

# Carbon Rights and REDD+



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Welcome to the third bulletin in the REDD-net Asia-Pacific series. In this issue we look at the topic of carbon rights. A top priority for many civil society and indigenous peoples' organizations, this topic is also very complex. Though environmental law is still struggling to define this new form of rights, and to understand their legal and social implications, local people need answers now. Civil society groups are telling REDD-net that there is a need for local communities to both clearly understand the discussions, and to play a stronger role in shaping how carbon rights are defined. There is a real and immediate risk that developments on the ground will overtake the debate, as voluntary carbon markets continue to develop and REDD+ countries begin to define carbon rights in national REDD+ frameworks. Are we getting carbon rights wrong?

The topic of carbon rights is abstract and difficult to understand – all the more so for local communities with limited access to information and the skills required for informed analysis. The playing field in carbon rights is inherently uneven and based on imbalances of power.

A recent REDD-net workshop on carbon rights, co-hosted with CoDe REDD, held in October 2010 in Manila, came strongly to the consensus that a strictly conventional and legalistic approach to carbon rights which sees carbon as a severable and transferable property right may not be appropriate for REDD+ in many countries in the Asia-Pacific region. This is because the participants from forest-dependent communities rejected the notion that carbon can be divided and sold separately from other elements, products and services of a forest which itself is the source of livelihoods, subsistence and income for many individuals or communities.

Participants were also strongly of the view that local people must have the right to participate in carbon rights discussions. They need the opportunity to contribute to the delineation of rights and entitlements appropriate to their particular concerns. Civil society groups and REDD-net members are calling for respect for property rights (including customary land rights) to be matched by respect for civil and political, economic, social and cultural rights. Carbon rights should not be simply about property rights. They need to be embedded in a comprehensive package of rights and entitlements. Unless this happens REDD+ will serve to entrench inequitable structures for determining and distributing benefits, and may unnecessarily expose indigenous peoples and other forest-dependent communities to fraud and corruption, thus resulting in the loss to communities of valuable carbon rights.

# OVERVIEW OF CARBON RIGHTS

## WHY ARE CARBON RIGHTS IMPORTANT?

REDD+ is based on the right to benefit from (i.e. be compensated for) reducing forest-based emissions of greenhouse gases, either through fund-based payments, carbon market payments, or a combination of these. But whose is this right? And will, or should, an entitlement to payment depend on who owns the 'carbon rights'? For countries interested in REDD+, this raises a number of legal issues including how to define and allocate carbon rights in national REDD+ frameworks. Each country will need to establish its own legislation defining carbon rights which will depend in part on existing laws regarding natural resources and property.

REDD+ is likely to involve a lot of money, which adds to the urgency surrounding the need to define carbon rights. Even without REDD+, carbon markets (both compliance and voluntary) are worth billions of U.S. dollars (some US \$5.9 billion in the first half of 2010 to be exact). Because REDD+ aims to compensate developing countries and the indigenous peoples and forest-dependent communities within them, the critical link in this lucrative market chain involves some of the world's most marginalized and disadvantaged groups. The need for them to understand, shape and exercise their rights over forests is critical if carbon markets are to deliver the livelihood gains and changes in behavior where they are most needed.

## WHAT DO WE MEAN BY CARBON RIGHTS?

There is no single, accepted definition of carbon rights, as the following examples show:

*Carbon rights are a form of property right that 'commoditise' carbon and allow it to be traded. They separate the right to carbon from broader rights to forest and land, and include the right to sequester carbon into the future ('carbon sequestration rights'). Carbon rights can be created through contract (e.g. as occurs for voluntary forest carbon projects) or by national legislation, the structure of which can be influenced by international law standards. Lisa Ogle, independent legal expert*

*Regular commodities are tangible things that exist independent of any law, regulation or contract. Carbon credits, on the other hand, are intangible rights that are created by people carrying out certain activities under relevant laws or contracts. The distinction here is the activity that needs to be carried out to create a carbon credit...Carbon rights are rather comparable to intellectual property rights that are intimately associated with an activity. Charlotte Streck, Climate Focus*

*Put simply, the registration of a carbon right over a block of land will clarify the ownership of the right to the benefits and liabilities that arise from changes to the atmosphere that are caused by carbon sequestration and carbon release on that block of land.*

*Carbon Rights in WA: a new interest in the land. Government of Australia*

## WHAT IS A 'RIGHT' ANYWAY?

The word 'rights' is used in a number of different ways, to refer to legal, social or ethical principles. In the context of carbon 'rights', the word can be (and has been) used in all these ways, and this has resulted in some confusion. Carbon rights are understood (primarily in a legal context) as referring to entitlements over property. However, given the association of carbon rights with the developing world and forest dependent local communities, carbon rights are increasingly being interpreted through a "human rights lens."

