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Legal Frameworks to Support REDD Pro-Poor Outcomes

Patricia Parkinson & Dr. Andrew Wardell



DEVELOPING SUSTAINABLE & EQUITABLE LEGAL FRAMEWORKS FOR THE GLOBAL LOW-CARBON ECONOMY / LEGAL EXPERTS REPORT SERIES¹

LEGAL FRAMEWORKS TO SUPPORT REDD PRO-POOR OUTCOMES²

Patricia Parkinson³ & Dr. Andrew Wardell⁴

1. Introduction

Tropical deforestation is a major source of greenhouse gas emissions, especially in developing tropical countries. In these countries, tropical forests also provide a broad range of goods and services to millions of forest-dependent people. Insecure title over land and unclear land use rights continue to hamper the efforts of the rural poor to secure their livelihoods. Agricultural expansion, illegal logging, new road infrastructure and new settlements, and increasing demands for land continue to result in the loss of forests and the increased vulnerability of communities who depend on forest resources. The importance of forests in mitigating climate change also must be balanced by the concomitant need to ensure the effective participation of forest-dependent communities in developing sustainable forest management and conservation initiatives.

The inclusion of forestry projects in the international compliance market has been dogged by political and technical delays. Concerns have centred on the potential for “leakage” and “permanence.” Despite the significant technical, methodological and policy challenges that still need to be met, it is likely that REDD+ will represent an important component of any post-2012 climate change agreement.

The Bali Road Map, agreed in December 2007, called on governments and civil society to take early action by including activities that Reduce Emissions from Deforestation and Forest Degradation (REDD). REDD demonstration activities often start at a project or sub-national scale while progressively working towards national-level carbon accounting.

¹ This Legal Experts Report was produced through consultation with key experts participating in the programme of activities hosted by the Centre for International Sustainable Development Law (CISDL) and the International Development Law Organisation (IDLO) during U.N. climate change negotiations in Copenhagen, December 2009. The symposium engaged leading academic partners from the University of Cambridge, the University of Chile, the University of Copenhagen, Hong Kong University, Ibadan University of Nigeria, University of Atma Jaya of Indonesia, Jawaharlal Nehru University of India, McGill University, the National Litoral University of Argentina, New York University, the University of Oslo, the University of Sydney, the University of Toronto, Tsinghua University of China, the Arabian Gulf University, and Yale University. Key collaborators included the International Law Association, the UN Environment Programme, the UN Development Programme, the Office of the High Commissioner for Human Rights (OHCHR), the World Conservation Union (IUCN), ClimateFocus, the Clinton Climate Initiative and the Assembly of First Nations.

² These notes were produced in 2009 as a support for a presentation held at a side event of COP 15 in Copenhagen.

³ Environmental Lawyer, IDLO on Aceh Project Outcomes on Land Rights, Tenure and Local Communities.

⁴ Program Director, Forest and Governance, Center for International Forestry Research (CIFOR).

A key risk in designing REDD+ demonstration projects with a narrow focus on climate change is that this may continue to reward poor governance and do little to alleviate poverty.

2. Key Legal Trends

2.1 At the International Level

REDD International Legal Architecture

REDD had not been included in the Kyoto protocol and was only introduced at the 11th Conference of the Parties to the UN Framework Convention on Climate change by Costa Rica and Papua New Guinea. Two years later, the Bali Road Map supports a new REDD mechanism in encouraging “[p]arties to explore a range of actions, identify options and undertake efforts, including demonstration activities, to address the drivers of deforestation relevant to their national circumstances, with a view to reducing emissions from deforestation and forest degradation and thus enhancing forest carbon stocks due to sustainable management of forests.”⁵ Yet, REDD international legal architecture is still being defined through on-going negotiations through the work of the *Ad Hoc* Working Group on Long-Term Cooperative Action under the Convention (AWG-LCA), including on the inclusion of environmental and social safeguards for pro-poor outcomes.

The Right to Free, Prior and Informed Consent

The right of Free, Prior and Informed Consent (FPIC) is an important emerging norm of customary international law. It is recognised in a number of international instruments and decisions, amongst others in the *United Nations Declaration on the Rights of Indigenous Peoples*, which was adopted by the U.N. General Assembly in September 2007 with a majority of 144 states. It is also recognised in the OAS *Draft American Declaration on the Rights of Indigenous People* and in *ILO Convention 169 on Indigenous and Tribal Peoples*.

2.2 At the National Level

Interpretation of the evolving international legal framework continues to drive the definition of new national laws and regulations, and the institutions needed to manage climate change.⁶ A large number of REDD demonstration projects are now under development in Latin America, Sub-Saharan Africa and South-East Asia. These early project-based experiences have provided valuable opportunities for “learning-by-doing” for the broad range of actors implicated in their designing and developing. It has also helped to identify areas where existing legal frameworks can be harnessed in support of REDD projects, as well as key gaps and challenges, notably the risks associated with weak governance regimes. These are outlined in the following sections.

2.3 At Sub-National and Project Levels

⁵ “Reducing emissions from deforestation in developing countries: approaches to stimulate action,” decision 2 of COP 13, UNFCCC Doc. No. 2/CP.13, para. 3.

⁶ See for instance in Cambodia: Sar Char Norr 699 and Sub Decree 188 (re-structuring of MAFF inc. Forestry Administration).

