



REDD in indigenous territories of the Amazon Basin.

Will indigenous peoples be direct beneficiaries?

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In the past two decades, most of the countries that share the Amazon Basin have recognized and demarcated indigenous territories (ITs) and protected natural areas (PNAs). This comes as a result national processes which, while uneven and still incomplete , have secured important protected forest corridors of the Amazonian biome. These national processes also represent the governments' commitments to

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the conservation of at least some portion of the biome in addition to recognizing and respecting the ways of life of the indigenous peoples who live there.

Officially recognized ITs currently total 25.3% of the Amazonian biome and the PNAs and ITs jointly represent an area equal to 41.2% of the region's total surface area.¹ This demonstrates the Amazon forest's unique significance for the conservation of carbon stocks in the global fight against climate change.

This document summarizes a study carried out by the Instituto Socioambiental (ISA), with support from the Environmental Defense Fund (EDF), on legal frameworks for implementing projects for the Reduction of Greenhouse Gas (GHG) Emissions from Deforestation and Forest Degradation (REDD) in indigenous territories of the Amazon Basin. Its main objective is to answer the question, ***Will indigenous peoples of the region be the direct beneficiaries of REDD projects in their territories?*** The study focused on six countries that, together, total more than 80% of the Amazon Basin area: **Bolivia, Brazil, Colombia, Ecuador, Peru and Venezuela.** (See the annexed map)

- **The territorial rights of the indigenous peoples of the region**

With the exception of Peru, Suriname and Guyana, the Amazon basin countries share a body of law and a group of institutions, both internal and regional, that recognize and protect the original rights of the indigenous peoples to administer, distribute and effectively control their territories and natural resources according to their customs and traditions. These constitute an excellent juridical basis for incorporating legislation on REDD mechanisms that guarantees the participation and direct benefits for these peoples in its definition and implementation.

Currently, the indigenous territories face great pressure from extractive industries and large infrastructure projects being planned and implemented in the absence of local consultation in all of the countries of the region. Legal norms on indigenous peoples in force in the basin still need to be made compatible and implemented coherently with the norms that govern timber and mineral extraction, road and hydroelectric construction, and monoculture agriculture and other drivers of deforestation. These frequently ignore the existence and implications of indigenous law and fail to respect the ways of life and territorial development plans of the indigenous inhabitants. Resolving the problem of coherence between indigenous and resource extraction norms will be fundamental to regulating REDD mechanisms with indigenous peoples at national and regional scales.

It is clear that the indigenous peoples, as legitimate owners of their lands and forest resources, are legal subjects with full juridical capacity to carry out

¹Data consolidated by RAISG www.raisg.socioambiental.org

activities that reduce Greenhouse Gas (GHG) emissions and as such, should be the owners of carbon credits that result from them. However, legal uncertainty in the absence of any national legislation on the nature, production and sale of carbon credits in the region can and should be quickly eliminated.

- **The assumptions and operative concepts of this study.**

For purposes of this study we defined a **REDD mechanism**, as *a group of activities whose goal is to stimulate a reduction in the emissions and concentration of GHG produced by deforestation and degradation of native forests, and that may eventually generate carbon credits.*

Noting the lack of legal definitions regarding the nature and ownership of carbon credits derived from REDD projects, it was necessary to make the following conceptual observations: a) substantial part of the native forests of the Amazon Basin correspond to the territories of indigenous and/or traditional peoples and communities and for this reason special legal regimes regarding the collective ownership of the lands and natural resources have been created region; b) specific environmental protection measures limit the use and disposition of the natural resources found in an important part of the Amazon Basin's native forests, independently of property rights or title to the land; and c) activities related to the use and management of forest resources, which could generate carbon credits, may only be carried out by people who have control and effective use rights to forest resources, and insofar as these comply with the obligations and requirements set forth in the environmental legislation of each country.

Therefore, the present study assumes that carbon credits originating from the implementation of REDD mechanisms will necessarily be linked to at least three types of activities:

1) Activities directed at avoiding the conversion of forested land to other uses, be they legal or illegal, according to the legislation in each country, 2) activities directed at restoring degraded areas, and 3) activities related to the maintenance of native forests, regardless of whether or not an immediate threat of deforestation exists².

These activities may only be carried out by those people who legally hold the rights to use and derive benefit from native forests, be they owners or holders of exclusive use rights. Understanding resource use rights is fundamental to determining the ownership of the carbon credits.