The Universal Declaration of Human Rights recognizes the following basic rights: civil, political economic, social and cultural. These are further subdivided into three generations (representing different waves in the evolution of the concept):

**First-generation human rights** deal with liberty and participation in political life. They serve to protect the individual from excesses of the state and include freedom of speech, the right to a fair trial, freedom of religion, and voting rights.

**Second-generation human rights** relate to equality and are social, economic, and cultural in nature. They emphasize the equality of different members of the population.

**Third-generation human rights** are those rights that go beyond civil and social, and are often seen as aspirational. These include:

- Group and collective rights
- Right to self-determination
- Right to economic and social development

### Box 1 A rights-based approach

A rights-based approach to development integrates the principles, standards, and goals of the international human rights system into the plans and processes of development. The methods and activities of this approach link the human rights system and its inherent notion of power and struggle with development processes.

Table 1 Contrasting Legal systems: Common vs. Civil law

	Common law	Civil law (also statutory law)
Source of law	Case law	Statutes/legislation
Examples	Australia, Canada (except Québec), Hong Kong, India, Ireland, Malaysia, Pakistan, Papua New Guinea, UK (except Scotland), USA (except Louisiana)	All European Union states except UK (but includes Scotland) and Ireland, USA (Louisiana), Brazil, Japan, Mexico, Québec, Switzerland, Turkey
Carbon Rights	Focus tends to be on whether or not carbon credits qualify as 'property rights'.	Defines different attributes of rights and offers more nuanced interpretation of carbon rights on basis of existing law.

- Right to a healthy environment
- Right to natural resources
- Communication rights
- Right to participation in cultural heritage
- Rights to intergenerational equity and sustainability

With its parallels to economic and social development rights, right to a healthy environment and rights to intergenerational sustainability, carbon rights fall squarely within the category of third-generation human rights.

## LEGAL DIMENSIONS

In the case of REDD+ and carbon rights there is no way around some basic legal literacy. Knowing whether a country uses **civil** or **common law** makes a big difference in how carbon rights will play out (see Table 1 above).

The original difference between the systems is that common law developed originally from its basis in custom, prior to written laws. Civil law, also known as statutory law, developed out of written laws dating back to the Roman Empire.

Local and indigenous peoples' rights are often recognized

on the basis of customary rights. However in some cases, governments have argued that those rights do not include commercial sales because they were not customary practices. These arguments may jeopardize the rights of local communities over carbon credit transactions.

### Box 2 Forest tenure and rights: Conflict between statutory and customary law

*Forest tenure* is the right to hold and use forest lands and resources. It defines how long, and under what conditions.

*Statutory tenure* is determined by the State and codified in written law. According to statutory tenure, most of the world's forests are owned by the State.

*Customary tenure*, on the other hand, is based on accepted local rules of use. From the viewpoint of customary tenure, the people living in and around forests are the owners, not the government.



In Nepal, forestry communities have user rights not ownership. Carbon rights should be linked to use rights. The government may get some minimal transaction fee, but the rights and revenues should belong primarily to the community.

Bhasundara Bhattarai, WOCAN



# CARBON RIGHTS AND LOCAL COMMUNITIES

## CARBON RIGHTS AND POTENTIAL

### RISKS TO LOCAL COMMUNITIES

REDD+ introduces a new playing field with a diverse set of actors – each with particular interests. Concerns are being raised that those stakeholders with the weakest rights and least voice in negotiations will be further marginalized in the context of REDD+. Particularly where economic incentives are strong, forest dependent local communities and indigenous peoples will be in a vulnerable position. Existing legal and tenure frameworks in the region are often unclear and contradictory with resulting disadvantages to local communities. If property rights and tenure are not clarified or reformed, the addition of another legislative layer in the form of carbon rights may further serve to entrench their marginalization.

Some of the specific concerns associated with carbon

rights include the possibility of recentralization of forest management, particularly should governments choose to treat carbon as a public good. Benefit sharing associated with rights over carbon remains unclear, in some cases even after REDD+ activities have been initiated, with potential

for communities to receive far fewer financial benefits than they are entitled to. The possibility of increased forest land values will necessarily raise the spectre of increased land-grabbing at the expense of forest-dependent poor – particularly where tenurial rights are not reflected in legislation. Potential conflict over rights to carbon is already emerging where national forest policy and customary forest rights are not synchronized. It is critical that REDD+ activities and associated carbon rights are placed within a framework of safeguards in the interest of

indigenous peoples and local communities.

