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## Introduction

The reduction of greenhouse gas emissions is an internationally agreed objective that has become increasingly attentive to the volume of carbon stored in forests.<sup>1</sup> One of the most ambitious and controversial climate change mitigation mechanisms deployed in the service of this goal is REDD+, a global programme designed to reduce emissions from deforestation and forest degradation (REDD) by rewarding the protection of forests in developing countries. States party to the United Nations Framework Convention on Climate Change (UNFCCC) and the Paris Agreement commit to supporting policy approaches and positive incentives for activities relating to REDD, including ‘conservation, sustainable management of forests and enhancement of forest carbon stocks’ (these additional words are encompassed by the plus sign in the acronym REDD+).<sup>2</sup> REDD+ envisages the creation of a financial value for the carbon stored in forests, encouraging developing countries to reduce emissions from forested lands in return for the provision of financial incentives, including ‘results-based payments’.<sup>3</sup> Developed countries are called upon to provide financial support<sup>4</sup> to enable such payments and to fund the international organizations and programmes tasked with providing advice and resources to recipient states. Recipient countries agree in turn to constrain the use of forests in their territory so as to reduce rates of deforestation and degradation, which in the context of ‘drivers’ of deforestation may involve limiting commercial logging, agricultural expansion or other activities.

<sup>1</sup> A sizable proportion of greenhouse gas emissions originates from forest-related activities: K L Denman et al, ‘Couplings between Changes in the Climate System and Biogeochemistry’ in S Solomon et al (eds), *Climate Change 2007: The Physical Science Basis. Contribution of the Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, 2007) 499; IPCC, *Climate Change 2013: The Physical Science Basis. Contribution of Working Group I to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, 2013).

<sup>2</sup> *Paris Agreement*, Article 5(2). <sup>3</sup> Decision 1/CP.16, para 76. <sup>4</sup> *Ibid.*

While in its initial conception REDD+ may have seemed a simple and elegant tool to support climate change mitigation efforts,<sup>5</sup> the concept engages highly complex and deeply problematic questions of law and justice. This is especially the case because the rights, property and jurisdictions of indigenous peoples and forest-dependent communities are often directly affected by REDD+ planning and projects. Decisions made in anticipation of REDD+ funding touch on matters very close to the core of national sovereignty and constitutionalism, including the distribution of property rights, the role of the state in regulating markets, and the status and rights of colonised or marginalised peoples. Constitutional arrangements governing property, human rights and indigenous peoples differ widely from country to country and responsibilities for law and policy in these areas is differentially allocated amongst national, regional and local governments. States with tribal and indigenous populations also accommodate, to varying degrees, local customary legal systems and property rights derived from those customary laws. These legal systems have a complicated relationship with state law. As we explain in this book, the claims of indigenous and tribal peoples to property rights sourced in customary law are a major source of tension in many nations that host or plan to host REDD+ programmes. In many instances, indigenous legal systems and embedded rights in respect of forest areas pre-exist the establishment of current nation states and the state's allocation of legal tenure and resource extraction rights to public and private actors. In many nations, the rights of forest-dwelling communities are only partially recognised by state law, if at all, and even where recognised, indigenous tenures are typically overridden by grants of interests to third parties.

A further layer of legal pluralism is represented by the international legal system, which contains a large number of treaties and norms of customary international law relating to forests, biodiversity protection, human rights, the rights of indigenous peoples and food security.<sup>6</sup> These are often grouped within established international legal regimes and supported by discrete intergovernmental organizations and epistemic communities. For the emerging REDD+ regime, questions about whether new rules and practices should integrate or diverge from existing international regimes are unavoidable and promise to impact greatly on indigenous peoples and forest-dwelling communities. In this context, this book presents an analysis

<sup>5</sup> On the influence of 'payment for ecosystems services' models, see Chapter 2.

<sup>6</sup> See further in Chapter 3.

