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

FOREST CARBON, MARKETS AND COMMUNITIES (FCMC)  
PROGRAM

MAY 2014

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The US Agency for International Development (USAID) has launched the Forest Carbon, Markets and Communities (FCMC) Program to provide its missions, partner governments, local and international stakeholders with assistance in developing and implementing REDD+ initiatives. FCMC services include analysis, evaluation, tools and guidance for program design support; training materials; and meeting and workshop development and facilitation that support US Government contributions to international REDD+ architecture.

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## DISCLAIMER

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# ACRONYMS AND ABBREVIATIONS

COP	Conference of the Parties
DRC	Democratic Republic of the Congo
EIA	Environmental Impact Assessment
FAO	Food and Agricultural Organization of the UN
FCPF	Forest Carbon Partnership Facility
FIP	Forest Investment Program
GEF	Global Environmental Facility
ILO	International Labour Organization
NAFTA	North American Free Trade Agreement
NGOs	Non-governmental organizations
NTFP	Non-timber forest product
REDD+	Reducing emissions from deforestation and forest degradation, and the role of conservation, sustainable management of forests and enhancement of forest carbon stocks
SESA	Strategic Environmental and Social Assessment
UN	United Nations
UN-REDD	United Nations REDD+ Programme
UNDP	United Nations Development Programme
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNEP	United Nations Environment Programme
UNFCCC	United Nations Framework Convention on Climate Change
FCMC	Forest Carbon, Markets and Communities Program
USAID	United States Agency for International Development

# EXECUTIVE SUMMARY

Identifying, respecting, and advancing rights associated with forest resources can help ensure effective, efficient, and equitable implementation of efforts to protect, manage and restore forests in developing countries, also known as REDD+<sup>1</sup>. This document, intended for a multi-stakeholder audience generally familiar with REDD+, presents a framework for identifying and asserting tenure and human rights associated with forests and land use in the context of climate change policies and measures.

Clearly defined land rights can help identify which actors are necessary to address drivers of deforestation and can determine shares in benefits from reduced deforestation. Local resource management may even 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.

In many countries, people and communities have any number of rights on paper – but they may be unaware of how these rights apply to REDD+ and forest activities or how to exercise and defend them. Governments and donors may be unaware of their responsibilities as duty bearers to uphold these rights. In many cases, stakeholder groups have not been adequately involved in REDD+ planning, decision-making, or implementation. Their greater involvement is essential for successful and sustainable REDD+ interventions. Moreover, 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.

In recent decades, many policies and laws have been developed and implemented to help determine the scope of forest-related tenure and human rights. Tenure rights include a suite of underlying rights, such as access; withdrawal (i.e. the right to remove resources and benefit from their sale or use); power to exclude, regulate and sanction; and alienate land, territories, and/or resources. Human rights can be procedural – such as access to information, participation in decision-making, due process in adjudications – as well as substantive, such as cultural rights (e.g. non-discrimination), equitable benefits, and resource-related rights to livelihoods and land. 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 rights holders and duty bearers.

There are a number of tools available to help ensure that rights are respected in the implementation of REDD+-related activities including impact assessments, participatory design, mapping and monitoring, and standards, laws and policies. Judicial and non-judicial mechanisms at scales ranging from the project to international levels can help resolve disputes that may involve tenure and human rights concerns.

Examples where rights have been successfully asserted include cases of the Saramaka People vs. Suriname in the Inter-American Court of Human Rights, a World Bank Inspection Panel investigation regarding timber concessions and pygmy communities in the Democratic Republic of the Congo (DRC), and indigenous lands recognized in Indonesian courts on forest zoning and licensing decisions. The brief concludes with a number of online resources and publications that provide additional information.

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<sup>1</sup> As included in United Nations Framework Convention on Climate Change decisions, REDD+ refers to policy approaches and positive incentives on issues relating to reducing emissions from deforestation and forest degradation in developing countries; and the role of conservation, sustainable management of forests and enhancement of forest carbon stocks in developing countries.

# 1.0 INTRODUCTION

The objective of this brief is to assist in the identification of rights relevant to REDD+ implementation and how those rights can be applied or supported to strengthen the effectiveness, efficiency, and equity of REDD+ activities. After introducing key concepts and legal and policy benchmarks, this brief outlines the technical elements of rights associated with REDD+, as well as options for and examples of asserting these rights. The final section lists a number of tools and resources available for additional information.

## 1.1. IMPORTANCE OF THIS REDD+ THEME

Clearly defined land and resource rights can help identify which actors need to be engaged to address threats and drivers, and also help determine shares in the benefits from reduced deforestation. Community management of resources may improve forest outcomes.<sup>2</sup> Respecting human rights, such as cultural, livelihood, non-discrimination, participatory decision-making, access to justice, and resource-related rights, helps enable REDD-related decisions that are fair and equitable, and supported and implemented by those with direct access to forest resources.

In many countries, people and communities may have any number of rights on paper but be unaware of how these rights apply to REDD+ and forest activities, much less how to exercise and defend them. Governments and donors may be unaware of their responsibilities as duty holders to uphold these rights. For example, many countries have signed and agreed to a wide range of international human rights conventions and other international agreements, which affirm basic human rights for all, with additional provisions for specific groups such as indigenous peoples and women. In many signatory countries, national law and policies may also support these rights; however, domestic implementation of these rights may be uneven. Moreover, many countries have enacted national policies and legislation on these human rights and other rights issues, such as regulations supporting land and resource tenure rights. For example, in some countries, such as Nicaragua and Colombia, it is national policy that household land tenure certificates should have the names of both the wife and husband,<sup>3</sup> but this policy may not be consistently followed or implemented throughout the country, as governmental officials in different localities may understand this policy differently.

Despite such agreements, and even similar national level laws and policies, many remain unaware of how these rights apply to forest conservation efforts like REDD+. Stakeholder groups have not always been adequately involved in REDD+ planning, decision-making, or implementation to date. Their greater involvement will be essential for successful and sustainable REDD+ interventions. Moreover, clarity around rights to forest resources (both decision-making, as well as ownership and use rights) can enhance the long-term sustainability of efforts and help ensure equitable future benefit-sharing.

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<sup>2</sup> See, e.g., Westholm, L., Robin Biddulph, Ida Hellmark and Anders Ekbo. REDD+ AND TENURE: A Review of the Latest Developments in Research, Implementation and Debate. Focali, Sida, and University of Gothenburg (2011).