All initiatives under Reducing Emissions from Deforestation and Degradation (REDD) must secure the recognition and implementation of the rights of Indigenous Peoples, including security of land tenure, recognition of land title according to traditional ways, uses and customary laws and the multiple benefits of forests for climate, ecosystems, and peoples before taking any action.

Report from the Conference on Indigenous Peoples and Climate Change Anchorage, Alaska, April 2009

### Box 3 How are forest carbon rights defined in Australia?

Australia was one of the first countries in the world to define forest carbon rights in legislation. All six Australian states have passed legislation clarifying how carbon rights are allocated and managed, and the Commonwealth (national government) has drafted a bill which would allow forest carbon to be traded as part of a national emissions trading scheme. The legislation generally establishes three types of carbon rights as separate property rights: carbon sequestration rights, soil carbon rights, and forestry rights. Carbon rights are generally allocated to the registered landholder or leaseholder, or if the land is unregistered, to the State so long as there are no competing interests over the land. The carbon rights are registered on the land title, so that if the land is sold, the new owner is legally bound to respect the carbon rights which have already been registered. Any competing claims to land ownership or carbon rights must be resolved before the carbon rights can be registered. Carbon credits are issued to the person who has registered the carbon rights over a piece of land. The legislation does not (yet) address the complex question of whether indigenous land claimants or registered indigenous land rights holders (native title holders) are entitled to carbon rights. Under the proposed emissions trading scheme, the landholder who holds the carbon rights is liable for any loss of permanence (eg forest fire, disease, etc).

Lisa Ogle, independent legal expert



## FINDING SIMILARITIES: LESSONS FROM INTELLECTUAL PROPERTY RIGHTS

The debate regarding rights over carbon is, in many respects, unprecedented. However, there are parallels with experiences in other intangible 'property' rights systems. A case in point is the development of intellectual property rights over traditional biodiversity knowledge and negotiations on Access and Benefit Sharing (ABS) under the Convention on Biological Diversity 1992 (CBD). The intent behind ABS is the fair and equitable sharing of benefits derived from the use of biological resources. The CBD came into force in 1993 and provides us with 17 years of experience in the success, or otherwise, of its implementation, the results of which can be used to inform the carbon rights debate.

So what have been the results of ABS? In one case involving the patenting of intellectual rights over traditional yoga in India, objections were raised that customary values of common property were being violated. "These processes have clashed with community values ...and free sharing/open access which sustain livelihoods and biodiversity and there is a fear that these will be replaced with private property values"<sup>2</sup>.

Other significant lessons from ABS point to the lack of clear laws and enforcement mechanisms which significantly inhibit progress. Krishna Oli, in his report on biological resource related access and benefit sharing, observed that "[After 17 years] there are legal arrangements regulating the access of biological resources which are still incomplete. The biggest problem faced by the policy makers and many stakeholders is on the benefit sharing arrangements -



defining rightful owners who can give consent and receive benefit from biological resources (ibid)."

Groundbreaking developments have recently taken place in the area of ABS. The 10th Conference of the Parties to the Convention on Biological Diversity (CBD COP10) led to the culmination of 6 years of charged discussions and finally led to the adoption of the Aichi Nagoya Protocol on Access and Benefit Sharing on 30 October 2010. It affirms the rights of countries and communities over their genetic resources, and the fair and equitable sharing of benefits from the use of these resources. The inseparable link between the traditional knowledge of indigenous peoples and local communities, and the genetic resources they manage, is enshrined in international law for the first time. The adoption of the Protocol is a landmark event for indigenous and traditional peoples.

## RECOMMENDATIONS FOR ENSURING COMMUNITY RIGHTS IN CARBON

### Tie carbon rights to broader definitions of rights

- Carbon rights should be included in the bundle of basic indigenous rights, which include respect for universally recognized human rights, territorial rights, and right to a process of free, prior and informed consent, among others.
- The legal view of carbon rights as a new form of property right should not be the exclusive lens through which carbon rights are approached. Alternative frameworks (including indigenous or human rights approaches) should also be considered as valid options.
- Statutory land rights must not be separated from customary land rights and removed from historical and situational contexts.

### Clarify rights and responsibilities

- Legal rights and responsibilities for carbon must be clear to all stakeholders (including over different types of carbon property – carbon sinks, sequestered carbon, carbon sequestration potential, carbon credits, etc.).
- National legislation over carbon rights should solidify and incorporate local and customary management and ownership systems.
- Contracts and agreements must clearly outline liability in the case of projects failing to deliver promised carbon sequestration.
- Carbon project negotiations must specify benefit-sharing mechanisms for and within communities.



