



## Rights and REDD+ Legal and regulatory considerations

Charlotte Streck

- The clarification of forest tenure is essential for the sustainable success of REDD+. Successful tenure reform should be supported by a participative process and build on customary tenure systems. Tenure reform, however, is a long-term process that has to be implemented in parallel with other REDD+ policies.
- The allocation of carbon rights is a precondition for subnational carbon crediting. The allocation can in most cases be deducted from existing legal principles. The clarification of carbon rights is not a condition for REDD+ policies that are not associated with entity-level carbon crediting and trading.
- The discussion about sharing international benefits must go hand in hand with a discussion about sharing the costs and burdens of REDD+. It is important to manage expectations regarding benefits, in particular where the international incentive systems are still under development.

### Introduction

Sustainable and long-term protection of forests requires a paradigm shift in the use of natural resources in developing countries. Land-use and forest-

sector policies often date back to colonial times and continue to be designed to allow fast extraction and export of natural resources, as well as to promote land occupation in remote areas. REDD+ requires a shift in thinking and a turnaround in the way countries value their natural resources; countries must protect forests and lands that are traditionally valued only for their timber resources and agricultural potential, rather than for the services provided by standing forest. Neutralising the drivers of deforestation means removing pressure from forests and land. This requires a carefully designed package of policies that targets various drivers at the lowest economic, social and political cost.

REDD+ action includes a diverse set of interventions ranging from policies that can be implemented quickly and without too many legislative changes (e.g., lifting certain subsidies) to more complex and long-term interventions (e.g., land title reform). An impact assessment will have to review the costs and benefits of various competing or complementary policy proposals. While the international REDD+ debate often focuses only on costs of abating greenhouse gas (GHG) emissions, governments will have to take into account the impact of policies on vulnerable constituencies, lobby groups, overall policy coherence and social acceptability. A number of variables determine the scope of the policy debate and the likelihood of adoption of a particular policy. These include the technical and administrative complexity of particular policies, the distribution and timing (short versus long term) of a policy's costs and benefits for the society as a whole and the extent to which it encourages or limits broad participation.

Whichever REDD+ policies are chosen, REDD+ will affect the rights of those using the forest and forest resources or holding permits to clear forest land for agricultural or other purposes. Where REDD+ policies limit the exercise of existing statutory or customary rights, compensation for the loss of benefits is mandated by law as much as by equity considerations. The sharing of costs associated with REDD+ policies and the due compensation for such losses thus stand at the centre of the national REDD+ debate. Rights that will be affected by REDD+ fall broadly into the following categories:

- forest tenure and rights to the existing forest, timber and land resources;
- newly defined rights, such as carbon or carbon sequestration rights and rights to exploit the benefits of GHG emission reductions and removals in general; and
- associated rights to international payments for REDD+.

This chapter analyses the legal and regulatory relevance of these three categories of rights for the implementation of national REDD+ policies with a focus on 1) tenure reform; 2) allocation of carbon rights; and 3) establishment

of benefit-sharing provisions. Tenure reform is relevant for the clear allocation of responsibilities and access to natural resources, and the discussion on carbon rights matters in the context of carbon markets and payment for ecosystem services (PES) schemes. The discussion on benefit sharing has become the proxy for discussing the domestic distribution of international REDD+ finance. The importance of these three issues is continuously stressed. However, the international debate and focus of donors and civil society on finding satisfactory solutions for these issues has often failed to clarify how they integrate into the broader process of REDD+ policy formulation. The objective of this chapter is therefore to elaborate on policy options and priorities in clarifying rights to land, timber, carbon and international REDD+ benefits in the national context of REDD+ implementation. Complementing the analysis on tenure included in Chapter 11, this chapter focuses on the legal and regulatory implications of the needed tenure reforms.

