

INDIGENOUS PEOPLES' RIGHTS, GLOBAL CLIMATE POLICIES AND FINANCE

A brief critical review for COP26 and beyond



SUMMARY

Indigenous peoples have long called for national and global actions to tackle the root causes of climate and environmental destruction and associated rights abuse. They have additionally demanded that all international climate policies, funding, and initiatives must respect and protect their rights, cultures, and knowledge. **They have insisted repeatedly that they be acknowledged and rewarded as key actors in climate solutions.** Yet, from their experience, global climate policies developed and implemented to date have often marginalised their communities and failed to uphold their rights. This briefing presents a rapid review of *existing* climate programmes and finance and their impacts on indigenous peoples. This review also flags several *new* so-called 'green' finance and sustainable trade initiatives as well as funds and market-based instruments that are being showcased by governments, large NGOs, and big business at the 26th Conference of the Parties (COP) to the **UN Framework Convention on Climate Change** (UNFCCC), herein after **COP26**. These global initiatives that will be launched during COP26 are being proposed as possible solutions to the climate crisis affecting the planet and all of humanity.

OPPORTUNITIES:

Increased focus by major bilateral donors (including the Government of the United Kingdom) on **the importance of secure indigenous land rights**, could provide a new opportunity for addressing the long-term problem of land tenure insecurity faced by many indigenous peoples and communities around the world. Although dwarfed by private sector financial flows for commodity extraction and trade, these emerging public commitments on indigenous peoples may indicate **important improvements in donor government policies** to fight against climate change and biodiversity loss **through support for secure indigenous collective tenure rights**. The application of robust rights-based approaches, coupled with a renewed emphasis on direct funding, where support organisations and international agencies are seen as enablers of local action, hold potential to empower indigenous peoples not only to own, but to govern, control and sustain their lands and build sustainable economies. An emerging global consensus on the **need to ensure all environmental policymaking aligns with, advances and does not violate international human rights law** is also a critically important step in building alliances for effective action.ⁱ

RISKS AND POTENTIAL PERVERSE OUTCOMES:

Without robust guarantees for the protection of indigenous peoples' rights, particularly in countries where such rights are weakly or inadequately protected, many of the proposed solutions for tackling the climate crisis risk enabling **'green land grabs,' leading to the expropriation of the lands,**

territories and resources of indigenous peoples and other customary communities. At the same time, global solutions based on the pursuit of flawed ‘net zero’ policies threaten to enable business as usual, fail to push for real and rapid reductions in emissions and allow destructive development to continue. Indigenous advocates and social/climate justice movements are again calling on world leaders to put human rights at the core of environmental and climate policies and demanding rapid and robust measures to curb greenhouse gas (GHG) emissions by phasing out dependence on fossil fuels and industrial agriculture as well as stopping harmful megaprojects.ⁱⁱ

SOME KEY TAKE AWAYS:

- Overall, **REDD+** social safeguards have not been applied effectively, indigenous tenure rights and FPIC are routinely violated or poorly implemented across many countries, and deforestation is often not prevented since underlying drivers are not addressed;
- More positive experiences with international forest and climate funds include important advancements in participatory programmes for the titling of indigenous lands in Peru under the Forest Investment Programme’s Dedicated Grant Mechanism for Indigenous Peoples (DGM);
- Some policies to be announced at COP26 in support of indigenous peoples’ tenure offer **genuine progress, but only** if they are designed and governed by and for indigenous peoples. They must ensure climate finance reaches them directly, as well as guaranteeing that indigenous peoples are actively engaged in their governance and rollout;
- One major **new** global REDD+ initiative called **Lowering Emissions by Accelerating Forest finance (LEAF)** will be promoted at COP26 by a coalition of governments, multinational companies and NGOs;
- While LEAF safeguards include protections for indigenous peoples’ rights on paper, without **guarantees** for full respect and protection of their land, territorial and resources rights and FPIC in each specific jurisdiction, this forest carbon finance initiative could enable **large-scale territorial grabs by participating countries**;
- Many donor and forest country governments, conservation NGOs and finance businesses at COP 26 are promoting so-called **nature-based solutions (NbS)** and ‘nature finance’ to address climate change, but without robust rights guarantees, some of the actions promoted under this banner could pose a similar threat to indigenous lands and resources and result in marginalisation and abuse;
- NbS finance and initiatives may represent powerful opportunities for indigenous peoples if they include efforts to secure their territorial rights as a key precondition for fair, efficient and effective interventions to protect nature and the climate;
- As a clear alternative to strictly nature-focused solutions, indigenous peoples are asserting their own **rights-based, culture-based and community-based** solutions to climate change and biodiversity loss, and **rejecting ‘false solutions’**: they demand strong guarantees for their collective rights in any NbS or new forest finance initiatives announced at COP26 and rolled out in coming months and years;
- With fully independent verification and audits, tools such as the **High Carbon Stock Approach** (a methodology seeking to ensure deforestation-free commodity production) could help ensure NbS respect indigenous peoples’ land, participation and FPIC rights;
- **Carbon markets** will be a key topic during COP26 in the context of Article 6 of the Paris Agreement. Social and climate justice movements are highlighting the risk of market-based mechanisms giving dirty companies and industries a green card to continue business as usual while merely **offsetting their CO2 emissions** by paying for ‘green projects’ elsewhere in the world, despite claims of new ‘integrity’ and safeguards for these markets;