Following this line of reasoning, if we legally define **carbon credits as immaterial goods derived from the certification of a reduction in GHG emissions arising from a combination of one or more activities directed at the restoration**

² Native forest conservation activities, regardless of imminent and immediate deforestation, make up the most recent dimension currently discussed internationally dealing with activities related to maintaining and increasing forest cover on the planet. This conservation dimension has been denominated REDD PLUS. For more information, please see: http://unfccc.int/methods_science/redd/items/4531.php

and conservation of native forests, the owners of the carbon credits are necessarily those who have the legal right to undertake these activities, meaning those people who under national laws can legally determine land use.

After considering the above concepts, we concluded that for purposes of determining if indigenous peoples can directly benefit from possible REDD mechanisms in their territories, **it is necessary to clarify who has the right to use forest resources in indigenous lands and what domestic legislation limits these activities in each country.**

Thus, the recognition and protection of indigenous peoples' rights to lands and forest resources are indispensable when analyzing the ownership of potential future carbon credits that originate from activities carried out by indigenous peoples in their territories. This is the primary focus of the comparative analysis of this study.

- **Country studies .**

The situations in each country, and their respective processes for the administrative and bureaucratic implementation of indigenous peoples' territorial rights, are disparate and specific. However, it is possible to identify some common and general factors in order to foster a regional discussion on the subject. For example, countries like **Ecuador** and **Bolivia** have recently approved Constitutional Charters that widely recognize indigenous peoples' rights to lands and to political autonomy. Both of these countries are now have genuine opportunities to harmonize their infra constitutional legislation regarding forest resources and indigenous territories. In general, the current norms in place secure indigenous peoples' control over land and resource use. It is yet to be seen how these principles will incorporate international norms on climate change and on the generation and sale of carbon credits in each country's post-2012 regime.

In **Peru's** case, the situation of indigenous peoples territorial rights is truly complex. On one hand, the domestic body of laws is completely inconsistent with the international norms on indigenous rights the country has ratified. According to the domestic legislation in force indigenous peoples do not own the forest resources on their lands, nor does the legislation offer any type of long-term guarantee of indigenous peoples' ownership of their collective territories.

In fact, official Peruvian policies currently stimulate the transfer of indigenous land rights and the disappearance of communal property. Peru is the Amazon Basin country that offers the least protection and fewest guarantees of indigenous peoples territorial rights (excepting Guyana and Suriname, which have no specific legislation on the subject).

In countries such as **Colombia** and **Brazil**, Amazonian indigenous peoples' rights are more consolidated. Indigenous peoples control of and access to forest resources in their territories is formally better protected than in the other basin countries. Nonetheless, both countries lack clarity regarding the application of

environmental restrictions to the indigenous peoples' resource use rights in areas that overlap with conservation areas, as well as on the extent to which indigenous lands should include areas strictly protected for conservation.

In **Venezuela**, indigenous peoples' territorial rights is much less an issue of formal legal protection, than an issue of administrative implementation. It is currently impossible to implement REDD projects because of the ideological position of the government, which opposes the use of offsets that it views as allowing industrialized countries to avoid their compliance obligations. In addition, there has for a decade a serious problem with the implementation of existing indigenous territorial rights. Clarity is also lacking on the harmonization of indigenous people rights and domestic forestry legislation. An extremely high percentage of indigenous peoples in the Venezuelan Amazon have their ancestral lands overlapping Protected Natural Areas, although indigenous and conservation laws are mutually inconsistent.