## **Rights to resources and tenure**

Deforestation results from local activities such as agricultural expansion and logging which stem from deliberate land use decisions. As discussed more extensively in Chapter 10, the decisions to clear land involve a set of economic incentives, disincentives and constraints (immediate or proximate causes), which are further embedded within a context of government policies, market access, land tenure systems and the sociocultural environment in which local actors live. These constitute the underlying causes or driving forces, that is, the fundamental processes that underpin the proximate causes, and that operate at much broader scales (de Sherbinin 2002). Unclear tenure systems, along with other institutional factors such as the lack of adequate governance structures (manifested by corruption, lawlessness, cronyism and mismanagement of the forestry sector) facilitate deforestation (Chapter 13; de Sherbinin 2002).

Therefore, to succeed, an incentive system that reduces forest emissions has to address perverse incentives that result from unclear and ambiguous tenure of forest and natural resources. A number of legal interests over forested land are relevant to REDD+ policies, including:

- land ownership which includes full property rights that can be held against third parties, including governments, and includes the right to use and transfer the land;
- tenancy of the land which includes the right to use the land without holding full property; relevant rights include usufruct, leases and traditional or indigenous land rights;
- formal or informal harvesting rights of timber and other forest products;
- the right to manage land to extract timber (e.g., concessions); and
- mining (exploration) rights.

These rights can be bundled into the broad concept of forest tenure, which includes ownership, tenancy and other arrangements for the use of forests (FAO 2009c). Forest tenure determines *who* can use what resource, for *how long* and under *what conditions*.

Property rights in most developing countries reflect a diversity of tenure regimes. Customary regimes based on local traditions, institutions and power structures such as chiefdoms and family lineages may exist alongside the formal legal tenure system sanctioned by the state (Elbow *et al.* 1998). In many African countries, formal tenure covers only 2–10% of land; this small percentage relates mostly to urban land. In Cameroon, only about 3% of the land has been formally registered and is held under private ownership, mainly by urban elites such as politicians, civil servants and businesspeople (Cotula *et al.* 2009). Customary systems are often composed of several different kinds of tenure, each of which defines different rights and responsibilities for the use of diverse resources. Clear individual or household rights are generally allocated for more or less exclusive use of arable and residential land, while group rights may prevail for use of pastures, forests, mountain areas, waterways and sacred areas (WRI 2009).

In Latin American countries in particular, deforestation has traditionally served as the very instrument to claim, and obtain, legal title. This ‘race for title’ is particularly relevant in countries where frontier areas were essentially open to anyone who wished to stake a land claim. Although this has become less common in the past decade, parts of the Brazilian and Ecuadorian Amazon continue to be settled in this way (Geist and Lambin 2001). The Brazilian Land Statute of 1964 demonstrates how land tenure insecurity can lead to increased deforestation. The Statute, which was recently amended by the Public Forests Act and the property regularisation decree to avoid abuse, allows farmers who do not have title but who make ‘effective use’ of the land to claim its holding. Clearing the forest is usually considered as proof of land development and is thus encouraged by this Statute. The deforestation incentive goes in both directions: large landowners seek to avoid occupation by spontaneous settlers and clear their forest in order to protect and maintain their rights to the land.

Unclear tenure systems may also lead to diluted responsibilities, which in turn may spur deforestation. For example, a complicated system of diverging rights to land and timber in Ghana creates incentives for farmers to log high-value trees on their farmland to prevent logging companies from invading the land, felling the trees and causing considerable damage to cocoa or other crops (Hansen and Treue 2008). National REDD+ policies should therefore rectify tenure systems that impede clear responsibilities toward land and natural resources.

However, the reform of tenure systems poses a formidable challenge for many developing countries. The root causes of this challenge are the general weakness of institutions, administrative capacity and legal systems paired with a complicated set of overlaying and contradicting (e.g., land cadastres) existing legal interests. Tenure reform is only as good as the institutions that implement and enforce it, and its legitimacy depends on the social and legal acceptance of the legislative process supporting that reform. A clear allocation of rights prevents dispute between competing stakeholders in the forest; the effectiveness of such allocation depends, however, on the social and legal recognition of these rights and their enforceability.