- The New York Stock Exchange backed by the Inter-American Development Bank (IADB) has just launched a financial instrument called **Natural Asset Companies** that will enable the commodification and global trading of water, air, natural carbon, plant pollination and other environmental ‘services’. These new markets and ‘**asset classes**’ are being developed without clear protections for indigenous peoples’ customary lands;
- Global ‘sustainable finance’ initiatives that are being given a high profile in Glasgow such as the **Taskforce on Climate-related Financial Disclosure** (TCFD) and the **Taskforce on Nature-related Financial Disclosure** (TNFD) only require financiers to pay attention to environmental ‘footprints’ without any commitments on indigenous peoples’ rights nor any meaningful treatment of human rights;
- Meanwhile, the inter-governmental roadmap for sustainable commodities to be launched at COP26 via the **Forest, Agriculture and Commodity Trade (FACT)** dialogue process led by the governments of the UK and Indonesia, has not been the subject of consultation with indigenous peoples in producing countries and the initial joint statement endorsed by 25 participating countries fails to properly address human rights and tenure rights;
- Important processes are underway in the EU, UK and US aimed at **regulating commodity supply chains by law**. While statutory regulation and demand side measures are positive and address demands for binding standards, so far most regulatory initiatives fail to include attention to and protections for indigenous peoples’ human rights, other than those contained in national or ‘local’ laws.

This rapid review finds overall that indigenous peoples at COP26 will have a dual task. On the one hand they will be working to ensure that positive policy and finance initiatives by the UNFCCC and its states parties are developed with their full and effective participation and in full respect of their rights guaranteed under international law. They will also, as ever, be alert to false ‘solutions’ by governments and corporate actors that fail to address underlying causes of climate change and threaten their fundamental rights and their very survival.

INTRODUCTION

Expectations are building high in advance of COP26 to be held in Glasgow 1st-12th November this year. It is six years since the landmark COP in 2015 when the Paris Agreement was adopted, however, targets and policies by signatory states are not nearly on track towards the aim of **limiting the increase in global average temperature to 1.5°C above pre-industrial levels**.ⁱⁱⁱ The threat posed by this lack of ambition is compounded by the fact that the world is warming much faster than earlier expected.^{iv} Climate change is not merely a dark forewarning on paper. It is starkly visible around the world, including to the increasing number of indigenous peoples and communities whose lands, livelihoods and ways of life are directly being affected and harmed by raging wildfires, droughts, floods, extreme storm events, scorching temperatures, variable seasons and rising sea levels.

The UN Secretary General António Guterres has recently warned^v that humanity is **on track for a climate catastrophe** and has called on world leaders for ‘decisive action’. In response, large industrial economies are expected to pledge increased ambition for emissions reductions, yet whether these pledges will be binding or met by deeds is in serious doubt as nation states continue to issue and subsidise fossil fuel extraction and mega infrastructure, agro-industrial and extractive industry projects worldwide. **Global finance** will also be an important point when the parties meet to respond to the call for decisive action: Where will the money to pay for the needed mitigation and adaptation actions come from? And how will harmful, unaccountable and often criminal private sector financial flows be eliminated?

With indigenous peoples’ rights and livelihoods in focus, **this briefing seeks to take stock of existing climate finance and programmes as well as to flag new so-called ‘green’ finance initiatives, funds and market-based instruments being put forward by governments and business at COP26 as solutions to address the climate crisis in the coming decades and enable ‘transition’ to more climate friendly societies**. It looks particularly at two pillars of finance that aim at addressing climate change and destruction of nature. First, global programmes and associated finance targeted at maintaining or enhancing nature’s capacity to store and absorb carbon and/or protect biodiversity. Second, a brief critical scan is made of international initiatives (both legal and voluntary) that aim to ensure the money linked to global commodity value chains does not lead to deforestation and environmental destruction – sometimes labelled as ‘deforestation-free’ finance.

1. GLOBAL CLIMATE FINANCE FOR NATURE – 2007 to 2021

1.1 REDD+

Since the COP in Bali in 2007, ‘REDD+’^{vi} has been a buzzword in international and national climate change fora and in international forest and climate initiatives. The idea of keeping carbon stored in forests was, and continues to be, an appealing idea to many, not least because it has been portrayed as one of the most cost-effective ways to reduce global GHG emissions. A multitude of actors – including UN agencies, states, multilateral organisations, philanthropies, companies and NGOs – have undertaken and/or supported a wide range of actions with the intension of setting up governance frameworks and technical systems enabling countries to receive compensation for *reducing* national annual deforestation rates and **keeping their forests standing**.^{vii} More specifically, the aim has been to set up systems where states can receive payments for results (primarily in the form of GHG emissions reductions)^{viii} that have been independently verified.^{ix}

Since 2007, at the same time as over 60 tropical forest countries have been ‘getting ready for REDD+’, there has been great uncertainty about **who will pay for the verified results in the long term** (readiness processes have been funded largely through bilateral and multilateral donors, and some through private foundations). From the start, a key intention of REDD+ proponents was that REDD+ would be linked to a **global carbon market** that could generate large-scale and long-term finance for forest conservation.^x However, that plan has

not yet materialised and is highly contested, including by indigenous peoples' organisations and climate justice movements.^{xi}

Instead, there has been stepwise movement towards the integration of what started out as a very fragmented REDD+ architecture. **In 2015, REDD+ was officially included in the international climate framework** - Paris Agreement (article 5) - as an important climate 'solution'. However, the funding question was still not fully addressed. In 2016, it was agreed that the Green Climate Fund (GCF), a financial institution within the UNFCCC, would contribute to results-based payments for REDD+ as part of its support to parties' implementation of their **Nationally Determined Contributions (NDCs)**. That said, the discussion about a global carbon market to generate REDD+ payments is yet to take place. **This will be an important discussion point at COP26** in Glasgow and will be deliberated on by the UNFCCC's scientific body known as SBSTA (see Box 3).

