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Carbon rights legislation: not yet ready for private sector REDD+

REDD+ is already developing private sector engagements, making rights to sell and benefit from reduced emissions (carbon rights) a crucial issue. Our review of private sector REDD+ projects reveals tendencies for legal arrangements that reinterpret tenure law so as to bundle the new commodity of carbon regulation with existing rights to tangible resources. Provisions for benefit sharing, particularly those aimed at addressing the underlying causes of forest degradation, are often vague or missing. Given the size and duration of private REDD projects, this has far reaching and long term implications for communities and countries.

Policy pointers

- **Without consistent** legislation on carbon rights, private sector REDD+ actors are reinterpreting land and forest legislation to establish rights over this new commodity.
- **Sharing mechanisms are** often unclear, suggesting most benefits accrue to the private sector, not communities or state.
- **A few countries have** introduced project-specific taxation, but most are missing the opportunity to generate revenue from private sector carbon credits. Experience in logging and other sectors suggests promised community benefits may not materialise without binding agreements.
- **REDD+ must focus on** what drives deforestation and forest degradation, ensuring local communities that help retain or enhance carbon also derive benefits. Community-owned land and forest resources should be further explored to achieve this.
- **Governments need to put a** move from opportunistic to long term legislation on carbon rights high on strategic development agendas.

Getting ready for REDD+

Countries are planning for the UN-REDD programme and the Forest Carbon Partnership Facility. They are designing national strategies for REDD+ (reduction of emissions from deforestation and forest degradation, conservation, sustainable forest management and enhancement of carbon stocks), capacity building and anticipating how REDD+ might work in practice. Already, emerging policy lessons could help scale up REDD+ implementation.

Governments, national and international NGOs are at the forefront of REDD+ testing, but the private sector is also involved; using its experience of afforestation and reforestation initiatives linked with the clean development mechanism, and tapping into carbon voluntary markets.

The private sector's involvement is much debated, particularly as it often remains unclear who holds rights to services such as carbon, and who benefits (and how) from private sector REDD+ investments.[1–4] Many believe that early private sector involvement is important, both to help REDD develop a market mechanism, and to close the financing gap.

But early engagement — leading to long concession periods before legislation on carbon rights, benefit sharing with local communities and taxation is established — leaves local people and national revenues vulnerable. It remains crucial to ensure local communities' rights are protected if REDD+ is not to exacerbate poverty.

IIED is developing and analysing a databank of private sector REDD+ initiatives in developing countries. This briefing discusses our early findings, related to tenure arrangements.

Private sector involvement: who and why?

More than 100 REDD+ projects in Africa, Asia and Latin America have private sector involvement. These are generally exploring opportunities in voluntary markets. Private actors include private manufacturing and service companies, private foundations, carbon project developers, legal assistance providers and credit brokers, as well as companies established by NGOs.

These projects have diverse objectives besides reducing emissions, including: (i) creating private protected areas on private land; (ii) conducting research, for example into carbon stocks or alternative energy generation that can help generate carbon credits for the market; (iii) conserving existing public protected areas and buffer zones; (iv) safeguarding sovereign frontiers; and (v) developing alternative income generation opportunities for local communities that are compatible with nature conservation.

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Tenure arrangements

State and private ownership dominates formal tenure arrangements for land, forests and other natural resources, and these often override existing customary use rights. The few exceptions are in countries such as Ghana, Lesotho, Swaziland and Papua New Guinea, where customary rights are vested in traditional authorities.

It often remains unclear who benefits from private sector REDD+ investments

State ownership is most common, and does at least provide for some adjudication on investor and community use rights, including a route to recognise community rights and establish leasehold rights for private investments. Examples are found in Cameroon, Democratic Republic of Congo, Indonesia, Mozambique and Tanzania.

Private tenure regimes feature in relatively few countries but these include Brazil, Kenya, Zimbabwe, Namibia and South Africa, which all have or are exploring REDD+ projects. Private ownership makes it easier for individuals or organisations to transact land and, by extension, carbon rights. That makes agreements for REDD+ implementation faster, but not necessarily fairer to the people or the state.

Resource rights and payments for services

Irrespective of tenure regime, there is generally a common understanding of rights over tangible resources. For example, all countries have land rights that allow investment in agriculture and infrastructure development; and forest, water and mining rights to allow extraction of goods.