**Recognition of rights.** The allocation of forest resources and land needs to consider customary tenure systems. State-sanctioned tenure systems often reveal a bias toward allocating title to individuals or households that contradict a rural community's customary tenure systems. The dual nature of land tenure arrangements persists whether national policies explicitly recognise customary tenure systems, ignore them or actively work to dismantle them. Attempts to completely overturn customary tenure systems and replace them with formalised systems of purely individual property rights have rarely been effective, prompting a shift in approach from replacement to adaptation (Bruce 1998).

**Enforceability.** The feasibility of tenure reforms depends on the robustness of the underlying system of rights and the supporting legal system. In many REDD+ countries, the rule of law is weak, corruption rampant and the judiciary inefficient and partial.<sup>1</sup> Court rulings are further complicated by lack of registration and cadastral maps. Enforcing legal title through judicial means is therefore difficult.

For tenure reform to be a viable part of a national REDD+ strategy, it therefore has to establish clear title to forest resources so that users feel that their obligations for managing and maintaining the resources are matched by corresponding rights. Rules governing the use of forest resources have to be vetted through a participative process and reflect national and local realities. Taking into account the general weakness of legal systems in many REDD+ countries, tenure reform should as much as possible build on existing and recognised customary title and enforcement systems. It is also important to recognise the challenge that comes with tenure reform: it must support REDD+ to ensure long-term sustainability of reformed tenure systems, but in itself may not be the most obvious way to reduce emissions in the short term.

---

<sup>1</sup> For the World Bank's governance indicators, see <http://info.worldbank.org/governance/wgi/index.asp> (1 November 2009).

### Box 12.1. REDD+ as natural resource?

The reduction of emissions or increase of removals – or the forest carbon pool itself – is sometimes compared to natural resources, such as oil, gas or minerals. The experience in the natural resources sector suggests that governments should manage funds and ensure equitable and sustainable use of these funds to the benefit of the whole community. However, this comparison is not fully accurate. First, while natural resources are usually traded internationally at prices that guarantee healthy profit margins, the same is not yet clear for REDD+. For many countries it may take years to get ready to participate in a global carbon market and this is against the prospect that there is no guarantee of price, predictability or stability of the market. Second, natural resources are legally regulated and in almost all jurisdictions the state has a legal claim over such resources. The state can give out concessions to allow private actors to mine the resource, but often retains the overall control over the resource. In the case of REDD+, the targeted forest (the one under threat) – whether under government, community or private ownership – is a resource that is already used, divided and exploited. Payments will therefore primarily be needed to compensate for the loss of income and rights, rather than to contribute to public funds that can be used for the community benefit. Third, the service to be traded – emission reductions and removals against an agreed reference level – is much more elusive than a barrel of oil or an ounce of gold. Whether they come as carbon credits, emission rights, or allowances, tradable REDD+ benefits are always politically constructed commodities that confer an intangible rather than a tangible right.

The situation is slightly different when countries seek compensation for projected future emissions. Countries with high forest cover and low deforestation rates argue that their forest resources could be considered as a saving account which would be monetised at will, once investments are flowing, or the government opens up the resource for exploitation. These countries argue that REDD+ payments are needed to remove future (rather than actual) pressure from the forest and that funds are needed to ensure low-carbon development. In these cases, REDD+ carries little actual costs, payments are not required to compensate lost income and benefits by implementing REDD+ policies are not needed. In these cases, REDD+ payments indeed are more akin to natural resource payments which can be used for the benefit of the community at large.

However, two important lessons from the management of state-owned natural resources hold for REDD+. First, whenever the state is negotiating access to resources, multiple stakeholders wish to benefit from it, whether they have a right or not, and whether they bear the costs or not. Second, a REDD+ scheme can only work if it is supported by a large consensus in the population, not so much because of the sharing of benefits, but because of the sharing of costs associated with a new land use system which protects forest resources at the cost of short-term interests.

Although tenure reform is a condition for the sustainable success of REDD+, it is a long-term process which has to be supported by participative processes and consultations to ensure legitimacy and recognition of the allocation of rights. The process has to go hand in hand with measures that strengthen the judiciary to enhance trust in the legality of the system and the enforceability of rights. Governments and countries engaging in this process will have to allocate time and resources to this process, which has to become an integral part of the long-term vision of the country. As tenure reform takes a long time to be fully implemented, it cannot be a precondition for REDD+ implementation. Instead, it must be one of the policies that ensure the eventual sustainability of REDD+.