<sup>3</sup> Renee Giovarelli, Beatrice Wamalwa, and Leslie Hannay. Land Tenure, Property Rights, and Gender: Challenges and Approaches for Strengthening Women's Land Tenure and Property Rights. USAID Property Rights And Resource Governance Briefing Paper #7 (2013), available at [http://usaidlandtenure.net/sites/default/files/USAID\\_Land\\_Tenure\\_Gender\\_Brief\\_0.pdf](http://usaidlandtenure.net/sites/default/files/USAID_Land_Tenure_Gender_Brief_0.pdf)

## 2.0 POLICY FRAMEWORK

To understand why rights are relevant to REDD+, it is helpful to understand the law, policy and institutional framework REDD+ exists in.

The Parties to the UNFCCC have agreed on rules, methodologies, and modalities for forest countries to take action to reduce deforestation and associated emissions. Funds and institutions beyond the UNFCCC are also used to support countries develop and implement their own approaches to REDD+. As such, the policy framework for REDD+ is grounded in UNFCCC rules and supplemented by specific institutional policies and procedures as well as national and international law. A number of these rules and policies pertain to forest rights. See Annex A for a more detailed chronology on international milestones supporting the REDD+ framework and forest rights.

At the UNFCCC meetings in 2007 Parties to the UNFCCC affirmed that “the needs of local and indigenous communities should be addressed when action is taken to reduce emissions from deforestation and forest degradation in developing countries.”<sup>4</sup> By 2010, countries better defined the scope of REDD+ measures, agreed they should “fully respect human rights” in all climate-related actions, and included a set of safeguards specific to REDD+ as well as launched the development of safeguard policies and a complaint mechanism for all activities (not just REDD+) financed by the Green Climate Fund. For REDD+ specifically, countries agreed that national REDD+ strategies or action plans should address land tenure issues, gender considerations, and promote and support safeguards including respecting indigenous and community rights and international obligations. By 2013, countries had adopted a more comprehensive series of decisions including a requirement to report on how these safeguards are being addressed and respected prior to accessing any results-based finance for REDD+.

As the foundational decisions for REDD+ were being negotiated and developed at the UNFCCC, multilateral, bilateral and national initiatives emerged to provide support to countries interested in developing REDD+ programs, plans, and activities. Each of these programs has its own legal and policy frameworks, which vary in the degree to which they explicitly include additional rights and tenure considerations. For example, the World Bank launched a Forest Carbon Partnership Facility and Forest Investment Program that have separate charters and policies that reference the rights of indigenous peoples and forest communities and apply broader institutional safeguards (the specifics of which depend in part on the implementing partner). The FCPF Charter clearly mandates compliance with the World Bank’s Operational Policies and Procedures, “taking into account the need for effective participation of Forest-Dependent Indigenous Peoples and Forest Dwellers in decisions that may affect them, respecting their rights under national law and applicable international obligations.”<sup>5</sup> Meanwhile, the FAO, UNDP, and UNEP combined efforts to launch UN Collaborative Programme on REDD+ (UN-REDD). UN-REDD’s program documents affirm the commitment to a rights-based approach that respects international obligations and the rights of indigenous peoples and forest-dependent communities, and include detailed guidance notes on topics such as free, prior and informed consent. Additionally, UN-REDD and FCPF have published joint guidelines on stakeholder engagement. Combined, these multilateral initiatives cover some sixty countries implementing REDD+ programs.

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<sup>4</sup> UNFCCC Decision 2/CP.13, chapeau.

<sup>5</sup> FCPF Charter Section 3.1(d).

Bilaterally and nationally, the policy framework for REDD+ activities varies, although all countries have agreed to the REDD+ framework adopted through the various UNFCCC decisions. With respect to rights, this requires promoting, supporting, and providing information on safeguards including that REDD+ actions “compliment or are consistent with . . . relevant international conventions and agreements,” and respect for rights and the full participation of indigenous peoples and local communities (including by taking into account international and national obligations). And while the particular instruments vary depending on the country, all countries are party to at least some international human rights treaties relevant to REDD+.

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 what conventions, agreements, and national and international obligations could apply in this context.<sup>6</sup> These can be broken down into tenure rights and human rights (both procedural and substantive), described in more detail below.

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<sup>6</sup> Annex A provides an indicative list of some of the more commonly recognized instruments, although the specific suite of obligations will vary according to the country, activities, and actors involved.

# 3.0 TECHNICAL ELEMENTS

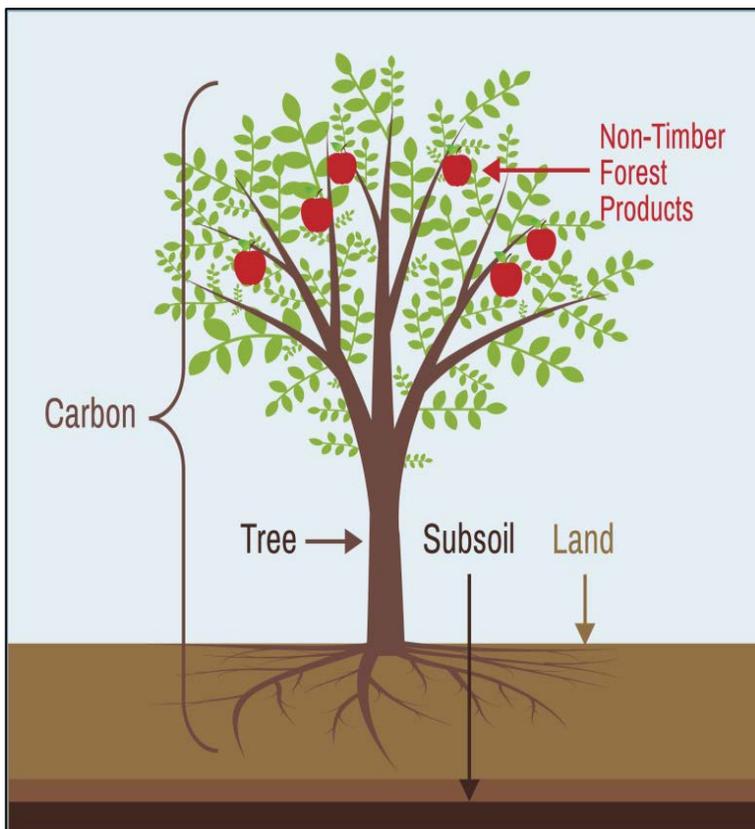
Rights related to REDD+ include tenure rights and human rights, which derive from a suite of different sources ranging from national laws, administrative decisions, traditional use, treaties, and customary international law.