However, Payment for Ecosystems Services (PES) schemes, the Clean Development Mechanism (CDM) and REDD+ initiatives, seek to value supporting and regulating services, put a price on these, and sell them in the market.

PES schemes generally acknowledge and compensate communities and other land users for maintaining forest functions of important water catchments, including carbon storage. CDM projects based on afforestation and reforestation are usually clear both on land ownership and on the tree planting investors' right to benefit from timber, as well as from carbon sinks (provided that land acquisition has followed due process and does not alienate the rights of local communities — usually verified when the investment is certified or validated).

But for successful REDD+ initiatives, the critical issues are:

- what is driving the deforestation or degradation;
- who are the major players in those changes; and
- what role will they play in mitigating the effects of their practices?

In our analysis of private sector engagement in REDD+, such thinking seems to be a common gap. Simply preventing shifting cultivation is not enough. It is essential that REDD+ schemes also provide tools and practices that let communities increase their productivity without degrading forests. Otherwise, local people, whose unsustainable exploitation of forests is usually for much-needed subsistence reasons, may be pushed further into poverty.

The objectives listed by projects with private sector involvement usually seem to suggest that extending the concept of conservation/protected areas from state to private sector (or establishing such areas on private land) also extends the rights for 'harvesting' and commercialising the carbon irrespective of who was using those resources before.

Clarifying carbon tenure is important because it has repercussions for benefit sharing. Our analysis found that private sector models vary (see How carbon rights are devised). Some generate revenue only for their investors. In some, taxation provides state revenue, and in others communities receive revenue (though it was not always clear how project developers apportion this).

Those projects claiming to benefit communities also cite indirect benefits, such as capacity building, and employment opportunities (for example, in patrolling the REDD+ project area borders), extension services,

How carbon rights are devised

Project documents generally discuss land tenure extensively, but the same is not true of carbon rights. As carbon storage was only recently acknowledged as a tradable environmental service, a number of countries have yet to incorporate it in their legislation. This lack of clarity has led state and private project developers to come up with innovative ways to treat this new commodity, for example:

- Where carbon is not expressly mentioned in the regulations, some project developers are interpreting it to be a product of the forest, similar to wood, non-timber, wildlife, and fishery resources (because it is a function of forest biomass). Where local communities hold exclusive rights to community forests' products, project developers may conclude there is sufficient basis for attributing carbon rights associated with project activities to the communities responsible for carrying out those activities.
- Where the law determines that the state owns all land and water, including subsoil minerals, the project developer and the state may consider that the state also owns the carbon rights and can transfer them to the project developer by signing a carbon rights agreement.
- Governments have sometimes endorsed a particular REDD+ initiative in a local community area by granting land tenure (renewable on an agreed time frame). The government owns the land but recognises the communities' temporary use rights as entitling them to the carbon credits generated in the area. The government, though, acts as the carbon seller.

and provision of social infrastructure such as schools and clinics. However, experience elsewhere suggests that in practice these may not materialise.[5] The underlying problem is the lack of legal instruments for setting monitoring systems, and defining and enforcing standards.

Case studies from the Democratic Republic of Congo, Kenya and Tanzania (chosen to focus on Africa and to draw on projects with good documentation) reveal a variety of ways to interpret existing legislation and develop carbon rights agreements (see Land laws and carbon rights: case studies). They show distinct categories of: carbon rights with state taxation (Mai Ndombe DRC); agreements that acknowledge yet override community rights (Isangi, DRC); private-private transfer of rights (Kasigau, Kenya); and private-community agreements (Tanzania).

Tenure and REDD+ in the Democratic Republic of Congo

The Democratic Republic of Congo's 1973 Land Tenure Law stresses state ownership of land and natural resources, but recognises customary norms and rights to occupy, live, cultivate or exploit it by any means — individually or collectively. There are two caveats. One is that the same law transfers community land to the domain of the state, requiring regulations to govern the rights to use the land; and the second is that customary authority is recognised only as long as it conforms to the constitution.

The DRC case studies show a government commitment to facilitate private sector investment (by issuing specific agreements on carbon rights) and also recognition of the need to generate revenue by taxing carbon sales. Project-specific taxes can be the quickest (though not necessarily the best) solution for governments needing to ensure some in-country revenue from private-sector REDD+ proposals.