## **Allocation of carbon rights**

The implementation of REDD+ at the national level involves more than just clarifying existing rights to resources; it also creates a set of new legal rights that relate to the reduction of GHG emissions and sequestration potential of a particular activity. Such ‘carbon rights’ describe the right to exploit the climate benefits of an activity, that is, its emission reduction or sequestration potential. Carbon rights are defined at different levels: through international law as in the flexible mechanisms of the Kyoto Protocol; through nationally binding legislation as in the European Union Emission Trading Scheme (EU ETS); or through private legal contracts as in the voluntary carbon market (Wemaere *et al.* 2009).

Carbon rights that may be defined in the context of an international REDD+ mechanism under international law, the UNFCCC or the Kyoto Protocol are assigned through treaty to the various state parties. Through legislation that transposes international legislation into national law, a government may decide to pass on and regulate ownership of carbon rights in the national context. The simple fact that a country participates in an international trading scheme, however, does not mean its government must create national carbon rights.

The Kyoto Protocol may serve as an example of a treaty that assigns carbon rights in the form of assigned amount units (AAUs) to parties and allows the creation of credits via the Clean Development Mechanism (CDM) and Joint Implementation (JI). While most industrial country parties to the Kyoto Protocol have authorised private entities to participate in CDM or JI projects, only New Zealand and Australia foresee the holding of AAUs by private actors. The countries of the European Union do not authorise private trade in AAUs, nor have they regulated ownership of forest carbon or allocated the right to removal units, the Kyoto unit for land use, land use change and forestry (LULUCF) emission reductions and enhancement in carbon stocks.

A country can receive incentives to increase storage of carbon in forest and agricultural systems in the form of tradable carbon, but it does not necessarily need to pass these rights (as tradable carbon rights) on to those that hold national entitlement over forest resources. If a country, however, decides to authorise private actors to participate in carbon trading, title over the currency of the trade – the carbon rights – needs to be established.

Although many REDD+ policies can be implemented without allocating carbon rights, the clarification of these rights is essential where governments authorise the implementation of carbon projects and the subnational generation, crediting and trading of carbon rights. Very few countries have adopted legislative definitions of carbon sequestration rights or integrated the concept of the CDM's Certified Emission Reductions (CER), Verified Emission Reductions (VER) or other carbon rights into national law. In the absence of a clear legislative framework defining principles of ownership for emission reductions, uncertainty exists as to how legal title to these rights can be securely established and transferred. To eliminate ambiguity, countries may also decide to adopt laws to allocate carbon rights. The allocation of carbon rights can go along with the setting of national and subnational reference levels. Another way to allocate entitlement to carbon is to design a national REDD+ scheme that sets regional-level or project-level reference levels, on which regional governments could base the allocation of carbon rights. Allocating rights to district administrations, projects or forest owners on the basis of subnational reference levels can therefore be a way to establish, quantify and clarify carbon rights, and to determine the potential size of any benefits the carbon rights holders will receive from a carbon credit scheme.

For developers of forest carbon projects, it is crucial to establish, as a first step, the legal entity or natural person authorised to explore the benefits associated with a particular activity. If carbon ownership is not regulated, there is a legal assumption that emission reductions and enhancement in stocks would be treated like any other economic benefit of a particular activity. The entity that has a right to the forest land is usually recognised as the owner of the primary carbon rights. Assuming that the right to the carbon follows the right to the land and to use the forest, carbon rights would rest with the government where the government controls both land and forests. Where local communities or indigenous people have a right, customary or codified, to use the forest, they would also hold rights to the forest carbon. The primary right to the forest carbon of private land and forest rests with the owner of that land.

## **Allocation of international REDD+ payments**

National REDD+ efforts are likely to be supported by international incentive schemes. Such schemes foresee the rewarding of GHG reductions through



## Box 12.2. REDD+ risks: Managing expectations

A number of international initiatives have emerged following the mandate included in the Bali Road Map for supporting REDD+ demonstration activities, over and above ongoing activities in the area of forest protection. Around 40 developing countries are now engaged in REDD+ strategy development and pilot activities.