REDD+ and indigenous peoples: After coordinated global pressure and repeated demands from indigenous peoples insisting 'No Rights, No REDD,' the UNFCCC COP adopted the 'Cancun Safeguards' in 2010. According to these safeguards, "*respect for the knowledge and rights*" as well as the "*full and effective participation of [...] indigenous peoples and local communities*" should be promoted and supported in any REDD+ activity. The safeguards also call for REDD+ to be "*consistent with [...] relevant international conventions and agreements.*"^{xii} ^{xiii} In addition, in order to be eligible for results-based payments, REDD+ countries must have in place Safeguard Information Systems (SIS) and provide a Summary of Information (SOI) to report on how the Cancun Safeguards are addressed and respected.^{xiv}

Some indigenous peoples report that REDD+ has sometimes opened up additional political space in national policy making and catalysed land titling processes. For example, in Peru, funds channeled to indigenous

BOX 1: Existing REDD+ initiatives and funding streams:

In the absence of a global framework for REDD+ in the early days of the concept, a fragmented landscape of funders and initiatives has emerged. This list briefly summarises some key funding mechanisms:

- **Forest Carbon Partnership Facility (FCPF):** Works with 47 developing countries across Africa, Asia, and Latin America and the Caribbean, along with 17 donors that have made contributions and commitments totalling \$1.3 billion. The FCPF supports REDD+ efforts through its Readiness and Carbon Funds. So far 18 countries have qualified for result-based payments from the World Bank's \$900 million Carbon Fund (CF) under so-called Emissions Reduction Payment Agreements (ERPAs). Only one payment has been made from the CF so far (to Mozambique in October 2021).
- **UN-REDD Programme:** Supports 65 partner countries across Africa, Asia-Pacific and Latin America and the Caribbean to adopt national policies for reductions in emissions from deforestation. So far 17 countries have submitted national REDD strategies or action plans to the UN.
- **Green Climate Fund:** Established under the UNFCCC in 2010. Supports REDD+ countries with funding three phases: readiness, implementation and payment for results. Proposals from eight countries — Brazil, Ecuador, Chile and Paraguay, Indonesia, Colombia, Argentina and Costa Rica — have been approved for results-based payments through the \$500 million pilot programme.
- **Forest Investment Programme (FIP):** Programme of the Strategic Climate Fund (SCF) within the Climate Investment Funds (CIF). The FIP supports 23 countries' efforts on REDD+ and is supported by eight donor countries. Note that FIP has a **Dedicated Grant Mechanism (DGM)** designed and led by representatives of indigenous peoples and local communities.
- **REDD Early Movers (REM):** Established by Germany, supported financially by Norway and the UK, and launched globally in 2012. This is one of the first mechanisms to pilot results-based payments for reduced/avoided emissions from deforestation. Implemented in the Brazilian states of Acre and Mato Grosso, in Colombia and in Ecuador.
- **Bilateral REDD+ funding:** Some donor countries have either individually or jointly agreed REDD+ partnerships with one or a group of forest countries. For example, the **Amazon Fund** (Norway-Brazil) and the **Central African Forest Initiative (CAFI)** (Cameroon, CAR, DRC, Equatorial Guinea, Gabon and the Republic of Congo – supported by EU, France, Germany, the Netherlands, Norway and Korea).
- **The BioCarbon Fund:** Supported by donor governments and administered by the World Bank since 2013. It seeks to reduce CO2 emissions from the land sector, including through REDD+. The Fund currently supports sustainable landscape management programmes in Ethiopia, Colombia, Zambia + Mexico and Indonesia.

organisations through the Dedicated Grant Mechanism of FIP has led to the legal recognition of over 300 communities, while 140 are in the process of land titling.^{xv}

However, overall, 15 years of evidence derived from multilateral and bilateral REDD+ ‘readiness’ and pilot programmes across Latin American, African and Asian tropical countries demonstrates that **REDD+ safeguards for land rights and FPIC have often not been applied** effectively, indigenous tenure rights and FPIC are routinely violated or poorly implemented, and deforestation is not being prevented since underlying drivers are not being addressed.^{xvi}

1.2 LEAF and TREES – jurisdictional REDD+

In the context of failing international efforts to set up a global payment system for REDD+, Norway, the UK and the US together with a group of multinational companies^{xvii} have set up a coalition aiming at **Lowering Emissions by Accelerating Forest finance (LEAF)**. The coalition wants to mobilise at least \$1 billion in financing to kick off what is expected to become one of the largest ever public-private efforts to protect tropical forests.