The second DRC example also shows how private sector interests that have access to high value forest concessions are claiming rights to all products and services, including carbon credits. Extending the legal provisions for harvesting timber to capture the economic value of 'no-logging' offers an interesting perspective.

Applying the same concept elsewhere could make communities eligible to own 'high timber-value' forest concessions for the purpose of maintaining its carbon storage capacity. At present, communities rarely obtain rights to high-value timber concessions due to their limited capacity to invest in sustainable logging management plans and processing technologies. Even where community rights are acknowledged, they generally gain access to poorer-stocked and lower-valued timber areas (with perhaps some exceptions such as in Mexico). Importantly, communities would also potentially offer better enforcement capacity,

Land laws and carbon rights: case studies

Mai Ndombe REDD+: The Mai Ndombe REDD+ initiative (covering 300,000ha) was established to tap into bilateral and multilateral financing mechanisms. The Government of DRC approved the project and signed a forest conservation concession and a carbon rights agreement that provide durable incentives for accessing market-based carbon finance. The project is a joint venture by the Canadian company Ecosystems Restoration Associates Inc. (ERA) and the USA-based company Wildlife Works. The companies pledge that "a percentage of the proceeds from the sale of verified emissions reductions will be used to support improved access to potable water, agricultural and economic diversification activities, local infrastructure development related to education and health, and capacity-building activities that will empower local communities to play a greater role in determining their future". ERA holds clear and uncontested rights to the carbon credits generated in the project area, is liable for an annual area tax, shares profits with the government and shares a portion of carbon revenues with local stakeholders.[6]

Isangi REDD project: Isangi forest belongs to the community, whose chief regulates land use and manages conflicts. The chief acts as a guarantor who can allocate land to clan members but cannot sell it. However, the project area is under a pre-existing logging concession awarded to Safbois by the DRC government. The government's endorsement of the Isangi REDD project grants Jadora/Safbois SPRL ownership rights to carbon credits generated in their logging concessions, and the right to explore this alternative revenue option.[7] The project area covers 155,000ha. Jadora commits to providing social infrastructures and services including constructing new schools and providing free educational materials, health facilities and agricultural extension services. The project runs for 30 years.

Kasigau REDD+: Kasigau REDD+ initiative is in Rukinga Sanctuary, Taita Taveta District, Kenya. The Sanctuary comprises 14 group-owned ranches (mostly based on kinship and traditional land rights). The REDD+ initiative, encompassing about 200,000ha, is run by Wildlife Works, the same company operating in DRC, and holds Voluntary Emission Reductions certificates for REDD+ under both the Verified Carbon Standard, and the Climate Community and Biodiversity Standard. The company has held a 'wildlife conservation and land management operating agreement' with Rukinga Ranching Company Ltd since 2005. More recently, Rukinga Ranching Company granted Wildlife Works a shareholder-approved carbon rights agreement/conservation easement that lets the company explore the land for carbon. Wildlife Works has also secured written commitment from the local authorities to assign the carbon rights of the adjacent Marungu Hills Conservancy. (Conservancies are areas where the primary objective is wildlife conservation. They can be managed by the state, communities or private sector.) Wildlife Works is supporting secondary (and some tertiary) education for over 700 young people, undertaking water projects and training Kenyans to intensify agriculture through organic greenhouse vegetable production and jojoba oil extraction. Some cash payments have been made, but there are still ongoing negotiations on sharing profits rather than revenue from carbon sales. The impacts of these benefits still need to be established, in particular how effectively technologies to increase productivity of the marginal lands have been transferred so as to protect local livelihoods and food security.

Carbon Tanzania and MCDI: Tanzanian-registered Ecological Initiatives Ltd has established a social enterprise called Carbon Tanzania that partners with a community-based forestry management organisation, Mpingo Conservation Development Initiative (MCDI), to implement carbon trading in Kilwa district, southern Tanzania. The objective is to work with communities that MCDI support, and to extend management plans for high-value timber to encompass carbon credit trading. This partnership applies Climate Community and Biodiversity Alliance standards and the Voluntary Carbon Standards. Carbon Tanzania has also signed partnership agreements with community representatives from Mongo Wa Mono and Domanga in Mbulu district, northern Tanzania. When validating carbon credits, the partnerships are using Plan Vivo, an international standard that promotes community-led initiatives and prioritises rural livelihoods. Carbon Tanzania then trades credits in the voluntary market.

particularly for protection that they would themselves devise to maintain and grow the carbon stocks that give them credits. They have clear advantages in numbers and local knowledge over distant law enforcement officers or licence issuers.