REDD projects are currently being developed within the existing legal framework, with sub-national (Province or District) legal frameworks yet to be developed. The recognition of the need for effective social and environmental safeguards for REDD and other forest carbon programs has driven the development by the Climate, Community and Biodiversity Alliance (CCBA) of REDD+ standard for the validation of avoided deforestation and forest degradation projects. With eight principles and a wide range of criteria and indicators, the CCBA Draft Standards specifically refer to the first principle of Free Prior and Informed Consent. The first Draft Principle, “Rights to land, territories and resources are recognized and respected,” states that “[t]he REDD+ program requires the free, prior and informed consent of rights holders for any activities affecting their rights to lands, territories and resources.” FPIC principles should also form the basis of REDD dispute resolution system over rights to land, territories and resources related to the program.⁷

Project level buyer-sellers agreements have been negotiated on an *ad hoc* basis. Emissions Reduction Purchase Agreements (ERPAs) provide a contracted and legally-enforceable agreement to ensure that responsibilities and risks for both parties are defined.

3. Legal Challenges

In this context, six key legal challenges have emerged:

1. The definition of a clear, definite international legal framework for REDD in a timeframe which is informed by the reality on the ground, addresses the drivers of deforestation and is conducive to pro-poor outcomes.
2. REDD preparedness at a national level, with the establishment of an adequate national and sub-national legal and institutional framework in the context of an evolving international legal framework or a coherent policy framework).
3. Legal certainty on land rights, tenure and access to natural resources without compromising customary rights and/or additional environmental services (watershed management, *etc.*).
4. Enshrining the right to Free, Prior and Informed Consent of Indigenous Peoples’ and local communities in the international, national and sub-national level and ensuring its effectiveness in the design and implementation of REDD+ projects
5. Promoting equitable distribution of net revenues from the sale of forest carbon credits – or leading to local elite capture.
6. Defining who owns/has rights on carbon.

4. Innovative Legal Best Practices

Existing national legislation can provide opportunities to align to government policies and programs and to use REDD+ projects as a vehicle to strengthen and scale-up such programs in support of either community-based NRM and/or commercial investments.

Examples include:

⁷ CCBA, *REDD+ Social & Environmental Standards*, draft version 1 June 2010, online: < http://www.climate-standards.org/redd+/docs/june2010/REDD_Social_Environmental_Standards_06_01_10_final.pdf >, principle 1, criteria 1.3 and 1.4.

- In Cambodia: the Community Forestry Sub-Decree of 2005 and all attendant regulations in its support (8-step process, training guidelines, mapping services, *etc.*).⁸
- Indonesia has sought to use its existing Forestry Law and Ecosystem Restoration licensing regulations to support the development of a REDD legal regime. Indonesia is also so far the only developing country to have enacted REDD regulations.
- In Vietnam: the government is working at establishing a best practice REDD Compliant Distribution of Benefits System based on institutional arrangements and process established for Payment of Environmental Services schemes.

Project-level experience also provides useful lessons to help define sub-national and national policy and legal frameworks.

5. Conclusions

Countries with weak implementation capacity and governance structures will need to clarify land tenure arrangements and improve law enforcement before market-based financing will be feasible on a large scale. In addition, determining who owns the carbon (Government and/or local communities), who has the right to sell carbon and how carbon payments are to be disbursed are key issues to be agreed prior to validation, and the first verification and sale of carbon credits. The mechanism used to disburse forest carbon revenues should:

- Ensure that the maximum amount of revenue reaches the forest-dependent communities;
- Be transparent and stable;
- Promote participation by all stakeholders, including Government and local communities;
- Build local governance and support for forest conservation;
- Guarantee investor confidence.

⁸ See: *supra* note 6.

The mission of the Centre for International Sustainable Development Law (CISDL) is to promote sustainable societies and the protection of ecosystems by advancing the understanding, development and implementation of international sustainable development law.

The CISDL is an independent legal research centre which collaborates with the McGill Law Faculty in engaging students and interested faculty members in sustainable development law research and scholarly initiatives. The CISDL also works in cooperation with a network of developing country faculties of law, and is developing closer ties with the Cambridge University Faculty of Law, the Université de Montreal, Capetown University and the University of Costa Rica. It has guidance from the three Montreal-based multilateral treaty secretariats, the World Bank Legal Vice-Presidency, the United Nations Environment Programme and the United Nations Development Programme, and a memorandum of understanding with the International Institute for Sustainable Development (IISD).

With the International Law Association (ILA) and the International Development Law Organisation (IDLO), under the auspices of the United Nations Commission on Sustainable Development (UN CSD), CISDL chairs a Partnership Initiative, International Law for Sustainable Development that was launched in Johannesburg at the 2002 World Summit for Sustainable Development, to build knowledge, analysis and capacity about international law on sustainable development.

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Contact Information:

Ashfaq Khalfan
Acting Chair of the CISDL Board of Governors
email: akhalfan@cisdl.org
Centre for International Sustainable Development Law
Faculty of Law, McGill University
3644 Peel St
Montreal, Quebec
H3A 1W9 Canada
Tel: 001 514 398 8918

Marie-Claire Cordonier Segger
CISDL *Pro Bono* Director
email: mcsegger@cisdl.org
Centre for International Sustainable Development Law
Faculty of Law, McGill University
3644 Peel St.
Montreal, Quebec
H3A 1W9 Canada
Tel: 001 514 398 8918