In short, the way this coalition is planning to lower emissions is by paying for emission reductions from forest jurisdictions that have been verified against a benchmark called **The REDD+ Environmental Excellence Standard (TREES)**. This standard is often presented as an answer to problems identified in relation to previous REDD+ projects in that it is meant to mitigate leakage and reversal risks; avoid double counting of emission reductions; assure robust environmental and social safeguards; and ensure transparent issuance of serialised units on a public carbon registry.^{xviii} It is a body called **ART (Architecture for REDD Transactions)** that is in charge of certifying that the emission reductions have complied with the rules of TREES and subsequently to issue the credits.

Although LEAF invokes the UNFCCC Cancun REDD+ Safeguards, so far its guarantees on the ground for full recognition and respect for untitled customary lands and territories of indigenous peoples remain unclear,^{xix} and like with previous versions of REDD+, **the underlying question of who owns the forest and the carbon stored in it is not addressed** in any explicit way. It also remains unclear how implementation and verification of compliance with the safeguards will happen on the ground, and states have been applying for the inclusion of large-scale forest jurisdictions in the scheme without the prior knowledge and informed consent of indigenous peoples and other traditional forest owners.^{xx}

BOX 2: Corporate finance for nature – the next step:

In the run-up to the Convention on Biodiversity COP in October, a whole new opportunity for investors seeking to support nature protection was launched. Backed by the Inter-American Development Bank, the New York Stock Exchange (NYSE) announced that it has created a new “asset class”, which will be listed and traded on the NYSE: **Natural Asset Companies (NACs)**. These will allow formation of specialised corporations “that hold the rights to the ecosystem services produced on a given chunk of land, services like carbon sequestration or clean water.”^[1] While it is being portrayed as a conservation tool with the planet’s health in mind, in reality it is a tool for players in the financial industry to increase their wealth by privatising and selling nature and natural process that we all depend on to live and thrive: The new “asset class was developed to enable exposure to the *opportunities* created by the estimated \$125 trillion annual **global ecosystem services market**” [emphasis added] ^[2].

This development represents a significant threat to lands and territories of indigenous and other customary land owners around the world as it is likely to catalyse a wave of land grabs by profit-seeking “greenwashers.” Land that has not been formally titled by the state, and where land tenure can be claimed to be unclear, would be under particular threat.

Only a month old, it remains to be seen how this his private finance instrument for nature protection develops, but there are good reason to keep a close eye.

[1] <https://unlimitedhangout.com/2021/10/investigative-reports/wall-streets-takeover-of-nature-advances-with-launch-of-new-asset-class/>

[2] <https://www.esgtoday.com/nyse-to-list-new-asset-class-for-natural-asset-companies-targeting-massive-opportunity-in-ecosystem-services/>

As COP26 starts, some countries and sub-national jurisdictions are already accepted into the LEAF-ART-TREES scheme (Guyana, Brazil (three subnational jurisdictions), Costa Rica, Ghana, Vietnam),^{xxi} while others have

BOX 3: Article 6 and carbon markets

At COP26, one of the central topics of negotiation will be the “rulebook” for article 6 of the Paris Agreement. Article 6 relates to **carbon markets and other forms of international cooperation** for achieving climate goals and is the only piece of the Paris regime that has not yet been finalised. The topic is highly controversial. Proponents highlight that ‘cooperation’ through buying and selling carbon credits will make it easier, cheaper and more likely for countries to reach their climate targets. Opponents stress that if rules are not designed correctly, it could increase global emissions, while indigenous and human rights organisations continue to warn that carbon markets **could drive land and forest expropriation and rights abuse on a massive scale should a global market be established**.

While it is not yet clear how REDD+ and other nature-based solutions will be linked to a global carbon market established under article 6, many worry that nature-based solutions will be used to enable polluters to continue business as usual by paying for creating, maintaining or restoring natural or ‘modified’ systems elsewhere. By doing so, it would **delay the overall emission cuts** that are essential globally to avert the growing climate and humanitarian crisis. From the perspective of customary land-owners such as indigenous peoples, an international market for carbon credits to back nature-based solutions is likely to increase the pressure on their lands, which in many places lacks formal legal recognition in national and ‘local’ laws.

Private sector: While it is still to be decided how the private sector will be able to participate in the ‘cooperation’ envisaged under article 6 - for example in an international carbon market governed by the UN - there are initiatives underway seeking to ensure that the private sector can contribute towards the goals of the Paris Agreement. One of them is the **Voluntary Carbon Market Integrity Initiative (VCMI)**. With **net-zero climate commitments** of companies, including so called **science-based greenhouse gas emission reduction targets**, rapidly growing, the VCMI seeks to address criticisms of voluntary carbon markets that have been used by the private sector to date by promising integrity. It should be noted that so far, any **human rights and tenure security guarantees seem to be absent** from the current ‘independent verification’ and integrity-focus of VCMI.

successfully completed an initial technical screening process (Burkina Faso, Ecuador, Mexico (two subnational jurisdictions), Kenya, Nepal, Nigeria, PNG, DRC, Uganda, Zambia and Brazil (four subnational jurisdictions)).^{xxii}

The lower area size limit for participation in LEAF coupled with promises of big finance could **incentivise large scale land grabs by states** – at least it is highly unlikely that it will encourage states to speed up land titling of currently untitled customary indigenous lands. Additionally, in the latest version (2.0) of TREES, the option for indigenous jurisdictions to apply as participants has been removed.^{xxiii}

That said, perhaps the launch of ART-TREES and LEAF will be **seized as an opportunity by indigenous peoples** to generate political (national and international) attention to underlying land tenure issues by highlighting how yet another international climate finance initiative fails to address these issues.

