

REDD+

High level policy brief

Summary of key issues

The REDD+ Law Project was established by Baker & McKenzie and the Cambridge Centre for Climate Change Mitigation Research (University of Cambridge), working with international and local advisers and institutions to assist countries in the development and implementation of their national REDD+ legal frameworks.

1. Introduction

Globally, forest covers around 30% of the Earth's land surface (nearly 4 billion hectares). Forests provide valuable ecosystem services and goods, provide a habitat for a wide range of flora and fauna, and within them hold a significant stock of forest carbon. The total carbon content of forests has been estimated at 638 Gt (2005), which is more than the amount of carbon in the entire atmosphere. Deforestation, driven mainly by the conversion of forests for agricultural activities, occurs at the alarming rate of 13 million hectares every year (as estimated for the period 1990-2005). Deforestation results in immediate release of the carbon stored in trees, thereby contributing approximately 20% of global greenhouse gas emissions (it is estimated that deforestation contributed approximately 5.8 GtCO₂/yr to global greenhouse gas emissions in the 1990s). According to the Intergovernmental Panel on Climate Change (IPCC) in its Fourth Assessment Report, reducing and/or preventing deforestation is the mitigation option with the largest, and most immediate, carbon stock impact.

International efforts to reduce emissions from forest destruction have developed through the United Nations Framework Convention on Climate Change (UNFCCC)/Kyoto Protocol negotiations, resulting in the global policy called *Reducing Emissions from Deforestation and Forest Degradation and the role of conservation, sustainable management of forests and enhancement of forest carbon stocks in developing countries* (REDD+).

This evolving global framework (which includes safeguarding principles) is expected to be implemented at the national level. However, **REDD+ is complex, involving many new legal concepts** and significant work is required to develop legal frameworks that will implement REDD+ in a manner that is consistent with the UNFCCC framework. While areas such as MRV and stakeholder engagement have been the focus of many efforts in relation to REDD+, work to directly build and implement the specific and necessary legal frameworks at a national level for REDD+ has not occurred in a manner that can facilitate the actual development and implementation of REDD+ programmes. For example, complex legal issues such as those related to land tenure, carbon benefits and benefit sharing, constitutional compliance and conflict resolution as they relate to REDD+ have not been addressed in the level of detail required to provide certainty about the domestic rules that will guide REDD+ implementation. This is particularly the case in terms of developing jurisdictional approaches to REDD+ at the national and sub-national level.

The importance of national legal frameworks for REDD+ implementation has been noted by UN-REDD,¹ GLOBE² and other leading commentators.³ The development of new national legal frameworks to implement REDD+ will be critical to underpin the successful implementation of national REDD+ strategies and to enable activities to be undertaken. Without strong REDD+ law (with respect to both the law itself and capacity to administer it), the successful implementation of REDD+ will not be possible and donors' investments in REDD+ will be at risk. However, the focus on legal frameworks for REDD+ has been minimal; it is important to note that the complexity of the issues involved and the time/resources required to build national legal frameworks for REDD+ is significant, and often underestimated.

REDD+ initiatives can build on existing laws – for example, land and natural resource law (including forestry), public finance and community rights and constitutional provisions. Alternatively, new legal frameworks may need to be developed especially where the current laws cannot be adapted to accommodate REDD+. In either case, any REDD+ laws must be consistent with existing constitutional provisions.

¹ See Francesca Felicani Robles, 'Legal analysis of cross-cutting issues for REDD+ implementation: lessons learned from Mexico, Viet Nam and Zambia' UN-REDD Programme (2013).

² Darragh Conway et al, 'The GLOBE Forest Legislation Study: A Review of Forest Legislation in Four Countries' (Report, The Global Legislators' Organisation, 2013), 33-34.

³ See International Union for Conservation of Nature (IUCN) [John Constenbader, ed.], *Legal Frameworks for REDD: Design and Implementation at the National Level* (Bonn: IUCN, 2009); Covington & Burling LLP and Baker & McKenzie, *Background Analysis of REDD Regulatory Frameworks* (Report prepared for The Terrestrial Carbon Group and UN REDD Programme: May 2009); Arild (ed), 'Realising REDD+: National Strategy and Policy Options' (Centre for International Forestry Research (CIFOR), 2009).

