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Status of Forest Carbon Rights and Implications for Communities, the Carbon Trade, and REDD+ Investments

INTRODUCTION

The Warsaw Framework on REDD+ adopted by Parties to the UNFCCC in November 2013 paves the way for payments to flow to developing countries for carbon emissions reductions from forests. The new framework encourages countries to set up a national entity or designated focal point for REDD+, which will be eligible to receive financing to implement REDD+ activities and strategies. The climate community has generally welcomed this decision as a landmark achievement, although there has been some criticism regarding the lack of a mechanism to implement social and environmental safeguards to protect the rights of local peoples.

A month after the Warsaw agreement, the Carbon Fund of the World Bank's Forest Carbon Partnership Facility (FCPF) finalized its Methodological Framework, which enables the purchase of "emissions reductions" from developing countries. These emissions reductions represent a new class of assets, which are inextricably linked to property rights to forest land, and yet, they can be purchased and transferred separately from other forest rights. Civil society groups have criticized the Framework for creating new property rights to carbon that impinge upon existing statutory and customary rights of Indigenous Peoples and local communities, without clear safeguards or measures to prevent conflicts and negative impacts on community rights.

It has been widely recognized that positive outcomes for REDD+ will depend on changes in the prevailing forest governance conditions in REDD+ countries, particularly in the domain of tenure reform. Moreover, it is widely acknowledged that the complex financial mechanisms needed to implement REDD+ programs tend to create opaque conditions, promote the lack of transparency, and impose high participation and transaction costs on those who can least afford them.

Recent research by RRI demonstrates that REDD+ has not been a catalyst of tenure reforms across low and middle income countries (LMICs), even though most countries with a REDD+ strategy have identified the clarification of tenure as a key component of their approach, and leading international REDD+ initiatives have

Table 1: Change in area of community tenure in LMICs, REDD+, and non-REDD+ countries in millions of hectares

	Designated for Indigenous Peoples and local communities		Owned by Indigenous Peoples and local communities	
	2002–2008	2008–2013	2002–2008	2008–2013
LMICs	+26.8	+19.7	+66.8	+11.2
of which				
REDD + Countries	+19.3	+16.7	+50.3	+9.3
Non-REDD+ Countries	+7.5	+3.0	+16.5	+1.9

committed to recognizing and advancing community tenure rights. RRI's research on 33 LMICs—including 28 that are implementing REDD + initiatives–indicates that the increase in the area recognized as owned by Indigenous Peoples and local communities was five times higher in the period 2002-2008 than 2008-2013, representing a slowdown in the recognition of rights on the ground (see Table 1).[1]

The research presented in this brief presents findings from forthcoming research[2] and examines the status of existing legal frameworks regarding Indigenous Peoples' and local communities' rights to trade forest carbon. There has been limited cross-comparable research on this question, despite its importance, and the lack of information has constrained full understanding of the nature and scope of the issue, thus limiting informed debates and the development of adequate action plans. The World Bank Carbon Fund's Methodological Framework, for example, does not identify or provide adequate guidance on how to address the risks associated with the existing ambiguity on carbon rights. The Methodological Framework notes, "The status of rights to carbon and relevant lands should be assessed to establish a basis for successful implementation of the emissions reduction program," but says nothing about the need to respect or enforce those rights. While acknowledging that title to emissions reduction may not be entirely clear in many countries, the guidelines for the transfer of emissions reductions state, "At the time of transfer of the emissions reductions, the Emissions Reductions Program Proponent must be able to demonstrate that it has obtained authority to transfer title to emissions reductions to the Carbon Fund." It is not clear whether those who wield the "authority" to transfer title and those who hold the rights to these resources are the same entity.

FINDINGS

This brief presents findings from a preliminary assessment of the status of communities' rights to carbon in 23 low and middle income countries,[3] representing 66 percent of forest area in LMICs. Of these 23 countries, 21 have a Readiness-Preparation Proposal (R-PP), a Readiness Plan Note Idea (R-PIN) or have submitted National Program Documents (NPD) to UNREDD or the FCPF. Brazil has a bilateral agreement on REDD with Norway. The only non-REDD country in the set is India.