1.3 Nature-based Solutions

A hot topic under both the UN climate and biodiversity conventions at the moment is that of ‘Nature-based Solutions’ (NbS). It is likely to receive a lot of attention at COP26 given that it features as one of the priorities of the UK COP Presidency. NbS is a broad term which is **used by different people to mean different things** and no international definition is universally agreed. There is no doubt that harnessing natural solutions offers necessary and positive ways to address some of the challenges thrown up by climate changes, including re-designing urban settings to improve tree cover, connecting habitats with nature bridges, supporting tenure security for indigenous peoples, revitalising or promoting traditional sustainable management, and restoring damaged ecosystems. However, it can be, and is, also **used to describe carbon offsetting of highly damaging activities** (including continued

emissions), carbon market mechanisms or ‘set asides’ of forest or other high carbon areas (which could, for example, be on land under customary ownership and asserted without consent). It can also include inappropriate industrial monoculture tree-planting proposals that are proven to carry high risks of harm to human rights and have limited environmental benefit and sometimes negative effects on biodiversity.

In short, NbS is a mixed and undefined term that **may include some potentially beneficial elements but also others that are very harmful**^{xxiv}. As with REDD+, indigenous peoples are again demanding strong guarantees for their collective rights, robust definitions and clarifications on NbS that must exclude unjust, harmful and ineffective finance and interventions, fully uphold indigenous and community rights and directly recognise and reward their historical and ongoing defence and maintenance of nature and the climate. Indigenous peoples are also asserting their own rights-based, culture-based and community-based solutions to climate change and to biodiversity loss and seeking recognition and support for them.^{xxv}

2. SUSTAINABLE TRADE AND VALUE CHAIN INITIATIVES

Soaring global demand for goods and services and rising consumption levels of food (especially meat), fibre, vegetable oils, paper and pulp fed by chemically-based industrial systems of production and extraction is propelling deforestation and associated human rights abuse. In response, there are a flurry of initiatives, particularly in consumer countries, seeking to address some of the detrimental impacts the production of commodities - and subsequent consumption by their citizens - have on forests and people where they are produced. The initiatives range from certification schemes and multilateral dialogues to legal proposals. Some of these are likely to receive attention during COP26, so some background is set out below:

2.1 Voluntary commodity standards and sustainable value chain initiatives

Industry and civil society sustainable finance initiatives

Since 2015, two taskforces have been established to identify what risks climate change and destruction of nature pose to the financial sector and how these risks can be addressed: **The Taskforce on Climate-related Financial Disclosure** (TCFD) and the **Taskforce on Nature-related Financial Disclosure** (TNFD). A main aim of these are to provide frameworks and guidelines for how financial actors can report on their nature and climate related risks so that investors can take this into account when deciding where to place their money.

From a civil society perspective, there are several important concerns that should be noted: First, human rights are absent from any of the principles and deliberations of these taskforces. As an example, the link between indigenous peoples (and other communities living in harmony with nature) and the risks of natural and climate destruction is absent. In their risk analysis and management the taskforces miss the important role that these peoples and communities have in protecting nature as well as how they are at risk when nature is destroyed. Not protecting their rights increases the risk of further destruction and CO2 emissions and continued criminalisation and threats to those who defend nature. Second, the taskforces are made up by the sectors that they are meant to transform (i.e. TCFD consists of 32 financial industry actors and TNFD of 35 senior executives from financial institutions, corporates and market service providers). The dominance of corporate members is particularly worrying when, like in the UK, it is being considered to base mandatory reporting rules on the voluntary approaches developed by the sector itself.

Commodity certification schemes

Standards across different commodity certification schemes are variable, with differential treatment of FPIC and customary tenure rights. However, in practice, all certification schemes continue to suffer from multiple **accountability and compliance problems** – such as lack of independent and thorough audits - with **land rights and FPIC standards especially suffering zero or poor compliance**. In addition, complaint mechanisms related to the schemes are often inaccessible, non-transparent and not rights-compliant, and there is no access to remedy for rights-holders negatively affected by violations of the certification standard.^{xxvi}

More positive experiences of efforts to end commodity-driven tropical deforestation led by civil society and private sector include the **High Carbon Stock Approach** (HCSA) that applies a rights-based approach and

requires participatory mapping of indigenous and community land rights with robust FPIC protections.^{xxvii} The HCSA offers genuine methods to recognise community rights, though in practice the audits and assessments are weak and are still failing to properly uphold prior consent and customary tenure rights. With much strengthened audits, HCSA and similar frameworks can be used by indigenous peoples to defend their forests alongside other tools, including use of the courts and judicial redress to claim territories, land restitution and respect for FPIC.