## 3.1 TENURE RIGHTS

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, meaning the ability to visit a resource and use it on location, without depleting it;
- withdrawal, or the right to extract a resource without necessarily replenishing it;
- the right to exclude: the power to control who has access or other rights to a resource (most commonly associated with ownership);
- alienation - the right to sell or otherwise transfer a tenure right; and
- resource management - the power to provision or regulate the use of a resource.

Figure 1 The bundle of forest rights



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

**Non-Timber Forest Product (NTFP):** local communities collect forest fruits and use some leaves for medicinal purposes (customary and human rights basis).

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

**Tree:** State may authorize timber concessions to a private company (statutory basis).

**Land:** State may claim ownership of the land (statutory basis); communities may live there and/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).

Tenure rights can be held publicly by governments or privately by individuals, groups (collective rights), or legal entities such as companies. Tenure rights holders may enjoy only one or multiple “sticks” in the bundle. Multiple rights holders may enjoy 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. In some cases, such as resource management rights, this authority may rest with the tenure rights holder; in others, including the right to exclude, it may rely upon the government as a duty bearer to enforce tenure laws and regulations. Indeed, governments in particular often play multiple roles, including as regulators, owners, and users.

Carbon rights and benefit sharing rights are related to tenure rights. First, trees store and sequester carbon, so holders of rights to trees (either as land or as forest resources, depending on the specific legal framework for the area) may also have some rights to carbon or to the benefits associated with carbon sequestration. However, the precise relationship between tenure, carbon rights, and benefit sharing may depend on contractual agreements and underlying rights holders (such as whether/how carbon rights holders are recognized in relation to forest rights holders), as well as the source of the 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--often by distinct cultures, communities, or other specific groups. Customary rights may or may not be recognized by the State, but they may still exist and are often affirmed under international law--human rights law in particular.

### CASE STUDY: FORESTS AND INDIGENOUS PEOPLES IN INDONESIA'S CONSTITUTIONAL COURT

In 2013, Indonesia's constitutional court issued a landmark ruling recognizing the rights of indigenous communities to the forest lands they have traditionally occupied. The case concerned Indonesia's Forestry Law, which classified customary indigenous areas under State forest land. AMAN (a national coalition of Indigenous Peoples), Indigenous Peoples of Kenegerian Kuntu and Indigenous Peoples of Kasepuhan C situ challenged the law in constitutional court based on alleged violations of their rights.

The Court decided that customary indigenous areas are not State land. This can have impacts on licenses granted by Indonesia's Ministry of Forestry. Indonesia is now working to implement the decision. While the case lasted many years, Indonesia's National Human Rights Commission considers the Court's Decision “an entry point to conduct means of restoration/ restitution of indigenous land rights over their indigenous territories (including over their customary forests).”

## 3.2 HUMAN RIGHTS

Human rights can be both procedural and substantive. Procedural rights generally 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 forest ecosystems).

Sources of human rights include State-negotiated treaties, as well as customary international law, which have a similar legal status as treaties even if not explicitly codified. For example, many provisions of the Universal Declaration of Human Rights are widely respected by States and treated as legal obligations even though declarations approved by the UN General Assembly are not in themselves legally binding.

**Table 1. The various sources, types and actors supporting rights related to REDD+**

	TENURE RIGHTS	HUMAN RIGHTS
SOURCES:	National law: <ul style="list-style-type: none"> <li>• Constitution</li> <li>• Laws</li> <li>• Common law</li> </ul>	Treaties <ul style="list-style-type: none"> <li>• Conventions, covenants, protocols</li> <li>• Any other binding global, regional, or bilateral agreement where at least on State is a party</li> </ul>
	Statutory <ul style="list-style-type: none"> <li>• Administrative decisions</li> <li>• Regulations</li> <li>• Licenses</li> </ul>	International institutions and donor agencies <ul style="list-style-type: none"> <li>• Operational policies</li> <li>• Finance agreements</li> </ul>
	Customary <ul style="list-style-type: none"> <li>• Traditional use</li> </ul>	Customary international law
TYPES	“Bundle of rights”: <ul style="list-style-type: none"> <li>• Access</li> <li>• Withdrawal</li> <li>• Right to exclude</li> <li>• Alienate/sell/rent</li> <li>• Management</li> </ul> Authority to sanction	Procedural: <ul style="list-style-type: none"> <li>• access to information, transparency</li> <li>• decision-making, participation, consultation/consent</li> <li>• access to justice and remedy</li> </ul>
		Substantive: <ul style="list-style-type: none"> <li>• equitable access and benefits;</li> <li>• Cultural: non-discrimination, religion, traditional knowledge, territories, livelihoods;</li> <li>• natural resources: lands, territories, resources; access to food, water, ecosystems</li> </ul>
RIGHTS HOLDERS	Private <ul style="list-style-type: none"> <li>• Collective/commons</li> <li>• Individuals</li> <li>• Companies</li> </ul>	Individuals <ul style="list-style-type: none"> <li>• Groups and cultures <ul style="list-style-type: none"> <li>• Indigenous, tribal, minorities</li> <li>• Women, youth, elders</li> </ul> </li> </ul>
	Public <ul style="list-style-type: none"> <li>• State owned</li> <li>• State managed</li> </ul>	
DUTY BEARERS	National Governments (primary duty bearers)	
	Subnational actors <ul style="list-style-type: none"> <li>• Jurisdictional authorities</li> <li>• Local authorities</li> <li>• Community authorities</li> </ul>	Transnational actors <ul style="list-style-type: none"> <li>• International organizations</li> <li>• Donors</li> <li>• Private sector companies and project developers</li> <li>• NGOs</li> </ul>

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. This has been highlighted in joint guidance issued by the FCPF and UN-REDD:

“Special emphasis should be given to the issues of land tenure, resource-use rights and property rights because in many tropical forest countries these are unclear as indigenous peoples’ customary/ancestral rights may not necessarily be codified in, or consistent with, national laws. Another important issue to consider for indigenous peoples and other forest dwellers is that of livelihoods. Thus clarifying and ensuring their rights to land and carbon assets, including community (collective) rights, in conjunction with the broader array of indigenous peoples’ rights as defined in applicable international obligations, and introducing better access to and control over the resources will be critical priorities for REDD+ formulation and implementation.”<sup>7</sup>

In 2008, the UN Human Rights Council approved a framework for addressing human rights in the context of private multilateral transactions, developed by the Special Representative of the Secretary-General on the issue of transnational corporations and other business enterprises with regard to human rights.<sup>8</sup> The Human Rights Council is an intergovernmental body, created by the UN General Assembly in 2006 that periodically reviews the condition of human rights in specific countries and oversees various technical experts to assist in the reporting on the situation of human rights across the globe. The Council also manages a working group and forum on business and human rights, which was created following the work of the Special Representative that developed the framework. This framework has become known as the “Protect, Respect and Remedy” framework and includes the following principles, which may be useful for REDD+:<sup>9</sup>

- PROTECT refers to the State’s duty to protect rights-holders from human rights abuses by third parties, through appropriate policies, regulations, and adjudications;
- RESPECT refers to third parties’ responsibilities with respect to human rights, including undertaking due diligence to avoid violations and addressing adverse impacts; and
- REMEDY means ensuring that rights holders have both judicial and non-judicial remedies available to address rights violations and concerns.

### CASE STUDY: SARAKA PEOPLE V. SURINAME

This case came before the Inter-American Court of Human Rights because Suriname did not recognize customary rights to forest resources when awarding timber and mining concessions to foreign companies. The Saramaka, a tribal (not indigenous) Afro-descendant people living in Suriname, petitioned the Inter-American Court of Human Rights to have their customary rights recognized. The court found that international obligations affirm customary rights to forests even if the State does not formally recognize them.

To remedy the rights violation, in 2007, the Court ordered Suriname “to delineate Saramakan territorial boundaries, legally recognize Saramakan communal property rights, consult with the Saramakans regarding projects affecting their land, and ensure that environmental and social impact assessments are conducted before the granting of any concession within Saramakan territory.” The Court’s ruling is binding, although implementation challenges continue.

<sup>7</sup> FCPF and UN-REDD (2012). Guidelines on Stakeholder Engagement in REDD+ Readiness With a Focus on the Participation of Indigenous Peoples and Other Forest-Dependent Communities, at 5.

<sup>8</sup> Guiding Principles on Business and Human Rights, available at [http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf).

<sup>9</sup> <http://www.reports-and-materials.org/Ruggie-protect-respect-remedy-framework.pdf>.

# 4.0 TOOLS FOR RIGHTS HOLDERS AND DUTY BEARERS

A number of practical tools exist in addition to legal resources that serve to help identify relevant international obligations particular to a given country or forest area (see Annex B below). At the project and programmatic/strategic level, impact assessments are frequently employed during planning stages to evaluate, avoid, and otherwise mitigate adverse impacts. The most common impact analysis is an environmental assessment, but assessments can also be undertaken for social, tenure, human rights, and gender purposes. Examples of specific impact assessment tools relevant to REDD+ include environmental impact analysis (EIA) for project-level work, strategic environmental and social assessment (SESA) for jurisdictional or national level work, a Land Governance Assessment Framework at the national level, and human rights impact assessment. For example, UN-REDD National Programs “assess the impact of UN-REDD Programme activities on the rights of indigenous peoples’ and other forest-dependent communities prior to taking decisions on such activities.”<sup>10</sup> At the project level, the Convention on Biological Diversity-derived Akwe:Kon guidelines may be helpful in undertaking cultural, environmental and social impact assessments regarding developments proposed to take place on, or which are likely to have an impact on, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities.<sup>11</sup>

## CASE STUDY: DEMOCRATIC REPUBLIC OF THE CONGO: INSPECTION PANEL CASE RELATED TO FOREST LENDING

This case relates to World Bank lending associated with tenure concession reforms in the DRC. Pygmy groups requested inspection of World Bank lending to support a new commercial forest concession system in the DRC. The Inspection Panel, an independent panel of international experts that reports directly to the World Bank’s Board of Directors, undertook fact-finding to assess compliance with World Bank Policies and Procedures.

The Panel found that the World Bank violated policies by failing to identify the cultural property and spiritual value of forest areas to the Pygmy peoples or avoid impacts. While pygmy organizations provide critical leadership for this case, support from international non-governmental organizations (NGOs) helped indigenous groups to better understand and access the Inspection Panel. The World Bank Management’s response and subsequent actions from this case helped strengthen recognition of customary rights and led to some changes in forest concessions.

<sup>10</sup> FCPF and UN-REDD (2012). Guidelines on Stakeholder Engagement in REDD+ Readiness

With a Focus on the Participation of Indigenous Peoples and Other Forest-Dependent Communities, at 13.

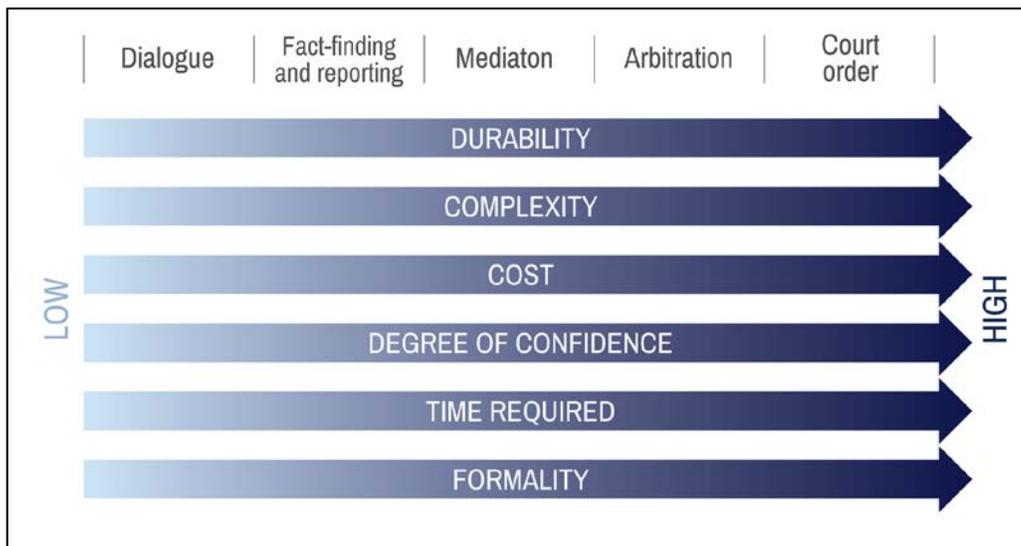
<sup>11</sup>The Akwe:Kon voluntary guidelines assist in conducting cultural, environmental and social impact assessments regarding developments proposed to take place on, or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities. In 2007, the CBD Conference of the Parties adopted the guidelines in furtherance of a work program associated Article 8(j) of the Convention on Biological Diversity, which is a provision supporting the livelihoods, traditional knowledge, cultural practices, and equitable sharing of benefits related to indigenous peoples and local communities. For more information, see <http://www.cbd.int/doc/publications/akwe-brochure-en.pdf>.