Of the 23 countries examined, only Mexico and Guatemala have passed national legislation defining tenure rights over carbon, and none of the countries have a national legal framework establishing rules and institutions to determine how carbon from REDD+ should be traded.[4] One country, Bolivia, passed a

Table 2: Status of carbon rights in national-level legislation in 23 countries

Number of countries that have...	Yes	No
Identified lack of clear tenure as a driver of deforestation/degradation in R-PP, R-PIN, or NPD	15	6
Identified the clarification of tenure as a component of REDD+ strategy in R-PP or NPD	17	2
Tenure rights to carbon defined through national legislation	2	21
Legal frameworks establishing rules and institutions for the carbon trade	0	23
Explicitly prohibited the commodification of ecosystems services in law	1	22
Draft laws to clarify carbon rights and/or establish carbon trading regulations	6	17

law explicitly prohibiting the commodification of ecosystems services, therefore closing off the possibility of participating in carbon markets.

The review of these countries identified six draft national-level laws[5] to establish carbon rights and/or establish a consistent regulatory framework for their trade (see Table 2).[6] There was also no sub-national legislation establishing regulatory frameworks for carbon trading at the regional level in any of these countries.

Legal experts in all 23 countries were consulted to identify if existing legal frameworks could provide some transactional basis for the carbon trade. The experts identified such frameworks in only 17 countries, mainly through contract laws. However, these laws have not been harmonized to reflect the intricacies of carbon trading or tenure, nor do they provide the necessary safeguards or credible institutions to arbitrate grievances in the context of the carbon trade. It is clear from these findings that the existing legal frameworks are uncertain and opaque with regard to carbon trading in general, but especially in terms of Indigenous Peoples' and communities' rights to engage with, and benefit from, the carbon trade.

In the absence of clear definitions of carbon rights and how they could be traded, legal experts were asked to assess whether current national laws (e.g. forest, land, and conservation laws) could be interpreted to allow communities to legally trade carbon under the existing legal frameworks that recognize communities' rights to land and/or forest resources.[7] In the 23 countries whose legal systems were reviewed, there were 60 such legal instruments that recognize Indigenous Peoples' and communities' rights to forest land or resources in general. [8]

The interpretations of the legal experts consulted of whether these established legal frameworks would confer some legal basis for allowing communities to trade carbon varied widely, which already indicates a need for greater clarity within these countries' legal frameworks. Nevertheless, preliminary attempts to harmonize these findings suggest that Indigenous Peoples and local communities arguably have the legal basis to trade carbon based on current national laws in only 39 of the 60 legal frameworks in the 23 countries analyzed. From these, nearly half are in Latin America. The lack of clearly-defined rights in these cases could also allow for interpretations that entirely exclude communities, should the State claim ownership over all carbon resources.

Defining carbon rights within an inclusive framework will therefore require governments to rethink the issue of "ownership" of natural resources. Even countries that recognize Indigenous Peoples' and local

communities' tenure rights over their lands do not necessarily extend this tenure to include ownership of natural resources such as minerals, oil, timber, and other forest products, which can often remain under State ownership.[9] While emissions reductions are not tangible products in the same way as timber or minerals, it is quite possible that governments may perceive them in the same manner, should it suit their interests.

Already, in eight of the 39 cases where communities could arguably have the right to trade carbon, consulted experts also found that national laws could easily be interpreted to allow governments to trade carbon in the areas under legally recognized community tenure. This overlap in rights would need to be clearly reconciled within a regulatory framework and sufficient safeguards would need to be put into place to avoid the dispossession of communities through the establishment of a REDD+ project.

The remaining 21 legal frameworks did not provide a sufficient basis to interpret that communities had the right to trade carbon, effectively excluding them. Among these 21 frameworks, experts assessed that national laws could be interpreted to allow the government to trade carbon on communities' lands in at least five cases. This sets the stage for potential conflict between communities and government-sponsored REDD+ projects.