2. International implementation principles for REDD+ and forest carbon legal frameworks

2.1 REDD+ requirements under the UNFCCC and other legal regimes

The exact details of how REDD+ will be implemented are still being debated. However, there are now a clear set of principles, or expectations, that have emerged out of the UNFCCC negotiations, indicating what the international community sees as the essential elements of REDD+ implementation. These principles include safeguarding principles, such as protection for indigenous rights and actions to reduce the risk of reversals. At this stage of development, these REDD+ principles are expressed as high-level objectives and it is ultimately left to national governments to develop their laws in a way that will reflect and further develop these principles.⁴

Additionally, implementation principles have developed under other programmes and arrangements such as the Verified Carbon Standard (VCS), the methodology adopted by the Forest Carbon Partnership Facility (FCPF) and bilateral arrangements (such as Indonesia's partnership with Norway). Certain aspects of these principles are now being operationalised. A number of domestic emissions trading and offset schemes that support forest-based carbon sequestration activities (such as in Australia, New Zealand and California) have developed or intend to develop more detailed and comprehensive legal mechanisms for dealing with relevant issues, particularly those regarding land, forest and carbon tenure, and permanence.

The principles that have emerged through the UNFCCC, national frameworks and voluntary schemes will be useful to guide the development of content for any REDD+ legal framework or law.

2.2 REDD+ implementation principles

When considered collectively, the different frameworks set out at 2.1 above articulate what are considered to be the appropriate requirements for the implementation of REDD+ in a domestic system (hereafter, referred to as "REDD+ implementation principles") and include the following:

- ▶ Identifying the drivers of deforestation
- ▶ Defining REDD and REDD+ qualifying activities (including peatlands and mangroves)
- ▶ Establishing institutional arrangements
- ▶ Spatial planning dealing with land mapping and land management
- ▶ National forest carbon stock reference levels
- ▶ Measurement, Reporting and Verification (MRV)
- ▶ Permanence of REDD+ activities and carbon stock/actions to address the risks of reversals
- ▶ Safeguards including recognition of customary rights and Free Prior and Informed Consent (FPIC); public participation; and, environmental impact assessment
- ▶ Incentive structures for community participation and benefit sharing
- ▶ Implementation and enforcement, including forest types and concessions, sanctions for illegal logging and project approval requirements
- ▶ Developing national/sub-national approaches
- ▶ Permissible public and private participation in REDD+ activities
- ▶ Legal clarity over land, forest and carbon tenure.

⁴ This is very similar to the way in which the rules around the Clean Development Mechanism (CDM) developed. Initially, these rules were laid out in Article 12 of the Kyoto Protocol but over time developed through both the Marrakesh Accords and by governments introducing domestic frameworks to implement the CDM in manner that was consistent with those UNFCCC rules.

While some of these principles are fundamental to building a valid legal approach to REDD+, others are more relevant to the longer-term implementation of REDD+ activities and carbon accounting. Where they derive from the UNFCCC, further detail regarding the exact nature of the requirements will be developed through the negotiating process. Their practical application has occurred more at a domestic level and under the other instruments such as the VCS and FCPF, and also bilateral arrangements.

When designing its REDD+ legal framework, countries should refer to these implementation principles and draw on international experience. Given that many of the concepts required by REDD+ are new and without precedent, it might be necessary for countries to develop new laws in order to incorporate these principles. Developing REDD+ law to be consistent with the implementation principles set out above will help to ensure that countries align with both the UNFCCC and other bilateral agreements that countries might have with partners such as Norway and Japan.