Other useful tools related to rights and REDD+ involve employing participatory design, mapping, and monitoring methodologies. In this context, duty bearers involve rights holders in implementation and there is a lower likelihood of violating rights because rights holders are present and contribute more directly to outcomes. While participatory processes may require more up-front time and cost investments, they may substantially reduce conflict and costs over the long-term.

Duty bearers also frequently employ laws, policies, and regulations that either directly or indirectly support rights related to REDD+. These processes may be proactive in terms of how they recognize rights, or may simply guarantee a venue for recourse in the event that rights are subsequently violated. For example, institutions or agencies at any scale (local to international) may issue guidance (such as the FAO Voluntary Guidelines on Land Tenure) and maintain safeguard policies and grievance mechanisms to avoid and address rights violations (such as the World Bank Inspection Panel).

Given the different scales of activities affecting rights, mechanisms may be available at various levels to assert and help remedy rights.

**Figure 2. The spectrum of possibilities to address and resolve disputes, ranging from informal discussions to binding, enforceable decisions**



**Table 2. Examples of dispute resolution options at different scales of REDD+ implementation**

	Project/ community	Jurisdiction	Country	Regional	International
<b>Judicial</b>	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
<b>Non-judicial</b>	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 Arhus Compliance Committee	World Bank Inspection Panel Committee on the Elimination of all forms of Racial Discrimination UN Human Rights Council

# 5.0 UNDERSTANDING, CLARIFYING, AND RESPECTING RIGHTS

This section provides a suite of recommended practical steps to help duty bearers and rights holders understand, clarify, and advance rights related to REDD+. These steps can help build capacity and create a stronger enabling environment to realize rights when undertaking REDD+ planning and implementation. Duty bearers can follow these steps to help protect, respect, and remedy rights. Additionally, these measures can help rights-holders to strengthen their effectiveness in clarifying and asserting their rights.

## *Step 1. Clarify the scope of statutory and customary rights relevant to the geographic area.*

### **Step 1a. Identify the applicable jurisdiction’s statutory framework governing forest/land tenure to understand the scope of nationally recognized rights.**

1. Map forest resources to national and provincial political boundaries;
2. Identify any special political designations within the geographic boundaries (indigenous territories, protected areas, community boundaries, etc.);
3. Clarify the statutory framework for land and resource ownership and use at the national and subnational levels;
4. Assess the institutional authorities and associated regulations that govern forest resources; and
5. Clarify whether additional national legal obligations apply based on common law and whether the national framework formally recognizes customary rights.

### **Step 1b. Identify customary forest rights to understand the scope of rights asserted by communities and traditional users of forest areas.**

1. Identify communities affected by REDD+ activities;
2. In areas potentially impacted by REDD+ activities, employ participatory mapping methods to aid in boundary clarification related to neighboring communities or other claimants;
3. Enlist communities’ organizations, authorities and institutions to assist in identifying customary norms impacting the use/appropriation of forest resources; and
4. Consider “issues of local ownership, demonstrated mandate, legitimacy as claimant, competence and expertise, and accountability.”<sup>12</sup>

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<sup>12</sup> FCPF and UN-REDD (2012). Guidelines on Stakeholder Engagement in REDD+ Readiness With a Focus on the Participation of Indigenous Peoples and Other Forest-Dependent Communities, at 7.

**Step 1c. Identify relevant international obligations related to rights in the context of REDD+ to understand applicable international norms that the national government is required to follow, and to help identify potential treaty bodies that could provide a means of recourse in the event of a complaint.**

1. Clarify the human rights and other treaties to which the country is a party;
2. Identify national laws, regulations, and policies implementing the relevant rights;
3. Apply the specific provisions of national and international law to the REDD+ activities in question; and
4. Utilize tools such as impact assessments, participatory decision-making, and implementation of safeguard policies to protect and respect rights in the implementation of REDD+ activities.

***Step 2: Understand, apply, and clarify rights specific to the owners and users of forest resources.***

**Step 2a: Facilitate inclusive and equitable outcomes in planning, implementation, and benefit sharing in order to ensure procedural and substantive rights are respected.**

1. Consider gender equity and the rights of women in all phases of REDD+ implementation;
2. Understand how the rights articulated in UNDRIP apply to REDD+ activities that may affect forest areas relevant to indigenous peoples;
3. Apply international and national laws pertaining to non-discrimination rights; and
4. Strengthen capacities of both rights-holders and duty bearers to apply rights.

**Step 2b: Determine any geographic areas with overlapping claims to forests in order to identify potentially disputed claims relevant to REDD+ activities and associated benefits. This is especially important where statutory and customary rights might provide parallel bases for claims.**

1. Understand and evaluate the legal basis of each type of user's forest claim;
2. Assess the degree of conflict and complexity associated with resolving claim disputes;
3. Decide whether and how to address any disputes that cannot be directly resolved among the parties; and
4. Avoid creating new rights violations or exacerbating existing conflicts in the implementation of REDD+ activities.

***Step 3: Utilize available recourse mechanisms to advance rights, resolve disputes and remedy violations in order to facilitate meaningful, equitable, and legal outcomes.***

1. Identify the accountability arrangements associated with the governance structures;
2. Understand the range of dispute resolution options available; and
3. Utilize the option most appropriate for the case in question as needed.

