

# Land tenure and fast-tracking REDD+: time to reframe the debate?

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## Key Points

- **Legally defensible and enforceable land tenure rights for forest owners are a key enabling condition for effective and equitable REDD+ implementation following a global agreement in 2020.**
- **However, reform of land tenure legislation will not achieve this in most forest countries before 2020.**
- **Where legal reform is attempted, limited political will, poor regulation, high cost and limited enforcement could undermine its effectiveness and sustainability.**
- **For rapid impact policy makers should focus on alternative policy options that create REDD+ enabling conditions without a wholesale reform of legal frameworks.**
- **Mapping national laws and policies across sectors (e.g. agriculture, mining, forestry, energy, and environment) can help identify perverse incentives, loopholes and conflicting priorities that may combine to exacerbate the drivers of deforestation.**
- **Interim measures, such as moratoria, can then be implemented to halt unsustainable development while government policies or priorities are re-assessed.**
- **Government engagement of large civil society networks with national forestry initiatives can fast-track improved tenure security for forest owners while working within existing legal frameworks, and also creates strong additional enabling conditions for REDD+.**

## Introduction

Complex socioeconomic and political factors interact to drive the loss of the world's tropical forests<sup>1</sup>. For any initiative to successfully curb historical trends of tropical deforestation and forest degradation, it must effectively address these factors, amongst which, insecure land tenure and poor forest governance are widely identified as significant.

Land tenure can be described as the 'bundle of rights' that determine the conditions for access, use, management, exclusion and alienation (the right to sell or transfer ownership rights) of land and resources<sup>2</sup>. Poor forest governance is characterised by a lack of efficient implementation and enforcement of regulations, over-lapping and inconsistent legal frameworks, and often a level of corruption.

Poorly defined land tenure can reduce the incentives for local or national forest protection and facilitate the over-exploitation of forest resources. Clearing forest land itself is often a means of securing ownership where land claims are disputed or undefined<sup>3</sup>. Unclear land tenure is a significant disincentive for investment in all kinds of forestry projects, as it represents a high risk to successful project implementation, and the costs of resolving related conflicts are high. The security and clarity of land tenure have been widely identified as critical to the success of an emerging number of incentive-based policy instruments that aim to reduce deforestation. Nowhere is this more apparent than in the debate surrounding REDD+.

Clarity of land tenure and usage rights is vital for REDD+ as it determines who should be compensated for reducing their deforestation (who gets the rewards) and who should be held accountable if deforestation does occur (who holds the risks)<sup>4</sup>. Many REDD+ practitioners argue that in most tropical forest countries comprehensive legal reform of the laws and policies surrounding land tenure is needed to ensure that REDD+ projects will both reduce emissions from deforestation and degradation, and positively impact the livelihoods of forest communities by maximising the flow of REDD+ benefits to these groups<sup>5</sup>.

However, comprehensive legal reform of land tenure is certain to be a lengthy process and tropical forests cannot afford to wait. For REDD+ to make a significant impact towards addressing climate change a global agreement under the UNFCCC is needed by 2020. If tenure reforms are unlikely to be enacted before 2020 in tropical forest countries, what other opportunities exist for catalysing REDD+ implementation in the short to medium term?

We examine land tenure regimes in Nepal and Papua New Guinea, drawing on research conducted for The REDD Desk ([www.theredddesk.org](http://www.theredddesk.org)), and analyse *de jure* (on paper\*) tenure in these contexts, and what the respective implications are for the establishment of national REDD+ mechanisms. Using these case studies and lessons from the literature we then assess the general relative efficacy of legal reform as a solution to promoting land tenure security and ensuring effective REDD+ implementation. Finally, we present a series of policy recommendations which could fast-track the creation of an enabling environment for REDD+ in the short to medium term.

### What is 'secure' tenure, and for whom is it secure?

Secure tenure is difficult to define, however 'hard' rights that can be defended by law are regarded as more secure than 'soft' rights, such as guidelines or policies that can be withdrawn by the relevant authorities<sup>6</sup>. Even where hard rights exist, however, many governments also retain the power of compulsory acquisition, which can enable the state to take control of land for specific purposes, irrespective of pre-existing tenure arrangements<sup>6</sup>. Therefore in order for legal rights to have meaning and be useful, landholders and/or owners must also have equitable access to affordable and fair avenues where they can protect their rights and appeal against decisions or violations.