REDD+ readiness is often initiated by the national forestry or environmental agencies, which, as a first step to build national consensus, have to get attention and elevate REDD+ to a Cabinet-level priority. For most countries, the implementation of REDD+ policies means a substantive shift in the way land and natural resources are managed and involves a new consensus for sustainable land use – a consensus that forest authorities cannot forge alone. Involving the relevant ministries and government agencies whose decisions affect land use decisions (agriculture, finance and infrastructure) is therefore a first priority in the readiness process.

While attention from line ministries may be hard to get, nongovernmental stakeholders in many REDD+ countries are well aware of REDD+ and associate the emerging mechanism with opportunity and threat in equal measure. However, knowledge of the emerging REDD+ mechanisms is often sketchy, based more on political fears than analysis backed up by facts. The perceived political risks often precede any consideration of what REDD+ means in the national context. The demands by international donors to hold extensive consultations as early as at the stage of preparing a REDD+ proposal do not necessarily help in rationalising the debate. Without a definition for an international REDD+ mechanism or national implementation measures, consultations tend to revolve around broader political issues, general injustices related to land tenure systems and the recognition of indigenous and other rights of local stakeholders, rather than on specific REDD+ actions.

Developing countries have shown extraordinary leadership in moving the REDD+ negotiations to their current position and in showing willingness to engage in REDD+ readiness long before adequate funds have been pledged to support these efforts. The engagement of all levels of society, from the treasury to forest dwellers tends to create expectations which, on the one hand, present national and international leaders with a unique opportunity to seize the moment and start implementing REDD+. On the other hand, the same engagement creates risks: If REDD+ funds are not forthcoming – or not fast enough – national leaders will have a hard time justifying to their constituencies their country's engagement in yet another mechanism that falls short of delivering real finance to support developing country action. It is the responsibility of politicians of countries that implement REDD+ and those that provide financial support alike to ensure that these expectations are managed.

market-based or fund-based solutions, possibly in a phased approach (see Chapter 2). Where entity-level trading is established, those that participate in emission reduction activities earn carbon credits, which they may sell on domestic or international carbon markets. The main proposals for the global REDD+ architecture are, however, for a national approach; that is, most international payments will eventually go to national governments, which will use them to support national REDD+ policies. Provisions regarding the domestic allocation of such REDD+ payments are often referred to as 'benefit-sharing' provisions.

An underlying idea of REDD+ is compensation for those that reduce forest emissions and increase removals; however, the strong focus on benefit sharing might disguise that REDD+ will primarily bring costs rather than benefits. When deciding appropriate REDD+ policies, governments will have to decide how to distribute the burden of reducing access to forest resources among groups and members of society. Governments may seek ways to limit the social, economic and political costs of REDD+ implementation by allocating the burden of REDD+ to actors that are able to bear them. Where REDD+ policies curtail and limit existing rights to forest resources, the government could compensate the loss of access. Such compensation can take the form of direct payments of opportunity costs, but it can also take the form of allocation of noncash benefits to the affected individual or community.

Moreover, REDD+ raises the question of who has the right to be compensated. There is general agreement that any government intervention that directly limits either a property right to land or a right that authorises tenancy and use of forest resources should be compensated to mitigate the negative effect of the measure. Things get more complicated if policy interventions have indirect negative effects, such as the reduction of land value by changing zoning laws or removing agricultural subsidies. While the decision regarding the need and degree of compensation will be answered in the light of the respective legal system, there are some generally accepted limitations to the right to be compensated. For example, limiting forest emissions by reducing illegal activities should probably not be compensated, but determining what constitutes an illegal activity is a political decision.

Whether REDD+ policies restrict access to forest resources to local communities or restrict the right to exploit forests to private landowners, those that suffer a loss will have to be integrated into REDD+ regimes. Where the government takes forest carbon under central management, private owners of the land and forests will have to be compensated for what the government takes. Where restriction in access leads to a loss of income or livelihood, development programmes will have to be set up to guarantee for local populations alternative sources of income, energy, food or shelter.