of the circumstances, laws and state-indigenous relationships at play in the emerging international legal regime underpinning REDD+. It considers the institutional dimensions of fragmented laws and arrangements that depend heavily on the policies of the World Bank's Forest Carbon Partnership Facility (FCPF) and the United Nations Collaborative Programme on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries (UN-REDD Programme). In their policy guidance and evaluative standards, these bodies have made significant interventions into legal arrangements laid out by REDD+, by, for instance, promulgating rules dealing with human rights, indigenous claims, free prior and informed consent, and tenure. The book outlines these interventions, analyses their content, and critically examines divergences amongst and within them. At the same time, it is important to keep in mind that the evolution of REDD+ at the international level draws on local activities and projects and is informed by climate change and resource management innovations in the domestic law and policy of states. The relationships between local circumstances and international norms that are structured by REDD+ are a central concern of the authors. The book examines four national settings – Malaysia, Papua New Guinea, Vanuatu and Australia – to illustrate the complexity and diversity of the local situations in which REDD+ or equivalent models will operate. The countries chosen as case studies represent regional Southeast Asian–Oceania nations across the development spectrum, from small nation states (Papua New Guinea and Vanuatu), to a medium-level power with large forest reserves (Malaysia), to a developed country with strong dependency on the land-use sector (Australia). As a group, these nations have not previously been intensively studied in terms of their participation in the expanding REDD+ regime. Moreover, each of these states manages the intersection of human rights, property, and indigenous or forest community rights differently, and each of the developing states considered in this book has a different local response to REDD+ and its international institutions. This diversity poses a serious challenge for the international agencies furthering the REDD+ programme, which are responsible for distributing funding to participating states and ensuring that their national laws and policies meet REDD+'s international standards and safeguards. Our choice of study highlights the need to understand local and national contexts as informing and modifying the articulation of the international REDD+ regime.

Drawing on national and local contextual information and at the urging of civil society groups and indigenous and tribal peoples, the UNFCCC has developed a range of safeguards designed to protect

vulnerable communities from the possibly negative impacts of REDD+.<sup>7</sup> As REDD+ has matured, and further information on the progress of its planning at the state level has become available, international bodies such as the UN-REDD Programme and World Bank have become more attentive to the complexity of local circumstances affecting REDD+ operations. This awareness has extended to an appreciation of the difficulty of generating uniform standards at the international level with which to evaluate state performance and condition REDD+ funding. The UNFCCC's safeguards and the derivative standards articulated by the UN-REDD Programme and the FCPF to date have been largely procedural in character. States are invited to have regard to a wide range of rights, interests, international legal instruments and international policies, and to ensure all stakeholders are consulted about proposed reforms and projects. REDD+ standards addressing the distribution of resource rights in land and carbon are far less developed and much more tentative in form. For example, work on the rights of indigenous peoples to free prior and informed consent (FPIC) is well developed in the REDD+ context, but policy on tenure reform is at a very nascent stage, even while both the UN-REDD Programme and the FCPF are of the view that 'secure and clear' tenure is a necessary determinant of REDD+ project success.<sup>8</sup> Further, the UNFCCC safeguards themselves do not directly address state obligations to recognise or protect property rights that might be affected by REDD+ implementation, nor do they require states to address tenure arrangements as a condition of REDD+ funding.<sup>9</sup> In short, the UNFCCC and REDD+ policy bodies have to date been reluctant to propose that a particular set of resource rights and entitlements should attend REDD+ planning, let alone suggest that these can be implemented in a substantially uniform way across all participating REDD+ states. Notwithstanding this reluctance, policy decisions and legal reforms undertaken by states in the early stages of REDD+ Readiness activities have profound impacts on the rights and interests of indigenous peoples and local forest communities, and on the capacity of vulnerable groups to benefit from

<sup>7</sup> Conference of the Parties, United Nations Framework Convention on Climate Change, *Report of the Conference of the Parties on Its Sixteenth Session, Held in Cancun from 29 November to 10 December 2010 – Addendum – Part Two: Action Taken by the Conference of the Parties at Its Sixteenth Session* (UN Doc FCCC/CP/2010/7/Add.1) (15 March 2011) Decision 1/CP.16, Annex; see further in Chapter 2.

<sup>8</sup> See further in Chapters 4 and 5. <sup>9</sup> Ibid.

REDD+ projects once implemented.<sup>10</sup> There is a risk that policies set in train in the REDD Readiness phase, under the guidance of the UNFCCC, the UN-REDD Programme and the FCPF, could further entrench unjust allocations of power and property in states with tribal and indigenous populations. It is this conundrum that animates the analysis we undertake in this book.

As REDD+ has evolved, participating states have become obliged not only to reduce emissions by preventing deforestation and forest degradation but also to ensure that emissions reductions are achieved with due respect for social and economic safeguards and are accompanied by tangible and equitable benefits for affected communities. As the range of safeguards and benefits incorporated within REDD+ grows, states are also required to reconcile conflicts between these goals and standards and to prioritise some over others. In the REDD+ context, as in many others, indigenous peoples and forest-dwelling communities are especially vulnerable to having their interests overridden by those of the state, the public and third-party stakeholders. REDD+ poses a particular challenge in this respect, as most of the targeted forests are inhabited or used by indigenous peoples and forest-dependent communities. On the one hand, the projects supported by REDD+ could provide indigenous and forest-dependent communities with financial, social and environmental benefits. On the other hand, the same projects and incentives could support measures that restrict or deny communities access to and use of forested lands on which they depend for the continuity of their livelihoods, cultural practices and connections to traditional land. For these vulnerable, and socially and economically disadvantaged communities, then, the opportunities offered by REDD+ are attended by significant risks. The interplay of risks and benefits, and the trade-offs between the two, require difficult decisions about how best to reconcile competing interests affected by REDD+, both in the short and in the long term.<sup>11</sup> The variables in play depend largely on law, not only at the national level but also at the international and local ones.