Permanence, enforceability, conflict, and risk

Beyond the clarification of "carbon tenure," the strong recognition of tenure rights of forest owners, including Indigenous Peoples and local communities, to forest land and resources "on the books" and "on the ground" is a fundamental pre-requisite if forest owners are to participate in and benefit from REDD+ investments. However, in several of the legal frameworks for indigenous and community tenure identified, the "bundle of rights"[10] recognized may be too weak to guarantee that Indigenous Peoples and local communities can benefit from REDD+ investments.

Indigenous Peoples and local communities had sufficient rights to constitute "ownership" of their lands and resources in only 19 of the 60 legal frameworks (in 12 countries) recognizing communities' rights. This means that communities' rights to forest land and resources in the other 41 legal frameworks (in 19 countries) are limited in ways that are critical for the viability of REDD+ projects and undermine the security of communities' rights. This is particularly noteworthy in terms of the duration of the tenure rights under a legal framework and the legal right to exclude outsiders from using resources on communities' lands. At least seven of the 60 legal instruments have not been implemented on the ground–and therefore recognize tenure rights for no actual communities.

Twenty-six of the 60 legal instruments are time-bound, meaning that communities' rights to their forest land expire after a given period of time, and they must petition the government to renew their claims. Some of these time limitations are as brief as five years between the need for renewals.[12] This has potential implications for "permanence," or the guarantee for the investor that the carbon will remain stored without the risk of release, and is therefore of fundamental importance to the viability of REDD+. If communities' rights are not guaranteed for a sufficient period of time, if not indefinitely, it becomes difficult for them to serve as a guarantor of the carbon's preservation. According to PROFOR, a World Bank program to promote sustainable forest management, "Governments interested in combating forest ecosystem destruction and degradation will need to (…) extend recognition of tenure rights and other reforms to enable communities to manage and benefit from their lands, forests, and carbon."[13] These types of reforms do not seem to have taken place thus far. The limited duration of some community tenure may otherwise serve as a deterrent for investors to engage with those

Table 3: The security of rights within legal frameworks that recognize the forest tenure rights of Indigenous Peoples and local communities in 23 countries

Number of legal frameworks that...	
Confer ownership of land and forest to Indigenous Peoples and local communities	19/60
Limit the duration of Indigenous Peoples' and local communities' tenure	26/60
Restrict Indigenous Peoples' and local communities' rights to exclude outsiders	26/60
Both limit the duration and deny exclusion rights	13/60
Have not yet been implemented on the ground	7/60

communities, and therefore exclude communities from REDD+ programs, or reduce their autonomy within agreements.

Ensuring permanence also requires creating conditions under which tenure insecurity is reduced.[14] In fact, CIFOR (Center for International Forestry Research) specifically identified the ability for the rights holder to exclude competing uses as a necessary precondition for the effectiveness of REDD.[15] However, 26 of the 60 legal instruments do not recognize communities' rights to exclude outsiders from encroaching on their resources, which has profound implications on the security of community tenure and, therefore, the enforceability of forest protection. The lack of rights to exclude others from encroaching on their resources can give rise to serious conflicts, as not only the communities, but also other actors (e.g. individuals, companies, and governments) may legally claim the right to extract resources within communities' lands. However, even in contexts where exclusion rights are recognized, they are not necessarily enforced or respected.[16]

A study published in 2013 by Sunderlin et al.[17] demonstrates how pervasive tenure insecurity is in REDD+ countries and project sites. In Cameroon, 100 percent of the communities surveyed identified tenure insecurity resulting from land competition and conflict, lack of title, or easily revocable rights. Across the 23 countries studied, 39 percent of communities in project sites identified the difficulty of excluding outsiders or land conflict as a source of tenure insecurity, while 15 percent perceived that their rights could easily be revoked by the government. The higher an investor perceives tenure risk to the preservation of forest land within a carbon trading investment, the more they can withhold credits as a "buffer" or insurance against the potential loss of forest land,[18] which can, in turn, decrease the communities' short term incentives to maintain the forest.

Overall, 13 of the 60 legal frameworks recognize a particularly weak set of rights for communities; where both the duration of tenure is limited and the communities do not have the right to exclude.