# 6.0 CONCLUSION

The international REDD+ framework and initiatives recognize the importance of respecting and supporting rights in the context of REDD+ implementation. Statutory and customary laws alike play important roles in determining the legal framework for effective REDD+ programs. In many instances these are well equipped to respect, protect, and remedy rights relevant to REDD+ implementation. Forest rights-holders may have claims based on both tenure rights and human rights (procedural and substantive).-

The sources and scope of these laws vary, from international to subnational levels and from traditional informal practices to codified formal regulations. It is important to look beyond the laws “on the books” and also identify customary rights and those that derive from international obligations or other sources (such as contracts) which may not be incorporated into national or local legislation.

A number of tools and other resources are available to help identify, respect, and protect rights in the context of REDD+. Assessments and participatory planning and mapping can assist in program and project design. International standards such as the Voluntary Guidelines on Land Tenure and FCPF-UN-REDD joint guidelines on stakeholder engagement provide useful considerations for REDD+ design and implementation. Legal resources (see below) can further help identify international and national obligations in the context of rights and forests.

REDD+ methodologies can be highly technical, both for rights-related considerations and for carbon accounting-related matters. Experts in one field may not have expertise in other areas. Human rights and tenure experts may not be familiar with the technical aspects of REDD+ accounting and finance for activities and associated emissions reductions. As such, it is important to involve experts from different fields in REDD+ planning, implementation, and monitoring. It is also important to integrate rights considerations into financial arrangements such as payment structures and benefit sharing.

Another important consideration is that situations with overlapping rights occur frequently. 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. It is not uncommon for disputes to arise. Title registries and participatory mapping processes are two methods that may help clarify claims and may even help achieve REDD+ objectives. In some cases, opportunities associated with REDD+ may help realize rights and resolve conflicts that predated REDD+; but in any case it is important that REDD+ activities do not exacerbate existing conflicts.

Once rights are clearly identified (even where they overlap), they can be applied to resolving disputes and identifying benefit sharing arrangements. Additionally, in cases where rights are not respected, it is important to help rights holders identify and effectively use mechanisms to address situations where their rights are potentially violated.

Changes to tenure laws can be a lengthy process, and it may take decades to resolve conflict claims or to make changes to laws governing property and resource rights. Strong consideration of rights issues throughout program and project implementation can assist both duty bearers and rights holders clarify, respect, protect, and remedy the rights of those impacted by REDD+ activities. The recommendations, resources, and tools presented in this document are offered in order help improve forest outcomes and equitably consider and respect both tenure and human rights to forest resources.

# ANNEX A: INTERNATIONAL POLICY MILESTONES

## UNFCCC MILESTONES

**1992:** The UNFCCC was adopted. Its objectives supports sustainable development and text further specifies that climate change responses should seek to avoid adverse social and economic impacts, and that all countries should employ methods such as impact assessments to minimize adverse impacts from mitigation measures.<sup>13</sup>

**2007:** At the 13th UNFCCC Conference of the Parties (COP 13), Bali, Indonesia: countries formally endorse REDD+ and recognize “the needs of local and indigenous communities should be addressed when action is taken to reduce emissions from deforestation and forest degradation in developing countries.”<sup>14</sup>

**2010:** At COP 16, in Cancun, Mexico, Parties agreed they should “in all climate change related actions, fully respect human rights.” Countries also mandated the development of safeguard policies and a complaint mechanism for activities financed by the Green Climate Fund.<sup>15</sup> And for REDD+ specifically, countries agreed they should address land tenure issues, gender considerations, and promote and support safeguards including “[r]espect for the knowledge and rights of indigenous peoples and members of local communities, by taking into account relevant international obligations, national circumstances and laws, and noting that the United Nations (UN) General Assembly has adopted the UN Declaration on the Rights of Indigenous Peoples.”<sup>16</sup>

**2011:** COP 17, Durban, South Africa: countries agreed to periodically provide information on how the REDD+ safeguards are being addressed and respected.<sup>17</sup>

**2013:** COP 19, Warsaw, Poland: Countries approved a series of decisions to help operationalize REDD+, including a requirement to publish summaries of information on how the safeguards are being addressed in order to obtain results based finance.<sup>18</sup>

## OTHER KEY REDD+ MILESTONES

**2007: Forest Carbon Partnership Facility (FCPF) charter** requires compliance with World Bank policies (including safeguards intended to minimize adverse social and environmental impacts), “taking into account the need for effective participation of Forest-Dependent Indigenous Peoples and Forest Dwellers in decisions that may affect them, respecting their rights under national law and applicable international

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<sup>13</sup> UNFCCC Art. 2, preamble, and Art. 4(f) respectively.

<sup>14</sup> UNFCCC Decision 2/CP.13, chapeau.

<sup>15</sup> The Governing Instrument for the Green Climate Fund indicates that the social and environmental safeguards will represent best practices and apply to all projects and programmes, and the accountability mechanism will include both an independent complaint mechanism as well as an independent integrity unit. See [http://gcfund.net/fileadmin/00\\_customer/documents/pdf/GCF-governing\\_instrument-120521-block-LY.pdf](http://gcfund.net/fileadmin/00_customer/documents/pdf/GCF-governing_instrument-120521-block-LY.pdf)

<sup>16</sup> UNFCCC Decision 1/CP.16, para 72 & appendix I.

<sup>17</sup> UNFCCC Decision 12/CP.17.

<sup>18</sup> Work program on results-based finance to progress the full implementation of the activities referred to in decision 1/CP.16, paragraph 70, Decision -/CP.19, at [http://unfccc.int/files/meetings/warsaw\\_nov\\_2013/decisions/application/pdf/cop19\\_redd\\_finance.pdf](http://unfccc.int/files/meetings/warsaw_nov_2013/decisions/application/pdf/cop19_redd_finance.pdf).

obligations.” The FCPF Common Approach subsequently extended this mandate to other implementing institutions.

**2008:** The Food and Agricultural Organization of the UN, the United Nations Development Programme (UNDP), and UNEP form a collaborative agreement initiating the UN Collaborative Programme on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries (UN-REDD). **UN-REDD adopts a rights-based approach and a standard of free, prior and informed consent.** The UN-REDD Policy Board includes indigenous and civil society representatives, including a subset of civil society with full voting rights in the governance of the programme.