Legal reforms of the regulations, policies and laws surrounding land tenure are promoted as a principal measure to improve the clarity and the long term security of land tenure. But security for whom? There is often an implicit assumption that legal reform of land tenure means a devolution of forest management responsibilities to communities, and that secure forest tenure for communities always equates to more sustainable forest management practices. While community control of forest resources has been demonstrated to have a positive impact on forest management, this is not always the case<sup>7</sup>.

Where legal reform focuses on improving the rights of forest communities it may involve the registration and clarification of existing *de facto* rights. This can lead to customary rights being formalised in statutory law, and occupancy being formally registered to reflect actual tenancy and use. In other cases, particularly where state ownership of land is high, tenure reform can also involve the redistribution of land between different owners or restitution of land to state control, which may or may not benefit forest communities.

Tenure reforms are also used as a vehicle to improve the efficiency of forest governance, often through the decentralisation and devolution of forest management rights and responsibilities to community forest management groups, or sub-national forestry authorities.

Although there is a strong tendency in REDD+ policy discussions to equate legal tenure reform with improved community forest tenure rights (and by extension, improved enabling conditions for REDD+), exactly who benefits depends entirely on the context and the application of such reforms. In the case of REDD+, as it is stored carbon (either above ground in wood or below ground in soil or peat) rather than the land per se that is acquiring a new value, the establishment of legal precedents for dealing with carbon rights and carbon tenure is critical, but has received limited attention in national legal frameworks to date<sup>8</sup>. Political and legislative reforms are also highly contested processes that do not always produce the expected outcomes<sup>9,10</sup> and may even cement existing inequalities in tenure regimes<sup>11</sup>.

### Land tenure in practice

The following country case studies, for Papua New Guinea (PNG) and Nepal, provide illustrative examples of the implications of different forms of land tenure as they exist in law and in practice, and offer important insights into what factors may impede or enable the establishment of national REDD+ mechanisms.

\* As stated in policy or law.



### Papua New Guinea

*Clear and strong rights on paper...*

PNG is unique in that almost all of its land (97%) falls under the customary ownership of clan groups. The remaining 3% is owned and administered by the state through leasehold and freehold interests<sup>12</sup>. The Land Act (1996) recognises the customary ownership of land by clans, and the legitimacy of traditional customs determining access, use, management, and exclusion rights to land. However, the Act precludes the sale of land. While customary landowners have the right to harvest timber resources in order to engage in commercial natural resource exploitation activities such as forestry enterprises, they are required to form legally constituted bodies, called Incorporated Land Groups (ILGs). ILGs allow landowners to lease their land, through selected executives, to the Papua New Guinea Forestry Authority (PNGFA), which takes over management responsibilities pursuant to a Forest Management Agreement (FMA).

FMA's allow for logging concessions to exploit timber resources, with timber royalty payments being funnelled to landowners via the PNGFA and the ILG executives<sup>13</sup>. For any development to proceed on their land, customary landowners must also have been consulted and have offered their informed consent.

Special Agricultural and Business Leases (SABL) were introduced through the Land Act (1996) to allow for customary landowners to benefit from agricultural investments in land. SABLs enable the State to lease customary land on the pre-condition that it be leased on to corporate entities approved by the landowners themselves (known as 'lease-lease back'). For the duration of the SABL (up to 99 years) all customary land rights are suspended<sup>7</sup>.

Therefore, on paper, PNG appears to have strong existing legal frameworks that support clear community land tenure rights.

*...but insecure tenure in practice*

With almost its entire territory under clearly legally defined customary ownership, one would imagine that such a system of land tenure would be highly indicative of an enabling environment for pro-poor REDD+. In reality however, the majority of customary land boundaries in PNG are un-surveyed and title not registered, making identifying entitled landowners problematic and highly contested. Furthermore, in practice, the process of establishing FMA's by the PNG Forestry Authority has been criticised for failing to ensure the proper Free, Prior and Informed Consent (FPIC) of landowners, and ILG executives from the land owning clans have repeatedly failed to equitably distribute the benefits from projects<sup>6,13</sup>.