There is a growing move towards **jurisdictional approaches to certification and** several pilot schemes for palm oil, beef and soybean have been set up. Under these schemes, **sustainability standards become statutory norms to be complied with** by all producers within a given legal and administrative area and the state is part of the framework for enabling and enforcing compliance. Early indications suggest the governance of such schemes must be inclusive of rights-holder groups if progressive reform is to be achieved. In addition, the effectiveness of such schemes requires the application of human rights-based approaches, truly independent verification and grievance mechanisms in conjunction with required credible compliance and enforcement mechanisms to address ‘freeloaders’ and ‘laundering’ of non-compliant goods. Given the move towards jurisdictional REDD+ (as seen above), these are important lessons to keep in mind for the further development of jurisdictional certification or carbon credits.

[Inter-governmental dialogues - FACT](#)

The Forest, Agriculture and Commodity Trade (FACT) Dialogue is an inter-governmental initiative co-chaired by the UK and Indonesia with an aim for the governments involved to work “together to protect the world’s precious forests while also promoting sustainable trade”. A total of 25 countries are formally participating.^{xxix} The FACT process has a five-year timeline and is guided by a joint statement by the participating countries.^{xxx} Based on a review of this statement there is no indication that tenure security or tenure rights will receive any significant attention, if any at all – in general there is very limited focus on indigenous peoples or other traditional, land-dependent communities. And while there is no human rights commitment, there is great emphasis on the rights of each country to “establish its own policies and approaches to sustainable land use and commodity markets” in the name of sovereignty.

The high level FACT dialogues so far have not directly involved indigenous peoples and Southern rights holder organisations. However, alongside the formal (closed) intergovernmental process, the Tropical Forest Alliance (TFA) is conducting a (limited) stakeholder consultation, which aims to provide input to the government process. This consultation is not only limited in scope, it is also informal and there is no clear indication of how any outcomes will feed into the process. While the TFA process has involved some indigenous participation the process is little known or entirely unknown to indigenous peoples’ organisations and leadership in most producer countries.

The FACT Dialogue will publish a Roadmap of actions during COP26.^{xxxi}

2.2 Demand-side legal regulation of ‘forest risk’ commodities and corporate conduct

There are legal proposals to address deforestation in commodity supply chains and to regulate corporate governance under development in the EU, the UK and in the US. These are often referred to as ‘**demand-side measures**’ since they seek to address the problem by changing rules in consumer countries, where much of the global demand for the commodities produced in tropical forest countries comes from. Most of these proposals centre around obligations of companies and market ‘operators’ to carry out **due diligence in order to identify, assess, prevent and mitigate potential and existing harmful impacts**. However, the scope of these proposed legal instrument is often seriously limited. Not all include attention to harms to people – i.e. human rights abuses. Some also only deal with deforestation that is illegal according to national laws in the producer country. This means there is a continued risk that the collective tenure rights of customary land owners could

be violated while products are still considered legal in the consumer country. Worse still, these laws tied to national legal frameworks could result in perverse outcomes whereby producer countries ‘lower’ their legal standards to enable land conversion and appropriation of indigenous peoples land, territories and resources. A remaining vital question with regards to these statutory proposals is whether and how they will ensure corporate liability for harms, for example through business obligations to provide **remedy and access to justice** for communities that have been harmed by commodity production.

[In the EU:](#)

There are two legal proposals under development in the EU:

- The first (often referred to as the **deforestation regulation**), is expected to be released in December 2021. A leaked version of the proposal suggests that this regulation will make it illegal for businesses to sell (certain) commodities on the EU market unless the company establishes (through due diligence) there is a low risk they are linked to deforestation or otherwise are illegal under national law. Despite strong pressure from civil society, it seems clear that compliance with **human rights will not be included** as a requirement of the law, unless that is a requirement of national law. Furthermore, the proposal does not include civil liability and thus will prevent victims of deforestation and adverse human rights impacts to seek redress. The draft regulation contains many other weaknesses that will undermine its success, including the exclusion of due diligence requirements for the financial sector and the absence of rubber, maize and other livestock from the list of forest-risk commodities. The EU is expected to share its plans on this legal initiative during COP26.
- The other proposal (often referred to as the **sustainable corporate governance initiative**), is also expected by the end of 2021. From the information available, this law would require EU companies, as well as non-EU companies carrying on business in the EU, to do human rights and environmental due diligence on their activities. These due diligence requirements would not prohibit companies from selling products on the market, but there would in principle be a requirement to avoid, mitigate or cease negative impacts. This initiative also involves duties on company directors in relation to stakeholders beyond the company (citizens, communities, etc). The draft proposal suggests that this law would apply to all companies and “high-risk” small and medium enterprises and include sanctions and civil liability.

[In the UK:](#)

The main development in the UK is a current proposal for a **product-based due diligence law** which would place obligations of due diligence on companies selling (or using in their commercial activities) certain commodities linked to deforestation. It however only prohibits entry to the UK market of commodities that were produced on land that was deforested illegally (under national law), or land that was acquired illegally under national property laws. If the deforestation were to violate customary tenure rights of indigenous peoples that are not recognised in national laws, then it would be allowed entry to the UK.^{xxxii}

[In the US:](#)

There is one national level and one state level legal proposal under development in the US that both relate to deforestation in supply chains:^{xxxiii}

- The national level bill (often referred to as **the Schatz Bill**) is being introduced to the two chambers of Congress during the last quarter of 2021. It would require importers of ‘high-risk’ agricultural commodities to certify that they took **‘reasonable care’** to determine that their imports did not come from illegally deforested land. The list of ‘high-risk’ commodities would start with palm oil, soy, beef, leather, rubber, cocoa and pulp and paper. ‘Illegal deforestation’ is defined as deforestation that is in **violation of national laws**, including land tenure and FPIC laws where those exist. This means that human rights is only covered by this law if protected under national laws.