3. Jurisdictional (national and sub-national) and project approaches

The early pursuit of REDD+ activities has occurred in the form of project-based activities (particularly under the VCS). However, there is a strong trend, supported by the UNFCCC process and being pursued by voluntary standards such as the VCS, to implement REDD+ at a jurisdictional level (whether that jurisdictional level is across a province or the whole country). Recognising the challenge of implementing REDD+ at the jurisdictional level in the short-term (in particular in determining jurisdictional reference levels and undertaking MRV), a number of countries are pursuing a "nested approach" which will enable projects to be developed in the short-term and be integrated into the jurisdictional programme in the longer-term.

The legal frameworks required for project-based or jurisdictional schemes are potentially quite different in terms of how they approach the management of REDD+ activities, and allocate liabilities and incentives. However, the need to implement international REDD+ principles and to deal with issues of tenure, permanence and rights to carbon will apply regardless of the approach adopted to REDD+ and irrespective of whether it is funded by private sector investors or donors. For example, where projects are developed, it is ordinarily the "project proponent" who will receive the primary benefits for achieving carbon sequestration/emissions reductions and who will bear the responsibility for managing permanence. If a jurisdictional approach is adopted, it will ordinarily be the provincial (or national) government who will derive the primary benefits and have the primary obligation to ensure permanence. The relevant government agency must then determine how to allocate secondary benefits to other stakeholders.

In all cases, national constitutions and national laws need to be followed or amended. In some cases where national governments have pursued a particular approach, national courts have held this unconstitutional and allocated rights to carbon to other parties.

4. Some specific legal issues

Strong REDD+ law (with respect to both the law itself and capacity to administer it) is required to avoid regulatory conflicts and uncertainty, and clarify key issues (such as carbon rights and being able to secure the permanence of forested areas). Strong REDD+ law is essential for the success of REDD+ and for facilitating investment into REDD+ initiatives (whether publicly or privately funded). It is important to be aware that under both the UN REDD Programme and the Forest Carbon Partnership Facility (FCPF), developing countries seeking to implement REDD+ have been given funding to prepare for this (often called "REDD+ readiness"). However,

within REDD+ readiness preparations, the focus on legal frameworks has been minimal. The complexity of the issues involved and the time/resources required to build national legal frameworks for REDD+ is significant and often underestimated (and involves a comprehensive analysis of existing laws, followed by their application to new issues).

REDD+ legal framework should reflect the REDD+ implementation principles drawn from the UNFCCC and other schemes (described above). In order to achieve this, clear legal positions will need to be developed regarding several issues, including some that will be new to domestic legal systems.

4.1 Institutional arrangements

The institution that will oversee and have the authority to implement REDD+ will need to be determined. This institution will need to overcome any potential conflicts or uncertainty regarding how it works with other agencies.

4.2 Legal clarity on land and forest tenure

Securing land and forest tenure is a key component of a successful REDD+ legal regime. This is because REDD+ activities have the greatest chance of success on land that is owned or controlled by one or more groups, all of whom are likely to have some claim to any benefits from a REDD+ intervention on that land.

While there are a number of general governance issues which impact on the administration of land and forest tenure (for example, corruption and challenges within decentralised management of natural resources), three are critically important to the successful implementation of REDD+:

1. Clarifying the legal status of community land and community rights with respect to forest areas (for example, in Brazil various community and indigenous groups have successfully sought legal rulings asserting their rights over forest areas and carbon in those forests);
2. Resolving overlapping natural resource concessions and ascertaining who holds such concessions; and
3. Identifying areas eligible for REDD + activities (for example, through comprehensive mapping).

When developing a specific REDD+ law framework, strategies to clarify land and forest tenure should be prioritised. For example, a new REDD+ law could implement REDD+ tenure arrangements that override all other arrangements following a process of consultation and agreement with existing land or concession holders.

4.3 Legal clarity regarding creating and owning carbon rights

As key stakeholders in REDD+ implementation, communities need to have entitlements linked to carbon clarified. In addition, a key driver of investment into REDD+ project activity is creating actual carbon rights and determining who owns them. To support both community participation and private sector support for REDD+ implementation, any new REDD+ legal instrument should create an explicit legal right to carbon that can be connected to arrangements on permanence (usually through agreements with the underlying holder of the land tenure and any concession holders over that land). In addition, where REDD+ is approached on a national basis, clarity over carbon ownership will help to avoid constitutional challenges.