Piloting REDD+ and voluntary carbon trading schemes

In spite of legal uncertainty and the absence of clear tenure rights, regulatory safeguards, and grievance mechanisms, communities have already entered carbon trading agreements through pilot REDD+ programs or voluntary carbon markets under 16 distinct legal frameworks for community tenure in at least eight countries.

Many of these early projects already demonstrate that opaque legal contexts do not work in favor of Indigenous Peoples and local communities. A case-by-case negotiation of principles and definitions in

individual contracts does not favor the weaker side of the transaction. Carbon contracts are complicated legal documents and Indigenous Peoples and local communities often lack the necessary technical, financial, and legal resources to negotiate these contracts to their benefit.[19] In Brazil, the organization responsible for overseeing the implementation of Indigenous Peoples Rights, National Indian Foundation (FUNAI from its acronym in Brazilian Portuguese), has identified at least 30 proposals of REDD+ projects in indigenous lands. According to FUNAI, there were illegal clauses in several of these proposals, including some that prevented Indigenous Peoples from conducting their traditional forest management practices in large areas of their territory.[20] This is not isolated only to Brazil, as similar cases have been identified in Peru.[21]

In other situations, the absence of clear definition of tenure rights over carbon may create an opening for governments to transfer the right to trade carbon to third parties within communities' lands. This was the case in Liberia, where carbon rights have been awarded to several large-scale agricultural concessions that took place in land claimed by communities.[22]

CONCLUSION

As much of the analysis on the status of carbon rights in existing tenure legislation is still preliminary and has not been cross referenced with court rulings–if there have been any–that may clarify rights, it is not possible to fully assess whether forest owners, including Indigenous Peoples, communities, or governments have the right to trade carbon on statutorily recognized community lands. There are strong international legal precedents arguing that Indigenous Peoples and local communities have rights to trade sequestered carbon in their customarily held forests, even without additional national legislation.[23] But this new research demonstrates that in the vast majority of countries analyzed in this report, it would be extremely difficult for communities to assert those rights in the absence of appropriate safeguards and institutional capacity to claim and fully utilize them. And it is clear that these safeguards and institutions have not yet been codified through national law.

On the other hand, it is quite possible that countries could use the Warsaw Agreement to establish national REDD+ agencies and use the current ambiguity in the Methodological Framework and existing national laws to transfer all authority (and thus rights) to transfer emissions reductions to State entities. This would lead to reversals in the gains that communities have made in securing their rights over the past several decades. Perhaps worse, there is a good possibility that many governments would then have no incentive to undertake any tenure reforms whatsoever, since the forests would have another layer of legal claims added onto them. This would only perpetuate and amplify existing conflicts, thus become self-defeating for REDD+ in the long term.

The dispossession of local communities and Indigenous Peoples does not have to be an outcome of the emergence of carbon markets. In the recent past, States have found ways to include Indigenous Peoples and local communities into their conservation and natural resource development agendas through the recognition of community rights, and can do so again in the context of reducing deforestation and forest degradation. Key elements for doing so include the following:

1. The strong recognition of tenure rights of Indigenous Peoples and local communities to forest land and resources in law and in practice.

2. Ensuring the strong participation of Indigenous Peoples and local communities in the development of national and sub-national legal frameworks related to REDD+.

3. Clearly establishing Indigenous Peoples and local communities as the legal owners of carbon credits generated from emissions reductions achieved within their lands.
4. Enabling Indigenous Peoples and local communities to trade carbon if they wish to, with rights clearly defined in law, as well as ensuring the existence of necessary regulations and technical assistance to level the playing field in the negotiations of carbon contracts.
5. In cases where the government retains the right to trade carbon contained within indigenous or local community lands, there should be clear and fair regulations determining how the economic benefits generated will be transferred to Indigenous Peoples and local communities as the ultimate beneficiaries of the land, once Free, Prior and Informed Consent (FPIC) has been obtained.
6. In cases where the ownership of forest land is contested, there should be strong safeguards and institutional mechanisms protecting the fundamental rights of Indigenous Peoples and local communities guaranteed under International Law, including the right to land and natural resources, as well as the principles of FPIC. Specific, accessible, and impartial grievance arbitration mechanisms should also be established to address communities' complaints.