While participating states have agreed to adhere to the UNFCCC safeguards, including those designed to protect indigenous peoples, outcomes for indigenous and forest-dependent communities rely in

<sup>10</sup> See Chapter 6.

<sup>11</sup> UN ECOSOC Permanent Forum on Indigenous Issues, *Indigenous People's Rights and Safeguards in Projects Related to Reducing Emissions from Deforestation and Forest Degradation*, UN Doc E/C.19/2013/7 (5 February 2013).

large part on the interrelationship of human rights and property norms and their application to local circumstances. These norms are variously sourced in international, national, subnational and customary legal systems. The climate change mitigation goals and legal mechanisms that animate REDD+, and the safeguards promulgated by the UNFCCC, operate on and amongst these complex relations and conflict with some of their underlying justifications and assumptions. This book provides a study of REDD+ as an international legal regime alongside the cultural, economic, land, and resource rights of indigenous and local forest-dwelling communities as well as other international and domestic legal regimes relating to forests, the protection of the environment, indigenous rights, property rights and human rights. We address the difficult question of how best to position REDD+ amongst a highly fragmented, contested and crowded area of forest governance and carbon markets, bringing together legal analyses of international, national and local contexts.

For the time being, the body of norms and laws comprising the REDD+ regime is contained in the standards advanced by the UNFCCC and the two major international funding bodies: the UN-REDD Programme; which is a collaborative partnership of the Food and Agriculture Organization (FAO); the UN Development Programme (UNDP) and the UN Environment Programme (UNEP); and the FCPF.<sup>12</sup> The standards applied by the UN-REDD Programme and the FCPF are the major interface between the REDD+ regime and domestic laws governing indigenous rights.<sup>13</sup> By examining the anatomy of REDD+ as an international regime, we consider the ways in which the rights and interests of indigenous and forest-dependent communities are incorporated into REDD+ from external sources and how they are thereafter articulated within it. The book outlines the multiple and contrasting sources of obligation for REDD+ participant states, investigates their resonance with extant human rights standards (such as an obligation on the state to obtain the free prior and informed consent of affected indigenous communities before proceeding with proposed projects) and addresses their internal points of tension. We explore how the global content of REDD+ might shape, and be shaped by, the efforts of states

<sup>12</sup> Aside from the UN-REDD Programme and the FCPF, other international organizations are involved in REDD+ funding; see further in Chapter 2.

<sup>13</sup> These frameworks interface with the active carbon and emissions-offsets markets operating in the voluntary sector, which are not a focus of this book; see further in Chapter 2.

and indigenous peoples to secure indigenous interests in domestic and customary law. We take as cases in point efforts to manage forests, reduce carbon emissions, and accommodate indigenous rights to forests in Papua New Guinea, Vanuatu, Malaysia and Australia.

The complex interrelationship of legal regimes implicated by REDD+, and the influence of these dynamics on the ways REDD+ schemes affect indigenous and local communities, has only recently become the object of sustained scholarly analysis.<sup>14</sup> This book adds to an emerging field of study by examining the challenges posed by the legal complexity of REDD+'s context, including the varied capacities and political will of states involved in REDD+, and assessing the impact of this complexity on the rights and interests of indigenous and forest-dwelling communities affected by REDD+ implementation, particularly their resource and land rights. In this book, we engage important aspects of REDD+ that have not been the major orientation of other studies. Our analysis proceeds by focussing attention upon the issues raised by the need to address: indigenous peoples and local community claims to land and resources in forest areas; FPIC principles; tenure arrangements under REDD+; legal definitions of indigeneity and customary ownership; the intersection of state and customary legal systems; the difficulty of equitable benefit-sharing within and amongst local communities; and the tensions between rights held by indigenous peoples as historic collectives and the human rights of indigenous and non-indigenous individuals. All of these potential points of conflict are implicated by REDD+, but in this area, as in others, the capacity of international organizations and international law to propose ways to resolve conflicts between rights holders is severely limited. Advice so far from the UNFCCC, the UN-REDD Programme and the FCPF emphasises the importance of the matters protected by safeguards and advanced by co-benefits, but contains little in the way of a methodology to rank or prioritise interests where they conflict with one another. Given this complexity and diversity (and the inability for