Additionally, the issuance of SABLs has been criticised both for facilitating the 'elite capture' of land rights and benefits deriving from agricultural projects, and for catalysing wide scale deforestation. This is made possible due to procedural loopholes which allow SABL proponents to bypass even the basic checks and balances usually applied to the establishment of FMA's<sup>14</sup>. Many SABL companies appear to have targeted this loophole to specifically exploit a clause which allows the clear felling and sale of valuable timber to create land for planned agricultural development, which then never materialises<sup>15</sup>.

In addition to insecure land tenure rights *de facto*, there is currently nothing in PNG law that distinguishes carbon rights from forest ownership<sup>13</sup>. The current version of the National Climate Change Policy assigns carbon rights to customary landholders while the right to develop and monetise future carbon credits remains with the government<sup>16</sup>. This and the acquisition of a large proportion of PNG's production forest (due to both FMA and SABL arrangements) hold significant implications for how forest carbon rights may be allocated in the future<sup>13</sup>.

<sup>†</sup> Section 11(2) of the *Land Act* of 1996



## Nepal

### *Weak rights...*

Nepal's forests are legally categorised as either national or private, with ownership and control under the government or individual owners respectively. About 67% of the national forest is under government management whilst approximately 21% is managed by communities<sup>17</sup>. Management of forests in Nepal is delegated to communities through a number of co-management schemes. The access and user rights granted vary depending on the regime, and hinge upon the development and approval of Forest Management Plans (FMPs). For community forestry, once FMPs are approved, forest access and management rights are granted through five or ten year renewable contracts<sup>18</sup>.

District Forest Officers have ultimate say over any amendments made to FMPs and can veto the implementation of any amendment deemed to adversely affect the environment. Similarly, if user groups are found to be unable to operate in accordance with their work plans, the District Forest Officer can cancel the registration of these user groups and reclaim the community forest. However, there is the possibility of appeal. Community forest user groups are able to keep the entirety of their forest-generated profits, on the condition that 25% is funnelled towards community development<sup>19</sup>.

Under Collaborative Forest Management (CFM) communities are granted access and withdrawal rights and glean residual income from non-timber forest products, after paying royalties. However, benefit sharing arrangements are highly weighted in the government's favour, with the state receiving 75% of the income from the sale of firewood and timber, and only the remaining 25% being split between local government committees and forest users.

### *...but strong access and control in practice*

The *de jure* legal rights of local communities in Nepal seem minimal when compared to those of the landowners in PNG. However, in spite of these apparent barriers, local user access to and control of forest areas at the community level has increased, and community forest groups have achieved great successes in reversing environmental degradation<sup>20</sup>.

National non-government federations have been instrumental in enhancing the success of community forestry in Nepal. Of these, the Federation of Community Forest Users Nepal (FECOFUN) is among the most prominent. FECOFUN involves 18,000 community forestry user groups, totalling eight million people, and acts on behalf of these user groups at sub-national and national levels, linking local forest users with national level policy makers.

FECOFUN's engagement in forest governance and policy has had numerous benefits. It has strengthened the voices of local community forest user groups within government fora, leading to improved protection of forest communities' management rights and greater opportunities for communities to benefit from commercial activities<sup>21</sup>; contributed to the capacity building of community forest managers; assisted with the coordination of national forestry projects by maximising the efficiency of government spending; and provided opportunities for projects such as REDD+ to reach jurisdictional scales through the engagement of their wide membership base.

Critically, these factors combined reduce the risk of project implementation, thereby promoting investment and providing a uniquely enabling condition for initiatives such as REDD+ within existing legal tenure arrangements. Movements such as FECOFUN in Nepal (and others globally, such as the Association of Forest Communities of the Péten – ACOFOP, Guatemala) that have managed to build alliances with international NGOs, other groups and national political actors have proven to be particularly successful in influencing national policy<sup>6,22,23,24,25,26,27</sup>.