Tenure and REDD+ in Kenya

Kenya introduced a new land law in 2012 that acknowledges private, public and customary land. Previous laws, now repealed, granted title deeds under freehold tenure of more than 99 years. Although these need to be re-registered, they are not revoked; hence the land distribution patterns are likely to remain largely unaltered.

Provisions for private land ownership in the country's constitution, combined with its other land legislation, have let private companies transfer rights from one to another, and let local state agencies transfer rights to the private sector. Traditionally such transfers would cover rights for producing goods such as beef, timber and crops as well as for tourism and game from hunting. With the advent of REDD+ and the possibility of trading carbon credits, rights to land and to forest — often associated with rights to provisioning and support services that allow production of food and harvesting of timber and non-timber forest products — have become bundled with rights to regulation services (that is, carbon rights).

Tenure and REDD+ in Tanzania

In Tanzania land belongs to the state but there are significant provisions both in the land and forest legislation that secure rights for local communities. The Village Land Act affords communities customary rights of occupancy in perpetuity. The Forest Act (2002) also provides ownership and use rights for forests on village or community land, and paved the way for community-based forest management in the country. A new forest policy was drafted in 2012 and makes explicit reference to the fact that payments for ecosystem services through carbon or watershed protection (PES) will be promoted to strengthen private sector and community investments.

Who stands to benefit or lose?

Large areas of land in developing countries are often acquired, either as privately owned land or leased from the state (for up to 99 years) but are frequently then left idle, perhaps owing to lack of capital, or because the acquisition was for speculation. In this context, REDD+ might make 'non-investment' a viable business proposition for the title holders, because carbon stocks can be assessed and traded. From a climate change mitigation standpoint this looks positive. But its downside can be lost access and use rights.

REDD+ is still at the trial and error stage in establishing carbon rights. Our analysis does offer important insights into innovative ways to secure private sector engagement in REDD+. Yet it also indicates that a legal vacuum prevails. No country had clear legislation on what carbon rights are, why they should be bundled with land and forest rights, or the conditions/prerequisites for acquiring and transferring those rights to the private sector.

Nor does legislation ensure that private sector REDD+ helps local land users increase productivity and use forest resources more efficiently, thereby addressing the underlying drivers of land use and land use change. Rather, the current arrangements seem to benefit mostly the private companies. Policy needs to set out clear rules, rights, obligations and processes. It should establish whether carbon rights and traded credits should be taxed, and if so by how much. The general absence of clear taxation mechanisms and safeguards for ensuring benefit sharing disadvantages both the state and communities. The private sector experiments described above cover vast areas and span decades. Mistakes made today could take generations to put right.

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Notes

[1] Nhantumbo, I. 2011. *REDD+: Ready to engage private investors?* IIED briefing. IIED, London. See: http://pubs.iied.org/17112IIED [2] Cotula, L., Mayers, J. 2009. *Tenure in REDD: start point or afterthought?* IIED, London. See: http://pubs.iied.org/13554IIED [3] UNEP Finance Initiative. 2011. *REDDy Set Grow – opportunities and roles for financial institutions in forest carbon markets.* UNEP. See: http://www.unepfi.org/fileadmin/documents/reddysetgrow.pdf ; [4] Peskett, L. 2011. *Benefit sharing in REDD+: exploring the implications for poor and vulnerable people.* World Bank and REDD-net. [5] For example, in Mozambique companies tend to offer these indirect benefits during the consultations before timber harvesting concessions are issued. But even when promises are fulfilled, the infrastructure is often of poor construction quality, and lacks provisions for service delivery. In several cases promises have remained unfulfilled, generating conflicts between investors and communities. [6] For more information, see http://www.reuters.com/article/2012/03/12/idUS133009+12-Mar-2012+MW20120312 and http://www.coderedd.org/redd-project/era-inc-mai-ndombe/ [7] http://www.jadorallc.com/project_isangi.html

This briefing has been amended since its original publication. In the box on page 3, corrections have been made to the locations of ERA and Wildlife Works, and details of the Kasigau REDD+ initiative.

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