

Carbon Rights and REDD+



*Carbon rights involve the simple question:
who owns the carbon stored in forests?
The question is simple, but like many other aspects
of REDD, the answer is fiendishly complicated.*

Chris Lang, REDD Monitor

REDD+ is based on the right to benefit from (or to be compensated for) reducing forest-based emissions of greenhouse gases, either through fund-based payments, carbon market payments, or a combination of these. But who can claim this right? Should an entitlement to payment depend on who owns the so-called 'carbon rights'? This raises a number of legal issues, including how to define and allocate carbon rights in national REDD+ frameworks.





Welcome to the REDD-Net Asia-Pacific bulletin! If you would like more information about REDD+ or the

REDD-Net initiative and communities, please visit www.redd-net.org. I welcome your comments, opinions, or questions, about material in the following pages. Please contact me at regan@recoftc.org.

Regan Suzuki
REDD-Net Asia-Pacific Coordinator

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About REDD-Net

REDD-Net is the hub for knowledge sharing and resources on Reducing Emissions from Deforestation and Degradation (REDD+). Aimed at southern civil society organizations and practitioners in REDD+, the network offers the latest information and resources to help build pro-poor REDD+ projects and policies. Led by the Overseas Development Institute (ODI), REDD-Net's partners include RECOFTC – The Center for People and Forests, CATIE, and UCSD.

From the editor

Dear Readers

REDD+ is likely to involve a lot of money, which adds to the urgency surrounding the need to define 'carbon rights'. Because REDD+ aims to compensate developing countries, and in theory the 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.

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 involves significant imbalances of power.

A REDD-net workshop held in August 2010 on carbon rights, co-hosted with the Philippines organization CoDe REDD, came to the consensus that a strictly conventional and legalistic approach to carbon rights is not appropriate for REDD+ in many Asia-Pacific countries. This is in part because many forest-dependent communities reject the notion that carbon can be divided and sold separately from other elements, products and services of a forest, particularly where the forest is integral to livelihoods, subsistence and cultural identity.

Participants strongly believed that local people must have the right to actively participate in carbon rights discussions. Civil society groups 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.

Each country will need to establish its own legislation defining carbon rights which will depend in large part on existing legal frameworks for natural resources and property. However, REDD-net discussions have strongly emphasized that carbon rights should not be simply about the protection of individual 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 unnecessarily expose indigenous and forest-dependent peoples to coercion, corruption and the violation of fragile rights.

In this bulletin, we look at some of the vital questions in the debate, including; who can benefit from carbon emission credits, what systems should be in place to protect forest dwellers' rights in the design of carbon market systems, and some recommendations for key points where local peoples' concerns need to be addressed.

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Defining rights

What do we mean by carbon rights?

Carbon rights are a form of property right that 'commoditize' 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, Environmental 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, Director of 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. – **Government of Australia, Carbon Rights in Western Australia: A new interest in the land.**



Where do they fit within the framework of rights?

There are fundamental differences in the way the word 'rights' is used, according to context. In the context of carbon 'rights' this has resulted in some confusion. In general, 'rights' can be defined as legal, social, or ethical principles of freedom or entitlement. Carbon rights are currently understood, in a legal context, as referring to entitlements over property.

However, in the context of 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 as follows:

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

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

International human rights standards recognize the right of forest peoples to own, control, use, and peacefully enjoy their resources and to be secure in their means of subsistence. None of these rights can be enjoyed peacefully without respect for basic rights and freedoms.

Forest Peoples Programme

Carbon rights take away power [from indigenous peoples and local communities in the region] because the concept ignores their traditional and time-tested arrangements of property rights and engagement with forest resources.

Harisharan Luintel, National Coordinator - Nepal, Grassroots Capacity Building for REDD Project

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.

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 as far back as 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 these were not customary practices. These arguments may jeopardize the rights of local communities over carbon credit transactions.

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 (CBD). ABS is intended to result in 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? Experiences with ABS point to the lack of clear laws and enforcement mechanisms significantly inhibiting progress.

"[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." - **Krishna Oli, 2009**

Groundbreaking developments have recently taken place in the area of ABS. In October 2010, the 10th Conference of the Parties to the Convention on Biological Diversity (CBD COP10) led to the culmination of 6 years of discussions and the adoption of the Aichi Nagoya Protocol on Access and Benefit Sharing. 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.

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, Louisiana (USA), 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.

