldbank.org/en/news/press-release/2021/02/05/madagascar-signs-landmark-agreement-with-the-world-bank-to-reduce-poverty-deforestation-and-carbon-emissions>.

³ Notably, as of 2019, approximately half the countries that had submitted Nationally Determined Contributions under the Paris Agreement indicated that they planned to participate in carbon markets or other international “cooperative approaches” in meeting their targets. See: Hood, Christina. 2019. Completing the Paris ‘Rulebook’: Key Issues. Center for Climate and Energy Solutions: Arlington, VA. Available at: <https://www.c2es.org/document/completing-the-paris-rulebook-key-article-6-issues/>; CIEL. 2021. Rights, Carbon, Caution: Upholding Human Rights under Article 6 of the Paris Agreement. CIEL: Washington, DC. Available at: <https://www.ciel.org/reports/rights-carbon-caution/#:~:text=Publication-.Rights%2C%20Carbon%2C%20Caution%3A%20Upholding%20Human%20Rights%20under%20Article%206,Read%20the%20full%20report.&text=In%20so%20doing%2C%20they%20are,adverse%20impacts%20of%20that%20action>.

⁴ UN Climate. 2020. “UN Climate Press Release: Commitments to Net Zero Double in Less Than a Year.” Available at: <https://unfccc.int/news/commitments-to-net-zero-double-in-less-than-a-year>; Geck, Marshall. 2020. “Seven Major Companies That Committed to Net Zero Emissions in 2020.” Principles for Responsible Investment Blog. Available at: <https://www.unpri.org/pri-blog/seven-major-companies-that-committed-to-net-zero-emissions-in-2020/6909.article>.

⁵ Taskforce on Scaling Voluntary Carbon Markets. <https://www.iif.com/tsvcm>.

⁶ For RRI, the term ‘Indigenous Peoples’ follows the definition, or ‘statement of coverage’ contained in the International Labor Organization Convention on Indigenous and Tribal Peoples in Independent Countries. Therefore, it includes:

peoples who identify themselves as ‘indigenous,’ tribal peoples whose social, cultural, and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations; traditional peoples not necessarily called indigenous or tribal but who share the same characteristics of social, cultural, and economic conditions that distinguish them from other sections of the national community, whose status is regulated wholly or partially by their own customs or traditions, and whose livelihoods are closely connected to ecosystems and their goods and services. While RRI recognizes that all people should enjoy equal rights and respect regardless of identity, it is strategically important to distinguish Indigenous Peoples from other stakeholders. They have a distinct set of rights linked to their social, political, and economic situation as a result of their ancestry and stewardship of lands and resources vital to their well-being.

⁷ Recognizing that local communities are not formally defined under international law, RRI considers that they encompass communities that do not self-identify as Indigenous but who share similar characteristics of social, cultural, and economic conditions that distinguish them from other sections of the national community; whose status is regulated wholly or partially by their own customs or traditions, who have long-standing, culturally constitutive relations to lands and resources; and whose rights are held collectively.

⁸ As per the Declaration of Santiago of 2000, the States of the Americas defined Afro-descendant as “the persons of African origin who live in the Americas and in the region of the African Diaspora as a result of slavery, who have been denied the exercise of their fundamental rights.” (See: The Durban Conference and Program of Action; The International Decade for People of African Descent https://www.un.org/en/durbanreview2009/pdf/DDPA_full_text.pdf). In Latin America and the Caribbean, constitutional and legal recognition of Afro-descendants’ collective tenure rights is based on their special cultural, ethnic, and spiritual relationship with land.

⁹ RRI. 2020. Estimated area of land and territories of Indigenous Peoples, local communities, and Afro-descendants where their rights are not recognized. Rights and Resources Initiative; Washington DC. Available at: <https://rightsandresources.org/publication/estimate-of-the-area-of-land-and-territories-of-indigenous-peoples-local-communities-and-afro-descendants-where-their-rights-have-not-been-recognized/> [Area Estimates].