**2010:** The **Forest Investment Program (FIP)** recognizes value of tenure and rights for REDD+ outcomes. FIP countries are required to describe forest governance arrangements, including “legislation, regulations, land rights and tenure systems, institutions and their capacities, participation of key stakeholders including indigenous and other forest communities, and accountability arrangements.”<sup>19</sup> Additionally, “consistent with relevant international instruments, obligations and domestic laws, FIP investment strategies, programs and projects should be designed and implemented under a process of public consultation, with full and effective participation of all relevant stakeholders on matters that affect their distinctive rights, including in particular groups that historically have tended to be marginalized such as indigenous peoples, local communities and women.”<sup>20</sup> The 2011 FIP results framework identifies “non-discriminative tenure” and recognition of traditional rights as an indicator of an improved enabling environment for REDD+, with two key outputs of FIP investments as (1) the institutional and legal framework that protects the rights of local communities and indigenous peoples as an important criteria for REDD+ results reporting, and (2) protection and empowerment of indigenous peoples and local communities’ rights.<sup>21</sup>

**2012: UN-REDD and FCPF** adopt joint guidelines on stakeholder engagement: “Both the UN-REDD Programme and the FCPF also recognize as part of their policies and procedures that for REDD+ to be implemented, participating countries should comply with applicable international obligations, treaties and national laws.”<sup>22</sup> Additionally, “It is critical for UN-REDD Programme countries to ensure that ... (a)ctivities follow a human rights-based approach and adhere to the UNDRIP, UN Development Group Guidelines on Indigenous Peoples’ Issues, and International Labour Organization (ILO) Convention No. 169.”<sup>23</sup> **2013: FCPF Carbon Fund adopts its Methodological Framework** for determining carbon emissions reductions and payment eligibility, including criteria for: consistency with World Bank and UNFCCC safeguards; availability of grievance mechanism(s); ability to transfer title; availability of land tenure assessment; and benefit sharing schemes consistent with both national and international obligations.

## BEYOND REDD+: FOREST RIGHTS MILESTONES

**1945: United Nations** is founded for the purpose of, *inter alia*, “promoting and encouraging respect for human rights.”<sup>24</sup>

**1948: Universal Declaration on Human Rights** is adopted without objection, endorsing a set of universally recognized rights and freedoms. While initially passed as a non-binding resolution by the UN General

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<sup>19</sup> Climate Investment Funds, Forest Investment Program (2010). FIP OPERATIONAL GUIDELINES, at Annex B, Section I (g).

<sup>20</sup> Climate Investment Funds (2010). FIP: Investment Criteria and Financing Modalities, at p. 7-8.

<sup>21</sup> Climate Investment Funds (2011). Forest Investment Program Results Framework, available at [https://www.climateinvestmentfunds.org/cif/sites/climateinvestmentfunds.org/files/FIP\\_Results\\_Framework\\_final.pdf](https://www.climateinvestmentfunds.org/cif/sites/climateinvestmentfunds.org/files/FIP_Results_Framework_final.pdf)

<sup>22</sup> FCPF and UN-REDD (2012). Guidelines on Stakeholder Engagement in REDD+ Readiness With a Focus on the Participation of Indigenous Peoples and Other Forest-Dependent Communities, at 2.

<sup>23</sup> *Id.*

<sup>24</sup> UN Charter Art. I.

Assembly, many of the rights named in the Declaration have since been elaborated under treaties or recognized as customary international law.

**1966: International Covenant on Civil and Political Rights** adopted, recognizing rights to, *inter alia*, non-discrimination, decision-making, culture, religion, and access to justice and remedies.

**1966: International Covenant on Economic, Social, and Cultural Rights** adopted, recognizing rights to culture, non-discrimination, and life/livelihoods, among others.

**1969: International Convention on the Elimination of All Forms of Racial Discrimination** adopted, which could be used as the basis for complaints to the Committee on the Elimination of all forms of Racial Discrimination hear complaints, an important international grievance mechanism.

**1972: Stockholm Declaration of the UN Conference on the Human Environment** affirms rights to freedom, equality, livelihoods, and non-discrimination in the context of environmental quality.

**1979: The Convention on the Elimination of All Forms of Discrimination against Women** recognizes important rights related to non-discrimination on the basis of gender, access to justice, and tenure.

**1981: African Charter on Human and Peoples' Rights** adopted, which created the African Commission on Human and Peoples' Rights and led to the 1998 Protocol establishing the African Court on Human and Peoples' Rights, which provides a forum to hear complaints from various peoples in Africa and their associated communities who believe their rights have been violated.

**1987: UN General Assembly endorsed the United Nations Environment Programme (UNEP) Goal and Principles of Environmental Impact Assessment**, which affirms the importance of a public comment period and a duty to publicly explain the decision.

**1989: Convention on the Rights of the Child** affirms rights to participation in decision-making, access to justice, and non-discrimination on the basis of age.

**1989: International Labor Organization Convention concerning Indigenous and Tribal Peoples in Independent Countries (No. 169)** is adopted, affirming, *inter alia*, key rights of indigenous peoples to lands, territories and resources and also presenting treaty level text regarding free, prior, and informed consent.

**1992: Rio Declaration on Environment and Development** emphasized the contributions of indigenous peoples and local communities to sustainable development and stressed the importance of public participation and access to information in environmental decision-making.

**1993: World Bank Inspection Panel** founded as the first grievance mechanism at an international financial institution to investigate complaints from affected groups about projects. Many other development banks and bilateral donors later adopt similar mechanisms.

**1998: Aarhus Convention on Access to Information** details governmental obligations associated with environmental decision-making. Though a regional convention for Europe, countries on other continents have also become parties to it.

**2000: UN General Assembly adopts the United Nations Millennium Declaration**, which contains a number of aspirations regarding human rights and the environment and was politically influential across a number of UN agencies and civil society.

**2003: Convention for the Safeguarding of the Intangible Cultural Heritage** adopted, affirming rights to culture, religion and sacred sites.

**2007: UN Declaration on the Rights of Indigenous Peoples (UNDRIP)** passed by the UN General Assembly after decades of negotiation between governments and indigenous peoples.

**2008: United Nations Human Rights Council approves the Guiding Principles on Business and Human Rights**, establishing a “protect, respect, and remedy” framework in the context of multilateral business transactions.<sup>25</sup>

**2010: Organization of American States Santo Domingo Declaration for the Sustainable Development of the Americas**, which promotes *inter alia* public participation in decision making on sustainable development policies.