### Tenure reform: lessons from the literature

A number of studies have examined the impact of tenure reforms over the past two decades both globally<sup>6,24,25,28</sup> and regionally<sup>26,29</sup>. Although these studies highlight a global transition from state-led to community based forest management, and a transfer of land-ownership rights from government to private entities, local communities and indigenous peoples<sup>24,25,28</sup>, the impacts of tenure reform are shown to have mixed outcomes<sup>24,25</sup>.

The evidence suggests that increased levels of local forest management and control have resulted in generally positive outcomes for forest conditions<sup>30</sup>, but the correlation is much weaker when extended to livelihood improvements, where the positive impacts have been quite limited<sup>7,26</sup>. Some clear common challenges of tenure reform can be identified from the extensive literature on this area.

#### **Community land tenure on paper, government control in practice**

In many countries where rights have been clarified on paper, the actual transition of *de facto* control of forest land has been very slow, and many reforms have been enacted in such a way that centralised government agencies have maintained discretionary control, leaving local tenure insecure<sup>9,31,32</sup>.

Forest owning governments in developing countries have traditionally been reluctant to give up control of forest areas with valuable timber resources, and the transfer of rights can come with a high level of bureaucracy and conditionality attached (see examples below). On other occasions the transfer of degraded lands to communities has been relatively quick, however often with reforestation conditionality attached to it<sup>25,33</sup>. In many instances, decentralisation and devolution of rights have actually increased costs for local communities, without necessarily providing tenure security<sup>7</sup>.

*Example:* In India, high-value forests remain predominantly under the control of the state, despite commitments to 'Joint Forest Management' (JFM) and community forestry. This limits both the size and quality of forest areas 'eligible' for community management – often smaller plots of lower value or degraded forest. The devolution of forest tenure to communities under the JFM initiative was in practice centred not on a recognition of 'rights' but on a devolution of responsibilities. Memorandums of Understanding, designed by the Indian forest department, were imposed on villages irrespective of existing customary tenure systems, indigenous forest use practices and village institutions, and as a result in some cases biodiversity and livelihoods declined<sup>33</sup>.

#### **Where enforcement is lacking, tenure reform is ineffective**

Where reforms have been implemented and rights changed *de jure*, those rights have not necessarily changed *de facto*, as unequal social structures and power relations often remain in place<sup>22</sup>.

*Example:* The land-redistribution programme in the Philippines (known as CARP<sup>‡</sup>) was on paper regarded as a success, especially in terms of transferring private lands to smallholders. However, upon closer examination it became clear that the voluntary land transfer schemes of the programme were largely based on 'paper sales' and 'paper beneficiaries'<sup>22</sup>. In reality the original landowners had maintained pre-reform tenure arrangements, knowing that the legal rights of the new 'owners' were unlikely to be enforced. This type of reform failure has also been observed in other regions where there are wide socio-economic inequalities<sup>22,32,34,35</sup>.

#### **Tenure reform will not address political and economic vested interests in 'business as usual'**

Many of the root causes that render local tenure insecure are driven by powerful political and economic factors that have an interest in maintaining business as usual practices. The amount of forest land in community control globally is dwarfed by that awarded to industrial concessions, largely driven by the low cost of forest land<sup>24,37</sup>, and in many forest countries the allocation of concessions for agriculture, mining or logging is prioritised by central government above that of land tenure reform processes.

Competing agendas and overlapping legal frameworks can jeopardise the efficient implementation of land tenure reform and the enforcement of established rights. These underlying conditions are unlikely to be changed through land tenure reform policy alone but require additional regulatory controls and incentives that increase the political will to change business as usual practices.

*Example:* After the civil war in Liberia, the government began major land tenure reforms while simultaneously pursuing an ambitious economic strategy to increase investment in commercial resource extraction and agriculture. In 2012 the conflict between these two paths became apparent, as the allocation of land to concessions had far outpaced the slow process of registering local tenure rights. Local analysts estimate that around 75% of total land, including forest land, was allocated to concessions during this period<sup>37</sup>.