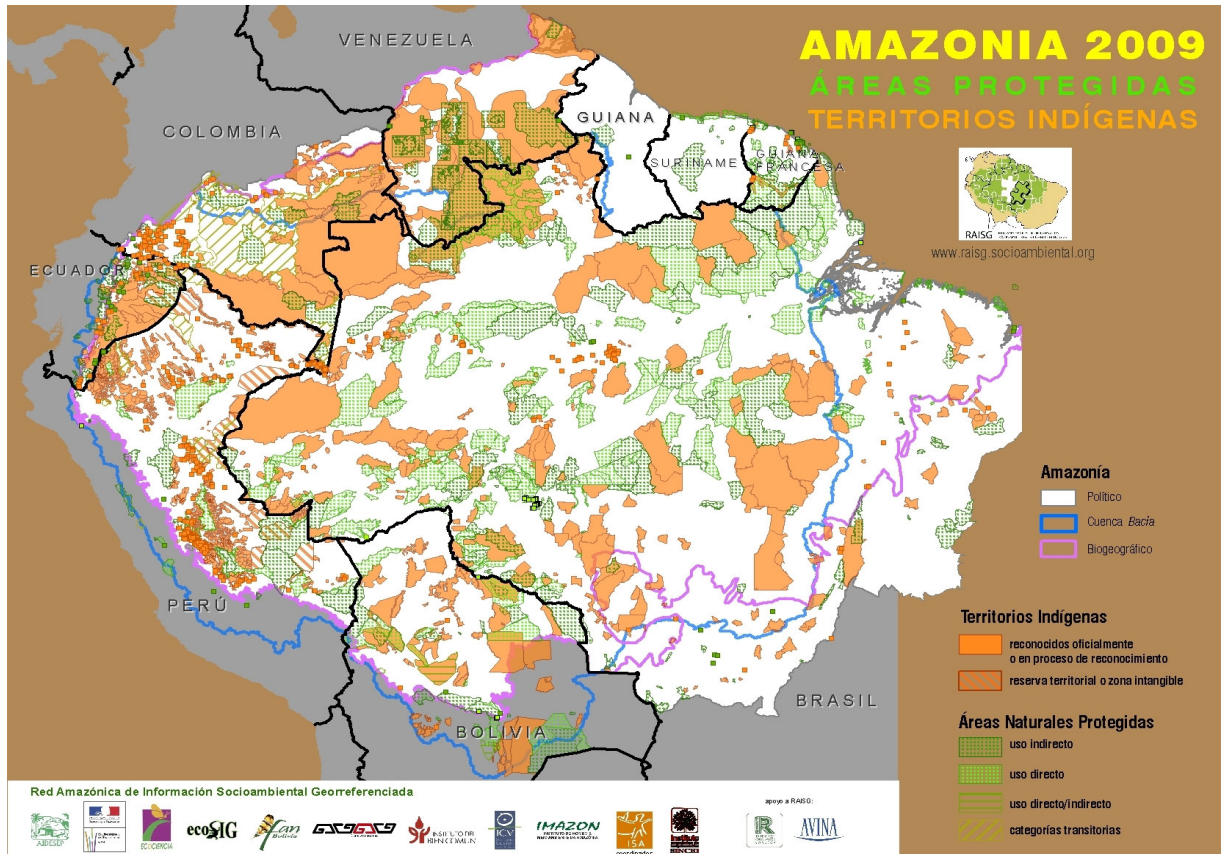
Finally, it is important to recognize that in many countries national laws and administrative practices are often inconsistent with international obligations countries have undertaken. This is clear in the case of Peru, although this does not imply that the other countries have a more acceptable level of normative coherence between the international instruments they have ratified and their internal norms and their administrative practices. For this among other reasons, it would be naive to assume that making international commitments is itself an effective guarantee of indigenous peoples' rights. At the same time, international commitments are an important reference point for the internal political debates that each country must conduct in order to define the distribution of costs and benefits associated with implementing REDD. International instruments on the human rights of indigenous peoples are an important but insufficient legal framework for guaranteeing coherence between the implementation of REDD and indigenous peoples' territorial rights.

Conclusion.

Valuing forests as carbon sinks has often been denounced internationally as a risk that will redound to the detriment of the communities who depend on the forests and who, directly or indirectly, have preserved them until now. The supposed risk of territorial expropriation of indigenous peoples should not arise in the Amazon Basin, since the legal structures and protection extant in countries such as Bolivia, Brazil, Colombia and Ecuador make it highly unlikely. It will also be extremely difficult to deny the legitimate owners of the forests, the indigenous peoples', the ownership of benefits derived from forest conservation.

Nonetheless, the struggle to consolidate formal rights remains a challenge throughout the region and REDD mechanisms, if used well, can contribute to consolidating indigenous territorial governability in the region.

Map of indigenous territories (ITs) and protected natural areas (PNAs) in the Amazon Basin



Access the complete version of the Amazon Basin study at: www.socioambiental.org.br

Forest activities in indigenous lands and carbon credits ownership in Brazil

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The important debate about safeguarding indigenous peoples rights in the definition of an international mechanism of greenhouse gas emissions compensation (REDD+), and the already existing initiatives of forest activities to reduce the emission of greenhouse gas in indigenous lands were the start point of a legal study about the indigenous ownership of carbon credits in Brazil. The study was developed by Instituto Socioambiental and supported by Conservation International Brazil.