<sup>14</sup> See Christine Voigt (ed), *Research Handbook on REDD+ and International Law* (Edward Elgar, 2016); Sébastien Jodoin, *Forest Preservation in a Changing Climate: REDD+ and Indigenous and Community Rights in Indonesia and Tanzania* (Cambridge University Press, 2017); Julia Dehm, *Reconsidering REDD+: Authority and Law in the Green Economy* (Cambridge University Press, forthcoming); Handa Abidin, *The Protection of Indigenous Peoples and Reduction of Forest Carbon Emissions: The REDD-Plus Regime and International Law* (Brill Nijhoff, 2015); see also Rosemary Lyster, Catherine MacKenzie and Constance McDermott (eds), *Law, Tropical Forests and Carbon: The Case of REDD+* (Cambridge University Press, 2013).

international organizations to effectively enforce priorities between rights holders), we propose that the institutional framework supporting REDD+ at the global level should move towards a model that facilitates the sharing of local experiences and expertise in REDD+ implementation and encourages the establishment of plausible benchmarks based on the real-world state and indigenous responses to REDD+.

The book's inquiry is timely, given that REDD+ continues to evolve as new understandings about impacts, benefits, and problems arise in different national and local contexts. Within the UNFCCC, parties have agreed upon different phases of REDD+ implementation: first, when financial assistance is given to states to build their institutional and administrative capacity to make them 'ready' to conduct REDD+ projects (known as 'readiness', and involving national strategies or action plans, policies and measures); second, when REDD+ projects are implemented; and third, when results are monitored, reported and verified.<sup>15</sup>

The countries we focus on are generally pursuing the 'readiness' phase, with preparation and 'demonstration' activities commenced in a range of international and transnational contexts with support from the UN-REDD Programme, the FCPF and other bodies. Financing of REDD+ has so far mostly come from bilateral and multilateral aid programmes, but many donor countries expect that REDD+ schemes will transition to market-based mechanisms, thereby accessing private finance that is stimulated by the demand for 'carbon credits' generated by carbon markets operating under offsetting arrangements.<sup>16</sup> The Paris Agreement has signalled that REDD+ will continue to be supported under the UNFCCC. The existing framework for REDD+ as set out in previous conferences of the parties (COPs) (such as Cancun and Warsaw) has been endorsed by states. Given the international community's demonstrated support for REDD+, the legal analysis contained in this book provides useful reflections on the continuing experiment of REDD+ as well as the more general endeavour of achieving climate change

<sup>15</sup> Conference of the Parties, United Nations Framework Convention on Climate Change, *Report of the Conference of the Parties on Its Sixteenth Session, Held in Cancun from 29 November to 10 December 2010 – Addendum – Part Two: Action Taken by the Conference of the Parties at Its Sixteenth Session* (UN Doc FCCC/CP/2010/7/Add.1 (15 March 2011), Decision 1/CP.16 ('The Cancun Agreements: Outcome of the Work of the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention') para 70.

<sup>16</sup> Christina Voigt and Felipe Ferreira, 'The Warsaw Framework for REDD+: Implications for National Implementation and Results-Based Finance' in Voigt, above n 14, 30.



mitigation that justly accommodates the interests of indigenous peoples and forest communities.

The book adopts a thematic approach to examining the interaction between the REDD+ scheme implementation and the interests of indigenous and local communities. First, it explores the primary sources of this complexity, by unpacking the legal regimes and concepts that bear most directly on the intersection of REDD+ with international law regimes (climate change, environmental protection, development and human rights) and with national and international law governing the identification, recognition, and constitution of indigenous and local communities (identity law). Second, it explores the implications of these interactions for national-level recognition of the land tenure and resource-based rights of indigenous and forest-dwelling communities. Third, it examines the ways in which these broadly conceived thematic areas of law (international regimes, identity law, and land and resource tenure) interact in three countries: Malaysia, Papua New Guinea and Vanuatu. We go on to consider the interconnection of indigenous land tenure and carbon-related legislation in Australia in order to demonstrate the in situ implications of REDD+-type project implementation and forest and land-sector governance. The final section offers an assessment of rights and accountability frameworks that underpin REDD+ as it has developed internationally, and considers how REDD+ might fit amongst debates on pluralist global governance. The concluding chapter revisits our arguments on whether REDD+, as currently conceived, can hope to provide the necessary balance between climate change mitigation objectives and the protection of the rights and interests of indigenous and forest-dwelling communities.