Now that funds are becoming available for the purchase of emissions reductions, these funds can create real incentives for governments to undertake the tenure reforms necessary to clarify and secure Indigenous Peoples' and local communities' rights to their land and resources, as well as ensure the reduction of emissions from deforestation and forest degradation on a long-term basis. This kind of transformative change is clearly necessary for REDD+ to work and should now be prioritized by international and bilateral REDD+ programs, as well as the World Bank's Carbon Fund.

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ENDNOTES

[1] These 33 countries represent 85 percent of the forest area in low and middle income countries. Rights and Resources Initiative. 2014. What Future for Reform? Progress and slowdown in forest tenure reform since 2002. Washington, DC: Rights and Resources Initiative.

[2] Rights and Resources Initiative and Ateneo School of Government. (Forthcoming). Ready to REDD+? Status of Forest Carbon Rights in 23 Countries and Implications for the Carbon Trade. Washington, DC: Rights and Resources Initiative. Manila, Philippines: Ateneo School of Government.

[3] The countries included in this study are as follows: Bolivia, Brazil, Cambodia, Cameroon, Colombia, Congo (Democratic Republic of the), Congo (Republic of the), Gabon, Guatemala, Guyana, India, Indonesia, Kenya, Liberia, Mexico, Mozambique, Nepal, Papua New Guinea, Peru, Philippines, Tanzania, Vietnam and Zambia.

[4] The preliminary results of this analysis were based on the legal assessment of 49 national experts.

[5] In Guatemala, Law Decree No. 7-2013-Framework Law to regulate the reduction of vulnerability, compulsory adaptation given the effects of climate change and mitigation of greenhouse gases provides the basis for a future framework and requires agencies from the executive branch to approve further regulations by 2015. These regulations follow a different legislative procedure, and do not constitute "laws" within this framework.

[6] The countries with draft laws for carbon include: Gabon, Indonesia, Kenya, Nepal, Peru, and the Philippines. However, in Kenya the Land Law to recognize community rights has not been finalized, a step which would be necessary in order to safeguard community rights within a carbon trading scheme.

[7] These legal instruments, also referred to as "tenure regimes" are defined as systems of rights, rules, institutions, and processes, under which land and resources are held, used, and managed, and under which rights are transferred.

[8] This approach is based on a findings presented by Rights and Resources Initiative in previous publications. For a full list and analysis of these legal instruments that recognize Indigenous Peoples' and local communities' tenure rights, see What Rights? A comparative analysis of developing countries' national legislation on community and Indigenous Peoples' forest tenure rights, and What Future for Reform? Progress and slowdown in forest tenure reform since 2002.

[9] Flórez, M. 2013. Impacto de las Industrias Extractivas en los Derechos Colectivos sobre Territorios y Bosques de los Pueblos y las Comunidades. Rights and Resources Initiative, Asociación Ambiente y Sociedad.

[10] Legal frameworks can recognize any combination of the following seven tenure rights, based on the "expanded bundle of rights": 1)The right to access, 2) the right to withdraw timber and non-timber forest products for subsistence or commercial purposes, 3) the right to manage their resources, 4) the right to exclude outsiders from accessing or using their resources, 5) the right to alienate the land or resources through lease, collateral, or sale, 6) the right to due process and compensation in the face of extinguishment, and 7) the duration of those rights. The full definitions for each of these rights are presented in Rights and Resources Initiative. 2012. What Rights? A comparative analysis of developing countries' national legislation on community and Indigenous Peoples' forest tenure rights.

[11] Forests are considered to be "owned" where communities have full legal rights to secure their claims to forests, defined in this analysis as areas where community tenure is unlimited in duration, where communities have the legal right to exclude outsiders from using their resources, and when communities are entitled to due process and compensation in the face of potential extinguishment by the state of some or all of their rights. Rights and Resources Initiative. 2014. What Future for Reform? Progress and slowdown in forest tenure reform since 2002.

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[22] See clause 21.12 in both the Golden Veroleum and Sime Darby agricultural concession contracts. Available at: http://www.leiti.org.lr/contracts-and-concessions.html.

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