## Establish fair process and necessary support

- Endowment of carbon rights to communities is not sufficient; there must be a clear process for communities to make use of these endowments.
- Full access to information in appropriate forms and languages is essential. Communities are unable to exercise their rights if they are unaware or do not fully understand them. The United Nations principles of free, prior, informed consent (FPIC) should inform all activities and be a continuous process in carbon credit ownership and sales.
- The burden of proof in demonstrating land and forest rights should not lie with communities, but with project proponents.
- Communities should have access to independent legal and technical advisory services to help negotiate their carbon rights.

Carbon rights are connected with human rights as de facto managers of forests. They are related to ownership of forests. They cannot be alienated from rights over land and rights to integrity of life. If the government alone maintains rights over carbon, it can be seen as a violation of basic human rights.

Marlea Munez, CoDeREDD

## Improving livelihoods

- Rights to carbon credits should not be viewed as passive 'endowments.' Rather communities should be encouraged to add value and secure benefits through contributing inputs (including local knowledge, monitoring activities).
- Rights to carbon credits should be seen as a vehicle to leverage other rights and entitlements (secure tenure,

participatory processes, etc.).

## ADDED BENEFITS OF CARBON RIGHTS

REDD+ could bring much-needed extra income to forest peoples, but money might not be the most compelling reason for communities to fight for their rights to carbon credits. For them, the carbon market's real value may lie in bringing the wider issue of benefit sharing of all forest resources back into focus.

Because of their sheer numbers and location in and around forests, local people hold a major bargaining tool. Without their support, the forest carbon market will likely fail. Negotiation of tenure and use rights (leading to a secure framework for local people to benefit from the whole suite of forest products) is the key to making forest carbon markets work. However, they are also amongst the most

marginalized stakeholders in REDD+ discussions and the safeguarding of their interests bears special attention. In this way, fighting for rights to carbon credits can become a vehicle to leverage other rights and entitlements, such as secure land tenure and more participatory policy-making processes.

### Box 3: What questions must communities ask?

- Are there existing REDD+ policies, laws or regulations in their country?
- Are they under common law or civil law jurisdiction?
- Under domestic law who has access and ownership rights over land and forests?
- What needs to be done to gain title over carbon rights (ie. purchasing, leasing or registering land, etc.)?
- What restrictions are associated with these rights (ie. specified timeframes, restrictions against sales, etc.)?
- Under domestic law is compensation due if rights over carbon are removed or restricted?
- What specific property is owned? Carbon properties may take the form of:
  - sequestered carbon;
  - carbon sinks (different legal rights and responsibilities apply for land above ground, land below ground, and trees);
  - carbon sequestration potential (including the right to manage the carbon sink to maximize this);
  - carbon credits generated from the project.
- Who owns which carbon-related property rights? The Government may reserve certain carbon property rights for itself. Private citizens or businesses may have some, all, or no rights to forest carbon property rights.
- Who will benefit from a forest carbon project, and what form will the benefits take?
- Who will bear liability if forest carbon fails to materialize?
- What dispute resolution mechanisms are in place?
- How does the jurisdiction plan to clarify customary property rights?



## Endnotes

1. For a detailed analysis of carbon rights in REDD+, see Takacs, D., (2009) Forest Carbon – Law + Property Rights, Conservation International, Arlington VA, USA.
2. Oli, Krishna, 2009. Access and benefit sharing from biological resources and associated traditional knowledge in the HKH region – protecting community interests. International Journal of Biodiversity and Conservation. Vol. 1(5). Pp. 105-118.
3. [http://www.rightsandresources.org/documents/files/doc\\_923.pdf](http://www.rightsandresources.org/documents/files/doc_923.pdf)

## List of resources

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Takacs, D. (2009). Forest Carbon: Law and Property Rights, Conservation International

## Photo acknowledgements

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## ABOUT REDD-NET

REDD-net is an international knowledge forum for southern civil society organizations through which they can access information about efforts to Reduce Emissions from Deforestation and forest Degradation, share their own experiences and help to build pro-poor REDD projects and policies. REDD-net is a partnership between Centro Agronómico Tropical de Investigación y Enseñanza (CATIE), the Overseas Development Institute, RECOFTC – The Center for People and Forests and Uganda Coalition for Sustainable Development. REDD-net is funded by Norad and the World Bank.

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