- The state level bill relates to **public procurement** (state purchasing) in **New York**. If this Bill were to pass, it would, among others, require contractors to have a No Deforestation, No Peat, No Exploitation policy in place that must indicate due diligence measures taken to identify the point of origin of commodities, to ensure the FPIC of affected indigenous peoples and local communities, among others.

While the different law proposals develop, indigenous peoples and corporate justice organisations continue to call on law makers in the EU, UK and US to ensure legislation on corporate governance and supply chain due diligence applies explicit protections and remedies for violations of human rights, including of collective rights and customary tenure rights, in line with international law and sustainability standards.^{xxxiv}

ⁱ See for example <https://www.forestpeoples.org/en/news-article/2021/open-letter-cop-26>

ⁱⁱ See for example *ibid*, and the forthcoming global statement “Real solutions, Not Net Zero: A global call for climate action”

ⁱⁱⁱ Article 2 of the Paris Agreement describe the Parties’ aim of “Holding the increase in the global average temperature to well below 2 °C above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5 °C above pre-industrial levels”.

^{iv} A UN report from August 2021 shows that the world is heading for a 2,7 degree warming compared to pre-industrial levels. See report and summary article: https://unfccc.int/sites/default/files/resource/cma2021_08_adv_1.pdf and <https://www.cnn.com/2021/09/17/us/catastrophic-climate-change-un-report/index.html>

^v <https://news.un.org/en/story/2021/09/1100382>

^{vi} Reducing emissions from deforestation and forest degradation and the role of conservation, sustainable management of forests and enhancement of forest carbon stocks

^{vii} See for example Mapping Forest Finance (2018) Environmental Defence Fund <https://www.edf.org/sites/default/files/documents/EDF101-REDD%2BFinance.pdf>

^{viii} In relation to results-based payments, the term ‘results’ normally refers to reduced/avoided CO2 emissions due to reduced/avoided deforestation, sustainable management of forests or afforestation. However, the link between these emissions results and other wider policy and non-carbon related performance (e.g. governance reform and social safeguard implementation) has received more focus in the past few years

^{ix} For a discussion of results-based payments see e.g. CIFOR (2016) Results-based payments for REDD+: Lessons on finance, performance, and non-carbon benefits, <https://www.cifor.org/knowledge/publication/6108/>

^x Seymour, F. and Busch J. (2016) *Why Forests? Why Now? The Science, Economics, and Politics of Tropical Forests and Climate Change*. Center for Global Development <https://www.cgdev.org/sites/default/files/Seymour-Busch-why-forests-why-now-full-book.PDF>

^{xi} See for example <https://www.kairoscanada.org/carbon-trading-threatens-indigenous-peoples> and <https://news.mongabay.com/2021/06/we-guard-the-forest-carbon-markets-without-community-recognition-not-viable/>

^{xii} UNFCCC, ‘Report of the Conference of the Parties on its sixteenth session, held in Cancun from 29 November to 10 December 2010, Addendum’ (15 March 2011) FCCC/CP/2010/7/Add.1, Appendix 1, para 2.

^{xiii} The UN-REDD Programme considers that “relevant international conventions and agreements” may include UNDRIP, ICERD, ICCPR, ICESCR and ILO 169. See for example <https://www.unredd.net/documents/global-programme-191/redd-academy-3509/redd-academy-asia-pacific-2014-october-27-november-7-yogyakarta-indonesia-3607/redd-academy-asia-pacific-presentations-3616/13625-5-safeguards-and-safeguards-information-systems-judith-walcott-13625.html?path=global-programme-191/redd-academy-3509/redd-academy-asia-pacific-2014-october-27-november-7-yogyakarta-indonesia-3607/redd-academy-asia-pacific-presentations-3616>

^{xiv} See useful background in Rey Christen, D.; García Espinosa, M.; Reumann, A.; Puri, J. (2020) Results Based Payments for REDD+ under the Green Climate Fund: Lessons Learned on Social, Environmental and Governance Safeguards. *Forests* **2020**, *11*, 1350. <https://doi.org/10.3390/f11121350>

^{xv} Personal communication with Roberto Espinoza, author of forthcoming study: Los derechos de la “jurisdicción indígena” ante los peligros del mercado de carbono: Evaluación y recomendaciones (FPP)

^{xvi} e.g., Rodríguez-de-Francisco, J.C et. all (2021) ‘Post-conflict transition and REDD+ in Colombia: Challenges to reducing deforestation in the Amazon,’ *Forest Policy and Economics* **127**