Local communities and carbon rights



Potential risks

REDD+ affects a wide range of actors – all with their own interests. When powerful actors detect new economic opportunities, forest dependent local communities and indigenous peoples are in a vulnerable position. Legal and tenure frameworks often work against their interests. If property rights and tenure are not reformed then carbon rights will act as another legislative layer and may further entrench local peoples' marginalization.

There is a **risk of recentralization** of forest management, if governments treat carbon as a public good. The possibility of increased forest land values will increase the **risk of land-grabbing** at the expense of forest-dependent poor – particularly where customary tenure rights are not reflected in law. And while the sharing of carbon-related benefits remains unclear, there is a **risk of increased inequity**, with communities receiving less than a fair share.

Wherever national forest policy does not take account of customary laws and practices, there is a **risk of conflict**. The same is true for REDD+ and carbon rights. All these risks highlight the need for safeguards to ensure that the interests of indigenous peoples and local communities are met.

Potential benefits

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

Because of their numbers and their presence in and around forests, local people hold a major bargaining tool in the development of REDD+ strategies. Without their support, the forest carbon market, or any strategy to reduce forest degradation, will be unlikely to succeed. Negotiation of tenure and use rights is the key to making forest carbon markets work. This is the only secure route for local people to benefit from the whole range of forest products.

However, forest dwellers have very little influence in REDD+ negotiations and the safeguarding of their interests bears special attention. The current attention on carbon rights is therefore an important opportunity for indigenous peoples, local communities, and their supporters, to leverage wider rights and entitlements, secure land tenure and more participatory policy-making processes.

It is widely acknowledged that the ownership and exercise of rights in carbon will have to be reconciled with current land and forest rights of local communities and shaped by wider social and environmental considerations.

Charlotte Streck,
Director of Climate Focus

I think community forestry should not be separated from user rights over forests. The carbon produced by trees both above ground and below ground should be linked to forest user rights.

Apsara Chapagain,
Federation of Community Forestry Users of Nepal (FECOFUN)

Carbon rights are important and relevant within the framework of realizing the rights of local communities and indigenous peoples as stewards of carbon-rich forests and land ecosystems.

Norman Jiwan,
Sawit Watch,
Indonesia

The case of Australia

'Carbon rights' is a thoroughly divisive term in the context of most REDD+ participant countries. This is because of the inherent implication that the carbon can be divided and sold separately from other elements of a forest, which may be the key source of local livelihoods.

**Ben Vickers,
RECOFTC – The Center
for People and Forests**

The wrong type of law may be worse than no law by creating a legal mechanism for the loss, invasion, and takeover of forest peoples' customary lands

**Forest Peoples
Programme**

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 that 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. If the land is unregistered and there are no

competing tenure interests, they fall to the State. 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 that 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, such as forest fire or disease.

Lisa Ogle, Environmental legal expert



REDD-net Interview

Interview with Ms. Pasang Dolma Sherpa, Chairperson, Nepal Federation of Indigenous Nationalities (NEFIN)

Q: *Do communities really need rights over the carbon OR rather the rights to benefit from carbon?*

A: From my perspective there should be legally enshrined rights over carbon going to the people. I'm scared that the experiences of protected areas will be repeated with the lion's share of the benefits going to the government.

Q: *Do you think the term 'carbon rights' is a useful one?*

A: Not really. Carbon rights should not be separated from other rights. We understand that trees sequester carbon but there is not only that. Indigenous peoples relate to their ecosystems in a collective and holistic way. It is like a spider's web. If you pull on only one thread, you disrupt the entire system.

Q: *Is it necessary for indigenous peoples and local communities to fully understand carbon rights given how complicated it is?*

A: Yes! It is our task and responsibility to make it understandable for them. We might see local people as innocent or naïve, but they have a right to, and a strong desire for, more information. There are no shortcuts.



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 dispute resolution mechanisms are in place?
- How does the jurisdiction plan to clarify customary property rights?
- 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?
- 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?



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 the respect for universally recognized human rights, territorial rights, and the right to a process of free, prior and informed consent (FPIC).
- The legal view of carbon rights as a new form of property right should not be the only view. Alternative ways to understand carbon rights (including indigenous or human rights approaches) should also be considered.
- Statutory land rights must not be separated from customary land rights nor removed from historical and geographic 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 principles of 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.

Improving livelihoods

- Rights to carbon credits should not be viewed as passive endowments. Instead, communities should be encouraged to add value and secure benefits through contributions such as local forestry knowledge and conducting monitoring activities.
- Rights to carbon credits should be seen as a vehicle to leverage other rights and entitlements, such as secure land tenure and more participatory decision-making processes.