4.4 Benefit sharing

Decisions about how to share benefits from REDD+ are critical to the success of REDD+. Considered choices about benefit sharing arrangements must be made, including who the beneficiaries will be and how benefits will be disbursed. Issues to consider include:

- ▶ **What is the benefit?** This is related to the legal clarity on carbon tenure, the legal right to carbon, and the legal clarity on carbon services. Both carbon and non-carbon benefits flowing from REDD+ activities need to be defined in law.

- ▶ **Who are the beneficiaries?** Policy choices identifying the appropriate beneficiaries of REDD+ need to be made. The State (at different levels of government), communities and project developers are each stakeholders for whom incentives need to be designed.
- ▶ **How are the benefits divided between the beneficiaries?** For example, rules found in national constitutions and statutes can affect how benefits are divided. Funds (at either the national, provincial and/or community level) could be used, as could contractual arrangements.

4.5 Permanence

Permanence (the guaranteed storage of carbon stocks on an ongoing basis without the risk of release) is a fundamental component of REDD+. Payments linked to the carbon stored through REDD+ activities will carry an expectation that the carbon sequestered in forests, vegetation or peatlands will remain stored permanently. Experience from Land Use, Land Use Change and Forestry (LULUCF) activities in the Clean Development Mechanism (CDM), voluntary standards and carbon forestry schemes in developed countries demonstrate that there have been a variety of approaches adopted to manage the issue of permanence, both at the project and jurisdictional levels. These approaches include issuing temporary credits (CDM), requiring a portion of emission reductions to be set aside in a buffer account for the duration of a project (VCS), or imposing a legislated obligation on project developers to maintain carbon stocks for periods of up to 100 years (Australia).

The legal frameworks for REDD+ at a domestic level will need to align the approach to permanence with emerging international standards and the requirements of funders/investors. The scale of REDD+ implementation within a country could affect its approach to permanence. A REDD+ law must also address the potential for permanence failure – for example, such a failure could be rectified by directly restoring any losses in the carbon stock, indirectly sourcing replacement credits, or cancelling issued credits. In the case of a project-based approach, it may also be desirable for a regulator to require that additional mechanisms such as bonds, guarantees or financial asset tests are implemented.

4.6 Enforcement of the law

Given the early stages of REDD+ development, most countries lack implementing laws and regulations for REDD+. However, effective law enforcement rules and implementation capabilities are critical in the REDD+ context - not only to manage potential conflicts over rights to benefits and land tenure, but also to avoid reversals through activities such as illegal logging. Some existing laws can play a key role, such as those that define illegal logging and associated crimes and stipulate criminal penalties. Close coordination with provincial governments and local communities is also required to assist with the implementation and enforcement of various aspects of REDD+.

4.7 National and sub-national government cooperation

Regardless of the approach adopted, the legal relationship between a national government and subnational governments must be managed. In the past, tensions have arisen where regional, state, provincial or district governments have pursued their own interests in relation to land concessions and protecting forestry areas (which have been driven by the central government). The separation of powers and responsibilities between national and subnational governments must be respected and there is a need to align the approaches adopted at each level of government. In addition, to the extent that certain key elements of REDD+ implementation have been decentralised to subnational level, political support and cooperation might be required, especially in the context of issuing conflicting land rights or activities that prevent permanence.

5. Conclusion

The evolving global REDD+ framework includes numerous elements - including safeguarding principles and different possibilities regarding the scale at which REDD+ is undertaken. It is complex, involving many new legal concepts, and requires the development of appropriate national legal frameworks to be successful. Developing legal frameworks for REDD+ will be an easier task for some nations than for others, depending in part on the complexity of land tenure and governance issues within a country. Legal norms and precedents will be established as countries work through REDD+ legal issues. Greater regulatory certainty will support the achievement of REDD+ outcomes for all stakeholders.

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