<https://www.sciencedirect.com/science/article/pii/S1389934121000563?via%3Dihub>; Rainforest Foundation UK (2017) *A critical analysis of the safeguards framework of the Mai-Ndombe REDD project* RF-UK, London http://www.reddmonitor.org/wpcontent/uploads/2017/08/PIREDDsafeguardsanalysis_31.7.17_final.pdf; Gauthier M (2018) Mai-Ndombe: will the REDD+ laboratory benefit indigenous peoples and local communities? Analysis of the cumulative impacts and risks of REDD+ initiatives, RRI report, Washington DC https://rightsandresources.org/wp-content/uploads/2018/03/EN_Mai-Ndombe-Report_RRI_Mar-2018.pdf; Berk, N and Lungungu P (2020) *REDD MINUS: rhetoric and reality of the Mai Ndombe REDD+ Programme* RF UK and APEM, London and Kinshasa <https://www.rainforestfoundationuk.org/media.ashx/redd-minus.pdf>; McAfee, K (2016) “A jurisdictional approach will not solve the most serious REDD+ problems” *REDD Monitor* <http://www.redd-monitor.org/www.tierrasindigenas.org.py/2016/07/01/a-jurisdictional-approach-will-not-solve-the-most-serious-redd-problems/>; Dehm, J (2016) “Indigenous peoples and REDD+ safeguards: rights as resistance or as disciplinary inclusion in the green economy?” *Journal of Human Rights and the Environment* 7(2)(2016): 170–217; Sarmiento Barletti J P and Larson A M (2017) *Rights abuse allegations in the context of REDD+ readiness and implementation: a preliminary review and proposal for moving forward* CIFOR Info-brief No. 190, October 2017 DOI: 10.17528/cifor/006630 http://www.cifor.org/publications/pdf_files/infobrief/6630-infobrief.pdf; Sunderlin, W (2014) *The challenge of establishing REDD+ on the ground: Insights from 23 subnational initiatives in six countries* CIFOR, Bogor https://www.cifor.org/publications/pdf_files/OccPapers/OP-104.pdf

^{xvii} including Amazon, Airbnb, Bayer, Boston Consulting Group, GSK, McKinsey, Nestlé, Salesforce, PwC, Delta Airlines, Eon and Unilever

^{xviii} <https://www.artredd.org/trees/>

^{xix} While TREES does include reference to the security of customary land and resource tenure rights, it says that these must be “anchored in relevant ratified international conventions/agreements **and/or** domestic and if applicable, subnational, legal framework”. This does not ensure implementation in line with international standards.

^{xx} For example in Guyana

^{xxi} See <https://art.apx.com/myModule/rpt/myrpt.asp?r=111>

^{xxii} See <https://leafcoalition.org/>

^{xxiii} Rights and Resources Initiative (Oct 2021) Commentary: Reflections on ART-TREES, Jurisdictional REDD+ and Nature-Based Solutions: https://rightsandresources.org/wp-content/uploads/Reflections-on-ART-Trees-Jurisdictional-REDD-and-NBS_Final-EN.pdf

^{xxiv} Tugendhat, H. (2021) ‘Re-thinking nature-based solutions: seeking transformative change through culture and rights: A briefing for the post-2020 Global Biodiversity Framework,’ Moreton-in-Marsh, available at: <https://www.forestpeoples.org/en/briefing-paper/2021/re-thinking-nature-based-solutions>

^{xxv} Tebtebba (December 2020), Nature-based solutions (NbS) for climate change: a vision of indigenous peoples: <https://www.tebtebba.org/index.php/news-and-updates/nature-based-solutions-nbs-for-climate-change-a-vision-from-indigenous-peoples>

^{xxvi} Griffiths T. and Jiwan N. (2021) Demanding Accountability: Strengthening corporate accountability and supply chain due diligence to protect human rights and safeguard the environment: Lessons from ten case studies of the Indonesian palm oil sector. (FPP) <https://www.forestpeoples.org/en/report/2021/demanding-accountability-strengthening-corporate-accountability>

^{xxvii} <https://www.forestpeoples.org/en/high-carbon-stock-approach-finalises-social-requirements>

^{xxviii} <https://www.forestpeoples.org/en/topics/redd-and-related-initiatives/news/2016/02/high-carbon-stocks-forests-challenges-implementation>

^{xxix} Belgium, Brazil, Colombia, Cote D’Ivoire, Democratic Republic of Congo, Denmark, France, Gabon, Germany, Ghana, Indonesia, Italy, Japan, Liberia, Malaysia, Netherlands, Nigeria, Norway, Paraguay, Peru, Republic of Congo, Republic of Korea, Spain, United Kingdom, Uruguay

^{xxx} <https://www.gov.uk/government/news/joint-statement-on-principles-for-collaboration-under-the-forest-agriculture-and-commodity-trade-fact-dialogue>

^{xxxi} To our knowledge, no public consultation on this has been conducted regarding this Roadmap.

^{xxxii} <https://www.forestpeoples.org/en/press-release/2020/forest-peoples-rights-threatened-proposed-uk-approach-legislation-deforestation>

^{xxxiii} There was a deforestation-free procurement bill under development in California, which after being voted through both chambers of the state legislature was vetoed by the Governor on Oct 6th 2021.

^{xxxiv} See, for example, Perspectives from Southern Organisations and Allied Human Rights NGOs: Ensuring a Legal Corporate Duty in the EU Includes Meaningful Provisions on the Rights of Indigenous Peoples and Local Communities

https://media.business-humanrights.org/media/documents/BHRRRC_EUPresidency_mHREDD_Compodium_11-2020.pdf and “Open letter from organisations representing indigenous peoples, forest communities and human rights defenders” to EU leaders: <http://www.indepaz.org.co/wp-content/uploads/2021/03/Open-letter-to-EC-from-Indigenous-peoples-and-human-rights-defenders-March-31-2021.pdf>