**2010: Parties to the Convention on Biological Diversity** adopt Decision X/33 affirming the importance of considering land tenure and participatory rights in the context of REDD+ implementation.

**2011: Global Environment Facility (GEF) Council** adopts new policy with minimum criteria for environmental and social safeguards for the agency and its implementing partners.

**2012: The FAO Committee on Food security** adopts 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.

**2013: United Nations General Assembly** endorses **UN Commission on International Trade Law Rules on Transparency in Treaty-based Investor-State Arbitration**. This reinforces the need for transparency in investor-State relations as a tool that can “increase transparency and accountability and promote good governance”.<sup>26</sup>

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<sup>25</sup> Guiding Principles on Business and Human Rights.

<sup>26</sup> <http://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf>

# ANNEX B: RESOURCES AND TOOLS

## INTERNATIONAL LEGAL INSTRUMENTS

Core International Human rights Instruments and their Monitoring Bodies from the UN Office of the High Commissioner on Human Rights:

<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx>

A more complete list of human rights instruments:

<http://www.ohchr.org/EN/ProfessionalInterest/Pages/UniversalHumanRightsInstruments.aspx>

UN Treaty System list of instruments and status of specific countries' ratifications:

<https://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en>

Standards and Guidance:

FAO, Portal for the Voluntary Guidelines on the Responsible Governance of Tenure

<http://www.fao.org/nr/tenure/voluntary-guidelines/en/>

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UN-REDD: Social and Environmental Principles and Criteria (SEPC), available at

[http://www.unredd.net/index.php?option=com\\_docman&task=doc\\_download&gid=6985&Itemid=53](http://www.unredd.net/index.php?option=com_docman&task=doc_download&gid=6985&Itemid=53)

UN-REDD, Benefit and Risks Tool (BeRT), available at

[http://www.unredd.net/index.php?option=com\\_docman&task=doc\\_download&gid=6380&Itemid=53](http://www.unredd.net/index.php?option=com_docman&task=doc_download&gid=6380&Itemid=53)

UN-REDD Guidelines on Free, Prior, and Informed Consent (final working draft), available at [http://www.unredd.net/index.php?option=com\\_docman&task=doc\\_download&gid=8717&Itemid=53](http://www.unredd.net/index.php?option=com_docman&task=doc_download&gid=8717&Itemid=53)

USAID, Gender mainstreaming checklist for lowering emissions from Asia's forests, available at [http://www.leafasia.org/sites/default/files/resources/Gender\\_LEAF\\_StrategyMainstreaming\\_Final20120831.pdf](http://www.leafasia.org/sites/default/files/resources/Gender_LEAF_StrategyMainstreaming_Final20120831.pdf)

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Rights and Resources Initiative: resources for land and forest tenure, available at <http://www.rightsandresources.org/pages.php?id=536>

UN Special Representative for Businesses and Human Rights (2008-2011): web portal at <http://www.business-humanrights.org/Home> and a list of grievance mechanisms at <http://www.reports-and-materials.org/Rees-Vermijs-Mapping-grievance-mechanisms-Jan-2008.pdf>

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# ANNEX C: TERMS

**Administrative decision:** an act by a governmental agency with regulatory authority over a specific area, such as forests, that may modify statutory rights, which can include issuing or revoking licenses and regulations, holding hearings, and investigations.

**Collective right:** a protected interest based on identity which cannot be subdivided to individuals but instead is held by a discrete group, community, culture, or people.

**Convention:** a type of treaty that often seeks to establish a framework to address or solve a particular problem of international significance. Many conventions identify broad goals and obligations, set up secretariats, and establish decision-making and subsidiary bodies. Conventions are often (but need not be) followed by protocols with more detailed obligations.

**Customary international law:** international obligations developed over time based on countries' behavior and belief that an obligation is legally binding; may be expressed in treaty or other text but does not need to be explicitly written down or otherwise negotiated.

**Customary right:** a vested interest which derives from traditional or long-term practice. It may not be written down but is treated as law. Customary rights in international law derive from practices by States in treating a norm as binding; customary property rights are more localized and based on traditional or historical practice, although they may be recognized under international human rights law.

**Duty Bearer:** An actor implementing or regulating an activity who has obligations to protect, respect, and/or remedy rights.

**Grievance mechanism:** generally a non-judicial process to receive complaints and help resolve issues through fact-finding, mediation, or other means at a project, company, or institutional level (often international).

**Human right:** an internationally recognized freedom or interest that transcends State rights based on a common humanity.

**Impact assessment:** process of anticipating, avoiding, and mitigating impacts associated with project and policy plans. The assessment may be environmental, social, or specifically focused on human rights.

**Individual right:** a specific right attaching to a person, as opposed to a collective right associated with a group.

**Judicial decision:** a formal decision issued by a government authority tasked with resolving legal conflicts, generally binding.

**Mediation:** Facilitated negotiations between conflicting parties to seek resolution to a complaint, which could be based on alleged rights violations.

**Ombudsman:** a specific contact person or office within a company, agency, or institution responsible for receiving and addressing complaints which may (but need not) be based on alleged rights violations.

**Procedural right:** the right to participate in a decision-making or other process, independent from a substantive outcome.

**Rapporteur:** an expert appointed for formal reporting on a specific matter. In the UN system, special rapporteurs periodically report to the Human Rights Council on thematic issues such as the rights of indigenous peoples.

**Property rights (tenure-related):** vested interests in resources such as land and/or trees which allow a person or group to claim geographically specific ownership, access, management, exclusion, and/or transfer rights. Property rights may be statutory and/or customary.

**Rights holder:** an individual or group representative who can legitimately assert rights related to a resource.

**Statutory Right:** a right explicitly conferred through a government-administered written legal system. Statutory rights may further international law, provide official recognition of customary rights, or instead may be rights created (or revoked) by the authority of the State.

**Substantive Right:** the right to affect the outcome of a decision or to assert a claim to land or a resource. It is distinct from a procedural right which has no right to modify an outcome if a fair process was followed to reach a decision.

**Tenure:** the basis by which statutory and customary rights can be asserted to claim an interest in lands and resources; due to various bases, multiple tenure rights holders may assert claims to the same resource.

**Treaty:** a legal agreement such as convention, protocol, or covenant in which countries and/or international institutions decide to be formally bound.

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