Where the government limits access to forest resources – in particular where such access builds on rights established by formal law, custom or tradition – compensation is mandated, whether by law in liberal systems that protect private property, or for social and equity reasons. In particular in countries where the relationship between the state and the nongovernmental sector (private sector, communities, individuals, civil society) is characterised by mistrust, fair compensation schemes are needed to create confidence among various actors, and generate valuable data and lessons learned. The discussion on benefit sharing should therefore be replaced by a debate on the design of appropriate incentive and compensation schemes that are essential to mobilise forest carbon emission reductions.

## Outlook

The discussion on benefit sharing, expected revenues and the generation of carbon credits has generated a mixture of expectation and fears which constitute an increasing challenge for REDD+ implementation at the national level. Expectations of significant REDD+ benefits have led to covetousness at various levels of government and to concerns among local forest stakeholders that they could be left carrying REDD+ costs without sharing in REDD+ benefits (Box 12.2).

A variety of policy options are available to achieve REDD+, and they have different needs in terms of the right definition and allocation, for example of carbon rights. The clarification of forest tenure and carbon rights is essential for the sustainable success of REDD+. Recent literature on REDD+ further suggests that the clear allocation of carbon rights is equally a prerequisite for REDD+ actions, even though it does not itself ensure a reduction of deforestation (UN-REDD Programme 2009). The underlying assumption is that REDD+ implementation would consist of PES schemes that make forests economically competitive by paying those who reduce deforestation and degradation and enhance forest carbon stocks. Without clear title to land, trees and carbon, it is difficult to establish a PES or REDD+ payment system. While it is important to clarify carbon rights in entity-level carbon finance transactions, the implementation of many, if not most, REDD+ policies does not require establishing title to the forest carbon. Hiring additional forest rangers, removing subsidies for biofuels or reforming environmental impact laws for infrastructure projects may all make viable REDD+ policies. None of these interventions requires the clarification of carbon rights.

Furthermore, until reliable MRV systems are in place, it will be difficult to monitor, verify and reward GHG emissions reduction and removals at the level of the individual land or forest owner. Payments may therefore be linked to the adoption or omission of certain practices, or for payments for GHG

emissions reductions at higher geographical scales rather than at individual levels. Activity-based subsidy and payment systems therefore do not require clarification of title to carbon rights.<sup>2</sup> The establishment and registration of forest carbon rights as part of a domestic emission trading scheme are required only where domestic or international emission trading schemes authorise the entity-level transfer of forest carbon rights, such as in the systems established in Australia and New Zealand. However, where a government claims international benefits for activities implemented by local, private actors on nonstate land, it would have to establish compensation schemes that allow those owners to participate in the international financing for REDD+.

The debate over appropriate benefit-sharing regimes stands in contrast to the notion of cost-efficient climate benefits associated with the low abatement costs for REDD+ (McKinsey *et al.* 2009). While the discussion of benefit sharing assumes REDD+ transfers above actual costs, traditional transfers for climate mitigation and adaptation traditionally limit the international contribution to the 'incremental' costs of a particular measure. Larger rents due to forest carbon can accrue only if the government overcompensates those bearing the costs of REDD+, which is unlikely, or if REDD+ carbon is being traded on international markets above opportunity costs. Taking into account that most market advocates see REDD+ as part of a global market of fungible carbon units, it is not unlikely that REDD+ units can be sold above costs. While this carbon market link may create a stable and predictable income, it creates a headache for those aiming to reduce the overall costs of climate change by achieving emission reductions at as close as possible to abatement costs (Project Catalyst 2009). Such large-scale international trading of carbon credits from REDD+ is most likely a few years away, and the details of how REDD+ is to be included are yet to be worked out. In the meantime, it is important to maintain realistic expectations about the benefits to be shared and not lose sight of the overall climate goal.

---

<sup>2</sup> In Costa Rica, for example, PES systems can be implemented without clarifying who owns the forest carbon.