It focuses on the legal possibility of forest carbon projects in indigenous lands (particularly those aimed at activities of reduction of deforestation and degradation, forest management and increasing carbon sinks, and conservation actions) and the indigenous ownership of carbon credits. The Constitution, indigenous and environmental Brazilian legislation in addition to international human rights instruments are the framework of the study. The conclusion is that indigenous peoples can be the direct beneficiaries of REDD projects through the elaboration of projects and the commercialization of carbon credits that result from forest activities developed in their lands. This is because indigenous peoples hold exclusively the ownership right over their lands and the permanent right to use the natural resources there found, including the forest that is the source of such carbon credits.

In Brazil, the protection of indigenous lands is significant to avoid deforestation. Although indigenous lands have been subjected to intense social and environmental pressure, according to INPE de deforestation in indigenous lands (that comprehends about 1 million hectares in the Amazon) represents less than 2% of the total 700.000km² deforestation in region. Besides, over 93% of that deforestation found in indigenous lands is considered to have external sources³ and therefore traditional manners of use of indigenous lands have been proved to have no relation to the deforestation that is to be avoided.

See below the main conclusions of the study and access the complete version at:
www.socioambiental.org.br or www.conservacao.org

³ Atlas Balanço do Desmatamento nas Terras Indígenas, Instituto Socioambiental, outubro 2009.

Main conclusions of the Brazilian study:

- In Brazil there is no legal restriction to the development of avoiding deforestation or reforestation projects in indigenous lands, as long as these are in conformity with indigenous peoples traditional use of forest resources and developed by indigenous peoples. Such activities cannot interfere on the indigenous peoples way of life neither affect their physical or cultural survival;
- Only indigenous peoples can develop and negotiate REDD projects, as they are the only ones empowered to decide on the land use of indigenous lands, regardless of the fact that those are Union's property. Indigenous peoples hold special ownership rights to their traditional lands and are entitled to decide on projects within their lands as part of their chosen way of life;
- It is not possible that other people or institution, including the Union and its agencies, develop projects of reforestation or avoiding deforestation in indigenous lands without the consent of indigenous peoples because according to the constitutional and other legal provisions, those areas are for the permanent possession and exclusive use by indigenous peoples;
- Since indigenous peoples are the only ones able to develop REDD and other projects within indigenous lands, they are also entitled of ownership rights over the carbon credits that may result from activities of avoided deforestation, reforestation and conservation of forests developed (REDD+). Although there is no express rule in the domestic legislation of Brazil, according to the carbon trade market rules already existing (CDM) it is consensual the understanding that the ownership of credits are derived from the activity that generated the reduction of emissions;
- Despite FUNAI and other federal bodies (IBAMA, Federal Police) have special capacity to protect indigenous lands from invasion of any kind and which may cause environmental damages, they could not claim ownership over carbon credits resulted from avoided deforestation in indigenous lands. Avoided deforestation in indigenous lands is a result of the illegal deforestation that is avoided but also of the indigenous options to not to provoke deforestation. The due diligence of those public bodies in order to avoid invasion and deforestation of indigenous lands take place in similar manners in private lands and does not constitute any rights for the State over the carbon credits generated;
- Even though the State cannot claim ownership over carbon credits from avoided deforestation projects in indigenous lands, it is important that those projects consider the support and partnership with FUNAI and other official bodies in order to increase the monitoring and protection activities of indigenous lands, like it happens in a number of indigenous lands in Brazil today;
- There is no restriction, in the national or international legislation, for indigenous organizations to represent indigenous peoples in the Project of reduction of emissions, including to deal with the credits derived from such projects as long as the indigenous peoples concerned will is respected. ILO Convention 169 and the Brazilian Federal Constitution along with the customary Law recognize the full capability of indigenous peoples as well as their right to self-determination. Therefore official authorization to develop the project is not a condition;
- Carbon credits that are result of forest projects developed in indigenous lands belong to the indigenous peoples, groups or communities that hold the right to permanent possession and exclusive right to use the resources found there. In the case of areas inhabited by different peoples and communities there must be a pre-agreement among those and the definition of one or more than one person or organization that represent those peoples for the purpose

of the project.



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