‡ The Philippine Comprehensive Agrarian Reform Programme implemented between 1988-2006

### Implications for policy makers

The case studies in Nepal and PNG, in addition to lessons from the wider literature, clearly highlight that reforms of legal frameworks related to land tenure are not sufficient to create enabling conditions for equitable or effective REDD+, even if those reforms favour devolution of control of forest resources to the community level.

The evidence presented here demonstrates that there is a weak relationship between the relative strength of *de jure* legal tenure rights and the practical application of these rights on the ground.

Therefore, land tenure reform without effective enforcement, prevalent where systems of governance are poor, not only poses a significant risk to the effectiveness of any legal reform process, but is also likely to significantly hinder effective future REDD+ implementation. There are also risks that tenure reform without appropriate enforcement measures, or without consideration of carbon tenure, could further cement existing institutional inequalities, and lead to inequitable distribution of future benefits arising from REDD+ projects.

Fundamentally however, a focus on the legal reform of tenure systems will not deliver an enabling environment for REDD+ in the short to medium term, or before 2020. A lack of political will, and an absence of regulatory measures that regulate or incentivise change, will ensure that legal reform of tenure systems is slow, costly and, unless the issue of enforcement is tackled through improved governance, potentially ineffective.

Delivering legally defensible and enforceable land tenure rights to forest owners is a key enabling condition for REDD+ in the long term, but policy makers cannot afford to wait. Economic pressures to convert forested land to agricultural production threaten to out-compete the possible future financial incentives offered by REDD+.

So what opportunities for rapid action exist in the meantime? Firstly, mapping the landscape of national and sub-national laws and policies across sectors (agriculture, mining, forestry, and the environment) is critical to ensuring policy consistency. This process can rapidly identify perverse incentives, legal loopholes and conflicting priorities that may combine to exacerbate the drivers of deforestation and/or jeopardise community rights. Interim measures, such as moratoria, can halt unsustainable development while government policies or priorities are re-assessed, without the need to embark on a wholesale reform of legal frameworks surrounding land tenure. In PNG, the government has attempted to enforce a moratorium on the granting of Special Agricultural Business Leases in response to a broad policy review, and in Indonesia different ministries have been tasked with the development of 'one map' for the entire country – developing a single methodology to assess existing resources, realign overlapping concessions, and develop mutually reinforcing strategies for resource management (SATGAS, 2012<sup>38</sup>). While legal changes may well be needed in the long term, both of these strategies may reduce

deforestation rapidly and support REDD+ development in the short term within existing legal structures.

Secondly, evidence from this paper suggests that the government engagement of large networks of community forest user groups (e.g. ACOFOP in Guatemala and FECOFUN in Nepal) with national forestry initiatives has been instrumental in fast-tracking improved tenure security for forest communities, and in the creation of strong additional enabling conditions for REDD+. Engagement of these types of networks ensures local stakeholders across multiple jurisdictions are engaged in regular dialogues with government ministries, which both promotes the recognition and enforcement of community *de facto* land rights at a national level, and encourages the devolution of forestry resource management responsibility to the local level. These types of formal civil society networks also act as a vehicle to access forest owners and users at jurisdictional or national scales (vital for REDD+ projects) – scales out of the reach of many developing country governments (or indeed international NGO-led programmes) due to governance challenges. Critically, the engagement of such networks can also contribute to rapidly strengthening land tenure security through the recognition of *de facto* landowner rights while working within existing legal frameworks.

For policy makers seeking to rapidly foster enabling conditions for REDD+, these two strategies offer clear opportunities to both reduce deforestation and degradation and to increase land tenure security for forest communities, without an over-commitment of resources towards broad reform of legal frameworks for land tenure in the short term.

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The GCP is a tropical forest think-tank, working to demonstrate the scientific, political and business case for safeguarding forests as natural capital that underpins water, food, energy, health and climate security for all. We work through our international networks – of forest communities, science pioneers, policymakers and corporate leaders – to gather evidence, spark insight, and catalyse action to halt forest loss and improve human livelihoods dependent on forests.