¹⁰ The countries covered within this study include in Africa: Cameroon, Central African Republic, Côte d’Ivoire, Democratic Republic of the Congo, Ethiopia, Gabon, Republic of the Congo, Tanzania, and Zambia; in Asia: Bhutan, Cambodia, Fiji, Indonesia, Lao People’s Democratic Republic, Mongolia, Nepal, Papua New Guinea, Philippines, Thailand, and Vietnam; and in Latin America: Bolivia, Brazil, Colombia, Costa Rica, Dominican Republic, Guyana, Honduras, Mexico, Nicaragua, Peru, and Suriname.

¹¹ Food and Agriculture Organization of the United Nations. 2020. Global Forest Resources Assessment 2020, 136-142. FAO, Rome. Available at: <http://www.fao.org/forest-resources-assessment/en/>.

¹² McKinsey & Company and World Economic Forum. 2021. Consultation: Nature and Net Zero. World Economic Forum: Cologny/Geneva, Switzerland. Available at: <https://www.mckinsey.com/business-functions/sustainability/our-insights/why-investing-in-nature-is-key-to-climate-mitigation#>.

¹³ Ibid. at 13.

¹⁴ Based on available data regarding the extent of community lands with and without legal recognition for 21 of the 31 countries analyzed. These countries are: Bolivia, Brazil, Cambodia, Cameroon, Central African Republic, Colombia, Costa Rica, Democratic Republic of Congo, Gabon, Guyana, Indonesia, Lao PDR, Mexico, Nepal, Peru, Philippines, Republic of Congo, Suriname, Tanzania, Thailand, Zambia (RRI. Area Estimates, supra note 8).

¹⁵ As per Article 4 of the Paris Agreement.

¹⁶ See Article 41 (I) (A) Brazilian Forestry Code and Article 1.228 Brazilian Civil Code. The legal understanding is corroborated by Lasse Loft et al. 2015. Taking Stock of Carbon Rights in REDD+ Candidate Countries: Concept Meets Reality. p.1041. Available: <http://www.mdpi.com/1999-4907/6/4/1031>.

¹⁷ See State Law n° 1.917 of April 17, 2008, which establishes that the state is the beneficiary or holder of carbon credits produced in the scope of emission reduction programs (Article 19).

¹⁸ Instituto Socioambiental (ISA). 2021. Terras indígenas no Brasil. Available: <https://terrasindigenas.org.br/>.

¹⁹ Neepes/ENSP/Fiocruz. 2021. Mapa de conflitos envolvendo injustiça ambiental e saúde no Brasil. Available: <http://mapadeconflitos.ensp.fiocruz.br/>.

²⁰ Transparency International. 2021. Corruption Perceptions Index 2020. Transparency International, Berlin, Germany. Available at: https://images.transparencycdn.org/images/CPI2020_Report_EN_0802-WEB-1_2021-02-08-103053.pdf.

²¹ World Justice Project. 2020. Rule of Law Index 2020. World Justice Project, Washington, D.C. Available at: https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2020-Online_0.pdf.

²² Rainforest Foundation Norway. 2021. Falling Short: Donor funding for Indigenous Peoples and local communities to secure tenure rights and manage forests in tropical countries (2011–2020). Rainforest Foundation Norway, Oslo. Available at: https://d5i6is0eze552.cloudfront.net/documents/Publikasjoner/Andre-rapporter/RFN_Falling_short_2021.pdf?mtime=20210412123104.

About the Rights and Resources Initiative

The Rights and Resources Initiative is a global Coalition of 21 Partners and more than 150 rightsholders organizations and their allies dedicated to advancing the forestland and resource rights of Indigenous Peoples, Afro-descendant Peoples, local communities, and the women within these communities. Members capitalize on each other's strengths, expertise, and geographic reach to achieve solutions more effectively and efficiently. RRI leverages the power of its global Coalition to amplify the voices of local peoples and proactively engage governments, multilateral institutions, and private sector actors to adopt institutional and market reforms that support the realization of their rights and self-determined development. By advancing a strategic understanding of the global threats and opportunities resulting from insecure land and resource rights, RRI develops and promotes rights-based approaches to business and development and catalyzes effective solutions to scale rural tenure reform and enhance sustainable resource governance.

RRI is coordinated by the Rights and Resources Group, a non-profit organization based in Washington, DC. For more information, please visit www.rightsandresources.org.

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